

Topic 3: Competence and Compellability

Competence: a witness is competent if that witness may be lawfully called to give evidence. May relate to:

- A. The capacity to give evidence (e.g. children and the mentally impaired); and
- B. Legal competence (e.g. cannot be called to give evidence by P)

Compellability: a witness is compellable if s/he may be lawfully obliged to give evidence.

1. **Starting point** = per **s 12** a witness is presumed to be both competent and compellable.
** It is helpful to keep in mind the **purpose** that evidence is being adduced for.
2. Has the presumption been **rebutted**?
 - a. Per **s 13(1)** W needs to understand and be capable of being understood (doesn't have to be a logical answer)
 - b. To determine this, the judge may rely on expert evidence – **s 13(8)**
 - c. **Sworn or unsworn** evidence?
3. Does a special category exemption apply?
 - a. Procedure of inquiry to be undertaken by a judge (*Seymour v The Queen*)
4. D is not competent to give evidence for P – **s 17**
NB. Think PASI
5. Is the W part of the **accused's family**? (This is a very *narrow* exception) – **s 18**

STEP 1: Presumption of competence

There is a rebuttable presumption that every person is both competent and compellable to give evidence (s 12).

- Whether [W] is competent to give evidence is a preliminary question for judge at **voir dire (s 189(1)(c))**
- **TJ assesses competence as they see fit** – may rely on **expert evidence** – **s 13(8)**. E.g. a psychologist who has examined the witness may be asked by the judge to give evidence as to competence or to provide a report.
- Standard of proof = BoP (**s 142(1)**)
- Burden of proof = party arguing that witness is not competent
- In **criminal proceeding (s 17(1))**, **D will not be competent to give evidence for P (s 17(2))**
- Accused is competent as a defence witness – whether to appear is at their own election based on legal advice (**ss 17-20**)
- Can choose to take **oath or affirmation (ss 21, 23)** – can take oath without swearing on the bible (**s 24**)

STEP 2: Has the presumption been rebutted?

[PARTY OPPOSING] *will argue that [W] is incompetent to give evidence because they do not have the capacity to...*

- **s 13(1)(a)** - understand a question about a fact; or
 - a witness is better able to understand a simple question rather than a complex one
- **s 13(1)(b)** - give an answer that can be understood to a question about a fact
 - young child may be able to respond to simple questions and not complex questions requiring inferences
- Essentially, they need to **understand** and be **understood**
 - assessed at the time of going evidence
- It is presumed, unless the contrary is proved, that a person is not incompetent because of this section – **s 13(6)**

and that capacity cannot be overcome.

- **Deaf** – questioned in an inappropriate way – **s 31(1)**
- **Mute** – a witness who cannot speak adequately may give evidence by any appropriate means – **s 31(2)**
- **Interpreter** – a witness may give evidence about a fact through an interpreter – **s 30**
- Consider the cost and delay associated and whether adequate / similar evidence may be **obtained from other sources** in respect of competence – **s 14**
- A person who is not competent to give evidence about one fact may still give evidence about other facts (simple questions- *ask it without inferences or abstractions*) – **s 13(2)**

On balance, it [IS/NOT] likely that [W] is competent to give evidence.

STEP 3: Does a special category or exemption apply/can unsworn evidence be given?

Rationale: balance between relevant evidence that can assist in making finding of fact against the need to exclude evidence that does not assist in making relevant findings and that may be unreliable or even prejudicial evidence against the defendant.

Procedure of inquiry to be undertaken by the judge – Seymour v The Queen:

The TJ must be satisfied that [W] has understood their obligation to give truthful evidence.

- Presumption W is competent must be overcome on the BoP (*R v GW*)
- Leading questions asked by a support person are insufficient in pre-hearing (*Seymour v The Queen*)
- It can be relevant to look at past conduct when assessing capacity to understand
- TJ assesses competence as they see fit – may rely on expert evidence – s 13(8). E.g. a psychologist who has examined the witness may be asked by the judge to give evidence as to competence or to provide a report.

Impaired people	OTF W has a cognitive impairment. Therefore, even if they are competent to give evidence, opposing counsel will seek an unreliability warning as W's evidence is 'of a kind that may be unreliable' (Crim – ss 31-32 JDA).
Children	<p>s 165A(1) specifically provides that a judge in any proceeding must not warn based on stereotypical views of children.</p> <ul style="list-style-type: none"> • At the request of a party, the judge may 'warn or inform' that jury that the evidence may be unreliable (and give reasons why) – s 165A(2)(a) • If satisfied there are circumstances other than age that affect a child's reliability the judge may caution the jury about the weight to be given to that evidence – s 165A(2)(b) <p>s 33 prohibits TJ, P or DC from suggesting children may be:</p> <ul style="list-style-type: none"> (a) unreliable as a class of witnesses (b) inherently less credible or reliable (c) unreliable solely on account of age (d) it would be dangerous to convict on evidence because W is a child.
Dies or ceases to be competent	Although [W] has died/ceased to be competent before completing their evidence, it does not mean that the evidence already given becomes inadmissible – s 13(7)

Unsworn evidence – if W does not understand the importance of telling the truth in evidence]:

[W] does not understand that they have an obligation give truthful evidence, however they can still unsworn evidence about the fact (s 13(4)) subject to the court telling [W] (s 13(5)):

- (a) it is important to tell the truth;
 - (b) he or she may be asked questions that he or she does not know or cannot remember, and he/she should tell the court this if it occurs; and
 - (c) he or she may be asked questions that suggest certain statements are true or untrue and he or she should agree with the statements that he or she believes are true with no pressure to agree to those which he/she believes are untrue.
- *SH v The Queen*: the TJ must give appropriate directions and strictly comply with the obligations under s 13(5), particularly in criminal cases relating to child witnesses. If not, conviction may be rendered unsafe and overturned.
 - *R v GW*: considered an appeal from ACT Supreme Court – TJ failed to direct the jury at all on issue of child witness (R) who gave unsworn evidence. HCA held the fact that R did not give sworn evidence was not material to the jury's assessment of the reliability of her evidence and no direction was required to be given (UEA treats sworn and unsworn evidence the same).

Alternative arrangements for vulnerable witnesses – women and children re sexual offences]:

1.	Adult (+18) not cognitively impaired	<p><i>Criminal Procedure Act 2009 (Vic) ss 359-163</i></p> <ul style="list-style-type: none"> • Using CCTV • Using screen to block D from W's eyeline • Re-robing of counsel / practitioners • Emotional support persons • Requiring practitioners to be seated while XxE
2.	Children under 18	<p><i>Criminal Procedure Act 2009 (Vic) – s 369</i></p> <ul style="list-style-type: none"> • Special hearing for giving pre-recorded evidence: the whole of the evidence of the complainant, including XxE and re-examination to be given at a separate hearing and recorded before trial – s 370

		<ul style="list-style-type: none"> • Use of recorded evidence in chief – s 367 • Using CCTV – ss 366-74
3.	Cognitively impaired people (children & adults)	<p><i>Criminal Procedure Act 2009 (Vic) – s 369</i></p> <ul style="list-style-type: none"> • Special hearing for giving pre-recorded evidence: the whole of the evidence of the complainant, including XxE and re-examination to be given at a separate hearing and recorded before trial – s 370 • Use of recorded evidence in chief – s 367 • Using CCTV – ss 366-74

STEP 4: The Defendant (s 17)

**** Applies only to criminal proceedings**

- D is not compellable to give evidence for or against **associated defendant** if they are tried **jointly**
- Competent but not compellable as a W for the defence
 1. **Give evidence** (except to XxE); or
 2. **Remain silent** (limited circumstances an inference of guilt may be drawn) – see [topic 7]

STEP 5: The Defendant’s family (s 18)

**** Applies only to criminal proceedings when called by the P**

[Spouse, de facto partner, parent or child] *of the D may object to being required to give evidence under s 18.*

- Discuss the **undesirability of allowing criminal law processes to disrupt marital and family r/ships more than community interests require** – likelihood that harm would or might be caused – s 18(6)

Adequate and proper inquiry of the factors in s 18(7) (McKinnin v The Queen):

- (a) nature and gravity of the offence (may not be in doubt)
- (b) the substance and importance of the evidence
- (c) whether any other evidence re the matters is available to the P
- (d) the nature of the r/ship between D and the person
- (e) whether the person would have to disclose matters that were received by the person in confidence from the D (cause distress to W?)

Give factors for and against (serious offence vs. distress caused)

- May result in punishment of those they love, betray their confidence or entail economic or social hardships
- **R v Khan:** if harm that would be caused to the r/ship outweighs desirability of giving evidence, W is not compellable as a witness for the P. In part because her evidence was of little weight (contradictory and could be adduced from other sources) – this case demonstrates the balancing factors well.
 - E.g., a child might perceive events very differently because they have not driven before.
- **s 19** excludes the operation of s 18 for specific offences including endangering/abusing or neglecting children and young people (-16), family violence offences and incest.

Topic 4: Privilege

** Privilege allows a party to resist compulsory demands for information – it can be used as an alternative if the witness fails to object under s 18.

Privilege (a) is personal to the witness, (b) is claimed in respect of each individual piece of evidence, and (c) can be waived. Applies equally to derivative evidence (*Sorby*).

Relevant provisions of the <i>Evidence Act</i>	
s 132	If the court can see a W/party may have grounds to object, the court must satisfy itself (in the absence of a jury) that the W/party is aware of this.
s 133	The court may order that a document be produced and inspect it for the purpose of determining whether privilege applies.
s 134	Evidence that, because of this Part, must not be adduced or given in a proceeding because it is not admissible in the proceeding.
s 131A	<p>Extends the application of privilege to preliminary proceedings of the court. This does NOT apply to ‘privilege against self-incrimination’ (s 128) = use the common law.</p> <p>s 131A(1) includes:</p> <ul style="list-style-type: none"> • a summons or subpoena to produce docs or give evidence • pre-trial discovery • non-party discovery • interrogatories • a notice to produce • a request to produce • a search warrant

Privilege against self-incrimination (PASI)

Red flags: D commits a sexual offence and wife becomes accessory after being told.

NB. Applies to pre-trial proceedings under the *Evidence Act* (s 131A(1) & (2)(b) EA). Does not apply to corporations (s 187 EA, s 1316A *Corps Act*).

1. **Starting point** = the test under s 128(1): the [W] will object to giving evidence because the evidence may tend to prove that the witness has committed a criminal offence or is liable to a civil penalty.
NB. Also applies to “derivative use immunity”.
OR is there something OTF that indicates [W] is likely objecting to giving evidence because...
2. Can W claim the privilege? (s 128(2)). Is there **reasonable grounds for objection** and a **real or appreciable risk of incrimination** (*Sorby*).
3. **What happens when W claims privilege?**
 - a. W need not give evidence unless required by the court to do so (s 128(3)(a)); and
 - b. The court will give a certificate under this section if the W give evidence voluntarily or is required to do so under (4) (s 128(3)(b))
4. **Court can compel W** to give witness anyway (s 128(4)) if:
 - a. The evidence **does not tend to prove** that the W has committed an offence or liable for a civil penalty under a law of a foreign country; AND
 - b. The **interests of justice** require W to give the evidence (see *R v Lodhi*).
I.e. low stakes, grave offence? Yes - W should give evidence.

STEP 1: Starting point (look for behaviour which suggests objection)

The [W] will object to giving evidence because it may tend to prove that the witness has committed a criminal offence / is liable to a civil penalty (s 128).

- W’s E must tend to prove that they committed an offence or they are liable for a civil penalty (s 128(1))