

## Witness Credibility

### 102 The credibility rule

**Credibility evidence about a witness is not admissible.**

Notes—

Specific exceptions to the credibility rule are as follows—

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

### 101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that—

(a) is relevant **only because it affects the assessment of the credibility of the witness or person**, or

(b) is relevant—

- (i) because it affects the assessment of the credibility of the witness or person, and
- (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

### The Credibility Rule

- **S102** - Credibility evidence about a witness is NOT admissible unless one of the Act's exceptions apply. This is to stop parties trying to win, by attacking each other's witnesses and showing they're generally dishonest or unreliable.
- **2 types of credibility evidence - s101A**
  - **Evidence relevant only because it affects credibility**
    - This is evidence whose sole function is to make the witness seem more or less believable
    - **Piddington 1940**
      - Defence tried to contradict witness's explanation of why they were at the scene (by calling bank manager to say that bank visit described never happened). If a witness volunteers an explanation to show they were an eyewitness, directly contradicting that explanation is relevant to the issues so that *may* escape the "only credibility" tag in some cases because it's intertwined with the facts in issue.
    - **Goldsmith 2002**
      - Showing mismatch between actual venue and witness's description, relevant to whether alleged conversation/ admission happened
    - If the attack on credibility is inseparable from proving/ disproving a **fact on issue**, it may NOT be 'only' credibility evidence
  - **Evidence that is NOT 'only' credibility so s102 doesn't apply**
    - These have an additional and admissible purpose beyond just believability
    - In *Peacock*, contradicting whether a person was at a robbery wasn't just about credibility, but was relevant to the accused's motive to injure another witness
- Test for s101A
  - **Would the evidence have any relevance if we weren't assessing whether to believe the witness?**

### 103 Exception: cross-examination as to credibility

(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**.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to—

- (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.

- Threshold test of probative value; the evidence must be (1) more than trivial or minor, and (2) capable of changing the court's assessment of a witness's honesty, reliability or bias in order to bypass the credibility rule of **s102**.
  - Evidence must have '**such potential to affect the jury's assessment of the credit of the witness in respect of the evidence they have given that the credit of the witness cannot be determined accurately without regard to it**' (**Lodhi 2006**)
  - It must have a 'real persuasive bearing' on reliability of witness (**Fowler 1997**)
  - Evidence must be considered in **context of case as a whole** (**El-Azzi 2004**)
    - Evidence may have a substantial effect on credibility even if it only **negates inferences sought to be drawn from other evidence**
  - If evidence only adds a little to what has already been admitted, it will not be capable of substantially affecting the credibility of the witness (**Galea 2004**)
  - Prior **criminal convictions** which are associated with the **admiration of justice, perjury or dishonesty** will be more likely to meet this threshold (**Fowler 1997**)
- **Kamm 2008**
  - Facts: sexual offence trial, female witness denied having a privileged role in accused's religious community and failed to disclose she received living expenses as one of his 'queens'
  - Her failure to disclose relationship and benefits showed potential bias and lack of impartiality
  - This was central to case dynamics, not trivial or remote. Could substantially affect how jury viewed her credibility. Thus cross examination properly allowed.

- **Piddington 1940**

- Facts:
  - Piddington was injured when hit by motorcycle owned by BW
  - An eyewitness Donnellan gave evidence seeing incident and described how he happened to be in Phillip Street, he had just been to Bank of NSW on an errand from Major and was on his way home
  - Defence wanted to attack his credibility. They sought:
    - In cross, to ask Donnellan about fact that bank's records showed there was no transaction on Major's account that day
    - To call the bank manager and tender the bank ledger to show this 'no transaction' fact
- Legal Issue:
  - Is the absence of any transaction **relevant** to the fact in issue? Or is it for **credibility only**?
- Held:
  - Bank evidence shows only that there was no deposit or withdrawal on the day. The **fact does not logically prove** that Donnellan could not have been where he said he was. He could have gone to bank for other reasons. Therefore, the evidence had no '**natural tendency**' to make the fact in issue more or less probable. **Thus it went to credibility only.**
  - **Further it was not substantive evidence** on facts in issue - **purely collateral** so doesn't satisfy **s103's** 'substantial effect' threshold.
- Can Donnellan be asked in XCM about absence of transaction?
  - Yes, defence can confront Donnellan under XCM to **test his credibility** (Browne and Dunn rule). This permissible question, even if it is collateral. But if he denies or disputes it, defence must accept his answer.
- Court must consider: **(s103(2))**
  - Whether evidence proves that witness **knowingly or deliberately** made a false representation when they were under an **obligation to tell the truth**
    - In **Lodhi 2006**, accused lied to prospective employer he had 2 years full time professional experience
  - The **period of time** since acts or events were done or occurred
    - In **Montgomery 2013**, criminal conviction is a **minimum of 50 years old**, it cannot have substantial probative value

#### **104 Further protections: cross-examination as to credibility**

- (1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.
- (2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.
- (3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant—
  - (a) is biased or has a motive to be untruthful, or
  - (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or
  - (c) has made a prior inconsistent statement.
- (4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that—
  - (a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and
  - (b) is relevant solely or mainly to the witness's credibility.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to—
  - (a) the events in relation to which the defendant is being prosecuted, or
  - (b) the investigation of the offence for which the defendant is being prosecuted.
- (6) Leave is not to be given for cross-examination by another defendant unless—
  - (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and
  - (b) that evidence has been admitted.

#### **Purpose**

- **S103** applies to the credibility cross of *any* witness (must be substantially probative)
- **S104** is **extra protection for an accused** in a criminal trial when Crown wants to cross them **solely on credibility**. **A defendant cannot be cross-examined on credibility matters** unless the court **gives leave**. Credibility evidence here means 'only relevant to whether the accused is believable'

#### **Automatic exceptions where leave is NOT required (s104(3))**

- The Crown **does not need leave** to ask the accused about:
  1. **Bias/ motive to be untruthful - s104(3)(a)**
    - a. E.g. testifying against a co-accused in exchange for a reduced sentence
  2. **Inability to recall/ perceive** relevant matters - **s104(3)(b)**
    - a. Accused says 'I don't remember anything about that night'
  3. **Prior inconsistent statements - s104(3)(c)**
    - a. E.g. says one thing in police interview, opposite in court

#### **The "opening the gate" rule – s104(4)**

- **Prosecution** can only get leave to cross-examine the accused on credibility if:
  - The **defence adduces evidence** that **tends to prove** a *prosecution witness* has a **tendency to be untruthful, and**
  - That evidence is **relevant solely or mainly to that witness's credibility**.
- **s104(5)** ensures:
  - This does **NOT** count if the defence attack is about:
    - (a) the **events** in this case, or

- (b) the **investigation** of this case.  
→ So you can suggest a witness is lying in this case or that police botched the investigation **without** “opening the gate”.

- **El-Azzi 2004**

- Defence heavily attacked Crown witnesses (bribery, perjury unrelated to case).
- Held: Gate opened (**s104(4)**) for Crown to cross-examine accused on prior corruption conviction.
- But threats/misconduct allegations unrelated to credibility wrongly admitted.
- **Takeaway:** Only substantially probative credibility evidence allowed in once gate opens.

- **Tieu 2016**

- Defence attacked co-offender's credibility (drug use, violent past).
- Crown cross-examined accused on drug use + dishonesty **without leave**.
- Held: Breach of **s104(2)** — leave required. Trial miscarried.

- **Kocoglu 2012**

- Defence attacked witness with 50+ convictions (mostly dishonesty + drugs).
- Gate opened → Crown allowed to cross-examine on accused's dishonesty convictions (admissible under **s103**).
- Not allowed to cross-examine on accused's drug offences — not probative of credibility, high prejudice.
- **Takeaway:** Court filters for probative value + prejudice even after gate opens.

## Exam/Problem Answer Structure

When asked if the Crown can cross-examine accused on credibility:

1. **Identify:** Is it credibility-only evidence? (**s101A / s102**)
2. **Default rule:** **s104(2)** — need leave.
3. **Check exception:** **s104(3)** — bias, recall, inconsistent statement (no leave needed).
4. **If other credibility matter** — Has defence **opened the gate?** (**s104(4), s104(5)**)
5. If gate opened → Apply **s103**: Is it substantially probative?
6. If yes → Weigh **s135/137** prejudice discretion.

## 106. Exception: rebutting denials by other evidence

(1) The credibility rule **does not apply** to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:

- (a) in cross-examination of the witness:
  - (i) the substance of the evidence was put to the witness, and
  - (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.

(2) Leave under subsection (1)(b) is not required if the evidence tends to prove that the witness:

- (a) is biased or has a motive for being untruthful, or
- (b) has been convicted of an offence, including an offence against the law of a foreign country, or
- (c) has made a prior inconsistent statement, or
- (d) is, or was, unable to be aware of matters to which his or 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.

Purpose

- At common law, once a witness has been cross-examined about their own credibility, their answer is final — no further evidence can be called to contradict them solely on credibility.
- **S106** allows a party to bring **extrinsic evidence** (from another witness/ document) to challenge a witness's credibility if **certain steps are followed**
- You can adduce credibility evidence **otherwise than from the witness** if:
  1. **In cross-examination of the witness:**
    - (i) The *substance* of the credibility allegation is put to the witness (**s106(1)(a)(i)**); and
    - (ii) The witness **denies** it, **does not admit**, or **does not agree** (**s106(1)(a)(ii)**).
      - Includes “I don't remember” responses if they amount to a practical denial — **Copmanhurst Shire Council v Watt**.
  2. **Court gives leave** — **s106(1)(b)**, unless an exception in **s106(2)** applies.
- Court applies the **s192(2)** leave factors (fairness, importance, efficiency, adjournment powers).
- No-Leave Categories — **s106(2)** — Leave is **not** required if the extrinsic evidence tends to prove the witness:
  - (a) **Bias / motive to be untruthful**
    - Bias = “all matters affecting witness's motives, temper, and character re: feelings toward a party” — **Nicholls (2005)**
    - **Examples:**
      - Relationship, personal interest, hostility, fear, bribery, coaching.
      - Threatening false complaint unless demands are met (**Abebe** and **Mulugeta**).
      - Intending to maintain false allegation to get reduced sentence (**Nicholls**).
    - **AG v Hitchcock** — can ask about relationship or feelings that might affect impartiality; can call evidence if denied.
  - (b) **Criminal convictions**
    - Includes foreign convictions.
    - Still must satisfy **s103** if adduced in cross-examination — must be substantially probative to credibility.
  - (c) **Prior inconsistent statements**
    - Must comply with **s43** procedural requirements if denying:
    - Identify enough circumstances for the witness to recognise it.
    - Draw attention to the inconsistent part.
    - If admitted or used for truth under **s60**, **s43** rules don't apply (**Aslett**).
    - **Copmanhurst Shire Council** — police officer denied making a statement about gravel; other witness's account admitted under s106.

- **MWJ** – absence of other allegations in child sexual assault does not necessarily equal inconsistency unless put directly.
- **JG** – minor inconsistencies on peripheral matters do not necessarily destroy credibility.
- **(d) Inability to be aware of matters in evidence**
  - Covers fundamental incapacity to perceive/understand events (psychosis, sensory deficits, severe cognitive distortions).
  - Not mere memory lapses (covered by **s104(3)(b)**).
  - Includes expert medical/psychological evidence (R v **Rivkin** – shortsightedness; **Toohey** – hysterical disposition).
- **(e) Knowingly/recklessly making false representation under oath**
  - Must be under a legal obligation to tell the truth at the time.
  - Overlaps with bias if the motivation is corrupt/self-interested.
- **Because credibility evidence is being adduced in cross-examination:**
  - **Must satisfy s103: substantial probative value to credibility.**
  - **For an accused, also must satisfy s104 leave rules unless an automatic exception applies.**

### 43 Prior inconsistent statements of witnesses

- (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not—
- complete particulars of the statement have been given to the witness, or
  - a document containing a record of the statement has been shown to the witness.
- (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner—
- informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement, and
  - drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.
- (3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

### Practical Steps for Using s106

#### During cross-exam:

1. Squarely put the credibility allegation to the witness.
2. Get a denial (explicit or effective via "I don't recall").
3. After denial:
  - a. If within s106(2) → adduce extrinsic evidence without leave.
  - b. If outside s106(2) → apply for leave (s192 factors).
4. Ensure compliance with s103 (and s104 if accused).
5. Adduce extrinsic evidence (other witness/documents)

**If you want to challenge or contradict a witness on a matter of credibility, have you put your case for the witness to address, in accordance with the rule in Browne v Dunn?**

#### Rule in Browne v Dunne

- When a party in court intends to challenge, contradict or impugn the evidence or credibility of a witness, the party must 'put their case' to the witness in cross-examination. This means directly confronting the witness with the contrary allegation (or alternative version of events) so witness has a fair chance to respond or explain
- *"Nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said."* **Browne v Dunn (1893)**
- Fairness - tries to prevent trial by ambush. Procedural justice - ensures that adverse findings are not made to a witness' evidence unless they are fairly confronted.
- In criminal trials, the rule is applied more strictly to the prosecution, since the defence is not obliged to resolve inconsistencies in the Crown's case (**MWJ [2005]**).

### 108 Exception: re-establishing credibility

- (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.
- (2) (Repealed)
- (3) The credibility rule does not apply to evidence of a **prior consistent statement** of a witness if—
  - evidence of a prior inconsistent statement of the witness has been admitted, or
  - it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion, and the court gives leave to adduce the evidence of the prior consistent statement.

Dictionary definition of 'prior consistent statement' - of a witness means a previous representation that is consistent with evidence given by the witness.

- Lets you bring in evidence to **restore a witness's credibility after it has been attacked** either:
  - **through re-examination (s108(1))** or
  - You can bring in a **prior consistent statement** (a previous statement that matches their current testimony) if
    - **s108(3)(a)** - A prior inconsistent statement has already been admitted; or

- First, the court must have already heard evidence that the witness has previously said something inconsistent with their current testimony. This inconsistency will naturally cast doubt on the witness's credibility.
- **s108(3)(a)** then lets you "repair" that damage by showing that on another occasion, the witness actually gave a statement consistent with their current evidence — to suggest their story hasn't been made up or recently fabricated
- I.e. Complainant in sexual assault case says at trial: "It happened in the bedroom." Defence tenders her statement to police saying: "It happened in the lounge room." (prior inconsistent statement → admitted). Prosecution then tenders an earlier journal entry from days after the event saying: "It happened in the bedroom" (prior consistent statement).
  - **s108(3)(b)** - it's suggested (expressly or impliedly) that their evidence is fabricated, re-constructed or the result of a suggestion
    - Merely denying events isn't a suggestion of fabrication (**Whitmore 1999**).
    - Suggestion **can be implied**; doesn't have to be explicit (**Pavitt 2007**).
    - "Is or will be" means you can act now if the other side plans to make that suggestion later — but **not** before the witness is called (**Hadid 1996**).
- Court's role under **s108(3)(b)** is to grant leave. Judge will consider:
  - Does the statement actually answer the suggestion? (**BD 1997**)
  - Who's giving the statement? If it comes from someone who isn't testifying in court, that can weigh against leave (**Leung 2003**).
  - When was it made? Timing matters:
    - Earlier, close in time to events → generally more persuasive.
    - Later → less persuasive but **not automatically excluded** (**Selsby 2004, Doyle** says can still be admitted even after an inconsistent statement or when "not fresh").

#### **Sleiman (2003)**

- Witness was cross-examined about a 7 month delay in making a statement about a fatal stabbing. He was allowed to explain in re-examination that he was scared, and why, and how he had discussed the issue with a friend who was a police officer

#### **HJS (2000)**

- Under **s108(3)(b)**, if it is suggested (expressly or by implication) that a witness's evidence is fabricated or reconstructed (for example, because of a delay in reporting), the court may, with leave, admit prior consistent statements to re-establish their credibility.
- In HJS, the defence directly suggested to several complainants that the reason for delay in reporting was because "the incidents didn't take place" or implied collusion or fabrication—this triggers **s108(3)(b)**.
- For instance, HJS's own evidence went further to flag the possibility that the daughters "got together to try and pin this on me... get compensation or what from it," which squarely raises an attack on credibility suggesting invention or motive to lie.
- Court must grant leave

#### **When deciding if a prior consistent statement can go in:**

1. **Has a prior inconsistent statement been admitted?** → yes = **s108(3)(a)**
2. **OR** has there been a suggestion (explicit / implied) of fabrication, reconstruction, or suggestion? → yes = **s108(3)(b)** + need leave.
3. Check timing/relevance to see if leave should be granted.
4. Remember: doesn't need to be "fresh" and can even be after the inconsistent statement.

#### **108A Admissibility of evidence of credibility of person who has made a previous representation**

(1) If—

- (a) evidence of a previous representation has been admitted in a proceeding, and
- (b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding, credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

(2) Without limiting the matters to which the court may have regard for the purposes of subsection (1), it is to have regard to—

- (a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth, and
- (b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

If you want to attack the credibility of someone who's not coming to court, but whose statement is being used, bar is set HIGH, must be really important for jury's assessment. Court must consider **s108A(2)** whether new evidence tends to show:

- The person knowingly or recklessly made a false representation while under a legal obligation to tell the truth; and
- The time gap between events and when the statement was made.

## 4B: Hearsay

### Hearsay

#### Hearsay Evidence

- When a party seeks to rely on a **previous representation** (a statement or conduct made out of court) **to prove the truth** of a fact asserted by that representation
- If you're telling the court what someone else told you happened (rather than what you yourself saw/ heard), it likely hearsay and excluded unless an exception applies
- Why exclude hearsay?



- Out of court statements aren't made under oath and there's no chance for the other side to cross-examine its original maker
- 'Chinese whispers' effect, risk of error and distortion through repetition
- Risk of fabrication - hard to test truth
- Can unfairly surprise parties (disrupting fair trial principles)

## 59 The hearsay rule—exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is **not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.**

(2) Such a fact is in this Part referred to as an **asserted fact.**

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Dictionary definition of '**previous representation**' - means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

- **A previous representation**
  - 'Representation' refers to '**statements** and to **conduct**' as well as 'that those statements or that conduct would convey to the observer' (**Lee 1998**)
    - Can include a communication made by **silence or failure to respond** (**Rose 2002**)
- **Made by a person**
  - Person includes an 'individual, a corporation and a body corporate or politic' - **Interpretation Act 1987 (NSW) s21(1)**
  - Does not include machine generated information where there is **no human input** (**Hansen Beverage Co 2008**)
- **To prove the existence of a fact** asserted by the representation (the **purposive test**); and
  - Ask:
    - What's the evidence being led to prove?
    - Was that fact something the person **intended to assert**?
    - Is it being used to **prove the truth** of what it says?
      - If YES → Hearsay rule applies
      - If NO → may be admissible as 'original evidence'
  - Examples of representations caught by the hearsay rule include:
    - If person A says, "Person B told me they committed the crime" and this is presented to prove that B actually committed the crime—this is hearsay, because the court isn't hearing directly from B, but from A about what B said. This is a 3rd party confession adduced to prove B actually committed the crime (**Baker 2012**)
    - If person A says, "I heard the deceased say 'B stabbed me' before she died," this is hearsay if it is adduced to prove who stabbed her, because A isn't a direct witness to the stabbing, but is reporting what the victim is alleged to have said. Statements made by the deceased about who injured her and how, if adduced to prove the identity of the killer and how the injuries were inflicted (**Harris 2005**)
    - Statements made by a sexual assault complainant about what had happened and who was responsible if adduced to prove the identity of the offender (**Papakosmas 1999**)
    - Evidence of labels on packaging identifying country of origin if adduced to prove the country of origin is that on the labels (**Patel 1965**)
    - Evidence from accused's psychiatrist that accused told her he was hearing voices instructing him to attack the deceased if adduced to prove that accused was suffering from hallucinations (**Welsh 1996**)
    - It's not hearsay for someone to say, "I saw..." (that's direct evidence). It is hearsay for someone to say, "I was told..." or "I read a letter..." or "I heard..." to prove the truth of what was told/read/heard.
- **It can reasonably be supposed that the person who made the representation intended to assert the existence of that fact (s59(2A))**
  - **Objective test** - Fact the person can reasonably be supposed to have intended to convey by the representation.
  - **Walton (1989)**: if a person said they planned to meet the accused the next day, this was not a hearsay assertion that they DID meet the accused, but rather original evidence showing their intention or state of mind.
- **If all satisfied, that representation is classified as hearsay and is not admissible in court.**

## The hearsay rule does NOT apply to: (ORIGINAL EVIDENCE categories)

- An out of court statement offered simply as **proof that the statement was made** (i.e. where it is **not adduced to prove the truth of the fact asserted**) (**Evans 1993**)
- Categories
  1. Proof the Statement was Made
    - a. Used to show that the representation occurred, regardless of its truth.
    - b. Example: In a duress defence, a threat made to the accused is relevant not because it was true, but because it affected the accused's state of mind.
    - c. **Subramaniam** — threats admitted to explain why accused acted under duress
  2. Verbal acts/transactional utterances
    - a. Statements that create legal relationships or perform legal acts e.g. words of contract formation 'i accept your offer'
    - b. **Macrailld** — recorded phone calls about a cannabis sale admission to show an agreement existed
  3. State of mind/ intention
    - a. Statements showing the maker's mental state, motive or intent e.g. 'im meeting the accused tomorrow' shows intention at that time
    - b. **Matthews (1990)** — victims statements of fear admitted to show non-consent, not that accused threatened her
  4. Basis of an expert's opinion
    - a. Experts can rely on info told to them (even if hearsay) to **explain their reasoning**
    - b. Example: A psychiatrist reports that a patient said they heard voices. That statement may be admitted to explain the expert's diagnosis, even if it's hearsay.

- c. **Welsh** – accused's statement about hearing voices admissible to show why psychiatrist formed opinion
- 5. Credibility purposes
  - a. Statements admitted to assess witness credibility, not proof of truth
  - b. E.g. prior consistent statements (to rebut suggestion of recent invention - s108)
  - c. Prior inconsistent statements to show unreliability - s103, 106
- 6. Demonstrating knowledge or consciousness
  - a. Statement shows maker's knowledge of certain facts, relevant circumstantially
  - b. Example: "Liz dead: 27 years 5 months 9 days" written in the accused's diary (from Matthews) was admitted to show knowledge of the death, not to prove the date was accurate.

- 5. Is there a 'previous representation'?
- 6. How is the representation relevant? ie. What fact is it being adduced to prove? Or to ask another way, is the previous representation being adduced to prove a fact asserted in the representation, or for some other purpose? (see point 5 below)
- 7. What did the declarant intend to assert in that representation? Is (the existence of) the fact to be proved what the maker **intended to assert** by the representation?
- 8. Does the maker have personal knowledge of the asserted fact? (this can be relevant to assessing what they 'intended to assert' and is also relevant to the application of exceptions to the rule)
- 9. Does the previous representation have more than one purpose (relevance) eg. is the previous representation **also** relevant simply because of the fact that it was made? If it has been admitted for that other purpose, can it also be used to prove the fact(s) intended to be asserted in that representation? (see point 2 above).

### **R v Bedingfield**

- Woman, fatally wounded says 'Look at what Harry's done'
- Evidence was **hearsay** (attempting to prove Harry did it)
- Not admitted - statement was made after the incident, not spontaneously enough for exceptions, not a dying declaration

### **Core distinction: Intended assertion v unintended assertion**

- **Intended assertion** - 'truth of what I am trying to communicate' - caught by hearsay rule
- **Unintended assertion** - fact you can infer from what i said/ did, but i didn't mean to assert it - outside of the hearsay rule
- **Hearsay can only be applied to intended assertion**
- Step 1: Identify the previous representation
  - 'This is my mother' - making one's name in a roll book, boarding a vessel
- Step 2: What fact is the party trying to prove? Is that fact something the maker intended to assert?
- Step 3: determine maker's intended assertion. Use **s59(2A)**: reasonable objective inference from circumstances
- Step 4: Classify:
  - **Intended** - if offered for truth - hearsay applies
  - **Unintended** - not caught by hearsay at all - admissible

Example	Intended Assertion?	Hearsay?	Explanation
"Hello Daddy" (child in <b>Walton</b> )	Intended: greeting father (identity of caller not consciously asserted) → No	No	Child intended to greet; identity inference is unintended assertion → outside hearsay.
"This is my mother"	Yes	Yes	Intended to assert a fact about identity of person with speaker.
"My brother is sick"	Yes	Yes	Intended to assert brother's condition.
"Yeah, I had heard that he was very violent"	Yes	Yes	Intended to assert that speaker had heard a fact about violence.
"Is the fridge available?" (coded for "drugs available?")	Intended in coded sense — depends on shared meaning	Yes	Maker's intention judged in context: code users intend to assert drug availability → hearsay if for truth.
Mark present on roll / writing name on seating plan	Yes (asserting presence at certain time/place)	Yes	Maker intended to indicate their attendance.
"My mother is feeling sick"	Yes	Yes	Direct assertion of condition.
"I didn't call out for help because he told me he had shot someone in the past"	Yes (assertion that he said it) but... careful: may be adduced to show effect on listener, not truth of shooting	Depends on purpose	If proving shooting = hearsay; if proving why W didn't call = admissible non-hearsay (effect on listener).
"I've just fired a gun"	Yes	Yes	Intended to assert fact of firing.
Captain examines ship before taking family aboard ( <b>Wright</b> )	Unintended assertion re seaworthiness	No	Captain intended to check/board ship, not assert seaworthiness; his conduct is relevant circumstantial evidence outside hearsay.
Election of person to a position of responsibility	Unintended assertion re competence/character	No	Electors did not intend to assert fitness as a proposition; admissible as circumstantial evidence of community opinion.

### **Diary Example**

- 'My husband gave me coffee... I think he's trying to poison me' written in diary
- As proof of poisoning by the husband → **hearsay and inadmissible unless exception**

- As proof she was *afraid* of husband → potentially admissible as state of mind evidence
- Other evidence (forensic, toxicology, proof of poison access) would be needed to make the link

**P has told W that the handbrake on W's car didn't work"**

**1. "P told me that the handbrake on my car didn't work"**

- Previous rep - yes, P's statement was made out of court
- Fact being proven - that the handbrake on W's car didn't work
- Truth of assertion - Yes, introducing P's statement to prove actual condition of handbrake
- Outcome under s59:
  - Hearsay if used to prove a car's brake didn't work. Admissible only if a hearsay exception applies (e.g. if P is unavailable - s65, or if it's a contemporaneous statement about mechanical defect under s66)
  - BUT if P is available and testifies themselves. W's evidence might be unnecessary

**2. "I told W that the handbrake on his car didn't work"**

- Previous rep - yes, P admitting their own words made out of court
- Fact being proven - that handbrake didn't work
- Truth of assertion - Yes
- Outcome
  - Not hearsay when P is in court, because P is now the maker of the representation and can be cross-examined about the accuracy of what they said
  - It becomes ordinary direct oral testimony from P about the facts (what they knew about the brake) not hearsay

**3. "I heard P tell W that the handbrake on W's car didn't work"**

- Previous rep - Yes, P's out of court statement
- Fact being proven - if used to prove the handbrake actually didn't work - hearsay
- BUT - if it is led only to prove that P spoke to W (i.e. to show W was made aware of the defect) then it is not hearsay because it's not for the truth of the defect, only that the statement was made (effect on listener)
- Outcome
  - If for truth of defect - hearsay
  - If just to prove W had been warned - original evidence (proof statement was made), admissible subject to relevance and any s135 unfairness discretion

**4. "W told me that the handbrake on P's car didn't work"**

- Be careful, this changes facts, now it's W making a statement out of court about P's car
- Previous rep - Yes, W's out of court statement
- Fact being proven - if tendered to prove the actual condition of P's car - hearsay
- Outcome:
  - Hearsay unless W is a witness in court and giving direct evidence about seeing/ knowing the handbrake fault
  - If W is available, better to have them give direct evidence of what they saw/ tested

**W had bought a video cassette recorder and wrote down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W on the basis of the serial number.**

- Previous representation
  - Document recording the serial number is a 'previous representation', that is a statement made out of court now being offered in evidence
- Fact being proven
  - Prosecution wants to use the document to establish that 'the serial number of the VCR bought by W was the same as the one found on D as it has the same serial number
- Truth of Fact asserted
  - Document is being put forward as evidence that serial number written on it is actually serial number of VCR bought by W
- Hearsay Rule Applies
  - Here, document is a statement made by W, outside these proceedings that 'the serial number of my VCR is X'
  - If W is not called as a witness to give direct oral evidence that he 'bought the VCR and the serial number was X' the written record is an out of court statement offered for the truth of its content
  - Unless exception applies:
    - If W appears in court and testifies to the serial number, the document can be used to refresh their memory (s32) but document itself cannot ordinarily be substituted for testimony
    - There may be exceptions (business records, contemporaneous notes, or if W is unavailable and other statutory criteria are met) but none apply by default

**B prosecuted for murdering X. B denies allegation. Can B adduce evidence that P has confessed to another prisoner (S) that he killed X?**

Generally no. A confession by a third party not the accused given to another person is typically inadmissible hearsay if it is led to prove that P in fact killed X, unless an exception applies.

**Why is it relevant? What is B seeking to prove?**

B is seeking to prove that someone else (P), committing the murder. If S testifies that P confessed to the killing, this could raise a reasonable doubt about B's guilt. The confession would be **exculpatory evidence**. If credible, it could support B's case by showing an alternative perpetrator for the crime which is highly probative to the central fact in issue. So highly relevant.

**S was caught during the Malaysian Emergency carrying ammunition without lawful authority, a capital offence under the 1951 Emergency Regulations. He said Communists kidnapped him, threatened him with guns, and made him carry ammunition. He claimed he was acting under duress the entire time.**

- It is **oral evidence** given by S (the accused) about **out of court statement made to him** by the alleged kidnappers
- The statements by the kidnappers are **previous representations (s59)** made by persons not called as **witnesses**
- It is not hearsay, not if tendered for a limited 'original evidence' purpose.



- The statements are **not** being adduced to prove the truth of the assertions (that the kidnappers actually would kill him if he left, or that he was really part of the Communist group). Instead, they are adduced to show **the fact that the threats were made and their effect on S's state of mind**, relevant to whether he reasonably believed death or serious harm was imminent if he refused to comply (the core elements of duress)
- It is admissible, because it falls under the 'not hearsay' category identified in **Subramaniam** - it is admissible to prove that the threats were made, not to prove their truth
- The intended assertion in the kidnapper's statement is effectively 'You must do as we say and come with us: if you refuse, you can't return home'. For duress purposes, the defence is not tendering the statements to prove the kidnappers actually would have killed him, but that he was told this and believed it, leading to his possession of the ammunition

### GREAT EXAMPLE

Jones, who owns a video store, is robbed in Paddington by a man with a pistol. She resists. The offender fires 2 shots and runs away. Police arrest Lee and his friend Calin shortly after in Kings Cross. Lee has a pistol in his jeans and is sweating. What Lee tell police: 'Two men ran past me after the hold up and gave me the pistol'

What Calin tells police immediately after arrest: He saw Lee in street and asked him for \$80 he owed. Lee said 'Don't bother me, I've just done a job, I fired two shots'. Later at police station, Calin repeats this and signs a written statement that includes 'I haven't got it, leave me alone, cause i'm running because i fired two shots'

At trial, Calin changes his story (resiles from his statement) and says 'I don't remember anything except asking Lee for \$80'.

Prosecution goal: They want to use Calin's earlier written statement to prove that Lee confessed to the robbery and firing two shots

#### Breaking Down the Evidence

1. Primary facts in issue: Did Lee commit the armed robbery and fire the two shots?
  2. Evidence sought to be adduced: Calin's prior statement to police, which contains words **Calin says Lee told him**
- Apply hearsay to Calin's statement
1. Identify 'maker' of previous representation
    - Maker is Calin (because statement being tendered is his written police statement)
    - Inside this trial, Calin is the witness and maker of the 'previous representation'
  2. What facts did Calin intend to assert?
    - a. That he had a conversation with Lee
    - b. That Lee said certain words 'I've just done a job, I fired two shots'
    - c. That Calin heard those words
    - Calin did NOT intend to assert that:
      - Lee actually did the job
      - Lee actually fired two shots
  3. Is it hearsay?
    - a. Depends on what prosecution is trying to use it for.
    - b. If they tender Calin's prior statement to prove the truth of the content (that Lee really did the robbery and fire the shots) → that would be hearsay, because Calin's intended assertion wasn't the truth of those facts
  4. However, it is relevant for credibility.
    - a. It can be used to show inconsistency between what Calin said earlier and what he says at trial affecting whether the jury believes him.

### Is Calin's evidence in his police statement relevant?

Calin's statement recounts an out-of-court conversation with Lee, in which Lee allegedly confessed "I just did a job, I fired two shots." At trial, the prosecution seeks to adduce this statement to prove that Lee robbed Jones and fired the shots.

The threshold test for relevance under the **Evidence Act 1995 (NSW)** is whether the evidence, if accepted, could rationally affect the assessment of the probability of a fact in issue (**s 55**). Here, the fact in issue is whether Lee committed the robbery and fired the pistol.

However, Calin's statement only affirms that Lee made certain statements to him; Calin neither witnessed nor claims first-hand knowledge of the offence. According to the High Court in **Lee**, Calin's intended assertion is that Lee made those remarks, not that the remarks are true or that Lee actually committed the crime. The statement may be relevant to Calin's credibility or consistency as a witness but is only indirectly relevant to the proof of Lee's guilt, unless admitted through a hearsay exception or as an admission by a party (**Lee [1998]; s 55**).

### What does Calin 'intend to assert' in his statement?

In his statement, Calin intends to assert that:

- He had a conversation with Lee;
- In that conversation, Lee said words to the effect of "I just did a job, I fired two shots."

However, Calin does **not** intend to assert as a fact that Lee actually "did a job" or "fired two shots." Calin cannot personally vouch for the truth of Lee's statements; he reports only what was said to him. Therefore, Calin's intended assertion is limited to the fact that the statements were made, not their truth. According to the High Court, "all Mr Calin intended to assert was that [Lee] had told him these things and (perhaps, on one view of the matter) that Mr Calin believed (or at least did not disbelieve) what he had been told" (**Lee [1998]**).

This distinction is critical to the application of the hearsay rule under **s 59**, which excludes evidence of a previous representation made by a person if it is adduced to prove the existence of a fact that the person intended to assert by the representation. Here, the only fact Mr Calin intended to assert was that Lee made the statements to him, not that the underlying events actually occurred (**s 59; Lee [1998]**).