

Is this credibility evidence? How/when can credibility evidence be used?

- **Exclusionary rules in s 102 and 108 apply only if the evidence is ‘credibility evidence’**
- **EA s 101A – Credibility evidence is:**

Evidence relevant to the credibility of the W or person that -

 - (a) is only relevant b/c it affects the assessment of the credibility of the W or person; or
 - (b) is relevant -
 - (i) b/c it affects the assessment of the credibility of the W or person; and
 - (ii) for some other purpose for which it is not admissible, or cannot be used (hearsay, opinion, admissions, T/C)
 - **2 categories of credibility evidence;**
 - (a) evidence only deemed relevant for a credibility purpose
 - (b) evidence that is relevant for credibility and another purpose, but not admissible for that purpose
e.g. relevant also for hearsay, but not falling under an exception
 - **BOTH OF THESE CASES – must find an exception to the credibility rule to be admitted!!!**
 - EVIDENCE that is relevant to credibility and hearsay for its truth (PIS), and admissible under hearsay exceptions, does not need to fall under a credibility exception b/c it can be admitted for that other purpose!!!
- **Generally, credibility evidence about a W is not admissible – EA s 102**
- **Exclusion A – CX as to credibility – EA s 103**

(1) CR does not apply to evidence adduced in CX of a W if the evidence could substantially affect the assessment of the credibility of the W

 - Opposing counsel can attack a Ws credibility – usually by adducing PIS or suggests recent invention
 - CX must be likely to affect the standing of the W in a substantial way (higher threshold than CL)
 - Often through leading Qs which put to the W some allegation, that if true, would tend to show the W is not a credible one
 - W may deny or agree → consider rebutting denials by other evidence
- **Exclusion B – Re-establishing credibility – EA s 108 ****leave s 192******

(1) CR does not apply to evidence adduced in RX of a W

(3) CR does not apply to evidence of a PCS of a W if -

 - (a) evidence of a PIS of the W has been admitted; or
 - (b) it is, or will be suggested (expressly or impliedly) that evidence given by the W has been fabricated or re-constructed (deliberately or otherwise) or is the result of a suggest - and the court gives leave to adduce the PCS
 - Where a W’s credibility has been impeached (through operation of s 103), then the party calling the W may be permitted to lead evidence to restore or re-establish the W’s credibility
***** Even though such evidence would not be permitted to be led in chief *****
 - Counsel in RX of their W can adduce PCS to rebut the PIS or suggestion of recent invention
 - **NOT AS WIDE AS IT LOOKS – Recall s 39** – RX limited to ‘matters arising out of evidence given by the W in CX’ or in relation to matters in which the court gives leave
- **Combined effect of s 101A, 102 and 108A?**
 - Evidence that is only relevant for a ‘credibility purpose’ – that is the assessment of the credibility of a W or person – cannot be used for that purpose, unless it falls within the scope of one of the exceptions
 - Evidence that has dual relevance and that is admissible for a non-credibility purpose can also be used for the credibility purpose – without having to fall within the scope of one of the exceptions
 - Evidence that has dual relevance, but that is inadmissible for the non-credibility purpose – cannot be used for the credibility purpose, unless it falls within the scope of one of the exceptions
 - Where the effect of the exclusionary rule is to prohibit the admission of the evidence altogether, the evidence cannot be used for any purpose, including the credibility purpose

- **CXing the D as to credit – further protections from operation of s 102 & exception under s 103**
 - **D being CXed in a criminal trial (c.f. a W)**
 - ** **SHIELD LOST if the D attacks a Crown W's credibility *****
 - **EA s 104(2)** – Generally, Court must give leave to CX a D as to their credit
 - **EA s 104(3)** – Leave not required for CX about whether the D -
 - (a) is biased, or has a motive to be untruthful
 - (b) is, or was, unable to be aware of or recall matters to which his/her evidence relates
 - (c) has made a PIS
 - **EA s 104(4)** – Leave **must not be given under (2) unless evidence has been adduced by the D that** -
 - (a) tended to prove that a Crown W has a tendency to be untruthful; and
 - (b) is relevant solely or mainly to the W's credibility
 - **EA s 104(6)** – Leave for A1 to CX A2 if A2 has adduced evidence adverse to A1 which has been admitted (Lowery v King; Murdoch v Taylor – if 2 co-As, and one denies that puts the other in the square)
 - **Credibility of a person who made a PR – EA s 108A**

Where evidence is to be admitted of a PR, and the maker of the PR has not been called and will not be called to give evidence, credibility evidence about that person is not admissible unless it could substantially affect the assessment of the person's credibility

 - E.g. if a diary is adduced under a hearsay exception, s 108A allows for credibility evidence about the writer to be admitted if it could substantially affect the assessment of their credibility – not just restricted to impeaching credit, can be favourable too

If the maker of the representation is an accused, credibility evidence not admissible without leave – EA s108B
→ Protection for an A who chooses not to testify