

VII CREDIBILITY AND CHARACTER

A Introduction

- In general, evidence relating to character and credibility will be **inadmissible** – rationale relates to overriding requirement for a fair trial
- If it were generally admissible it would:
 - Most likely **operate unfairly** in relation to the person against whom it is adduced
 - Be ‘**time-consuming and would lead to a proliferation of issues** with no direct bearing on the facts in issue’
- Idea is that a witness’ credibility is what **strengthens or diminishes the fact-finder’s confidence** in relation to whether the witness has given **truthful evidence** about facts in issue at the trial
- Note: **credibility rules only apply to ‘credibility evidence’** – not evidence with a credibility purpose (ie evidence that has more than one purpose under s 101A)

Evidence Act 1995 (NSW)

Dictionary

“**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

- Credibility evidence usually includes:
 - Evidence relating to the witness’ **general honesty**, expertise, or standing in the community
 - Evidence showing that, in the circumstances of the particular case, the witness is **biased** or has a **motive to lie**
 - Evidence showing that the witness’ evidence is either **consistent** or **inconsistent** with other statements the witness has made about the events in question
 - Evidence tending to show that the witness is **lying or mistaken** in relation to some or all of their testimony, including evidence to show that the witness is lying or mistaken in relation to some collateral detail of their testimony

CREDIBILITY AND CHARACTER - The Credibility Rule

- Evidence relating to the witness' capacity for accurate **observation and recollection**
- Evidence of **coaching**
- **Prior dishonest conduct** and dishonest convictions, including evidence of making a false representation whilst under legal or moral obligation to tell the truth
- Note: evidence can be adduced in XIC and XXN and (in some instances) RXN – this can influence how credibility evidence may be adduced (ie whether it falls into an exception to the rule)

B The Credibility Rule

- **Default position** set out in s 102: 'credibility evidence about a witness is not admissible'
 - Subject to specific exceptions found in ss 103, 104, 106, 108, 108A-C, 110
- The term 'credibility evidence' is defined in s 101A

Evidence Act 1995 (NSW)

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.

- Combined effect of s 101A and s 102:
 - All **evidence relevant only to matters relating to truthfulness** of witness and accuracy of their testimony is prima facie **not admissible**
 - Where evidence is **both relevant to credibility and relevant but not admissible for another purpose** (ie because of the hearsay, opinion, tendency etc rules), it is 'credibility evidence' and **not admissible**

CREDIBILITY AND CHARACTER - The Credibility Rule

- If evidence appears to be credibility evidence but **is relevant to a FII**, it **may not satisfy the definition** in s 101A, meaning it can't be excluded under that provision (may still be excluded on some other ground)
- Where evidence is **relevant and admissible in another way** (ie relevant to a FII, or both to a FII and credibility) s 102 has no application
 - Can be very difficult to draw distinctions between credibility and matters going to FII: *Palmer v The Queen* (1998) HCA; *Peacock & Peacock v the Queen* [2008] NSWCCA

Method of approach
<ul style="list-style-type: none"> ● What is/are the FII? ● To what is the proposed evidence relevant? (ie for what purpose is it being adduced?) <ul style="list-style-type: none"> ○ If relevant only to credibility the credibility rule applies (+ its exceptions) ○ If relevant to a FII and credibility, identify the other character of the evidence (eg hearsay, tendency, opinion character etc) <ul style="list-style-type: none"> ▪ If it falls into an exception of the other rules, and can be adduced, then it is no longer credibility evidence and can be used to go towards the 'credibility' of the witness (ie it is not technically 'credibility evidence' but has a credibility purpose) ▪ If it does not fall into an exception of the other rules, but a credibility exception applies (meaning it can be adduced), then it can usually be also used for its other purpose (ie hearsay, opinion, tendency etc) ● Go to corresponding provision

1 Determining Relevance Solely to Credibility

Evidence relevant solely to credibility	Evidence relevant to a FII but not admissible for some other purpose
<p><u><i>Piddington v Bennett and Wood</i> [1940] HCA</u> Issue: Whether a motorcycle driver was negligent, witness (Donellan) said he saw the event because he remembered transacting at a nearby bank for Major Jarvie that day, bank said no transaction for Major Jarvie had occurred that day</p>	<p><u><i>Peacock & Peacock v The Queen</i> [2008] NSWCCA</u> Issue: Whether evidence that Baker initially testified that Biddle was with him during a burglary, later said he wasn't there went only to credibility or also to motive?</p>

CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

<p>Held: Goes to credibility only (barely), not to FII because no particular significance or relevance attached to Donellan having been at the bank (his presence at the bank not a necessary condition for him witnessing the accident)</p>	<p>Held: Relevant to both credibility and motive, as per hearsay rule it was not admissible for that purpose</p>
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C Exceptions to the Credibility Rule

- The cumulative effect of the exceptions is that **credibility evidence cannot be gratuitously introduced during XIC** before any attack has been made on their credibility or the consistency of their evidence during XXN
 - Evidence would otherwise be **self-serving** and designed to enhance a witness' credibility, leading to potential for proliferation of collateral issues

1 In Cross-Examination

(a) Section 103: Cross-Examination of a Witness

- A **witness' credibility can be attacked in XXN** as long as threshold is met

<i>Evidence Act 1995 (NSW)</i>
<p>103 Exception: cross-examination as to credibility</p> <p>(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.</p> <p>(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to:</p> <ul style="list-style-type: none"> (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.

Test breakdown: S 103	...evidence adduced in cross- examination...	... could substantially affect...	... assessment of the credibility of the witness...	[note extra considerations in subsection (2)]
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CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

Explanation:	Only applies to cross examination	High threshold	See ‘credibility’ in Act dictionary	These do not limit the Court
Examples:	<p><u>Lohdi [2006] HCA</u></p> <p>Issue: whether accused was guilty of planning Holdsworthy Barracks terrorism plot FII: lied on resume <i>and</i> professed to be a person of high character who “struggles for inner perfection and moral virtue” Held: accused’s credibility was substantially affected (but barely passed threshold, represents lowest bar) because of combination of lie and claim of high morals, also relevant that a person is under obligation to tell the truth on a resume</p> <p><u>Kamm [2008] NSWCCA</u></p> <p>Issue: whether the leader of a cult was guilty of sexual offences against a minor FII: in XIC, a witness denied that she was accused’s ‘mystic spouse’; in XXN, letter was adduced in which she referred to herself as ‘mystical spouse, Queen Candice’ Held: witness’ credibility substantially affected – strong bias toward accused if she is his ‘mystical spouse’ (see provision re rebutting false denials: s 106)</p>			

(b) Section 104: Further Protections for Defendant

- **Defendant cannot be treated like other witnesses being cross-examined** in a criminal trial due to risk of unfair prejudice
- Effect of this provision is that questions relating to ‘credibility evidence’ (as per s 101A) are **prima facie prohibited unless the court gives leave**, except questions under s 104(3)

Evidence Act 1995 (NSW)

104 Further protections: cross-examination as to credibility

(1) This section applies only to 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. [*must satisfy s 43(2) first*]

CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

- (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.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:
- (a) the events in relation to which the defendant is being prosecuted, or
 - (b) the investigation of the offence for which the defendant is being prosecuted.
- (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.

- **If leave is required** (ie prosecution wants to XXN defendant about credibility evidence that is not for a reason under s 104(3)), it **must not** be given **unless**:
 - **Accused has adduced evidence against the credibility of a Crown witness**, and
 - That evidence is **not** related to:
 - The proceedings at hand, or
 - The relevant investigation
- Giving of leave will also require consideration of s 192, *Stanoevski* [2001] HCA
- Thus, there is a **sequential approach**:
 - First, must pass hurdle of s 103(1)
 - Assess whether accused has ‘lifted the shield’ of 104(2) via 104(4)
- Note effect of s 104(5) – **accused can challenge credibility of prosecution witnesses** about events giving rise to subject charge/investigation **without ‘lifting the shield’** – as a result, **accused can XXN parties (including police) about their conduct** at the time of the event

Examples	
Evidence against Crown witness	Prosecution rebuttal evidence
<p><u><i>El-Azzi</i> [2004] NSWCCA</u></p> <p>Facts: accused (police officer) convicted of conspiracy to produce commercial quantities of</p>	<p><u><i>DPP v Kocuglu</i> [2012] VSC</u></p> <p>Facts: accused charged with drug-related murder, the only prosecution witness had criminal history of over 50 offences, accused had similar criminal</p>

CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

<p>meth, gave evidence at trial, judge granted leave under s 104 for prosecution to XXN him on:</p> <ul style="list-style-type: none">• 2 charges of police misconduct• alleged threats made to witnesses• criminal corruption conviction <p>Issue: whether leave should have been granted Held: TJ was correct, first and second points not relevant to credibility anyway, third point was relevant to credibility and assessed in this order:</p> <ul style="list-style-type: none">• s 101A → s 102• s 103• s 104(4) → (5)• s 192	<p>history, offences grouped into two categories – dishonesty and drugs</p> <p>Issue: whether prosecution witness could be XXN'd on history of both categories of offences Held: Evidence relating to drug offences is not credibility evidence because it does not satisfy s 104(4) (it is however relevant to defence case for motive); evidence relating to dishonesty offences is credibility evidence, satisfies s 104(4) and leave application can be made under s 104(2) – thus if witness XXN'd on these offences, Crown could XXN accused on his entire record</p>
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- Note: **if prior inconsistent statement is to be adduced**, s 43 must be satisfied as matter of **procedure** – not concerned with admissibility or use of PIS, but creates a **pre-condition of admissibility**

(c) Section 106: Finality Rule

- Prevents collateral attacks on the credibility of a witness – effect is that **any answers given by a witness relevant only to their credibility are taken as final** and binding
- Exceptions are made for evidence that falls within one of 5 categories (as per subs (2)), otherwise the Court must give leave (as per subss 1(a) and (b))

Evidence Act 1995 (NSW)

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

CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

- (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.

- Exception in s 106(1) implements **Browne v Dunn rule**: if you have conflicting evidence from someone else **you must put it to the witness in XXN** (before adducing that evidence in XIC of your own witness) – ie **put it to them and elicit a denial**
 - Also brings s 192 factors into consideration (broad scope for rebuttal)
- Exceptions in s 106(2) discussed in table below

Exceptions to finality rule in s 106(2)		
Exception	Main Features	Relevant Cases
(a) Bias/motive to be untruthful	The interest or concern in the outcome of the case is relevant to assessing the impartiality of the witness – must be applied with care when accused is witness not to disadvantage this evidence	<u>Nicholls v The Queen (2005) HCA</u> Facts: accused charged with murder of prostitute Issue: whether a plea deal gave key prosecution witness motive to lie (promised immunity) Held: evidence re plea deal admissible – jury should be aware of witness’ motives* <u>Adebe and Mulugeta (1994) WACCA</u> Facts: witness had previously threatened to dob Adebe in to Immigration over money dispute Issue: whether this indicated a motive to lie Held: evidence of threat admissible, counsel should have been allowed to XXN re same
(b) Prior conviction	Offence usually perjury or some form of dishonesty, eg stealing or fraud	Proof by certificate of conviction: ss 178-180 (doesn’t apply to all convictions – must first satisfy ‘substantially affects’ threshold in s 103)
(c) Prior inconsistent statement	Oral or written statement made by a witness before trial and inconsistent with testimony	<u>Adam v The Queen (2001) HCA</u> Facts: accused charged with murder of off-duty police officer [see also p 32 & 85 of these notes]

CREDIBILITY AND CHARACTER - Exceptions to the Credibility Rule

	given at trial on same issue [see also s 43]	Issue: accused's brother was witness, statements made to police and in court were inconsistent, whether evidence of previous statement was admissible (relevant to FII – identity) Held: admissible, after compliance with s 43 <u>Copmanhurst Council v Watt [2005] NSWCA</u> Facts: civil suit re car accident, attending police officer's evidence had inconsistencies with his contemporaneous notes re gravel on road Issue: whether police officer's evidence in court amounted to denial, thus allowing the PIS to be proved from another source (private investigator) Held: PIS allowed to give evidence contradicting the officer's evidence under this provision
(d) Unable to be aware of matters	Lack of capacity and/or opportunity for observation of relevant matters – broadly interpreted by courts to include aspects of reliability but does not include inability to recall	<u>R v Souleyman (1996) NSWSC</u> Issue: whether evidence of psychiatric report re witness concerning diagnosis of 'histrionic personality disorder' which resulted in witness 'not knowing the truth' satisfied this provision Held: test of lack of 'awareness' satisfied
(e) False representation while under obligation to tell the truth	Applies where witness obliged to tell truth in statutory declarations, affidavits, and statements to be used in court and there is a knowing or reckless false representation	<u>R v Lohdi [2006] HCA</u> Facts: [see p 54 of these notes] Issue: whether the lie satisfied this provision Held: this section only applies to <i>legal</i> obligations to tell the truth, as opposed to <i>moral</i> obligation to tell the truth NB: does not apply to lies in current proceeding

- *NB: Court gave definition of bias/motive to be untruthful at [266] “matters which affect motives, temper, character...with reference to his feelings towards one party or another”
 - Types of **motive to untruthful**:
 - **Bias** = favouring personally eg hostility, prejudice
 - **Interest** = witness and cause of action
 - **Corruption** = conscious false intent eg bribe
 - Examples: