

YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Giving of evidence or information for purposes of criminal proceedings

Chapter V: Competence of witnesses and capacity to be sworn

184 The sections in this Chapter reform the law about who is to be considered competent to give evidence in criminal proceedings and about when evidence may be given unsworn.

Section 53 (and certain amendments made by Schedule 4): General rule of competence

185. The general rule, set out in this section, is that all people, whatever their age, are competent to act as witnesses unless they cannot understand questions asked of them in court, or cannot answer them in a way that can be understood (with, if necessary, the assistance of special measures under Chapter I).
186. *Subsection (4)* provides the only exception to the general rule: that a defendant is not competent to give evidence for the prosecution in his own trial, and nor is any co-defendant in the proceedings.
187. The new general rule renders obsolete the existing rules on the competence of husbands and wives to give evidence for or against each other. Those rules are contained in section 80 of the Police and Criminal Evidence Act 1984 which, accordingly, is amended by paragraph 13 of Schedule 4 (so as to become a provision solely about the compellability of husbands and wives who are competent to give evidence). Those amendments, taken together with section 52, will ensure that, in future, no-one who is a defendant in a trial will be a competent witness for the prosecution in respect of any offence in that trial until such time as he either pleads guilty, is convicted or the charges against him are dropped.

Section 54: Determining whether a witness is competent

188. This section sets out how a witness's competence is to be determined if it is questioned by the prosecution, the defence or the court itself.
189. When the court assesses the witness's competence, *subsection (3)* requires it to take into account any special measures it has granted, or is planning to grant, under Chapter I (including, for example, communication aids or the giving of evidence through an intermediary). This is to avoid a potential witness being judged not to be competent to be a witness if the use of special measures would make him competent.
190. If the witness's competence is challenged and he needs to be questioned, *subsection (6)* requires the questions to be asked by the court (and not by the party that is calling or

cross-examining the witness). Any such questioning will be done in the presence of both the prosecution and the defence. Courts will be allowed to ask for expert advice about the witness's competence. It will be the responsibility of the party calling the witness to satisfy the court that the witness is competent.

Section 55: Determining whether witnesses are to be sworn

191. This section sets out how courts are to decide whether a witness should swear an oath to tell the truth before giving evidence. Here, as in other legislation, references to swearing an oath include making an affirmation. *Subsection (1)* provides that the question of whether a witness is eligible to swear an oath may be raised by either party to the proceedings - i.e. prosecution or defence - or by the court itself. The procedure used to determine this question will be the same as the procedure outlined above for determining competence.
192. *Subsection (2)(a)* provides that no witness under the age of 14 is to be sworn. A witness of 14 or over is only eligible to be sworn if he understands the solemnity of a criminal trial and that taking an oath places a particular responsibility on him to tell the truth. If no evidence is offered suggesting that the witness does not understand those two matters, *subsection (3)* sets up a presumption that the witness is to be sworn if he is 14 or over.
193. *Subsections (5) – (7)* provide that, as with considerations of competence, the question of whether a witness should be sworn is to be considered in the absence of any jury (but in the presence of both the prosecution and the defence) and that expert evidence can be received on this subject.

Sections 56 and 57: Unsworn evidence

194. **Section 56** provides that anyone who is competent to be a witness but not allowed to give evidence on oath may give evidence unsworn. At present, a person aged 14 or over who cannot be sworn is not allowed to give evidence at all. **Section 57** describes the penalties for giving false unsworn evidence.
195. *Subsection (5)* of section 56 provides that convicted offenders will not be successful if they appeal against their convictions solely on the ground that a witness gave evidence unsworn when it should have been sworn.