

EVIDENCE LAWS2016
FINAL EXAM TOPIC NOTES
2025

TOPIC 1 – Introduction to Evidence Law

KPT Ch 1.

The Law of Evidence

- **Functions:** Regulates
 1. What material a court may consider in determining factual issues.
 2. How that material is presented.
 3. How the court decides factual issues on the evidence.
- **Adversarial system:**
 - o Parties, not the court, determine issues and lead/tender/adduce evidence.
 - o Judge acts as umpire, deciding questions of law and applying law to facts found (or directing jury).
 - o Modified for procedural safeguards (criminal) and efficient case management (civil).
- **Rules of evidence:** Framework for how evidence may be adduced, its admissibility, and how fact-finders use it.
- **Pre-1995:** Largely common law, minimal statutory intervention.
- **Post-1995:** Uniform legislation “covers the field” in many areas, especially admissibility, abrogating common law rules.

Background to the Uniform Evidence Acts

- **1979** – ALRC reference to review evidence laws for modernisation.
- **1985–1987** – ALRC Interim Report No 26, Final Report No 38 (draft Evidence Bill).
- **1995** – Acts passed (Cth: 18 April; NSW: 1 Sept).
- **2001–2002** – NT (Norfolk Island earlier) and Tasmania enact uniform evidence laws.
- **2004** – ALRC 102 joint inquiry with NSWLRC and VLRC → recommended amendments.
- **2007–2010** – Amendments implemented across jurisdictions (NSW, Cth, Vic, ACT, NT).
- Now largely uniform across jurisdictions, though not identical in all provisions.

Relationship with Other Laws

- **Not a complete code:** ss 8, 8A, 9 – operates alongside other statutes and laws.
- **Ch 3 (admissibility):** Generally treated as a code – common law rules on admissibility abrogated (e.g., *Telstra v Australis Media Holdings (No 2)* (1997) 41 NSWLR 346, 349; *McNeill v The Queen* (2010) 168 FCR 198).
- Some specific parts entirely replace common law (e.g., Pt 3.6 similar fact evidence – *Hughes v The Queen* [2017] HCA 20 at [31]).
- **Exceptions:** Heydon J in *Dasreef* (2011) 243 CLR 588 argued “basis rule” survives; *Haddara v The Queen* [2014] VSCA 10 found unfairness discretion survives.
- **Interpretation:**
 - o Statute interpreted by its language (e.g., *Papakosmas v The Queen* (1999) 196 CLR 297 at [10], [88]).
 - o Common law generally unhelpful unless directly relevant (e.g., pre-Act position may assist, *Cornwell v The Queen* (2007) 231 CLR 260).
 - o Divergent approaches to ss 97(1), 101 (*Hughes*).

Structure of the Act

1. **Ch 1** – Introductory matters.
2. **Ch 2** – Adducing evidence (procedure for producing evidence).
3. **Ch 3** – Admissibility of evidence (rules on what can be admitted).
4. **Ch 4** – Proof.
5. **Ch 5** – Miscellaneous.

Preliminary Matters

- **Definitions** in Dictionary.

- **s 5** – Applies to all proceedings in a “court” (with extended application in some provisions).
- **s 8–9** – Interaction with other statutes & common law.
- **s 110** – Preserves parliamentary privilege.
- **s 11** – Court retains power to control proceedings.

Recurring Issues

Civil vs Criminal Proceedings

- Dictionary:
 - o *Civil proceeding*: anything not criminal.
 - o *Criminal proceeding*: prosecution for offence (incl. committal, bail), excludes prescribed taxation offences.

Court Powers

- **s 11** – Control proceedings.
- **s 26** – Control witness questioning.
- **s 34** – Require production of doc/thing used to revive memory.
- **s 36** – Require compellable person to give evidence/produce documents.
- **s 45** – Require production of documents for content evidence.
- **s 133** – Inspect document for privilege claims.
- **s 188** – Impound documents.
- **s 193** – Additional powers re discovery, inspection, disclosure, exchange.

Judicial Rulings

- Many provisions require leave/permission/direction (e.g., **s 38**).
- **s 192** – Factors for giving leave.
- **s 192A** – Advance rulings.

Objections & Waiver

- Objections often required to trigger compliance.
- Civil: failure to object usually waives right to raise on appeal.
- Criminal: r 4 *Criminal Appeal Rules* – leave needed if no objection at trial (*Picken v The Queen* [2010] NSWCCA 319 at [19]; miscarriage of justice test).
- Judges should rule on objections promptly (*Dasreef* at [97]).

Preliminary Questions

- **s 189** – Voir dire procedure for admissibility facts (e.g., voluntariness under **s 84**).
- **s 142** – Standard of proof for admissibility-related facts.

Drawing Inferences

- Common law inference rules remain.
- **s 58 & s 183** – Allow reasonable inferences from documents/things for relevance/application.

Joint Trials

- Multiple defendants: evidence admissible against one may not be admissible against another unless **s 87** applies.
- Multiple charges: same principle – admissibility depends on Act provisions; may require jury directions.
- Some authority that principle doesn’t always extend to civil proceedings (*ASIC v Rich* (2004) 213 ALR 338; *Johnstone v NSW* [2010] NSWCA 70).

Evidence Act 1995 (NSW)

Section 8 – Operation of other Acts

8 This Act does not affect the operation of the provisions of any other Act.

Note —

The Commonwealth version of this section has extra subsections covering:

- The *Corporations Act 2001* (Cth)
- The *Australian Securities and Investments Commission Act 2001* (Cth)
- Certain laws in force in the ACT, and
- A rule that regulations continue to have effect (until amended) after the Commonwealth section starts

Section 9 – Application of common law and equity

1. Common law/equity rules still apply unless the Act clearly says otherwise or necessarily implies otherwise.
2. Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to—
 - a. Admission or use of evidence about **reasons for a jury’s decision** or **deliberations** in relation to that decision, in a proceeding by way of appeal from a judgment, decree, order, or sentence.
 - b. The operation of a **legal or evidential presumption** that is not inconsistent with this Act.
 - c. A court’s power to **dispense with a rule of evidence or procedure** in an interlocutory proceeding.

Note —

This section differs from the Commonwealth version, which also preserves State/Territory written and unwritten laws relating to various matters.

Section 11 — General powers of a court

1. The court’s power to control the conduct of a proceeding is **not affected** by this Act, except where the Act expressly or by necessary intendment provides otherwise.
2. In particular, a court’s powers concerning **abuse of process** in a proceeding are not affected.

Section 189 — The voir dire

1. If deciding whether—
 - a. evidence should be admitted (whether discretion is involved or not), or
 - b. evidence can be used against a person, or
 - c. a witness is competent or compellable,depends on the court finding that a **particular fact exists**, the question of whether that fact exists is a **preliminary question** for the purposes of this section.
2. If there is a jury, a preliminary question whether—
 - a. certain evidence is evidence of an **admission**, or evidence to which **section 138** applies, or
 - b. such evidence should be admitted,must be heard and determined **in the jury’s absence**.
3. In a hearing of a preliminary question about whether a **defendant’s admission** should be admitted into evidence in a criminal proceeding (whether discretion is involved or not), the **truth or untruth** of the admission is to be **disregarded** unless raised by the defendant.
4. If there is a jury, it must **not be present** at a hearing to decide **any other preliminary question** unless the court orders otherwise.
5. When deciding whether to make such an order, the court must take into account—
 - a. Whether the evidence to be adduced in that hearing is likely to be **prejudicial** to the defendant,
 - b. Whether the evidence will be adduced in the course of the hearing to decide the preliminary question, and
 - c. Whether the evidence would be admitted if presented at another stage of the hearing (other than another preliminary question hearing or, in a criminal case, a sentencing hearing).
6. Section 128(10) does not apply to a preliminary question hearing.
7. For the purposes of Chapter 3, in a hearing to determine a preliminary question, the **facts in issue** are taken to include the fact to which the hearing relates.
8. If the jury was not present at the preliminary question hearing, evidence from that hearing **must not be adduced** in the main proceeding unless—
 - a. it is **inconsistent** with other evidence given by the witness in the proceeding, or

TOPIC 3 – Proof (i)

Burden and Standard of Proof – KPT Ch 15

Evidence Act 1995 (NSW)

s 140 — Civil proceedings: standard of proof

1. Court must find a party's case proved **if satisfied it has been proved on the balance of probabilities.**
2. In deciding whether satisfied, court must take into account (without limitation):
 - a. **nature of the cause of action or defence**
 - b. **nature of the subject-matter of the proceeding**
 - c. **gravity of the matters alleged**

s 141 — Criminal proceedings: standard of proof

1. Court must **not** find prosecution case proved **unless satisfied beyond reasonable doubt.**
2. Court must find a defendant's case proved **if satisfied on the balance of probabilities.**

s 142 — Admissibility of evidence: standard of proof

1. Unless Act provides otherwise, court must find facts necessary for deciding:
 - a. whether evidence should be admitted or not admitted (discretionary or otherwise), or
 - b. any other question under this Act,proved **if satisfied on the balance of probabilities.**
2. In deciding whether satisfied, court must take into account:
 - a. **importance of the evidence in the proceeding**
 - b. **gravity of the matters alleged in relation to the question**

Standard of Proof in Civil Proceedings

- **s 140(1):** A fact is proved if the court is “**satisfied ... on the balance of probabilities.**”
- Requires **actual persuasion** — not just comparing scraps of evidence. “*The evidence must be enough to enable the court to feel actual persuasion that a particular fact is so*” (*Brown v NSW Trustee & Guardian* [2012] NSWCA 431 at [51]).
- A single scrap of unopposed evidence may still not persuade.

What “Balance of Probabilities” Means

- **Briginshaw** approach (calibration of proof)
 - o Dixon CJ (*Murray v Murray*; *Briginshaw*, via *Henderson v Queensland* [2014] HCA 52, Gageler J at [87]):
 - The tribunal **must be “satisfied” or “reasonably satisfied.”**
 - It is **not** a matter of “balancing probabilities and say[ing] which way they incline.”
 - Judges must **reason responsibly** on the evidence as a “**sensible man would in all the circumstances.**”
 - Degree of strictness varies with importance and likelihood of the allegation.
- **Circumstantial evidence**
 - o **Bradshaw v McEwans** (quoted in *Henderson* at [88]):
 - Civil: need only a “**more probable inference**” supporting the allegation.
 - Must do **more than** produce “conflicting inferences of equal degrees of probability.”
 - Not conjecture: if evidence makes one inference **reasonably more likely**, that is enough.

Threshold Between Conjecture & Inference

- **Jones v Dunkel** (Kitto J, cited *Henderson* at [89]):
 - o “**One does not pass from the realm of conjecture to the realm of inference until some fact is found which positively suggests ... that in that actual case a specific event happened or a specific state of affairs existed.**”

Proving Negatives

- Same method applies to proving events **did not happen**.
- **Davidson J, *Ex parte Ferguson; Re Alexander* (cited *Henderson* at [90]):**
 - o Plaintiff must prove the **affirmative in substance**, even if framed as a negative.
 - o Adduce facts making non-occurrence **more probable than not**.

Tactical Burden

- If evidence from the burdened party raises a rational inference, a “**practical/tactical burden**” shifts to the other side to adduce further evidence to avoid the inference (*Henderson* at [90]).

The *Briginshaw* Principle — Gravity of Allegations

- ***Henderson* at [91]:**
 - o Courts reluctant to find **fraud or crime** on civil BoP.
 - o “A court should not lightly make a finding that ... a party ... has been guilty of such conduct.”
 - o Even stronger reluctance for **non-parties** (no chance to explain).
- This is **not a higher standard**, but a demand for **cogent proof** proportionate to seriousness.

Appellate Function

- ***Henderson* at [95]–[97]:**
 - o Appeal courts must draw their **own inference** from primary facts if correctness is in issue.
 - o Not enough to say the trial judge was “entitled” — appellate duty is independent reassessment.

Application in *Henderson*

- Gageler J at [98]:
 - o Absent evidence displacing the conventional perception against criminality, “**the more probable inference**” was jewellery **not illegally acquired**.
 - o The State’s case failed because there was no basis to draw the adverse inference.

Reinforcing Cases

- ***Brown v NSW Trustee & Guardian [2012] NSWCA 431 at [51]:*** Proof requires **actual persuasion**, not just weight comparison.
- ***NOM v DPP (2012) 38 VR 618 at [124]:*** Civil standard (statute/common law) requires more than mechanical probability weighing; fact-finder must feel “**actual persuasion**.” With circumstantial evidence, there must be a “**reasonable and definite inference**.”

Qantas Airways Ltd v Gama (2008) 167 FCR 537

FACTS: Federal Magistrates Court (8 Dec 2006) awarded **\$711,692.70** to Mr Gama (ex-employee) for breaches of the *Racial Discrimination Act 1975* (Cth) s 9(1) and *Disability Discrimination Act 1992* (Cth) s 15(2)(d); some complaints upheld, many rejected. On appeal, disability findings to be set aside; racial discrimination damages essentially unaffected because they rested on the same evidence.

ISSUES:

1. Did the magistrate err by applying a so-called “*Briginshaw* test” as a higher standard in civil proceedings (s 140 EA)?
2. How does s 140(2) interact with *Briginshaw* in discrimination cases (gravity, subject-matter, cause of action)?

HELD: No third standard of proof; civil standard remains **balance of probabilities** (*Briginshaw* calibrates cogency, not standard. “*Briginshaw* test/standard” terminology is misleading; courts must apply s 140(1)–(2). Cross-appeal failed — no indication the magistrate’s reference to *Briginshaw* caused error. Appeal otherwise allowed on DDA only.

REASONING

No “third standard”

- French & Jacobson JJ: “*The so-called Briginshaw test does not create any third standard... the degree of satisfaction... may vary according to the seriousness of the allegations*” ([110]). No sign this harmed Gama ([110]–[111]).

TOPIC 4 – Adversarial Trial

JJ Spigelman, 'Truth and the law' (2011, Winter) *Bar News* 99

Core thesis

- **Fact-finding is the engine room:** “well over 90% of all litigation is determined by findings of fact” (intro).
- **Position adopted:** courts **seek truth**, but that search is **qualified by fair-trial principles and specific rules protecting other public values** (the “third position”). He endorses Knight Bruce VC’s idea that “truth... may be loved unwisely... may cost too much” (Pearse v Pearse (1846) 1 De G Sm 12, 28–29; n 20–21).
- **Reform stance:** exceptions to truth-seeking should be **clearly defined, narrowly confined and regularly reviewed**; rules of evidence should be adapted to “the successful development of the truth” (Funk v United States 290 US 371, 381; n 22).

Three competing views of “truth” in the adversarial system

1. **Procedural/“legal” truth, not ultimate verity**
 - Pollock: the “greatest... fallacy” is that courts exist to discover truth; rather they decide the justice of claims, **testing truth only so far as relevant in law** (Pollock, *Essays in the Law* 275; n 6).
 - Viscount Simon LC: a court “is not engaged in ascertaining ultimate verities” but the proper result **“having regard to the evidence before it”** (Hickman v Peacey [1945] AC 304, 318; n 7).
 - **Air Canada (PII):** Lord Wilberforce — in purely inter partes litigation the court’s duty is **“to do... justice between the parties... There is no higher or additional duty to ascertain some independent truth”** (Air Canada v Sec of State for Trade [1983] 2 AC 394, 438–39; n 10).
2. **Socratic dialogue best finds truth (traditional bar view)**
 - Lord Eldon: **“Truth is best discovered by powerful statements on both sides”**, but in context counsel is “indifferent” to the outcome and an **officer assisting justice** (Ex p Lloyd (1822) Mont 70, 72; n 11, 13).
 - Brennan J: counsel’s duty is to **assist the court in doing justice according to law** (Giannarelli v Wraith (1988) 165 CLR 543, 578–79; n 14).
 - Spigelman notes from judicial experience that when parties **seek victory**, the Socratic ideal may **not** reliably produce truth (text; n 16–17).
3. **Spigelman’s “third way” (adopted position)**
 - Courts **seek truth, subject to:** (i) **fair-trial** principles and (ii) **specific rules/discretions** that protect other public values even when they **constrain fact-finding** (text around n 18–21).

Why truth matters (and how to reform)

- Public confidence requires a system **“dedicated to the search for truth, subject only to... fairness... and other public values”** (text).
- **Two corollaries:** (i) exceptions must be **narrow & clear**; (ii) **regular review** to test whether original justifications still hold (Funk v US 290 US 371, 381; n 22).

Constraints on truth-finding

- **Privileges:** legal professional privilege; public interest immunity; confessional privilege (where recognised); journalists’ privilege (where recognised).
- **Illegality & fairness:** exclusion of illegally obtained evidence; involuntary/unknowing confessions; privilege against self-incrimination; limits on adverse inferences from silence (esp. criminal); **s 135/137 UEL balancing** of probative value vs unfair prejudice (n 26).
- **Finality & appeals:** finality principle (re-opening), double jeopardy, restrictions on fresh evidence on appeal (cf *Amphill Peerage* [1977] AC 547, 569 per Wilberforce; n 24).
- **Character & tendency:** restrictions on tendency/coincidence (similar-fact/propensity).
- **Hearsay & opinion:** hearsay rule; lay opinion rule; business records carve-outs in civil.
- **Practice rules:** parol evidence rule; rule against splitting a case; settlement privilege (without prejudice).
- **Point:** many rules were built for **juries**; with civil juries largely gone, Spigelman urges **systematic review**, noting UEL modernisations (e.g., corroboration warnings abolished save jury context: UEL ss 164–165; n 27).

- **R v Kneebone**: prosecution must identify **specific factors justifying a decision not to call a material witness** (e.g., unreliability). Failure requires justification.

Exceptional circumstances for judge calling witness

- **R v Damic [1982] 2 NSWLR 750**: accused was **unrepresented**; trial judge on own motion called **psychiatric evidence** that raised the defence of mental illness to a murder charge.

Fairness obligation

- **Velevski v The Queen (2002) 76 ALJR 402**: prosecutors have a duty to **act fairly** and call **all relevant and material expert witnesses**, not simply those that support their case.

Evidence Act

s 11 — General powers of a court

1. A court's **power to control the conduct of a proceeding** is **not affected** by the Act, **except** where the Act expressly or by necessary intendment provides otherwise.
2. In particular, a court's **powers regarding abuse of process** in a proceeding are **not affected**.

s 26 — Court's control over questioning of witnesses

The court may make such **orders as it considers just** in relation to:

- a. the **way witnesses are to be questioned**;
- b. the **production and use of documents and things** in connection with questioning;
- c. the **order in which parties may question a witness**;
- d. the **presence and behaviour of any person** in connection with the questioning of witnesses.

R v Kneebone (1999) 47 NSWLR 450

FACTS: Appeal against conviction for **aggravated sexual assault** of the appellant's de facto spouse's 14-year-old daughter. The complainant alleged an assault at home; during it, the **mother entered the bedroom, said "that's enough", and left**, after which further assault occurred; later there was a bathroom assault. The mother **denied** any assault and had given a **27 Feb 1995** police statement (in the brief for the earlier physical-assault matter). At the sex-assault trial in 1998 the **prosecutor chose not to call the mother**, seeking a **Jones v Dunkel** direction on the basis she was in the defence "camp"; the **defence did not call her** (no proof taken). On appeal, affidavits showed the prosecutor had formed an **unreliability** view without interviewing her; she had **attended court ready to give evidence** and was not interviewed by either side.

ISSUE: Whether the **Crown's failure to call the mother**, a **material eyewitness** on matters central to the narrative/credibility, **occasioned a miscarriage of justice**.

HELD: Appeal allowed; conviction quashed; new trial ordered. Failure to call the mother, **without taking appropriate steps to assess reliability**, produced a **miscarriage of justice** ([61]). The Crown's approach departed from proper practice: a **material witness** should have been called (or at least properly interviewed/assessed) ([99]–[105]).

REASONING (James J; Spigelman CJ concurring; Smart AJ concurring)

- **Apostilides principles restated:** The Court set out **six propositions** governing calling of witnesses in criminal trials (from **R v Apostilides**):
 - (1) "**The Crown Prosecutor alone bears the responsibility** of deciding whether a person will be called" ([39] prop 1).
 - (2) The judge **may question** the prosecutor about reasons but **is not to adjudicate** their sufficiency ([39] prop 2).
 - (3) The judge may **invite reconsideration** at close of Crown case but **cannot direct** the Crown to call a witness ([39] prop 3).
 - (4) In summing up, the judge **may comment** appropriately on the effect of the failure to call a witness, influenced by any disclosed reasons ([39] prop 4).
 - (5) "**Save in the most exceptional circumstances**" the judge **should not call** a person as a witness ([39] prop 5).
 - (6) A decision **not to call** is a ground to set aside the conviction **only if** it gives rise to a **miscarriage of justice** ([39] prop 6).

What it is (and isn't)

- A **practical script** judges can use to prepare a young/cognitively-impaired witness before their evidence (often over CCTV).
- It's **guidance, not law**. Use it to make sure the **statutory pre-conditions** for **unsworn evidence** are properly covered and the witness is settled.

Why it matters legally

- **Evidence Act 1995 (NSW) s 13** governs competence and unsworn evidence.
 - o s 13(1)–(2): capacity to understand questions & give understandable answers.
 - o s 13(3): capacity for **sworn** evidence = understanding the **obligation** to give truthful evidence.
 - o s 13(4)–(5): if not competent to give sworn evidence, the witness **is competent to give unsworn evidence if the court has told the witness:**
 - **(a)** it's important to tell the truth;
 - **(b)** they may be asked questions they don't know/can't remember and must say so;
 - **(c)** they may be asked **suggestive** questions and **should agree only with what they believe is true and feel no pressure to agree with what they believe is untrue**.
- **Key cases**
 - o **SH v The Queen (2012) 83 NSWLR 258:**
 - No residual discretion to refuse unsworn evidence once s 13(1) capacity is met and the s 13(5) instruction is given.
 - The **court (judge)** must give the s 13(5) directions; counsel's version doesn't substitute.
 - Omission of part of the s 13(5) content (esp. the "no pressure to agree" limb) can be **fatal**.
 - o **R v GW (2016) 258 CLR 108:**
 - Unsworn evidence is **not inherently less reliable**; **no general requirement** to direct the jury on differences between sworn/unsworn evidence.

How the script maps to s 13(5)

- The long preface (introductions, comfort, simple biography, "rules") is **good practice** to reduce anxiety and gauge comprehension under **s 13(1)**.
- The **three mandatory directions** are embedded (make sure you hit them expressly):
 1. "It's important to tell the truth." → **s 13(5)(a)**.
 2. "If you don't know/can't remember, say so." → **s 13(5)(b)**.
 3. "You may be asked suggestive questions; agree only if you believe it's true; **feel no pressure** to agree otherwise." → **s 13(5)(c)** (the "**no pressure**" wording is crucial per **SH**).

Practical use / pitfalls

- **Who says it?** The **judge**. (Counsel can't "cure" the record.)
- **When? Before** the witness gives evidence (on the **voir dire** if doing competence first).
- **Form?** No magic words, but the **substance** of each limb must be **told**. Asking questions to elicit "yes" is fine, but a **response isn't required by the Act**; many judges seek one as a check.
- **Record it** clearly on transcript.
- **Tailor:** use the "younger children" or "older/cognitively impaired" variants. Plain language; avoid legalese.
- If the witness **can** understand the obligation to tell truthful evidence → take **sworn/affirmed** evidence (s 13(3)); otherwise proceed unsworn after s 13(5).

ALRC 102

Purpose of competence rules

- Competence law addresses **capacity to be a witness**, not credibility ([4.3]).
- Rationale = **filter**:
 - o Prevent admission of evidence with *little/no probative value*.
 - o Balance against excluding relevant evidence unnecessarily, esp. in criminal law where fairness to the accused must be protected ([4.3]).

- Competence ≠ credibility: factors like observation skills, memory, elapsed time, etc. affect **weight**, not **competence** ([4.4]).

Proper test of competence

- Test should assess **ability to function as a witness** ([4.5]):
 - o Can they understand questions?
 - o Can they give understandable answers?

Contexts where competence is in issue

- Usually arises with:
 - o **Children**
 - o Persons with **mental, intellectual, cognitive or physical disability** ([4.6]).

Historical views of children's evidence

- Past rationale for strict rules: children thought inherently unreliable ([4.7]).
 - o Less reliable observation/memory.
 - o "Make-believe" world, egocentric, forgetful.
 - o Suggestible, little sense of duty to tell truth.
- Even extreme past claims that children inherently fantasise.

Modern research on children as witnesses

- **Challenges stereotypes** ([4.8]):
 - o No psychological evidence that children habitually fantasise about incidents leading to court.
 - o Children not more likely to lie than adults; may in fact be **more truthful**.
 - o Children may be **more cautious about lying in court** than adults.
 - o Adults usually detect lying by young children.
- **Understanding of truth/lying develops early** ([4.9]):
 - o Preschool age: often sophisticated grasp of concepts.
 - o Positively rate truthful statements, negatively judge lying to conceal rule-breaking.

Law reform changes (ALRC 102 → amendments to Evidence Act 1995 (NSW))

- **Old s 13(2)(a)**: required court to be satisfied person "**understands the difference between a truth and a lie**" before being ruled competent to give **unsworn evidence** ([2.90]).
- **ALRC 102 recommendation**: delete this requirement.
- **Amended s 13**: test now focuses only on **capacity to understand questions and give understandable answers**, plus the **obligation to give truthful evidence** for sworn evidence.
- **Case application**: *SH v The Queen* (2012) 83 NSWLR 58; [2012] NSWCCA 79 — NSWCCA explained operation of the amended s 13

TOPIC 7 – Credibility Evidence

Definition and exclusion

Definition of “credibility”

- **s 101A** defines *credibility evidence*: “evidence relevant to the credibility of a witness or person.”
- **Dictionary** definition of *credibility of a witness*:
 - o the credibility of *any part or all* of the evidence of the witness, and
 - o includes the witness’s **ability to observe or remember facts/events** they give evidence about.

Covers both *reliability generally and reliability of particular testimony*.

Factors relevant to credibility:

- truthfulness/veracity
- intelligence
- bias or motive to be untruthful
- opportunities for observation
- reasons for recollection or belief
- powers of perception and memory
- competency and special circumstances
- prior statements (consistent/inconsistent)
- internal inconsistencies/ambiguities
- direct contradictions of testimony

The Credibility Rule (s 102)

- **s 102** → general prohibition: “*credibility evidence about a witness is not admissible.*”
- Policy = prevents collateral attacks on witnesses.
- **s 101A** clarifies that Pt 3.7 only applies where evidence is relevant *only* to credibility.
 - o If evidence is also admissible for another purpose → not caught by credibility rule.
 - o Example: prior convictions admitted under Pt 3.6 → may also be used to bear on credibility.
- Inserted after **Adam v The Queen (2001) 207 CLR 96** where HCA interpreted the old **s 102** literally → meant evidence relevant to credibility + another purpose (e.g. hearsay) escaped exclusion.
- **s 101A** now ensures evidence isn’t excluded where it has another admissible use, even if it also bears on credibility.
- Evidence that is relevant both to credibility and to a fact in issue, but inadmissible for the fact in issue, will still be treated as credibility evidence (*Palmer v The Queen* – McHugh J discusses difficulty).

Exceptions to the credibility rule

Expert credibility evidence (s 108C)

- Exception: expert evidence may be adduced concerning credibility of a witness.

Cross-examination of witnesses (s 103)

- Credibility evidence may be used in cross-exam if it “**could substantially affect the assessment of the credibility of the witness.**”
- This requires *real, persuasive bearing* on reliability of testimony.
- Typical permissible areas: bias, motive to be untruthful, opportunities of observation, reasons for recollection, powers of perception/memory, prior inconsistent statements, internal inconsistencies, direct contradiction.
- Not permissible: general discredit of witness in a *moral sense* (e.g. past drug use) if little bearing on reliability.

Cross-examination of defendants (s 104)

- Additional restrictions apply when cross-examining a **defendant in criminal proceedings** on credibility.

Rebuttal evidence of credibility (s 106)

- Where a witness denies or does not admit what is put in cross-exam under s 103/104:
 - o Court may give leave for evidence to be admitted to prove it.
 - o Leave considerations: importance of the witness, potential significance of rebuttal evidence, nature of proceedings.
 - o **No leave required** if evidence falls within categories in s 106(2).

Re-establishing credibility (s 108)

- Party calling the witness can adduce credibility evidence to **rebut an attack** on credibility.
- Must satisfy requirements of s 108.
- Evidence admissible in re-exam if consistent with re-exam rules in s 39.
- **s 108(3)(a)**: where prior inconsistent statement admitted, court may allow evidence of contrary prior consistent statement.
- **s 108(3)(b)**: even without prior inconsistent statement, with leave, prior consistent statement admissible if it rebuts suggestion of fabrication, reconstruction, or suggestion.

Credibility of non-witnesses (ss 108A–108B)

- **s 108A**: credibility of persons who made *out-of-court representations* admitted into evidence.
 - o Rule: credibility evidence inadmissible **unless** it could substantially affect assessment of person's credibility.
- **s 108B**: further restrictions if the representation-maker is a **defendant in criminal proceedings**.

Evidence Act

s 101A – Credibility evidence

Credibility evidence = evidence relevant to the credibility of a witness or other person that:

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

Notes:

1. ss 60 and 77 do not affect para (b) → they cannot apply to evidence not yet admitted.
2. Inserted in response to **Adam v The Queen (2001) 207 CLR 96**.

Division 2 – Credibility of witnesses

s 102 – The credibility rule

Credibility evidence about a witness is not admissible.

Notes:

1. Specific exceptions:
 - o Evidence in **cross-examination** (ss 103, 104).
 - o Evidence in **rebuttal of denials** (s 106).
 - o Evidence to **re-establish credibility** (s 108).
 - o Evidence of persons with **specialised knowledge** (s 108C).
 - o Evidence of **character of accused persons** (s 110).
 - o Other provisions of this Act, or other laws, may also operate as exceptions.
2. ss 108A and 108B → deal with credibility evidence about a **person who made a prior representation but is not a witness**.

Palmer v The Queen (1998) 193 CLR 1

FACTS: Palmer was convicted of several sexual offences against a 14-year-old complainant. At trial (pre-Evidence Act 1995), defence cross-examined the complainant suggesting she was “paying [him] back” for not giving her attention; the complainant denied it. The Crown then **cross-examined Palmer** asking him to suggest a motive for the complainant's accusation; he could not. On appeal, the propriety/relevance of that line of cross-examination was in issue.

TOPIC 8 – Hearsay

The hearsay rule

Overview of Hearsay (Pt 3.2 UEL)

- **Part 3.2:** Governs hearsay evidence.
- **s 59:** Creates the *hearsay rule* → excludes evidence of a “previous representation” (out-of-court statement, express or implied, including conduct) **if:**
 1. **(a)** the evidence is adduced to prove the existence of a fact asserted by the representation (i.e. offered for its truth); and
 2. **(b)** it can reasonably be supposed that the person who made the representation intended to assert that fact.

Offered for its truth

- Examples of representations **not caught** by hearsay rule:
 - o Oral discussions/refs to prove the **terms of an agreement**.
 - o Threats made → to prove victim acted under **duress**.
 - o Prior statements used only to prove **consistency/inconsistency** with in-court testimony → goes to **credibility**.
 - o Medical history given to a doctor → to prove **basis of expert opinion**, not truth of the history itself.
- **s 60:** If evidence of a previous representation is admitted for a **non-hearsay use**, the hearsay rule no longer applies and the evidence may be used to prove the truth of the fact asserted (subject to:
 - o s 136 discretionary limitation,
 - o exception for *remote hearsay of an admission* in criminal proceedings).

Intention to assert

- Burden: On the party seeking admission → must prove on balance of probabilities (**s 142**) that it **cannot reasonably be supposed** the maker intended to assert the fact implied.
- Example:
 - o Witness testifies they heard B say “Hello John” on the phone. If the evidence is used to prove the caller’s name was John, the party must show B **did not intend to assert** that fact.
 - o If a reasonable person in the circumstances would infer that B **did intend to assert** the fact, the hearsay rule applies.

Exceptions (Pt 3.2)

- **Division 2:** Exceptions for **firsthand hearsay** (maker of representation is the source).
 - o Different rules for **civil vs criminal** proceedings.
 - o Depends on whether the maker is **available** to testify.
 - o Aim: admit the *best evidence available* → involves both (i) quality of evidence, and (ii) availability of the maker.
 - o Example: In criminal proceedings, hearsay admitted if maker is available **and** events were “fresh in the memory.”
 - o Policy: Stricter in criminal → minimise risk of wrongful conviction.
 - o Other exceptions found in **Pt 3.4 (Admissions)**.
- **Division 3:** Exceptions for **more remote hearsay**.
 - o Example: **s 69 Business records** → admissible because business use creates incentive for accuracy/reliability.
 - o BUT does not apply if representation made in contemplation of legal proceedings or during criminal investigation → risk of fabrication.
- **s 75:** Hearsay rule **does not apply in interlocutory proceedings**, provided evidence of source is also adduced → facilitates urgent/interim hearings.
- **Pt 4.6 Div 2 (ss 170–173):** Allows facts to be proved by **affidavit or written statement** (for public documents), if given by authorised person (**s 171**).

appellant had ‘fired two shots’ ... All Mr Calin intended to assert was that the appellant had told him these things” ([23]).

- Calin’s belief or disbelief in what Lee told him was **irrelevant** to issues at trial ([24]).

What s 60 can (and cannot) do.

- Because Calin’s out-of-court representation (that he’d earlier said X) was relevant to **credit** (prior inconsistency), **the hearsay rule did not apply** to that representation **for that purpose**; s 60 rendered it admissible **for its non-hearsay purpose** ([26]).
- But s 60 **“had nothing to say”** about the **representations allegedly made by the appellant to Mr Calin** (the reported confession) ([28]).
- **Crucial limit: “s 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out of court did not intend to assert.** And yet that is what was done here” ([29]). The police officer’s evidence that Calin said Lee said “I did a job” was **improperly treated as evidence Lee actually did the job**—a fact Calin **never intended to assert** ([29]).
- Therefore, the prior statements reporting a confession **were not evidence of the truth** of that confession; they **should not have been received** as proving commission of the offence ([30]–[31], [41]).

Structure and policy coherence.

- The scheme admits limited inroads on hearsay (first-hand hearsay in Div 2; business-type records in Div 3), reflecting reliability concerns with **second-hand hearsay** ([33]–[35], [38]).
- Nothing in the ALRC materials suggested s 60 was intended to be a **gateway for any hearsay however remote** ([38]).
- Practical upshot for trials: if such prior statements are admitted **only for credit**, the judge should **reject irrelevant parts** or give **clear limiting directions**; in this case **rejection** was preferable ([41]).

PRINCIPLES

- **Three-step s 59 analysis:** (i) identify the previous representation; (ii) identify the **intended asserted fact**; (iii) ask if it’s tendered to prove that asserted fact ([22]–[23]).
- **Scope of s 60:** it removes the hearsay bar **only** for the representation admitted for a **non-hearsay purpose** (e.g., to prove prior inconsistency/credit). It **does not** transform a report of a confession into **proof of the confession** when the reporter never intended to assert its truth ([26]–[29], esp **“s 60 does not convert evidence ...”** [29]).
- **Directions/limits:** Where prior inconsistent statements are in, confine use by **s 136** (limit use) and consider **exclusion** of parts (cf noted **s 137** in the judgment) ([41]).
- **UEL alignment:** *Lee* sits with **s 59** (intended assertion focus) and **s 60** (non-hearsay purpose only). Post-2009, **s 60(2)–(3)** clarifies breadth and the **criminal admissions carve-out**, but *Lee*’s core proposition—**no conversion of remote hearsay into truth**—remains the anchor.

Quick v Stoland Pty Ltd (1998) 87 FCR 371

FACTS: In a corporate insolvency case, the trial judge admitted a **financial report by Madden**, a chartered accountant and auditor, who opined the company was insolvent. Madden’s report included **summaries of company financial records**, some of which were **not themselves admitted into evidence**. On appeal, the issue was whether admitting this material (which contained hearsay financial information) was an error.

ISSUE: Was the admission of hearsay material in an expert’s report permissible under **s 60**, given it was relied upon as the basis for expert opinion?

HELD: Evidence admissible, but with caution.

- The **factual basis** of an expert opinion may be admissible **not as proof of the facts asserted**, but because it is relevant to understanding and testing the opinion.
- By operation of **s 60**, once admitted for that limited purpose, the hearsay could also become evidence of the truth of the facts asserted.
- This is subject to **s 136 discretion** to restrict unfair use.

REASONING

Branson J

- Madden’s report was admissible **“on the basis that it was relevant for a purpose other than proof of the facts thereby asserted... [namely] establishing the factual basis upon which Madden held the expert opinions expressed”** ([377]).

- Always test whether a **s 136 limiting direction** can cure any risk before excluding probative material. This is particularly apt once truth is withdrawn and documents go to **malice or damages** only. ([103])
- **Procedural disadvantage** arguments under s 135 are narrow and fact specific. Prior involvement and opportunities to test issues will weigh against exclusion. ([105])
- Good authority to cite alongside **Papakosmas, BD**, and ALRC 26 on the misuse concept under s 135, and to contrast with cases where prejudice arises from emotive or propensity reasoning rather than probative strength.

La Trobe Capital & Mortgage Corp v Hay Property Consultants (2011) 190 FCR 299

FACTS: Valuer **negligently** overvalued security for a **\$2.4m** loan; lender sued for loss. Lender led evidence from senior manager **Mr Gidman** about what La Trobe would have done if it had not made the Jet loan, including foregone alternative loans and demand exceeding funds. Primary judge **admitted** this evidence; valuer appealed contending **s 135** exclusion due to inability to effectively cross-examine and risk of “trial by ambush”.

ISSUE: Whether Mr Gidman’s evidence was irrelevant or should be **excluded under s 135 as unfairly prejudicial** because it was unparticularised and could not be effectively tested.

HELD: Evidence was **relevant and properly admitted**; no s 135 exclusion. Appeal failed on this point. ([59]–[63], [69]–[73])

REASONING (Finkelstein J; Jacobson and Besanko JJ agreeing)

- **Relevance:** Statements about borrower demand, loan pipeline, and foregone opportunities were plainly relevant to **lost income/opportunity**. Lack of full particulars did not make them irrelevant. ([59]–[61], [69]–[70])
- **s 135 threshold:** Exclusion requires **probative value substantially outweighed** by danger of **unfair prejudice**. There must be **compelling circumstances** to exclude. “[T]o exclude evidence under s 135 there must be compelling circumstances... only then will the admission of the evidence cause ‘unfair prejudice.’” ([63])
- **Meaning of unfair prejudice:** Risk of **misuse** by the trier of fact, often by **improper or emotional** reasoning per ALRC 26 [644]; can include some **procedural** risks, but that is context dependent. ([64])
- **“Cross-examining in the dark”** rejected on these facts: Counsel could cross-examine, seek clarification, challenge credibility, or choose to leave gaps and argue **failure of proof**. “To be faced with a strategic decision is not to be burdened with a forensic disadvantage.” ([70]–[71])
- **No ambush here:** Contrast with cases where evidence is opinionated, high-level, or conversation-effect without context. Distinguished **Guide Dogs** and **Seven Network (No 8)**; here the evidence’s **substance** and topics were clear and any further detail would not blindside the opponent. ([65]–[69], [72]–[73])
- **Practical point:** Even where records were incomplete, the evidence could be **tested**; the risk that cross-examination may strengthen the opponent’s case is a normal forensic risk, not unfair prejudice. ([70]–[71])

PRINCIPLES

- **High bar for s 135:** Exclude only where **probative value is substantially outweighed** by danger of **unfair misuse**; “strongly helps the other side” is not enough. ([63]–[64])
- **Procedural prejudice** is narrow: mere lack of perfect particulars or fear of eliciting helpful clarifications in cross-examination is **not** unfair prejudice. Strategic choices are not forensic disadvantage. ([70]–[72])
- **Context matters:** Ambush risk may justify exclusion where the evidence is abstract opinion or conversation-effect with no context, but not where the **substance and limits** are apparent. Distinguish **Guide Dogs** and **Seven Network (No 8)**. ([65]–[69], [72]–[73])
- **Use La Trobe** to resist s 135 objections to business-practice evidence of **counterfactuals** and **opportunity cost** when particulars are imperfect but the evidence is testable.

Prosecution Evidence in Criminal Proceedings

Core rule: Court **must exclude** prosecution evidence in criminal proceedings **if its probative value is outweighed by the danger of unfair prejudice to the defendant**. It is a **mandatory rule**, not a free discretion (**s 137**).

Authorities illustrating application

- **R v Dann** — whether to exclude medical evidence in a child sexual assault trial due to unfair prejudice.

TOPIC 13 – Admissions

Evidence Act 1995 (NSW)

Part 1 Dictionary

admission means a previous representation that is—

- a. made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and
- b. adverse to the person's interest in the outcome of the proceeding.

s 59 The hearsay rule: exclusion of hearsay evidence

1. **Evidence of a previous representation** made by a person is **not admissible** to prove a **fact** that it can **reasonably be supposed** the person **intended to assert** by the representation.
2. In this Part, that fact is an **asserted fact**.
3. For deciding under (1) whether it can reasonably be supposed the person **intended to assert** a particular fact, the court **may have regard to the circumstances** in which the representation was made.
4. **Subsection (1) does not apply** to a representation in a **certificate or other document** given or made under regulations made under an Act **other than this Act, to the extent** the regulations provide that the certificate or document **has evidentiary effect**.

Note—Subsection (3) was inserted in response to *R v Hannes*.

Part 3.4 Admissions

Note—“Admission” is defined in the Dictionary.

s 81 Hearsay and opinion rules: exception for admissions and related representations

1. The **hearsay rule** and the **opinion rule do not apply to evidence of an admission**.
2. The hearsay rule and the opinion rule **do not apply to evidence of a previous representation**:
 - a. **made in relation to an admission** at the time the admission was made, or **shortly before or after**, and
 - b. to which it is **reasonably necessary to refer** in order to **understand the admission**.

Note—Specific exclusionary rules: **s 82** (not first-hand), **s 83** (third parties), **s 84** (violence etc), **s 85** (unreliable admissions), **s 86** (records of oral questioning).

Example: D admits to W (best friend) that he sexually assaulted V. At D's trial, the prosecution may lead from W:

- a. that **D made the admission**, as **proof of its truth**, and
- b. that **W formed the opinion D was sane** when he made it.

s 82 Exclusion of evidence of admissions that is not first-hand

1. Section 81 does **not prevent** the **hearsay rule** applying to evidence of an admission **unless**:
 - a. it is given by a person who **saw, heard or otherwise perceived** the admission being made, or
 - b. it is a **document** in which the admission is made.

Note—**s 60 does not apply** in a **criminal proceeding** to evidence of an admission.

s 83 Exclusion of evidence of admissions as against third parties

1. Section 81 does **not prevent** the **hearsay rule or opinion rule** applying to evidence of an admission **in respect of the case of a third party**.
2. The evidence **may be used** in respect of the case of a third party **if that party consents**.
3. **Consent cannot be given** in respect of **part only** of the evidence.
4. In this section, **third party** means a party to the proceeding other than the party who:
 - a. **made the admission**, or
 - b. **adduced the evidence**.

s 84 Exclusion of admissions influenced by violence and certain other conduct

1. Evidence of an admission is **not admissible unless** the court is satisfied the admission, and the making of the admission, **were not influenced** by:
 - a. **violent, oppressive, inhuman or degrading conduct** (towards the maker or another), or
 - b. a **threat** of conduct of that kind.

evidence of admissions the reliability of which is in question” [510]]. It was **not in dispute** that although the accused was initially not being questioned as a suspect, **all admissions were made in the course of official questioning**, and in any event **resulted from the acts of others** with capacity to influence prosecutorial decisions, so **s 85 applied** [510].

ISSUES:

- Whether, under **s 85(2)**, the admissions were inadmissible unless the circumstances were “**such as to make it unlikely that the truth of the admission was adversely affected**” [510].
- How **s 85** interacts with **s 84** and **s 189** where the accused contests **truth or falsity**.

HELD:

- **Different result to s 84:** “**Application of this section produces a different result to the application of s 84**” [51].
- **Reliability focus:** s 85 focuses on the **reliability of the admission in the circumstances** and is “**not directed to the truth or falsity** of the content ... **but that position is not absolute**. **Section 189** governs the conduct of voir dire proceedings” [51].
- **Truth raised by accused permits veracity evidence:** The **combined effect of s 189(1) and (3)** is that truth or falsity is **disregarded unless introduced by the accused** and this “**obviate[s] a ‘bootstraps’ argument**” [52]; here the **accused explicitly raised truth or falsity** [53], so the court could consider veracity after first assessing circumstances [54].
- **Outcome on reliability:** Apart from one feature, the Crown **established circumstances were such as to make it unlikely the truth was adversely affected** [55]; the **deadline pressure** might even have had the opposite effect on veracity [55].
- **But** the binary choice to “**co-operate or be charged with murder**” was problematic: “**This alone ... would prevent my being satisfied that it was unlikely to have adversely affected the truth**” [57] when considering circumstances in the abstract.
- **After veracity review:** Having reviewed the confession’s **accuracy and inconsistencies** (including timing, letters, car description, media reports, psychiatric points) [58]–[62] and the **compelling walk-through video** [63], the judge concluded: “**I am satisfied that ... the reliability of the circumstances in which they were made is unaffected ... I would not, on the basis of s 85, reject this admission. The veracity ... would ... be a matter for jury determination.**” [64].

REASONING

- **Scope and method:** s 85 asks whether the **making-circumstances** render it **unlikely truth was adversely affected** [510]. The court must first assess **circumstances** without truth proof, then, if the accused puts **truth in issue**, may examine **veracity** under **s 189(3)** [52]–[54].
- **Police conduct and reliability:** Offers of benefits, deadline pressure, and statements by officers **affected voluntariness** under s 84, but did “**not ... have the same impact on [the confession’s] reliability**” for s 85 [51], [55]. The “**limited time**” injunction did not adversely affect veracity and “**may well have had the opposite effect**” [55].
- **The problematic feature:** The **binary ultimatum** to “**co-operate or be charged with murder**” [56]–[57] was the **one circumstance** that, taken alone, would stop satisfaction of the s 85 test [57].
- **Veracity assessment once opened:** Because the accused said parts were made up, the court examined **inconsistencies and corroboration:** some answers were wrong on timing and details [58]–[61], but other aspects, including the **existence of the tax letter** and the **walkaround video**, gave “**substantial support**” and were “**compelling**” [59], [63].
- **Bottom line:** Even though the admissions **lacked voluntariness** for s 84 purposes, **on s 85 the reliability of the circumstances was not adversely affected**, so **no exclusion under s 85** [64].

PRINCIPLES

- **s 85 test:** The prosecution must show the **circumstances** of making the admission made it **unlikely the truth was adversely affected** [510]. The focus is **circumstances and reliability**, not intrinsic truth, **unless the accused raises truth** under **s 189(3)** [51]–[54].
- **Two-stage approach:** Step 1 assess **circumstances only**; Step 2 if accused raises truth, consider **veracity evidence** to resolve the **preliminary question** under **s 189** [52]–[54].
- **Voluntariness vs reliability:** **s 84** and **s 85** can diverge. Conduct that **vitiates voluntariness** may not necessarily render the admission **unreliable** [51], [64].

15. For the purposes of subsection (12), a **prescribed State or Territory provision** is a provision of a law of a State or Territory **declared by the regulations** to be a prescribed State or Territory provision for the purposes of that subsection.
16. Subsection (12) **applies** to a proceeding in relation to which this Act applies because of **s 4, other than a proceeding for an offence against a Commonwealth law** or for the recovery of a **civil penalty under a Commonwealth law**.

Notes

1. **Bodies corporate** cannot claim this privilege. See **s 187**.
2. **Dictionary** cl 3 of Pt 2 sets out what is a **civil penalty**.
3. **Cth s 128(12)–(14)** give effect to certificates under the NSW Act in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.
4. Subsections (8) and (9) were inserted as a response to the High Court decision in *Cornwell v The Queen*.

s 187 No privilege against self-incrimination for bodies corporate

1. This section applies if, under a **law of the State** or in a **proceeding**, a **body corporate** is required to
 - a. **answer a question or give information**, or
 - b. **produce a document or any other thing**, or
 - c. **do any other act whatever**.
2. The **body corporate is not entitled to refuse or fail to comply** with the requirement on the ground that answering the question, giving the information, producing the document or other thing, or doing that other act, **might tend to incriminate the body or make the body liable to a penalty**.

s 128 creates a privilege against self-incrimination. A witness may **object in civil and criminal proceedings** to giving particular evidence, or evidence on a particular matter, on the ground the evidence **“may tend to prove”** that the witness **has committed an offence or is liable to a civil penalty** (use this language in exam answers).

s 187: bodies corporate cannot claim the privilege. Corporations are not entitled to refuse or fail to comply on self-incrimination or penalty-exposure grounds.

CFMEU v Australian Building and Construction Commissioner (2018) 259 FCR 20

FACTS: Mr MacDonald, a CFMEU official, was facing **civil penalty proceedings** under the Fair Work Act. While giving **evidence-in-chief**, he said he was **“concerned about giving certain evidence because it might incriminate him”** and sought a **s 128 certificate** [4]. The primary judge **refused** the certificate, reasoning that Mr MacDonald was not a witness **“objecting”** so as to engage s 128, and relying on *Song v Ying* and **obiter** in *Cornwell v The Queen* [4]. Context included reverse-onus provisions under **s 361 FW Act** on proscribed purpose or intent [11] and the allegation that MacDonald had blockaded a site on specified dates [11]–[12].

ISSUE: Whether a **party witness** who, in **evidence-in-chief**, wishes to give evidence only with the protection of a certificate is a witness who **“objects”** under **s 128(1)**, absent any element of **compulsion**, and whether the primary judge erred in refusing the certificate [3]–[4].

HELD: Appeal dismissed. The Full Court **affirmed Song v Ying** and rejected *Ferrall v Blyton*. **“The argument that Song was wrongly decided cannot be sustained. To the contrary, that decision was plainly correct and should be followed”** [65]. Mr MacDonald’s application for a certificate was rightly refused [66].

REASONING

1) Purpose and structure of s 128

- s 128 **modifies** the common law privilege by allowing **compelled evidence** to be given with **use and derivative-use immunity**. It represents a balance between the individual’s privilege and the **public interest** in having evidence available [19]–[23], [34]–[35].
 - The ALRC’s certification model shows the bargain: compulsion is permitted, but the witness gets immunity. Bromwich J described this as a **“compensated loss”**, trading **“a private right or interest for a public interest”** [35].
 - Parliament implemented the model under which a court may **compel evidence** under **s 128(4)**, coupled with **use/derivative-use** protection in **s 128(7)** [31].

2) “Objects” in s 128 requires compulsion, not a tactical election

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PROOF

A. GENERIC PRELIM PARAGRAPH (USE AT THE TOP OF MOST ANSWERS)

Use when: Any problem where it is clear whether proceedings are civil or criminal.

Preliminary

These are [civil / criminal] proceedings concerning [briefly describe claim / charge]. The legal burden of proving the elements of [the cause of action / the offence] lies on [P / the prosecution], who must prove each element [in civil: on the balance of probabilities (s 140(1))] [in criminal: beyond reasonable doubt (s 141(1))]. Any fact that [P / D] bears a specific statutory onus to prove must be established on the balance of probabilities (s 140(1), s 141(2)), having regard to the nature of the cause of action, the subject matter of the proceeding and the gravity of the matters alleged (s 140(2)). Evidential issues will be addressed [chronologically by witness and stage of trial / issue by issue].

Then go into first evidence issue

B. CIVIL PROCEEDINGS – S 140 AND BRIGINSHAW

Use when: The problem is civil or there is a specific fight about whether something is “proved” on the civil standard.

1. CORE RULE AND TEST

In civil proceedings, a fact is proved if the court is satisfied that it is more probable than not that the fact exists. This is the balance of probabilities standard (s 140(1)). It requires actual persuasion, not a mechanical weighing of scraps of evidence. The tribunal must feel reasonable satisfaction that the fact is so, having regard to the whole of the evidence (Brown v NSW Trustee & Guardian [51]; Helton v Allen; Neat Holdings).

Template with facts:

Here, [P] bears the legal burden of proving [fact in issue, eg that D’s conduct caused the injury] on the balance of probabilities (s 140(1)). The court must be reasonably satisfied that this is more probable than not, on the whole of the evidence, rather than merely seeing a slight numerical tilt in P’s favour.

2. S 140(2) – BRIGINSHAW FACTORS

In deciding whether the civil standard is met, the court must take into account the nature of the cause of action, the subject matter of the proceeding and the gravity of the matters alleged (s 140(2)(a)–(c)). This reflects the Briginshaw principle that serious, inherently unlikely or grave allegations require more cogent evidence before the court can be reasonably satisfied on the balance of probabilities, but do not change the standard itself (Briginshaw; Helton; Neat Holdings; Qantas v Gama).

Template with brackets:

Here, the allegation that [eg D committed fraud / serious dishonesty / sexual misconduct] is a grave one. Under s 140(2) the court must consider the [nature of the cause of action, eg deceit], the [subject matter, eg allegations of criminal conduct] and the gravity of the allegation. Consistent with Briginshaw, this does not raise the standard beyond the balance of probabilities, but it does require clear and cogent evidence before the court can be reasonably satisfied that [allegation] is more likely than not to be true (Neat Holdings; Qantas v Gama).

3. CIRCUMSTANTIAL PROOF AND CONJECTURE

Civil findings can be based on circumstantial evidence. It is enough that the inference supporting the allegation is more probable than competing inferences, but it must do more than produce conflicting inferences of equal probability or mere conjecture (Bradshaw v McEwans; NOM v DPP; Henderson).

Template:

If the court is invited to infer [eg that the money was proceeds of crime] from circumstantial evidence, it must be satisfied that this is the more probable inference on the whole of the evidence, and that there is some fact positively

suggesting that [specific event / state of affairs] existed in this case, rather than mere speculation (Jones v Dunkel; Bradshaw; Henderson).

4. PROVING NEGATIVES AND TACTICAL BURDEN

A party can prove a negative using the same method. The plaintiff must prove the affirmative substance of their case, even if framed as a negative, by adducing facts that make non-occurrence more probable than occurrence. Once one side's evidence establishes a rational inference, a practical or tactical burden may shift to the other to adduce evidence to displace that inference (Henderson; Briginshaw line).

Template:

Although [P] frames the allegation negatively, as [eg "D did not obtain the money lawfully"], [P] must still prove facts that make that non-occurrence more probable than not. If [P]'s evidence establishes a rational inference that [the property was illegally acquired], a practical burden then falls on [D] to adduce evidence to displace that inference, although the legal burden remains on [P] (Henderson; Neat Holdings).

5. STOCK CONCLUSION LINE FOR CIVIL PROOF

Accordingly, on the whole of the evidence, the court would [be / not be] reasonably satisfied on the balance of probabilities that [insert fact in issue], having regard to the seriousness and inherent likelihood of the allegation as required by s 140(2) and the Briginshaw principle.

C. CRIMINAL PROCEEDINGS – S 141 AND BRD

Use when: Criminal PQs, or when the problem explicitly raises the meaning of BRD or jury directions.

1. ONUS AND STANDARD

In criminal proceedings, the prosecution bears the legal burden of proving each element of the offence beyond reasonable doubt (s 141(1); presumption of innocence). The accused has no obligation to prove innocence and no burden is shifted simply because there is a prima facie case. Where statute places a burden on the accused in relation to a particular matter, that matter is to be proved on the balance of probabilities (s 141(2)).

Template:

Here, the Crown bears the legal burden of proving each element of [offence] beyond reasonable doubt (s 141(1)). [D] bears no burden to prove innocence. Any specific defence or exception that statute places on [D] must be established on the balance of probabilities (s 141(2)), but overall the prosecution carries the onus from first to last (May v O'Sullivan).

2. MEANING OF "BEYOND REASONABLE DOUBT"

"Beyond reasonable doubt" is not defined in the Act. A reasonable doubt is a doubt that a reasonable jury considers to be reasonable in the circumstances. Trial judges should not attempt elaborate definitions that dissect the phrase or equate it with "comfortable" or "clear" satisfaction. It is enough to instruct that jurors must be sure of guilt, and that BRD sits above the civil balance of probabilities (Green v The Queen; Dookheea).

Template:

The standard of proof is beyond reasonable doubt. A reasonable doubt is not any fanciful doubt, but one that a reasonable jury considers reasonable in the circumstances. Trial judges should ordinarily avoid re-defining the phrase or equating it with "comfortable satisfaction", which risks diluting the standard (Green; Dookheea). It is sufficient to explain that guilt must be proved beyond reasonable doubt, not merely that guilt is more likely than not.

3. CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES

In circumstantial cases, the ultimate inference of guilt must be proved beyond reasonable doubt, but it is not necessary that every intermediate fact be proved beyond reasonable doubt. It may be appropriate in some cases to

RELEVANCE

0. ONE LINE TO START EVERY EVIDENCE ISSUE

Use this under every evidence issue heading before going into hearsay / opinion / credibility etc.

As a threshold, the evidence of [EVIDENCE] is relevant if, if accepted, it could rationally affect the assessment of the probability of a fact in issue in these proceedings (s 55(1); s 56(1); Papakosmas at [81]).

If relevance is uncontroversial, that is enough and you move on. If relevance is live or tricky, expand using the scaffold below.

USE THIS SCAFFOLD WHEN

- Asked if some item is admissible
- PQ raises Smith / Evans / complaint evidence / similar fact
- Need to remind the marker that relevance is the first admissibility gateway

Structure:

1. Identify facts in issue
2. Apply relevance test
3. Deal with special patterns (Smith, Evans, sexual assault complaints)
4. Provisional relevance and inferences
5. Conclusion on admissibility subject to other exclusions

1. WHAT ARE THE FACTS IN ISSUE

Relevant evidence must relate to a fact in issue. Facts in issue are the material facts that go to the elements of the cause of action or offence, or a pleaded defence.

Template:

1. **Identify proceeding type and elements**
 - **Civil**
 - In civil proceedings, facts in issue are the factual elements of the cause of action and any pleaded defence, as disclosed in the pleadings and particulars. Pleadings define the issues and particulars fill in the detail and put the other party on notice (Goldsmith v Sandilands (2002) 190 ALR 370 at [2] (Gleeson CJ)).
 - **Criminal**
 - In criminal proceedings, facts in issue are the elements of the offence charged and any defence put in issue on the evidence (Smith v The Queen (2001) 206 CLR 650).
 - Here, the facts in issue include whether [eg D breached a duty owed to P / D was the person who robbed the bank / the complainant consented to the act].
2. **Tie to the specific PQ**
 - Here, the facts in issue include whether [eg D was the person depicted in the footage / the complainant consented / P suffered loss caused by D's negligence]. Evidence will be admissible only if it tends to prove a fact in issue, or a fact relevant to a fact in issue (Goldsmith at [31] (McHugh J)).
3. **Examples:**
 - Smith: whether the accused is the person in the photo
 - Papakosmas: whether the complainant consented
 - Evans: whether the accused committed the robbery

2. THE RELEVANCE TEST UNDER S 55 AND THE GENERAL RULE IN S 56

ADDUCING EVIDENCE – WITNESSES

CALLING A WITNESS

1. FRAMING THE ISSUE

Use this when the problem raises something like:

- The prosecutor did not call a key eyewitness
- The judge is thinking about calling a witness
- One party has not called someone obvious and the other wants a Jones v Dunkel inference

Issue headings:

- “Should the court or a party have called [W]?”
- “What are the consequences of the failure to call [W]?”

2. STARTING POINT: EVIDENCE ACT SILENCE + COURT CONTROL (S 11, S 26)

Core rule sentence:

The Evidence Act 1995 (NSW) does not deal with which witnesses must be called. That question is governed by the common law, subject to the court’s general power to control the conduct of proceedings under s 11 and its specific power to control questioning of witnesses under s 26.

Fill-in template:

The Act is silent on who must be called as a witness. Accordingly, the calling of [W] is governed by common law principles, read with the court’s powers to control the conduct of the proceeding (s 11) and the way in which witnesses are questioned (s 26).

Add quick s 26 hook if relevant:

Under s 26, the court may make such orders as it considers just about the way [W] is questioned, the use of documents, the order of questioning and the presence and behaviour of persons during questioning.

3. CIVIL PROCEEDINGS: CAN THE JUDGE CALL A WITNESS?

Key rule: no judicial calling without consent

In civil proceedings, a trial judge should not call a witness of their own motion without the consent of both parties. This is treated as a matter of fundamental principle, not discretionary convenience (Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd (1988) 14 NSWLR 552 at 567–568, approving Re Enoch [1910] 1 KB 327).

Template:

In civil proceedings, the court cannot simply call [W] on its own initiative. A judge in a civil trial should not call a witness without the consent of both parties (Clark Equipment at 567–568). Unless both [P] and [D] consent to [W] being called by the court, the calling of [W] is a matter for the parties.

4. JONES V DUNKEL ADVERSE INFERENCE FOR FAILURE TO CALL (MAINLY CIVIL, OCCASIONALLY CROWN)

Use when a party has not called a seemingly obvious witness.

Rule:

Where a party fails, without reasonable explanation, to call a witness who would be expected to be called and who is available to give evidence, the court may draw an inference that the witness’s evidence would not have assisted that party (Jones v Dunkel). The inference is about the weight of the evidence, not a separate item of proof.

Checklist:

Ask:

1. Was [W] apparently available to be called by [PARTY]?
2. Would [W] be expected to be called in the ordinary course (material to issues, not merely cumulative)?
3. Is there any reasonable explanation for not calling [W] (e.g. genuine unreliability, privilege, marginal relevance)?

Template:

Here, [PARTY] did not call [W], who appears to have been available and able to give material evidence about [TOPIC]. Absent a reasonable explanation, the court may draw a Jones v Dunkel inference that [W]'s evidence would not have assisted [PARTY]'s case. This inference does not fill gaps in the opposing party's proof, but it may make the existing evidence against [PARTY] more safely accepted.

Special notes:

- **Against the defence in a criminal trial:** you do not use Jones v Dunkel to undermine the presumption of innocence; any inference is very limited and must not reverse the onus.
- **Against the Crown:** a Jones v Dunkel-type inference may exceptionally be drawn where the failure amounts to a breach of prosecutorial duty and there is no satisfactory explanation (cf Dyers), but most of the weight is picked up through the **miscarriage of justice** question (Kneebone / Apostilides).

5. CRIMINAL TRIALS: PROSECUTOR'S DUTY TO CALL WITNESSES

5.1 CORE PROSECUTORIAL DUTY (WHITEHORN / APOSTILIDES / KNEEBONE)

Rule sentence:

In a criminal trial, the Crown prosecutor must act with fairness and detachment, seeking to establish the whole truth and ensure a fair trial. As a general rule, the Crown should call all available witnesses whose evidence is necessary to unfold the narrative and give a complete account of the events on which the prosecution is based, including eyewitnesses, even if aspects of their evidence are inconsistent with the Crown case (Whitehorn v The Queen, cited in Kneebone at [41]–[42]).

Template:

The prosecutor must present the Crown case fairly and call all material witnesses necessary to unfold the narrative and present a complete account of the events, even if some parts of their evidence do not support the Crown's theory (Whitehorn; Kneebone at [41]–[42]). Here, [UN CALLED WITNESS] was [describe: an eyewitness / central participant / crucial context witness], so their evidence appears material to the jury's understanding of [ISSUE].

Add the expert nuance if relevant:

These obligations primarily concern witnesses to the facts. They do not require the Crown to seek out and call a "balanced" head-count of expert opinions, though fairness concerns may still arise if crucial experts are ignored (Velevski v The Queen (2002) 76 ALJR 402 at [47] (Gleeson CJ and Hayne J)).

5.2 WHEN THE PROSECUTOR MAY LEGITIMATELY NOT CALL A WITNESS

Whitehorn + Kneebone refinements:

The prosecutor is not obliged to call a witness, even an eyewitness, whose evidence is genuinely unreliable, untrustworthy, otherwise incapable of belief, or merely repetitious (Whitehorn, cited in Kneebone at [42]).

But:

It is not enough that the witness's account is inconsistent with, or unhelpful to, the Crown theory. The prosecutor must be able to point to identifiable factors justifying a decision not to call a material witness as unreliable, and should take appropriate steps (such as interviewing the witness) before forming that view (Kneebone at [49]–[51], [60]).

Fill-in template:

- The witness is a child or has cognitive/communication difficulties
- The witness is a defendant, co-accused, judge, juror, MP, spouse or other family member
- There is an objection to giving evidence or question about comments on silence

Core distinction

- **Competence** – does [WITNESS] have the capacity to give evidence at all (generally or about a particular fact)?
- **Compellability** – assuming competence, can [WITNESS] be required by the court to give that evidence?

2. GENERAL PRESUMPTION AND STANDARD

Presumption

There is a general presumption that every person is competent to give evidence and, if competent about a fact, is compellable to give that evidence: **s 12(a)–(b)**, reinforced by **s 13(6)**.

- The party asserting incompetence must rebut the presumption **on the balance of probabilities** (s 142(1) applies generally).
- The court may inform itself as it thinks fit, including by expert evidence, when determining competence: **s 13(8)**.

Policy (optional line)

Competence rules filter out evidence with no real probative value while avoiding unnecessary exclusion of relevant evidence, especially in criminal trials. Competence concerns capacity to function as a witness, not credibility [ALRC 102 [4.3]–[4.6]].

3. COMPETENCE – DOES THE WITNESS LACK CAPACITY? (S 13)

Step 1 – s 13(1): basic capacity

[WITNESS] will be incompetent in relation to a particular fact if, for any reason, [they]

- cannot understand a question about that fact, or
- cannot give an answer that can be understood,

and that incapacity cannot be overcome: **s 13(1)(a)–(b)**.

- Incompetence may be **fact specific** – s 13(2) – so [WITNESS] might be competent on some topics but not others.
- Practical supports: language barriers can be overcome by an interpreter (s 30), and physical impediments by allowing questioning in any appropriate way (s 31).

Procedural note

Competence is usually determined on a voir dire under **s 189(1)(c)**, with the court able to receive expert evidence: **s 13(8)**.

4. SWORN EVIDENCE – UNDERSTANDING AN OBLIGATION TO TELL THE TRUTH

If basic capacity under s 13(1) is established, ask whether the witness can give **sworn** evidence.

A person who is otherwise competent is not competent to give sworn evidence if they do not have the capacity to understand that they are under an obligation to give truthful evidence: **s 13(3)**.

- The “obligation” is more than just knowing it is important to tell the truth. It refers to being morally or legally bound to give truthful evidence in court (**R v GW (2016) 258 CLR 108 at [26]–[27]**).

Application template

- based only on a **stereotype** about sex, race, culture, ethnicity, age or disability: s 41(1)(d).

In deciding whether a question is inappropriate, the court must consider:

- the witness's **age, education, ethnic and cultural background, gender, language skills, maturity, personality**, and any **disability**: s 41(2)(a)
- the **context**, including
 - the nature of the proceeding,
 - in criminal matters, the nature of the offence, and
 - the relationship between the witness and any party: s 41(2)(b).

Questions are **not** disallowable merely because they:

- challenge the truthfulness, consistency or accuracy of the witness, or
- relate to subjects that could be distasteful or private: **s 41(3)**.

Any party may object that a question is disallowable: **s 41(4)**.

However the court's duty to intervene applies even **without** objection: **s 41(5)**.

Failure to disallow does not affect the admissibility of the answer: **s 41(6)**.

Libke v The Queen (2007) 230 CLR 559

Heydon J gives the common law texture for s 41.

Key points:

- Cross-examination is a powerful tool but conditional. Counsel must act with due regard to the burden on the witness and the integrity of the fact-finding process.
- Improper forms include:
 - **compound questions** that bundle several issues so the witness cannot tell which they are answering, often confusing or misleading: Libke at [127]
 - **bullying, taunting or abusive questions** calculated to humiliate, belittle or break the witness, described as "wild, uncontrolled and offensive" in Libke at [121]–[123]
 - **comments or editorialising instead of true questions**, injecting counsel's personal view into the questioning. Opinions belong in address, not "questions" (Libke at [125]–[126])
 - **assumption-laden questions** that assume contested facts, which can mislead and "put into the mouth of an unwilling witness" statements they never intended (Libke at [129]–[130])
 - **cutting off responsive answers**, especially after a disparaging or confrontational question (Libke at [128])
 - **argumentative questions**, inviting a debate rather than factual answers (Libke at [131]).
- Even where defence counsel does not object, the trial judge has an **independent duty** to stop improper questioning. Failure to object does not give "carte blanche" to Crown counsel; the judge must enforce standards immediately (Libke at [133]). This mirrors **s 41(5)**.

Exam paragraph:

Here, [COUNSEL]'s questions appear misleading and harassing, including compound, assumption-laden questions and sarcastic interruptions. Under s 41(1)(a)–(c), and applying Libke v The Queen (2007) 230 CLR 559 at [121]–[131], the trial judge was required to disallow them even if no objection was taken. However, any answers already given would remain admissible by virtue of s 41(6).

3.5 CROSS-EXAMINATION ON PRIOR INCONSISTENT STATEMENTS AND DOCUMENTS (SS 43–45)

This is the statutory detail that underpins a lot of cross-exam strategy.

(A) PRIOR INCONSISTENT STATEMENTS – S 43

A witness may be cross-examined about a prior inconsistent statement whether or not

- (a) full particulars of the statement have been given, or
- (b) a document containing it has been shown to them: **s 43(1)**.

- Correct or remove unfair impressions created in cross.
- It is not a chance to:
 - Simply repeat examination-in-chief, or
 - **Adduce new evidence-in-chief** or expand the case, unless the court gives leave under s 39(b) and s 192.

Exam line:

Re-examination is confined to explaining or qualifying matters raised in cross-examination. It is not an opportunity to lead fresh evidence-in-chief, save with leave under s 39(b) and s 192.

FORM OF QUESTIONING: LEADING QUESTIONS (S 37)

General rule: Leading questions are **not** allowed in re-examination unless an exception in s 37(1) applies.

s 37 Evidence Act

1. Leading questions not allowed in examination-in-chief or re-examination unless:
 - (a) the court gives leave (guided by s 192), or
 - (b) the question relates to a matter introductory to the evidence, or
 - (c) there is no objection and all other parties are legally represented, or
 - (d) it relates to a matter that is not in dispute, or
 - (e) the witness has specialised knowledge and the question seeks their opinion on a hypothetical.
2. Civil proceedings: s 37(1) does not apply to questions about an investigation, inspection or report made in public or official duties, unless the court directs otherwise.
3. Court rules can provide that a written statement or report be tendered as the evidence-in-chief of its maker despite the above.

Dictionary definition: leading question

A **leading question** is one that:

- (a) directly or indirectly suggests a particular answer, or
- (b) assumes the existence of a disputed fact about which the witness has not yet given evidence.

Practical points

- In re-exam, questions are usually **open**:
 - “Can you explain what you meant when you said X in cross-examination”
 - rather than “You meant Y when you said X, did you not”.
- Leave to ask leading questions is more likely where:
 - the witness has been declared unfavourable under s 38, or
 - there is a narrow point of clarification where a leading question is efficient and not unfair.

Exam line:

During re-examination, [party] generally cannot put leading questions (s 37(1)), unless an exception applies or the court grants leave under s 37(1)(a) taking into account the s 192 factors.

LIMITS ON SCOPE: S 39

Statutory rule

- **s 39 Evidence Act**
 - (a) A witness may be re-examined **only on matters arising out of cross-examination**.
 - (b) Other questions cannot be asked unless the court gives **leave**.

Meaning of “arising out of cross-examination”

- Re-examination may:
 - clarify ambiguous answers given in cross,
 - correct incomplete or potentially misleading answers,
 - qualify or explain statements that might unfairly damage the party’s case if left as they stand.

CREDIBILITY EVIDENCE

0. ONE-LINER WHEN A CREDIBILITY ISSUE POPS UP

The issue is whether [EVIDENCE] is caught by the credibility rule in Pt 3.7. Credibility evidence is generally inadmissible (s 102) unless it fits a statutory exception. It is necessary to determine whether [EVIDENCE] is credibility evidence within s 101A, and if so, whether it falls within an exception such as cross-examination (ss 103, 104), rebuttal of denials (s 106), re-establishing credibility (s 108), expert evidence (s 108C) or related provisions (ss 108A–108B, s 110).

IS IT “CREDIBILITY EVIDENCE”?

WHAT IS “CREDIBILITY” AND “CREDIBILITY EVIDENCE”?

Definition

Credibility of a witness includes the credibility of any part of their evidence and their ability to observe or remember the facts or events about which they give evidence (Dictionary, “credibility of a witness”).

So it covers both:

- truthfulness / honesty / bias / motive to lie
- reliability of perception and memory

s 101A – definition of credibility evidence

Under s 101A, credibility evidence is evidence relevant to the credibility of a witness or other person that is:

- relevant only because it affects the assessment of their credibility (s 101A(a)), or
- relevant both to credibility and to some other purpose, but is inadmissible or cannot be used for that other purpose because of a provision in Pt 3.2–3.6 (s 101A(b)).

Template

Here, [EVIDENCE] goes to [eg bias, motive to lie, ability to remember / inconsistencies]. It affects [WITNESS]’s credibility in that it bears on [their truthfulness / reliability / observation / memory].

Because [explain: it is only relevant to whether they should be believed / its non-credibility use is blocked by hearsay / opinion rules], it is credibility evidence within s 101A([a]/[b]).

Examples of credibility factors to name-drop

- truthfulness / dishonesty (incl prior dishonesty convictions)
- bias, hostility, motive to be untruthful (Palmer)
- opportunities to observe
- powers of perception (eg eyesight, lighting)
- powers of memory (eg intoxication, brain injury, youth)
- prior inconsistent or consistent statements
- internal inconsistencies / contradictions

IS THE EVIDENCE CAUGHT BY THE CREDIBILITY RULE AT ALL?

Key move: If the evidence is admissible to prove a fact in issue for some other reason, it is *not* caught by Pt 3.7.

Template

If [EVIDENCE] is admissible to prove [FACT IN ISSUE] (for example under a hearsay or opinion exception), it falls outside the definition in s 101A and is not excluded by the credibility rule. It may then also be used to attack or bolster [WITNESS]’s credibility.

By contrast, if [EVIDENCE] is inadmissible for its non-credibility purpose (eg hearsay or opinion), but it still affects the assessment of credibility, it remains credibility evidence under s 101A(b) and is *prima facie* caught by s 102.

- Use of prior inconsistent police statement to attack a hostile complainant's credit properly admitted under s 103 and s 38; once in, s 60 made it evidence of facts.

Own witness – s 38

If [PARTY] has called [WITNESS] but they give unfavourable evidence, fail to make a genuine attempt to give evidence, or have made a prior inconsistent statement, the party can seek leave under s 38 to question them as if in cross-examination, including on matters going only to credibility. Such questioning is then treated as cross-examination for the purposes of s 103.

S 104 – EXTRA PROTECTIONS FOR CROSS-EXAMINING A DEFENDANT IN A CRIMINAL TRIAL

Apply this only in criminal context where the accused is being cross-examined.

Structure

Where the witness is a defendant in criminal proceedings, s 104 overlays further protections on top of s 103.

- As a starting point, the prosecutor must not cross-examine the defendant as to credibility unless leave is granted (s 104(2)), except for questions about:
 - bias or motive to be untruthful (s 104(3)(a))
 - inability to perceive or remember relevant matters (s 104(3)(b))
 - prior inconsistent statements (s 104(3)(c)).
- Beyond this, leave to cross-examine the defendant on credibility may only be given if the defendant has themselves adduced credibility evidence that suggests a prosecution witness has a tendency to be untruthful, where that evidence is solely or mainly directed to that witness's credibility (s 104(4)), excluding evidence about the events of the offence or investigation (s 104(5)).

Case use

In El-Azzi, the Court confirmed that credibility-only cross-examination of an accused must clear two hurdles: it must have substantial probative value (s 103) and the court must grant leave under s 104(2), taking into account fairness, importance and prejudice under ss 192, 135 and 137.

Palmer warning

In Palmer, the majority held that asking an accused "why would the complainant lie?" is generally impermissible or irrelevant, as it risks inviting the jury to reason that the complainant must be truthful unless the accused can give a positive motive, thereby subtly reversing the onus of proof. Such questioning typically should not be allowed under s 103/s 104.

EXCEPTION 2: REBUTTING DENIALS – S 106

Use where you want to prove with other evidence something put in cross that the witness denied or did not admit.

Rule

Section 106 allows a party to adduce credibility evidence from another source to contradict a witness's denial in cross-examination.

Template

During cross-examination, [CROSS-EXAMINER] put to [WITNESS] that [SUBSTANCE OF ALLEGATION]. [WITNESS] [denied / did not admit] the substance of that allegation. Under s 106(1)(a), the credibility rule does not apply to evidence from another source that tends to prove that allegation, provided leave is given under s 106(1)(b).

Leave not needed in key categories

Leave is not required if the rebuttal evidence tends to prove that the witness:

- is biased or has a motive for being untruthful (s 106(2)(a)),
- has been convicted of an offence (s 106(2)(b)),
- has made a prior inconsistent statement (s 106(2)(c)),
- was or is unable to be aware of matters to which their evidence relates (s 106(2)(d)), or