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## GENERAL APPROACH FOR EVIDENCE

1. **Standard of Proof**
  - a. **S 142** - For admissibility of evidence – Balance of probabilities
  - b. **S 141(1)** - For prosecution – Beyond a reasonable doubt
  - c. **S 141(2)** - For defence – Balance of probabilities
2. Is it a **judge-only trial or a jury trial**?
  - a. Role of judge – Determine matters of law; Role of jury – Determine matters of fact
3. **S 144** - Does the evidence contain **matters of common knowledge**? – on the balance of probabilities
4. What are the **facts in issue**?
  - a. Look at the indictment/pleading
  - b. Look for AR, MR, Motive, Knowledge?
5. **S 55** - Is the evidence, you are looking to adduce, **relevant to proving a fact in issue**?
  - a. If yes, admissible under s **56**.
  - b. If no, inadmissible under s **56**.
6. **Who** is adducing the evidence?
  - a. Prosecution? Defendant?
  - b. Has the Prosecution called all relevant witnesses?
7. **When** are you adducing the evidence?
  - a. Examination-in-Chief?
  - b. Cross-Examination?
  - c. Re-Examination?
  - d. Re-Opening Prosecution Case?
8. **What is the purpose** for which you are adducing the evidence?
  - a. **Direct Evidence** – To prove a fact in issue.
  - b. **Credibility Evidence** – To impugn the credibility of a witness and question the truth of what the witness has said on the stand.
  - c. **Hearsay Evidence** – To adduce asserted facts relevant to determining a FII.
  - d. **Opinion Evidence** – To adduce an opinion expressed relevant to determining a FII.
  - e. **Character Evidence** – To demonstrate that the defendant is less likely to commit the offence (propensity) and that they are credible and truthful.
  - f. **Tendency Evidence** – To prove that the defendant had a tendency to act in a particular way or have a particular state of mind.
  - g. **Coincidence Evidence** – To prove that the occurrence of 2 or more similar events renders it improbable that events occurred coincidentally.
  - h. **ID Evidence** – To prove that the defendant was or resembled a person who was present or near a place when and where the offence occurred.
9. Does the evidence fall under a **relevant exception**?
10. Have parties **given relevant notice** for their intention to adduce evidence?
  - a. **S 67** – Hearsay
  - b. **S 99** – Tendency and Coincidence
11. **S 138; s 139** - **How** was the evidence obtained?
  - a. **S 90** - Was it an admission?
  - b. **S 138** - Was it obtained properly, without any impropriety and/or not in contravention of an Australian law?
12. **S 190** - Were any **rules of evidence waived**?
13. **S 135; s 137** – Can the evidence be **excluded** entirely?
14. Is the evidence **admissible**?
15. **S 136** – Can the **use of evidence be limited**?
16. **Ss 165, 165A, 165B** - Should a **warning** be given about the evidence?
  - a. Are there any issues relating to the witness which might render evidence/testimony given unreliable? Was there immense delay?

# **EVIDENCE**

- Direct Evidence**
- Eye witness account
  - Relationship evidence (sibling, spouse, etc.)
  - Transactions - evidence of a series of events to prove offender's identity
- Circumstantial Evidence**
- Series of facts from jury is asked to draw an inference

**Direct evidence is not captured by any exclusionary rule. The only requirements are:**

- Relevance
- Not to be excluded under the exclusionary rules (ss 135/137)

## **ACCUSED, WITNESSES AND QUESTIONING**

### **Oath**

#### **s21 Sworn evidence of witnesses to be on oath or affirmation**

- (1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.
- (2) Subsection (1) does not apply to a person who gives unsworn evidence under section 13.
- (3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.

→ **s24 Alternative Oath**

### **Defendant's Right to Silence**

#### **s20 Comment on Defendant's Silence**

- (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment [by the judge] **must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.**
- (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:
  - (a) the defendant's spouse or de facto partner, or
  - (b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:

- (a) the defendant was guilty of the offence concerned, or
- (b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.

**Weissensteiner direction (CL principle, tension with s. 20(2)):** When there are no other witnesses or evidence and D is only person who can tell you what happened, an inference can be drawn from the defendant's silence.

Direction by judge that jury was not to infer guilt from Df's silence but also added that Df's silence in court might affect the value jury might give to P's witness → **Burke**

## Competence and Compellability

### S 12 Competence and Compellability

Except as otherwise provided by this Act:

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

### S 13 Competence: Lack of Capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- (a) the person does not have the capacity to understand a question about the fact; or
- (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

- (a) that it is important to tell the truth; and
- (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
- (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this sec.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

#### **S 14 Compellability: Reduced Capacity**

A person is not compellable to give evidence on a particular matter if the court is satisfied that:

- (a) Substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter; and
- (b) Adequate evidence on that matter has been given or will be able to be given from one or more other persons or sources

#### **S 17 Competence and Compellability**

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

(4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3)

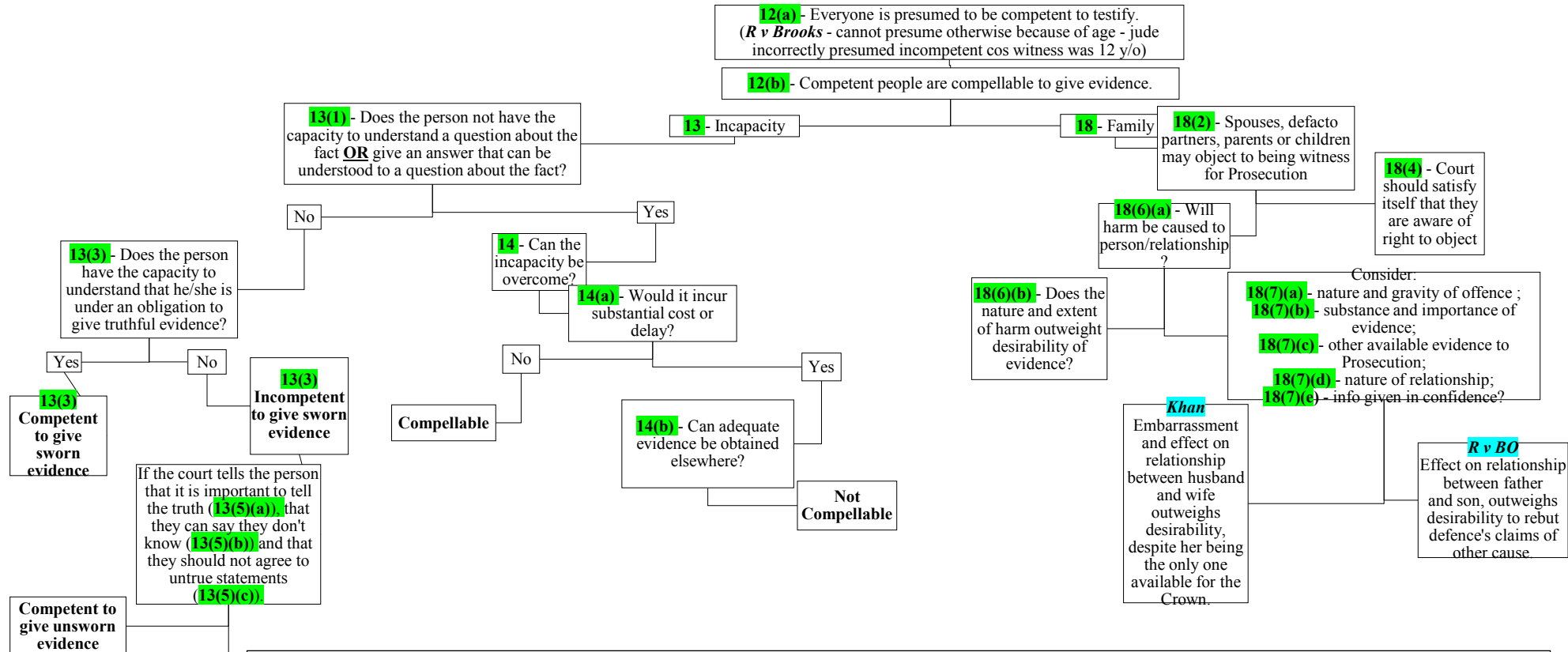
## **S 18 Compellability of Spouses and Others in Criminal Proceedings**

- (1) This section applies only in a criminal proceeding.
- (2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required:
  - (a) to give evidence; or
  - (b) to give evidence of a communication between the person and the defendant; as a witness for the prosecution.
- (3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
- (4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.
- (5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.
- (6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
  - (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and
  - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
- (7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:
  - (a) the nature and gravity of the offence for which the defendant is being prosecuted;
  - (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
  - (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
  - (d) the nature of the relationship between the defendant and the person;
  - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
- (8) If an objection under this section has been determined, the prosecutor may not comment on:
  - (a) the objection; or
  - (b) the decision of the court in relation to the objection; or
  - (c) the failure of the person to give evidence.

Accused charged with manslaughter of partner's baby – P wanted to call BO's sons to testify that baby was alive when they left the house. TJ said that harm caused under s18(6)(a) to sons outweighed the desirability of admitting evidence → **BO**

Husband kills wife's partner and wife refused to testify. Compelling wife to admit to extra-marital relations likely to cause harm which outweighed desirability to admit evidence → **Khan**

**COMPETENCE AND COMPELLABILITY – SS 12-13, 14, 18**



**17 – Right to Silence + 128 - Privilege Against Self-Incrimination**

- 17(2) – Defendant is not compellable to give evidence as a witness for Prosecution + 128(1)(a) – Witness may object to evidence that may tend to prove he committed offence
  - o 20(2) – Silence of defendant cannot be used to comment on guilt of defendant, unless by an associated defendant.
  - o 20(4) – Silence of family cannot be used to comment on guilt of defendant, unless by an associated defendant.
  - o 20(5) – Judge may comment on silence of defendant/family/anyone, when a joint trial is involved.
- 17(3) – Associated defendant is not compellable to give evidence for a defendant unless the associated defendant is being tried separately from the defendant.
  - o 17(4) – If tried jointly, Court has to satisfy itself that the witness/associated defendant is aware of the effect of 17(3).
- Kirk v Industrial Court (NSW) – the defendant’s right to silence and self-incrimination under s17 cannot be waived under s 190
- Dyers – Prosecution has a duty to call all relevant witnesses + prove case BRD, Defendant is not obligated to call any witnesses or defend their case BRD.
  - o Jones v Dunkel – direction inappropriate in crim cases - Failure to call a witness does not necessarily give rise to an adverse inference being drawn + Distracts from issues at hand
- If Defendant does not give evidence, it is almost always desirable for a judge to give an Azzopardi direction: 1) that silence is not evidence against accused, 2) silence is not admission against accused, 3) silence may not be used to fill in gaps in evidence tendered by prosecution and 4) silence is not make-weight in assessing whether prosecution has proved BRD.

**21 – Oaths/Affirmations**

- 21(1) – Witness must either take an oath or make an affirmation before giving evidence.
  - o 21(2) – 21(1) does not apply when a person gives unsworn evidence under 13.
  - o 24(1) – Not necessary that a religious text be used in taking an oath.
- 21(3) – Person who is called merely to produce a document/thing to the court need not take an oath/make an affirmation before doing so.