

# COMPETENCE & COMPELLABILITY

“In order for [D/P] to compel \_\_ they must be competent and compellable. There is a strong emphasis on giving oral evidence in our adversarial system, as such there are minimal exclusions...”

## COMPETENCE

Every person is presumed to be competent to give evidence (s 12(a); s 13(6))

- They are presumed to be not incompetent, evidence must be put before the court to establish why they are incompetent, balance of probabilities
- Competence and compellability are determined on a *voir dire* hearing (s 189(1)(c))

### 1. DOES \_\_ HAVE CAPACITY?

- Have the capacity to **understand a question** about a fact? (s 13(1)(a))

**AND**

- Have the capacity to **give an answer that can be understood?** (s 13(1)(b))

>> if has other issues that affect reliability e.g. memory “this may well affect the reliability of \_\_’s evidence, but doesn’t necessarily make \_\_ incapable etc.”

>> do both elements together where appropriate

- Court may **inform itself as it thinks fit** in order to determine these questions, inc obtaining info from a person who has relevant specialised knowledge based on their training, study or experience (s 13(8))
- Can the incapacity be **overcome?** (s 13(1))
  - o Interpreter (s 30)
  - o Persons who can’t hear (1) or speak (2) adequately may give evidence by any appropriate means (s 31)

**IF NO => not competent**

- Can still be competent to give evidence about **other facts** (s 13(2))

**IF YES => continue**

### 2. CAN \_\_\_ GIVE SWORN EVIDENCE?

- Do they understand that they’re under an **obligation** to give truthful evidence? (s 13(3))
- Obligation has ordinary grammatical meaning of being morally or legally bound to give truthful evidence (GW)
- Not enough for W to merely understand difference between truth and lies (GW)

**IF YES => can give sworn evidence, move to oath/affirmation**

**IF NO => may give unsworn evidence (s 13(4)), move to unsworn evidence**

### 3. UNSWORN EVIDENCE

- Competent to give **unsworn evidence** about the fact if the court has told the person (s 13(5))
  - o (a) that its important to tell the truth; and

- o (b) that they may be asked questions that they don't know or can't remember the answer to and that they should tell the court if this occurs
- o (c) that they may be asked questions that suggest certain statements are true/untrue and that they should agree with the statements that they believe are true and feel no pressure to agree with statements they believe are untrue
  - How does this make sense to a child or person with mental disability?
  - Such instruction is required to be **provided by the court**, not by the person who is likely to be doing the questioning (*SH per Basten JA*)
- Court has no discretion to disallow this, must comply with s 13(5) requirements, must allow unsworn evidence if met (*SH per Basten JA*)
- Failure to comply may render W not competent to give unsworn evidence and evidence inadmissible (*SH*)
- Requirements can be met in form of putting questions to W, section doesn't require particular form but rather particular effect (*SH per Basten JA*)
- Judge doesn't need to inform jury that evidence is unsworn (*GW*)

>> may mention that reliability warning may be given under ss 31-32 *JDA* if there are any reliability issues

#### 4. OATH OR AFFIRMATION

“\_\_ can give sworn evidence and must take an oath/affirmation before doing so (s 21(1))”

- In accordance with appropriate form in sch 1 or in a similar form (s 21(4))
  - o Such an affirmation has the same effect for all purposes as an oath (s 21(5))
- Doesn't apply to person who gives unsworn under s 13 (s 21(2))
- Don't need to take oath/affirmation if merely called to produce doc or thing (s 21(3))
  - o As long as no intention to examine the person
- Witness/interpreter may choose whether take oath or affirmation (s 23(1)) and court must inform them of choice unless satisfied that person already informed or knows they have a choice (s 23(2))
- Court may direct a person who is to be a witness to make an affirmation if (a) person refuses to choose or (b) not reasonably practicable for person to take appropriate oath (s 23(3))

#### OATHS

- Not necessary that religious text be used (s 24(1))
- Effective even if person who took it (a) didn't have (particular) religious belief or (b) didn't understand the nature and consequences of the oath (s 24(2))
- Can take an oath even if religious/spiritual beliefs don't include belief in existence of a god (s 24A(1))

#### 5. CHILDREN'S EVIDENCE

- **S 33 JDA**: the TJ, prosecution and defence **must not say, or suggest in any way**, to the jury that
  - o (a) **children** as a class are unreliable witnesses; or

- o (b) the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults; or
- o (c) a particular child's evidence is unreliable solely on account of the age of the child; or
- o (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.
- Must be something else that is **independent of them being a child/age/unsworn** in order to get warning (s 33(2) *JDA*; 165A(2) *EA*) – see reliability warnings
- Equivalent provision **re civil cases**: s 165A *EA*

## 6. EVIDENCE OF D

- In a **criminal proceeding**, D isn't competent to give evidence **for the prosecution** (s 17(2))

## 7. \_\_ DIES/CEASES TO BE COMPETENT

Evidence given by W doesn't become inadmissible merely bc, before finishes, they **die/cease to be competent** (s 13(7))

## COMPELLABILITY

Person who is competent to give evidence about a fact is compellable to do so, unless exception applies (s 12(b))

### 1. ASSOCIATED ACCUSED (**CRIM PROCEEDING**)

- An 'associated accused' **isn't compellable** for or against D **unless tried separately** (s 17(3))
- Associated accused: person against whom a prosecution has been instituted, but not yet completed/terminated, for (**dictionary in sch 2**)
  - o (a) an offence that arose in relation to the same events as those in relation to which the offence for which D is being prosecuted arose; or
  - o (b) an offence that relates to or is connected with the offence for which D is being prosecuted;

### 2. RELATIVES OF D (**CRIM PROCEEDING**)

"As \_\_ is the [**spouse/de-facto/parent/child** (at the time of giving evidence)] of D, they may not be compelled to give evidence (a) generally or (b) about communication between them and D, as a prosecution W (s 18(2))"

- De facto defined by Act to include same-sex couples

### **Objection**

>> " \_\_ must object as soon as possible, and TJ must satisfy themselves that \_\_ is aware of this right (s 18(3)(4))"

- W must object **before giving evidence** or as soon as practicable after W becomes aware of the right, whichever is later (s 18(3))

- If appears to the court that W may have a right to object, the court must satisfy itself that W is **aware** of the effect of the section (s 18(4))
- Any objection must be determined in the absence of the jury (if any) (s 18(5))

**Compellability – balancing process** => (see *Khan per Hidden J*)

>> “The court will balance certain factors (*Khan per Hidden J*), \_\_\_ won’t be required to give evidence against D if harm that might be caused to \_\_\_ or the relationship outweighs the desirability of the evidence being heard (s 18(6))”

- \_\_\_ must not be required to give the evidence if the court finds that: (s 18(6))
  - o (a) there is a **likelihood** that **harm** would or might be caused (directly or indirectly) to \_\_\_, **or to the relationship** between \_\_\_ and D, if they give the evidence; and
    - E.g. community harm, family violence repercussions
  - o (b) the nature and extent of that harm **outweighs** the desirability of having the evidence given
- Without limitation, the court must take into account the matters in s 18(7)

>> “in favour of \_\_\_ giving evidence is [apply section], against \_\_\_ giving evidence is [apply section]”

- (a) **nature and gravity of the offence** for which D is being prosecuted;
- (b) **substance and importance** of any evidence that \_\_\_ might give and the **weight** that’s likely to be attached to it;
  - o Evidence links crucial elements of the offence
  - o The weight may be diminished given ‘XYZ’ calls into question the reliability of \_\_\_’s evidence and a **reliability** warning will likely be granted under ss 31-32 *JDA*
- (c) whether **any other evidence** concerning the matters to which the evidence of \_\_\_ would relate **is reasonably available to prosecutor**;
- (d) **nature of the relationship** between D and \_\_\_;
  - o E.g. *Khan* marriage endured, notwithstanding the circs, relationship of 10 years and father of children
- (e) whether, in giving the evidence, \_\_\_ would have to **disclose** matter that was received by them **in confidence** from D

**Conclusion**

- Therefore, [P/D] can/can’t compel \_\_\_ to give evidence
- If objection under this section has been determined, **prosecutor may not comment on** (s 18(8))
  - o (a) the objection; or
  - o (b) the decision of the court in relation to the objection; or
  - o (c) the failure of the person to give evidence