

Competence WHERE A CHILD

General presumptions of competence exists (s 12(a)).

Here, [CHILD] is only [X] years old (AND HAS A DEVELOPMENTAL DISORDER OR LEARNING DEFICIENCY) and this may impact on his/her competence.

The test is whether he has capacity to understand questions and answer them per s 13(1) and this will be determined on a *voire dire* and in the absence of a jury.

The facts suggest that _____.

- Expert evidence to determine his competency may be required: s 13(8)

It is likely that [CHILD] will be competent for the purposes of s 13. In this case, [CHILD] will likely give sworn evidence whereby the judge is satisfied that [CHILD] understands the obligation to tell the truth (s 13(3)).

It is unlikely that [CHILD] understands the obligation to tell the truth as _____. Nonetheless, he is still able to give unsworn evidence as long as the judge informs him of the matters in s 13(4) and (5).

Sworn evidence must be given by oath or affirmation: s 21.

Jury directions

CRIMINAL: s 33(1) JDA

Judge cannot suggest that the evidence of children is unreliable.

CIVIL: s 165A(1) EA

Judge cannot suggest that the evidence of children is unreliable.

Unsworn evidence is not a category of unreliable evidence.

Counsel may request that an unreliability warning in relation to mental capacity: s 32 JDA

Privilege against self-incrimination in other proceedings: s 128

[CORPORATION] cannot claim this privilege (majority in EPA v Caltex; s 187).

[WITNESS] can object to giving evidence as the evidence/ the matter generally will prove that

- he has committed an offence arising under Australian/ foreign law (1)(a)
- he is liable to a civil penalty (1)(b)

This objection will be assessed for reasonableness by the court.

s 128(3): It is likely to be found that the objection is reasonable. Therefore, the witness need not give evidence but if they should do so willingly, the court will provide a certificate.

S 128(4): Nonetheless, the court may still give [WITNESS] a certificate and require the witness to give evidence as

- he has not committed an offence or liable to a civil penalty under **foreign law** AND
- the interests of justice require that the witness gives evidence
 - nature of the proceedings – criminal or civil; interests of justice stronger in criminal
 - if criminal, is the evidence called by defence or prosecution
 - defence – fully understand the case against me in order to defend myself
 - prosecution – public interest in the serious criminal matter to be fully prosecuted
 - the importance of the evidence
 - likelihood of prosecution or imposition of penalty
 - consider also the broader harms that the certificate cannot protect (R v Lohdi)

As the witness here has been required to give evidence, it is likely a reliability warning would need to be given per s 165.

- Brebner – tried to claim privilege to protect others
- Sorby – this privilege extends to derivative evidence; which is not incriminating in itself but may start a train
- Song – cannot volunteer information for your case then attempt to claim privilege

OPINION EVIDENCE

s 76 Opinion evidence is not admissible.

s 77 The opinion rule will not apply to evidence of an opinion adduced for another purpose.

s 78 Lay opinion

X will argue that his lay opinion is based on what he saw, heard or otherwise perceived about [the event]. As opposed to in *Lithgow City Council* where the paramedics did not actually witness the event, here, X saw _____.

Further, X will argue that the evidence of this opinion is necessary to obtain an adequate account or understanding of his perception of that event.

It is necessary to adduce his evidence in order to communicate accurately to the jury what was observed.

s 79 Expert opinion evidence is allowed

P will argue that _____ is an area of specialised knowledge that the jury requires assistance with interpreting.

The expert opinion is also based on that specialised knowledge and training.

- In *Honeysett v The Queen*, an anatomist's expert opinion on the comparison of photographs of the accused was not based on his training and qualifications in anatomy but on his subjective impression of what he saw when he assessed the images.
- In *Dasreef v Hawchar*, the expert's training in chemistry and engineering did not qualify him to express numerical values in relation to the concentration of silica particles
- In *Tuite v The Queen*, expert opinion was validly based on new statistical software that the expert was versed in
- In *HG v R*, the psychologist made speculative statements which went beyond his training identifying the accused as another family member

X may raise issues of reliability (s 135 / s 137) - *Tuite*.

Reliability will be considered in relation to the appropriate scientific validation of both the underlying science and the methodology being used

Here, the technique is unduly prejudicial as it raises the illusion of science:

- not being a particular methodology that it accepted within the courts
- lack of peer review
- high false positive rates

s 79(2) specialised knowledge of expert opinion

specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)

includes the development and behaviour of children generally or the development and behaviour of children who have been victims of sexual offences or offences similar to sexual offence