Competence and compellability (Sections 12, 13, 14 and 18)

Legislative provisions

Section 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.

Section 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 or affirmed 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 or affirmed evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence or evidence that is not affirmed about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn or affirmed evidence is competent to give unsworn evidence or evidence that is not affirmed 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 section.

(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.

Section 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.

Section 18 Compellability of spouses and others in criminal proceedings generally

(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 an accused may object to being required—

(a) to give evidence; or

(b) to give evidence of a communication between the person and the accused—

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 accused, 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 accused 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 accused 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 accused.

(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.

Statements of rules

Presumption of competence to give evidence (s 13(1))

A person is competent to give evidence about a fact unless, for any reason:

(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.

Presumption of competence to give sworn or affirmed evidence (s 13(3))

A person who is competent to give evidence may give sworn or affirmed evidence, unless they do not have the capacity to understand that, in giving evidence, they are under an obligation to give truthful evidence.

Possibility of unsworn evidence (s 13(5))

A person who is not competent to give sworn or affirmed evidence may 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.

Compellability and capacity (s 14)

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.

Compellability of family members of the accused (s 18)

The following people may object to giving evidence, or evidence of a communication between the person and the accused, for the prosecution in a criminal proceeding:

(a) The accused's spouse;
(b) The accused's de facto partner;
(c) The accused's parent;
(d) The accused's child.

The court must not require a family member who objects to give such 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 accused, if the person gives the evidence; and
(b) The nature and extent of that harm outweighs the desirability of having the evidence given.

In performing the balancing exercise, the court must take into account:

(a) The nature and gravity of the offence;
(b) The substance and importance of the evidence the family member may give, and the weight that is likely to be attached to it;
(c) Whether any other evidence on the same matter is reasonably available to the prosecutor;
(d) The nature of the relationship between the accused and the family member;
(e) Whether giving the evidence would require the family member to need to disclose a matter that was received in confidence from the accused.

If it appears that a person may have a right to object as a family member, the court must satisfy itself that the person is aware of the effect of s 18.

Judicial College of Victoria

Guidance on the provisions

Sworn and unsworn evidence

The Act starts with a presumption of competence. While neither party carries an onus, the court may only find that a witness is not competent to give evidence / not competent to give sworn or affirmed evidence if the court is affirmatively satisfied of that proposition on the balance of probabilities (*Seymour v The Queen* [2020] VSCA 113, [4], [9], [48]; *R v GW* (2016) 258 CLR 108, [28]).

Competence to give evidence at all must be considered on a fact by fact basis, unless there is a reason to believe that the person is not competent to give evidence about any facts and that incapacity cannot be overcome (*RJ v The Queen* [2010] NSWCCA 263, [18]).

Competence to give sworn or affirmed evidence requires an understanding of the notion of an obligation to give truthful evidence. This is more than an understanding that telling the truth is important. It requires an understanding of being morally or legally bound to give truthful evidence, that the person is making a solemn binding commitment to give truthful evidence, or that the person will be punished in some way if they do not give truthful evidence (*Seymour v The Queen* [2020] VSCA 113, [51]-[66]; *R v GW* (2016) 258 CLR 108, [26]).

The Act does not draw a distinction between children and adults. While, as a factual matter, a child may be less likely to be able to understand an obligation to give truthful evidence than an adult, the court should not approach the issue as though there is a presumption that children below a certain age cannot give sworn evidence (see *Pease v The Queen* [2009] NSWCCA 136, [7], [11]; *R v GW* (2016) 258 CLR 108, [27]).

The court is responsible for testing whether the witness is competent to give sworn evidence, and should do so using language that is adapted to the needs of the witness. The court should use 'simple and concrete terminology', though that can be difficult with a young child who may have limited capacity to understand questions and articulate answers about an obligation to give truthful evidence (*Seymour v The Queen* [2020] VSCA 113, [58]).

The court must decide that the witness cannot give sworn or affirmed evidence before it decides to allow the witness to give unsworn evidence (*SH v The Queen* (2012) 83 NSWLR 258, [35]; *RJ v The Queen* [2010] NSWCCA 263, [22]).

A witness may give unsworn evidence if the court is satisfied the witness is not competent to give sworn or affirmed evidence, and the court has told the witness the three matters in s 13(5). There is no residual discretion to disallow the person from giving unsworn evidence, or obligation to test whether the person understands the three matters in s 13(5) (*R v Muller* (2013) 7 ACTLR 296, [40]-[41]. See also *R v GW* (2016) 258 CLR 108, [30]).

Family members of the accused

The right to object to giving evidence lies with the witness (*Gilmour v EPA* (2002) 55 NSWLR 593, [48]). It is not for the accused to object to the family member giving evidence.

The focus is on the nature of the relationship at the time of the trial. The Act does not provide protection for former spouses or former de facto partners (*El Khouli v The Queen* [2019] NSWCCA 204, [38]).

Being satisfied that the witness is aware of the operation of s 18 means making sure the witness knows:

- That they can object to giving evidence;
- That the court will decide whether to override the objection;
- That the court must apply the test in s 18(6) in deciding whether to override the objection; and
- That the court will take into account the five matters in s 18(7) (*Tran v The Queen* [2017] NSWCCA 93, [27]).

Unlike other sections of the Act which require the court to consider the probative value of evidence at its highest, s 18(7)(b) requires the court to consider the weight likely to be given to the evidence. This allows the court to consider the likely credibility and reliability of the evidence (*R v Westbrook* [2020] VSC 472, [90]-[91]).

As the objection may be made before the family member gives evidence, the court cannot require the family member to give evidence in support of the objection. But the court may take into account information and submissions the family member chooses to give in support of the objection (*Tran v The Queen* [2017] NSWCCA 93, [28], [40]-[41]).

A family member who is excused from giving evidence under s 18 becomes an unavailable witness, and provisions like s 65 (hearsay statements from a witness who is not available) may apply (*Fletcher v The Queen* (2015) 45 VR 634, [61]).