

Consultation Paper on Proposals to Amend the Law on Compellability of Spousal Witness



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Consultee

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27 June 2006

Dear Consultee,

CONSULTATION ON PROPOSALS TO AMEND THE LAW ON COMPELLABILITY OF SPOUSAL WITNESSES

The Minister for Justice, Cathy Jamieson MSP, made known on the 9 March 2006 to the Scottish Parliament that the Scottish Executive would bring forward a short consultation paper on options for amending the law which governs whether individuals should be required to give evidence in relation to an offence committed by their spouse or partner. I am writing to you following the publication of the consultation paper today to provide you with a copy and to invite you to respond.

We are inviting written responses to this consultation paper by **19 September 2006**. Earlier responses would be very welcome. Please remember to complete and return the Respondee Information Form attached at Annex B along with your response. Please send your response to:

CompellabilityConsultation@Scotland.gsi.gov.uk

or

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This consultation and all other SE consultation exercises, can be viewed online at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest internet access point is.



We will make all responses available to the public in the Scottish Executive Library by 10 October 2006 unless confidentiality is requested. All responses not marked confidential will be checked for any potentially defamatory material before being logged in the library or placed on the website.

Yours sincerely

SUSAN HERBERT
Criminal Procedure Division

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Annex A – The Scottish Executive Consultation Process

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many types of consultation. However, in general Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body. Consultation exercises may involve seeking views in a number of different ways, such as public meetings, focus groups or questionnaire exercises.

Typically, Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the area of consultation and they are also placed on the Scottish Executive web site enabling a wider audience access to the paper. Copies of all the responses received to consultation exercises (except those where the individual or organisations requests confidentiality) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh EH11 3XD, telephone 0131 244 4552).

The views and suggestions detailed in the consultation responses are analysed and used as part of the decision making process. Depending on the nature of the consultation exercise the responses received may:

- Indicate the need for policy development or review
- Inform the development of a particular policy
- Help decisions to be made between alternative policy proposals
- Be used to finalise legislation before it is implemented

If you have any comment about how this consultation exercise has been conducted please send them to the person named in this letter.

The Scottish Executive now has an e mail alert system for SE consultations (SE consult). This system allows stakeholders to register and receive a weekly e mail containing details of all new SE consultations (including web links). SE consult complements but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE

consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Annex B– Respondent Information Form: Consultation on Proposals to amend the law on Compellability of Spousal Witnesses

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual go to Q2a/b and then Q4
- (b) **on behalf of** a group/organisation go to Q3 and then Q4

INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

- 2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

- 3 The name and address of your organisation **will be** made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes

No

CONSULTATION PAPER ON PROPOSALS TO AMEND THE LAW ON COMPELLABILITY OF SPOUSAL WITNESSES

1: Introduction

1.1 Cathy Jamieson MSP, Minister for Justice, made known to the Scottish Parliament on 9 March 2006 that the Scottish Executive would bring forward a short consultation paper on options for amending the law which governs whether individuals should be required to give evidence in relation to an offence committed by their spouse or civil partner. This document invites your views about these proposals.

1.2 Under the law as it stands, you can only be required to give evidence against your civil partner, husband or wife when they are accused of an offence against you. If the alleged offence has been committed (for example) against one of your children, you can refuse to give evidence without running the risk of being found in contempt of court. However, if a man and woman are living together but are not married, each can be compelled to give evidence against the other regardless of the nature of the alleged offence or the identity of the victim.

1.3 Ministers wish to seek your views as to whether this position should be changed either by abolishing or modifying the exception which spouses and civil partners currently enjoy in relation to the obligation to give evidence in criminal proceedings. The issue generally emerges most sharply when a crime against a child in the family is alleged, and hence in the context of child protection. Ministers are minded to promote changes to the law to reduce the risk that offences against children cannot be effectively prosecuted. But they wish first to take the views of all those with an interest.

1.4 This paper relates only to compellability in the criminal sphere. Ministers recognise that different rules apply in the civil sphere. However their judgement is that the civil arrangements do not raise, or do not raise nearly as acutely, the child protection issues which are driving this review.

1.5 Section 2 of this paper sets out the general position in Scots criminal law in relation to the extent to which an individual can be compelled to give evidence against their spouse or civil partner. Section 3 sets out the position in England and Wales. Section 4 discusses the options for change.

2: The current law

What the law says

2.1 Under the current law, in criminal proceedings in Scotland, any person who has information about a crime may be cited as a witness by either the Crown (the prosecution) or by the accused (the defence). A witness who is permitted by law to testify is known as a **competent witness**, and any witness who can be required to attend court to give evidence is known as a **compellable witness**. A competent and compellable witness who fails to give evidence may be guilty of contempt of court.

1.1 There is however an exception to this rule which can lead to a witness not giving evidence:

- A witness who is the spouse or civil partner of the accused.

2.3 To establish the law relating to the compellability of spousal witnesses it is necessary to look at both statute and the common law. Common law is derived not from statute but from other sources such as judicial decisions, authoritative writings, Roman Law or custom.

2.4 The current statutory provisions are section 264 of the Criminal Procedure (Scotland) Act 1995 and section 130 of the Civil Partnership Act 2004. Both provisions are at Annex A.

2.5 Under Section 264 of the Criminal Procedure (Scotland) Act 1995 a spouse is a competent witness in all circumstances. However, s/he is a compellable witness for the prosecution or a co-accused only where s/he is compellable at common law. In terms of the common law, a spouse is only compellable where the accused is charged with an offence against him or her. The operation of the common law rule is not restricted to offences of personal injury, but extends to false accusation and to offences against property, including theft and even the forgery of the spouse's signature on a cheque. It does not extend to damage of property of which the spouse is only a tenant, unless perhaps s/he is liable to pay for the repair of the damage.

2.6 Essentially if a spouse of an accused is the victim of the crime with which the accused is charged then their marital status is of no consequence. A spouse and an unmarried partner would be a compellable witness for the prosecution. It is only where a spouse is not

the victim that he or she can decline to give evidence for the prosecution. So, for example, when the victim is a child of the couple, the spouse of the accused may be an important witness. However, s/he is not a compellable witness, whereas an unmarried partner would be.

2.7 If the spouse of an accused is called as a Crown witness, in circumstances in which s/he is not compellable against her husband or wife, s/he has the option of declining to give evidence. But if s/he elects to give evidence against the accused, s/he cannot decline to answer questions which incriminate the spouse. An unmarried partner cannot decline to give evidence in any circumstances.

2.8 A person who has been but is no longer married to the accused is compellable to give evidence as if they have never been married. They are therefore compellable on behalf of the prosecution, the accused or any co-accused whether evidence relates to events which occurred before, during or after the terminated marriage.

2.9 The law in relation to persons who are in a civil partnership is similar to the law in relation to spouses.

3: The Position in England and Wales

3.1 The current position in Scotland contrasts with that in England and Wales. Since 1 January 1986, when section 80 of the Police and Criminal Evidence Act 1984 came into force, the spouse of an accused in England and Wales has been a compellable witness for the prosecution where the offence charged involves:

- Personal violence against the other spouse or against a child under the age of 16;
- A sexual offence against such a child under 16; or
- Attempting or conspiring to commit, or aiding and abetting or inciting the commission of an offence with regard to types of offences set out above.

Since 5 December 2005, this has applied to spouses and civil partners.

3.2 This provision reflects serious public concern at the level of “child battering” and sexual abuse of children. In instances where a spouse is called as a witness for the defence he or she is competent and compellable unless the spouses are jointly charged and tried together.

3.3 A new offence of Familial Homicide (causing or allowing the death of a child or vulnerable adult) was introduced in England and Wales in 2004 by the Domestic Violence, Crime and Victims Act 2004. This was introduced to tackle a perceived loophole in the law whereby members of a household who are jointly accused could escape justice by remaining silent or blaming each other. Where spouses are joint defendants and it is established that one must have caused the death and the other must have failed to take reasonable steps to prevent it, the prosecution does not have to prove which is which. Furthermore, where a defendant is also charged with murder or manslaughter in relation to the same death, and where the court or jury is permitted to draw an adverse inference in respect of the offence from the defendant's failure to give evidence or to answer questions, an adverse inference may also be drawn in relation to the charge of murder or manslaughter, even where there would not otherwise be a case to answer on that charge. The accused would each be answering charges on their own account.

3.4 As in Scotland, a person who has been but is no longer married to the accused is compellable to give evidence as if they had never been married.

4: Options for Change

4.1 Ministers wish to consider updating the law to provide legal protection and safeguards for children and adults in today's family structure. The current provisions create scope for abusing the institution of marriage and updating the law would help prevent the degradation of relationships between married people and between civil partners. There is an argument as to whether the rule which prevents spouses and civil partners being compelled to give evidence in the circumstances described above should be retained at all. It can be criticised for the following reasons:

- The current rule has caused difficulty, particularly where the crime libelled is a crime against a child and there is important and material evidence to be obtained from a spouse in relation to that crime;
- It does not apply to co-habiting couples and could therefore be seen as discriminatory;
- It continues to apply where a married couple are separated. It is difficult to see any justification for this;

- The rule does not extend to the wider family unit as there is no rule of exclusions between brothers and sisters or between parent and child; and
- It is capable of exploitation and causing abuse of the institution of marriage. There have been cases where an accused has married their partner who is a main witness in order that the partner cannot be compelled to give evidence against them. This may result in the court being unable to consider all of the material evidence in the case.

4.2 The first of the reasons set out above is probably the most significant. Under the current law a spouse is a competent and compellable witness when an assault is made against them, but not where their spouse is charged with offences against other persons, even when those offences are sexual offences against children to the marriage. There are real child protection issues here with the danger of the perpetrator continuing to abuse a child with the knowledge that important and material evidence may not be heard against them.

Option 1 Simple Repeal

4.3 The simplest option would be to repeal Section 264 of the Criminal Procedure (Scotland) Act 1995 and Section 130 of the Civil Partnership Act 2004 which would result in a spouse being treated no differently to any other witness. Alongside this, a provision would be needed to overturn the common law provisions regarding the status of the spouse as a witness.

4.4 This proposal stems from a desire to amend the anti-diversity nature of the current provisions and to help protect children. It is also the most straightforward of the options.

Option 2 Removing the right not to give evidence against a spouse or civil partner where the offence is one against a child

4.5 This would involve a change to Scots law in order to bring the law broadly into line with that which applies in England and Wales (see Section 3 above). While the law of England and Wales limits the compellability of a spouse to offences against a child involving personal violence or sexual abuse, however, it is proposed here to simply remove the right not to give evidence in relation to any offence committed against a child. Ministers believe it is desirable not to have to await the

escalation of offending for the spouse to be a compellable and competent witness.

Option 3 Retention of the Current Law

4.6 There would be no change to the law and the rules governing the compellability of a spouse and a civil partner would remain. Arguments in favour of retaining the current law are:

- Respect for the matrimonial relationship, and the privacy that should be afforded to that relationship;
- Protection of adult vulnerable witnesses in that they are entitled to decline to answer certain questions asked in relation to the person whom they live with, whereas if they were to be required to incriminate that person then this could put them at risk; and
- The risk of perjury by the spousal or civil partner witness in favour of the accused. It may be argued, however, that courts are able to evaluate the truthfulness or otherwise of a witness who is a spouse, as they do with any other witnesses.

4.7 Whilst respect for the matrimonial relationship and for the privacy that should be afforded that relationship are factors that Ministers value and seek generally to preserve, they are not absolutes and need to be assessed alongside other considerations. In this context Ministers believe they are outweighed by the pressing need to ensure the safety and welfare of children and they conclude therefore that this option has less merit than the others.

4.8 At paragraph 4.6 adult vulnerable witnesses are discussed and the point is made that they may be put at risk if required to incriminate the person with whom they live. Such adults are, it is argued, already at risk from abusive partners and the proper remedies and protection lie elsewhere and not in the current law on compellability. As an example, although not yet available in sheriff court summary trials, the Vulnerable Witnesses (Scotland) Act 2004 provides for an application to be made to the court for special measures to assist the witness to give evidence where there is a significant risk that the quality of evidence will be diminished. That Act also contains other provisions such as prior identification of an accused and the possibility of an accused person being prohibited from conducting their own defence in certain types of cases. Pre-existing provisions in the Criminal Procedure (Scotland) Act 1995 and common law also allow for a range of measures for which application can be made designed to help witnesses give evidence. The

Victim Information and Advice service (VIA) operated by the Crown Office and Procurator Fiscal Service provides advice and information throughout Scotland to victims of serious crime and vulnerable witnesses. VIA provides information and advice about how the criminal justice system works and what victims or witnesses can expect. They can:

- Keep the victim/witness updated on the progress of their case;
- Arrange a court visit, to allow the victim/witness to familiarise themselves with the surroundings before a trial; and
- Put victims/witnesses in touch with other useful services and organisations specific to individual needs and requirements.

4.9 VIA serves individual victims, or groups of individual victims, in all cases of domestic abuse, racist crime, sexual offences and cases likely to be tried before a jury. The service is also provided to all child witnesses or vulnerable witnesses and to the next-of-kin where criminal proceedings are possible, a Fatal Accident Inquiry is to be held or further enquiries are pending. VIA works closely with other statutory agencies (the police, Scottish Courts Service) and also with voluntary organisations (such as the Witness Service, Women's Aid and Victim Support).

Ministers' view

4.10 Ministers' preliminary view is in favour of Option 1. But they wish to take wider views before reaching a final decision.

Annex A

Section 264 of the Criminal Procedure (Scotland) Act 1995

Section 264 of the Act states that:

(1) The spouse of an accused may be called as a witness –

(a) by the accused;

(b) by a co-accused or by the prosecutor without the consent of the accused

(2) Nothing in this section shall –

(a) make the spouse of an accused a compellable witness for a co-accused or for the prosecutor in a case where such a spouse would not be so compellable at common law;

(b) compel a spouse to disclose any communication made between the spouses during marriage.

(3) The failure of the spouse of an accused to give evidence shall not be commented on by the defence or the prosecutor.

(4) The spouse of a person charged with bigamy may be called as a witness either for the prosecution or the defence and without the consent of the person charged.

Section 130 of the Civil Partnership Act 2004

Section 130 states:

(1) The civil partner of an accused may be called as a witness -

(a) by the accused, or

(b) without the consent of the accused, by a co-accused or by the prosecutor.

(2) But the civil partner is not a compellable witness for the co-accused or the prosecutor and is not compellable to disclose any communication made, while the civil partnership subsists, between the civil partners.

(3) The failure of a civil partner of an accused to give evidence is not to be commented on by the defence or the prosecutor.

Definition of “spouse”

The leading case in this area is *Casey v HMA* 1993 SLT 33, in which it was held that the word “spouse” in Section 143 of the Criminal Procedure (Scotland) Act 1975 (now section 264 of the 1995 Act)

applied only to persons who were married to each other and not to those who were cohabiting with each other and were not married. Lord Justice-Clerk Ross stated in this opinion:

“(In S143), the word which is used is “the spouse” and we are satisfied that it is only persons who are married to each other who are properly referred to in law as spouses. We see no justification for attaching the expression “spouse” to persons who are cohabiting with one another but are not married.”

Annex B

Examples of Case Law

Hunter – v – HMA, 1984 SLT 434

The accused was charged with assaulting and then murdering his daughter. His wife appeared on the Crown witness list against him, but was not called. The accused who had lodged a special defence of incriminating his wife on the assault charge only, sought to call her as a defence witness on the murder charge. The trial judge ruled that she need not answer any questions put to her by her husband's counsel if she did not wish to. On appeal it was held that, although the omission had not led to a miscarriage of justice, the trial judge had erred in his ruling that the wife was not a compellable witness for her husband.

Bates – v – HMA, 1989, SLT 701

The accused was charged under the Misuse of Drugs Act 1971. He was tried in the High Court along with several co-accused. The accused had lodged a notice of intention to incriminate one of his co-accused whose wife was called by the Crown. The wife was directed by the trial judge that she was not obliged to answer any questions the answers to which might incriminate her husband. She proceeded to give evidence against the accused but declined to answer any questions put in cross examination on the accused's behalf. The co-accused ultimately pled guilty to the offences in respect of which the accused was convicted. The accused appealed on the ground that the trial judge had misdirected the co-accused's wife and that that misdirection had resulted in unfairness to the accused since the Crown relied on evidence given by the co-accused's wife incriminating the accused although his counsel had not had the opportunity to cross examine her fully on the accused's behalf.

On Appeal it was held that while there was no miscarriage of justice, the trial judge gave an erroneous direction, and he ought to have directed the co-accused's wife that although she was entitled to give evidence she could not be compelled to do so, but that, if she did give evidence, she would be required to answer all the questions put to her. The Lord Justice-Clerk (Lord Ross) held that it was unsound to make a distinction between a spouse of the co-accused as a witness against her husband and as a witness against the appellant. The trial judge ought to have directed the wife of the co-accused that although she was entitled to give

evidence she could not be compelled to do so, but that, if she did give evidence, she would require to answer all questions put to her.



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