

Whose Job is it to Call Witnesses?

In both civil and criminal trials, both parties can call witnesses.

However, in a criminal trial, the prosecution bears the main burden of calling witnesses.

According to the [Prosecution Guidelines](#), the prosecution must call all apparently credible witnesses if their evidence is:

- Admissible;
- Essential to the prosecution case; and
- Material or relevant to the proceedings – this includes witnesses that may not be favourable to the prosecution

Evidence which is merely repetitious or proves unchallenged facts by both parties should not be called, unless the defence wishes it to be.

The prosecution is not allowed to refrain from calling a witness as a tactical consideration and they cannot choose not to call a material witness simply because their evidence does not match up with the case that the prosecution are trying to make.

Merely calling a witness does not mean that the prosecution embraces or agrees with the testimony of that particular witness, but it is their duty to call all material witnesses.

The prosecution can only refuse to call a witness if it is obvious that they are so devoted to the defendant that they will not tell the truth.

And if the prosecution does decide not to call a witness who could be reasonably expected to appear, the defence must be notified.

The prosecution must also give a reason for their failure to be called, such as the witness was not available or deemed untruthful.

Police failure to call a witness can sometimes cause such a substantial miscarriage of justice that a trial may be overturned.

This happened in the case of [R v Kneebone](#) where a girl had accused her mother's boyfriend of assaulting her.

During that trial, police failed to call the mother to give evidence.

The mother was in the house during the alleged attack and was said by the daughter to have intervened at one point.

However, the prosecution did not call her despite the fact that she was a material witness.

On appeal, it was held that the failure to call the mother caused a substantial miscarriage of justice. The conviction of the defendant was quashed and a new trial was ordered.

The fact that the prosecutor bears the responsibility of calling material witnesses can sometimes work to the advantage of a defendant in a criminal trial.

The party calling the witnesses examines them first, and then the opposing side can cross-examine. Cross-examining a witness is advantageous because you may ask leading questions, which is not allowed during the examination in chief.

[Leading questions](#) are questions that invite a particular answer and are often an effective means of questioning a witness.

However there is a problem for the defence: if the prosecution refuses to call a witness, the judge does not have much scope to intervene.

In Australia, judges are not supposed to call witnesses except in very, very exceptional circumstances.

So while it is the prosecution's job to call witnesses, a failure to do so may be difficult to remedy in court, as a judge's power to intervene here is limited merely to questioning the prosecution on their decision not to call a particular witness.

Does the defence have to call witnesses?

Unlike the prosecution, the defence has no 'duty' to call any witnesses.

Due to the right to silence, a jury is not permitted to draw any adverse inferences from the defendant's choice not to go onto the witness stand and give evidence.

In fact, in a jury trial, a trial judge should direct a jury not to take note of this fact, as a jury otherwise believe that the accused is hiding something or speculate about what such evidence might have been.

On the other hand, if the prosecution fails to call evidence, a jury may consider this in certain circumstances.

They may not speculate about what such evidence may have been but they may take note that a particular witness was not called.

Rules surrounding calling witnesses and their evidence are quite complicated.

While it is definitely the job of the prosecution to call all material witnesses in most circumstances, this does not always happen.

This is very difficult to remedy in court so if you have any concerns about witnesses that may be important in your upcoming hearing at Downing Centre Local Court or trial at the

[Downing Centre District Court](#), it may be best to get expert advice from an experienced criminal lawyer.