

### **TOPIC 3: COMPETENCE AND COMPELLABILITY**

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

- **Competence:** Does the person have the capacity to give evidence?
- **Compellable:** Is the person obliged to give evidence and can they be forced to do so?
- Different from privilege- Competence and compellability are concerned with getting the witness to give evidence whereas privilege is concerned with what questions the witness does not have to answer, or evidence the witness does not have to give if they do not want to.

#### **Evidence Act 2008 (Vic)**

##### **12 Competence and compellability**

Except as otherwise provided by this Act-

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

#### **(1) Is the witness competent? – section 13**

A [witness] is taken to be competent, unless, per s13(1), they either do not have the capacity to understand a question about the fact or do not have the capacity to give an understandable answer to a question about the fact, AND that incapacity cannot be overcome.

On the facts, X will argue that [witness] is incompetent since they are [accused/child/mentally impaired] and will not have capacity to understand (expand if facts given) -> go to 1.2.

The burden of proof will rest on [X] since they are arguing that witness is not competent, and, they will need to satisfy to the judge on a balance of probability that this is the case (s142(1)). This is a question for the judge to determine on a voir dire (s189(1)(c)) and the court may inform itself as it sees fit (s13(8)).

**Talk about directions then go onto sworn/unsworn evidence.**

#### **Evidence Act 2008 (Vic)**

##### **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**
  - » Able to comprehend the question being asked
- (b) the person does not have the capacity to give an answer that can be understood to a question about the fact—
  - » Able to give an answer that can be understood

and that incapacity cannot be overcome.

» E.g. Alzheimer's cannot be overcome but deafness/blindness can be (see 1.1.1 below)

(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.

» Eg. a young child could be permitted to answer simple factual questions but be ruled to be not competent to answer abstract or inferential questions (ALRC)

» \*\*\*MENTION FOR CHILD

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

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, they die or cease 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.

» Court can use expert witness eg. to determine the extent of someone's mental impairment

❖ Overcoming incompetence

- **S 30**: a witness may give evidence through an interpreter if required.
- **S 31**: a deaf or mute witness can give evidence in appropriate way (e.g. writing down, using sign language).
- Consider the cost and delay associated and whether adequate/similar evidence may be obtained from other sources in respect of compellability (**s 14**).

## 1.2 Competence and special parties – children, witnesses who are cognitively impaired & defendants

- A child is a person under 18 (**s366(2)(a) CPA**).
- A party may wish to challenge a person's competence because of characteristics such as age, physical or sensory disability, acquired brain injury, mental illness and intellectual or cognitive disability (**ALRC**).

### 1.2.1 The defendant (accused) CRIMINAL CASES

**CRIMINAL MATTERS**: defendant is not competent to give evidence as a witness for the prosecution (**s 17(1)-(2)**) **but** competent to give evidence for own defence.

### 1.2.2 Children's evidence in CIVIL CASES WITH JURY (directions)

#### **Evidence Act 2008 (Vic)**

##### **165A Warnings in relation to children's evidence**

(1) A judge in a *civil proceeding* in which evidence is given by a child before a jury must not—

- (a) warn/suggest to the jury, that children as a class are unreliable witnesses;
- (b) warn/suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
- (c) warn/suggest a particular child's evidence is unreliable solely on account of the age of the child.

» Only for civil proceedings before a jury

» Is about general stereotyping of children whereas (2) is about the particular child e.g. they may be giving inconsistent versions, varying their story etc.

(2) Subsection (1) does not prevent the judge, at the request of a party, from—

- (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable; and
- (b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it—

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

### 1.2.3 Children's evidence in CRIMINAL CASES WITH JURY (directions)

#### **Jury Directions Act 2015 (Vic)**

##### **33 Prohibited statements and suggestions in relation to reliability of children's evidence**

The trial judge, the prosecution and defence counsel (or, if the accused is unrepresented, the accused) must not say, or suggest in any way, to the jury that—

- (a) children as a class are unreliable witnesses; or

- (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
- (c) a particular child's evidence is unreliable solely on account of the age of the child; or
- (d) it would be dangerous to convict on the uncorroborated evidence of a witness because that witness is a child.

#### 1.2.4 Witness who is cognitively impaired (directions)

**s 32 JDA:** prosecution or defence may request trial judge to direct jury on evidence of a kind that may be unreliable. They must specify the significant matters that make the evidence unreliable.

Definition **s 31(b) Jury Directions Act:** 'evidence of a kind that may be unreliable' includes— evidence that is affected by 'age, ill health (whether physical or mental), injury or the like'.

#### 1.3 Sworn vs unsworn evidence – does person understand obligation to tell the truth?

*A competent witness can only give sworn evidence if they understand they have an obligation to give truthful evidence (s 13(3)).*

*[Witness], even though competent, may not understand the obligation to give truthful evidence because [facts]. Nevertheless, [witness] may give unsworn evidence if the court informs them of the matters in s 13(5) (s 13(4)) which are:*

#### **Evidence Act 2008 (Vic)**

##### **13 Competence—lack of capacity**

- (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 that—
- (a) it is important to tell the truth; **and**
  - (b) they should tell the court if they do not know/ cannot remember answers to questions asked; **and**
  - (c) they may be asked questions that suggest certain statements are true or untrue and that they should agree with the statements that they believe are true and should feel no pressure to agree with statements that they believe are untrue.

- A judge's failure to give a direction under **s 13(5)** will render the witness incompetent even if counsel raises the issues: **SH v R**.
- *If the witness is giving sworn evidence, they must so under oath or affirmation (s 21(1)-(2)).*
  - » An oath swears by a god (any god)
  - » Affirmations does not refer to god
- Does not apply if the person is called for merely producing a document (**s21(3)**).
- May make informed choice as to oath or affirmation (**s 23(1)-(2)**).

#### **Evidence Act 2008 (Vic)**

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

- (1) A witness giving sworn evidence must take an oath or make an affirmation.
- (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.
- (4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.
- (5) Such an affirmation has the same effect for all purposes as an oath.