

CRIMES (COMPETENCE AND COMPELLABILITY OF SPOUSE WITNESSES) BILL.

NOTES ON CLAUSES.

Clause 1 sets out the long title and provides for the *Crimes Act 1958* to be referred to as the Principal Act. It also provides for proclamation of the date of commencement, and applies the provisions of the Act only to proceedings commenced on or after the date of commencement.

Clause 2 re-enacts section 399 of the Principal Act, which deals with the competence of witnesses in criminal cases. The basic proposition stated by the existing section 399 is that an accused person, or his or her spouse, is a competent witness for the defence whether or not the accused is charged solely or jointly with another person. This proposition is subject to a proviso set out in six paragraphs (a), (b), (d), (e), (f) and (g).

A summary of the re-enacted provisions is as follows:—

Sub-section (1) re-states the basic proposition that an accused person is a competent, but not compellable, witness in his own defence or in defence of any co-accused. In effect, it re-enacts the substance of section 399 and paragraph (a) of the proviso (which provides that an accused person shall not be called as a witness except upon his own application), but omits any reference to the spouse of an accused person.

Sub-section (2) replaces the existing provision for a spouse to be a competent witness for the defence. It differs from the existing provision in two respects—

- (a) it extends to former wives and husbands of accused persons; and
- (b) it makes a spouse or former spouse a compellable witness, unless he or she is also charged in the same proceedings.

Sub-section (3) re-enacts, with an amendment, the substance of paragraph (b) of the proviso to section 399 which prevents the failure of an accused person or his or her spouse to give evidence being commented on by the prosecution or, unless the accused makes an unsworn statement, by the Judge. The re-enacted provision omits reference to the spouse of the accused.

Sub-section (4) re-enacts without substantive amendment paragraph (d) of the proviso to section 399. This provision allows a person charged who gives evidence under the section to be asked a question in cross-examination even though it would tend to incriminate him.

Sub-sections (5) and (6) re-enact the provisions of paragraph (e) of the proviso to section 399, which sets out the circumstances in which an accused person who is called as a witness under the section may be asked, and required to answer, a question tending to show he has committed, been convicted of or charged with some other offence, or is of bad character.

Among the circumstances in which such questions may be asked are cases where the accused or his counsel has asked questions of witnesses for the prosecution (other than the spouse of the accused) to establish his own good character, or where the defence involves imputations on the character of the prosecutor or witnesses for the prosecution (other than the spouse of the accused). *Sub-sections (5) and (6)* reproduce the substance of the existing provisions, but extend the exceptions relating to the spouse of the accused to former spouses.

Sub-section (7) re-enacts, without substantive amendment, paragraph (f) of the proviso to section 399, which provides that a person called as a witness under the section shall, unless otherwise ordered by the presiding Judge or justice, give evidence from the same place as other witnesses.

Sub-section (8) re-enacts, without substantive amendment, paragraph (g) of the proviso to section 399 which preserves the operation of certain procedural provisions of the *Magistrates (Summary Proceedings) Act 1975* in relation to indictable offences, and also preserves the right of an accused person to make an unsworn statement.

Clause 3 re-enacts with amendments section 400 of the Principal Act, which deals with the giving of evidence by husbands and wives.

The following is a summary of the re-enacted provisions :—

Sub-section (1) provides that an accused person shall not be required to give evidence on the hearing of the charge against him.

Sub-section (2) provides that, subject to sub-section (3), the spouse or former spouse of the accused shall be a competent and compellable witness for the prosecution in proceedings against the accused, including proceedings relating to bail.

Sub-section (3) enables the presiding judge or justice to exempt the accused's wife, husband, mother, father or child from giving evidence on behalf of the prosecution. The exemption is to be granted only if, upon application made in the absence of the jury, the presiding Judge or justice is satisfied that in "all the circumstances of the case" (as defined in the sub-section) the interest of the community in obtaining the evidence is out-weighed by certain criteria in respect of the relationship between the accused and the proposed witness, and the harshness of compulsion.

Sub-section (5) prohibits comment to the jury by the prosecution or the presiding judge on the fact that a proposed witness has applied for or been granted an exemption under the section.

Sub-section (6) requires the presiding Judge or justice to be satisfied that, where a husband wife mother father or child of an accused person is called as a witness, he or she is aware of the right to apply for an exemption under the section.

These new provisions contrast with the existing provisions of section 400, the effects of which are—

1. The husband or wife of an accused person is competent to be a witness for the prosecution in all cases without the consent of the accused (sub-section (1)).
2. The husband or wife of an accused person is compellable to give evidence for the prosecution where the offence charged is any of certain offences specified in sub-section (3), and is competent and compellable to give evidence for the prosecution in any proceedings for the grant or revocation of bail. (Sub-sections (3) and (3A)).
3. Where the spouse of the accused is competent, but not compellable, to give evidence for the prosecution, the presiding Judge is required to inform the witness in the absence of the jury that he or she is not compelled to give evidence if unwilling to do so. (Sub-section (2)).
4. The operation of section 27 of the *Evidence Act* 1958 is preserved by sub-section (4). This section provides that a spouse shall not be compelled to disclose a communication made by his or her spouse during the marriage.

Clauses 4 and 5 amend sections 24 and 26 respectively of the *Evidence Act* 1958. Section 24 makes the husbands and wives of parties to civil proceedings, and of persons in whose behalf the proceedings are brought or defended, competent and compellable to give evidence on behalf of any of the parties to the proceedings.

Section 26 provides (amongst other things) that, subject to the provisions of the Crimes Act under which a person charged or his or her spouse may be called as a witness in criminal proceedings, a spouse shall not be competent or compellable to give evidence for or against his or her spouse in criminal proceedings.

The amendments made by clauses 4 and 5 extend the references to husbands and wives to include former husbands and wives.

Clause 6 : As mentioned in the notes relating to clause 3, under section 27 of the *Evidence Act* communications between husbands and wives during marriage are privileged.

Clause 6 amends section 27 to confine its operation to civil proceedings, by providing that it shall not apply to any criminal proceeding or proceeding relating to bail.