

EVIDENCE SCAFFOLD

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STEP 1: RELEVANCE

For evidence to be admissible in a proceeding, it must also be relevant (s56).

EVIDENCE THAT IS RELEVANT

Pursuant to s55(1), the evidence of [evidence] is relevant because if it were accepted, it could rationally affect, directly/indirectly, the assessment of the probability of the existence of the fact in issue in the proceeding, being the [fact in issue] (Smith).

If about evidence of motive:

Evidence of a motive is merely an intermediary fact but it will be relevant as it goes towards asserting [fact in issue] (Macrae).

If about re cred, admissibility of other evidence, failure to adduce evidence:

As the evidence relates to credibility (s55(2)(a))/admissibility of other evidence (s55(2)(b))/failure to adduce evidence (s55(2)(c)), it is not taken to be irrelevant (s55(2)).

Ultimately, the evidence is likely to be found relevant and therefore is admissible to the proceeding (s56(1)), unless it is subject to the exclusionary, discretionary or mandatory rules.

EVIDENCE THAT IS NOT RELEVANT

Pursuant to s55(1), the evidence of [evidence] is not relevant because if it were accepted, it could not rationally affect, directly/indirectly, the assessment of the probability of the existence of the fact in issue in the proceeding, being the [fact in issue] (Smith). Therefore, as the evidence is not relevant, no further questions will arise about its admissibility (s56(2); Evans).

Cases to consider:

- *Papakosmas*
- *Smith*
- *Evans*

STEP 2: EXCLUSIONARY RULES

The [evidence] may be used for its _____ purpose/dual purpose of _____.

If evidence serves dual purpose including hearsay, always structure non-hearsay purpose first before hearsay.

HEARSAY

1) HEARSAY PURPOSE

Not hearsay

Only apply where evidence used to prove conversation/statement occurred, not the truth of it

Based on the facts, as the representation made by [maker] is being used to prove that the conversation/statement had occurred, rather than the truth of what was represented, it will not fall foul of the hearsay rule (Subramaniam).

Hearsay

Only apply where evidence is tendered to prove the truth

Apply below, then go to step 2.

Sum up facts re below

Representation

They made:

- (a) An express or implied representation (either in oral or in writing)
- (b) A representation to be inferred from conduct
- (c) A representation not intended by its maker to be communicated to or seen by another person
- (d) Representation that for any reason is not communicated

Previous representation/maker

As the representation was made prior to giving evidence of it in court, it constitutes as a previous representation that was made by [person] (the maker).

Fact intended to be asserted

In making this representation, it is clear on the facts that they intended to assert the existence of [fact].

- **Implied assertions will not apply under s59(2A):** Pursuant to s59(2A), as the [maker]'s assertion was unintended, it will not be caught by the hearsay rule.

2) HEARSAY RULE

However, this evidence will fall foul of the hearsay rule, as evidence of a previous representation made by [maker] is not admissible to prove a fact they intentionally asserted by the representation (s59(1)).

3) IS THE EVIDENCE FIRST-HAND HEARSAY?

Is the evidence first-hand hearsay?

If yes, go to step 4A.

If no, go to step 4B.

CREDIBILITY

1) DEFINING CREDIBILITY

In accordance with the EA dictionary, [evidence] is considered to be credibility evidence as it goes towards:

- Establishing the credibility of [witness]'s representation; OR
- Establishing [witness]'s ability to observe or remember facts and events

However, under s102, credibility evidence about a witness is not admissible.

2) WHAT IS IT RELEVANT FOR?

S101A(a): relevant for single credibility purpose – will fall foul of credibility rule

Under s101A(a), [evidence] is credibility evidence as, based on the facts, it is relevant only to the assessment of the credibility of [witness]. Therefore, it will be excluded under s102.

However, [party] may be able to argue that an exception applies under s_____.

Apply exception

S101A(b): relevant for multi-purpose; inadmissible for other purpose – will fall foul of credibility rule

Under s101(b), [evidence] is credibility evidence as, based on the facts, it is relevant for both the assessment of the credibility of [witness] and its [other] purpose for which it is not admissible. Therefore, it will be excluded under s102.

However, [party] may be able to argue that an exception applies under s_____.

Apply exception

S101A(b): relevant for multi-purpose; admissible for other purpose – will NOT fall foul of credibility rule, can be admissible for both purposes

Under s101A(2), [evidence] is, based on the facts, relevant for both the credibility purpose and [other] purposes. Therefore, the credibility rule will not apply and the evidence will be admissible for both purposes.

3) EXCEPTIONS

Cross-examination as to credibility

Only applies to credibility evidence adduced during cross examination.

Based on the facts, the [evidence] was adduced during cross-examination. **Apply facts**

Under s103(1), the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the credibility of the witness (Lodhi; Shamouil).

Apply facts re “substantial”, could be below factors:

- Witness intentionally lying to police during testimony: s103(2)(a)