

**TOPIC 3 – COMPETENCE AND COMPELLABILITY**

In order for [witness] to give evidence, he/she must be both competent and compellable. The EA provides two rebuttable presumptions that every person is competent to give evidence (s 12(a) EA) and that every competent person is compellable to give that evidence (s 12(b) EA)

SKELETON (go through both in exam)

- 1) Competence – whether [witness] **can** give evidence
- 2) Compellability – whether an otherwise competent witness can be **excused** from giving evidence

**COMPETENCE**

**STEP 1: WITNESS PRESUMED COMPETENT**

To rebut this presumption, X will need to rely on one of the limbs of s 13(1) EA to prove that they are not competent to give evidence about [insert], the relevant fact. This is to be presented on a voir dire (s 189(1)(c) EA)

Competence may relate to:

- the **capacity** to give evidence (e.g. children and the mentally impaired); and
- **Legal** competence (e.g. the accused).

WITNESS	DEFENDANT
W <b>presumed competent</b> to give evidence (s12(a))	× <b>Not competent</b> to give evidence as witness for <b>Prosecution (s17(2))</b>
Consideration of whether a witness is otherwise incompetent is determined on a <i>voir dire</i> (s. 189(1)(c))	✓ <b>Competent</b> for his/her own defence (i.e. accused can elect to give evidence after pros case closed)

**STEP 2: IS THE WITNESS OTHERWISE INCOMPETENT?**

X will argue that W will be incompetent to give evidence if, for any reason (including a mental, intellectual or physical disability) (s13(1)) the:

W does not have the capacity to **understand** a question about a fact → outline [THE FACT] (s13(1)(a)) AND/OR

- **ABOUT HOW THEY PROCESS ANSWERS**

W does not have the capacity to **give an answer** that can be understood to a question about the fact (s 13(1)(b))

- **ABOUT HOW THEY GIVE ANSWERS**
  - Can they express themselves effectively?
  - Can the jury understand the answers that they give?

And that **incapacity cannot be overcome**

**EXCEPTION: CAN THE INCAPACITY BE OVERCOME?**

Even if an incapacity is proven, s 13(1) also requires that for the W's competence to be undermined, this capacity 'cannot be overcome'

- The court may obtain expert advice with 'relevant specialised knowledge based on the person's training, study or experience' to determine the extent of W's incapacity (s 13(8))

<b>Disabled / interpreter</b>	<b>S30 EA:</b> A W may give evidence about a fact through an interpreter unless W can understand and speak English language sufficiently to enable W to understand, and to make an adequate reply to, questions that may be put about the fact.
<b>Speech or hearing impediment</b>	<b>s31 EA – Deaf or mute witness</b> <ol style="list-style-type: none"> <li>1) A witness who <b>cannot hear adequately</b> may be questioned in any appropriate way.</li> <li>2) A witness who <b>cannot speak adequately</b> may give evidence by any appropriate means.</li> <li>3) The court may give directions concerning either or both of the following:               <ol style="list-style-type: none"> <li>a) the way in which a witness may be questioned under subsection (1);</li> <li>b) the means by which a witness may give evidence under subsection (2).</li> </ol> </li> <li>4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30.</li> </ol>

<b>Partial competence</b>	<p>Where someone is incompetent to give ev for some facts <b>but</b> can give ev about <b>other facts</b>  <i>S 13(2) EA provides that a person who may be incapable of giving [certain evidence], may be able to give evidence about other facts, such as [insert]</i></p> <ul style="list-style-type: none"> <li>○ E.g. dementia <ul style="list-style-type: none"> <li>× Short term memory inaccurate</li> <li>✓ long term memory is more accurate</li> </ul> </li> <li>○ E.g. children (<i>example given by ALRC in Evidence (Interim), Report No 26 (1985) vol. 1 [522]</i>) <ul style="list-style-type: none"> <li>✓ simple factual matters (what day it was, what time of day, where they were)</li> <li>× more complex ones that require inference goes beyond their capacity <ul style="list-style-type: none"> <li>▪ NB: children as a class used to be considered as unreliable witnesses → NOW: changed <ul style="list-style-type: none"> <li>• Also sexual offence victims</li> </ul> </li> </ul> </li> </ul> </li> <li>○ E.g. mental capacity <ul style="list-style-type: none"> <li>▪ Will be assessed at the point they will need to give evidence</li> </ul> </li> </ul>
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**CONCLUDE:** *On balance, W will/won't be competent to give evidence relating to [particular fact]*

**STEP 3: IF THE WITNESS IS COMPETENT, CAN HE/SHE GIVE SWORN EVIDENCE**

**SWORN EVIDENCE s13(3)**

*[Given that W is likely to be competence / If I am wrong about W's incompetence], upon giving their evidence, W must have the 'requisite capacity' (Full HC in R v GW, [31]) to understand that they are under an obligation to tell the truth (s 13(3)) (in the sense of being 'morally and legally bound' per GW). Importantly, the EA is neutral in its treatment of the weight accorded to evidence sworn or unsworn (R v GW).*

- **[If W is a child]** – don't deal with their nature as a child, will deal with under **(4)**

**[If merely called to produce document]**

*As W has only been called to produce a document/thing, being [identify], s 21(3) EA provides that they do not need to take an oath/affirmation*

**[If they can → OATH / AFFIRMATION]**

*As it is likely the judge will be satisfied OBOP of this, they can give sworn evidence by oath or affirmation (s 21(1)-(2) EA; full HC in R v GW)*

- W has choice of oath or affirmation (**s23(1)**) and be informed of that choice (**s23(2)**)
- Not necessary that religious text be used in taking Oath (**s24(1)**)
- Oath effective even if person who took it did not have religious belief or did not understand nature or consequence of Oath (**s24(2)**)

**CHILDREN:**

- A child can give sworn evidence, h/e only if the TJ is satisfied that they can understand the obligation (**R v GW**)
- Applying **R v GW** – D committed indecent acts against 5 yo daughter; excerpt (below) demonstrated doubt as to whether she was under an obligation to tell the truth
  - **HELD:** Burns J (TJ, supported by Full HC) indicated he had 'difficulty truly gauging the level of her understanding and her age'
  - **Proceeded under s13(5) instead**

**R v GW**

Facts	Issue	Held (French CJ, Bell, Gageler, Keane & Nettle JJ)
Offence related to D committing indecent acts in the presence of his <b>5 yo daughter</b> Child giving evidence by way of audio recorded interview Voir dire as to whether it should be sworn or unsworn  <b>Excerpt</b> "Now, you'll be asked to tell us the truth about what happened to you in the past. What do you understand to be the truth about what happened to you in the past? (No audible reply) Now, I'll ask it another way. How long have you been at your school? I don't know. Right. Did you come to the court today in a car or in a bus? In a car. All right [sic]. <b>So if I was to say to you, you came to court today in a bus would that be true or not true?</b> <b>Not true.</b>	Way in which the judge informed himself on the relevant questions  (a) whether judge could be satisfied as to relevant questions  (b) whether less weight be given to evidence because it was unsworn	Evidence was allowed  They believed it was clear enough and that he had the relevant satisfaction she did not have capacity <ul style="list-style-type: none"> <li>• Did not have to be in the exact way as in the act</li> </ul> 'The failure to express the conclusion in the terms of the statute did not support a finding that [the trial judge] was not satisfied on the balance of probabilities that R lacked the requisite capacity.'  EA doesn't treat it as unreliable, nor is unsworn evidence → No basis for asking for an unreliability warning on the basis of it being unsworn 'Unsworn evidence' is not a category of unreliable evidence under s. 165

<p>And do you understand that today in giving evidence you have to only tell us the truth? You have to tell us things that really happened, you understand that? Yes. Things that you saw and you heard. You understand that? Yes.”</p> <p>Judge formed view as to capacity of child witness – proceeded under unsworn evidence (questioned that she had capacity to understand the oath)</p> <p>“At the present time, because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence. So I propose to proceed under subsection (5) of section 13.”</p>		<p>[S.33 JDA] makes specific provision in relation to the evidence of children.</p> <p>‘The Evidence Act does not treat unsworn evidence as of a kind that may be unreliable. Had a direction been requested under s 165(2), there was no requirement to warn the jury that R’s evidence may be unreliable because it was unsworn.’</p>
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**UNSWORN EVIDENCE s13(4)-(5)**

[If they can’t → UNSWORN EVIDENCE DIRECTIONS]

Here, W arguably does not understand the obligation because [facts]. Nevertheless, even though it is unlikely the judge will be satisfied OBOP that W has the ‘requisite capacity’, W may give unsworn evidence if the court informs them of the matters in s 13(5) EA (s 13(4) EA). A W who gives unsworn evidence cannot be XXN.

- Therefore, s 13(5) requires W to be told:
  - (a) that it is important to tell the truth;
  - (b) that they should tell the court if they don’t know or cannot remember answers to questions; and
  - (c) that they must agree with statements that they believe are true, but feel no pressure to agree with statements if untrue
- Informing the court does not have to take a particular form, so long as it has been communicated in **substance (SH v R)**
- **STRICT COMPLIANCE** → a **judge’s failure to comply** may render W not competent to give unsworn evidence (SH v R)
  - Counsel cannot inform W of these matters instead of the judge
    - e.g. SH, no mention of fact that witness “should feel no pressure” resulted in a quashed conviction

**SH v R [2012] NSW**

Facts	Issue	Held
<p>Child witness permitted to give unsworn evidence despite TJ not giving directions required by ss 5</p> <p>In particular, didn’t make point about not feeling pressured <b>BUT Counsel</b> had made this point → In essence/broadly, everything had been complied with</p>	<p>Was the witness competent?</p>	<p>Appeal was allowed → child was an incompetent witness Judge’s directions weren’t in accordance with the law</p> <p>Court acknowledged that all elements had been complied with <b>BUT</b> queried where they would draw the line – <b>couldn’t discharge obligations that Parliament allocated to trial judge</b></p>

There can be no warning to the jury that unsworn evidence is unreliable and is worthy of a warning under s 165(2) EA (R v GW)

**STEP 4: ADDITIONAL CONSIDERATIONS – SPECIAL WITNESSES**

**THE DEFENDANT**

- The accused in a **criminal proceeding** is:
  - × **not competent for the prosecution: s 17(2) EA;**
  - ✓ **competent for his/her own defence** (i.e. accused can elect to give evidence after prosecution has closed its case)

**PERSON WITH COGNITIVE IMPAIRMENT**

**Cognitive impairment:** includes impairment because of mental illness, intellectual disability, dementia or brain injury (s3 CPA)

While W is competent, opposing counsel will have grounds to seek an unreliability warning as the W’s evidence is of a kind that may be unreliable (CRIM: s 31-2 JDA; CIVIL: s 165 EA) (PAGE 33 AND 96)

**DEATH OF W / CEASES TO BE INCOMPETENT**

Although W has [died / ceased to be competent because of...] while giving evidence before he/she has finished, s13(7) EA provides that the evidence already provided remains admissible

## A CHILD

### STEP ONE: reject any warnings

<p><b>CIVIL CASES</b></p> <p><i>TJ and counsel cannot provide any warning on the basis that the W is a child (s 165A EA)</i></p>	<p><u>SECT 165A EA - Warnings in relation to children's evidence</u></p> <p>(1) A judge in any <b>civil</b> proceeding in which evidence is given by a child before a jury must not do any of the following—</p> <ol style="list-style-type: none"><li>warn the jury, or suggest to the jury, that <b>children as a class are unreliable witnesses</b>;</li><li>warn the jury, or suggest to the jury, that the <b>evidence of children as a class is inherently less credible or reliable</b>, or <b>requires more careful scrutiny</b>, than the <b>evidence of adults</b>;</li><li>give a warning, or suggestion to the jury, about the <b>unreliability of the particular child's evidence solely on account of the age of the child</b></li></ol> <p>(2) if party satisfies the court of <b>reasons that affect reliability</b> (other than age) and <b>warrant a warning</b>, judge <u>may</u> still:</p> <ol style="list-style-type: none"><li>inform jury particular child's evidence may be unreliable, giving reasons; or</li><li>warn/inform jury of need for caution re accepting/giving weight to particular child's evidence.</li></ol>
<p><b>CRIMINAL CASES</b></p> <p><i>TJ and counsel cannot comment on the basis that the W is a child (s 33 JDA)</i></p>	<p><u>S 33 Jury Directions Act – Prohibited statements and suggestions in relation to reliability of children's evidence</u></p> <p>The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) <b>must not say, or suggest in any way, to the jury that—</b></p> <ol style="list-style-type: none"><li>children as a class are <b>unreliable witnesses</b>; or</li><li>the evidence of children as a class is <b>inherently less credible or reliable</b>, or requires more careful scrutiny, than the evidence of adults; or</li><li>a particular child's evidence is <b>unreliable solely on account of the age of the child</b>; or</li><li>it would be dangerous to convict on the <b>uncorroborated evidence of a witness</b> because that witness is a <b>child</b>.</li></ol>

### STEP TWO: identify any other factors that indicate the child doesn't have the necessary capacity

- *H/e they may comment on other factors independent of them being a child (R v GW)*
  - E.g evidence of delayed learning ability

**CONCLUDE:** *On balance, it is likely / unlikely that W will be competent to give evidence relating to [facts]*

## COMPELLABILITY

*[As W likely competent / If I be wrong about W's competency], they are presumed to be compellable, therefore, can be required by the court to give evidence about [fact] (s 12(b) EA). An incompetent witness is not compellable.*

- COUNSEL WANTING IT OUT → argue W is not compellable
- COUNSEL WANTING IT IN → maintain presumption of compellability

Witness may not be compellable if:

- The defendant (s 17) – criminal only
- Family members of the defendant (s18) – criminal only
- Witnesses who claim privilege against self-incrimination – civil and criminal

### STEP 1: CAN THE WITNESS OBJECT? CRIMINAL ONLY

*The burden is on [opposing counsel] to raise that the W can object under:*

- A. [IF W IS CO-ACCUSED] s 17 EA
- B. [IF W IS SPOUSE or FAMILY OF D] s 18 EA

### W IS CO-ACCUSED – S17

- NB: s 17(2) provides the def itself is **not COMPETENT** to give ev for prosecution **but** can give evidence on own behalf

**Tried jointly:** co-accused is **not compellable** to give evidence for or against an 'associated defendant' if they are tried jointly (s 17(3) EA)

**Tried separately:** co-accused is **compellable** to give evidence for or against an 'associated defendant' if they are tried separately (s 17(3) EA)

**Associated accused** (Sch 2, Pt 1, Dict): person against whom pros has instituted, but not yet completed or terminated, for

- (a) an offence that arose in relation to same events as those which accused being pros for **OR**
- (b) an offence that relates to/is connected with offence which accused pros for

### W IS SPOUSE OR FAMILY – s18

[Applies only to CROWN WITNESSES]

### STEP ONE: INTRO COMMENTS + IDENTIFY THE APPLICABLE WITNESS

*As [witness] being called by the P (Stoddart) is the [spouse / de-facto / parent / child] of [defendant] and this is a criminal proceeding, [witness] may object to giving evidence for the prosecution (s18(1) EA) or to give evidence of a communication between W and the accused (s18(2) EA)*

List of family members is **intentionally closed**

- **'Spouse'** = marriage
  - COMMENT: *Per Stoddart, there is and has never been a blanket spousal privilege in Aus law. Instead, the only recourse is through the balancing act in s 18 EA*
- **'De facto partner'** includes partner of same-sex relationships (Sch 2, Pt 1 Dictionary EA)
- **'Parent'** includes adoptive parent, or if an ex-nuptial child – the person's natural parent or person treated as if they are the parent (Sch 2, Part 2, cl 10(2))
- **'Children'** includes 'an adopted child or ex-nuptial child of the person; or a child living with the person as if the child were a member of the person's family' (Sch 2, Part 2, cl 10(1))

NB: doesn't include sister/brother/grandparent

### STEP TWO: OBJECTION REQUIREMENTS (looking for compliance)

- The W must **object** 'before the person gives the evidence' **or** 'as soon as practicable', whichever is later (s 18(3))
- If it appears that W has right to object, the court must satisfy itself that **W is aware of the effect of the section** (s 18(4))
- Thirdly, the objection must be **heard** and **determined in absence of a jury** (if any) i.e. *voir dire* (s 18(5))

### STEP THREE: S 18(6) EA (TWO-LIMB BALANCING TEST)

S 18(6) provides a two-limb balancing test that opposing counsel must satisfy for W not to be compellable.

Firstly, s 18(6)(a) requires [opp counsel] to show there is a 'likelihood of harm that would or might be caused (directly or indirectly) to the person or to the relationship'; **AND**

- **WHAT HARM IS THERE?**
- Harm to the person:
  - Domestic violence, economic duress
- Harm to the relationship:
  - Losing trust and reputation – leading to ostracization

Secondly, s 18(6)(b) requires [opp counsel] to show that 'the nature and extent of that harm **outweighs** the desirability of having the evidence given'

- **HOW IMPORTANT IS THE EVIDENCE?**

In determining the above test, the court is not limited by but **must** take the following factors into account (s 18(7) EA; Stoddart):

Section	Factor	Explanation
s 18(7)(a) EA	(ss a) the nature and gravity of offence for which D prosecuted (here: _____);	The more serious an offence, the more we prefer to hear the evidence (e.g. murder, rape c.f. shoplifting) <ul style="list-style-type: none"> <li>• As a matter of policy, the more serious offence will be in the public interest for W to give ev</li> </ul> <p><i>Khan</i>: murder of a friend</p>
s 18(7)(b) EA	(ss b) the substance and importance of evidence person may give and likely weight attached (here: _____)	<b>Substance:</b> <ul style="list-style-type: none"> <li>• <i>Khan</i> – wife would have to acknowledge lack of chastity. Little weight due to PIS.</li> </ul> <b>Importance</b> <ul style="list-style-type: none"> <li>• How vital? What weight can jury give?</li> </ul>
s 18(7)(c) EA	(ss c) whether alternative evidence re matter W's evidence relates reasonably available (here: _____)	If W the only one who can provide evidence, will increase desirability of evidence being heard  LESS IMPORTANT if there's someone else that can give the same evidence that does not have such a relationship  <i>Khan</i> : Wife was the only one there
s 18(7)(d) EA	(ss d) the nature of relationship between D and W (here: _____)	Query the nature of the relationship – how much will compelling this witness undermine the relationship + gravity of this impact  Element of estrangement? <ul style="list-style-type: none"> <li>• MARRIAGE – <u>but</u> estranged/separated</li> <li>• PARENT/CHILD – compare ages, are they living together?</li> </ul> <p><i>Khan</i>: Length of marriage, no. of children, if couple have endured 'trying circumstances of trial'?</p>
ss 18(7)(e) EA	(ss e) if – in giving ev – W needs to disclose matters received in confidence from D (here: _____)	Exceptionally harsh to force family members to give evidence against a partner of confidential info in context of relationship.

### STEP FOUR: CONCLUDE

On the facts, it is [likely/unlikely] that the harm outweighs the desirability of evidence and therefore [witness] [will not/will] be compellable under s 18(6) EA

If an objection under s18 has been determined, the prosecutor may not comment on (a) the objection, (b) the court's decision re objection or (c) the failure of [witness] to give evidence – s 18(8) EA