

Admissibility and Relevance

Section 56: Evidence that is relevant is admissible

Section 55: Evidence will be relevant if 'accepted, could rationally affect (directly or indirectly) the assessment of probability of the existence of a fact in issue'

Goldsmith: Relevant = proves or makes probable the past, present, or future existence or non-existence of the other fact

Papakosmas: Words "if it were accepted" = assess probability assuming the evidence is reliable

Smith v The Queen: police asserted knew identity from photographs, no different from material given to jury = police asserting they recognise appellant is not evidence that could rationally affect the jury's assessment → irrelevant photos

Evans v The Queen: 1. wear balaclava, overalls and sunglasses & 2. walk and say the words the robber did on tape.

Gummow and Hayne: 1 not relevant as would not assist jury in identifying. 2 relevant to compare.

Heydon: relevant as it could exculpate and inculpate.

Kirby (dissent): relevant as could rationally affect jury's assessment. However, excluded under s137 (unfairly prejudicial)

Section 57: If evidence requires further findings to see if relevant, the court can decide that evidence is relevant if a) they are reasonably open to make the finding or b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make the finding

Witness Competence & Compellability

Section 12: Presumed competent to give evidence & competent person can be compelled to give evidence

Section 189(1)(c): Party asserting witness' incompetence bears burden of demonstrating incompetence on balance of probabilities s189(1)(c).

Section 13:

1) Not competent = a) does not have capacity to understand question about the fact OR b) does not have the capacity to give answer that can be understood to a question about the fact

2) However, A person who is not competent to give evidence about a fact may be competent to give evidence about other facts

3) A person who is competent is not competent to give sworn evidence if they don't have the capacity to understand that in giving evidence, they are under obligation to tell the truth

4) they can, instead, give unsworn evidence

5) they, who can't give sworn answers can give unsworn, if the court has told them:

a) it is important to tell the truth &

b) they may be asked questions they don't know/can't remember the answer to and that they should tell the court if this happens &

c) they could be asked questions which suggest certain statements are true/untrue and they will agree with the ones they believe are true and should not agree with those untrue

...8) court can decide who is fit by getting relevant specialised knowledge from experts

R v GW: No requirement to warn/direct jury to take into account differences between sworn and unsworn evidence of child.

Section 18 Compelling domestic partners and others in criminal proceedings

6) Must not give evidence if

a) likely harm would/might be caused (directly/indirectly) to person, relationship

b) nature/extent of harm outweighs desirability of having evidence

7) Must take into account

a) nature/gravity of offence

b) substance/importance of evidence might give/weight attached

c) whether other evidence is reasonably available

d) nature of relationship

e) whether would have to disclose matter received in confidence from defendant

R v Khan: Grave offence but other evidence available and wife giving evidence likely to harm marriage

Section 19: Section 18 does not apply if offence against person under 16, or family violence