

Improper questions (Section 41)

Legislative provision

Section 41 Improper questions

- (1) The court must disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered.

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- (3) In this section, *improper question or improper questioning* means a question or a sequence of questions put to a witness that—
- (a) is misleading or confusing; or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
 - (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

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- (5) A question is not an improper question merely because—
- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (6) A party may object to a question put to a witness on the ground that it is an improper question.
- (7) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (8) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Notes

- 1 A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section—see section 195.
- 2 Section 41 differs from the Commonwealth Act and New South Wales Act.

Statement of the rule

The court must disallow an improper question or improper questioning put to a witness in cross-examination, or inform the witness that it need not be answered.

Improper questions are questions, or a sequence of question that:

- Are misleading or confusing;
- Are unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- Are put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate;
- Have no basis other than a stereotype (such as being based on the witness' sex, race, culture, ethnicity, age, or mental, intellectual or physical disability).

A question is not improper merely because:

- It challenges the witness' truthfulness, consistency or accuracy;
- It requires the witness to discuss a subject that may be distasteful or private to the witness.

The duty to disallow improper questions does not depend on whether a party raises an objection.

History of the provision

Section 41 was amended by *Justice Legislation Miscellaneous Amendment Act 2018* s 57, which commenced on 28 October 2018. Before that, the section contained separate provisions which stated that a court must disallow improper questions of vulnerable witnesses and may disallow improper questions of all witnesses. The amendments removed the special category of vulnerable witnesses, with the result the court must disallow improper questions asked of any witness.

Application of the rule

Section 41 directs attention to the effect of the questions on the witness. The court may consider the identity of the witness, such as the complainant in a sexual assault trial, when deciding whether the questions are unduly harassing, offensive or oppressive (*R v TA* (2003) 57 NSWLR 444, [8]-[13]).

Examples of improper questions

Asking the wife of the accused about having a ‘whirlwind courtship’, going ‘straight to the altar’ and that she ‘very quickly got to breeding again’ (*Murillo v The Queen* [2020] VSCA 68, [107]-[109]).

Compound questions – that is, a question that calls for more than one answer – are ambiguous, potentially confusing, and unfair to the witness in forcing the witness to choose which part of the question to answer and in what order (*Libke v The Queen* (2007) 230 CLR 559, [127] (Heydon J)).

A question about why a witness chose to give evidence on affirmation rather than oath may be improper, as the questions will likely either be irrelevant or unduly annoying, harassing, offensive or oppressive (*Werden v The Queen* [2015] VSCA 72, [128] (Priest JA)).

Asking a witness to an assault, who gave evidence that the victim had asked the attacker ‘what the bloody hell are you doing?’, whether ‘[the witness] perhaps want to suggest that the [victim] was engaged in the Socratic method of learning and thought he’d go and ask some questions. Is that what you’re trying to suggest?’ (*R v Forsyth* [2013] ACTSC 174, [52]).