

# I'm a Defendant: Will I Have to Testify in Court?

A question that defendants often ask their lawyer is: will I have to testify in court?

The simple answer is no, you never have to go on the witness stand if you have been charged with a criminal offence and are going to court.

The exception to this rule is where you are going to certain tribunals – such as at the Crime Commission or Independent Commission Against Corruption – where you may be under an obligation to answer questions.

But if you are a defendant in court, you have a right to silence and cannot be forced to testify on the witness stand.

## **Right to Silence in Court**

Witnesses who are subpoenaed to attend court are under an obligation to answer questions. However, the right to silence means that defendants cannot be forced onto the witness stand.

But this 'right to silence' has been undermined to an extent by [section 20 of the NSW Evidence Act](#), which says that a judge "may comment on a failure of the defendant to give evidence" as long as that "comment" does not suggest that the defendant is guilty.

So while you do not have to testify, the question of whether you should take the witness stand is an entirely different matter – and one which should be carefully considered by your lawyer.

## **The Pros of Testifying**

The prosecution's case will always go first. For that reason,

the final decision about whether the defendant should testify is often left until after the prosecution case has finished. If, after all of the prosecution witnesses have given evidence, the prosecution case is weak, then it may be against a defendant's interests to risk taking the witness stand and being exposed to questioning by the prosecution (called 'cross-examination').

On the other hand, if the prosecution case is relatively strong and the defendant's evidence will rebut that case, then it may be in the defendant's interests to take the stand.

A defendant who is credible and convincing can be the turning point in a case. It could be the thing that makes a favourable impression upon the jury and convinces them to acquit.

While the prosecution must prove the accused's guilt beyond [reasonable doubt](#), a defendant who comes across as honest and sincere can help establish the necessary doubt to get them over the line. And testifying is often the only way to introduce evidence of an alternative explanation of the events when there is no other way to get that material before the jury.

### **The Cons of Testifying**

While putting the defendant on the stand could win a trial, it also comes with considerable risks – even for an innocent person.

A defendant who comes across as implausible due to nerves, anxiety, presentation or personality type, can have a disastrous effect on their case.

Some might think that an innocent person has nothing to worry about, but the courtroom is a daunting place that can cause extreme anxiety – imagine facing a courtroom full of people – including lawyers, the judge, jury, court staff, complainant, families and the public – and having to accurately answer

questions when you are facing the prospect of many years in prison..

Anxiety can cause all sorts of problems –from hesitating before answering questions, to giving inconsistent answers, to making mistake or failing to recall times and dates – all of which can undermine a person’s credibility.

For that reason, the question of whether a defendant will take the witness stand is one of the most important call that a defendant (in consultation with their lawyer) can make.

### **Case study:**

I was recently instructing in a case where our client and a co-accused both pleaded guilty and were both put on the stand during sentencing. Our client gave evidence of his remorse and regret for his actions, as well as the positive steps that he had taken since committing the offence in order to turn his life around.

While our client came across as genuine, remorseful and credible (and got a significant penalty reduction), the co-accused gave exactly the opposite impression.

The look on the judge’s face during the questioning said it all – he was clearly not impressed. I did not get to see the sentence that the judge ultimately imposed on him, but my guess is that the co-accused’s testimony only harmed, not helped, him.

Under pressure, it is very difficult to predict how a person will act, and despite all of the preparation in the lead up to court, a lawyer will never know for certain how their client will perform on the witness stand in a busy courtroom. Because of this, many lawyers will often advise their client not to give evidence, unless there is a compelling reason for them to do so.