

Chapter 3: Competence and Compellability. Special Measures.

Question One

- a) John is charged with assaulting Fred after a verbal exchange about football in a bus queue. John claims self-defence because he says Fred was wearing knuckleduster rings and he, John, only retaliated because he was afraid he would be badly hurt. John's wife, Hilda, was also in the bus queue but she is reluctant to appear as a witness for John. The prosecution are considering calling her as a witness. Fred is nineteen years old.

Advise John whether Hilda is competent and compellable for his defence.

- b) Gerald is facing trial for the sexual assault of Janet who is thirteen years old.

Advise the prosecution on how Janet may give evidence at trial.

Answer guidance

- a) The general rule of competence and compellability should be cited, see s53(1) Youth Justice and Criminal Evidence Act 1999. Spouses or civil partners are competent and compellable for the defence under s80(2) PACE 1984. However they may be hostile witnesses. Consider s80 (2A)(b) and (3) of the 1984 Act and discuss the relevance of the fact that the victim. Refer also to s80A PACE which forbids comment by the prosecution on the failure of a defendant to call his or her spouse to give evidence.
- b) It is important to state the general rule about competence and compellability of children set out in s53(1) YJCEA 1999 which reads that 'At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.' However a witness who is under fourteen years of age cannot or give sworn evidence, see s55(2)(a) YJCEA. A complainant in a sexual offence is eligible for the protective measures for vulnerable defendants (SMDs) on two grounds, namely if h/she is under eighteen years and is the alleged victim of a sexual assault. Sections 16-27 and 29-33 of the YJCEA should be referred to. Note that some sections of this statute are being introduced in stages eg s28 on video recorded cross examination. Reference should be made to the 'primary rule' of the presumption of the use of SMDs unless the child requests otherwise, s21(4) (b).

Question Two

Should the same Special Measures Directions for vulnerable non –defendant witnesses apply to vulnerable defendants? Give reasons for your answer.

Answer guidance

The background to this question is that the UK's treatment of child defendants has been under scrutiny by the Strasbourg Court, see *T v UK* [2000] 30 EHRR 121. The first part of the essay should set the context for the question by comparing the Special Measures Directions for non-defendant witnesses in the Youth Justice and Criminal Evidence Act 1999 with the limited protection for vulnerable defendants in the Police and Justice Act 2006 and the Coroners and Justice Act 2009. You should set out the arguments for and against the case for equality of arms in this area. Reference should be made on the one hand to judgments in the English courts which have found that the current position in relation to defendants does not violate Article 6, see *R v Waltham Forest Youth Court* [2004] 2 Cr App R 21 and *R (D) v Camberwell Green Court* [2005] 1 All ER 999. See also *R v Ukpabio* [2008] 1 WLR 728 in relation to the availability of common law powers for vulnerable adult defendants. On the other hand there is unease, expressed for example by academics such as Hoyano (2010) *Crim LR* 345, that defendants are disadvantaged under the current limited statutory provisions. Cases such as *R v Watts* [2010] EWCA 1824 should be cited. The contextual background to the current approach should be discussed. Reference should be made to the political emphasis on improving treatment of victims' and encouraging reporting of offences particularly sexual assaults. Other measures for protecting victims include increased admissibility of hearsay evidence and protecting non-defendant witnesses from the admissibility of bad character. The essay should address the ECHR treatment of vulnerable defendants, for example under Article 8.