

## A practical approach to the Credibility Rule – When, Why and How

### When

It is important to identify whether or not the credibility rule applies to evidence you are trying to adduce or impugn.

- If the evidence is admissible for its relevance to a fact in issue then the credibility rule will not apply.
- If the evidence is relevant only to credibility, the exclusionary rule will apply and admissibility will require an exception to the credibility rule (s 102).
- If the evidence is relevant both to a fact in issue AND credibility but inadmissible for its fact in issue purpose (due to the hearsay rule or the tendency and coincidence rules) again an exception to the credibility rule will be required (ss 101A and 102).

### Why

The policy reason behind the credibility rule is obvious – trials and hearings should not be lengthened and the tribunal of fact distracted with extraneous evidence about witnesses. Findings of fact should be based on evidence related to what happened on the day.

Consideration of the underlying policy reason will assist in remembering when the exclusionary rule applies: If the evidence has been admitted by the court for its relevance to a fact in issue the credibility rule will not apply. The Act recognises that credibility evidence may also be relevant (s 55(2)). If the evidence is to be used only for its credibility purpose the Act offers generous exceptions to the rule. These can be categorised into three groups:

- **Evidence that discredits** a witness: ss 103 (cross-examination); 104 (cross-examination of an accused); 106 (evidence rebutting a witness's denial of assertions concerning credibility); and 108C (expert evidence).
- **Evidence that accredits** a witness: ss 108 (re-examination and prior consistent statements) and 108C (expert evidence).
- Evidence about credibility of non-witnesses whose representation has been admitted into evidence (s 108A for all people except an accused person; s 108B for an accused).

### How

#### **Evidence that discredits – cross-examination**

Cross-examination offers the greatest scope for adducing evidence relevant solely to credibility. The guiding provision is s 103. Evidence adduced in cross-examination will not be subject to the credibility rule if the evidence “**could substantially affect the assessment of the credibility of the witness**”.

When interpreting the section there are a few matters of note:

- The use of the word 'could' means the court must consider whether the evidence is *capable* of substantially affecting the assessment of the credibility of the witness, as opposed to whether it is likely to do so (*R v Shamouil* (2006) 66 NSWLR 228)
- The evidence should be taken at its highest – meaning when determining the question the court should presume the witness will agree with the questions being put in cross-examination
- *R v Lodhi* [2006] NSWSC 670 also offers some guidance on the interpretation of the exception. Although the case considered a former incarnation of s 103, it is still of assistance given the similarity of the terms between the former and current section<sup>1</sup>. Whealey J found that the use of the word 'substantial' should be given its full import. The test will be satisfied if the credit of the witness cannot be determined adequately without regard to the evidence.

Section 103(2) identifies some specific considerations when determining whether evidence could substantially affect the assessment of the credibility of the witness. These are:

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

When cross-examining a prosecution witness on credibility there is no hard and fast rule on what will or will not be admissible. The scope of the exception to the exclusionary rule is determined based on the facts of the case and the specifics of the credibility evidence. The following areas *might* meet the s 103 exception:

- Ability to observe or remember (eg lighting, obstructions, noise and the witness's physical and mental capacities, such as intoxication, stress levels, age, eyesight etc).
- Motivations to lie (including bias).
- Evidence of a false representation when under an obligation to tell the truth.
- Certain prior convictions relating to dishonesty or perjury.
- Other instances of lies or dishonesty (NB not all instances of dishonesty will be sufficient see *R v Lodhi* re the scale of dishonesty).
- Prior inconsistent statements, inconsistencies while giving evidence and with other witnesses.
- Evidence of coaching.

### **Protecting your client – when your client is giving evidence**

Section 104 offers additional protections for an accused person giving evidence and applies in addition to s 103. It requires the seeking of leave before cross-examination on a matter relevant only to credibility (s 104(2)). However, there are broad exceptions to the requirement for leave.

Leave will not be required by the prosecution on matters relating to whether the accused:

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<sup>1</sup> The former exception provided by s 103 allowed for evidence "adduced in cross-examination of a witness if the evidence has substantial probative value".

- Is biased or has a motive to be untruthful
- Is/was unable to be aware of or recall matters to which his or her evidence relates or
- Has made a prior inconsistent statement.

An attack on credibility should be based on evidence that has some reliability. In *Campbell v R* 25 August 1993, WA CCA BC 9301393, unreported, a line of cross-examination of an accused was found to be impermissible. The cross-examination related to questions of an accused, charged with supplying cocaine, suggesting that an unrelated trip to Bolivia had been for the purpose of either importing or supplying drugs. The court described the cross-examination as bordering on vexatious or scandalous.

In situations where the prosecution is required to seek leave, the court must not grant leave unless evidence has been adduced by the defence and been admitted that:

- Tends to prove a prosecution witness has a tendency to be untruthful and
- Is relevant solely or mainly to the witness's credibility.

In other words, if the defence case has raised issues of credibility about a prosecution witness the accused will lose some protection regarding their credibility if he or she chooses to give evidence. *R v El-Azzi* [2004] NSWCCA 455 provides an example of an instance where the manner of cross-examination of prosecution witnesses had "thrown wide open" an opportunity for extensive cross-examination of the accused. The case also offers analysis on types of evidence, some but not all of which were found to satisfy the s 103 threshold.

### **Protecting your client – consequences of your cross-examination of prosecution witnesses**

It is also important to remember that another possible consequence of an attack on the credibility of a prosecution witness could lead to the prosecution being allowed to adduce evidence that accredits the witness in accordance with s 108. This provision will be considered in the re-examination and prior consistent statements section of the paper.

### **Evidence that discredits – adduced in examination in chief**

If you wish to lead evidence from another witness about the credibility of a prosecution witness section 106 provides the relevant exception. To make use of the section it is essential to have adequately laid the groundwork during cross-examination of the witness whose credibility you have impugned. Section 106 provides that the credibility does not apply to evidence adduced via another witness as long as:

- (a) in cross-examination of the witness:
  - (i) the substance of the evidence was put to the witness, &
  - (ii) the witness denied, or did not admit or agree to, the substance of the evidence, AND
- (b) the court gives leave to adduce the evidence.

This section requires a grant of leave. However, leave will not be required if the evidence tends to prove the witness:

- (a) is **biased** or has a **motive for being untruthful**, or
- (b) has been **convicted of an offence** (incl in a foreign country), or
- (c) has made a **prior inconsistent statement**, or
- (d) is, or was, **unable to be aware of matters** that his/her evidence relates, or
- (e) has knowingly or recklessly **made a false representation** while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

In *R v Abebe and Mulugeta* 3 February 1994, WA CCA BC 9401655, unreported, the defence had attempted to cross-examine a prosecution witness, also the ex-girlfriend of an accused, in respect of a letter she had written to the Immigration Department asserting facts that would have been detrimental to Mulugeta's immigration status. The cross-examination was stopped at trial. On appeal the court found that the cross-examination with respect to the question of bias could have indicated a motive to give false evidence and should have been permitted. Depending on the answers to the questions under cross-examination the letter and its contents may have also been admissible. In NSW (or another Evidence Act jurisdiction) this scenario is likely to fall within s 106.

#### **Evidence that accredits – re-examination and prior consistent statements**

Once a witness's credibility has been attacked the party who has called the witness is permitted to ask questions solely relevant to re-establishing that witness's credibility. This exception to the credibility rule is found in section 108(1).

A prior consistent statement is a matter that goes to credibility. If the prior consistent statement is inadmissible for its fact in issue purpose it may become admissible for its credibility purpose if s 108(3) applies. Section 108(3) will apply if evidence of a **prior inconsistent statement has been admitted** or the witness's **credibility has been impugned on the basis** that the witness has **fabricated or re-constructed** their evidence or their evidence is the **result of a suggestion**. This provision also requires the court to grant leave.

#### **Matters to note:**

- Applications for leave should be made in accordance with s 192
- All questions of admissibility will invite a consideration of ss 135-137

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### Overview of provisions

Section	Purpose	Key issue	Leave Req
Dictionary definition; 101A	Identifying when the rule applies	Includes matters truthfulness, accuracy and reliability	n/a
102	The exclusionary rule		n/a
103	Cross-examination	The test: Could the evidence substantially affect the assessment of credibility of the witness	No
104	Cross-examination of the Accused	The test from s 103 PLUS leave is required unless XX about – bias, motive to be untruthful, unable to be aware, or prior inconsistent statement. Leave must not be given unless credibility of a prosecution witness has been impugned during XX	Yes – unless conditions satisfied
106	Rebutting denials by adducing evidence to discredit a witness	Ensure the evidence has been "put" to the relevant witness during XX. Only admissible if evidence denied.	Yes – unless a condition in (2) is satisfied
108	Re-establishing credibility	Re-examination may cover credibility if credibility impugned. Prior consistent statements may become admissible	Yes – for prior consistent statements
108A (similar test to 103)	Credibility of non-witness	Rules re credibility where evidence of a representation admitted but witness not called	No
108B (similar test to 104)	Credibility of Accused who is a non-witnesses	Rules re credibility where evidence of a representation admitted but accused not called	Yes – unless conditions satisfied
108C	Experts giving evidence on cred.	An expert may give evidence re the credibility of a witness	Yes

