



THE GODFATHER WIKI

# What *The Godfather* can teach us about evidence law

## THE ABOLITION OF SPOUSAL PRIVILEGE HAS CHANGED THE RELATIONSHIP BETWEEN MARRIAGE AND EVIDENCE LAW.

**Although Michael Corleone may have come to a grisly end, it appears he was right about one thing (at least in the context of Australian evidence law).**

“Don’t ask me about my business, Kay”; a line from the movie *The Godfather* bears new relevance to practitioners following *Australian Crime Commission v Stoddart*.<sup>1</sup> Therein, a majority of the High Court rejected the existence of a privilege protecting a spouse from being forced to give evidence incriminating their partner. The idea of the marital bond granting a form of special evidentiary protection seems to have, at least in the common law, gone the way of *The Godfather III* – we’d be better off pretending it never existed in the first place.

This article aims to provide a guide to the relationship between evidentiary law and marriage after *Stoddart* through an analysis of the protections available (or lacking thereof) under both the common law and the *Uniform Evidence Act 2008* (Vic) (*UEA*).<sup>2</sup> However, any such guide first needs to clearly distinguish between the three evidentiary “limbs” of competence, compellability, and privilege.

These three are distinct areas of law which are commonly and erroneously conflated by both layperson and practitioner; indeed, as we shall see, one of the central issues in *Stoddart* was the interchangeable use of

“compellability” and “privilege” throughout authorities relied on by the defendant.

A competent witness is a person who may be asked to give evidence; a compellable witness may be required by order of the court to do so.<sup>3</sup> The two principles are distinct in that although every compellable witness is competent, not every witness who is competent is necessarily compellable. Although as we shall see there are certain classes of persons that are protected from being compellable, this does not mean they are privileged. A privilege does not protect a witness from being compelled to give evidence, but rather from being obliged to answer particular questions. The essential difference lies in that a non-compellable witness may only object to being questioned prior to entering the witness box; once sworn in, all questions must be answered unless the witness is excused or covered by a relevant privilege.<sup>4</sup>

### The common law position

The High Court’s reasoning in *Stoddart* was limited to the common law, as the *UEA* does not apply to investigations conducted by the Australian Crime Commission (ACC).<sup>5</sup> So what then was the argument put before the Court in *Stoddart*, and what is the common law’s position following the decision? Answering these questions requires a brief examination of both the facts and authorities referred to in that case.

In 2009, an investigator conducting an investigation under s24A of the *Australian Crime Commission Act 2002* (Cth) compelled the defendant (Mrs Stoddart) to give evidence against her husband utilising the powers afforded to him by s28(1).<sup>6</sup> In the course of answering some questions put to her, Mrs Stoddart claimed she was entitled

to “the privilege of spousal incrimination”, which she defined as a right not to give incriminating evidence against her husband. The examination was adjourned to allow Mrs Stoddart to bring proceedings to determine whether such a privilege existed.

Mrs Stoddart’s argument was built on Australian interpretation of what has been referred to as the “critical authority” on the privilege of spousal incrimination;<sup>7</sup> a statement made in dicta by Bayley J in the English case *R v Inhabitants of All Saints, Worcestor (All Saints)*.<sup>8</sup> Referring to a woman called to give evidence that might have incriminated her husband, Bayley J (somewhat ambiguously) stated that he was “not prepared to say the court would have compelled her to answer . . . [but rather] she would . . . be entitled to the protection of the court”.<sup>9</sup> Naturally, this statement, with its confusing mix of the confined “compellability” with the open ended “protection of the court”, took on a life of its own as it was passed through academic commentary; although it is unclear as to whether Bayley J was referring to compellability in its traditional sense, the scholarly “better view” of his statement soon became that he was espousing a view of a privilege where a spouse may “decline to answer any question which would . . . expose [their partner]”.<sup>10</sup>

This “better view” was entrenched in Australian authority in the reasons of *Callanan v B (Callanan)*, a 2005 Queensland Court of Appeal case upon which Mrs Stoddart relied. Therein, the lead judgment of MacPherson JA found a common law privilege against spousal incrimination based on the better view of *All Saints*.<sup>11</sup> However, MacPherson JA’s judgment used the terms “privilege” and “compellability” interchangeably, creating a confusing



precedent unfavourably reviewed (although followed) by Kiefel J in the later case of *S v Boulton*.<sup>12</sup>

The questionable validity of *Callanan* was the basis of the ACC's arguments before the High Court. The High Court (with Heydon J dissenting) found that Bayley J's statement in *All Saints* was "no firm foundation" on which to base the existence of a common law privilege, due both to its status as dicta and its ambiguity; making clear that Kiefel J's doubts over MacPherson JA's confusing application of *All Saints* in *Callanan* were justified.<sup>13</sup>

Accordingly, in a 6-1 decision, the High Court found that *Callanan* had no legal basis, and that accordingly there is no Australian privilege at common law allowing a spouse to decline questions which will incriminate their partner.

## Statute

Although under the *UEA* spouses remain *prima facie* competent and compellable witnesses, s18 provides a mechanism by which a spouse may avoid testifying against their partner; providing that if in the context of a criminal proceeding a spouse or de facto partner is compelled to give evidence against their partner, they may raise an objection.<sup>14</sup>

Any objection requires the court to engage a "balancing test"; assessing whether "harm . . . might be caused . . . to the person or the relationship between the person and the accused" by giving evidence, and weighing the "nature and extent of that harm . . . [against] the desirability of having the evidence given".<sup>15</sup> If the harm outweighs the probative value of the evidence, the compulsion may be avoided.

Although s18 appears to provide relief, the protection it offers is inherently limited. Not only does it apply exclusively in criminal cases, but it must be said that the interests of justice will probably present a difficult hurdle to be overcome by "harm" to such a relationship. It is submitted that it would require either extreme emotional circumstances or evidence of extraordinarily low probative value for the court to find in favour of upholding an accused's relationship over the interests of the criminal justice system.<sup>16</sup> In short, outside of s18's limited scope, a spouse will not be able to avoid either being compelled to give evidence or to answer questions once on the stand.

## Conclusion

Marriage carries with it a great many benefits – love, security, tax breaks.

However, following *Stoddart*, and taking into account the *UEA*, the ability to hear a partner's confession without being able to be forced to recount it later is probably not one of them. The best advice to give to a client considering telling their partner about something they've done wrong or being faced with questions from a loved one about "their business" is to keep it to themselves; there's always the privilege against self-incrimination to fall back on. ■

**HAMISH MCCORMACK** is a student at Monash University currently completing the second year of his LLM (JD). The content of this article is for informative purposes only and does not constitute legal advice.

- 1 *Australian Crime Commission v Stoddart* (2011) 224 CLR 554.
- 2 *Uniform Evidence Act 2008* (Vic).
- 3 *Australian Crime Commission v Stoddart* (2011) 224 CLR 554, 575 (Heydon J).
- 4 J.D. Heydon, *Cross on Evidence* (Lexisnexis, 8th Edition, 2010) 417.
- 5 *Australian Crime Commission v Stoddart* (2011) 224 CLR 554, 621 [178] (Crennan, Kiefel, and Bell JJ).
- 6 *Australian Crime Commission Act 2002* s24A, s28(1).
- 7 *S v Boulton* (2005) 155 A Crim R 152, 156 (Kiefel J).
- 8 *R v Inhabitants of All Saints, Worcester* [1817] EngR 404.
- 9 *R v Inhabitants of All Saints, Worcester* [1817] EngR 404, 200-201.
- 10 Pitt Taylor, *A Treatise on the Law of Evidence* (1848) 997.
- 11 *Callanan v B* (2005) 1 Qd R 348, 352-353 [7-9].
- 12 *S v Boulton* (2005) 155 A Crim R 152.
- 13 *Australian Crime Commission v Stoddart* (2011) 224 CLR 554, 571 [41] (French CJ and Gummow J), 637 [231] (Crennan, Kiefel and Bell JJ).
- 14 *Uniform Evidence Act 2008* ss18(1)-18(3).
- 15 *Uniform Evidence Act 2008* s18.
- 16 See, e.g., *R v YL* (2004) 187 FLR 84. There are few cases on this point in Australian jurisprudence.

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