

THE HEARSAY RULE IN CRIMINAL PROCEEDINGS

What is Hearsay and its Purpose?

Hearsay is a critical evidentiary rule that applies in both criminal and civil court cases.

Hearsay is evidence given by a witness as a result of information they hear another person mention about a court matter outside of the courtroom. This means the witness did not directly hear or see the offence, but rather they are in receipt of the evidence. In other words, the information passes from A (person who witnessed the offence) to B (hearsay - "Y told me Z raped her") to C (the court). As such, they are not able to provide direct evidence of what occurred in court. Therefore, this hearsay evidence is inadmissible (it cannot be used to establish whether or not Z raped Y). There are exceptions to this - see below.

The reason why hearsay evidence is inadmissible is because it cannot sufficiently be cross-examined in the court room. This makes the evidence **unreliable** and so it must be used cautiously. This means only the most reliable evidence can be submitted to the court by the parties to the case. The court is then fairly positioned to weigh up the disputing facts and uphold a fair trial.

As highlighted by the Australian Law Reform Commission, the importance of hearsay evidence being excluded is to reduce the risk of:

- Errors in the recollection of the person who made the hearsay statement and the person who heard and reported the hearsay statement
- Memory for what we hear is less reliable than memory for what we directly witness
- The statement was not made inside a courtroom under oath
- Cannot cross-examine the maker of the statement nor assess its context (*R v Nemeth*)

Hearsay v Direct Evidence

Hearsay evidence is broadly inadmissible (unless an exception below applies). Direct evidence is admissible. This is because it is given by an original witness who directly saw/heard the facts ("I saw Z rape Y"). As such, it is much more reliable and is given greater weight in the courtroom.

Hearsay at Common Law v the Law Under the *Evidence Act 2008* (Victoria) ('the Act')

Hearsay is an old common law rule and is defined as having 2 features: "**evidence of a statement made out of court** [out of court statement] that is **adduced to establish the truth of a fact asserted in the statement** [adduced for testimonial purpose - hearsay purpose]" (*Subramaniam v Public Prosecutor*).

Since 2010, this common law rule is now covered for in the Act. Other states and territories in Australia have their own equivalent Act. The Act closely follows the common law with the main difference being the use of exceptions to the rule.

Hearsay under the Act starts with s 59 (the exclusionary rule) and exceptions to the rule (ss 60-75) follow. The exclusionary rule includes 5 elements that need to be established in order to determine whether it is hearsay evidence and inadmissible. They include:

1. A previous representation

- a. “Representation made outside the court in which the evidence of the representation is sought to be adduced” (s 59 Act)
 - i. The representation can be express/implied (oral/in writing), inferred from conduct, not intended by its maker to be communicated or seen by another person, or a representation that for any reason is not communicated
 - ii. Evidence of previous representation is often adduced **orally** by a witness who testified about what another person previously told them outside of court; or
 - iii. **Documentary evidence** tendered as an exhibit which records the person’s written words and was made on a previous occasion outside of court

2. Was made by a person

3. That contained an asserted fact

- a. Which can be expressly asserted (Z raped Y) or asserted by implication

4. Intended to be asserted by the maker (this is an objective test)

5. Adduced by a party to establish an asserted fact (hearsay purpose)

Exceptions to Hearsay

Hearsay evidence (s 59 Act) might still be admissible if an exception applies. In other words, evidence of a previous representation might be admitted for a hearsay purpose.

First-Hand Hearsay Exceptions

First-hand hearsay is “evidence of a previous representation that was made by a person who had **personal knowledge** of an asserted fact” (s 62(1) Act). To determine whether this exception applies, the context in which the evidence is proposed to be adduced needs to be considered. Personal knowledge is evident if it is based on something the person perceived (or may reasonably be supposed to have).

Examples of first-hand hearsay circumstances (be careful they are not second-hand, third-hand or more remote hearsay circumstances) that are admissible in criminal cases (and may be argued as a defence to the other side arguing inadmissible hearsay evidence) (ss 62-68 Act), include:

- A saw, smelt, tasted, heard or otherwise perceived an act that they have personal knowledge of
- A tells B about the act
- B provides oral evidence to the court of the ‘previous representation’ made by A containing asserted facts (“Y told me Z raped her”)

Exception 1: Maker of the Previous Representation is Unavailable

If the maker of the previous representation provides **reasonable notice** they are not available to provide evidence about the previous representation, the first-hand evidence might be admissible (s 65 Act).

The purpose of this exception is to balance the problems of little evidence with the risk of admitting evidence that has been fabricated or is unreliable.

Exception 2: Maker of the Previous Representation is Available

If the maker of the previous representation provides **reasonable notice** they are available to provide evidence about the previous representation, the first-hand evidence might be admissible (s 66 Act). For example:

- A saw, smelt, tasted, heard or otherwise perceived an act that they have personal knowledge of
- A tells B about the act
- A provides oral evidence to the court of the ‘previous representation’ they made to B

Exception 3: Statement About a Person’s Health

If evidence of a previous representation is made by a person and this occurs contemporaneously in relation to their health, feelings, sensations, intention, knowledge or state of mind, the hearsay rule does not apply (s 66A Act).

What if the Opposing Side Counter the Admissibility of the First-Hand Hearsay Exception?

The opposing party may take further action to prevent potential unreliable hearsay evidence from being tendered in court, including:

- Applying to the court to have the hearsay evidence excluded because it is prejudicial (ss 135 and 137 Act)
- Apply to the court to limit the use of the prejudicial evidence (s 136 Act)
- Apply to the court to have warnings about the reliability of the evidence given (under the *Jury Directions Act 2015*)

Second-Hand and Remote Hearsay

Second-hand and remote hearsay is always inadmissible, because no exceptions to the rule apply.

Examples of second-hand hearsay circumstances:

- B reports the act told to them by A to C (to which B never heard or perceived the act, so C’s evidence goes through 2 people before B reports)
- C provides oral evidence to the court of the ‘previous representation’ made by B containing asserted facts which are not their own personal knowledge (“Y told her Z raped her”)

Other Exceptions to Hearsay

Hearsay evidence that is relevant for a non-hearsay purpose (whether it is first-hand hearsay or not (s 60(2) Act)) might be admissible evidence in court (s 60 Act). However, this exception does not apply

to evidence of admissions or admissions in criminal proceedings (*Lee v The Queen*), unless the admission is first-hand hearsay (s 81 Act).

The following examples of evidence given by a witness might be admissible evidence for a non-hearsay purpose (however the court may scrutinise it for its reliability, credibility and probative weight):

1. A previous representation made by a person that reveals their **state of mind** at a given time (mental state of fear, intention or belief)
2. A **statement** made by a person that is **inconsistent** with the prior statement made before giving evidence in court. The previous statement might be admissible to establish the truth of the facts in the prior statement.

Admissions

The hearsay exception does not apply to evidence of a previous representation in relation to admissions - X admits to Y that they raped Z (s 81 Act). In the criminal trial to determine X's guilt, counsel for the victim might use evidence from Y to argue X made the admission to Y to establish that their admission was true, and Y believed that X had the required mental state of mind when they made this admission to them. Exceptions apply and exclusions include:

- Admissions that are not first-hand hearsay (s 82 Act)
 - To determine whether this applies, carefully differentiate a document where an admission was made directly and a document (police notes) recording an admission by another person (third party) - as this is second-hand hearsay and inadmissible evidence
- Admissions against third parties (s 83 Act)
- Admissions obtained as a result of violence or other conduct (s 84 Act)
 - The admission must be true and correct (reliable) to be admissible evidence
- Unreliable admissions by defendants (s 85 Act)
 - The admission must be true and correct (reliable) to be admissible evidence
- Records of oral questions of defendants (s 86 Act)

Second-Hand and Remote Hearsay Exceptions

Exceptions for second-hand and remote hearsay are fewer due to groups of evidence likely to be unreliable. These are provided for under ss 69-75 Act.

The following examples of evidence given by a witness might be an exception to the hearsay rule and be admissible evidence:

- Business records (s 69 Act)
- Contents of tags, labels and writing (s 70 Act)
- Electronic communication (s 71 Act)
- Aboriginal and Torres Strait Islander traditional laws and customs (s 72 Act)
- Reputation in relation to relationship and age (s 73 Act)
- Reputation in relation to public or general rights (s 74 Act)

- Interlocutory proceedings (s 75 Act)