

CREDIBILITY

PART 3.7

ss. 101A – 108C



Introduction

- ▶ Part 3.7 provides the rules for leading evidence in cross examination on credibility.
- ▶ The Part commences with statements which are largely the same as the common law.
- ▶ There are significant changes in the way some evidence is presented.
 - Rebutting denials by other evidence;
 - Where representations are admitted but the maker is not called to give evidence.
 - Expert evidence of the credibility of another witness.

The Credibility Rule


- ▶ S.101A excludes evidence which is relevant only to the credibility of the witness or person and is not otherwise admissible.
- ▶ In other words (subject to exceptions) a party cannot call evidence solely to bolster or impugn the credibility of a witness.



Credibility of the Witness or Person

- ▶ There is focus on this provision in the cases and whether or not evidence is relevant only to the credibility of a witness or person.
- ▶ The dictionary definitions of credibility are broad – they cover fabrication but also exaggeration and unreliability.
- ▶ In *Peacock v R* [2008] NSW CCA 264 the majority drew a distinction between:
 - Evidence going to credibility of a witness; and
 - Evidence going to the credibility of evidence given by that witness.
- ▶ The latter is not caught by the rule in s.102.

Credibility of the Witness or Person (cont.)

- ▶ The NSW CCA seemed keen not to unduly limit (and thereby exclude) evidence as going only to credibility; e.g if a witness is given a benefit such as a discount for co-operating, this is not merely evidence of credibility but goes to the “true status of the witness”.
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Cross Examination as to Credibility

- ▶ s.103 permits cross examination of a witness on credibility if the evidence “could substantially effect the assessment of the credibility of the witness”.
- ▶ The test is taken at its highest: i.e. that the witness will give the answer sought by the cross examiner.
- ▶ It is a test of capability not likelihood or probability.
- ▶ The requirement of “substantially effect” is to keep the trial focused.
- ▶ The cross examination should have the:
“Potential to effect the jury’s assessment of the credit of the witness...[so that] the credit of the witness cannot be determined adequately without regard to it.”
See *R v Lodhi* [2006] NDSW SC 670.


Cross Examination as to Credibility (cont.)

- ▶ Credibility may encompass:
 - Previous conduct/prior convictions.
 - Veracity, bias, motive, coaching of the witness.
 - Intellectual capacity.
 - Prior inconsistent or consistent statements.
- ▶ s.103(2) the Court must have regard to:
 - Knowingly/recklessly made a false statement when obliged to tell the truth.
 - The period that has elapsed.
 - There is no time limit or strict rule on lapse of time. It will depend on the seriousness of the previous acts in relation to the assessment of the witness's character.
- ▶ The defence may nevertheless apply to exclude such evidence under either ss.135 or 137.

Cross Examination of the Accused

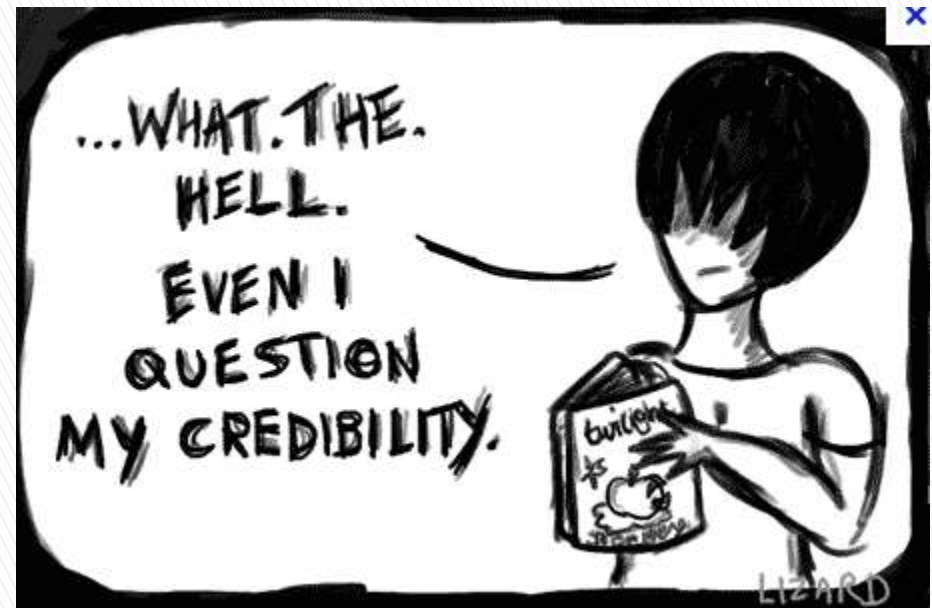
- ▶ Leave of the Court is required to cross examine a defendant on their credibility.
- ▶ Leave is not required for cross examination as to:
 - Bias/motive to be untruthful.
 - Unable to be aware/recall matters to which their evidence relates.
 - Prior inconsistent statements.
- ▶ Leave must not be given unless the defendant has
 - actually adduced evidence solely or mainly attacking a prosecution witness's credibility **and**
 - tending to prove the witness had a tendency to be untruthful **and**
 - the attack does not relate to the events or investigation of the prosecution.

Cross Examination of a Defendant by a Co-Defendant

- ▶ Leave will not be granted unless the defendant to be cross examined has actually adduced evidence and the evidence is admitted that is adverse to the cross examining accused.
 - ▶ Leave to cross examine is not generally required – it is only on credibility or character issues
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Rebutting Denials by Other Evidence

s.106 provides a significant departure from the old finality rule. A party may seek to adduce evidence as to a witness's credibility where the matter was put to the witness and the witness denied it.



Rebutting Denials by Other Evidence (cont.)

Leave is not required if the evidence relates to:

- Bias/motive to be untruthful.
- Prior convictions.
- Prior inconsistent statements.
- Unable to be aware of matters
- Knowingly/recklessly made a false statement.



Rebutting Denials by Other Evidence (cont.)

- ▶ “Unable to be aware” is a contentious phrase. The NSW CCA held that fresh evidence that a witness had only recently recalled old sexual assaults (having sworn at trial that she never forgot) did not fall within the meaning of “unable to be aware”.
- ▶ In those cases defence can overcome the problem by applying for leave to adduce the evidence.

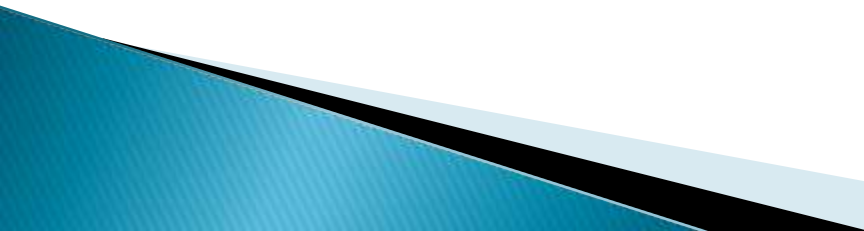
s.108 Re-establishing Credibility

- ▶ The credibility rule does not apply to re-examination,
- ▶ However leave is required to lead a prior consistent statement if:
 - A prior inconsistent statement is adduced; or
 - It is or will be suggested that the witness has fabricated or reconstructed evidence.
- ▶ s.108 was used successfully in *McCrae* where evidence was put to the informant of prior consistent statement after a defence witness was cross examined on inconsistencies.

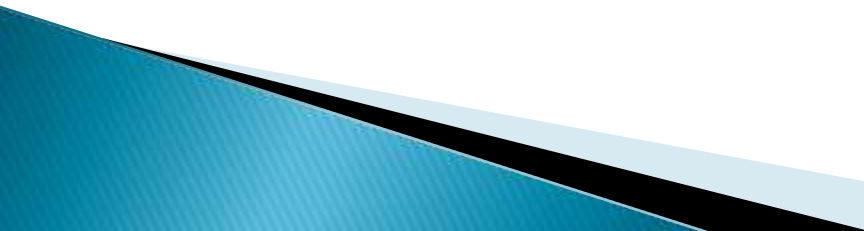
Credibility of Persons Who Are Not Witnesses

Under s.108A credibility evidence may be given about the credibility of a person who has not and will not be called to give evidence.

Credibility of a Defendant Who is Not a Witness

- ▶ Note, there is some ability for prosecutor to adduce credibility evidence with and without leave in some circumstances, where a defendant has made a previous representation and which is admitted in the proceeding but where the defendant is not called to give evidence.
 - ▶ The provision follows the familiar statutory formula.
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Person With Specialised Knowledge (Experts)

- ▶ s.108C enables a party to apply for leave to call expert evidence of the credibility of another witness.
 - ▶ This particularly pertains to child sex abuse cases.
 - ▶ The application for leave must take into account s.192.
 - ▶ The defence may seek to exclude the evidence under ss.135 –137.
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“And finally, Doctor, in your expert medical opinion, is this lump in my armpit anything to be concerned about?”