

IS THERE A COMMON LAW PRIVILEGE AGAINST SPOUSE-INCRIMINATION?

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I INTRODUCTION

The privilege against *self*-incrimination 'is not simply a rule of evidence but a basic and substantive common law right'.¹ Unless excluded by statute, it can be claimed in both judicial and non-judicial contexts to resist any demand for the disclosure of information, or the production of a document or thing, which might tend to incriminate the person from whom it is sought.²

Judicial statements on the scope of the privilege against self-incrimination often emphasise that it only protects a person from being compelled to incriminate himself or herself, rather than other persons.³ Such statements are unexceptionable, as long as they are confined to a delineation of the scope of the privilege against *self*-incrimination. However, they are often cited to support the broader proposition that there is no privilege against incriminating a person other than oneself.⁴

The purpose of this article is to examine whether there exists a common law privilege against *spouse*-incrimination, analogous to the privilege against self-incrimination. Over the years this issue has arisen in a wide range of contexts around the world, yet in no jurisdiction has it been conclusively resolved and there is a dearth of academic research in this field. The resulting uncertainty has caused significant problems in Australia, where the issue regularly falls for

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1 *Reid v Howard* (1995) 184 CLR 1, 11.

2 See below nn 31–33 and accompanying text.

3 See, eg, *The King of The Two Sicilies v Willcox* (1851) 1 Sim NS 301, 329; 61 ER 116, 128; *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 145, 150; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385.

4 See, eg, Peter Gilles, *Law of Evidence in Australia* (2nd ed, 1991) 456, 459–60; Suzanne B McNicol, *Law of Privilege* (1992) 224–5; Law Book Company, *The Laws of Australia*, vol 16 (at 6 June 2004) 16 Evidence, 'Chapter 16.7 Privilege and Public Interest Immunity' [69].

determination and there is little guiding authority or instructive commentary.⁵

Most modern texts in this field do not refer to any common law privilege against spouse-incrimination, implying that it does not exist. Of those that do, few devote more than a sentence to the issue and the vast majority suggest that there is no such privilege.⁶ Law reform bodies in the United Kingdom, New Zealand and Australia have considered the issue – albeit, only by way of brief digressions – and have doubted the existence of a common law privilege against spouse-incrimination.⁷ However, in 1993, Brennan J of the High Court of Australia remarked that ‘[p]erhaps the privilege [against incrimination] extends to the protection of spouses’.⁸

It is submitted that Justice Brennan’s speculation was well-founded. Historical and comparative authorities demonstrate that there is a common law privilege against spouse-incrimination, which is analogous to, yet separate and distinct from, the better-known privilege against self-incrimination.

Part II of this article provides an overview of the often-confused concepts of spousal incompetence, non-compellability and privilege. Part III traces the origins of these concepts, shedding new light on an ancient principle to the effect that *a wife is not bound to discover the crime of her husband*. Part IV examines the evolution of this principle at English common law, demonstrating that it spawned a gender-neutral privilege against spouse-incrimination. Part V reviews authorities on this privilege from America, Canada, New Zealand and Australia, which confirm that the privilege is a basic and substantive common law right that can only be overturned by ‘a clear, definite and positive enactment’.⁹ The issue of whether the *Evidence Act 1995* (NSW) and other Australian statutes fall within this category is also examined.

II DISENTANGLING SPOUSAL INCOMPETENCE, NON-COMPELLABILITY AND PRIVILEGE

It has been rightly observed that much of the uncertainty surrounding the testimonial capabilities of spouses has resulted from confusion between the concepts of competence, compellability and privilege.¹⁰ The basic differences between them are well explained by Cowan and Carter:

A competent witness is a person whom the law allows a party to ask, but not compel, to give evidence. A compellable witness is a person whom the law allows a party to compel to give evidence. There are certain questions which a witness may

5 See, eg, *Southwell v Maladina* [2002] FCA 76 (Unreported, Dowsett J, 5 February 2002) [13]; *Sogelease Australia Ltd v Griffin* [2003] NSWSC 178 (Unreported, Palmer J, 29 July 2003) [44]; *Callanan v Bush* [2004] QSC 88 (Unreported, Douglas J, 8 April 2004). See also below nn 213-33 and accompanying text.

6 See below nn 148–9, 152, 232 and accompanying text.

7 See below nn 137, 142, 143, 208, 210, 240 and accompanying text.

8 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 516 (fn 60).

9 *Leach v The King* [1912] AC 305, 311; *Hawkins v Sturt* [1992] 3 NZLR 602, 610.

10 See, eg, Norman W Williams, ‘Compellability of Witness’ [1978] *Criminal Law Review* 429; McNicol, above n 4, 301.

refuse to answer if he so wishes. He is said to be privileged in respect of those questions ... Compellability is concerned with whether a witness can be forced by a party to give evidence at all. Privilege is concerned with whether a witness who is already in the box is obliged to answer a particular question. The protection of privilege is exactly the same whether the witness is barely competent and of his own free will elected to give evidence or the witness is compellable and was forced to give evidence.¹¹

A Spousal Incompetence

At common law, spouses were generally not competent to testify *for* or *against* each other in any proceedings.¹² The two aspects of this rule reflected separate legal and social policies.

The inability of spouses to testify *for* each other was based on the common law doctrine of unity, which considered husband and wife to be ‘one and the same person in law’.¹³ Given that parties to proceedings were traditionally barred from testifying themselves, the doctrine of unity dictated that their spouses should also be barred.¹⁴

The inability of spouses to testify *against* each other was aimed at preserving marital harmony. As Tilghman CJ declared in 1814, ‘[m]uch of the happiness of society depends on the intimacy of husband and wife. The law ... will not suffer their union to be broken or even put to hazard by testifying against each other’.¹⁵

Spousal incompetency was ‘an absolute bar’ to testifying that could not be waived.¹⁶ It applied irrespective of the content of the evidence the witness-spouse could give in the proceedings and precluded each party from calling his or her own spouse or the spouse of any other party.¹⁷ However, the rule of spousal incompetency was subject to various exceptions; the principal one being that which permitted spouses to testify against each other in criminal cases involving the alleged wrongdoing by one to the person, liberty or health of the other.¹⁸

The rule of spousal incompetency and all other common law rules of evidence and privileges relating to spouses were strictly limited to *de jure* spouses.¹⁹ They

11 Zelman Cowan and Peter B Carter, *Essays on the Law of Evidence* (1956) 220.

12 See Sir Edward Coke, *The First Part of the Institutes of the Lawes of England. Or, a Commentarie Upon Littleton, Not the Name of a Lawyer Onely, but of the Law It Selfe* (1st ed, 1628) 6b; Sir Matthew Hale, *History of the Pleas of the Crown* (c1676) vol 2, 279; William Hawkins, *Pleas of the Crown* (1716) book 2, 431; Joseph Chitty, *A Practical Treatise on the Criminal Law* (1816) vol 2, 594; Thomas Starkie, *Practical Treatise of the Law of Evidence: and Digest of Proofs, in Civil and Criminal Law Proceedings* (1st ed, 1824) vol 2, 706.

13 Matthew Bacon, *A New Abridgement of the Law* (7th ed, 1832) vol 3, 203.

14 See, eg, Hawkins, above n 12; Sir Geoffrey Gilbert, *The Law of Evidence* (1754) 96.

15 *Snyder's Lessee v Snyder*, 6 Binn 483, 488 (Pa, 1814). See also *Mary Grigg's Case* (1672) T Raym 1; 83 ER 1.

16 See Chitty, above n 12; *Barker v Dixie* (1736) Cas t Hard 264; 95 ER 171; *Bentley v Cooke* (1784) 3 Dougl 422; 99 ER 729; Starkie, above n 12.

17 See *R v Locker* (1803) 5 Esp 107; 170 ER 754; *R v Brittleton and Bates* (1884) 12 QBD 266; *R v Mount* (1934) 24 Cr App R 135.

18 See *Lord Audley's Case* (1631) 3 St Tr 401; *R v Azire* (1726) 1 Str 633; 93 ER 746; *Director of Public Prosecutions v Blady* [1912] 2 KB 89.

19 See *R v Inhabitants of Bramely* (1795) 6 TR 330; 101 ER 579; *Batthews v Galindo* (1828) 4 Bing 610; 130 ER 904; Gilbert, above n 14, 97–8.

did not extend to *de facto* spouses or other family relations, such as parents and children, all of whom were competent and compellable to testify and had no testimonial privileges arising out of their relationships.²⁰

B Spousal Non-Compellability

As a general rule, witnesses who are competent to testify are also compellable.²¹ However, the House of Lords has twice held that it is a fundamental common law principle that spouses cannot be compelled to testify against each other in criminal proceedings, even in cases where they are fully competent to do so.²² As explained by the English Criminal Law Revision Committee, this rule of spousal non-compellability is aimed at preventing hardship to the witness-spouse:

if the wife is not willing to give evidence, the state should not expose her to the pitiful clash between the duty to aid the prosecution by giving evidence, however unwilling, and the natural duty to protect her husband whatever the circumstances ... The law ought to recognise that, as between spouses, conviction and punishment may have consequences of the most serious economic and social kind for their future and that neither of them should in any circumstances be compelled, against his or her will, to contribute to bring this about.²³

C Spousal Privileges

A fundamental feature of the rules of spousal incompetence and non-compellability is that they only apply to a witness who is the spouse of a party to the proceedings in question. In addition, when they apply, the rules exempt witnesses from testifying altogether, regardless of the content of their potential evidence. In both respects these rules are distinguishable from privileges. The latter do not turn on the identity of the parties to the proceedings and do not wholly excuse witnesses from testifying. Instead, privileges merely entitle witnesses to withhold particular items of information. A further distinction is that privileges are not necessarily limited to judicial proceedings: some privileges can be raised in response to administrative demands for information.²⁴ This feature is of immense practical significance in light of the recent proliferation of investigative bodies that are armed with wide compulsory information-gathering powers.

There are three possible privileges arising out of marriage that have been recognised in some, or all, of the common law jurisdictions reviewed in this article.

20 See John H Wigmore, *Evidence in Trials at Common Law* (1961) vol 8, §§575, 600, 2227, 2230.

21 See *Ex parte Fernandez* (1861) 10 CB NS 3, 39; 142 ER 349, 364; *Tilley v Tilley* [1949] P 240, 248.

22 See *Leach v The King* [1912] AC 305; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474.

23 English Criminal Law Revision Committee, *Eleventh Report: Evidence (General)*, Cmnd 4991 (1972) [147].

24 See below nn 32–3 and accompanying text; *Baker v Campbell* (1983) 153 CLR 52.

1 *The Marital Communications Privilege*

In 1853, a statutory privilege enabling witnesses to refuse to disclose communications between themselves and their spouses was enacted in England.²⁵ Legislatures in many other jurisdictions, including Australia, followed suit.²⁶ In England it has been held,²⁷ and in most other countries it appears to have been accepted, that the marital communications privilege is derived solely from statute.²⁸ The marital communications privilege is entirely separate and distinct from any privilege against spouse-incrimination and is not further discussed in this article.

2 *The Privilege Against Adverse Spousal Testimony*

This privilege is unique to America. It originally enabled parties to proceedings to prevent their spouses from testifying against them,²⁹ but the Supreme Court subsequently took this power away from party-spouses and gave it solely to witness-spouses.³⁰ As first recognised, the privilege against adverse spousal testimony significantly differed from any privilege against spouse-incrimination, but (as discussed in Part VA below) the two privileges appear to have recently coalesced.

3 *The Possible Privilege Against Spouse-Incrimination*

Assuming that there is a privilege against spouse-incrimination and that it is analogous in nature and scope to the privilege against self-incrimination, it would, unless excluded by statute, entitle a person to refuse to disclose information, or produce a document or thing, if to do so could *directly or indirectly* incriminate his or her spouse.³¹ The privilege would be available to *any witness* (not merely spouses of parties) in any civil or criminal proceedings and to *any person* required to produce information pursuant to pre-trial procedures, such as discovery or interrogatories.³² In addition, the privilege could be claimed in non-judicial contexts to resist demands from administrative agencies with compulsory information-gathering powers.³³

25 *Evidence Amendment Act 1853*, 16 & 17 Vict, c 83, s 3.

26 See generally McNicol, above n 4, ch 4; Law Book Company, *Laws of Australia*, vol 16 (at 6 June 2004) 16 Evidence, 'Chapter 16.7 Privilege and Public Interest Immunity' [99]–[104].

27 See *Shenton v Tyler* [1939] 1 Ch 620; *Rumping v DPP* [1964] AC 814.

28 See McNicol, above n 4, 295. An exception is America, where the privilege is found both in statutory form and at common law: Wigmore, above n 20, vol 8, §2333; *Blau v United States*, 340 US 332 (1951).

29 See Wigmore, above n 20, vol 8, §2227–45; *Hawkins v United States*, 358 US 74 (1958).

30 *Trammel v United States*, 445 US 40 (1980).

31 See, eg, *Sorby v Commonwealth* (1983) 152 CLR 281; *Reid v Howard* (1995) 184 CLR 1.

32 See, eg, *Warman International Ltd v Envirotech Australian Pty Ltd* (1986) 11 FCR 478; McNicol, above n 4, 140–4.

33 See, eg, *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

III ORIGINS OF THE COMMON LAW RULES AND PRIVILEGES RELATING TO SPOUSAL TESTIMONY

In 1628, Lord Coke wrote that

it hath been resolved by the Justices that a wife cannot be produced either against or for her husband, *quia sunt duae animae in carne una* [for they are two souls in one flesh], and it might be a cause of implacable discord and dissention between the husband and the wife, and a means of great inconvenience.³⁴

This passage is routinely cited as the earliest statement of the testimonial capabilities of spouses at common law.³⁵ To date, legal historians have been unable to shed further light on the origins of the various common law principles relating to spousal testimony. Professor Wigmore, for example, stated:

The history of the privilege not to testify against one's wife or husband is involved ... in a tantalizing obscurity. That it existed by the time of Lord Coke is plain enough, but of the precise time of its origin, as well as the process of thought by which it was reached, no certain record seems to have survived ... In searching for analogies to throw light upon this treatment of marital testimony, we are left without significant traces.³⁶

This article provides new insight into the origins of the common law rules and privileges relating to spousal testimony. It is submitted that many centuries before the time of Lord Coke the common law recognised a basic and substantive principle to the effect that *a wife is not bound to discover the crime of her husband*. It is from this under-acknowledged principle that the first common law rules relating to spousal testimony were derived, particularly the privilege against spouse-incrimination. The principle itself emanated from divine law.

A Biblical Origins

Many common law rules and principles relating to marriage have a biblical origin. The clearest example is the doctrine of unity, which sprang from the biblical notion of a husband and wife being 'one flesh'.³⁷ Glanville Williams rightly observed that '[t]here can be no doubt that it was this theological metaphor that produced the legal maxim'.³⁸ As discussed earlier, the doctrine of unity formed the basis of the common law rule of incompetency, in so far as it prevented spouses from testifying *for* each other.

Linked to the 'one flesh' metaphor is the theological tenet that marriage is an institution created by God. This derives from bible passages in which Jesus refers to the union of husband and wife as follows: 'What therefore God hath joined together, let no man put asunder'.³⁹ This concept of marriage as a 'God-given

34 Coke, above n 12, 6b.

35 See, eg, Glanville Williams, 'The Legal Unity of Husband and Wife' (1947) 10 *Modern Law Review* 16, 19; *Trammel v United States*, 445 US 40, 43–4 (1980); Sir William S Holdsworth, *A History of English Law* (3rd ed, 1944) vol 9, 197.

36 Wigmore, above n 20, vol 8, §2227.

37 Holy Bible (King James version), *Old Testament*, Genesis II 24; *Holy Bible* (King James version), *New Testament*, Matthew XIX 5–6; Mark X 8.

38 Williams, above n 35, 16.

39 Holy Bible (King James version), *New Testament*, Matthew XIX 6; Mark X 9.

relationship'⁴⁰ explains the common law's 'special concern for the sanctity of marriage',⁴¹ which serves as one of the justifications for the rule of spousal non-compellability.

The influence of both the 'one flesh' metaphor and the 'God-given' concept of marriage on the development of common law rules relating to spousal testimony is readily apparent and explains why the relationship of husband and wife was singled out for special treatment ahead of other close family ties, such as that of parent and child.⁴² However, it appears to have been a third biblical notion that had the earliest influence on the development of the common law in this area.

There is no question that the Bible directs wives to serve, obey and never depart from their husbands.⁴³ Whilst these biblical duties are now outdated and objectionable, in earlier times they were zealously preached by the Church⁴⁴ and this created an extreme legal and moral dilemma for God-fearing women who became aware that their husbands had committed a crime. It was the common law's recognition of, and sympathetic response to, this dilemma that originally gave rise to the principle that a wife is not bound to discover the crime of her husband.

B A Wife is Not Bound to Discover the Crime of her Husband

From the earliest days of the common law, it was the duty of citizens who knew that a treason or felony had been committed to report it to the proper authorities.⁴⁵ Failure to do so constituted the offence of misprision of treason or of felony.⁴⁶ In addition, any person who received, comforted or assisted a known felon and hindered his apprehension was guilty as an accessory after the fact.⁴⁷ These offences placed a wife who discovered that her husband had committed a felony in an impossible position. The Bible demanded that she receive, serve and obey him, yet such actions would almost certainly render her guilty of misprision and being an accessory after the fact.

In response to this quandary, the common law developed a rule exempting wives in such situations from criminal liability. This rule appears to have been founded by King Ine of West Saxon, whose code (c688–94) provided that

40 Garth E Moore, *An Introduction to English Canon Law* (1967) 83. See also Bernard A Siegle, *Marriage Today* (1973) 10.

41 *Rumping v DPP* [1964] AC 814, 836–7. See also *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 495.

42 The common law rejected Roman and ecclesiastical precedents, which extended testimonial privileges and disqualifications to all family members: Wigmore, above n 20; Max Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 *California Law Review* 487.

43 See, eg, Holy Bible (King James version), *New Testament*, Ephesians V 22–3; Colossians III 18; Titus II 5; 1 Corinthians VII 9, 39.

44 See generally Julius Goebel Jr, *Cases and Materials on the Development of Legal Institutions* (1949) 444–53.

45 See *R v Crimmins* [1959] VR 270; *Skyes v DPP* [1962] AC 528; *A v Hayden* (1984) 156 CLR 532, 552.

46 See James F Stephen, *A Digest of the Criminal Law* (1877) 93–4; Butterworths, *Halsbury's Laws of England* (3rd ed, 1955) vol 10, Criminal Law and Criminal Procedure, 'Chapter 1 Principles of Criminal Liability' [574].

47 See Sir William Blackstone, *Commentaries on the Laws of England* (1st ed, 1769) book 4, 37.

[i]f a husband steals a beast and carries it into his house, and it is seized therein, he shall forfeit his share [of the household property] – his wife only being exempt, since she must obey her lord.⁴⁸

The rule later appeared in King Canute's code (c1020–34) as follows:

If anyone carries stolen goods home to his cottage and is detected, the law is that he (the owner) shall have what he has tracked. §1. And unless the goods had been put under the wife's lock and key, she shall be clear [of any charge of complicity]. 1a. But it is her duty to guard the keys of the following – her storeroom and her chest and her cupboard. If the goods have been put in any of these, she shall be held guilty. §1b. But no wife can forbid her husband to deposit anything that he desires in his cottage.⁴⁹

There can be little doubt that the spousal immunity granted by these two Kings, who were both devout Christians, was derived from the biblical duties owed by wives to their husbands. A wife was excused from criminal liability because she was obliged to 'obey her lord' and receive him into the matrimonial home. In subsequent statements of this rule we find that a wife is no longer considered to be so submissive. Not only is she expected not to assent to her husband's felony, but she is encouraged to hinder him as best she can. In these statements, we also find the first specific references to the principle that a wife is not bound to discover the crime of her husband. Thus, in Bracton's *De Legibus et Consuetudinibus Angliæ* (c1250–59) the rule appears as follows:

If stolen property is found in someone's hand or within his potestas, he in whose house or potestas the stolen property has been found will then be held liable ... but his wife will not be held liable because it is not she who has it within her potestas but her husband. *A wife ought not to accuse her husband nor disclose his theft or felony*, but neither ought she assent to it or act as his confederate; she ought to keep him as best she can from felony and wickedness ... *But a concubine or housemaid will not be in the same case as a wife, for such persons are bound to accuse the man* or to withdraw from his service; otherwise they are taken to consent.⁵⁰

In *Fleta seu Commentarius iuris Anglicani* (c1290) the rule is similarly expressed as follows:

The wife of a thief will not be held responsible for her husband's delict, for a penalty should strike those who do the deed. *A wife moreover, should neither accuse her husband nor assent to his felony*; but she is required to hinder him so far as she is able ... *The case of a concubine or maid servant is different from a wife's, for she is bound to accuse [the man] or to withdraw from his service; otherwise she will appear to consent.*⁵¹

Subsequent statements of this rule of spousal immunity not only continue to declare that a wife is not bound to accuse her husband or discover his felony, but even cite this principle as the rationale for the rule. Thus, at the end of the 13th century, Britton wrote that 'the felon's wife may plead, that although she was privy to the crime of her husband, yet she neither could nor ought to accuse

48 Quoted in Frederick L Attenborough, *The Laws of the Earliest English Kings* (1922) 55–6.

49 Quoted in Agnes J Robertson, *The Laws of the Kings of England From Edmund to Henry I* (1925) 214–15.

50 Quoted in Samuel E Thorne, *Bracton on the Laws and Customs of England* (1968), vol 2, 428–9 (emphasis added, brackets omitted).

51 Quoted in Henry G Richardson and George O Sayles, *Fleta* (1955) 92 (emphasis added).

him'.⁵² Two-and-a-half centuries later, Sir William Staunford wrote that 'a wife cannot be accessory to her husband because by the law divine she ought not to discover him'.⁵³ By the time of Lord Coke the law in this field was beyond question. He stated it as follows: 'the wife cannot be accessory to her husband ... for by the Law Divine, she is not bound to discover the offence of her husband'.⁵⁴ Similar statements later appeared in many other leading treatises.⁵⁵

Despite the fact that the principle that 'a wife is not bound to discover the crime of her husband' originated in response to primitive biblical notions demeaning of women, it has endured for centuries and continued to be recognised in the modern era,⁵⁶ as has the rule exempting a wife from liability for misprision of felony and being an accessory after the fact in relation to a crime committed by her husband.⁵⁷ The reason for the longevity of both the principle and rule that it historically supported is that even though most wives may no longer consider themselves bound by the Bible to conceal their husband's crime, many, if not most, are likely to continue to feel equally inclined to do so out of natural feelings of love and devotion.

The dilemma faced by wives who discover that their husbands have committed crimes still remains and the common law still maintains that society may be better off if such a difficult situation was met with compassion rather than coercion. In modern times, the rule exempting wives from criminal liability has thus been said to reflect 'social policy'⁵⁸ and 'inevitable human feeling',⁵⁹ rather than divine law. In 1975, the Law Reform Commission of Victoria recommended that the rule be retained, 'not only as being supported by the clearest authority, but also because personal loyalty between husband and wife may properly be regarded as of fundamental importance to the stability of the family as the basic unit in our society'.⁶⁰

However, it would be wrong to suggest that the rule exempting wives from being accessories after the fact to crimes of their husbands continues to enjoy universal support. There are at least two reasons why it does not. First, the common law rule was originally limited to mere concealment of a husband's

52 Quoted in Francis M Nichols, *Britton* (1983) 120.

53 Sir William Staunford, *Les Pleees Del Coron* (1557) 26b, as referred to in Glanville Williams, above n 35, 26 (fn 29). See also Ferdinando Pulton, *De Pace Regis et Regni* (1609) 130, which includes a similar statement.

54 Sir Edward Coke, *Third Part of the Institutes of the Laws of England* (1628) 108.

55 See, eg, Hale, above n 12, vol 1, 621; Blackstone, above n 47, book 4, 38–9; William O Russell, *A Treatise on Crimes and Misdemeanors* (4th ed, 1865) vol 1, 66.

56 See, eg, Butterworths, *Halsbury's Laws of England* (3rd ed, 1955) vol 10, Criminal Law and Criminal Procedure, 'Chapter 1 Principles of Criminal Liability' [561]; *R v Holley* [1963] 1 All ER 106 (editor's note). See also Law Book Company, *Laws of Australia*, vol 9 (at 6 June 2004) Criminal Law Principles, 'Chapter 9.2 Ancillary Liability' [68]; Ray Watson, Anthony Blackmore and Greg Hosking, *Criminal Law (NSW)* (2004) '2 Crimes Act' [2.33120].

57 See *R v CAL* (Unreported, New South Wales Court of Criminal Appeal, Handley JA, Grove and Ireland JJ, 24 October 1996); *R v Brown* (Unreported, New South Wales Court of Criminal Appeal, McInerney, Hulme, and Barr JJ, 9 December 1998).

58 Montague Lush, *The Law of Husband and Wife* (4th ed, 1933) 597.

59 Williams, above n 35, 26.

60 Victorian Law Reform Commission, *Criminal Liability of Married Persons (Special Rules)*, Report No 3 (1975) [35]–[36].

crime or providing passive assistance, such as receiving him, but it subsequently expanded to the extent that ‘a wife could not *in any circumstances* be an accessory after the fact to the felony of her husband’.⁶¹ Many would consider this rule unreasonably wide. Second, at common law the rule never exempted a husband from being an accessory after the fact to crimes of his wife,⁶² as it logically should have once it became justified on the basis of social policy rather than biblical duty. In response to these two criticisms, some legislatures have abolished the rule altogether,⁶³ but it seems that most have retained, or merely modified, it. In many jurisdictions the rule now applies equally to husbands and wives.⁶⁴

In any event, irrespective of the current status of the rule exempting wives from being accessories after the fact to crimes of their husbands, it is clear that for many hundreds of years English common law has recognised the basic principle that a wife is not bound to discover the crime of her husband. It was this principle that gave rise to the first common law rules relating to spousal testimony and spawned a general privilege against spouse-incrimination.

IV ENGLISH AUTHORITIES ON THE PRIVILEGE AGAINST SPOUSE-INCrimINATION

At English common law there are five lines of authority evidencing the existence of a privilege against spouse-incrimination. In recent decades, there has also been significant statutory intervention in this field.

A Bankruptcy Examinations

The first English case to establish a clear common law rule in relation to spousal testimony involved a bankruptcy examination. Early bankruptcy legislation ‘was mainly directed against fraudulent debtors’⁶⁵ and authorised public examinations of bankrupts and other persons through a procedure ‘calculated to yield potentially incriminating material’.⁶⁶ Bankrupts were not entitled to refuse to be examined on the ground of self-incrimination.⁶⁷

In an anonymous case, decided in 1613, the issue arose as to whether a bankrupt’s wife could be forced to undergo an examination. The Court ruled that she could not, reasoning that ‘the wife is *not bound* in case of high treason to

61 PJ Pace, ‘Impeding Arrest – A Wife’s Right as a Spouse?’ [1978] *Criminal Law Review* 82, 84; Williams, above n 35, 26.

62 See Hawkins, above n 12, Book 2, 320; Blackstone, above n 47, 504; *R v Jones* [1949] 1 KB 194.

63 See, eg, *Criminal Code Act* (NT) s 13(2); *Crimes Act 1900* (NSW) s 347A.

64 See, eg, *Crimes Act 1958* (Vic) ss 337, 338; *Criminal Code* (WA) s 10(2); *Criminal Code Act 1924* (Tas) s 6(2); *Crimes Act 1961* (NZ) s 71(2).

65 David M Walker, *The Oxford Companion to Law* (1980) 111.

66 *R v Director of the Serious Fraud Office; Ex parte Smith* [1993] AC 1, 40.

67 See *R v Scott* (1856) Dears & B 47, 56; 169 ER 909, 913; John H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All the Jurisdictions of the United States and Canada* (3rd ed, 1940) vol 8, §2260.

discover her husband's treason, although the son be bound to reveal it; therefore by common law she shall not be examined'.⁶⁸ Whilst no authorities were cited by the Court, the wording of the judgment leaves little doubt that it was founded on the principle that a wife is not bound to discover the crime of her husband. It was this principle that excused a wife from discovering her husband's treason, negating what would otherwise amount to misprision of treason.

In 1623, Parliament sought to reverse the rule established in the anonymous case by granting a new power to 'examine upon oath the wife ... of ... every such bankrupt, for the finding out and discovery of the estate'.⁶⁹ However, in 1719, Lord Parker LC held that, notwithstanding this reform, the wife of a bankrupt could still refuse to be examined about her husband's 'acts of bankruptcy',⁷⁰ which often involved the commission of criminal offences.

These early bankruptcy authorities provide strong support, either directly or by way of analogy, for the recognition of a common law privilege against spouse-incrimination. They also demonstrate the general and fundamental nature of the principle that a wife is not bound to discover the crime of her husband. Not only did this principle provide a substantive defence to criminal offences, but it also withstood a wide statutory power, notwithstanding that the bankrupt himself had no protection against *self*-incrimination.

B Criminal Committals and Trials

In criminal proceedings, witnesses could not generally be compelled to testify until the enactment of the *Marian Committal Statute* in 1555.⁷¹ This Act authorised Justices of the Peace to conduct preliminary examinations of accused persons and witnesses, commit the accused to trial and bind the witnesses to testify at trial.⁷² The accused had no effective privilege against self-incrimination. At both the preliminary examination and the trial itself the accused was interrogated about the alleged offence and had no choice but to answer – his 'refusal to respond to the incriminating evidence against him would have been suicidal'.⁷³ Witnesses were not accorded any privilege against *self*-incrimination until the latter part of the 17th century,⁷⁴ whilst the accused did not enjoy this privilege 'in any meaningful sense' until as late as the mid-19th century.⁷⁵

It was not until decades of practice under the *Marian Committal Statute* had elapsed that 'a true law' of criminal procedure began to develop.⁷⁶ The leading

68 *Anonymous* (1613) Brownl 47, 47; 123 ER 656, 656–7 (emphasis added).

69 *Bankrupts Acts*, 21 Jac I, c 19, s 6.

70 *Ex parte James* (1719) 1 P & Wms 610, 611; 24 ER 538, 539. It was held that wives could only be examined about their husbands' 'goods, effects or estate'.

71 *Marian Committal Statute* 1555, 2 & 3 Ph & M, c 10. See generally Holdsworth, above n 35, 178–203.

72 See generally John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (1974) 1–118.

73 John H Langbein, 'The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries' in R H Helmholz (ed), *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82, 83.

74 See *R v Reading* (1679) 7 St Tr 259, 296; *R v Shaftesbury* (1681) 8 St Tr 759, 817.

75 *Azzopardi v The Queen* (2001) 205 CLR 50, 92.

76 See Langbein, above n 72, 123.

treatise in this field at that time was Michael Dalton's *The Countrey Justice* (1618),⁷⁷ described by Lord Goddard as 'a work of the highest authority'.⁷⁸ This treatise, not Lord Coke's (1628),⁷⁹ was the first to describe the common law rules relating to spousal testimony. Dalton observed that the *Marian Committal Statute* empowered justices to examine any person 'that can informe any materiall thing against the prisoner' and 'binde them to give in evidence against the prisoner' at trial.⁸⁰ However, he identified the following qualification:

And yet the wife is not to be bound to give evidence, nor be examined against her husband; for by the lawes of God, and of this land, she ought not to discover his counsell, or his offence in case of Theft, (or other Felonie, as it seemeth). See *Stamford 26.b*. Nay, I have knowne the Judge of Assise greatly to disallow, that the wife should bee examined, or bound to give in any Evidence against others in case of Theft, wherein her husband was a partie; And yet her Evidence was pregnant and materiall to have prooved the Felonie against others that were parties to the same Felonie, and not directly against the husband.⁸¹

The citation 'Stamford 26.b' is a reference to the previously quoted passage from Staunford (1557): 'a wife cannot be accessory to her husband because by the law divine she ought not to discover him';⁸² which, in turn, cited the previously quoted passages from Britton (c1272)⁸³ and Bracton (c1250-59)⁸⁴ relating to the same principle. Accordingly, it is clear that the rule stated by Dalton was based on the centuries-old principle that a wife is not bound to discover the crime of her husband.

There are a number of noteworthy points about the rule stated by Dalton. First, like the rule relating to bankruptcy examinations, it only excused wives from testifying against their husbands, not *vice versa*. This reflects the scope of the principle from which both rules were derived. Second, as in the bankruptcy cases, this principle was regarded as being so fundamental that it overrode the general wording of a wide statutory power. Third, it is clear that the rule stated by Dalton, like the one in the bankruptcy cases, was not derived from any privilege against *self-incrimination*: both were established in contexts where there was no privilege against self-incrimination. Indeed, *Marian* committal procedures were 'devoted to pressuring the accused to incriminate himself'.⁸⁵

A further feature of Dalton's treatise is that it did not state that wives were *incompetent* to testify for or against their husbands, as Lord Coke was later to assert. Dalton did not identify any restrictions on the ability of wives to testify for their husbands, and as regards testifying *against* them he only seems to have opined that they were not *bound* to do so. Clearly, he considered that they 'ought

77 Michael Dalton, *The Countrey Justice* (1st ed, 1618).

78 *R v County of London Quarter Sessions Appeals Committee; Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670, 675.

79 Coke, above n 12.

80 Dalton, above n 77, 262.

81 Ibid 261.

82 Staunford, above n 53 and accompanying text. Stamford is an alternative spelling of Sir William Staunford's surname: Walker, above n 65, 1189.

83 Nichols, above n 52 and accompanying text.

84 Thorne, above n 50 and accompanying text.

85 Langbein, above n 73, 91-2.

not' do so, but he did not contend that they *cannot* do so. Declarations by both Dalton and Staunford to the effect that 'every one shalbe admitted to give evidence for the king'⁸⁶ suggest that a wife who was willing to testify against her husband may have been permitted to do so.

Another significant feature of Dalton's treatise is his reference to the decision by an 'Assise judge' to exempt a wife from testifying 'against others' in relation to a theft that her husband was also involved in, even though her evidence was not given 'directly against' him. This decision implies that a wife was not bound to give evidence in 'collateral cases' (proceedings against third persons) if her testimony would implicate her husband in the commission of a crime. Such a rule, which resembles a testimonial privilege, has a wider application than the rules of spousal incompetency and non-compellability, which 'only came into operation in the case where the other spouse was a party'.⁸⁷

From the anonymous bankruptcy case (1613) and Dalton's treatise (1618) a reasonably clear picture of the early development of the common law rules relating to spousal testimony starts to emerge. It seems that the judges who formulated these rules simply, and logically, based them on the well-established principle that a wife is not bound to discover the crime of her husband. Thus, it appears that a wife was not bound to testify in criminal proceedings against her husband (a rule of non-compellability) and not bound to give evidence in collateral cases that would reveal that her husband had committed a crime (akin to a privilege against spouse-incrimination).

However, this state of the law underwent a major augmentation in 1628 when Lord Coke declared that 'a wife *cannot* be produced *either against or for* her husband',⁸⁸ thereby asserting an absolute rule of spousal *incompetency*. Lord Coke did not refer to Dalton's treatise. The only authority he cited was the anonymous bankruptcy case, but neither this case nor any other pre-1628 case supports a rule as wide as the one that he asserted. Accordingly, it seems correct to credit Lord Coke with giving birth to the rule of spousal incompetency.⁸⁹ Lord Coke's rule appears to be a distortion of the earlier rules stated by Dalton, which had a much firmer jurisprudential foundation being based upon the centuries-old principle that a wife is not bound to discover the crime of her husband.

Lord Coke's rule of spousal incompetency, originally confined to wives, was quickly adopted by the courts and soon applied equally to husbands.⁹⁰ By the end of the 17th century the general rule that a person could not testify in any case *if his or her spouse was a party to the proceedings* was beyond question. This disqualification rendered recourse to the earlier rules stated by Dalton unnecessary in most situations. As spouses were *incompetent* to testify against each other in the vast majority of cases, the issues of *compellability* or *privilege* rarely arose for consideration, much less for determination. However, in those

86 Dalton, above n 77; Staunford, above n 52, 163.

87 *Shenton v Tyler* [1939] 1 Ch 620, 627.

88 Coke, above n 12, 6b (emphasis added).

89 'This singular condition of the law may perhaps be laid to the blame of Lord Coke': Wigmore, above n 20, §2228.

90 See, eg, *Mary Grigg's Case* (1672) T Raym 1; 83 ER 1; *Mossar v Ivy* (1684) 10 St Tr 555, 627.

cases where Lord Coke's disqualification did not apply there was scope for recognition and development of these additional principles; it is in these cases that we find continuing support for a common law privilege against spouse-incrimination.

C Collateral Cases

Even though Lord Coke's rule of incompetency was to dominate the common law on spousal testimony for centuries to come, it did not supplant the earlier rules stated by Dalton. With their differing nature and scope, they existed alongside each other. Thus, post-1628 editions of Dalton's treatise contained his original statements, including his rule in collateral cases, immediately followed by Lord Coke's pronouncement of the rule of spousal incompetency.⁹¹ Similarly, in Hale's highly influential treatise (c1676) we find references to Lord Coke's rule of incompetency⁹² and an additional distinct reference to Dalton's rule in collateral cases, which Hale described as 'a woman *is not bound* to be sworn or to give evidence against another in case of theft, &c. if her husband be concerned, tho it be material against another, and not directly against her husband'.⁹³

Before considering the application of this rule, it must be noted that by the 18th century the biblical notions that first served to justify the exclusion of adverse spousal testimony had been replaced with modern policies aimed at preserving marital harmony, avoiding hardship and preventing perjury.⁹⁴ These policies were gender-neutral and it followed that all of the rules of spousal testimony came to be applied equally to husbands and wives.

On three occasions between 1788 and 1831 the Court of the King's Bench was called upon to define the common law rules relating to adverse spousal testimony in collateral cases. All three cases involved pauper settlement proceedings in which removal of a female pauper was resisted on the basis that she claimed to have a husband. In each case, evidence was adduced showing that the pauper and the husband were married, but it was counter-claimed that this marriage was void because the husband had an earlier wife still living at the time of his marriage to the pauper. The issue for determination was whether 'the first wife' could testify to prove the earlier marriage. Her testimony, if accepted, would show that her husband had committed bigamy by marrying the pauper. However, the husband was not a party to the proceedings at hand, and any testimony from the first wife could not be received against him if he were later prosecuted for bigamy.

The first case was *R v Inhabitants of Cliviger*⁹⁵ ('Cliviger'). The husband testified that he was married to the pauper and denied any marriage to the first wife. The defendant then proposed to call the first wife to prove her marriage to

91 See, eg, Dalton, *The Countrey Justice* (1727) 540–1.

92 Hale, above n 12, vol 2, 279.

93 Hale, above n 12, vol 1, 301 (emphasis added).

94 See, eg, *Mary Grigg's Case* (1672) T Raym 1; 83 ER 1; Hawkins, above n 12; *Barker v Dixie* (1736) Cas t Hard 264; 95 ER 171; Gilbert, above n 14; Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1767) 286a.

95 (1788) 2 TR 263; 100 ER 143.

the husband, but the prosecution claimed that she was *incompetent*, citing the anonymous bankruptcy case and Hale's statement on collateral cases. The trial judge refused to admit her and this decision was affirmed by the King's Bench, with Ashhurst J stating:

the ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime; but even in collateral cases, if their evidence tends that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy; yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended ... therefore I am of the opinion that her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other.⁹⁶

This statement of principle provides strong support for the existence of a common law *privilege* against spouse-incrimination, but it further suggests that spouses were *incompetent* to incriminate each other in collateral cases. In this latter respect, the principle expressed in *Cliviger* was not supported by any of the authorities referred to during argument or cited in the judgment. This discrepancy was subsequently identified by Phillpotts, who correctly pointed out that Hale's statement on collateral cases 'goes no further than this, that the wife is not *compellable* to give any evidence charging the husband with an offence'.⁹⁷

The second King's Bench case was *R v Inhabitants of All Saints, Worcester*⁹⁸ ('*All Saints*'). The defendant proposed to call the first wife to prove that she married him prior to him marrying the pauper. The prosecution, relying on *Cliviger*, argued that she was *incompetent* on the basis that her testimony would tend to show that her husband had committed bigamy, but the trial judge held that she could testify and this was affirmed on appeal. The judges decided the case by emphasising that the wife 'did not refuse to be examined' and by declining to strictly follow *Cliviger*.⁹⁹ They held that a wife was only *incompetent* to incriminate her husband in proceedings brought directly against him (in which Lord Coke's rule applied), but that this rule did not extend to collateral cases (in which the rules stated by Dalton and Hale applied). Justice Bayley, in the most important judgment for present purposes, stated:

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.¹⁰⁰

It is submitted that these comments amount to specific recognition of a common law privilege against spouse-incrimination. Whilst strictly obiter, they

96 Ibid 268; 146. See also ibid 268–9; 146–7 (Grose J).

97 Samuel Phillpotts, *A Treatise on the Law of Evidence* (3rd ed, 1817) 67 (emphasis in original).

98 (1817) 6 M & S 194; 105 ER 1215.

99 Ibid 198–200; 1217–18.

100 Ibid 200–1; 1217–18.

are entirely in line with the relevant statements from Hale and Dalton, the bankruptcy authorities and the centuries-old principle that a wife is not bound to discover the crime of her husband. Accordingly, they should be, and have in fact been, regarded ‘as being of the highest persuasive authority’.¹⁰¹

Commentators and courts soon regarded *All Saints* as the leading authority in its field, stating that the rule enunciated in *Cliviger* was ‘too extensive and too indefinite’.¹⁰² In 1831, these views were confirmed in the third King’s Bench case, *R v Inhabitants of Bathwick*.¹⁰³ The facts in this case were essentially the same as those in *Cliviger*, but the trial judge held that the wife was *competent* to incriminate her husband. This decision was affirmed on appeal, with the Court choosing to follow *All Saints* ahead of *Cliviger*.

Following the three King’s Bench cases, leading textwriters embraced the comments of Bayley J in *All Saints*, concluding that whilst witnesses were *competent* to give evidence tending to incriminate their spouses in collateral cases, both civil and criminal, the better view was that they had a *privilege* to decline to do so.¹⁰⁴ For example, in 1848, Taylor wrote:

But although, in [collateral] cases, the wife will be *permitted* to testify against her husband, it by no means follows that she will be *compelled* to do so; and the better opinion is that she may throw herself upon the protection of the Court, and decline to answer any question, which would tend to expose her husband to a criminal charge.¹⁰⁵

In Roscoe’s highly influential digests the law is similarly described as follows: ‘[b]ut though the husband and wife are, in [collateral cases], competent, it seems to accord with principles of law and of humanity, that they should not be compelled to give evidence which tends to criminate each other’.¹⁰⁶

In 1852, these principles appear to have been applied in *R v Hamp*.¹⁰⁷ The witness in question was the wife of a man who was not on trial in this case, but was under indictment for a separate offence and had failed to appear at his trial. Under cross-examination she was asked about her husband’s whereabouts and she refused to answer. Lord Campbell CJ said that she must answer or provide a reason for not doing so. The wife said, ‘I decline to answer the question, because my husband did not appear to his recognizance’,¹⁰⁸ to which Lord Campbell CJ replied: ‘I think on that the question ought not to be pressed’¹⁰⁹ and it was

101 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 496 (Salmon LJ). See also *Riddle v The King* (1911) 12 CLR 622, 628 (Griffith CJ).

102 See, eg, Starkie, above n 12, 710; *Henman v Dickinson* (1828) 5 Bing 183; 130 ER 1031.

103 (1831) 2 B & Ad 637; 109 ER 1280.

104 See, eg, Phillpotts, above n 97, 69; Richard Burn, *Justice of the Peace* (1836) vol 1, 1037 (fn b); Richard N Gresley, *A Treatise on the Law of Evidence in the Courts of Equity* (2nd ed, 1847) 342.

105 Pitt Taylor, *A Treatise on the Law of Evidence* (1848) vol 1, §997 (emphasis in original). See also Samuel M Phillpotts and Thomas J Arnold, *Treatise on the Law of Evidence* (10th ed, 1852) vol 1, 73.

106 See, eg, Mills and Sir William Markby, *Roscoe’s Digest of the Law of Evidence on the Trial of Actions at Nisi Prius* (11th ed, 1866) 106. See also James F Stephen, *Roscoe’s Digest of the Law of Evidence in Criminal Cases* (7th ed, 1868) 146.

107 (1852) 6 Cox CC 167.

108 *Ibid* 170.

109 *Ibid*.

withdrawn.¹¹⁰ No further reasons are given for the Chief Justice's ruling, but the headnote to the case reads: 'Privilege of wife to refuse to answer questions as to the residence of her husband, who is liable to be apprehended'.¹¹¹ It thus appears that the case involved an application of the privilege against spouse-incrimination.

D Discovery and Interrogatories in Civil Cases

In civil cases, parties and their spouses were, historically, incompetent to testify.¹¹² As a result, there was little scope for persons to incriminate their spouses in civil trials. However, the potential for spouse-incrimination did arise in relation to the pre-trial processes of discovery and interrogatories available in the Court of Chancery, whereby persons could be compelled to produce documents and answer questions on oath relating to matters in dispute.

In *Cartwright v Green*, decided in 1803, discovery was sought from a married woman as to acts constituting larceny on the part of her husband.¹¹³ The woman demurred and this was upheld by Lord Eldon LC, who stated: '[h]ere the wife, *if the act was a felony* in the husband, would be protected: at all events *she could not be called upon to make a discovery against her husband*'.¹¹⁴ No supporting authorities were cited, but the wording of the judgment strongly suggests that it was based on the general principle that a wife is not bound to discover the crime of her husband.

The authority of the decision in *Cartwright v Green* does not appear to have ever been doubted. Leading textwriters have repeatedly cited it for either the proposition that a wife cannot be forced to make a discovery tending to incriminate her husband or the gender-neutral proposition that no person can be forced to make a discovery tending to incriminate his or her spouse.¹¹⁵

It did not take long for England's foremost scholars on the law of evidence to marry *Cartwright v Green* with the collateral case authorities and conclude that there was, or at least appeared to be, a common law privilege against spouse-incrimination analogous to the privilege against self-incrimination. Thus, the following passage appears in the first edition, and all subsequent editions, of Taylor's treatise:

110 Ibid.

111 Ibid 167.

112 Holdsworth, above n 35, 192–4; *Bentley v Cooke* (1784) 3 Dougl 422; 99 ER 729; *Davis v Dinwoody* (1792) 4 TR 678; 100 ER 1241.

113 (1803) 8 Ves Jr 405; 32 ER 412.

114 Ibid 410; 413 (emphasis added).

115 See, eg, James Wigram, *Points in the Law of Discovery* (2nd ed, 1840) 80; Sir Henry W Seton, *Forms of Decrees in Equity* (3rd ed, 1862) vol 2, 1056; William W Kerr, *A Treatise on the Law of Discovery* (1870) 150; Edward C Dunn and Leonard Field, *Practice of The High Court of Chancery* (5th ed, 1871) vol 1, 167, 482; Walter S Sichel and William Chance, *The Law Relating to Interrogatories, Production, Inspection of Documents and Discovery* (1883) 38, 58–9; Ralph Thicknesse, *A Digest of the Law of Husband and Wife* (1884) 214, 296; Edward Bray, *The Principles & Practice of Discovery* (1885) 342; John Cutler and Charles F Cagney, *Powell's Principles and Practice of the Law of Evidence* (7th ed, 1898) 102; Cecil C M Dale, Charles W Greenwood, Sydney E Williams and Francis A Stringer, *Daniell's Chancery Practice* (7th ed, 1901) vol 2, 1579; R E Ross, *The Law of Discovery* (1912) 256.

there are some questions which a witness is *not compellable to answer*. This is the case: *first*, where the answers would have a *tendency* to expose the witness, or, as it seems, the husband or wife of the witness to any kind of *criminal charge*.¹¹⁶

A similar statement appears in the first edition, and all subsequent editions, of Sir James Stephen's highly influential *Digest of the Law of Evidence*.¹¹⁷ In *Lamb v Munster*, decided in 1882, Stephen, who was by then a prominent judge of the Court of Queen's Bench, adopted the wording of his text in delivering a judgment on the privilege of a person to decline to answer potentially incriminating interrogatories in a civil case, stating:

When the subject is fully examined, it will I think be found that the privilege extends to protect a man from answering any question which would in the opinion of the judge have a tendency to expose the witness, *or the wife or husband of the witness*, to any criminal charge.¹¹⁸

Thereafter, leading texts on the law of evidence identified a general common law privilege against spouse-incrimination, alongside the privilege against self-incrimination.¹¹⁹ This also occurred in successive editions of *Halsbury's Laws of England*¹²⁰ and *Encyclopaedia Britannica*.¹²¹

E Non-Compellability of Spouses in Criminal Cases

At the close of the 19th century, one major issue remained unresolved in relation to spousal testimony: whether a person who was *competent* to testify in a criminal prosecution against his or her spouse could be *compelled* by the Crown to do so. This issue gained heightened significance with the enactment of the *Criminal Evidence Act 1898*,¹²² s 4(1) of which created new exceptions to the rule of spousal incompetency by providing that in respect of specified offences,

116 See, eg, Taylor, above n 105, vol 1, §1068; Pitt Taylor, *A Treatise on the Law of Evidence* (12th ed, 1931) vol 2, §1453 (original emphasis, citations omitted). See also Thomas Starkie, *Practical Treatise of the Law of Evidence* (4th ed, 1853) 204 (fn).

117 See, eg, James F Stephen, *Digest of the Law of Evidence* (1876) art 120; James E Stephen, *Digest of the Law of Evidence* (12th ed, 1948) art 129.

118 (1882) 10 QBD 110, 112–13 (emphasis added). See also *In Re A Debtor (No 7 of 1910)* [1910] 2 KB 59, 64–5.

119 See, eg, Sidney L Phipson, *Law of Evidence* (1st ed, 1892) 111, through to, at least, (10th ed, 1963) 264; Sidney L Phipson, *Manual of the Law of Evidence* (1st ed, 1908) 48, through to, at least, (10th ed, 1972) 99–100; Cockle, *Leading Cases and Statutes on the Law of Evidence* (1st ed, 1907) 211, through to, at least, (10th ed, 1963) 111.

120 See, eg, The Earl of Halsbury, *The Laws of England* (1910) vol 11, Discovery, Inspection, and Interrogatories, 'Chapter IV Production of Documents for Inspection' [135]; The Earl of Halsbury, *The Laws of England* (1910) vol 13, Evidence, 'Chapter V Witnesses' [784]; Butterworths, *Halsbury's Laws of England* (2nd ed, 1934) vol 10, Discovery, Inspection, and Interrogatories, 'Chapter IV Production of Documents for Inspection' [477]; Butterworths, *Halsbury's Laws of England* (2nd ed, 1934) vol 13, Evidence, 'Chapter V Witnesses' [804]; Butterworths, *Halsbury's Laws of England* (3rd ed, 1955) vol 12, Discovery, Inspection and Interrogatories, 'Chapter 3 Inspection of Documents' [72]; vol 15, Evidence, 'Chapter V Witnesses' [760]; Butterworths, *Halsbury's Laws of England* (4th ed, 1975) vol 13, Discovery, Inspection and Interrogatories, 'Chapter 4 Production and Inspection of Documents' [92]; vol 17, Evidence, 'Chapter V Witnesses' [240].

121 See, eg, *Encyclopaedia Britannica* (10th ed, 1902) vol 28, Evidence (Law of), 'V Witnesses', 340; *Encyclopaedia Britannica* (11th ed, 1911) vol 10, Evidence, 'V Witnesses', 20.

122 *Criminal Evidence Act 1898*, 61 & 62 Vict, c 36.

including incest, the spouse of an accused ‘may be called as a witness’ for the prosecution.

In *Leach v The King*¹²³ (*‘Leach’*), the House of Lords unanimously held that s 4(1) did not imply that a wife could be compelled to testify against her husband in a prosecution for incest. Earl Loreburn LC declared that ‘it is a fundamental and old principle ... that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind’, stating that only ‘definite’ legislation could remove this ‘right’.¹²⁴ Lord Halsbury remarked that the principle that a wife should not be compelled to testify against her husband has existed ‘since the foundations of the common law’ and ‘is almost ingrained in the English Constitution’.¹²⁵ Lord Atkinson stated:

The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment.¹²⁶

Whilst the above statements are all expressed in terms of compelling wives to testify against their husbands, it is submitted that this merely reflects the particular facts of *Leach* and that the Law Lords did not intend to imply that it was less objectionable to compel husbands to testify against their wives. This is evident from the following gender-neutral response given by the Lord Chancellor to a submission made by counsel during argument:

There may be something more than justice and innocence at stake. It might be thought better that a guilty person should escape, than that homes should be made impossible by husband and wife being compelled to divulge things against one another.¹²⁷

It is further submitted that the general principles expressed in *Leach* are not limited to the rule of spousal non-compellability in criminal trials, but apply with equal force to the synonymous privilege against spouse-incrimination: the two being particular manifestations of the one basic principle that spouses should not be compelled to incriminate each other. This conclusion is supported by the general and unqualified language in the Law Lords’ speeches and the approach taken by the House of Lords in its second decision in this field.

In *Hoskyn v Metropolitan Police Commissioner*¹²⁸ (*‘Hoskyn’*), the House of Lords was called upon to determine whether its decision in *Leach* governed the case where a wife was competent *at common law* to testify against her husband because she was the alleged victim of inter-spousal violence. Earlier, the Court of Criminal Appeal had held that a wife was compellable in such a case, distinguishing *Leach* as being solely concerned with s 4(1) of the *Evidence Act*.¹²⁹

¹²³ *Leach v The King* [1912] AC 305.

¹²⁴ [1912] AC 305, 309–10.

¹²⁵ *Ibid* 311.

¹²⁶ *Ibid*.

¹²⁷ (1912) 7 Cr App R 157, 164.

¹²⁸ [1979] AC 474.

¹²⁹ See *R v Lapworth* [1931] 1 KB 117. See also *R v Algar* (1953) 37 Cr App R 200, 206.

In *Hoskyn*, a four-to-one majority of the Law Lords rejected this distinction. They held that it was a fundamental principle that spouses should not be compelled to testify against each other in criminal cases, even when they were fully competent to do so. Of great significance is the fact that they founded this conclusion on authorities relating to the privilege against spouse-incrimination. The Law Lords in the *Hoskyn* majority cited with approval the relevant comments from Bayley J in *All Saints*, the ruling of Lord Eldon LC in *Cartwright v Green* and pertinent passages from Taylor's treatise,¹³⁰ in order to demonstrate that it would be 'altogether inconsistent with the common law's attitude towards marriage that it should compel ... a wife to give evidence against her husband'.¹³¹ Lord Salmon even referred to Bayley J's comments as follows: 'That pronouncement was, no doubt, obiter, but coming from such a master of the common law it deserves to be treated with the greatest respect: I regard it as being of the highest persuasive authority'.¹³²

Of equal, if not greater, significance is the dissenting judgment by Lord Edmund-Davies. Whilst his Lordship sought to downplay the relevance of Bayley J's comments in *All Saints* to the precise issue before the Court, he did so by specifically emphasising that they supported a 'privilege' (against spouse-incrimination) rather than a rule of non-compellability.¹³³ Lord Edmund-Davies was not critical of Justice Bayley's dicta or the privilege that he considered them to reflect. In fact, he described him as 'a judge of outstanding quality'¹³⁴ and stated that 'many judges would share the view of Bayley J ... that it would not be right to compel [a wife] to furnish material which might later form (however indirectly) the basis for ... a criminal charge against her husband'.¹³⁵

The immense relevance of the judgments in *Hoskyn* to the topic of this article is twofold. First, the unanimous endorsement of Bayley J's dicta in *All Saints* is the next best thing to an express ruling that there is a common law privilege against spouse-incrimination. Second, the majority's conclusion that authorities evidencing this privilege were equally demonstrative of a rule of spousal non-compellability suggests that the general statements of principle enunciated in *Leach*, in relation to the latter, apply with equal force to the former. The *Hoskyn* majority, correctly it is submitted, treated the two as synonymous in terms of basic principle. It follows, in this author's opinion, that in England the privilege against spouse-incrimination is a fundamental common law right, which can only be removed 'by a clear, definite, and positive enactment'.¹³⁶

130 *Hoskyn* [1979] AC 474, 485, 490–1, 493, 496, 508.

131 *Ibid* 495.

132 *Ibid* 496.

133 *Ibid* 501–3. Lord Edmund-Davies ultimately concluded that in cases of inter-spousal violence the considerations which led to the exception to the rule of spousal incompetency also justified an exception to any rule of non-compellability. He distinguished *All Saints* on the basis that it did not concern this particular exception.

134 *Ibid* 502.

135 *Ibid* 503.

136 *Leach* [1912] AC 305, 311.

F Law Reform Developments

In 1967, the English Law Reform Committee released a report entitled *Privilege in Civil Proceedings*, which contained the following commentary:

It is not clear that the privilege [against self-incrimination] extends to answers or documents which would render the spouse of the witness or party liable to a criminal prosecution ... For our part, we find it rather more repellent that a husband should be compelled to incriminate his wife, or a wife her husband, than that either should be compelled to incriminate himself ... we recommend that the opportunity should be taken of extending the privilege against self-incrimination to a privilege against incrimination of a spouse.¹³⁷

This recommendation was promptly given effect to by s 14 of the *Civil Evidence Act 1968* (UK).¹³⁸ During parliamentary debates, Lord Gardiner LC acknowledged that a 'privilege against incrimination of a spouse' might already exist at common law,¹³⁹ and stated that as long as there is a privilege against self-incrimination 'it should surely cover spouses'.¹⁴⁰ Since 1968, most legislation passed in the United Kingdom either preserving or abrogating the privilege against self-incrimination (in both judicial and non-judicial contexts) has been expressed to apply equally to the privilege against spouse-incrimination.¹⁴¹

The Law Reform Committee's recommendations were strongly endorsed by England's Criminal Law Revision Committee¹⁴² and Ireland's Law Reform Commission,¹⁴³ but the recommendations of these two bodies were never acted upon. Consequently, the position of witnesses in criminal proceedings in Britain, and in all contexts in Ireland, is still governed by the common law.

During these law reform debates, as in other contexts, it appears to have been assumed that any common law privilege against spouse-incrimination arose as an 'extension' of the privilege against self-incrimination, caused by the doctrine of unity.¹⁴⁴ This assumption is incorrect. The former privilege is not a mere adjunct to the latter, even though the two are frequently coupled together in academic, judicial and statutory phrasings (just like the privilege against self-incrimination is frequently coupled with the 'different' and 'distinct' privilege against self-

137 English Law Reform Committee, *Privilege in Civil Proceedings*, Report No 16, Cmnd 3472 (1967) [9].

138 *Civil Evidence Act 1968* (UK) c 64, s 14 essentially provides that in any context, other than in criminal proceedings, if a person has (or does not have) a privilege against self-incrimination, he or she shall have (or not have) 'a like' privilege against spouse-incrimination. It further provides that where any enactment requires a person to provide information, subject to the proviso that it will not be admissible against them in proceedings, the information will, also, be inadmissible in proceedings against his or her spouse. These provisions were replicated in the *Civil Evidence Act (Northern Ireland) 1971* (NI) s 10. See also *Coroners (Practice and Procedure)(Amendment) Rules (Northern Ireland) 2002* (NI).

139 United Kingdom, *Parliamentary Debates*, House of Lords, 22 February 1968, vol 289, 683.

140 United Kingdom, *Parliamentary Debates*, House of Lords, 8 February 1968, vol 288, 1348.

141 See, eg, *Theft Act 1968* (UK) c 60, s 31(1); *Criminal Damage Act 1971* (UK) c 48, s 9; *Supreme Court Act 1981* (UK) c 54, s 71; *Representation of the People Act 1983* (UK) c 11, s 141; *Children Act 1989* (UK) c 41, s 48(2); *Pensions Act 1995* (UK) c 26, s 102(1); *Job Seekers Act 1995* (UK) c 18, s 33(9); *National Minimum Wage Act 1998* (UK) c 39, s 14(2); *European Parliamentary Elections Regulations 2004* (UK) reg 98.

142 English Criminal Law Revision Committee, above n 23, [169].

143 Ireland Law Reform Commission, *Report on Competence and Compellability of Spouses as Witnesses*, Report No 13 (1985), 73.

144 See, eg, Caroline Fennell, *The Law of Evidence in Ireland* (1st ed, 1992) 181.

exposure to a penalty¹⁴⁵). As previously discussed, the privilege against spouse-incrimination was first recognised in contexts where the privilege against self-incrimination did not exist and the former has a distinct lineage that is unrelated to the latter. Whilst the two privileges are analogous, and may be justified by similar social policies, they are entirely separate and have different doctrinal foundations.

The statutory reforms in the 1960s and 1970s provoked varied comments from textwriters about the state of the common law. Sir Rupert Cross suggested that s 14(1) of the *Civil Evidence Act 1968* (UK) was ‘merely declaratory of the common law’,¹⁴⁶ and that a like privilege ‘probably’ applied in criminal cases ‘by virtue of the common law’.¹⁴⁷ However, after Sir Rupert’s death, the author who continued *Cross on Evidence*, Colin Tapper, suggested that there was no common law privilege against spouse-incrimination.¹⁴⁸ It is respectfully submitted that Tapper committed a basic error in reaching this conclusion, one which has been repeated by many others.¹⁴⁹

Tapper suggested that the existence of a common law privilege against spouse-incrimination was negated by comments made by Lord Diplock in the 1978 case of *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*¹⁵⁰ (*‘Rio Tinto’*). Notably, Tapper only referred to the italicised words from the following passage in Lord Diplock’s judgment:

It was submitted that ... companies ... had a privilege in English law to require their officers and servants to refuse to answer questions that ... would tend to expose the companies to a penalty. *At common law*, as declared in section 14(1) of the Civil Evidence Act 1968, *the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else*. There is no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary.¹⁵¹

There are four reasons why reliance on this passage in the present context is misplaced. First, the comments are directed towards the distinct issue of whether the privilege extends to companies, not spouses. Second, Lord Diplock refers to the common law ‘as declared in section 14(1) of the *Civil Evidence Act 1968*’ and this section expressly includes a privilege against spouse-incrimination. Third, Lord Diplock’s statement that there is no trace in decided cases or textbooks of a ‘wider application’ certainly does not hold true for the privilege

145 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 336–7, 350–1.

146 Sir Rupert Cross, *Evidence* (4th ed, 1974) 246fn; Sir Rupert Cross, *Evidence* (5th ed, 1979) 278fn. See also Sir Rupert Cross, *Evidence* (1st ed, 1958) 229–30; Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (1964) 75–6.

147 Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (3rd ed, 1971) 80; Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (4th ed, 1975) 83; Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (5th ed, 1980) 100.

148 See Sir Rupert Cross and Colin Tapper, *Cross on Evidence* (6th ed, 1985) 384; Sir Rupert Cross and Colin Tapper, *Cross on Evidence* (7th ed, 1990) 422.

149 See, eg, Peter Murphy, *Blackstone’s Criminal Practice* (1992) 1920–1; Adrian Keane, *The Modern Law of Evidence* (3rd ed, 1994) 449; Christopher Allen, *Practical Guide to Evidence* (1998) 288; Paul Matthews and Hodge Malek, *Disclosure* (2000) [9.093].

150 [1978] AC 547.

151 *Ibid* 637–8 (emphasis added).

against spouse-incrimination. Fourth and foremost, it is a complete non sequitur to contend that statements along the lines of those italicised in the above passage somehow imply that there is no privilege against spouse-incrimination. Of course, the privilege against *self*-incrimination is limited to incrimination of one's *self*. This has no bearing on the issue of whether there is an additional and distinct, albeit analogous, privilege against spouse-incrimination. Lord Diplock's comments in *Rio Tinto* are irrelevant to this issue.

Current opinion is divided¹⁵² on the issue of whether a common law privilege against spouse-incrimination is available to witnesses in criminal proceedings in the United Kingdom.¹⁵³ Almost two decades ago Cowsill and Clegg remarked that 'it cannot be long before the point falls to be decided',¹⁵⁴ yet it remains unresolved to this day.

G Summary and Opinion

It is submitted that the foregoing authorities establish that there is a common law privilege against spouse-incrimination, which is analogous to, yet separate and distinct from, the privilege against self-incrimination. Any doubt about the existence of the privilege should be regarded as having been dispelled by the Law Lords' speeches in *Hoskyn*. In addition, the recent creation of statutory privileges against spouse-incrimination indicates that the social policies underlying the common law privilege cannot be dismissed as invalid or outdated. If further proof of the existence of the privilege is needed, it is provided by the overseas authorities referred to in part V of this article.

On the issue of whether a common law privilege against spouse-incrimination is available to witnesses in criminal proceedings, there can be little doubt that the privilege extends to any witness who is *not* the accused's spouse. This directly follows from the collateral case authorities. In situations where the witness is the spouse of the accused the law is less clear, but it is submitted that he or she would at least have a privilege against incriminating the accused in respect of offences *other than the one charged*. In relation to the offence charged, the better view seems to be that the privilege would be lost once the accused's spouse took the stand.¹⁵⁵ If the witness testified voluntarily, he or she could be characterised as having waived any privilege in relation to that offence. If the witness was forced to testify under a statutory provision expressly making him or her

152 For sources suggesting that there is no privilege, see above nn 148–9; Richard May, *Criminal Evidence* (4th ed, 1999) [13-05]; Butterworths, *Halsbury's Law of England* (4th ed Reissue, 1990) vol 11(2), Criminal Law, Evidence and Procedure, '13 Evidence' [1186]; Peter B Carter, *Cases and Statutes on Evidence* (2nd ed, 1990) 218. For sources suggesting that the privilege does exist, see Williams, above n 10; Celia Hampton, *Criminal Procedure* (3rd ed, 1982) 47; Peter Murphy, *A Practical Approach to Evidence* (2nd ed, 1985) 321; Derek W Elliott, *Elliott and Phipson Manual of the Law of Evidence* (12th ed, 1987) 151.

153 Pursuant to s 80 of the *Police and Criminal Evidence Act 1984* (UK) c 60, spouses are competent to testify in all criminal cases but only compellable by the Crown in prosecutions for offences involving inter-spousal violence or child abuse.

154 Eric Cowsill and John Clegg, *Evidence: Law and Practice* (1985) 91. See also John A Andrews and Michael Hirst, *Criminal Evidence* (2nd ed, 1992) 348.

155 See *R v Pitt* [1983] QB 25; Williams, above n 10, 430.

compellable in relation to the offence charged, such as an offence involving inter-spousal violence or child abuse, that provision could be construed as being sufficiently clear, definite and positive to override the common law privilege.

In relation to the precise scope of the common law privilege against spouse-incrimination, many factors suggest that it extends to non-judicial contexts. First, the principle from which it was derived was not simply a rule of evidence, but a substantive common law right exempting wives from criminal liability. Second, the privilege has been recognised in the context of bankruptcy examinations, which are administrative in nature. Third, the privilege has been held to apply in relation to pre-trial processes of discovery and interrogatories, which, whilst judicial, significantly differ from giving *evidence* in court. Fourth, the fact that new statutory privileges against spouse-incrimination apply in non-judicial contexts suggests that the application of the common law privilege in such contexts would accord with public policy. Fifth, if the privilege was not recognised in administrative contexts, such as in relation to investigative powers, it would often render nugatory any privilege in subsequent judicial proceedings. Sixth, courts in some of the countries referred to in Part V below have recognised the privilege in non-judicial contexts.

V COMPARATIVE AUTHORITIES AND COMMENTARIES

The issue of whether there is a common law privilege against spouse-incrimination has been considered in a number of jurisdictions around the world.

A United States of America

During the 19th century, American common law in this field developed along the same lines as that in England. The rule of spousal incompetency disqualified a person from testifying if his or her spouse was a party to the proceedings,¹⁵⁶ but this rule did not apply in criminal cases involving offences committed by one spouse against the other.¹⁵⁷

Early debate in America centred on whether the rule of spousal incompetency applied to a witness in a collateral case who was called to give evidence tending to incriminate his or her *non-party* spouse (as had initially been held in England in *Cliviger*, but was later rejected in *All Saints*). In many cases decided before 1817 it was held that such a witness was incompetent.¹⁵⁸ However, in 1839, the United States Supreme Court, referring to both *Cliviger* and *All Saints*, remarked that: '[t]he law does not seem to be entirely settled how far, in a collateral case, a wife may ... be asked questions as to facts, that may, in some measure, tend to

156 See *Fitch v Hill*, 11 Mass 286 (1814); *Stein v Bowman*, 38 US 209, 221 (1839); *Graves v United States*, 150 US 118 (1893).

157 *Stein v Bowman*, 38 US 209, 221 (1839); *Johnson v State*, 94 Ala 53; (1892); *Wyatt v United States*, 362 US 525 (1960).

158 *State v Gardner*, 1 Root 485 (Conn, 1793); *Canton v Bentley*, 11 Mass 441 (1814); *Fitch v Hill*, 11 Mass 286 (1814).

criminate her husband'.¹⁵⁹ Thereafter, courts generally came to hold that the principles enunciated in *Cliviger* were stated too broadly, and that a witness in a collateral case was *competent* to incriminate his or her spouse.¹⁶⁰

The issue of whether a witness in a collateral case also had a *privilege* to decline to incriminate his or her spouse was first considered in *State v Briggs*, where the Supreme Court of Rhode Island stated:

If we accord to the witness the privilege of objecting to testify on the ground that the testimony, if given, will criminate, or tend to criminate, a husband or wife, we think that ... there is no sound principle of public policy which requires that we should go still further [by allowing a third person to prevent the witness from testifying] ... We concur in the opinion expressed by Mr Justice Bailey [sic] in *Rex v All Saints*, that a husband or wife, objecting to give such testimony, would be entitled to the protection of the court.¹⁶¹

In 1871, this privilege was applied in *Commonwealth v Reid*,¹⁶² a case involving a prosecution against a doctor for performing an illegal abortion. The witness, upon whom the abortion was performed, testified for the prosecution. When asked who else was present at the time of the operation she declined to answer on the ground that it would criminate her husband. The trial judge held that she did not need to answer and this ruling was upheld on appeal, with Paxson J of the Supreme Court of Pennsylvania declaring:

It must be borne in mind that there is a marked distinction between the competency of the husband or wife to testify where the other is on trial, and the competency of either to testify in a collateral proceeding ... [I]n collateral proceedings the wife may be permitted to testify against her husband, even if her testimony tends directly to charge him with crime ... And ... it must be observed that there is a clear distinction between the competency of the witness and the privilege or right to decline to answer to facts criminating his or her husband or wife ... [W]hile in such cases the husband or wife is a competent witness for the Commonwealth, it is, notwithstanding, his or her privilege to decline to testify to such facts as would criminate the other.¹⁶³

In *Williams v Georgia*, decided in 1882, the Supreme Court of Georgia ruled that a wife testifying in a collateral case should be cautioned 'that she need not answer any question tending to criminate her husband'.¹⁶⁴ In *Woods v State*, a collateral case decided in 1884, the Supreme Court of Alabama endorsed the decision in *State v Briggs*, stating that 'where the testimony of husband or wife ... tends to criminate the other, while it will be admitted, it seems that it will not

¹⁵⁹ *Stein v Bowman*, 38 US 209, 222 (1839).

¹⁶⁰ See, eg, *Stewart v Johnson*, 18 NJL 87; 3 Harrison 87 (NJ, 1840); *Van Cort v Van Cort*, Edw 4 Ch 621; 6 NY Ch R Ann 997 (NY Ch, 1844); *State v Welch*, 26 Me 30; 45 Am Dec 94 (1846); *Funk's Lessee v Kincaid*, 5 Md 404 (1854); *State v Bradley*, 9 Rich 168; 43 SCL 168 (SC App Law, 1855); *State v Dudley*, 7 Wis 664 (1858); *Commonwealth v Sparks*, 7 Allen 534; 89 Mass 534 (1863); *State v Wilson*; 31 NJ 77 (1864).

¹⁶¹ *State v Briggs*, 9 RI 361; 11 Am R 270 (1869) at pp 3–4 of the non-paginated case report held by the author, cited, with approval, in *State v Deslovers*, 100 A 64, 71–2 (RI, 1917).

¹⁶² 8 Philadelphia Reports 385 (1871).

¹⁶³ *Ibid* 390, 392, 396.

¹⁶⁴ *Williams v Georgia*, 69 Ga 11, 14 (1882).

be *compelled*'.¹⁶⁵ Later, in *State v West*, the Supreme Court of Wisconsin quoted the following passage from *Wharton's Criminal Evidence* with approval:

The mere fact that the testimony to be given by a wife criminales her husband, or that the testimony of the husband criminales the wife, does not exclude such testimony in prosecutions in which the party so criminated is not a defendant. Yet while such testimony will be admitted, it will not be compelled.¹⁶⁶

This common law privilege was subsequently acknowledged by John McKelvey, who stated that, in addition to the privilege against self-incrimination, '[a] witness may also refuse to disclose matters tending to show that the husband or wife of such witness is guilty of crime'.¹⁶⁷

It can thus be seen that up until the early 20th century a common law privilege against spouse-incrimination was widely recognised in America. However, it subsequently came to be overshadowed by a different common law privilege called the *privilege against adverse spousal testimony*. The leading authority on this privilege was Professor Wigmore, who defined its core features as follows:

- (a) it only applied where one spouse was a party to the proceedings;
- (b) it enabled the witness-spouse to refuse to testify against the party-spouse;
- (c) it also enabled the party-spouse to prevent a willing witness-spouse from testifying against him or her; and
- (d) it did not apply in cases involving an alleged offence committed by one spouse against the other.¹⁶⁸

It is respectfully submitted that the American privilege against adverse spousal testimony was founded upon a flawed analysis of English authorities relating to the common law rule of spousal incompetency. In particular, it is submitted that Wigmore wrongly concluded that the general *incompetency* of a witness to testify if his or her spouse was a party to the proceedings was a waivable *privilege* held by both spouses. This view was subsequently repudiated by the English Court of Appeal,¹⁶⁹ and criticised by Professors Morgan and Maguire, who described Wigmore's conclusions as 'far from convincing'.¹⁷⁰

Nevertheless, the privilege against adverse spousal testimony came to dominate American jurisprudence, being acknowledged by the United States Supreme Court on numerous occasions.¹⁷¹ As its profile grew, the profile of the previously-recognised privilege against spouse-incrimination correspondingly

165 *Woods v State*, 76 Ala 35; 52 Am R 315; (1884) at p 3 of the non-paginated case report held by the author. This ruling was approved in *Watson v State*, 61 So 334, 335 (Ala, 1913).

166 *State v West*, 95 NW 521 (Wis, 1903). The specific edition of *Wharton's Criminal Evidence* was not identified in the judgment. However, similar passages appear in the following editions of this leading text: Ronald A Anderson, *Wharton's Criminal Evidence* (12th ed, 1955) vol 3, [776]; Charles E Torcia, *Wharton's Criminal Evidence* (13th ed, 1972) vol 2, [391].

167 John McKelvey, *Handbook of the Law of Evidence* (3rd ed, 1924) 443–4.

168 Wigmore, above n 20, vol 8, §§2227–45. Wigmore called this the 'privilege for anti-marital facts', but it became more commonly known by the name referred to in the text above: see, eg, *Trammel v United States*, 445 US 40 (1980).

169 *Shenton v Tyler* [1939] 1 Ch 620, 638, 648.

170 Edmund M Morgan and John M Maguire, *Cases and Materials on Evidence* (3rd ed, 1951) 365.

171 See, eg, *Funk v United States*, 290 US 371 (1933); *Griffin v United States*, 336 US 704 (1949); *Lutwak v United States*, 344 US 604 (1953); *Hawkins v United States*, 358 US 74 (1958); *Wyatt v United States*, 362 US 525 (1960).

diminished. However, the latter privilege has never been directly overruled and recent authorities (referred to below) suggest that the two spousal privileges may have coalesced to such an extent that the privilege against adverse spousal testimony is now, in all but name, a common law privilege against spouse-incrimination.

The most recent Supreme Court decision on the privilege against adverse spousal testimony is *Trammel v United States*¹⁷² ('*Trammel*'). In this case, the Court abolished the *party-spouse's* privilege to prevent a willing witness-spouse from testifying against him or her, but confirmed the *witness-spouse's* privilege to decline to do so:

we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification – vesting the privilege in the witness-spouse – furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.¹⁷³

However, whilst the Supreme Court endorsed this common law privilege in *Trammel*, it made no attempt to delineate its scope. Every case in which the Court has considered the privilege has involved a criminal prosecution against the witness's spouse, but the Court has never stated that this is the only context in which the privilege is available. Dicta in *Trammel* suggests that the privilege only extends to testimony relating to 'criminal acts' of a witness's spouse,¹⁷⁴ but such testimony could be sought in any context, including in collateral criminal cases, civil cases or administrative fora. Irrespective of the context in which it is given, it is readily foreseeable that such testimony could trigger an investigation that leads to the discovery of further evidence and results in the witness's spouse being arrested, charged and convicted. Accordingly, it is arguable that testimony sought *in any context* that relates to criminal acts of a witness's spouse is sufficiently 'adverse' to enliven the privilege against adverse spousal testimony.

This argument has been accepted in a series of recent cases. Since the decision in *Trammel*, it has been held that the privilege against adverse spousal testimony is available to witnesses in grand jury proceedings, even though the testimony given there would not be admissible in any prosecution against the witness's spouse.¹⁷⁵ In this context, courts have repeatedly ruled that a witness may rely on the privilege as long as his or her testimony is *directly or indirectly* 'capable of incriminating' his or her spouse,¹⁷⁶ even if the spouse is not a target of the grand jury investigation.¹⁷⁷ In such cases, a husband or wife will only be compelled to

172 445 US 40 (1980).

173 Ibid 53.

174 '[The] privilege is invoked ... to exclude evidence of criminal acts': ibid 51.

175 See, eg, *Re Grand Jury (Malifitano)*, 633 F 2d 276, 280 (3rd Cir, 1980); *Re Grand Jury Proceedings*, 640 F Supp 988 (ED Mich, 1986).

176 *Re Grand Jury (Hermann & Vannier)*, 664 F 2d 423, 430 (5th Cir, 1981). See also *United States v Brown*, 605 F 2d 389, 396 (8th Cir, 1979); *United States v Smith*, 742 F 2d 398 (8th Cir, 1984); *United States v Van Cauwenberghe*, 827 F 2d 424, 431 (9th Cir, 1987); *In re Martenson*, 779 F 2d 461, 464 (8th Cir, 1988); *Re Grand Jury*, 111 F 3d 1083, 1086–7 (3rd Cir, 1997).

177 *United States v Wooten* (Unreported, 21 November 1980, CA6, No 80-5139); *Re Grand Jury Matter*, 673 F 2d 688 (3rd Cir, 1982); *AB v United States*, 24 F Supp 2d 488 (D Md, 1998); *Re Grand Jury Subpoena*, 22 F Supp 2d 507 (D Md, 1998).

incriminate his or her spouse if the state undertakes not to use the ‘testimony, or the fruits thereof, in any criminal proceeding’ against the spouse.¹⁷⁸

The grand jury authorities leave little doubt that the privilege against adverse spousal testimony can be claimed by any witness in any criminal proceeding (including in collateral cases) to refuse to provide evidence with a demonstrated tendency to directly or indirectly incriminate his or her spouse. The most significant unresolved issue is the extent to which witnesses in non-criminal proceedings may rely on the privilege where the information sought has the same tendency.

In *Ryan v Commissioner of Inland Revenue*¹⁷⁹ (‘*Ryan*’), the United States Court of Appeals (7th Cir) was invited to limit the privilege against adverse spousal testimony to criminal cases. It declined to do so, stating that ‘an argument can be made that no policy supports the distinction between allowing the privilege ... in criminal cases but not in civil cases’.¹⁸⁰ The Court ultimately rejected the privilege in the case before it, not because it was a civil proceeding, but because the information withheld did not involve ‘evidence of the other spouse’s crime’.¹⁸¹ In other words, the testimony did not *tend to incriminate* the witness’s spouse.

A number of courts and commentators have overlooked the precise basis of the decision in *Ryan*, wrongly citing it for the proposition that the privilege against adverse spousal testimony ‘is inapplicable in civil cases’.¹⁸² In *United States v Yerardi*, this prompted the United States Court of Appeals (1st Cir) to remark that ‘some formulations of the privilege, and dicta in some cases, assume that the privilege can never be asserted in a civil case. Interestingly, it is hard to find a square holding to this effect’.¹⁸³ In that case, the Court held that the privilege could be claimed in civil forfeiture proceedings that were ancillary to criminal proceedings, without deciding whether the privilege was generally available in civil cases.

It is submitted that as long as the privilege against adverse spousal testimony is restricted to the right to withhold evidence with a demonstrated tendency to incriminate the witness’s spouse,¹⁸⁴ there is no logical basis for refusing the privilege to witnesses in civil proceedings, or even in administrative contexts.¹⁸⁵ To deny it would be inconsistent with the reasoning employed in the grand jury cases.

178 *Re Grand Jury*, 111 F 3d 1083, 1089 (3rd Cir, 1997). See also *Re Grand Jury Subpoena (Ford)*, 756 F 2d 249 (2nd Cir, 1985).

179 568 F 2d 531 (7th Cir, 1977).

180 *Ibid* 544.

181 *Ibid*, paraphrasing *United States v Van Drunen*, 501 F 2d 1393, 1396 (7th Cir, 1974).

182 Michael H Graham, *Handbook of Federal Evidence* (5th ed, 2003) vol 1, §505.1.

183 *United States v Yerardi*, 192 F 3d 14, 19 (1st Cir, 1999).

184 Which now seems to be generally accepted. See, eg, Graham, above n 182, vol 1, §505.1: ‘The scope of the ... privilege extends only to the right to refuse to answer questions which tend to incriminate the non-testifying spouse’.

185 See, eg, *Gilles v Del Guercio*, 150 F Supp 864 (DC Cal, 1957); *Volianitis v INS*, 352 F 2d 766 (9th Cir, 1965); *Garcia-Jaramillo v INS*, 604 F 2d 1236 (9th Cir, 1979).

Overall, it now appears that the privilege against adverse spousal testimony is essentially the same as the privilege against spouse-incrimination that was expressly recognised in America until the early 20th century. In recent years, courts have declared that this privilege is 'vital in modern jurisprudence' and emphasised the need to 'guard against turning [it] into an empty promise'.¹⁸⁶ Accordingly, American authorities can be viewed as confirming both the original existence and continued significance of the common law privilege against spouse-incrimination.

B Canada

Canadian courts have recognised a common law privilege against spouse-incrimination on many occasions, yet it is rarely referred to in texts or commentary.¹⁸⁷ An early express reference to the privilege can be found in an argument put by Mr Weldon QC to the New Brunswick Supreme Court, in *Ellis v Power*.¹⁸⁸ However, the court did not find it necessary to address this issue.

In 1884, the privilege was upheld in *Millette v Little*, a case involving a civil action for libel against a husband and wife.¹⁸⁹ Both refused to answer certain interrogatories on the ground that their answers might tend to expose each other to a charge of criminal libel. The Master in Chambers ordered them to answer, but this was overturned on appeal by Galt J, who ruled that 'the witness's privilege of refusing to answer, extended to cases where the danger ... apprehended was the criminal prosecution of the wife or husband of the witness'.¹⁹⁰

In *Gosselin v The King*, decided in 1903, Mills J of the Supreme Court of Canada both acknowledged and endorsed the common law privilege against spouse-incrimination, declaring:

A witness cannot be compelled to answer a question or produce a document, the tendency of which is to expose him or his wife, or if the witness should be the wife, to expose her or her husband, to any criminal charge or prosecution. The privilege is based upon the confidential relations which exist between husband and wife, and which the well-being of society requires should be carefully guarded.¹⁹¹

In *R v Mottola*, the Ontario Court of Appeal similarly declared:

186 See, eg, *United States v Morris*, 988 F 2d 1335, 1339 (4th Cir, 1993); *AB v United States*, 24 F Supp 2d 488, 490 (D Md, 1998); *Re Grand Jury Subpoena*, 22 F Supp 2d 507, 508 (D Md, 1998).

187 An exception is Peter K McWilliams, *Canadian Criminal Evidence* (2nd ed, 1984) 930.

188 (1880) 20 NBR 40, at p 5 of the non-paginated case report held by the author: 'Mrs Ellis was not bound to answer the questions put to her on cross-examination. They were ... privileged, on the ground that they tended to criminate her husband, *Rex v All Saints, Worcester*'.

189 (1884) 10 Ontario Practice Reports 265.

190 Ibid 266.

191 (1903) 7 CCC 139, 162–3. The fact that this statement was made in a dissenting judgment does not diminish its persuasive value. The majority did not consider this privilege and its decision is also widely considered to be wrong: McWilliams, above n 187, 909; *R v Arneson* (1930) 25 Alta LR 125; *R v Carter* [1970] 5 CCC 155.

At common law, certainly from the middle of the eighteenth century, no witness was compellable to answer any question or to produce any document, the tendency of which was to expose the witness (or his or her spouse) to any criminal charge, penalty or forfeiture.¹⁹²

Further evidence of the Canadian judiciary's recognition of a common law privilege against spouse-incrimination is provided by the fact that Stephen J's explicit statement on this privilege in *Lamb v Munster*¹⁹³ has been quoted with approval by Wilson and Iacobucci JJ of the Supreme Court of Canada,¹⁹⁴ and by appellate courts in Manitoba¹⁹⁵ and British Columbia.¹⁹⁶ In addition, in *R v McGinty*, McLachlin JA (now Chief Justice of the Supreme Court of Canada) quoted a number of express statements on the common law privilege against spouse-incrimination, including Justice Bayley's dicta in *All Saints*, with apparent approval.¹⁹⁷

In the recent case of *R v Kabbabe*, the Quebec Court of Appeal held, in effect, that a witness at a non-judicial fire commissioner's inquiry had a common law privilege against spouse-incrimination.¹⁹⁸ The witness was the wife of a person suspected of arson. After refusing to co-operate with police, she was subpoenaed and compelled to testify at the inquiry. Under cross-examination she revealed the identity of a third person (B), then unknown to police, who turned out to be a crucial witness against her husband. The husband was prosecuted for arson and B testified at the trial. He was convicted, but then appealed, arguing that his wife should not have been compelled to testify against him at the inquiry and that all evidence derived from her testimony, including B's testimony at trial, should have been excluded. A majority of the Court upheld the appeal, concluding that the fire commissioner had violated the wife's common law right not to be forced into directly or indirectly aiding a criminal prosecution against her husband.¹⁹⁹

Overall, the better view is that Canadian common law recognises a privilege against spouse-incrimination, although its existence and scope is yet to be confirmed by the Supreme Court. At present, the privilege appears to be 'a dormant giant who can be awakened in proceedings which are not perceived to involve its express statutory abridgment'.²⁰⁰

192 (1959) 124 CCC 288, 294.

193 (1882) 10 QBD 110, 112–3, referred to in above n 118 and accompanying text.

194 See *Thomson Newspapers v Canada* (1990) 54 CCC (3d) 417, 451; *R v S (RJ)* (1995) 96 CCC (3d) 1, 29.

195 See *Manitoba (Attorney General) v Kelly* (1915) 9 WWR 863, 866. See also *Manitoba (Attorney General) v Kelly* (1916) 10 WWR 131.

196 See *Bell v Klein* (1953) 10 WWR (NS) 324, 329. See also *Staples v Isaacs (No 2)* [1940] 2 WWR 657, 658.

197 (1986) 27 CCC (3d) 36, 49–58.

198 (1997) 6 CR (5th) 82. On 20 November 1997, leave to appeal to the Canadian Supreme Court was allowed (226 NR 309), but on 3 May 1999 the appeal was discontinued.

199 The decision in *R v Kabbabe* has been cited with approval by other Canadian courts. See, eg, *Del Zotto v Canada* (1997) 116 CCC (3d) 123; *R v Pruden* (Unreported, Manitoba Provincial Court, 28 January 2000).

200 *R v S (RJ)* (1995) 96 CCC (3d) 1, 29.

C New Zealand

Throughout most of the 20th century the existence of a common law privilege against spouse-incrimination was widely accepted in New Zealand. For example, in 1910, the Solicitor-General conceded that: 'On common-law principles a wife will not be compelled to give evidence to incriminate her husband'.²⁰¹ In the same year, Parliament acknowledged the privilege by expressly abrogating it in proceedings under the *Destitute Persons Act 1910* (NZ), s 69 of which provided that no witness 'shall be excused from answering any question on the ground that the answer thereto may tend to criminate the witness, or the husband and wife of the witness, in respect of any offence'.

From 1949 to 1979, leading textwriters referred to the common law privilege against spouse-incrimination,²⁰² and it was subsequently addressed in a number of New Zealand statutes.²⁰³

In *Hawkins v Sturt*,²⁰⁴ decided in 1992, the High Court of New Zealand held, in effect, that a person examined by the Serious Fraud Office had a common law privilege against spouse-incrimination, even though her privilege against *self*-incrimination had been expressly abrogated. Relying on the decisions of the House of Lords in *Leach* and *Hoskyn*, and employing similar reasoning to that adopted in the grand jury cases and in *R v Kabbabe*, Tompkins J stated:

There is no statutory justification in the Act for her refusing to [incriminate her husband]. The question is whether she can rely on the common law ... It is my conclusion that she can ... I consider that the fundamental common law principle that a spouse is not to be compelled to give evidence against the other spouse is not to be overturned, save by a clear, definite and positive enactment to that effect. There is no such express provision in the Act. I recognise that the cases I have cited, and others on this issue, are referring to a spouse being compelled to give evidence in Court. But I see no reason why the common law should be applied differently in the case of a spouse being compelled to answer questions that, although the answers themselves cannot be given in evidence, may lead to evidence being given against his or her spouse.²⁰⁵

In 1989, the New Zealand edition of *Cross on Evidence*, following the English edition, raised the argument that the existence of a common law privilege against spouse-incrimination would be 'contrary' to the statement of Lord Diplock in *Rio Tinto* to the effect that the privilege against *self*-incrimination is restricted to incrimination of *oneself*.²⁰⁶ As explained earlier,²⁰⁷ this argument is specious. However, in 1996, it was also adopted by New Zealand's Law Commission, which further assumed that any common law privilege against *spouse*-incrimination was merely an extension of the privilege against *self*-incrimination,

201 *R v Grbich* (1910) 29 NZLR 1045, 1047.

202 See, eg, Jack D Willis, *Garrow and Willis's Principles of The Law of Evidence in New Zealand* (3rd ed, 1949) 183; (4th ed, 1960) 197; (5th ed, 1966) 243; (6th ed, 1973) 284; Donald L Mathieson, *Evidence by Rupert Cross* (2nd ed, 1971) 249; (3rd ed, 1979) 258.

203 See, eg, *Petroleum Demand Restraint Act 1981* (NZ) s 18; *Commerce Act 1986* (NZ) s 106; *Takeovers Act 1993* (NZ) s 11. See also *Apple and Pear Marketing Act 1971* (NZ) s 45(b).

204 [1992] 3 NZLR 602.

205 Ibid 610.

206 Donald L Mathieson, *Evidence by Rupert Cross* (4th ed, 1989) 245.

207 See above nn 150–1 and accompanying text.

caused by the outdated doctrine of unity.²⁰⁸ As discussed earlier,²⁰⁹ this assumption is false. Nonetheless, the Commission subsequently released a draft Evidence Code, which, if enacted, would have abrogated any common law privilege against spouse-incrimination.²¹⁰ However, Parliament did not adopt the Code. Accordingly, the issue of whether there is a privilege against spouse-incrimination in New Zealand still falls to be determined by the common law. It is submitted that both *Hawkins v Sturt* and overseas authorities indicate that the better opinion is that the privilege does exist.²¹¹

D Australia

In Australia, the common law rule of spousal incompetency has been abolished, but in most jurisdictions there are still significant restrictions on the prosecution's ability to compel an accused's spouse to testify against him or her in a criminal case.²¹² Whilst there is no binding authority on the common law privilege against spouse-incrimination, its existence has been expressly recognised by judges, legislatures and commentators on numerous occasions.

1 Judicial Authorities

The most authoritative endorsement of the common law privilege against spouse-incrimination in Australia is the judgment of Griffith CJ in *Riddle v The King*.²¹³ The case involved a point of statutory construction, but the Chief Justice found it instructive to examine the common law rule of spousal non-compellability. In doing so, he quoted many explicit statements on the privilege against spouse-incrimination with approval, including Hale's statement on collateral cases, Lord Eldon LC's ruling in *Cartwright v Green*, Bayley J's dicta in *All Saints*, and passages from *Taylor on Evidence*.²¹⁴ Chief Justice Griffith referred to Bayley J as 'a Judge of very great experience and learning'²¹⁵ and stated that Taylor's text reflected the 'better opinion' of the law in this field.²¹⁶ His Honour clearly regarded all of the statements to be accurate descriptions of the common law, implicitly endorsing a privilege against spouse-incrimination.

208 Law Commission of New Zealand, *The Privilege Against Self-Incrimination*, Preliminary Paper No 25 (1996) 72.

209 See above nn 144–5 and accompanying text.

210 Law Commission of New Zealand, *Evidence*, Report No 55 (1999) 78 and the attached draft Evidence Code s 61(4)(b).

211 See, eg, Butterworths, *The Laws of New Zealand* (Service No 29, 5 May 2003), Evidence [138] and Discovery [81].

212 Queensland and the Northern Territory are the only jurisdictions in which an accused's spouse is absolutely compellable: *Evidence Act 1977* (Qld) s 8; *Evidence Act 1939* (NT) s 9. In Western Australia, a spouse is generally not compellable, although there are specific exceptions: *Evidence Act 1906* (WA) s 9. In all other jurisdictions spouses are generally compellable, but in most cases the court 'must' or 'may' excuse them from giving evidence, if certain criteria are met: *Evidence Act 1995* (Cth) s 18; *Evidence Act 1995* (NSW) s 18, *Evidence Act 2001* (Tas) s 18; *Crimes Act 1958* (Vic) s 400; *Evidence Act 1929* (SA) s 21.

213 (1911) 12 CLR 622.

214 Ibid 627–9.

215 Ibid 628.

216 Ibid 629.

This common law privilege was subsequently acknowledged in *Tinning v Moran*, where the Full Bench of the NSW Industrial Commission declared that:

No one is bound to answer any question if the answer thereto, or to produce any document if the production thereof, would in the opinion of the Court have a tendency to expose the witness, *or the wife or husband of the witness*, to any criminal charge, or to any penalty or forfeiture.²¹⁷

In 1958, the common law privilege was recognised in *Re Wagner*.²¹⁸ The case involved a bankruptcy examination, during which the bankrupt asserted a 'common law right ... not to answer questions which might tend to incriminate his wife',²¹⁹ and argued that this right had not been excluded by s 68 of the *Bankruptcy Act 1924* (Cth), which obliged him to 'answer all such questions as the Court puts or allows to be put to him'. Whilst Hanger J of the Supreme Court of Queensland ultimately ruled against the bankrupt, his Honour specifically based his decision on the ground that s 68 overrode the common law.²²⁰ In so ruling, Hanger J did not dispute that there was a general common law privilege against spouse-incrimination.

In 1975, the privilege was further acknowledged by Bowen CJ, who, in the context of an examination under the *Companies Act 1961* (Cth), stated:

The position appears to be that a witness is entitled to refuse to answer a question on the ground that the answer may incriminate him, if the answer may tend to expose the witness, *or the husband or wife of the witness*, to a criminal charge or penalty or forfeiture.²²¹

This statement has been quoted, with approval, by the Federal Court on numerous occasions.²²²

In addition, in recent years, Brennan J of the High Court of Australia,²²³ Katz J of the Federal Court of Australia,²²⁴ and Santow J of the Supreme Court of New South Wales²²⁵ have each expressly acknowledged the *possible* existence of a common law privilege against spouse-incrimination, either judicially or

217 (1939) AR (NSW) 148, 151 (emphasis added).

218 [1958] QWN 49.

219 Ibid 50, citing *Riddle v The King* (1911) 12 CLR 622 (above nn 213–16), *Phipson* (above n 119) and *Cliviger* (1788) 2 TR 263; 100 ER 143 (above nn 95–96).

220 It is submitted that Hanger J's decision on this point is contrary to the principles of statutory interpretation enunciated by the House of Lords in *Leach* [1912] AC 305 (see above nn 123–26) and by the High Court of Australia in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561.

221 *Re Intercontinental Development Corporation Pty Ltd* (1975) 1 ACLR 253, 259 (emphasis added).

222 See, eg, *Navair Pty Ltd v Transport Workers' Union of Australia* (1981) 52 FLR 177, 193; *Metroplaza Pty Ltd v Girvan NSW Pty Ltd* (1992) 37 FCR 91, 92; *Re New World Alliance Pty Ltd*; *Syncotex Pty Ltd v Baseler* (1993) 47 FCR 90, 96. See also *Re Robert Sterling Pty Ltd* [1979] 2 NSWLR 723; *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 125, 142; *Australian Securities and Investment Commission v United Investment Funds Pty Ltd* [2003] FCA 674 (Unreported, Finkelstein J, 4 July 2003) [2].

223 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 516 (fn 60).

224 Justice Leslie Katz, 'The Marital Communications Privilege in NSW' (1991) 7 *Australian Bar Review* 1, 18.

225 *Fotis v Favret* (Unreported, Supreme Court of NSW, Santow J, 8 May 1996) [3].

extrajudicially, without offering an opinion one way or the other.²²⁶ In 2003, Finkelstein J of the Federal Court of Australia also quoted with approval the explicit statement on this privilege from Justice Stephen's judgment in *Lamb v Munster*.²²⁷

However, in *Callanan v Bush*, it was held that a wife required to attend an investigative hearing before the Queensland Crime and Misconduct Commission was not entitled to refuse to provide information about the alleged drug trafficking activities of her husband, who had already been charged with drug trafficking offences.²²⁸ In finding her guilty of contempt for refusing to incriminate her husband, Douglas J of the Supreme Court of Queensland concluded that there was no relevant 'spousal privilege' at common law. However, this conclusion was merely based on an assumption to the effect that the common law *rule of spousal non-compellability* was confined to judicial proceedings. Justice Douglas did not specifically consider the availability in non-judicial contexts of a wider common law *privilege against spouse-incrimination* or refer to any authorities on this privilege. Accordingly, it is respectfully submitted that the correctness of the decision in this case is highly questionable.²²⁹ On 5 May 2004, an appeal against the decision was lodged in the Queensland Court of Appeal.

2 Express Statutory Authorities

On various occasions, the legislatures in at least five Australian jurisdictions have recognised an actual or possible common law privilege against spouse-incrimination by either expressly abrogating²³⁰ or preserving²³¹ it in a diverse range of judicial and non-judicial contexts.

3 Academic Commentary

There is little Australian commentary on the common law privilege against spouse-incrimination. That which exists is cursory and seems to assume that the only authority supporting the privilege is the dicta in *All Saints*. Most

226 Cf *Southwell v Maladina* [2002] FCA 76 (Unreported, Dowsett J, 5 February 2002) [13]; *Sogelease Australia Ltd v Griffin* [2003] NSWSC 178 (Unreported, Palmer J, 29 July 2003) [44]. In these cases the possible or actual existence of the privilege appears to have been completely overlooked.

227 *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* [2003] FCA 674 (Unreported, Finkelstein J, 4 July 2003) 2.

228 *Callanan v Bush* [2004] QSC 88 (Unreported, Douglas J, 8 April 2004).

229 In this author's opinion, the decision runs counter to virtually all of the authorities referred to in this article.

230 *Defamation Act 1974* (NSW) s 56(1); *Electoral Act 1985* (Tas) s 219(4); *Local Government Regulations 1994* (Tas) reg 11; *Workers' Compensation Act 1951* (ACT) s 163(4), prior to amendment by pt 1.19 of the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT); *Fair Trading (Consumer Affairs) Act 1973* (ACT) s 13(3), prior to amendment by ss 17, 18 of the *Fair Trading Legislation Amendment Act 2001* (ACT).

231 *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) ss 25(10), 28(13); *Coroners Act 1958* (Qld) s 33(2), prior to repeal by s 105 of the *Coroners Act 2003* (Qld); *Evidence Act 1971* (ACT) s 57, prior to amendment by pt 2.4 of the *Sexuality Discrimination Legislation Amendment Act 2004* (ACT); *Parole Act 1976* (ACT) s 19(3)(b), prior to repeal by s 111 of the *Rehabilitation of Offenders (Interim) Act 2001* (ACT).

commentators, without referring to any of the additional authorities discussed in this article, have asserted that the privilege does not exist or is unlikely to be recognised in Australia.²³² On the other hand, for over 30 years the learned authors of the Australian edition of *Cross on Evidence* have suggested that the privilege does exist:

There is no direct authority, but dicta suggest that the privilege does extend to answers tending to incriminate the witness's spouse. The policy considerations underlying the existence of the privilege – conformity with public opinion and the encouragement of testimony – appear to apply to such a case. However, a witness cannot object to answering questions on the ground that the answers would incriminate strangers. In the absence of any suggestion to the contrary, it may be assumed that there is no privilege against giving answers which might incriminate members of the witness's family other than the spouse.²³³

In this author's opinion, when full regard is had to all relevant Australian and overseas authorities, there can be little doubt that Australian common law recognises a privilege against spouse-incrimination. However, in recent years a number of legislatures have adopted *Uniform Evidence Acts*²³⁴ that contain no reference to any privilege against spouse-incrimination. This raises a two-part question: why is there no such privilege in these Acts; and what effect, if any, does this absence have on Australian common law?

4 The Uniform Evidence Acts

Two sections of the *Uniform Evidence Acts* are of particular relevance for present purposes. The first is s 128, which confirms that witnesses have a privilege against *self-incrimination* and also provides a procedure for it to be waived or overridden, in return for a certificate granting use and derivative use immunity in relation to the witness's testimony. The second is s 18, which contains a *non-compellability* mechanism for spouses, and other relations, of defendants in criminal proceedings. Such persons are generally compellable to

232 See, eg, Ian R Freckelton, 'Witnesses and the Privilege Against Self-Incrimination' (1985) 59 *Australian Law Journal* 204, 207; David Williams, *Investigations by Administrative Agencies* (1987) 103; Mark Aronson, Jill B Hunter and Mark S Weinberg, *Litigation: Evidence and Procedure* (4th ed, 1988) 276; Shane Simpson, David Bailey and Ewan Evans, *Discovery and Interrogatories* (2nd ed, 1990) 201; McNicol, above n 4, 224–7; Chris Corns, 'The Big Four: Privileges and Immunities' (1994) 27 *Australian and New Zealand Journal of Criminology* 133, 147; Andrew L C Ligertwood, *Australian Evidence* (3rd ed, 1998) §5.78; Graham B Roberts, *Evidence: Proof and Practice* (1998) 180; Stephen Donaghue, *Royal Commissions and Permanent Commission of Inquiry* (2001) 85; Butterworths, *Halsbury's Laws of Australia*, vol 13 (at 26 November 2003) 195 Evidence, 'Chapter V Witnesses' [195-7410]; Law Book Company, *The Laws of Australia*, vol 16 (at 6 June 2004) 16 Evidence, 'Chapter 16.7 Privilege and Public Interest Immunity' [106].

233 James A Gobbo, *Evidence by Rupert Cross* (1st ed, 1970) 289; James A Gobbo, David Byrne and John D Heydon, *Cross on Evidence* (2nd ed, 1980) 267; David Byrne and John D Heydon, *Cross on Evidence* (3rd ed, 1986) 627; David Byrne and John D Heydon, *Cross on Evidence* (4th ed, 1991) 687–8; John D Heydon, *Cross on Evidence* (5th ed, 1996) 682; John D Heydon, *Cross on Evidence* (6th ed, 2000) 694–5; David Byrne and John D Heydon, *Cross on Evidence* (Aust ed, Service 80, April 2004) [25150], see also [25075]. Surprisingly, none of the editions cite any relevant cases apart from *R v All Saints* (1817) 6 M & S 194, 200–1; 105 ER 1215, 1217–18.

234 References in this article to the *Uniform Evidence Acts* means the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 1995* (ACT) and *Evidence Act 2001* (Tas), which are almost identical.

testify for the prosecution, but the court ‘must’ excuse them from testifying if they object and the court finds that the harm likely to be caused to the witness, or the witness’s relationship with the defendant, from compelling him or her to testify outweighs the desirability of obtaining the witness’s evidence.

Before considering the detail of these provisions it is important to appreciate that the ambit of the *Uniform Evidence Acts*, and, hence, their capacity to influence the ‘one common law’ that exists throughout Australia,²³⁵ is limited in three crucial respects. First, the Acts only apply in NSW, Tasmania and Commonwealth jurisdictions. Second, even in these jurisdictions they only apply to ‘court’ proceedings,²³⁶ and, more particularly, ss 18 and 128 only apply to ‘witnesses’ giving ‘evidence’ in court. These sections have no application in non-judicial contexts or in relation to the disclosure of ‘information’ during pre-trial procedures.²³⁷ The existence and scope of privileges in these contexts is ‘still governed by the common law’.²³⁸ Third, even in those contexts where they apply, the Acts are not complete ‘codifications’ of the law of evidence.²³⁹ Indeed, s 9(1) of the NSW and Tasmanian Acts states:

This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

While s 128 expressly addresses the privilege against self-incrimination, it is silent on the issue of spouse-incrimination. The reason for this omission appears to be that the Australian Law Reform Commission (‘ALRC’), which drafted the Act, doubted the existence of a common law privilege against spouse-incrimination. For example, in 1985, the ALRC released a report containing the following commentary on the forerunner to s 128: ‘...the protection in the legislation is not extended to questions incriminating spouses. It is doubtful whether the common law privilege extends to such questions’.²⁴⁰ No authorities were cited to support this statement.

Two facts are clear from the ALRC reports. First, the ALRC’s research into the common law privilege against spouse-incrimination left something to be desired. Its failure to refer to either the aforementioned Australian authorities, or recommendations from Law Reform Committees in the United Kingdom, is particularly notable. Second, the non-inclusion of a privilege against spouse-incrimination in s 128 of the *Uniform Evidence Acts* was deliberate. What

235 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562–3.

236 *Uniform Evidence Acts* s 4. In particular, the Acts do not apply to persons or bodies that are not ‘required to apply the rules of evidence’, such as most tribunals and commissions of inquiry: Stephen Odgers, *Uniform Evidence Law* (5th ed, 2002) 17–24; Jill Anderson, Jill Hunter and Neil Williams, *The New Evidence Law: Annotations and Commentary on the New Evidence Acts* (2002) 13–20.

237 *Mann v Carnell* (1999) 201 CLR 1; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; Anderson, Hunter and Williams, above n 236, 42–4, 450–2; Odgers, above n 236, 42–4, 406–7.

238 Odgers, above n 236, 407.

239 *Idoport Pty Ltd v National Australia Bank Ltd* (2000) 50 NSWLR 640; John D Heydon, *A Guide to the Evidence Acts 1995 (NSW) and (Cth)* (2nd ed, 1997) 4–9; Odgers, above n 236, lv–lvii; Anderson, Hunter and Williams, above n 236, xix–xxi.

240 Australian Law Reform Commission, *Evidence*, Report No 26: Interim (1985) vol 1, 489. See also Ian Freckelton and T H Smith, *Privilege*, ALRC Research Paper No 16 (1983) 88–9.

remains unclear, however, is the intended effect of this omission. By its specific terms, s 128 merely confirms the existence of a privilege against *self*-incrimination and modifies that privilege. Unlike many other statutory provisions in the United Kingdom and Australia, s 128 does not expressly abrogate or modify the common law privilege against *spouse*-incrimination.

Commentators have rightly pointed out that the privilege and certification procedure in s 128 'is not available to protect the interests of another person, including a spouse'.²⁴¹ However, this does not resolve the issue of whether witnesses may, nevertheless, invoke a privilege against spouse-incrimination *at common law*. Given that Parliament must be taken to have been aware of this privilege, and could have easily expressly abolished it if that was its true intention (just as it expressly abolished any possible common law privilege against self-incrimination for corporations under s 187 of the Act), it is submitted that there is no justification for construing s 128 as having impliedly abrogated the common law privilege against spouse-incrimination. Section 128 is not 'clear, definite, and positive'²⁴² on this issue, and there is no 'necessary intendment' within the meaning of s 9(1) of the NSW and Tasmanian Acts. This fact has been recognised by New Zealand's Law Commission, which observed that:

Although s 128(1) limits the certification process to witnesses who object to giving evidence on the ground that they will personally be incriminated, there is nothing to prevent claims based on the common law ... privilege for incrimination of a witness's spouse.²⁴³

This conclusion is perfectly sound.²⁴⁴ Section 128 merely modifies the privilege against *self*-incrimination and it should not be regarded as having any effect on the separate and distinct privilege against *spouse*-incrimination. However, s 18 stands on a different footing.

Section 18 must be read alongside ss 12 and 19. Section 12 lays down a general rule that every person who is a 'competent' witness is also 'compellable'. Section 18, like comparable statutory provisions in Victoria and South Australia,²⁴⁵ creates an exception for a witness who is the spouse of a defendant in criminal proceedings. Section 19 provides that this exception does not apply in prosecutions for certain offences involving domestic violence or child assault.

In this author's opinion, ss 18 and 19 are sufficiently clear, definite and positive to override the common law privilege against spouse-incrimination *in those particular circumstances where the sections apply*, namely, where the witness in question is the spouse of a defendant in criminal proceedings. As the NSW Court of Criminal Appeal has stated in relation to these sections, there 'is no room to read down their clear meaning by the application of the common

241 Anderson, Hunter and Williams, above n 236, 456. See also Odgers, above n 236, 408.

242 Leach [1912] AC 305, 311; *Hawkins v Sturt* [1992] 3 NZLR 602, 610.

243 Law Commission of New Zealand, above n 208, 117.

244 It also accords with the view expressed by Lord Gardiner LC during debates on the British *Evidence Act 1968*, see above n 139. See also *Fotis v Favret* (Unreported, Supreme Court of NSW, Santow J, 8 May 1996).

245 *Crimes Act 1958* (Vic) s 400; *Evidence Act 1929* (SA) s 21. Commentary in this article on s 18 and associated provisions of the *Uniform Evidence Acts* is generally applicable to these comparable statutory provisions.

law'.²⁴⁶ They 'cover the field'.²⁴⁷ It follows that if a person covered by these sections objects to giving incriminating evidence against his or her spouse, the objection will be governed solely by the statutory regime for seeking an exemption from testifying.

However, ss 18 and 19 are not inconsistent with the existence of a common law privilege against spouse-incrimination *in circumstances beyond their application*; for example, in non-judicial and pre-trial contexts, civil proceedings and 'collateral' criminal proceedings. On the contrary, in this author's opinion, these sections reinforce the common law privilege.

Section 18 confers a specific 'right' on a person to seek an exemption from being compelled to incriminate his or her spouse at trial. The court is obliged to inform the witness of this right and 'must' grant an exemption if the balancing test in s 18(6) is satisfied. The ALRC identified the policy grounds supporting this right as follows:

- (a) the undesirability that the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships ...;
- (b) the undesirability that the community should make unduly harsh demands on its members by compelling them ... to give evidence that will bring punishment upon those they love, betray their confidences, or entail economic or social hardships.²⁴⁸

The enactment of s 18, and equivalent provisions in other jurisdictions, demonstrates that there is still a widespread belief in Australia that the social costs of compelling spouses to incriminate each other may far outweigh the benefits. In other words, convictions secured by resorting to this repellent tactic 'may be obtained at too high a price'.²⁴⁹ Section 18 and the common law privilege against spouse-incrimination both seek to guard against this. The former does so at trial, whilst the latter operates in all other contexts and has a particularly important application in relation to investigative procedures and pre-trial processes. The general protection afforded by the common law privilege prevents the 'right' under s 18 from being rendered nugatory before a criminal trial has even begun. In this regard, the common law privilege and statutory right are perfectly compatible and complementary.

5 *Implied Statutory Abrogation in Other Contexts?*

Most Australian statutes conferring information-gathering powers expressly address the privilege against self-incrimination, either preserving or abrogating it. Provisions to the latter effect almost invariably compensate the information-provider by restricting the use that can be made of the information in criminal proceedings against him or her. However, unlike the situation in the United Kingdom, most provisions in Australia do not expressly address the privilege

246 *R v Glasby* (2000) 115 A Crim R 465, 476. See also Anderson, Hunter and Williams, above n 236, 43; Odgers, above n 236, 42.

247 Odgers, above n 236, 27.

248 ALRC, above n 240, vol 1, 289.

249 *R v Ireland* (1970) 126 CLR 321, 335 (Barwick CJ). See also *Leach v The King* (1912) 7 Cr App R 157, 164 (Earl Loreburn LC).

against spouse-incrimination and do not restrict the use that can be made of the information in criminal proceedings brought against the information-provider's spouse.²⁵⁰

In this author's opinion, such provisions should not be interpreted as having impliedly abrogated the common law privilege against spouse-incrimination because it is likely, if not certain, that the legislature simply overlooked this privilege or wrongly assumed that it did not exist. It is well established that 'when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the Statute cannot operate as a negation of its existence'.²⁵¹

VI CONCLUSION

The historical and comparative authorities referred to in this article demonstrate that there is a common law privilege against spouse-incrimination. With a clear lineage dating back to the 13th century, the privilege is analogous to, yet separate and distinct from, the privilege against self-incrimination and it can only be abrogated by 'a clear, definite, and positive enactment'.²⁵² Recent judicial authorities, academic commentaries and statutory enactments confirm that the privilege retains considerable vitality in both judicial and non-judicial contexts.

Indeed, only last year, Hong Kong enacted a general privilege against spouse-incrimination for witnesses in criminal proceedings,²⁵³ complementing the identical privilege already available in civil proceedings and non-judicial contexts.²⁵⁴ These privileges were recommended by Hong Kong's Law Reform Commission, which stated that it could 'see no objections in principle or logic to the creation of such a privilege (assuming it does not already exist at common law)'.²⁵⁵

The modern justification for the privilege against spouse-incrimination is essentially twofold. First, it is perceived as furthering society's interest in

250 See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G; *Australian Crime Commission Act 2002* (Cth) s 30; *Australian Securities and Investments Commission Act 2001* (Cth) s 68; *Trade Practices Act 1974* (Cth) ss 151BUF, 155(7), 159; *Proceeds of Crime Act 2002* (Cth) ss 197, 206, 271. Cf the statutory provisions referred to above at nn 138, 141, 230.

251 *Mollwo, March and Co v The Court of Wards* (1872) LR 4 PC 419, 437; *Johnson v The Queen* (1976) 136 CLR 619, 664. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 505–6: 'The circumstance that Parliament (or the drafter) assumed that the antecedent law differed from the law as the Court finds it to be is not a reason for the Court refusing to give effect to its view of the law. Parliament does not change the law simply by betraying a mistaken view of it' (quotations and citations omitted).

252 *Leach* [1912] AC 305, 311; *Hawkins v Sturt* [1992] 3 NZLR 602, 610. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561.

253 *Evidence (Miscellaneous Amendments) Ordinance 2003* (HK), inserting s 65A in the *Evidence Ordinance* (Cap 8).

254 *Evidence Ordinance* (Cap 8) s.65.

255 Law Reform Commission of Hong Kong, *Report on Competence and Compellability of Spouses in Criminal Proceedings* (Topic 18) (1988) 133.

preserving marital harmony. This school of thought is particularly prevalent in America, as evidenced by recent commentary on the privilege against adverse spousal testimony:

The rationale for the testimonial privilege is to protect the harmony and sanctity of the marital relationship. Testifying against one's spouse could seriously damage, or perhaps destroy, the marriage. The existence of an ongoing marital relationship is likely to represent a vitally important interest of the witness-spouse and party-spouse alike, and one which is often wholly separate from the litigated controversy. Society also has a stake in the institution of marriage, hence in the preservation of individual marriages. These interests should not be lightly sacrificed for the sake of compelled testimony.²⁵⁶

The second justification for the privilege against spouse-incrimination is that it advances the same policies as the privilege against *self*-incrimination. Not only has this rationale been embraced by American scholars (referred to below), but it is widely accepted in the United Kingdom, having been promoted by Sir Rupert Cross,²⁵⁷ law reform committees and legislatures.²⁵⁸ Without seeking to devalue the first justification, it is submitted that this second one is compelling.

The principal rationale for the privilege against self-incrimination is the belief that it is repugnant to human dignity to subject a person to the 'cruel trilemma of self-accusation, perjury or contempt'.²⁵⁹ Few would disagree that a person compelled to incriminate his or her spouse faces a comparable trilemma because the lives of most spouses are intertwined to such an extent that the incrimination of one is likely to entail severe emotional, social and financial hardship for the other as well. This justification for a privilege against spouse-incrimination has been advanced by a number of American scholars, including Professor George Fletcher, who has commented:

The better explanation of the privilege between husband and wife is that if a relationship is intimate and entrenched in a legal bond of loyalty, then demanding that a husband harm his wife on the stand is like asking him to harm himself, to incriminate himself. Significantly, the Fifth Amendment sanctifies each individual's right to remain silent and thus to escape the sense of being trapped between 'a rock and a hard place': between harming oneself on the witness stand and committing perjury to protect oneself. It is a minor extension of this principle to recognize an analogous right to remain silent where the choice is between harming a spouse and committing perjury.²⁶⁰

In a similar vein, Amanda Frost has stated:

256 Christopher B Mueller and Laird C Kirkpatrick, *Federal Evidence* (2002) vol 2, §206. See also *Trammel*, 445 US 40, 48 (1980).

257 Sir Rupert Cross, *Evidence* (1958) 229–30. See also the Australian editions of *Cross on Evidence*, above n 233.

258 See the references above nn 137–43.

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

260 George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (1993) 81.

I believe that requiring an unwilling spouse to testify against the other asks much more than the typical law-abiding citizen can give ... If the [privilege] did not exist, the witness-spouse would have to choose between incriminating her spouse, remaining silent, and likely being jailed for contempt, or perjuring herself. Since the first two options carry penalties for the defendant spouse or the witness-spouse, respectfully, perjury becomes the 'understandable wrong choice' that the average law-abiding citizen would resort to if placed in similar circumstances.²⁶¹

Recognising the magnitude of this trilemma, many commentators have remarked that granting witnesses a privilege against spouse-incrimination is unlikely to result in the loss of much truthful testimony.²⁶² Frost, for example, has commented:

Excusing the witness-spouse from the obligation to testify aids him or her without doing significant harm to the truth-seeking process. For the most part, allowing the witness-spouse to opt out of testifying does not deprive the judge or jury of valuable information, because, without a privilege, reluctant spouses are likely to lie rather than incriminate [their husband or wife].²⁶³

Of course, if these arguments are accepted, a case could also be made for recognising privileges to protect other persons in close relationships from being forced to incriminate each other. This author does not dispute the strength of such a case. However, as Sir Rupert Cross sensibly remarked, 'the line must be drawn somewhere'²⁶⁴ and it is perfectly logical that it was drawn at *de jure* spouses by the common law. This does not prevent legislatures from creating new privileges extending to additional persons, as has already occurred in Australia²⁶⁵ and in some international courts and tribunals.²⁶⁶ There is also nothing to prevent legislatures from abrogating the common law privilege against spouse-incrimination by express words or necessary implication. However, as the Supreme Court of the United States observed in *Trammel*:

the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships – already subject to much erosion in our day – also counsels caution.²⁶⁷

261 Amanda H Frost, 'Updating the Marital Privileges: A Witness-Centred Rationale' (1999) 14 *Wisconsin Women's Law Journal* 1, 29.

262 See, eg, David Louisell, 'Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today' (1956) 31 *Tulane Law Review* 101, 109–10; Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) *Iowa Law Review* 725, 731.

263 Frost, above n 261, 31.

264 Cross, above n 257, 230.

265 See, eg, *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) ss 25(10), 28(13).

266 See, eg, International Criminal Court, *Rules of Procedure and Evidence*, r 75(1); United Nations Transitional Administration in East Timor, *Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, s 17.2 <http://worldlii.org.tp.legis.consol_reg/2001/10.html> at 6 June 2004.

267 *Trammel*, 445 US 40, 48 (1980).