

## First-hand hearsay

### Section 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.

#### Note

Subsection (2A) was inserted as a response to the decision of the Supreme Court of New South Wales in *R v Hannes* (2000) 158 FLR 359.

### Section 60 (Exception – evidence relevant for a non-hearsay purpose)

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62(2)).

#### Note

Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

#### Note

The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay—see section 82.

### Section 62 (Restriction to “first-hand” hearsay)

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

## Section 63 (Exception – civil proceedings if maker not available)

- (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
  - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

### Notes

- 1 Section 67 imposes notice requirements relating to this subsection.
- 2 Clause 4 of Part 2 of the Dictionary is about the availability of persons.

## Section 64 (Exception – civil proceedings if maker available)

- (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to—
  - (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation—

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

### Note

Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

- (3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by—
  - (a) that person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made.
- (4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

### Note

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

## Section 65 (Exception – criminal proceedings if maker not available)

- (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
- (a) was made under a duty to make that representation or to make representations of that kind; or
  - (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
  - (c) was made in circumstances that make it highly probable that the representation is reliable; or
  - (d) was—
    - (i) against the interests of the person who made it at the time it was made; and
    - (ii) made in circumstances that make it likely that the representation is reliable.

### Note

Section 67 imposes notice requirements relating to this subsection.

- (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—
- (a) cross-examined the person who made the representation about it; or
  - (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

### Note

Section 67 imposes notice requirements relating to this subsection.

- (4) If there is more than one accused in the criminal proceeding, evidence of a previous representation that—
- (a) is given in an Australian or overseas proceeding; and
  - (b) is admitted into evidence in the criminal proceeding because of subsection (3)—
- cannot be used against an accused who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.
- (5) For the purposes of subsections (3) and (4), an accused is taken to have had a reasonable opportunity to cross-examine a person if the accused was not present at a time when the cross-examination of a person might have been conducted but—
- (a) could reasonably have been present at that time; and
  - (b) if present could have cross-examined the person.
- (6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by—

- (a) the person to whom, or the court or other body to which, the representation was made; or
  - (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
  - (c) the person or body responsible for producing the transcript or recording.
- (7) Without limiting subsection (2)(d), a representation is taken for the purposes of that subsection to be against the interests of the person who made it if it tends—
- (a) to damage the person's reputation; or
  - (b) to show that the person has committed an offence for which the person has not been convicted; or
  - (c) to show that the person is liable in an action for damages.
- (8) The hearsay rule does not apply to—
- (a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
  - (b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

**Note**

Section 67 imposes notice requirements relating to this subsection.

- (9) If evidence of a previous representation about a matter has been adduced by an accused and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that—
- (a) is adduced by another party; and
  - (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

**Note**

Clause 4 of Part 2 of the Dictionary is about the availability of persons.

## **Section 66 (Exception – criminal proceedings if maker available)**

- (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
- (2) The hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if—
- (a) the person who made the representation has been or is to be called to give evidence; and
  - (b) either—
    - (i) when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or

- (ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.

**Note**

Subsection (2) differs from the Commonwealth Act and New South Wales Act.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including—

- (a) the nature of the event concerned; and
- (b) the age and health of the person; and
- (c) the period of time between the occurrence of the asserted fact and the making of the representation.

**Note**

Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in an Australian or overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

**Note**

Clause 4 of Part 2 of the Dictionary is about the availability of persons

## **Section 66A (Exception – contemporaneous statements about a person’s health etc.)**

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

## **Section 67 (Notice to be given)**

(1) Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state—

- (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and

(b) if section 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction—

(a) is subject to such conditions (if any) as the court thinks fit; and

(b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

## **Statement of the rule**

### **The hearsay rule (s 59)**

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

A previous representation is a representation made other than in the course of giving evidence in that proceeding.

### **Exception – Dual use (s 60)**

The hearsay rule does not apply to previous representations admitted for a purpose other than proof of the asserted fact.

### **Exception – First-hand hearsay in civil proceedings (ss 63 and 64)**

The hearsay rule does not apply in civil proceedings to evidence of a previous representation given by a person who saw, heard or otherwise perceived the representations being made if:

1. The person who made the previous representation is not available to give evidence about the asserted fact (s 63(2)); or
2. The person who made the previous representation is available to give evidence about the asserted fact, but it would cause undue expense or delay, or would not be reasonably practicable, to call that person (s 64(2)); or
3. The person who made the previous representation has been or will be called to give evidence (s 64(3)).

The hearsay rule also does not apply in civil proceedings to evidence of previous representations given by the person who made the previous representations.

## **Exception – First-hand hearsay in criminal proceedings (ss 65 and 66)**

### **Person who made previous representation not available**

The hearsay rule does not apply in criminal proceedings to evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made if the person who made the representation is not available to give evidence and the representation:

- (a) was made under a duty to make that representation or representations of that kind;
- (b) was made:
  - a. when or shortly after the asserted fact occurred and
  - b. in circumstances that make it unlikely that the representation is a fabrication;
- (c) was made in circumstances that make it highly probable that the representation is reliable; or
- (d) was:
  - a. against the interest of the person who made it at the time it was made and
  - b. made in circumstances that make it likely that the representation is reliable (s 65(2)).

A representation may be against the interest of the person who made it for any reason, including if it tends to:

- (a) damage the person's reputation; or
- (b) show that the person has committed an offence for which they have not been convicted;
- (c) show that the person is liable in an action for damages (s 65(7)).

The hearsay rule does not apply in criminal proceedings to evidence of a previous representation made in an Australian or overseas proceeding if the accused in the current proceeding:

- (a) cross-examined the person who made the representation about the representation; or
- (b) had a reasonable opportunity to cross-examine the person who made the representation about the representation (s 65(3)).

The hearsay rule does not apply in criminal proceedings to evidence of a previous representation adduced by the accused from a person who saw, heard or otherwise perceived the representation being made (s 65(8)).

### **Person who made previous representation available**

The hearsay rule does not apply in criminal proceedings to evidence of a previous representation given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if-

- (a) the person who made the representation has been or will be called to give evidence; and
- (b) the representation:
  - a. was made at a time when the occurrence of the asserted fact was fresh in the memory of the person who made the representation; or
  - b. was made by the alleged victim of an offence charged in the proceeding, and the alleged victim was under 18 at the time of making the representation; and

- (c) the representation:
- a. was not made for the purpose of indicating the evidence the person would be able to give in an Australian or overseas proceeding; or
  - b. concerns the identity of a person, place or thing.

### **Exception – statements about health, feelings and states of mind (s 66A)**

The hearsay rule does not apply to a previous representation which was a statement about the person's current health, feelings, sensations, intention, knowledge or state of mind.

### **Notice requirements**

A party seeking to adduce hearsay under ss 63(2), 64(2), 65(2), (3) or (8) must give reasonable notice of its intention to adduce the evidence.

### **Considerations**

#### General considerations

Applying the hearsay rule requires the court to first identify how the evidence is relevant. If the evidence is relevant and admissible for a non-hearsay purpose (such as to prove the previous representation was made, rather than to prove it was true), then it can also be used for a hearsay purpose as evidence that the statement is true (s 60).

Where the making of the original statement was relevant for a non-hearsay purpose (such as the making of a threat), a recounting of that statement to a third party becomes first-hand hearsay, rather than second-hand hearsay (*R v Lindholm* [2019] VSC 726, [19]-[25]).

While s 136 allows a court to limit the use of evidence, it is not appropriate to use s 136 automatically to limit the hearsay use of evidence admitted under an exception by reference to how the common law treated certain types of evidence (*Papakosmas v The Queen* (19996) 196 CLR 297, [39]-[40], [74]).

The exceptions in ss 63 to 66 are limited to first-hand hearsay. This refers to hearsay where the person who made the representation had personal knowledge of the asserted fact. A person has personal knowledge if their knowledge was, or might reasonably be supposed to have been, based on what they saw, heard or otherwise perceived, other than a previous representation by another person about the fact (s 62).

Section 44 regulates the process of cross-examining one witness about another person's previous representations. If the previous representation was made verbally, it may only be the subject of cross-examination if the statement has been or will be admitted. If the previous representation is contained in a document and will not be admitted, then the document must be produced to the witness, the witness must have a chance to read or listen to the document without others hearing the contents of the document, and the witness must then be asked if he or she stands by the evidence he or she has given.

### When is a person available to give evidence?

Several hearsay exceptions depend on whether the person who made the previous representation is available to give evidence.

A person is not available if they meet any of the circumstances listed in *Evidence Act 2008* Dictionary, clause 4, which provides an exhaustive list of when a person is unavailable to give evidence about a fact. The list includes where the person is:

- dead;
- physically or mentally unable to give the evidence and it is not reasonably practicable to overcome that inability;
- not competent to give the evidence (unless incompetence is due to s 16 – judges and jurors);
- not permitted to give the evidence, whether due to a provision of the *Evidence Act* or otherwise;
- all reasonable steps have been taken by the calling party to find and secure the witness' attendance without success;
- all reasonable steps have been taken by the calling party to compel the witness to give evidence without success.

A person who is not compellable (such as due to s 18) to give evidence is not available (*Fletcher v The Queen* (2015) 45 VR 634).

A person who is called and refuses to give evidence, whether due to a privilege or under threat of contempt, is not available (*R v Darmody* (2010) 25 VR 209).

Courts will strictly apply the requirement that all reasonable steps be taken. This will be assessed on the facts of the case (*Sio v The Queen* (2016) 259 CLR 47; *Tsamis v State of Victoria (No 6)* [2019] VSC 591).

### Criminal proceedings where the person who made the previous representation is not available

The exceptions in s 65(2) must be considered and applied on a representation by representation basis. While context is relevant, and there may be some overlap in representations and circumstances, the exceptions cannot be applied to a series of representations holistically (*Sio v The Queen* (2016) 259 CLR 47, [57], [59], [61]; *Prasad v The Queen* [2020] NSWCCA 349, [89]-[94]).

To satisfy the exceptions in s 65(2), the party calling the witness must establish the conditions in paragraphs (a), (b), (c) or (d) on the balance of probabilities (s 142).

Paragraph (b) requires the court to make a normative judgment about the delay between the occurrence of the asserted fact and the making of the representation. This requires evidence that allows the court to judge the extent of that delay, and for the court to consider the nature of the event and how long a memory of that event is likely to remain clear (*R v Mankotia* [1998] NSWSC 295; *Azizi v The Queen* [2012] VSCA 205, [47]).

Paragraphs (c) and (d) require the court to be affirmatively satisfied that the circumstances make it highly probable or likely that the representation was reliable. A focus on circumstances that may make the representation

unreliable may be a distraction. Instead, the party needs to point to circumstances that make the representation reliable despite its hearsay character (*Sio v The Queen* (2016) 259 CLR 47, [63]-[71]).

Section 65(3) provides a means for evidence given at a committal hearing to be used in the higher courts if the witness becomes unavailable between committal and trial, provided the defence either cross-examined the witness or had a reasonable opportunity to do so (see *Snyder v The Queen* [2021] VSCA 96).

#### Criminal proceedings where the person who made the previous representation is available

In deciding whether the asserted fact was fresh in the memory of the witness, the court must take into account all relevant matters, including:

- (a) the nature of the event;
- (b) the age and health of the person;
- (c) the period of time between the occurrence of the asserted fact and the making of the representation (s 66(2A)).

The court is not limited to a temporal comparison, and must take into account that the occurrence of some events (especially repeated traumatic events) may remain fresh in the memory for longer than others (*ISJ v The Queen* (2012) 38 VR 23, [48]; *R v Bauer* (2018) 266 CLR 56, [89]).

The operation of s 66 depends on the availability of the person who made the representation. It is not necessary that the person who heard the representation give evidence, but the absence of confirmation from the other person may affect the weight given to the evidence (*Barrow v The Queen* [2020] VSCA 102, [75]).

Section 66(2)(b)(ii) is a child-specific hearsay exception that applies where the alleged victim was under 18 when he or she made the relevant representation.

#### Potential unreliability of hearsay evidence

Hearsay evidence is recognised as a 'evidence of a kind that may be unreliable' and which may need to be treated with caution (*Evidence Act 2008* s 165 (civil); *Jury Directions Act 2015* s 32 (criminal)). Common dangers of hearsay evidence include:

- faults in the perception, recollection and narration of the person who made the hearsay statement, and the person who reported the terms of the hearsay statement;
- risk that memories of what is heard are less reliable than memories of what is seen;
- that the statement was not made in a court environment, which may increase the pressures on a person to make a false statement;
- inability to cross-examine the maker of the statement;
- inability for the finder of fact to assess the context and context of the statement (*R v Nemeth* [2002] NSWCCA 281, [7]-[10]; *Brown v The Queen* [2006] NSWCCA 69).