

# Competency of Witnesses, Including Children<sup>1</sup>

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## Competency

Every person, including a child, is presumed to be competent to give evidence in a proceeding and competent to give evidence in a proceeding on oath: s 9 Evidence Act 1977.

“Child” is not defined in the Evidence Act, but is defined in the Acts Interpretation Act 1954 (Qld) as “... an individual who is under 18”: s 36.

The starting point is the presumption of competence, but an issue may be raised by a party to the proceeding or by the court in respect of either or both of two distinct questions: whether the person is competent to give evidence at all (dealt with in s 9A of the Evidence Act) and whether, if competent to give evidence, the person is competent to give it on oath or affirmation (s 9B).

If such an issue is raised, competence is decided by the judge alone. There will be various sources of information, such as questioning of the person on the voir dire, the section 93A tapes, and expert evidence. Expert evidence is admissible about the person’s level of intelligence, including their powers of perception, memory and expression, or other matters relevant to competence or ability to give reliable evidence: s 9C Evidence Act.<sup>2</sup>

## Competence to give evidence: s 9A

Where an issue is raised as to a person’s competence to give evidence, the statutory test is whether in the court’s opinion, the person is “able to give an intelligible account of events which he or she has observed or experienced” (regardless of the fact that the evidence is not given on oath).

The phrase “the person is able to give an intelligible account of events” probably means no more than that the person’s account of events is capable of being understood, rather than that it is necessarily truthful or accurate.

## Competence to give sworn evidence: s 9B

If an issue is raised as to whether the person is competent to give sworn evidence, the statutory test is whether, in the court’s opinion, the person understands that the giving of evidence is a serious matter and that in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

That test has nothing to do with belief in God or divine sanctions: *R v BBR* [2010] 1 Qd R 546. It derives from the test in *R v Hayes* [1977] 1 WLR 234, which focussed on “whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.”

It is a fundamental error of law to permit a witness to give unsworn testimony without determining the question of their competence to give sworn evidence under s 9B: *R v BBR* [2010] 1 Qd R 546; *R v MBT* [2012] QCA 343.

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<sup>1</sup> See “Protected Witnesses” (No 8), “Special Witnesses” (No 11) and “Evidence of Affected Children” (No 10).

<sup>2</sup> See the discussion of admissibility of opinion evidence in *R v D* (2003) 141 A Crim R 471.

<sup>4</sup> Section 632(3); *A* [2000] QCA 520 at [142]; *Robinson v The Queen* (1999) 197 CLR 162.

The court forms its opinion as to the witness's understanding in any manner in which it sees fit. In practice the age of the witness and the submissions of counsel will bear upon the court's opinion. The following are suggestions, but not a template, for questions which might be asked in assessing whether a person is competent to give evidence on oath:

- (a) Do you understand you are here in court today to answer questions about something involving [the defendant]?
- (b) Do you understand that answering questions in court is very serious? Why do you think that is?
- (c) Do you know what the difference is between telling the truth and telling a lie? Can you tell me?
- (d) If I were to say there was a tiger in the room where you are, would that be the truth or a lie?
- (e) Do you understand that it is even more important than usual to tell the truth when you answer questions in court?
- (f) Why do you think it would be particularly important that you tell the truth here in court?
- (g) Do you understand that if you don't tell the truth, you could get into trouble and you might hurt other people?

If the witness objects to being sworn but the conditions of s 9B are met, he or she can give evidence on solemn affirmation: s 17 Oaths Act 1867.

If the witness is competent to give evidence in the proceeding but is not competent to give the evidence on oath (or, it would follow, on affirmation), the evidence may be given unsworn (and unaffirmed). In that event, the court must explain to the person the duty of speaking the truth: s 9B(3) Evidence Act. Failure to give the explanation renders improper the receipt of the evidence which follows, vitiating the trial: *R v BBR* [2010] 1 Qd R 546; *R v MBT* [2012] QCA 343.

See also *R v Chalmers* [2013] 2 Qd R 175 where the trial judge raised the issue as to the complainant's competency to give sworn evidence. McMurdo P and Cullinane J decided that the trial judge should have proceeded under s 9B(2) to determine whether the complainant was competent to give evidence on oath as defined in that subsection, rather than simply assuming the complainant was not (so competent).

If evidence is admitted on the basis that the witness is competent under s 9A but it is not given on oath, the jury should be directed that the probative value of the evidence is not decreased only because the evidence is not given on oath (or affirmation): s 9D Evidence Act.

A finding that a child witness is not competent to give evidence in a proceeding precludes the admission of an earlier out of court statement by the child witness under section 93A of the *Evidence Act 1977*. However, a finding that a child witness is not competent to give evidence in a proceeding of itself does not preclude the admission of earlier out of court representations by that child witness under section 93B of the *Evidence Act 1977*.<sup>3</sup>

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<sup>3</sup> *R v SCJ; Ex parte Attorney General of Queensland* [2015] QCA 123.

The principles for dealing with a child witness are set out in s 9E of the *Evidence Act 1977*. These are that:

- (1) Because a child tends to be vulnerable in dealings with a person in authority, it is the Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving the child's evidence.*
- (2) The following general principles apply when dealing with a child witness in a proceeding –*
  - (a) the child is to be treated with dignity, respect and compassion;*
  - (b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;*
  - (c) the child should not be intimidated in cross-examination;*
  - (d) the proceeding should be resolved as quickly as possible.*
- (3) In this section –*  
*“Child” means a child under 16 years.”*