

# Credibility Evidence

ss101A – 110 Evidence Act (NSW) 1995

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Credibility evidence includes prior offending and acts of dishonesty that were not criminal or did not result in criminal proceedings. Such evidence is relevant solely to the credibility of a witness and, in general, is not admissible in court proceedings. However, there are many exceptions to this rule and further rules that apply only in criminal proceedings.

In general, if Defence counsel adduces evidence to attack the credibility of the complainant or other prosecution witnesses, he 'opens the gateway' for the prosecutor to adduce credibility evidence against the defendant. Every defence lawyer needs to understand these rules in order to decide whether to open the gateway and to represent their clients effectively.

## Definition

Section 101A Evidence Act defines credibility evidence:

*Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—*

- (a) is relevant only because it affects the assessment of the credibility of the witness or person, or*
- (b) is relevant—*
  - (i) because it affects the assessment of the credibility of the witness or person, and*
  - (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.*

Section 102 Evidence Act provides that such evidence is inadmissible. However, ss103 – 110 provide six exceptions to the rule:

- evidence adduced in cross-examination (ss103 & 104)
- evidence in rebuttal of denials (s106)
- evidence to re-establish credibility (s108)
- evidence of persons with specialised knowledge (s108C)
- character of accused persons (s110)
- credibility evidence about a person who has made a previous representation but is not a witness (ss108A & 108B).

## Cross-Examination <sup>1</sup>

The rule does not apply to evidence adduced in cross-examination that could 'substantially affect' the assessment of the credibility of the witness. In making the determination about 'substantial affect', the court must have regard to:

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<sup>1</sup> s103 Evidence Act (NSW) 1995

- (a) *whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and*
- (b) *the period that has elapsed since the acts or events to which the evidence relates were done or occurred.*

## ‘Opening the Gateway’ in Criminal Proceedings

Further protections are provided for defendants in criminal proceedings. A defendant cannot be cross-examined about a matter relevant solely to his or her credibility unless the court grants leave.<sup>2</sup> The court must not grant leave unless the defendant has adduced evidence to attack the credibility of a prosecution witness which does not relate to the offence being prosecuted.<sup>3</sup> This is known as ‘opening the gateway’.

So, accusing a prosecution witness of lying about the alleged offence will not open the gateway, but accusing them of dishonesty on other occasions will. Deciding whether to open the gateway and attack prosecution witnesses can be a very difficult forensic decision. Counsel should always obtain the client’s criminal history and get instructions about what the witness might say about the defendant in response.

## Section 137 Evidence Act

Even where the Defence has ‘opened the gateway’, the Defence can still apply to exclude credibility evidence in reply under s137 on the basis that its probative value is outweighed by the danger of unfair prejudice to the defendant. So, it is open to the Defence to ventilate all the credibility evidence in the absence of the jury and ask the bench to determine whether the credibility evidence in reply should be received into evidence or excluded under s137.

## Three Step Process

So, before the prosecution can lead credibility evidence against an Accused person:

1. The Defence must adduce credibility evidence against a prosecution witness,
2. The Prosecutor must seek and obtain leave of the court, and
3. The court must consider whether the probative value of the proposed credibility evidence against the accused is outweighed by its prejudicial value.

I’m available every day if you have any interesting issues.

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<sup>2</sup> s104(2) Evidence Act (NSW) 1995

<sup>3</sup> s104(4) Evidence Act (NSW) 1995