

Paper presented by The Honourable Justice K.A. Cullinane

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ASPECTS OF PRIVILEGE: SPOUSAL

The aspect of privilege that I have been asked to speak to you about today is spousal privilege.

When we speak of spousal privilege we are speaking of what is described as a basic and substantive right closely associated with and analogous to the privilege against self incrimination. In this case the privilege is the privilege of the spouse who has a right not to give evidence or provide information which might tend to incriminate that person's husband or wife.

As a basic and substantive right spousal privilege is one which in accordance with general principle can only be overturned to use Lord Atkinson's language in *Leech v King* [1912] AC 305 by clear, definite and positive enactment.

It is important to bear clearly in mind what we are not discussing. We are not talking here about any question of the competence or compellability of a spouse to give evidence against another spouse. Whilst the two matters are closely related, the difference between the two is obvious. Competency and compellability relate to the capacity of a party to call a witness and if the witness is capable of being called to compel the witness to give evidence. Privilege arises in respect of questions directed towards a certain subject

matter. As would be obvious the protection of the privilege is in judicial proceedings exactly the same whether the witness is compellable or whether he or she has given evidence of his or her own free will.

Since recent amendments to the *Evidence Act*, spouses are competent and compellable witnesses against their spouses in all court proceedings to which the *Queensland Evidence Act* applies. I will come back to this and to the *Commonwealth Evidence Act* a little later.

It is also important to distinguish this privilege from a privilege to refuse to disclose communications between husband and wife. Such a privilege is not a common law privilege but one conferred by Statute. It is no longer part of the enacted law of Queensland having been repealed by the amendments made at the same time as all spouses were made competent and compellable witnesses.

In *Callanan v B* (2004) QCA 478, the Court of Appeal had to consider the question whether there was a common law privilege of the kind we are discussing, i.e. against spouse incrimination in Queensland.

The court at first instance had held that there was no such common law privilege.

Prior to this matter which was the first occasion upon which the issue was directly raised before a court in Queensland, the question was one attendant with considerable uncertainty both here and elsewhere. There are cases in which the existence of such a privilege was accepted or assumed and other cases in which the existence of such a privilege was expressly denied. See Lord Diplock in the *Rio Tinto Zinc Corporation* case [1978] AC 547. Curiously however there appears to have been no common law jurisdiction in which the issue had been conclusively resolved. The texts expressed differing views on

the subject.

The matter is now settled in Queensland by the judgment in *Callanan's* case in which the Court of Appeal held that there was a common law privilege against spousal incrimination.

In reaching its conclusion the Court of Appeal found convincing an article by an academic, David Lusty, entitled "Is there a common law privilege against spouse – incrimination?" published in 2004 in the *University of New South Wales Law Journal* volume 27 (1).

The Court of Appeal held in *Callanan's* case that the privilege was not limited to judicial proceedings but applied in the form of, to use MacPherson J's words, a free standing privilege. That is, it can be invoked in non-judicial proceedings. *Callanan's* case was itself concerned with the power of an investigatory body to compel a wife to answer questions in the course of an investigation into her husband's business affairs. The Court held disagreeing with the Judge at first instance in this regard that the privilege could be invoked in such a case the legislation in that case not having succeeded in excluding it. There are of course many investigatory bodies which have information gathering powers expressly conferred and in the various Acts, both Commonwealth and State which give rise to these bodies and provide for their powers, the privilege against self incrimination or an analogous privilege such as the one we are discussing is generally expressly addressed at least in general terms.

The same issue came before Justice Keifel in the Federal Court of Australia last year in *S v Boulton* (2005) FCA 821. Her Honour considered the history of the matter to which I will briefly refer in a moment and would have reached a different conclusion to that reached by the Court of Appeal. She took the view that for reasons of comity she should apply the judgment of the Court of Appeal thus meeting the needs of consistency and certainty.

I suppose then I could say that this is all that need be said on this subject of whether there is such a common law privilege and the only issue is whether in any given set of circumstances the privilege has been abrogated. That would enable me to take my seat and let the next speaker get on with his subject with the only observation necessary being that the matter will presumably come before the High Court for conclusive determination at some time or there will be an intervention by the Legislature in one form or another. Some might say it would be a good thing if I took that course.

However I think it would be instructive without turning the matter into a history lesson, to look at the origins of the privilege and also to look at its scope particularly whether it applies to judicial proceedings to which the Commonwealth and State Evidence Acts apply and whether it is limited to a lawfully married spouse. As to the latter matter, Keifel J had to consider whether the privilege could be invoked by a de facto spouse. She held that it could not.

Turning to the history of the matter it is common ground that considerable obscurity attends the development of the relevant principles. In particular there has been a good deal said about the statement by Lord Coke in 1628: *“It hath been resolved by the justices that a wife cannot be produced against either or for her husband quia sunt duae animae in carne uno (for they are two souls in one flesh) and it might be a cause of implacable discord and dissension between the husband and the wife, and a means of great inconvenience.”*

This passage is often, indeed usually, taken as the earliest statement of the testimonial capabilities of spouses at common law.

It however and what flowed from it is directed towards the question of the competence and compellability of a wife rather than a question of a privilege against spousal incrimination.

I have already referred to the obvious distinction between the two situations.

Lusty says that the common law privilege against spouse incrimination predates by centuries the statement of Lord Coke and was not supplanted in any way by the rule about competence and compellability. Lusty identifies the origins of the principle against spousal incrimination as Biblical and points to its recognition in some of the earliest laws such as those of King Ine of West Saxon and King Canute's Code.

He says that the principle derives from the theological metaphor that a husband and wife are of one flesh and the Biblical demand that a wife serve and obey her husband. The principle which all of this is said to have given rise to is that a wife is not bound to discover the crime of her husband.

The acceptance of spousal incompetency (originally confined to wives but subsequently to become unisex – as did on Lusty's argument the spousal privilege) meant that few issues of the existence of a privilege could arise since a spouse was not in any case competent to testify.

However there were a number of cases in which a spouse was not a party but in which the competency of that person's spouse to give evidence incriminating him arose. These are described by Lusty as the collateral cases. *All Saints' case*, *Cliviger's case* and *Hamp's case* with the first of these being the most significant and in which the privilege was recognised.

He discusses the principle as it has applied in other jurisdictions. In the United States of America a principle against a spouse giving adverse spousal testimony came to be recognised. At least one member of the Supreme Court of Canada appears in 1903 to

have endorsed the principle. In 1959 the Ontario court of Appeal accepted its existence and it has found some recognition in some cases in New Zealand. I have already referred to Lord Diplock's case in which he rejected the notion. Brennan J as he then was in *Environment Protection Authority v Caltex Refining Co* (1993) 17 CLR 477 postulated the existence of such a privilege.

Justice Keifel on her examination of the history of the matter said that she was not convinced that such a privilege existed. Her interpretation of the historical developments in this field led to the conclusion that relevant principles in the field were concerned with competence and compellability. This view is consistent with the views expressed in some cases and texts.

All of these interesting historical issues have been resolved for us in this State by the Court of Appeal in *Callanan's* case.

It leaves open however, the question of whether in other proceedings and in particular judicial proceedings, the privilege continues to exist. As I have said *Callanan's* case was concerned with an investigation under the *Crime and Misconduct Act*. I should mention that Dowsett J in *Stoten v Sage* (2005) FCA 935, a matter which concerned an examination by the Australian Crime Commission (as was the case in the judgment of Keifel J) took a similar view to that of Keifel J namely that for reasons of comity he should accept that there is such a privilege at common law. He concluded however that the relevant legislation in that case the Australian Crime Commission Act abrogated that right.

Neither the *Commonwealth Evidence Act* nor the *State Evidence Act* say anything expressly on the subject.

In the *Commonwealth Act*, section 18 provides that whilst a spouse is a compellable

witness, a court may permit in criminal proceedings a spouse or a de facto spouse, parent or child of an accused to object to being required to give evidence or to give evidence generally of certain matters as a witness for the prosecution. The Court is given a discretion to allow the witness to refuse to give evidence and the Act sets out the considerations relevant to the exercise of that discretion. These include the nature of the relationship between the witness and the accused, the nature and gravity of the offence, the substance and importance of the evidence and whether the person would have to disclose matters received in confidence from the accused and whether there is other evidence available on the subject.

Lusty accepts that Section 18 of the *Commonwealth Act* would have the effect of abrogating the Commonwealth privilege in proceedings to which it applies. He says that whilst the mere recognition in Section 128 of *Commonwealth Evidence Act* of a privilege against self incrimination without reference to spousal privilege would not be sufficient to abrogate spousal privilege in accordance with the principles to which I have referred, the terms of Section 18 should be regarded as sufficiently specific and clear when conferring upon the Court a power to permit in certain circumstances a spouse to refuse to answer questions as to be regarded as having abrogated the common law.

The Commonwealth Act is the model for the proposed Uniform Evidence Act and has been adopted or substantially adopted in some States.

In Queensland then the issue of whether in proceedings to which the *Evidence Act* applies, namely the judicial proceedings which day by day are dealt with in the Courts is still to be determined. This is plainly an issue of considerable importance and one can expect that it will arise for consideration before long.

No doubt those who argue that such a common law right continues to apply in such proceedings would point to the absence of any express language abrogating the privilege

and argue that simply because the legislation now provides that spouses are competent and compellable in all proceedings both civil and criminal, this does not carry with it the abrogation of spousal privilege dealing as it does with a separate subject matter.

On the other hand those who would contend that the common law privilege does not apply in such proceedings would adopt the opposite approach arguing that the express statutory recognition of the common law privilege against self-incrimination and of that privilege alone, and the fact that spouses are now both competent and compellable in all proceedings allows no room for the existence in such proceedings of such common law rights.

One I think can as I have just said expect that the important issue of whether this privilege can be invoked in proceedings to which the *Queensland Evidence Act* applies will necessarily have to be faced up to before long. If as one suspects might be the case a judgment of the Court is followed by intervention by the legislature, it is much more likely to be in favour of abrogation than of confirmation or express recognition.