

LAWS399 EVIDENCE LAW NOTES | TABLE OF CONTENTS

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CREDIBILITY & CHARACTER EVIDENCE

(1) CREDIBILITY EVIDENCE

Credibility Evidence

- **Evidence that goes to the credibility of a witness and their reliability**
 - o If the witness is believable then their evidence is considered to be reliable
- **Probative** about a witness's reliability
- This kind of evidence is different to hearsay, opinion, admissions because they have all been about the facts in issue
- Credibility evidence is not about facts in issue
 - o Evidence about a witness
- Evidence about **collateral** facts to facts in issue
 - o Similar to other collateral facts evidence such as evidence of facts that might amount to tendency and coincidental evidence
- **Probative** about a witness's reliability

Definition of Credibility Evidence

- **Dictionary of Evidence Act 1995 (NSW)**
 - o Partly helpful but doesn't give us the full story
 - o **"Credibility"** of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence
- **Analysis of Dictionary**
 - o Might refer to the totality of the witness's evidence or it might simply refer to one **piece** of evidence that they have given
 - o This definition only attempts to address **credibility** but doesn't attempt to address **credibility EVIDENCE**
 - o **It includes matters that are relevant to the witness's:**
 - Reputation
 - Expertise

- Honesty
- Motive
 - To exaggerate
 - To lie
- Consistency or inconsistency with other statements that they have made
- Ability to **recall** events
- Ability to memorise events
- Ability to perceive events
- Ability to observe events
- Ability to understand events
- **When you put them all together, there are two basic things that the witness's credibility refers to**
- **Generally, TWO basic things about the credibility of the evidence**
 - **1.** Things that are associated with their honesty, varsity etc.
 - **2.** Their capacity and their opportunity to perceive events; understand what they've seen

Relevancy of Credibility Evidence

- **RELEVANCY** Even though it is not about facts in issue directly, it is relevant evidence because it **indirectly** affects the probability of the existence of the facts about which the witness is giving evidence
 - Relevant because it affects the probability that the witness is telling the truth, recall events, witness is mistaken or not mistaken about what they've seen
- Credibility evidence **is relevant because it indirectly affects the assessment of the probability of the existence of a fact in issue**
- **Section 55 (2) Relevance Evidence**
 - **2)** ...evidence is not taken to be **irrelevant** only because it relates only to...the **credibility** of a witness

Admissibility of Credibility Evidence

- Why is there an exclusionary rule – why do we exclude it?
- **Rationale of exclusion**
 - By focusing too much on a witness there is a danger that the FF might stray from the main issue and be overtaken by factors relating to the witness and that the FF will ignore their very purpose – to determine the facts in issue
 - **Problems could arise in the fact finding process (DANGERS)**
 - If courts are too willing to hear about the **credibility** of witnesses, plaintiffs, defendants, other witnesses generally
 - Evidence about **credibility** can sometimes be very **misleading**. A witness could be telling the truth about a particular fact in issue, although generally they may be a person without much credit. Also a witness could be lying or mistaken about a fact in issue although they are generally a person that appears to be very credible.
 - Parties could be leading **endless evidence** about whether one witness is more believable than another witness etc. Thus the FF would therefore be **diverted** from the real issue and end up only thinking about these **collateral** issues
 - The common law and the act have generally taken the view that such evidence should be excluded because of the danger that it takes the jury's eye of its primary task
 - Unless it is important enough (CE) to admit under some exceptions

Limited types of Evidence that will be considered Credibility Evidence – thus will not be admissible in which event we would have to go to the exceptions

- What we mean by credibility evidence so that it would be inadmissible and we would therefore have to go to the exceptions

Main Exclusionary Rule

- Section 102 – The credibility rule

- Credibility evidence about a witness is not admissible.

- **Analysis of Section 102**

- It is not admissible but it is admissible under the certain exceptions and it can be very important
 - Why should courts not be able to hear about these indirectly relevant and collateral issues?
- Once we know that witnesses have a motive to lie then this will affect the fact finders reasoning process about the facts in issue and they could possibly be affected in an important way
- **Section 102 has to be read together with Section 101A**

- **Section 101A: 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**

- **Analysis of Section 101A**

- This section **narrows the scope** of inadmissible credibility evidence in order to give courts greater scope for admitting such evidence where it would be helpful to the fact-finder
- Section 101A through this key provision
 - We can see that evidence can be relevant either for a credibility purpose or for a non-credibility purpose
- Credibility Purpose
 - Evidence that affects the assessment of the witness's credibility
 - If evidence is admitted for a credibility purpose, it is admitted for a purpose that goes to the witness's credibility
- Non Credibility Purpose
 - Evidence that does **not** affect the assessment of the witness's credibility

- **Credibility evidence will be inadmissible in two types of situations – unless there is an exception**

- 1. Where the evidence is relevant only to the credibility of the witness and nothing else (Section 101A (A))
- 2. Where evidence is relevant to the credibility of the witness and for some **other** purpose for which it is not admissible
 - **Other purpose is limited to Part 3.2 -3. 6 (admission, hearsay, tendency, coincidence)**
- **Two key provisions**
 - **Section 101**
 - Credibility evidence is admissible
 - Section 101A
 - Defines what credibility evidence may be in any given situation

Combined Effects of Sections 101A and 102

- 1. If the evidence is only about the credibility of a witness (i.e. relevant only for a credibility purpose), it is **inadmissible** unless it satisfies one of the exceptions
- 2. If the evidence is relevant for a credibility purpose and for a non-credibility purpose, and it is **inadmissible** for that other non-credibility purpose, it is also **inadmissible** for its credibility purpose unless it satisfies one of the exceptions
- 3. If the evidence is relevant for a credibility purpose and for a non-credibility purpose, and it is **admissible** for that other purpose, then it becomes **admissible** for its credibility purpose as well
- 4. If the evidence is **completely prohibited** by one or other of the exclusionary rules, it cannot be used for a credibility purpose or any other purpose

Examples of how the above could work

- **Example 1 – where the other purpose might be a hearsay purpose**
 - Where the witness has made a prior statement which supports the prosecution case and then comes to court and gives unfavourable evidence at the trial (i.e. prior inconsistent statement situation).

- E.g. The witness was present at the scene, they saw something and tell police that there was a big fight and they saw Adam with a knife in his hand. Then they come to court later and they say they didn't see anything – thus PIC
- **Dual Relevance**
 - You want to get evidence in of that PIC. The prior statement to police is a previous representation.
 - **That PR is relevant both for the credibility of the witness and to the truth of the facts that are asserted in that PR – also relevant for a hearsay purpose** because it goes directly to the truth of the asserted fact (fact in issue – he had a knife in his hand)
- Categories
 - Because it is of a dual relevance purpose – it doesn't fit into the first category above (section 101A [A])
- Does it **fall** within Section 101A (B)?
 - **If it is not admissible for its hearsay purpose** or other exceptions, then YES, it is **credibility** evidence and it is inadmissible under section 102 unless you go through the exceptions successfully
 - **If it admissible for its hearsay purpose (first hand hearsay- maker is available)** then its admissible for that hearsay purpose and the credibility rule **would not apply** and it could be used to assess the witness's credibility without having to go through the credibility exceptions
- **Example 2 – Opinion Evidence**
 - We have a plaintiff who is injured. He gives evidence to a doctor about what happened and in there, there are statements about how the accident happened etc. We may have his doctor's report to be admitted that expresses an opinion and it corroborates a plaintiff's version of events.
 - **Can we use the doctors report not only for its opinion purpose but also for its credibility purpose – to bolster the plaintiff's credibility in relation to the testimony he has given in which the way he was injured?**
 - **1.** If the statement is admissible for its opinion purpose (e.g. specialised knowledge exception) then that makes it admissible also for its credibility purpose

- **2.** If the statement is **inadmissible** under the opinion exceptions (e.g. doesn't satisfy SK exception) then that statement would also be inadmissible for a credibility purpose unless a credibility exception is successful
- **Example 3 – Admissions**
 - If the evidence is of an admission which is then ruled **inadmissible** because it was obtained under threat of violence (84), or because it was unreliable because of the circumstances in which it was made (85), or not signed (86).
 - Then the evidence would fall under section 101A (B) unless exceptions are successful
- **Thus it is necessary to identify the purpose of purposes for which the evidence is relevant**
 - If the evidence relevant to credibility or is the evidence relevant to facts in issue or is it relevant to both?

How do we distinguish between evidence that is relevant to credibility and evidence relevant to issue?

- The **Key is to understand** that there is often very little evidence relevant to credibility but it is not at the same time relevant to facts in issue
- **Palmer v R (1998) 151 ALR 16 – McHugh J**
 - 'The line between evidence relevant to credit and evidence relevant to a fact in issue, is often indistinct and unhelpful'
 - **The rationale for distinguishing between credibility evidence and evidence that goes to fact in issue is not a distinction that is based on LOGIC**
 - The distinction is one of **efficiency** and **expediency**
 - It's a pragmatic distinction that the common law and evidence act makes in order to prevent litigation from being side-tracked into marginal issues and time wasting.
 - 'Evidence concerning the credibility of the witness is as relevant to proof of an issue as are the facts opposed to by the witness'
 - **Example**

- There is no difference between accepting that a car went through a red light (FII) and accepting the witness who says that the car went through the red light (credibility)
 - If you accept that the witness is credible then you have basically accepted their evidence that the car went through the red light – **vice versa**
 - **Thus, if you can get the evidence in under a hearsay exception, opinion exception etc.**
 - Then it will be reliable enough to be taken into a credibility purpose as well
 - Traditional **common law method** for testing whether a piece of evidence is relevant only to credibility and therefore inadmissible or relevant to both credibility and facts in issue comes from **Attorney General v Hitchcock (down below)**
 - **SUMMARY**
 - We know that credibility
- Attorney General v Hitchcock (1847) 1 Exchequer 91 – Pollock CB**
- **Justice Pollock said:** you should ask the following questions:
 - **1. Is the matter sufficiently relevant to the facts in issue that the party would have been permitted to lead evidence of it in examination in chief (case in chief) regardless of whether or not the particular witness was giving evidence**
 - If it is, it is relevant to credibility and issue
 - If it's not, its relevant only to credibility
 - **If the relevance of the evidence depends on whether or not a PARTICULAR PERSON is giving the evidence (this was the FIRST QUESTION BY JUSTICE POLLOCK IN AG V H)**
 - It's likely that the evidence is relevant **only** to the credibility of the witness.
 - **Example**
 - **Situation 1:** Assume that we have a witness and that witness gives evidence that the witness said she saw the Holden go through the red light. If that witness was 100m away from the scene – any evidence that goes to showing that she had a sight impairment or

that she wasn't wearing glasses at the time – that sort of evidence would be relevant **only to her credibility**

- This is because if the witness was not giving evidence about the accident, the fact that she was short-sighted would not be relevant at all to the case
- **Situation 2:** Say you have evidence of the witness that she couldn't have seen that because she was overseas on that day. If it turns out that she was overseas, then evidence of this kind would be very relevant (high probative value) but that evidence would be relevant **only** to her credibility.
- If the witness was not giving evidence about this accident, then the fact that she was overseas or not would be totally irrelevant to the proceedings unless an exception could be applied
- **Would the prosecution in the above matter be allowed to lead the evidence in EIC (about sight impairment) regardless of whether or not the particular witness was giving evidence**
 - NO. Any questions directed at the witness about these things would clearly be relevant to credibility only and would come within the first category of section 101A and it would be inadmissible because of section 102 unless exceptions.

- **Summary of Credibility Evidence**

- **1.** We know that credibility evidence is basically about a witnesses' reliability and honesty on one hand and on the other hand their capacity and opportunity to perceive, observe and understand events
- **2.** If the witness is about the witness themselves, this is a good indication that it has a credibility purpose.
- **3.** To decide whether a piece of evidence does have a credibility purpose, you can ask the question:
 - **Is that evidence SO RELEVANT to the fact in issue that it could be lead in the parties case in chief**
 - **If it is:**
 - it's unlikely to be relevant only to credibility
 - **If it's not relevant in that way**
 - It's likely to be relevant to credibility ONLY

- 4. Evidence that only has a credibility purpose is admissible because it falls within Section 101A (A) unless exception
 - **however**, we know that evidence may have a credibility purpose and also some other purpose
- 5. Evidence that has a credibility and some other purpose
 - Might be admissible but its only admissible for its credibility only if it is admissible for that other purpose
 - If it is not admissible for that other purpose, it is not admissible for its credibility purpose other
 - ^ The evidence may still be admissible if an exception can be found

Two principal ways of getting credibility evidence into evidence are:

- 1. To argue that the evidence is admissible for **another purpose** (a non-credibility purpose) and a credibility purpose at the same time. And thus get it in through section 101A (B)
 - We are avoiding section 102 in this way by using section 101A
- 2. To argue that evidence should be admitted under one of the credibility **exceptions**
 - In this way we are using the exceptions to Section 102

EXCEPTIONS to the Credibility Rule

- **If we end up with evidence that is relevant for the witness's credibility or for another purpose for which it is inadmissible then we have to go to the exceptions, as it offends the credibility rule.**
- **These exceptions basically apply in the content of 3 situations**
 - 1. SITUATION 1
 - **Attack credibility of the opponent's witness (most common)**
 - **Sections 103 and 104**
 - 2. SITUATION 2
 - **Where we are bolstering or re-establishing the credibility of our own witness because their credibility has been damaged or comprised**
 - 3. SITUATION 3

- **Attacking the credibility of our own witness (unfavourable witness section 38) – not as common as those 2 above**

SITUATION 1: ATTACKING CREDIBILITY OF THE OPPONENTS WITNESS

Section 103 Exception: Cross-examination as to credibility

- Section 103 Exception: Cross-examination as to credibility

- **1)** The credibility rule does not apply to evidence adduced in **cross-examination** of a witness if the evidence could substantially affect the assessment of the credibility of the witness.
- **2)** Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:
 - **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.

- Analysis of Section 103

- In this section, you want to:
 - Cross examine someone to show that they are lying, fabricating evidence or somehow their ability to recall what they saw is compromised or that they weren't in any good position to see what they claim, perceive it e.g.
- **Aim of Section 103**
 - To impeach the credibility of the witness during the cross examination of that witness
 - You can ask them anything that is relevant to their credibility if it could **substantially affect the FF's assessment of their credibility as a witness**
 - The court may take any matter into account but must take into account:
 - 1) Anything that established that the witness has lied

- 2) Amount of time between the event and giving of the evidence
- This section has a higher threshold than at common law (substantially)
 - Common Law
 - Almost any question about the witness' credibility was allowed
 - ALRC
 - Explained that they have tried to tighten this up so you aren't able to attack the witness's credibility totally, there are some limitations
 - A witness should no longer be open to cross-examination on any negative affect aspect of character or misconduct on the basis that is relevant to credibility
 - Emphasis should be placed on evidence of conduct which is similar to testifying untruthfully
 - Involves false statements and which took place in circumstance similar to those testifying
 - **Obligation to tell the truth**
 - Only under this obligation when there is some legal requirement
 - Just because you are a liar by nature
 - That's not enough. There has to be some indication that you tend to lie whilst under an obligation to tell the truth
- **Purpose of 103**
 - Is to allow cross-examination on a range of matters that arise typically from the EIC of witnesses, such as:
 - Their capacity and opportunity for accurate observation and recollection
 - Motives for being untruthful
 - Their prior convictions as long as those convictions are reasonably recent and reflective of dishonesty generally
 - Prior inconsistent statements about the events that are in question

- Their contradictions in the evidence that they have given in or outside of court
 - Any failures by the witness to tell the truth whilst under an obligation to tell the truth
- These matters are limited to conduct or characteristics of the witness which would logically and rationally weaken confidence and their trustworthiness **as a witness, not as a person** (case of Bickel)
- **Bickel v John Fairfax & Sons [1981] 2 NSWLR 474**
 - Facts
 - Bickel was a science writer for the ABC and other places. He wrote a book 'Deadly Element' about uranium etc.
 - There was a scathing book review of his book that was published in 1980 in a newspaper in the National Times. Bickel sued for defamation. He sued John Fairfax and Sons for defamation.
 - He won the case and the jury awarded him damages.
 - Justice Hunt in NSW Supreme Court
 - Refused to allow questions in cross examination of Bickel about his political beliefs – supposed connections to communist party etc.
 - He said: the above cross examination (politics) was not directed to showing his credibility or his veracity as a witness. It was directed to prejudicing the court against the witness as a **person**.
 - This was not allowed

Section 104 Further Protections: Cross examination as to credibility

- Section 104 Further Protections: Cross examination as to credibility

- **1)** This section applies only to the credibility evidence in a criminal proceeding and so applies in addition to section 103
- **2)** A **defendant must not be cross-examined** about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives **leave**
- **3)** Despite subsection (2) leave is not required for cross-examination by the prosecutor about whether the defendant
 - **A)** is **biased** or has a **motive** to be untruthful, or

- **B)** is, or was, **unable to be aware** of or recall matters to which his or her evidence relates, or
 - **C)** has made a **prior inconsistent statement**
- **4)** Leave must not be given for cross examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:
 - **A)** Tends to prove that a witness called by the prosecutor has a **tendency to be untruthful**, and
 - **B)** Is relevant solely or mainly to the witness's credibility
- **6)** Leave is not to be given for cross-examination by another defendant unless:
 - **A)** the evidence that the defendant to be cross-examined has given includes evidence **adverse to the defendant seeking leave** to cross-examine, and
 - **B)** That evidence has been admitted
- **Analysis of Section 104**
 - Section 104 starts with the **general proposition** that leave of the court is required to CE a defendant about their credibility except some certain situations in 104 (3)
 - **This provision says that section 103 continued to apply**
 - It applies in addition to section 103
 - **You still have to pass the Section 103 test (sustainably affecting the credibility of the witness to be admissible)**
 - However, section 104 (3) qualifies the preceding rule quite heavily
 - **According to 104 (3)**
 - Leave is not required where the prosecutor is CE to accused and if the evidence goes to the matters:
 - **1)** Biased in relation to a particular matter or aspect of the case rather than his bias in the general outcome of the case
 - **2)** motive in relation to a particular aspect
 - **3)** Ability to recollect or perceive events
 - **4)** Any prior inconsistent statements

- **According to 104 (4)**
 - Where the accused has adduced evidence that goes towards attacking the character of a prosecution witness on the basis of the prosecution witness has been untruthful etc. then the prosecutor is allowed to cross-examine the defendant as to the defendant's character etc.
 - **Rationale**
 - The jury is entitled to know the credit on who's words the prosecution's witness' character is being attacked
 - If the D attacks a prosecution's witness' credibility, then you can attack the credibility of the witness without leave because we are entitled to know about the credibility of the person who attacks our credibility.
- **104 (6) – protection for co-defendants**
 - Sometimes with a co-defendant, the defendants will go against each other.
 - E.g. to attack them and adduce evidence that makes them guilty
 - A co-defendant will be able to cross-examine the defendant will leave is the defendant's evidence is at least in part adverse to the co-defendant
 - **Adverse means:**
 - Any evidence that objectively supports the prosecution's case against the co-defendant
 - If this is the case – you may cross examine the defendant with leave.
- **When a court is deciding whether to grant leave or not**
 - The judge must have regard to certain matters in **Section 192**
 - E.g. length of hearing, unfairness, nature of proceedings, gravity of offence, alternative orders or directions etc.
 - **The most important of those factors would be any unfairness to the defendant**

- **Stanoevski v The Queen (2001) 202 CLR 115**

- Facts: in this case the court gave leave to cross-examine the defendant about a prior incident. This was the legal practitioner who had never been in trouble in her life and somehow she was charged with being involved with some sort of insurance scam on a car.
 - She said: no I didn't do it, am I the sort of person. She raised her character. They were going to cross-examine her about law society investigation about whether she had properly witnessed a client's signature on a document.
- The judge allowed the judge to cross-examine her about this issue (client)
 - the judge allowed this and the trial judge gave a direction to the jury that there was no evidence that she had forged any signature but the allegation that she could have witnessed the signature incorrectly, could affect the jury's assessment of her character.
- High Court
 - High Court was not happy with the trial judge and section 102. They held that she was cross-examined in breach of the evidence act. Her conviction was therefore not to stand unless the prosecution could establish that there was no miscarriage of justice.
- **Thus judges have to be careful when giving leave.**
 - **It could potentially lead the jury to misuse the evidence adduced in the cross examination**
 - **Example**
 - Evidence of a tendency that they have. A tendency to be violent. Where the evidence would otherwise be inadmissible as tendency evidence.
 - You're getting tendency evidence through the back door – it's got to have significant probative value but people try and get it in through leave for credibility (this was in the case of **Matusevich v The Queen**)

- **Matusevich v The Queen (1977) 137 CLR 633**

- Facts
 - The defendants raised certain issues about the credibility and character of his co-defendant Matusevich
 - Matusevich said that his co-defendant was crazy and that's why he did the damage
- Cross Examine
 - Was allowed on the basis that he had impugned the character of the co-accused.
 - Then cross-examined about this own credibility and character
 - Specifically, about his prior convictions and he ended up being convicted
- Appeal
 - Said that that was done incorrectly because by cross examining him about this prior convictions, the jury were allowed to see his prior convictions
 - These were acts of violence, serious assaults
 - He argued that the evidence about his prior convictions obtained through cross-examination were inadmissible and the high court agreed and said that the crown should not have taken advantage of the fact that one co –accused gave evidence adverse to another co-accused in order to raise their credibility or character an issue.
 - Only the co-accused who interest was adversely affected could do that
 - This was unfair to Matusevich because the jury would have seen this as evidence that went against him.
 - His tendency to be violent, escape from custody
 - Which otherwise would have been inadmissible if they tried to get it in through evidence of tendency
 - E.g. significant probative value, notice – test
 - The court said **the granting of leave to the crown in such cases is likely to be extremely rare.**

Section 106 Exception: Rebutting denials by other evidence

- Section 106 Exception: Rebutting denials by other evidence

- **1)** The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced **otherwise than from the witness** if:
 - **A)** In cross-examination of the witness:
 - **I)** The substance of the evidence was put to the witness, and
 - **II)** The witness denied, or did not admit or agree to, the substance of the evidence, and
 - **B)** The court gives leave to adduce the evidence
- **2)** Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness"
 - **A)** Is biased or has a **motive** for being untruthful, or
 - **B)** Has been **convicted** of an offence, including an offence against the law of a foreign country, or
 - **C)** Has made a **prior inconsistent statement**, or
 - **D)** Is, or was **unable to be aware** of matters to which his or her evidence relates, or
 - **E)** Has **knowingly or recklessly made a false representation** while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

- Analysis of Section 106

- **What this section means**
 - What happens when an allegation is put to a witness in order to undermine their credibility in cross-examination e.g. and the witness denies that allegation.
 - Can the cross examiner lead evidence in rebuttal of the denial? i.e. to prove the truth of the allegation
- **The evidence act has moved on from the Common Law in this area**
 - Common Law
 - Generally, it says that credibility issues are collateral issues. Where the allegation is relevant only to the credibility of the witness, the answer that the witness gives should be

regarded as final even though the FF doesn't have to accept that answer as true.

- The cross-examiner may not then lead evidence to disprove the rebuttal.
- This is based on efficiency and fairness
 - As otherwise, if you did allow that then you have to allow the other side to bring in evidence to disprove the rebuttal and it goes on forever.
 - It would encourage endless collateral issues and thus taken your eye off the fact in issue.
- This **danger is illustrated by Goldsmith case**

- **As to Section 106 (2)**

- Other evidence may be brought in. Whereas the common law has said you don't do it – it takes your eye off everything.
- Other evidence may be brought in to rebuttal a denial as long as the substance of the evidence was put to the witness in CE after the Cross Examiner was given permission to CE about the matter under section 103 (sustainably affect etc.) and the witness either denied it or did not agree to it and the court gives leave (section 192)

- **Goldsmith v Sandilands (2002) 190 ALR 370**

- Facts
 - We had a civil case. Police officer was a passenger in a police car. That police car was involved in some police business. The police car was involved in a car accident and the police officer was injured.
 - He routinely sued for his injuries – he sued the police department and the driver of the car.
- Evidence
 - Evidence was given by the driver of the car (defendant) that a couple of days before the accident, the plaintiff (injured police officer) played indoor cricket with him. He complained at the time that he had 'stuffed his back'. Then two days later there was the car accident.
- Cross Examined

- They CE the plaintiff about that. The plaintiff denied saying he stuffed his back but he did agree that he did agree he played indoor cricket before the accident.
- Problem
 - It became clear that the driver who raised this issue couldn't remember where they had played indoor cricket. Then the driver's council CE the plaintiff about the exact address of the venue. He couldn't remember either.
 - This went out of control and was unnecessary because the P already conceded he played cricket.
- Council for the plaintiff sorts leave
 - To re-open the case to lead evidence proving the location of where they played cricket in order to bolster his credibility.
 - This was refused.
- High Court
 - HC agreed that it should have been refused.
 - **Basis:** The location of where they played cricket was a collateral issue in view of the plaintiff's concession that he had played cricket. If he had denied, possibly would have been legitimate to pursue this relevant to his credit. Even if it happened, still a collateral issue
- Justice McHugh
 - Called for greater flexibility on this kind of evidence. This was provided for by allowing for leave to be given under section 106 (2)
- This is essentially where somebody has denied something put to them in cross examination that goes to their credibility
 - To what extent are you allowed to seek evidence to rebut the denial
 - Clearly, the court will want to put a 'cap' on this kind of evidence unless it goes to serious matters relating to the credibility of the witness
 - Otherwise it is not that important (e.g. where you played cricket)

SITUATION 2: BOLSTERING THE CREDIBILITY OF OUR OWN WITNESS

Section 108 Exception: re-establishing credibility

- Section 108 Exception: re-establishing credibility

- **1)** The credibility rule does not apply to evidence adduced in re-examination of a witness
- **3)** The credibility rule does not apply to evidence of a **prior inconsistent statement** of a witness if:
 - **A)** Evidence of a **prior inconsistent statement** of the witness has been admitted, or
 - **B)** It is or will be suggested (either expressly or by implication) that evidence given by the witness has been **fabricated or re-constructed** (whether deliberately or otherwise) or is the result of a **suggestion**, and the court gives **leave** to adduce the evidence of the prior consistent statement

- Analysis of Section 108

- Where the credibility of a witness has been undermined during cross examination, then the party calling the witness may leave credibility evidence in **re-examination** to restore the witness's credibility, even though such evidence would not have been permitted to be led in examination in chief
- **As to Section 108 (1)**
 - The credibility rule does not apply when we are re-examining our own witnesses
 - This will take place in re-examination and remember that section 39 limits re-examination to certain things
 - Limits to matters arising out of cross examination or matters for which the court gives leave
 - This includes situations where matters relevant to credibility have been raised in cross examination and they were denied by your witness and then they were rebutted by the cross-examiner
 - You can use 108 (1) to rebut the rebuttal of your own witness
- **As to Section 108 (3)**

- It creates two exceptions.
 - **1. Section 108 (3)(a):** where you want to lead evidence of a prior inconsistent statement that is consistent with what they said in examination in chief
 - You try and bring in evidence of a prior consistent statement (statement that is consistent with what they said in EIC but which has been diminished in CE)
 - **You may do so to counter the weight of the PIC with evidence of the PCS to restore the witness's credibility**
 - **2. Section 108 (3) (b):** to rebut an allegation of recent invention in cross examination
 - Now you are raising this issue for the first time and this is recent invention, fabrication or re-construction that results of a suggestion etc.
 - If they say 'no, it's not' – then evidence may be lead of past statements that are consistent with the witness's evidence to diminish any suggestion of recent invention or fabrication
- **Leave of the court is required**
 - In exercising discretion to give or not to give leave, the court should mostly have regard to the **relevance of the prior consistent statement** to the actual attack of the witness's credibility
 - Could depend on the (1) timing and (2) circumstances of the prior consistent statement

- **R v Cassar [1999] NSWSC 352**

- Gives an example of how Section 108 can be used as it can be very effective in restoring your witness's credibility
- **Facts**
 - Criminal matter. There was a witness in court and he said he saw the accused and another accused push the victim and stab the victim.
 - When he first spoke to police, he said that he didn't see anything but in court he said he saw them stabbing and pushing the victim.

- Seven months after he first made that statement to the police, he changed his mind and he told the police – I really did see something but the reason I said I didn't see something (at the BEG) was because I was afraid of threats made against me and my family.
- Court
 - It was put to him that all of this was a fabrication and to counter this, the prosecution was given leave to lead evidence that the witness had told a friend before he made the initial statement to the police, that he **had** seen the victim being stabbed and that he had been threatened about giving evidence.
 - This sort of countered and explained his actions
 - That consistent statement was used to bolster his credibility

SITUATION 3: ATTACKING OWN WITNESS (UNFAVOURABLE WITNESSES)

- **A witness called by a party to give evidence, that witness may turn out to be unfavourable – then the party that called that witness may be able to cross-examine their own witness under section 38 and the cross-examination may include CE on matters relevant only to their credibility (with leave of the court)**

Short Summary

1. You can't leave evidence of credibility unless it is admissible for another purposes otherwise you have to go to the exceptions
2. These exceptions are all designed to be able to get credibility out in circumstances where it would be useful for the fact finder.
3. Work through those three situations and work through the exceptions if it is not admissible

(2) CHARACTER EVIDENCE

General Information & Background

- With character evidence we are talking specifically about Part 3.8 of the Evidence act – there are only 4 provisions
 - o Section 109
 - o Section 110
 - o Section 111
 - o Section 112

Few Preliminary Things about Character and Character Evidence

- **Character is not defined in the evidence act**
 - o It combined moral, ethical, psychological attributes etc.
- **Melbourne v The Queen (HIGH COURT DECISION)**
 - o **Character** was described as the aggregate of qualities which distinguishes one person from another, or
 - o The moral constitution of a person
 - o Embodies the permanent and unchanging pattern of the nature of the individual concerned

Evidence about a person's character can be relevant in several different contexts

- **1.** The witness's displayed a **tendency** to act in a particular way or to have a particular state of mind (tendency) is regarded as evidence of their **character** and we saw that if that's the evidence you want to adduce in order to establish that they have a particular tendency
 - o **You can do that** but you have to do it through Section 97 (tendency) and the exceptions to Section 97
- **2.** Character is a form of **credibility** evidence in the sense that a particular person's character goes to their honesty, veracity, reliability, credibility etc.
 - o **In this context** – evidence of the witnesses character in so far as it relates to their credibility of a witness is subject to the rules in Part 3.7
 - Generally, it is inadmissible if it goes only to their credibility (unless exception)

- **3. Part 3.8 – ‘Character’**
 - This part deals only with the character of an accused person in criminal proceedings. It got a very specific and limited focus
 - They are not relevant in civil cases and this context, character evidence can only be relevant for the evidence given by a defendant or a co-defendant, not to witnesses generally.
 - However, you **can** attack the credibility of a witness generally but this has to be done through tendency and credibility
 - But under 3.8 it is only in criminal cases where the character is the character of the defendant or the co-defendant

Historically, there were interesting things in this area

- A long time ago:
 - Defendants couldn't give evidence in their own trial
 - They couldn't give evidence in their own interest
 - No one would believe them
 - This changed in the late 19th century – after which they could give evidence generally and be cross-examined generally
- Issue arose in criminal trial
 - About whether they could be cross examined about their character, their past, prior conduct, prior convictions, reputation
 - There was a fear that the jury would use it in a dangerously prejudicial way.
 - As defendants didn't really have good characters and they were more likely to be convicted by the jury
 - Danger that jury would convict people on the basis of their prior conduct even if they were unconvinced of the matter before the court
- Thus legalisation allowed a general rule that defendants could not be cross examined about their character unless they open their character

Section 110: Evidence about character of accused persons

- Section 110: Evidence about character of accused persons

- **1)** The hearsay rules, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character
- **Analysis of Section 110**
 - **1.** A defendant may raise evidence of their good character in their defence and this is a choice made by the defendant and it would be designed to show to the FF that they are not likely to have committed the offence, either in the general or particular sense.
 - **2.** None of the hearsay rules, the opinion rule, the tendency rule and the credibility rule are relevant to apply to:
 - Evidence that the defendant is either generally or particularly, a person of good character
 - **General Sense**
 - Because their good reputation, good name – make it **generally unlikely** that they would commit a crime of this kind
 - **Particular Sense**
 - Because they have not particular tendency of the kind that this crime would be expected to exhibit
 - **As to Section 110 (1)**
 - Say that the hearsay, tendency, opinion and credibility rules are displaced proof of a defendant good character can be led by the D in a variety of ways
 - None of those rules apply to it.
 - Example
 - You can have a witness say that she heard the D has a good reputation – this is hearsay but it doesn't apply
 - A witness might say that she has a good opinion of this person – opinion rule (doesn't apply)

- Opinion of character held by a third person (hearsay – doesn't apply)
- Evidence of a tendency that the D has – helping people (working for charity etc.) in order to prove their good character – tendency but it doesn't apply here
- **HOWEVER The prosecution may not raise the defendants character at all unless the defendant has raised it first**
 - This is even in situation where the character of the evidence is raised indirectly or inadvertently by the crown witnesses
 - Very often you have police officers who gave evidence (who saw what happened etc.)
 - The defendant is not known to them
 - They don't know about him. He has got no reason to ever come to the attention of the police – is this evidence of good character
 - The police may say that D has no prior convictions, good family man etc.
- **Where the defendant has raised his own character**
 - Then the prosecution and any co-defendant are able to rebut evidence of the defendant's good character also in a wide variety of ways
 - Variety of Ways: Subsections 2 and 3 of 110
 - Show that the rules (h, t, o, c) don't apply to any evidence adduced to prove that the D is **not** of good character
- **Tactical or forensic choice made by the defendant which may or may not have benefits**
 - Sometimes it is useful but sometimes all sorts of catastrophes arise when the defendant raises their good character
 - **TKWJ**
- **It does not depend on any other evidence or directions of the judge.**
 - **PKS**

- **TKWJ v The Queen [2002] HCA 46**

- Chief Justice Gleeson
 - Called it a rational, tactical decision made to avoid a forensic risk
 - It does not depend on any other evidence or directions for the judge.

- **The Queen v PKS (unreported, NSWCCA, 1 October 1998)**

- Facts
 - D was charged with sexual assault of the child. D was generally of good character although he had some very old dishonesty offences and convictions but nothing for a long time. He didn't raise the issue of his good character and because he didn't raise it, the crown didn't raise it either.
- Appeal
 - After he was convicted, he appealed partly on the ground that the trial judge gave no directions as to the possibility of his being able to raise his good character
- NSW Court of Criminal Appeal
 - Section 110 (1) gives a **choice** to the D - they can raise it their good character.
 - If he chose to raise it generally, then there was a risk that the crown could apply under section 112 to cross examine him about his dishonesty offences
 - If he raised his good character generally, that would open the door for the prosecution to rebut this with dishonesty offences
 - If he chose to raise it in a particular respect (to show he had no convictions in relation to sexual assault against children) then the prosecution would not be able to raise the general dishonesty offences as they are outside the scope – he only raised it on the particular way
 - **If he made the wrong choice – there was no duty on the trial judge to raise the issue at all.**
 - **No duty on the judge to raise this, all up to the defendant**

Dual use of character evidence

- Evidence of good character adduced by a defendant could be directed in two ways
 - o 1. To the ultimate issue of fact – to show that he did not commit the crime (e.g. Stanovski)
 - o 2. The credibility of the D's evidence – to show that D was believe in evidence generally or particular evidence

Good Character and Bad Character Evidence

- Evidence of a defendant's good character whether it goes to ultimate issue or only to the credibility can be admitted by the defendant without reference to its probative value
 - o All of these rules don't apply to it and PV doesn't apply to it.
 - o He can raise his good character which is a completely different situation to any evidence raised by the prosecution about his **bad character**
- However, Crown's evidence about the **BAD CHARACTER** needs PV
 - o Has to have probative value for it to be admissible
- Why treat the evidence of good character in a different way to evidence of bad character?
 - o **Melbourne v The Queen**
 - This kind of evidence (allowing evidence of D of their good character). D could raise evidence about a long time ago where he was nice to somebody. It hasn't got much PV but we can let it in.
 - If you want to raise something bad about him, you have to have **probative value**.
 - Justice McHugh called this a **common law indulgence**
 - No logic. A common law indulgence in favour of defendants. Based in consideration of fairness, humanity and policy. To make sure that D's have protections in this area
- ALRC – Raising of good character evidence can be **problematic**
 - o Example

- The jury may **wrongly** estimate the PV of the defendant's good character and they may decide any wrongdoing on the defendant's part is neutralised or balanced by his previous good behaviour.
 - Thus it is **unfairly favourable**
- **Overall**
 - The ALRC felt that there was more compelling reasoning to allow them to raise good character evidence without any exceptions.
- **Two Important Safeguards**
 - The ALRC **insisted** that evidence of good character should be subject to two very important safeguards.
 - **1. Relevance** – in section 55. Evidence of character should not be admitted unless it could rationally affect the fact find assessment of the existence of a fact in issue.
 - E.g. evidence of D's good reputation. That would not be relevant to a defendant if that doctor is facing child sexual assault charged. The fact that they are of good character would be totally **irrelevant** to the fact in issue.
 - However, if that doctor had a proven record of working with children – then that could be something that could be taken in account for determining the existence of a fact in issue.
 - **2. Judicial Discretion** – to exclude evidence (S 135, 137)
 - the court needs to assess whether the prejudicial effect of the evidence will outweigh any probative value it may have.

Directions to the jury on Character Evidence

- Important Question – Obligations of Court

- Should a judge give any directions to the jury in view of the fact that the prosecution is restricted in terms of evidence it may which to lead about D's **bad character** and in view of the fact that the D is virtually **unrestricted** when the D is giving evidence about their **good character**?

- **Melbourne v The Queen (1999) 198 CLR 1**

- Facts
 - Melbourne was charged with murder – stabbing his next door neighbour to death. Misunderstanding about noise. He was heavily intoxicated at the time and sort a conviction for manslaughter instead of murder.
- Good Character
 - He raised his good character. He had not prior convictions except for one very old drink driving offence.
 - There was evidence from the police that he was not known to them. There was evidence from neighbours and friends that he was a nice quiet man. There was also evidence that he had medical treatment for depression, substance abuse etc.
- Directions
 - Melbourne wanted the judge to direct the jury that they could use evidence of his good character in two ways:
 - 1. To show he was not guilty of murder – improbability reasoning
 - It's improbable he could be guilty of the offence because of his good character
 - 2. To direct the jury that they could use evidence of his good character to bolster his credibility in relation to some statements he had made to his doctors about his illnesses and medication etc.
 - this was credibility reasoning.

- **The judge agreed to do this** but in fact when the time came to do it – but when the time came, the judge addressed the jury only in relation to the improbability reasoning and not credibility reasoning
 - Appeal
 - When he was convicted, he appealed and part of the appeal dealt with this point
 - High Court
 - HC held there was **no rule** that the judge must direct the jury that good character evidence can be used in both ways (improbability and credibility way).
 - However, the judge has a discretion as to whether to give directions to the jury on evidence of good character, **after** evaluating its **probative significance** in relation to those two things (improbability and credibility reasoning)
 - **The character evidence was not of such probative significance** in relation to his credibility as to require the judge to give a direction that the evidence bore favourably upon his credibility
 - He gave his character evidence but he wanted the judge to use that evidence in a particular way – for a credibility reasoning and also the improbability of his having committed the murder
 - **None of the character evidence** related to his truthfulness and thus there was no miscarriage of justice
- **Despite this case above, this issue continued to attract attention**
 - Issue
 - What directions should a give judge to the jury in how to consider this character evidence
 - Example: the NSW CCA has held:
 - It is generally desirable for a judge to **assist a jury** when a defendant raises good character
- **R v Soto-Sanchez (2002) 129 A Crim R 279**
 - The NSWCCA
 - Expressed the view that it is desirable that a judge give directions about the use to which character evidence should be put.
 - **They SHOULD advise juries about:**

- Judges **should** advise juries that they should bare the D's good character in mind when drawing conclusions to D's guilt. – probability
- **They MAY advise juries about:**
 - They could bare the D's good characters' evidence in mind when considering the credibility of D
 - However, they **should** remind juries specifically that even people with good character do commit crimes for the first time and evidence of good character **cannot prevail over evidence of guilt**
 - **Always give priority to the facts as they have been proved**

Rebuttal of Good Character Evidence

- If the defendant adduces evidence about their good character, the prosecution or a co-defendant may respond with evidence to **negate** that good character (section 101 (2) (3))
- **The word 'adduced'**
 - Section 110 (1) 'If the defendant 'adduces' evidence about his good character'
- **How do we know if something has been adduced?**
 - Is the defendant adducing evidence of good character simply by denying guilty? Or should we have something more.
- **The Queen v Bartle [2003] NSWCCA 329**
 - Facts: defendant was cross examined. A question was put to him. When that question was put to him he answered this way.
 - I've never been involved in importation selling drugs
 - The prosecutor was granted leave to cross examine about a prior conviction for importing drugs
 - This was cross examination as to character.
 - On appeal, this was held to be an error by the trial judge to allow cross examination about his prior conviction.
 - **Is he raising his good character when he says 'I've never been involved in importation selling drugs**

- The appeal court said: those words of this **could not be** construed as **adducing** of good character.
- Those words can only be seen as a direct denial of the charge.

- **Skaf v The Queen [2004] NSWCCA 74**

- Facts: The D was cross examined. He was asked specifically –
 - **Q: Have you lied to police?**
 - **A: He answered: 'I've never been charged with anything, only a driving offence'**
- This was seen as a non-responsive answer. The answer was not directed to the question. He wasn't answering the question
- **It was held to be an assertion of good character** – that he was raising his good character and therefore the prosecution was entitled to cross-examine him about his past convictions.
 - he opened the door, even though it was a non-responsive statement by him.

- **Discretions to exclude**

- If the prosecutor or a co-defendant lead evidence to rebut the defendant's evidence of good character,
 - The trial judge has the discretion to **exclude it**
- Especially if that evidence is a **disproportionate response**
- Example
 - Q: I'm a good bloke
 - A: prosecution comes with all guns blazing to destroy him completely

○ **Section 112: Leave required to cross-examine about character of accused or co-accused**

- A defendant must not be cross-examined about matters arising out of evidence of a king referred to in this Part unless the court gives leave
- **Reasons not to give leave in Section 112**
 - **1.** The judge **must** exclude the evidence if its probative value is outweighed by the risk of unfair prejudice.
 - **2.** The judge **may** exclude the evidence if there is a danger that the jury would use the evidence rebutting his good character in order

to conclude that the defendant has a propensity or tendency to commit the crime as charged

- **Why?** Because this is tendency evidence and needs to be admitted through tendency
- **Exceptions:** unless that evidence brought in by the prosecution would be admissible under the tendency rule.

Attacking the defendant's character when they have opened their good character and a co-defendant attacks them

- **Section 111: Evidence about character of co-accused**

- **1)** The hearsay rule and tendency rule do not apply to evidence of a defendant's character if:
 - **A)** The evidence is evidence of an **opinion** about the defendant adduced by **another defendant**, and
 - **B)** The person whose opinion it is has **specialised knowledge** based on the person's training, study or experience, and
 - **C)** The opinion is wholly or substantially based on that knowledge
- **2)** If such evidence has been admitted, the hearsay rules, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted

- **Analysis of Section 111**

- General Principle
 - The co-defendant **may not** lead evidence of the defendant's bad character merely to attack the credibility of the defendant to show that they are a bad bloke in order to then get the jury to prefer the co-defendant to the defendant
- **Dispositions**
 - However, it is possible under section 111 – For a co-defendant to lead evidence about any disposition the defendant has to establish that the co-defendant was **under the defendant's control or direction**

○ **Lowery and King v R [1974] AC 85**

- If it is probative of the co-defendant's innocence
- **Even if** the evidence of that disposition that the defendant has (to control the co-defendant) breaches the **tendency rule**
 - You don't have to prove significant probative value in this content
- Co-defendant can also lead opinion evidence to show that the defendant has a tendency to control the co-defendant