

TOPIC: COMPETANCE & COMPELLABILITY

TOPIC: COMPETENCE

Competence (capacity): does the person have the capacity to give evidence?

Compellable (obligation): is the person obliged to give evidence and can they be forced to do so?

STATE: For W to give evidence, W must be competent and compellable.

Co-Accused: If the issue is whether **[co-accused]**, who is being tried jointly with **[accused]**, is competent and compellable to give evidence for or against the other accused.

STATE: Every person is presumed competent unless lack of capacity is proved (s 12, s 13(6)). A competent witness is able to give evidence and W is presumed to be competent to give evidence (s 12(a) EA).

STATE: However, a defendant is **not competent or compellable for the prosecution**, but is competent to give evidence for their own defence if they choose to do so. An accused cannot be forced to give evidence because they have a right to silence. Here, **[Hayley/Gloria]** is an accused in the proceeding. Therefore, they cannot be called by the prosecution to give evidence against themselves. Accordingly, **[accused]** is not competent or compellable as a prosecution witness in their own trial.

STATE: Under s 17(3), if accused persons are tried jointly, an associated defendant is not compellable to give evidence for or against a co-accused. If tried separately, the associated defendant may be compellable in the other proceeding, subject to other objections such as s 128 privilege against self-incrimination. Here, [X] is a co-accused being tried jointly with [Y]. Therefore, [X] cannot be compelled by the prosecution to give evidence against [Y], nor compelled by [Y] to give defence evidence. If [X] chooses to give evidence voluntarily, they may be cross-examined, but they cannot be forced. Accordingly, in a joint trial, [X] is not compellable for or against [Y].

1. What if the prosecution calls the co-accused?

STATE: If the prosecution seeks to call **[co-accused]** against **[accused]** in a joint trial, **[co-accused]** is not compellable under s 17(3). This protects the co-accused's right to silence and avoids forcing one accused to assist the prosecution case against another accused. Here, because Gloria does not wish to give evidence, the prosecution cannot force her to testify against Hayley while they are jointly tried. Gloria is therefore **not compellable for the prosecution** against Hayley in the joint trial.

2. What if the defence calls the co-accused?

STATE: If **[accused]** seeks to call **[co-accused]** as a defence witness in a joint trial, the co-accused may be competent to give evidence, but cannot be compelled to do so. The co-accused may choose to give evidence if they wish, but they cannot be forced. Here, if Hayley's defence wants to call Gloria, Gloria may choose to give evidence about Hayley's defence if she wants to. However, because they are being tried jointly, Gloria cannot be compelled to give that evidence.

STATE: The answer differs slightly if Gloria is called by the defence: she may be able to give evidence voluntarily, but she remains **not compellable**.

3. What if the co-accused are tried separately?

STATE: The position may change if the accused are tried separately. Under **s 17(3)**, an associated defendant may be compellable in separate proceedings once they are no longer being jointly tried. If Gloria's trial is separated from Hayley's, Gloria may be competent and compellable as a witness in Hayley's proceeding, subject to other objections such as privilege against self-incrimination.

STATE: Therefore, if tried separately, Gloria may be compellable in Hayley's trial, but if tried jointly, she is not compellable.

Step 1:
Is W competent to give evidence about [fact]?

STATE: X is presumed competent to give evidence unless lack of capacity is proved (**s 12(a)**, **s 13(6)**). The ALRC has stated that the primary rationale for the competence test is 'to guard against the admission of evidence with little or no probative value' ([Australian Law Reform Commission, \(Report No 102, 2005\) \[4.3\]](#)).

Under **s 13(1) EA**, W is not competent to give evidence about a fact if W lacks the capacity to:

1. **understand a question about that fact: s 13(1)(a); or**
2. **give an answer that can be understood to a question about that fact: s 13(1)(b);**

and that incapacity **cannot be overcome**.

Competence is **fact-specific**: W may be competent to give evidence about some facts but not others: **s 13(2) EA**.

STATE: W's competency is in contention because [issue] and under s 13(1)[(a) or (b)] EA, W is not competent if W does not the capacity to [understand a question about the fact 13(1)(a)/have capacity to give an answer that can be understood to a question about the fact s 13(1)(b)] and that capacity cannot be overcome. Whether W is competent will be determined on **voir dire** (**s 189(1)(c) EA**).

STATE: The court may inform itself as it sees fit, ie. calling for expert evidence, to determine W's competency (**s 13(8) EA**). [The judge may rely on expert evidence i.e ask a psychologist who has examined the witness to provide a report or give evidence on competency.](#) Incapacity is assessed **at the time the evidence is being given** (**Hawker**). **OTF**, although W appears to have **[a mental/intellectual/physical/cognitive impairment / difficulty understanding questions / difficulty communicating answers]**, that does not automatically make W incompetent.

STATE: Here, W would likely satisfy **s 13(1)** because although W has [the impairment/issue], W can still understand simple questions about [fact] and provide answers that are intelligible. Any difficulty could likely be overcome by [using simpler language / short questions / breaks / an intermediary / other assistance]. This affects the mode of giving evidence and not competence itself. She is therefore also presumed compellable under **s 12(b)**, as no exception applies

[If not competent:] Here, W would likely not satisfy **s 13(1)** because W cannot understand questions about [fact] (a) and/or cannot give answers capable of being understood (b) , and that incapacity cannot be overcome even with assistance.

Sworn or unsworn evidence?

STATE: Even if W is competent under s 13(1), W may only give sworn evidence if W understands the obligation to give truthful evidence s 13(3) EA. W does not understand that obligation, W may still give **unsworn evidence** if the court tells W the matters in s 13(5) namely that:

1. it is important to tell the truth(13(5)(a);
2. W may be asked questions they do not know or remember; and (13(5)(b);
3. W should say if an answer is untrue or incorrect. (13(5)(c).

STATE:The requirements in s 13(5) must be strictly complied with. If the trial judge does not give the required instructions, the witness may not be competent to give unsworn evidence, and a conviction may be unsafe (SH v The Queen) . A child's unsworn evidence is not treated as inherently less reliable. The Evidence Act is neutral between sworn and unsworn evidence, so the judge does not need to direct the jury that unsworn evidence is weaker or less reliable (R v GW)I Therefore, child can likely be required to give evidence, with appropriate adjustments to questioning.

- **ANALOGY:** Pursuant to R v GW, a witness may lack capacity to give sworn evidence under s 13(3) because they do not understand the abstract obligation to give truthful evidence, but still be competent to give unsworn evidence under s 13(5) if, after being told the matters in s 13(5)(a)–(c), they demonstrate in practical terms that they understand the difference between truth and falsehood, that they must say what really happened, and that they should not agree with statements they believe are untrue.
- **ANALOGY:** Pursuant to GW, “obligation” means being **morally or legally bound** to tell the truth. It is not enough that W merely says they know they should tell the truth; the question is whether W understands the more abstract idea that, in giving evidence, they are under an obligation to do so.
- **ANALOGY:** Lik Seymour (a pseudonym) v The Queen, the witness may be found capable of giving sworn evidence or an affirmation where their answers show not only that they understand the difference between truth and falsehood, but also that they understand it is important to tell the truth.

Statutory categories (competence limits)

STATE: Some witnesses are incompetent or limited by statute:

- A judge or juror in the proceeding is not competent, except a juror may give evidence about matters affecting the conduct of the proceeding: s 16 EA.
- A defendant is not competent for the prosecution: s 17(2) EA.
- An associated defendant is generally not competent for the prosecution or defence unless tried separately: s 17(3) EA.

Child Example: OTF, W is a child with communication difficulties. That alone does not make W incompetent. The issue is whether W can understand questions about [the alleged event] under s 13(1)(a) and give answers that can be understood under s 13(1)(b).

	If W can answer simple, fact-specific questions and any difficulty can be overcome by age-appropriate questioning, W will remain competent. If not, W will be incompetent under s 13(1).
Step 2: Can W's incompetency be overcome?	STATE: It is not presumed that W is incompetent and unable to give evidence because s 13[(a) or (b)] EA is satisfied. Incapacity may be overcome. • A person who is not competent to give evidence about one fact may still give evidence about other facts (s 13(2)). STATE: The Act provides mechanisms to overcome incapacity in appropriate cases, including: • Deaf: P can be questioned in any appropriate way (s 31(1) EA). • Mute: P can give E by any appropriate means (s 31(1) EA). • Interpreter (incl. EAL): may give evidence through an interpreter (s 30 EA). • Practicality: if the costs and delay to ensure W has capacity outweigh the probative value, consider whether similar evidence can be obtained from another witness (s 14 EA).

Step 3:

What evidence can W give?

If W is competent/incompetency can be overcome:

STATE: As [W is competent/W's competency can be overcome], they must give sworn evidence and take an oath or affirmation (s 21(1) EA) as relevant (s 21(4) EA). If the oath is taken, for it to be legally effective, the witness does not have to swear on the Bible or other religious text (s 24(1)); be religious (s 24(2)(a)); understand what it means to take the oath (s 24(2)(b)); or believe in a god (s 24A).

An affirmation is not inferior to an oath.

Oath = a promise, especially that you will tell the truth in a law court. A declaration made to God or a Supreme Being

Affirmation = is a solemn vow by the signer that has no pledge to a higher power but to the signer's personal honor.

The difference between an oath and affirmation is that an oath is a solemn undertaking to give the truth and refers to the witness's religious beliefs whereas an affirmation, while also a solemn undertaking, does not refer to a religious belief (s 24A). Sections 23 and 24 provide that the witness has a choice of either taking an oath or making an affirmation

If W is incompetent:

STATE: If W is not competent to give sworn evidence about [fact], W may still be competent to give unsworn evidence about that fact, provided the requirements in s 13(5) EA are met. The court must inform W that it is important to tell the truth, that W may be asked questions that they cannot answer and they must tell the court if so, and they should feel no pressure to agree with statements they believe are untrue (s 13(5) EA).

If W dies or ceases to be competent mid-evidence

STATE: Evidence already given by W does not become inadmissible merely because, before W finishes giving evidence, W dies or ceases to be competent (s 13(7) EA).

Children's evidence and "unreliability" directions

If W is a **child:**

Civil proceedings

STATE: In civil proceedings, the judge must not suggest evidence is unreliable because the witness is a child or because of the child's age (s 165A(1) EA).

STATE: The judge may give a direction of unreliability if there are circumstances concerning the child (other than age) that affect reliability (s 165A(2) EA).

Criminal proceedings (JDA)

STATE: In criminal proceedings, the judge, prosecution and defence must not say or suggest to the jury that children as a class are unreliable, children's evidence is inherently

	less reliable, a particular child is unreliable solely due to age, or it is dangerous to convict on uncorroborated evidence because W is a child (s 33 JDA). Evidence affected by age, ill health (physical or mental), injury etc may be “evidence that may be unreliable” (s 31(b) JDA). A party may request a direction specifying matters relevant to unreliability (s 32 JDA), but if the request concerns a child, it must identify significant matters other than age (s 32 JDA). Alternative arrangements (if relevant) - Div 4-7 Criminal Procedure Act 2009 STATE: Even where W is vulnerable (e.g. child, cognitively impaired, adult complainant in certain offences), W may be able to give evidence through alternative arrangements rather than being excluded altogether. Adults (Vic) - over 18 and not cognitively impaired - 369-365 CPA STATE: Alternative arrangements apply where (s 359 CPA): sexual offence, family violence offence, or offences against s 17(1) or s 19 Summary Offences Act 1966 (Vic). These may include CCTV, screens, de-robing of counsel, emotional support persons, and requiring practitioners to be seated while examining W (ss 363–366 CPA; s 360(f) CPA). If such arrangements are made, the judge must warn the jury not to draw any adverse inference against the accused or give the evidence more or less weight because of those arrangements (s 361 CPA). STATE: The judge must warn the jury not to draw an adverse inference to D or give the evidence greater/lesser weight because of the arrangements (s 361 CPA). Children and/or cognitively impaired complainants (Vic) - 366-375 CPA STATE: In Victoria, for child or cognitively impaired witnesses in proceedings covered by s 366 CPA, evidence-in-chief may be prerecorded (ss 367–368 CPA), and for eligible complainants the whole of their evidence, including cross-examination and re-examination, is ordinarily taken at a special hearing, audiovisually recorded, and played at trial (s 370(1) CPA). The court may instead allow direct testimony if the complainant is aware of the right to a special hearing and is able and wishes to testify directly (s 370(2) CPA). Any such recording is admissible as if it were the witness’s direct testimony, subject to exclusion or editing of inadmissible parts (s 374 CPA). STATE: These arrangements regulate the manner of testimony only, not the obligation to give evidence. The jury must not reason that W is more or less credible merely because alternative arrangements were used. In relation to children, no adverse reliability assumption may be made merely because of age (s 165A EA; s 33 JDA).
TOPIC: COMPELLABILITY Red flags: accused or spouse/family member	
Step 1: Is W compellable to give evidence about [fact]?	STATE: If W is competent, it is presumed W is compellable and required to give evidence (s 12(b) EA), unless an exception applies. Some witnesses may have immunity (e.g. diplomatic immunity: s 15 EA).

Key exceptions where witnesses are not compellable

1. The defendant
2. Family members of defendant
3. Witnesses who claim the privilege against self-incrimination

If W is the accused (D) - only applies to criminal proceedings - ONLY ACCUSED

STATE: D is not competent or compellable for P and competent but not compellable for the defence (**s 17(2) EA**). D may elect to give evidence for the defence (**s 464J Crimes Act 1958 (Vic)**).

STATE: If D elects to give evidence, they will be cross-examined and this will ultimately have forensic consequences.

STATE: However, D can elect to remain silent:

- Jury may draw adverse inferences of guilt but JDA prohibits statements or suggestions in relation to D's silence (**s 44 JDA**).
- If P does not call a particular witness, D may request TJ to inform the jury that P did not call that witness if TJ is satisfied that P was reasonably expected to call that witness and P has not satisfactorily explained why P has not called that witness. TJ may also inform the jury that they may conclude that W would not have assisted P's case (**s 43 JDA**).

If W is D's spouse/family member:

STATE: Common law in Australia does not recognise privilege against spousal incrimination and the privilege could only be a creature of statute (**HC in ACC Act**).

STATE: As W is a [**spouse/de facto partner/child/parent**] of D, W may object to giving evidence if called by P (**s 18(1) EA**). W may do so because of the fact that giving evidence would disrupt their relationship and W may feel like they betrayed D's trust and confidence. W must object before giving evidence or as soon as W becomes aware of their right to object (**s 18(3) EA**) and the court must satisfy itself that W understands their right to object if applicable (**s 18(4) EA**).

ANALOGY - This reflects **R v Khan**, where the court recognised the need to balance the **harm that giving evidence may cause to a marital relationship** against the desirability of having relevant evidence before the court. Here, W may argue that giving evidence would damage their relationship with D because W may feel they are betraying D's trust and confidence. However, P will argue that the evidence is desirable because [insert: it is central / serious / unavailable from another source / relevant to a key fact in issue].

ANALOGY where excuses did not exempt family member from giving evidence: Like **McKinnon v The Queen**, W's objection under **s 18** may fail where the alleged harm is limited or unsupported. In that case, the mother's lack of memory and family annoyance about her giving evidence against her son were not enough to outweigh the desirability of the evidence. Similarly, here, [**W's discomfort/family tension**] may be insufficient unless W can show a real likelihood of harm to W or the relationship.

STATE: This is not an automatic privilege and the objection is only allowed by the court if the court is satisfied that:

- There is a likelihood of harm to W or to the relationship between W and D if W gives evidence (s 18(6)(a) EA); or
- The nature and extent of harm of giving the evidence outweighs the desirability of having the evidence given (s 18(6)(b) EA).

The list of family members is intentionally closed s 18(2). Children include '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'.

MUST DO THIS

STATE: To determine whether s18(6) EA is satisfied, court must consider (s 18(7) EA) on *voir dire* (s 189(1)(c) EA): s18(7)

- o (a) nature and gravity of the offence; and
- o (b) substance and importance of evidence W might give and the weight likely to be attached; and
- o (c) whether any other evidence concerning the same is reasonably otherwise available to P; and
- o (d) the relationship between D and W; and
- o (e) whether, in giving the evidence, W would have to disclose matters received in confidence from D.

STATE - conclusion: As s18(6) is satisfied, W can object to giving evidence, the prosecution cannot comment on the objection, the decision of the court as to the objection or the failure of W to give evidence (s 18(8) EA).

If W is associated D: co-accused

STATE: If tried jointly, an accused is not compellable to give evidence for or against a co-accused (s 17(3) EA). If tried separately, an accused may be compellable in the other proceedings (s 17(3) EA).

STATE: If there is a joint trial, the court must satisfy itself on *voir dire* that both accused understand they cannot give evidence against the other (s 17(4) EA).

W has reduced capacity

- Given that W has reduced capacity they are likely not compellable if the court is satisfied there would be substantial cost and delay in ensuring the person would have the capacity to understand a question or give an answer that can be understood to a question about the matter, and adequate evidence on that matter has been or will be given from other people or source (s 14 EA).

Alternative Arrangements for Witnesses - same as above

STATE: Even if W is competent and compellable, vulnerable witnesses may give evidence through alternative arrangements. Alternative arrangements do not change whether W is competent or compellable. They only affect the mode of giving evidence. Their purpose is

to reduce trauma and intimidation while preserving competence and compellability (s 12 EA).

STATE: In Victoria, alternative arrangements may apply to children, cognitively impaired witnesses, complainants and other vulnerable witnesses in relevant proceedings, including sexual offence, family violence and indictable assault matters: CPA ss 359, 366.

- The court may allow arrangements such as CCTV, screens blocking the accused, a support person, modified courtroom formality, or practitioners being seated while questioning: CPA ss 360, 363–364.
- Evidence-in-chief may also be given by audio-visual recording where notice is given, the accused can view it, and the witness attests to its truth and is available for cross-examination: CPA ss 367–368.
- For child or cognitively impaired complainants, evidence may be pre-recorded at a special hearing and later admitted at trial: CPA ss 370, 372, 374.

STATE: Here, although W is [child / cognitively impaired / vulnerable complainant], this does not make W non-compellable. Instead, the court may use [CCTV / screen / support person / pre-recording / special hearing] to reduce trauma while still requiring W to give evidence.

STATE: These arrangements regulate the manner of testimony only, not the obligation to give evidence. The jury must not reason that W is more or less credible merely because alternative arrangements were used. In relation to children, no adverse reliability assumption may be made merely because of age (s 165A EA; s 33 JDA)