Raising the Curtain: the Proposed Evidence Code and the Compellability of Spouses in Domestic Violence Cases

> "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of a trifling violence."[1]

In New Zealand, like in many other countries, domestic violence is a social problem of epic proportions. As such there is a clear duty on the criminal justice system to ensure that those who commit these offences are convicted. However, it is alarming how often prosecutions are unsuccessful due to lack of victim testimony.[2] This situation is compounded by the current New Zealand law relating to compellability which allows for spouses to refuse to testify against their abusers. Without their testimony it is hard to prove the offence and as a result offenders often escape conviction. The inability to convict offenders due to lack of evidence and cooperation on the part of the victim only serves to further hinder the law's ability to respond to domestic violence.

The compellability status of spouses will have little impact on the psychological, social, and economic causes of domestic violence. However, this commentary examines the proposed Evidence Code and discusses whether its abolition of spousal non-compellability is in fact desirable. It is contended that compellability will allow for more effective prosecution of the perpetrators of domestic violence and in turn result in greater justice and protection for its victims.

Compellability: The Common Law Position

Under the common law the accused's spouse was incompetent to give evidence for the prosecution unless the offence fell into a class of charges seen as involving an attack on the spouse's person or liberty by

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1 *State v Rhodes* (1868) 61 NC (Phil Law) 453, 459. In this case the defendant whipped his wife "three licks, with a switch about the size of one of his fingers (but not as large as a man's thumb)" (at 454). The Court ruled that a husband had the right to chastise his wife and so was not guilty of assault and battery.

2 It has been estimated that 90 per cent of the time non-compellability is invoked to prevent wives from being compelled to testify against their husbands. Therefore, this note focuses on the evidence of the female victim-spouse as a husband's assertion of non-compellability will occur only in rare cases. See Frost, "Updating the Marital Privileges: A Witness-Centred Rationale" (1999) 14 Wis Women's LJ 1, 20.

the accused. In these cases the spouse was a competent but not compellable witness for the prosecution.[3] However, the exception was interpreted narrowly[4] and only used in cases of extreme necessity to avoid the injured spouse being without a remedy.[5] As it was simply an exception to the general rule, a wife could testify only to acts done directly against her by her husband and therefore in the face of many crimes she was incompetent.[6]

The disqualification of spouses from testifying encountered fierce criticism. Critics questioned whether it could be justified in the face of changing societal attitudes towards marriage and the status of women. Wigmore saw it as "the merest anachronism in legal theory and an indefensible obstruction to truth in practice".[7] Many viewed spousal incompetence and non-compellability as archaic in its view of the marital relationship and saw the witness-spouse as the best judge of whether the sanctity of the marriage should be protected, not the court.[8] As a result of these criticisms, statute and common law eventually adjusted so that a spouse became a competent but not compellable witness for the prosecution. Vesting the decision whether to testify solely in the witness-spouse struck a balance between society's competing interests in promoting marital harmony and in fostering the administration of justice.

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3 *Police v Griffiths* [1977] 1 NZLR 522. It has been argued that the original common law position drew no distinction between competence and compellability. Therefore as a spouse was generally not competent there was never any need for a discussion of compellability.

4 For an example of a narrow interpretation of the competency of a wife, see *Police v Griffiths*, ibid. In that case, a husband was charged with the offence of using obscene and threatening language over the telephone to his wife who was the sole witness for the prosecution. It was held that the wife was not a competent witness against her husband as under the Act the offence was one against the Postmaster-General not the wife. With respect, it is the opinion of the author that this decision was highly legalistic and overly technical resulting in the Court completely overlooking the reality of domestic violence situations. The Judge made it clear that he was not looking at the violence in its context when he stressed the need to examine the nature and terms of the *charge* rather than the circumstances disclosed (at 528).

5 *R v Sergeant* (1826) Ry & M 352 (wife held competent to testify against her husband who was charged as accessory to her rape).

6 The inadequacy of this approach was particularly acute in *Grier v State* (1924) 158 Ga 321, 123 SE 210, where the mother was the intended victim, but it was the baby who was shot. It was held that the mother was incompetent to testify against the father-husband. See also *Director of Public Prosecutions v Blady* [1912] 2 KB 89 where the husband was charged with living on the earning of a prostitute (his wife) and her evidence was held to be inadmissible because the offence did not (directly) concern her liberty, health or person. This would be held to be the case even if she was coerced into prostitution or ill-treated (at 91).

7 Wigmore, *Evidence* (1961) para 2228.

8 See Brosman, "Edward Livingstone and Spousal Testimony in Louisiana" (1937) 11 Tul L Rev 243; Hutchins and Slesinger, "Some Observations on the Law of Evidence: Family Relations" (1929) 13 Minn L Rev 675; American Bar Association Reports (1938); Model Code of Evidence (1942); and Uniform Rule of Evidence 23(2) (1953).

Compellability: The New Zealand Position

1. The Current Law

The common law rule under which the accused's spouse was neither a competent nor a compellable witness for the prosecution or defence was altered in New Zealand by section 2 of the Criminal Evidence Act 1889. Today, the law relating to the evidence of the accused's spouse in criminal cases is covered by section 5 of the Evidence Act 1908.[9] Section 5(1) states as a general proposition that:

> Except as provided by or under this or any other Act, neither the person charged with any offence nor that person's spouse shall be a competent or compellable witness for the prosecution or defence in any proceeding in connection with the offence.

The exception is subsection 6:

> The spouse of a person charged with an offence shall be a competent but not compellable witness for the prosecution, and without the consent of the person charged, at every stage of the proceedings.

The partner of the person charged, if not legally married to the accused, is both competent and compellable.[10] Under section 5(2) a spouse is both a competent and compellable witness for the defence at every stage of the proceedings.

2. The Current Practice

In New Zealand, the refusal of a large proportion of wives to testify against their husbands is of particular concern in the context of domestic violence cases where the victim-spouse is often the only witness to the offence. Without their evidence the prosecution faces an uphill battle in trying to ensure the offender is convicted. The result is that many charges are dismissed before they even get to court or once tried the defendant escapes conviction due to lack of evidence. Taking an individualistic approach to the prosecution of domestic violence, the failure of the prosecution to secure a conviction impacts merely on the individuals concerned. The reluctant spouse is thus entitled to choose whether or not

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9 Introduced by Evidence Amendment Act 1987, s 2(1).

10 *R v Kingi* (1910) 29 NZLR 371 (spousal privilege not applicable to a Maori customary marriage).

to testify based on personal reasons. However, by looking at domestic violence in the context of the ramifications it has for the welfare of society as a whole, the failure of the criminal justice system to deal with this pervasive problem is more concerning.

In New Zealand only 64 per cent of the prosecutions laid under section 194(b) of the Crimes Act 1961 (male assaults female) result in a conviction. This is due to the fact that 20 per cent are withdrawn and the balance are dismissed because of a spouse refusing to testify.[11] The refusal of witnesses to testify is not limited solely to witnesses who are legal spouses. De facto spouses are also reluctant to testify but they are not exempted and can be compelled by law to give evidence. The problem of reluctant witnesses is more acute with spouses as they have a legal right not to testify and this "non-compellability is most frequently invoked within the context of offending against members of the family" where the spouse is the only witness.[12] It was noted by Thomas J in *Reddy v Police*[13] that the unwillingness of spouses to give evidence "is a matter which is of grave social concern"[14] and he expressed general dissatisfaction at New Zealand law's current inability to convict offenders of domestic violence and uphold justice.[15]

3. *The Law Commission Proposal: The Evidence Code*

The general dissatisfaction amongst the prosecution and the judiciary at the consequences of spousal non-compellability has been emphasised by the New Zealand Law Commission.[16] Its report on evidence law reform culminated in the 1999 proposed Evidence Code. If enacted, the Evidence Code will replace the entire body of evidence law currently found in the Evidence Acts and in case law. In the report the Commission recommends abolishing the existing law of spousal non-compellability completely. Despite acknowledging that concern had been expressed that compelling a woman to testify against her violent partner could put her at risk of retaliatory violence, it consciously declined to make a specific

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11 Statistics courtesy of the Department of Justice (1992), cited in Busch and Robertson, "'What's Love Got to Do with It?' An Analysis of an Intervention Approach to Domestic Violence" (1993) 1 Waikato LR 109, 110.

12 Harvey, "Spousal Non-Compellability" [1997] NZLJ 114, 117.

13 [1994] 1 NZLR 457.

14 Ibid 458.

15 A desire to limit the assertion of non-compellability was also expressed by Anderson J in *R v Bradley* [1996] 1 NZLR 441, 443 when he observed that "the legislative intention in relatively modern times has been to encourage rather than to restrict the admission of relevant evidence".

16 New Zealand Law Commission, *Report 55: Evidence – Reform of the Law* (1999) vol 1, paras 344-347 ["*Evidence*"].

exemption for domestic violence.[17] Due to the competing public interests and difficult policy considerations involved, the Commission thought it "premature for the Code to include special rules dealing with the compellability of victims of domestic violence".[18] However, it did not elaborate on what these public interests and policy considerations were.

In its Code the Commission recommends that all persons other than the defendant in criminal proceedings and certain specific individuals (including the Sovereign, Heads of State and judges in their judicial capacity) are both eligible[19] and compellable to give evidence. The proposed section 73 states:

> **Eligibility and compellability generally**
> Except as provided otherwise by the Code or any other Act,
> (a) any person is eligible to give evidence; and
> (b) a person who is eligible to give evidence is compellable to give evidence.

The effect of the general compellability rule is to abolish the existing law of spousal non-compellability. The Law Commission formed its recommendation on the basis that the spousal non-compellability rule creates an anomalous exception that could not be supported as a matter of logic or policy.[20] This view stemmed from the idea that "any rule that offers greater protection to a particular group of people should also be extended to people in a relationship of a similar kind".[21] In other words, as marriage is not the sole family unit in today's society there is no logical reason why it should be the only relationship protected from interference by the criminal justice system. However, it is interesting to note here that extending the spousal non-compellability rule to other de facto or family relationships is what the Commission initially did recommend in its 1994 discussion paper on privilege.[22] In fact its latest proposal is a complete turn around from what it had earlier proposed. In this discussion paper the Commission identified the policy goals of spousal non-compellability as being the protection of intimacy and the

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17 Ibid para 344.
18 Ibid para 347.
19 Section 73 abolishes the common law rule that a person must be competent before he or she can give evidence. This means that no person, whether on the grounds of age, intellectual disability, or mental disorder, or on any other ground can be disbarred from giving evidence on the grounds of incompetence. See New Zealand Law Commission, *Evidence*, supra note 16, vol 2, C294.
20 New Zealand Law Commission, ibid vol 1, para 342.
21 Ibid.
22 New Zealand Law Commission, *Preliminary Paper 23: Evidence Law: Privilege* (1994) ["*Privilege*"].

avoidance of "hardship that may befall a spouse as a result of giving evidence in the course of a prosecution".[23] As such it saw limiting the exception solely to spouses as being an ineffective and inappropriate way of meeting these concerns as the goals for according protection extend to relationships other than marriage.[24] The Commission therefore recommended that relationships of the same character as marriage should also be protected. However, it proposed a non-compellability scheme that was based on a judicial discretion rather than an absolute rule.[25]

The option of extending the non-compellability rule to make the exception apply more fairly is less than ideal. One of the main objections to non-compellability is that it deprives the justice system of crucial evidence and cripples its ability successfully to prosecute domestic violence offenders. This situation would only be exacerbated when combined with an extended class of people who would qualify as non-compellable. There would be a risk that the prosecution would be confronted with a large group of people refusing to give evidence which would only contribute to the already prevalent problem of reluctant witnesses. Extending the class of people who are non-compellable would deprive the prosecution of too many valuable witnesses and further undermine the requirement that all citizens have a duty to testify. Determining which relationships are covered by the extended non-compellability rule could also be problematic. It would involve the courts or the legislature making a value judgment at too general a level as to which relationships were worth protecting. Simply specifying the required relationship duration or level of co-dependency may not be a good indication of whether the relationship is "healthy" or whether it may potentially be harmed by the testimony. There could also be practical difficulties in determining whether borderline relationships were covered causing huge time delays while the court decided whether the relationship qualified for protection.

Ironically, the Law Commission's latest report, which provides a commentary on its proposed Evidence Code, argues against the expansion of witness non-compellability to include other intimate relationships and instead seeks its complete abolition. The Commission does acknowledge the departure from its earlier recommendations and justifies it on the grounds that the boundaries of any extension to the rule were difficult to establish logically.[26] It would also leave the undesirable

23 Ibid para 229.
24 Ibid para 236.
25 Ibid para 258-263.
26 New Zealand Law Commission, *Evidence*, supra note 16, vol 1, para 342.

impression that the giving of evidence was discretionary and allow a large number of potential witnesses to be excused.[27] The Commission saw the only logical alternative to the inconsistency that the spousal non-compellability rule created as its complete abolition.

Compellability: The Debate

It is clear that one of the main problems with the current New Zealand law of compellability is the large proportion of domestic violence prosecutions which are unsuccessful due to lack of evidence caused by witness-spouses refusing to testify. This problem raises the question of whether the proposed Evidence Code approach to compellability is the appropriate solution to this problem. There has been extensive academic, political and judicial debate on whether spouses should be compellable witnesses. Most of these arguments relate specifically to the operation of non-compellability for victim-spouses in domestic violence cases. The weight of argument is in favour of the approach in the Evidence Code and the abolition of spousal non-compellability.

Arguments in Favour of Non-Compellability

1. *Sanctity of Marriage*

One of the main arguments in favour of non-compellability is that a compulsion to testify against one's spouse would disturb family peace and undermine marital harmony. Forcing spouses to incriminate one another is assumed to cause irreparable injury to the relationship and thereby harm the community's interest in a stable family. If the marriage is disrupted there is hardship for all members of the family, especially children. This is too harsh a burden to place on a witness.[28] The New Zealand Law Commission has echoed this view in its 1994 report on privilege. Here the Commission suggested that the underlying aim of non-compellability was to protect the institution of marriage.[29] It identified two policy goals behind this protection. First, the fact that as marriage is generally a very intimate relationship it would be "unquestionably harsh for the legal system to disregard that intimacy in

27 Ibid, paras 342 and 345.
28 Mack, "Compellability of Family Members of an Accused" (1989) 17 MULR 219, 220.
29 New Zealand Law Commission, *Privilege*, supra note 22, para 227.

its search for information".[30] Here the Commission acknowledged that the intimate relationship could be one which the witness wants to preserve even when it involves violence.[31] The second possible factor identified was the hardship that may befall a spouse as a result of giving evidence for the prosecution. The threat of further violence and adverse economic or social consequences in particular were noted.[32]

2. *Criticism*

Proponents of compellability contend that any arguments based on the sanctity of marriage are outdated, as present societal attitudes require a spouse to be treated like any other citizen. Spousal non-compellability treats the spouse not on the basis of her being a citizen with rights and obligations equal to any other, but in terms of her particular identity as a spouse in a specific marriage or an occupant of a status.[33] Traditional notions of the family and its existence in the private sphere free from the State are gone. Marriage is no longer a sacred institution which must be protected and kept free from interference at all cost. The outdated conception of marriage that non-compellability also represents is based on an idealised view of marriage. The sanctity of marriage rationale is often inappropriate when applied to unstable and violent marriages. It takes no stretch of the imagination to realise that non-compellability is often asserted with regard to the least healthy and least socially productive relationships. Therefore it could easily be argued that "the loss of a spouse's testimony to the truth-seeking process is too high a price to pay for the benefit of sustaining such relationships".[34] The goal of preserving marriage at the expense of reaching the correct outcome in a criminal proceeding is also difficult to justify at a time when marriage in New Zealand frequently ends in divorce and there are other relationships which are perhaps more stable and as equally worthy of protection.

Spousal non-compellability is premised on the basis that protecting the sanctity of marriage is more important than other societal interests. The values preserved by the exercise of the exemption are said to be more important than any information gathered in violation of it.[35] It also

30 Ibid para 229.
31 Ibid.
32 Ibid.
33 Regan, "Spousal Privilege and the Meanings of Marriage" (1995) 81 Va L Rev 2045, 2103.
34 Frost, supra note 2, 23.
35 Murphy, "Partners in Crime: An Examination of the Privilege Against Adverse Spousal Testimony" (1984) 22(4) J Fam L 713, 713.

assumes that not compelling a spouse to testify preserves marital harmony or that compelling a spouse to testify would destroy it. Supporters of compellability do not say that sanctity of marriage is not a valid public interest but that in the light of the status of marriage in today's society and the presence of competing public interests requiring compellability, it is outweighed. This was the approach taken by Lord Murray in *Burman v Burman*[36] when he said that "any public policy resting on the sanctity inherent in the conjugal relation … must yield to the paramount public policy of ascertaining truth and doing justice".[37]

The inappropriateness of the sanctity of marriage justification is especially obvious in domestic violence cases. In these cases the public interest in having all relevant evidence before the court and securing a proper prosecution easily outweighs any justification based on the supposed sanctity of marriage. It is here that the historical rationales for spousal non-compellability seem particularly outdated. This view that the sanctity of marriage rationale is unable to justify non-compellability particularly in cases of domestic violence is evident *Moran v Beyer*[38] and *R v McGinty*.[39] In the former it was held that spousal immunity was not rationally related to the alleged purpose of maintaining family harmony as it "does little more than grant one spouse almost unconditional license to make his marriage partner a sparring partner".[40] In the latter case the Court asserted that a rule which leaves a husband or wife the choice of testifying is "more likely to be productive of family discord than to prevent it".[41]

Finally an approach which focuses on sanctity of marriage will always operate to the benefit of the abuser even though in fact it is his violence which is destroying the family, not state intervention. Furthermore, with any criminal conviction there will be hardship on the family. It seems anomalous that the State will only take this into account when the prosecution requires the testimony of the wife, the result being that in the majority of cases non-compellability and its justification based on the sanctity of marriage will only apply when the spouse is the victim. Criminal offenders such as burglars are unable to argue financial hardship on their families as a basis for immunity from prosecution.

36 [1930] SC 262.
37 Ibid 271.
38 734 F 2d 1245 (1984).
39 [1986] 4 WWR 97 (YTCA).
40 Supra note 38, 1248.
41 Supra note 39, 122.

According to the rationale behind non-compellability, if a wife chooses not to testify it should be because she wishes to preserve the sanctity of her marriage and therefore does not want her husband to be convicted on the basis of her evidence. However, often women refuse to testify for reasons other than this thereby undermining the justificatory basis for the exception. Arguments in favour of compellability have asserted that leaving the decision whether to testify in the hands of the victim shows a lack of understanding of the realities of domestic violence and the well-documented behaviour of its victims. Assuming that because a spouse refuses to testify, marital harmony exists and should be preserved is misguided and dangerous. In fact many wives refuse to testify because they have been pressured by their husbands not to give evidence.[42] Even without an express threat, women are often too frightened to testify due to negative interactions they have had with criminal justice institutions in the past. In addition, material considerations such as the potential loss of financial support and accommodation should the husband be convicted are also factors to be taken into account, especially if there are young children.[43] Making spouses compellable removes the distraction of these concerns. The focus can then be on seeing the interests of justice are served and the issues of financial and emotional support can be dealt with by other governmental agencies.

3. *Revictimisation*

It has been argued that compellability revictimises the victim[44] and on this basis it could be seen that the Evidence Code is overly harsh. At the extreme, compellability may lead to jailing and punishing the victims who refuse to cooperate. This is an ironic result for a justice system designed to ensure offenders are convicted and victims are protected. Much of the opposition to compellability has also focused on the increased risk of violence to the spouse if she testifies against her abuser. Critics have commented that a witness should not be forced to testify as the State cannot ensure her safety once she does. If arrest automatically leads to the victim having to testify and a subsequent conviction, women

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42 Busch, "Don't Throw Bouquets at Me ... (Judges) Will Say We're in Love: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence" in Stubbs (ed), *Women, Male Violence and the Law* (1994) 128.

43 Thornton, "Feminism and the Contradictions of Law Reform" (1991) 19 International Journal of the Sociology of Law 460, 461.

44 Ibid.

will be less likely to call the police for help.[45] The New Zealand Law Commission noted that when preparing its draft Evidence Code it received submissions expressing these concerns. In particular these submissions recommended that a woman should not have to testify against her violent partner if doing so would put her at risk of retaliatory violence.[46] The Law Commission accepted the validity of these concerns but refused to include a domestic violence exception to compellability in its Code. It should be noted here that previously the Commission had expressly rejected the argument that compelling a fearful woman to testify would remove the threat of further violence as the abuser would not hold her responsible for his conviction like he would if she had chosen to testify. The Commission argued that "a vindictive man is not likely to draw nice distinctions based on whether his partner appeared in court compulsorily or voluntarily".[47]

4. *Criticism*

Leaving the choice whether to testify to the wife means that she is open to being harassed, threatened, and manipulated by her husband into invoking non-compellability. Non-compellability gives the abuser a weapon to use against her which "virtually invites batterers to intimidate victims into withdrawing the charges".[48] The victim is left to be manipulated by her batterer as well as his lawyer. Once the victim is compelled to testify the batterer has less incentive to try to control or intimidate her as it is apparent that she no longer controls the process.[49]

Criticisms of compellability that are based on increased risk of violence to the victim are misplaced and potentially harmful. While it is true that testifying may carry the risk of further violence the problem is not the testimony and the solution is not non-compellability. The problem lies with the violence. If the spouse does not testify out of fear then the abuser's threats have been successful. In effect the State condones this use of threats by recognising that they occur and then providing an evidentiary exception based around them. Furthermore, a choice that is made out of fear is no choice at all. It is illogical to say that the choice should lie with the victim because some women may be afraid to choose

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45 Schneider, *Battered Women and Feminist Law Making* (2000) 186.

46 New Zealand Law Commission, *Evidence*, supra note 16, para 344.

47 New Zealand Law Commission, *Privilege*, supra note 22, para 255.

48 Corsilles, "No-drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?" (1994) 63 Fordham L Rev 853, 868.

49 Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 Harv L Rev 1849, 1865.

to testify. She is not choosing not to testify, instead she is choosing not to get beaten. Furthermore, consider a woman who refuses to testify out of fear, but without the threat of violence she would be a willing witness. Now not only is she subjected to domestic violence in the first place but she also cannot obtain the protection of having her abuser convicted as she is too afraid to testify. The solution lies in preventing the threats not in preventing her from testifying.[50]

Arguments in Favour of Compellability

1. Duty to Testify

There is a presumption that all citizens have a duty to testify and this case can only be displaced by a strong policy argument to the contrary. The general right of the State to compel the testimony of witnesses is "firmly established in Anglo-American jurisprudence"[51] and arises from the need of the judicial system to have access to all relevant evidence to ascertain the truth. Society's general interest in identifying and punishing offenders takes priority over the individual wishes or interests of the witness and as a result places on the witness an overarching duty to testify. This duty is particularly necessary in cases where the witness is also the victim as here their evidence is usually essential if prosecutions are to be successful. As it is the public interest which requires the conviction of offenders the decision whether a wife should testify should lie with the State rather than with the wife. If the State has a sufficient interest in prosecution to enable a spouse to testify it seems unfair on the spouse and self-defeating for the State, to leave the decision whether the prosecution is going to be successful to that spouse.

2. Domestic Violence as a Public Matter

Critics of non-compellability have fiercely maintained that it perpetuates the traditional view that domestic violence is a private rather than public matter. Historically, the State has regulated the public sphere but the law has aggressively protected the private sphere from intervention. This distinction between the two spheres led to a "zone of

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50 See *R v Salituro* [1991] 3 SCR 654, 676-677. In this case the Supreme Court of Canada pointed out the weakness of using the rules relating to competence and compellability to protect women from domestic violence. The Court went on to point out that making a spouse compellable may in fact reduce the risk of violence by giving the spouse no choice but to testify.

51 *Kastigar v United States* 406 US 441, 443 (1972) (citing Wigmore, supra note 7, 2190).

privacy" surrounding marriage where the family was free from state regulation.[52] Until recently the principle of non-intervention protected the 'right' of a husband to beat his wife without fear of criminal prosecution.[53] The notion of privacy has often been behind claims to protect the home and family from public visibility and has traditionally been given great weight when marital privileges have been asserted.[54] Feminist critics have eschewed the privacy rationale on the basis that it is frequently used to isolate the family from interference by the State which means that gender hierarchies and power imbalances are perpetuated even after the legal rules that established these inequities have been abolished.[55] As a result, women receive no protection from the State and are at the mercy of whatever rule is inflicted upon them in the home. It has further been argued that the notion of privacy and its embodiment in the rule of non-compellability grants wife-beaters a form of immunity from prosecution.[56]

Refusing to give the prosecution the right to compel testimony in domestic violence cases as it can for other crimes sends a message that "when a man beats his wife it is not a crime that offends the state – it is simply a private matter between the two of them".[57] Critics have argued that giving the witness-spouse the option not to testify transforms domestic violence into a private problem in which the State stands as a neutral party between disputing spouses.[58] This sends a message to victim-spouses that the State is not serious about punishing these crimes against women. The ability to enforce the criminal law is effectively taken away from the State and given to individual witnesses, transforming the act of violence into a tort rather than a crime against society. This observation is particularly pertinent in the light of the fact that other crime victims are not given the choice whether to testify. Although domestic violence may fit the definition of crime, the different treatment given to wives indicates the legal system views domestic violence as less serious than criminal matters. Furthermore, non-compellability discriminates between crimes of victimisation, helping only those who are strong enough to help themselves. This is contrary to

52 Hanna, supra note 49, 1869. The example given is *Griswold v Connecticut* 381 US 479 (1965).
53 Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv L Rev 1497, 1857.
54 See *Griswold v Connecticut*, supra note 52; and *Mapp v Ohio* 367 US 643 (1961).
55 Seymore, "Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence" 90 Nw UL Rev 1032, 1052.
56 Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy" (1996) 105 Yale LJ 2117.
57 Seymore, supra note 55, 1036.
58 Ibid 1080-1082.

the provision of state protection. The victim's level of cooperation with the criminal justice system should not be the determining factor in whether domestic violence is punished as this does not accord with how the State deals with other crimes. Moreover, a victim cannot legally consent to battery.

Critics of non-compellability have pointed out that it is paternalistic and deprives women of their autonomy. However, these criticisms presume that domestic violence is an individual, rather than a social, problem. Proponents of compellability assert that as domestic violence has ramifications not only in terms of individual justice but also for the welfare of society as a whole, it is for the State to decide whether or not the offender should be convicted, not the wife. They see that much of the discussion criticising compellability of wives in domestic violence cases focuses too much on individual women's circumstances. The extensive social costs of violence and the larger issue of women's subordination is said to give way to concerns for women's personal well-being.[59] Successful prosecutions can help end this cycle by removing the abuser from the home and preventing the long-term effects of violence. Failure to prosecute because of lack of cooperation can also have consequences for women other than the victim as most batterers will continue to be abusive and batter new partners until prevented.[60]

Protecting the private sphere, in other words the sanctity of marriage, is not a viable justification for non-intervention in domestic violence cases because the purpose of the criminal law is to serve the greater public good. As explained by Hanna, in the domestic violence context the goal is to punish criminals in order to protect potential victims. Although removing a woman's right to choose whether to testify may undermine her autonomy, such an infringement on her liberty is necessary in order to protect society overall.[61]

Is Compellability the Preferable Approach?

While it seems logical to leave it to individual witnesses to assess their own complex personal consequences that testifying involves, the NZ Law Commission has viewed this model as leaving no room for an overriding public interest in prosecution.[62] It may not always be the case that the protection of a relationship or one individual can override the

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59 Hanna, supra note 49, 1877.
60 Ibid 1895.
61 Ibid 1871.
62 New Zealand Law Commission, *Privilege*, supra note 22, para 253.

need of the criminal justice system to have all crucial information before the court. A model that has spouses non-compellable in all circumstances makes no allowance for variables such as whether the couple are still together or whether the testimony would in fact harm the relationship or the spouse.

Like any legal argument, a conclusion on whether a spouse should be compellable will depend on the starting presumption. If the initial presumption is that all citizens are compellable then, in today's society, there is no persuasive reason why spouses should have a unique testimonial exemption that does not extend to other witnesses in similar circumstances. Furthermore, the arguments against compellability, such as revictimisation and autonomy, could apply equally to these other witnesses. The logical effect of these justifications is an extension, rather than abolition of non-compellability, in which case the ability of the criminal justice system to punish offenders would be completely undermined. The only rational solution can be the compellability of all witnesses.

However, if one starts from the presumption that spouses are non-compellable, then it is necessary to look at what the purpose of abolishing non-compellability would be. If it is to secure more convictions then there must be strong evidence to prove that compellability would achieve this and that the harm to the individual spouse can be justified. If the purpose is to bring the treatment of spouses in line with that of other witness then one might question what tangible shift has occurred to warrant this change in attitude. All in all the State has a heavier burden in rebutting the presumption of non-compellability.

A presumption of compellability is preferable as the spousal testimonial exemption is based on an attitude towards women and marriage which is anachronistic and can no longer be justified. Women (as the sex that usually asserts non-compellability) are equal citizens with a duty to the State to testify. In the context of domestic violence cases, where non-compellability most commonly leaves its mark, this duty is of particular importance. Domestic violence is an offence against the State and non-compellability only serves to decriminalise it by making it a private matter and leaving its successful prosecution in the hands of the individual victim-spouse. The societal benefits gained through punishing and deterring criminal conduct and preventing the harm of domestic violence outweigh any short-term costs to women's autonomy. Finally, the fears of further violence that may occur through testifying should be dealt with by addressing the threats directly rather than inviting and condoning them through non-compellability.

The Evidence Code: Any Room For Improvement?

Although it is concluded that the abolition of spousal non-compellability is desirable, the Evidence Code's approach to compellability does not leave any flexibility for cases where the risk of harm to the relationship does in fact outweigh any benefit to be gained from the evidence. As such, the addition of a testimonial exemption rule is necessary for the Code to deal more fairly with the testimony of victims in domestic violence cases.

The proposed Evidence Code, in its current form, favours the criminal justice system's interest in having all relevant material before the court over the individual's concern for her own personal safety or wellbeing and this can be unduly harsh if the evidence is available through other means. It is conceded that there may be instances where the importance of the evidence cannot justify the harm that may occur to the relationship or the individual witness if he or she is forced to testify. A compellability model that has no mechanism for granting a witness an exemption from testifying is too restrictive as it does not allow for circumstances where testifying would put the relationship or the individual at unnecessary risk. Compelled testimony may also be counterproductive if the offence was isolated and minor, the evidence unimportant, and the potential harm to the healthy relationship irreparable. A preferable approach would involve a presumption of compellability, which requires testimony from all competent witness, but allow for exemptions from testimony based on a balancing test.

The exemption approach has been adopted in some jurisdictions in Australia[63] and the general test is that a spouse can be exempted from testifying if the harm to the witness or the relationship would outweigh the community's interest in having the evidence available. The burden of arguing for non-compellability is placed squarely on the witness claiming it. Creighton sees this approach, which balances the considerations for and against compellability in the light of the facts of the case as "a more rational and sophisticated response to the problem".[64] It is concluded that this approach is preferable as it enables competing policy considerations to be weighed in the light of the facts of the particular case without compromising the justice system's determination of the truth. It reconciles the interests of the individual with those of society.

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63 Evidence Act 1929, s 21 (SA); Crimes Act 1958 s 400 (Vic); and to a limited extent Evidence Act 1995, s 18 (NSW) and Evidence Act 1995, s 18 (Cth), but see Crimes Act 1990, s 407AA (NSW) and s 19 (Cth).

64 Creighton, "Spouse Competence and Compellability" [1990] Crim L Rev 34, 36.

At present the New Zealand approach to granting a witness exemption from testifying is not nearly as comprehensive as that of Australia and there is no specific mechanism for exemption in domestic violence cases. Currently the New Zealand Courts utilise section 352 of the Crimes Act 1961:[65]

> **Refusal of a witness to give evidence –**
>
> (1) If any witness, *without offering any just excuse*, refuses to give evidence when required … the Court may order that, unless he sooner consents to give evidence … he be detained in custody for any period not exceeding 7 days, and may issue a warrant for his arrest and detention in accordance with that order.

It is reasonable to assume that this section was not intended to be so extensively used to allow people in intimate relationships with the accused not to testify. The section simply sets out what the legal consequences are for a witness who refuses to testify rather than providing a positive exemption. The section is not an adequate mechanism for dealing with reluctant witnesses in domestic violence cases because the term "just excuse" gives no indication to the judge as to what should be taken into account when deciding whether the excuse is justified. This sparseness means that judges can ignore or overlook many issues which are specific to domestic violence cases such as intimidation of the witness by the defendant, victim guilt, and the role that the cycle of violence may play in causing the victim to forgive her abuser and therefore be reluctant to testify.[66] Furthermore, the fact that the section was not drafted with domestic violence specifically in mind means that it has no explicit means of taking into account the social consequences of domestic violence and the fact that the defendant may be a repeat offender with the witness having been excused from testifying previously.

If a specific exemption mechanism is provided in the Evidence Code, the legislature could combat the inadequacies of section 352 by explicitly setting out the factors that the court should take into account when

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65 The sole case where the applicability of this section is discussed in any detail is *R v Burgess* (18 February 1992) unreported, High Court, Dunedin Registry, T16/91, Williamson J. His Honour looked at "just excuse" in the context of overall justice and fairness not solely from the witness' personal viewpoint but also on the basis of an objective assessment. In deciding whether to exercise his discretion, the Judge took into account "the context of the particular allegations, the overall circumstances, the relationship between the persons and the circumstances of the witness at the time when the refusal to give evidence is made". (at 2, emphasis added)

66 For a further discussion of the "cycle of violence" see Walker, *The Battered Woman Syndrome* (1984).

exercising its discretion. Considering an exemption should involve balancing the risk of harm to the witness or damage to the relationship against the community interest in having the evidence available. The regime should set out specific factors the judge should take into account when exercising his or her discretion. These factors could include: the nature and gravity of the offence; the importance of the evidence; whether the evidence is available from another source;[67] the reliability of substitute testimony; the defendant's right to a fair trial and the need for cross-examination; the nature of the relationship; and whether there are any children in the relationship. Beginning with a presumption of compellability and allowing exemption only if certain criteria are satisfied would also send a strong message that testifying is an important public duty which witnesses will not be excused from lightly. In the context of domestic violence it would also ensure that offenders know that the State is serious about prosecuting these crimes. An advantage of this approach is also that a witness in any intimate relationship could apply for an exemption, thereby removing the unjustifiable privileging of marital relationships over all others.

Conclusion

Professor West suggested the following standard for analysing laws: "[A] law is a good law if it makes our lives happier and less painful and a bad law if it ... stabilises the conditions that cause our suffering".[68] It is the view of the author that while neither the proposed Evidence Code nor the success of criminal prosecution will eliminate domestic violence, non-compellability only serves to prevent any progress being made towards successful prosecution by maintaining the status quo. The possibility that the criminal justice system will not in itself prevent spousal abuse is no justification for allowing non-compellability to hinder criminal prosecution. This paper starts from a presumption that all citizens are compellable with a duty to testify and therefore any exceptions must be justified. The reasons in favour of spousal non-compellability are seen as insufficient to warrant allowing many domestic violence offenders to escape conviction. It is concluded that compellability combined with a mechanism for testimonial exemption,

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67 If the Code's proposed hearsay rule is amended to include someone who is exempted under the definition of "unavailable" in s 16(2), this could limit the problem of not having essential evidence before the court.

68 West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" 3 Wis Women's LJ 81, 152.

while not a perfect solution, offers the best possibility of minimising domestic violence while still respecting individual victims' concerns. This approach also shows that society is serious about its attitude to domestic violence – it is not a private matter between spouses but instead a crime that will not be tolerated.

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