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## HEARSAY

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Write: The defence/prosecution may argue that [evidence] should be excluded on the basis of the hearsay rule because it is evidence of a previous representation made by a person adduced to prove the existence of a fact that the person intended to assert by the representation: **s 59**

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### IS IT HEARSAY EVIDENCE?

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To **determine** whether evidence **falls within scope of s 59**, need to answer these questions:

- 1) Is it evidence of a previous representation?
- 2) Does this previous representation contain an asserted fact which you can identify in your analysis?
- 3) Was that representation made by a person?
- 4) Is it being adduced to prove the asserted fact? (i.e. the evidence is being used by a party to litigation for a hearsay purpose – purpose of prosecutor)
- 5) Did the person who made the representation intend to assert the existence of that fact? (intention objective - “reasonably supposed”)

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### STEP 1: RELEVANCE

The evidence will be relevant if it is capable of rationally affecting (directly or indirectly), the assessment of the probability of a fact in issue: **s 55(1)**

If evidence is relevant, it will be admissible under **s 56(1)**

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### STEP 2: PREVIOUS REPRESENTATION

*What is the representation? Identify it! Oral rep or document?*

**Evidence** of a previous representation simply refers to:

- a person called to give oral evidence about the representation; and/or
- documentary evidence tendered as exhibits which show the representation made (e.g. the letter itself, or a video recording).

A representation containing an asserted fact can be made by:

- **written statements** (e.g. pre-prepared witness statements (but not affidavits filed in the court proceeding), letters and other written correspondence, notes, diary entries, account book entries);
- **oral statements** (i.e. words said by a person in any context);
- **non-verbal conduct** (e.g. a victim pointing to a photograph of a person to indicate his assailant).

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### STEP 3: DOES THIS PREVIOUS REPRESENTATION CONTAIN AN ASSERTED FACT

May need discussion or may be obvious on the facts

#### Express/implied/inferred?

- Can be more than one
- What is the express thing? Any what is it IMPLYING?
- **Express:**
  - E.g. “Daddy is on the phone” = express. “Hi Daddy” = implied Dad is person on phone
- **Implied:**
  - E.g. “is the shop open today?” = implied rep that going to the shop
  - E.g. “she shook the baby” – implied that she = Jasmine
- **Inferred from conduct**
  - E.g. victim pointing to a photograph to indicate his attacker

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### STEP 4: MADE BY A PERSON

Representation **must be made by a person**, not another entity (e.g. computer logs = not hearsay)

Representation in documents in “made by a person” if per **Dic Pt 2(6)**:

(a) the doc was **written, made or otherwise produced by the person**; OR

(b) The representation was recognised by the person as his/her representation by signing etc.

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### STEP 5: ADDUCED TO PROVE THE ASSERTED FACT

*Why is the evidence being adduced? What other possible reasons could the evidence be adduced for?*

The evidence of the previous representation must be adduced ***to prove the asserted fact*** contained in it (a **“hearsay purpose”**).

If the evidence is **adduced for a purpose other than to prove the truth of the asserted fact** contained in it, **it is not hearsay**.

## NOT HEARSAY if used to prove:

### State of mind of the person who made the representation:

- **Ratten**: court held that woman saying, 'get me the police' could NOT be used to prove that she was in grave danger but could be used to prove that she was scared (her state of mind)
- **Walton**: Court held that the statement "Daddy's on the phone" was clearly admissible to establish the belief that the person whom she was arranging to meet was Walton.

### To show a representation was made

- **Subramaniam**: adduced to prove the threats were made, not whether the terrorist were being truthful in saying they would kill him

### Evidence of threats made by a person to show duress caused to another

- **Subramaniam**

**Evidence of a prior consistent/inconsistent statement** (to bolster or undermine credibility of witness's in-court testimony)

**Evidence of a representation said to be a lie** (consciousness of guilt)

**Where the making of the representation is itself legally significant** (e.g. a defamatory publication, an "offer" or "acceptance", a threat to kill);

**S 60**: if the evidence of the previous representation **IS ADMISSIBLE** for a **NON-HEARSAY** purpose, it can be **ADMITTED AND USED FOR A HEARSAY PURPOSE** as well.

This is a departure from the common law

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## **STEP 6: INTENDED TO ASSERT THE EXISTENCE OF THAT FACT (OBJECTIVE INTENTION)**

Did the person who made the representation intend to assert the existence of that fact?

Intention is defined **objectively** (**Hannes**) → what can reasonably be supposed that the person intended to assert, taking into account the circumstances in which it was made (**s 59(2A)**)

This requirement highlights a distinction between:

- **express** previous representations – where intention to convey asserted fact is obviously present (e.g. "Daddy's on the phone..."); and
- **implied** previous representations – where intention to convey asserted fact is arguable (e.g. "Hello Daddy...")

Rationale – **lack of intention** to assert meant the asserted fact contained in the previous representation **more reliable**.

## LOOK AT:

**Age** of the person making the representation

- A child objectively unlikely to be intended to assert a fact (*Walton*)

Is it a **normal conversation** where person might say something without thinking?

- *Walton* – telephone call to father – “Hi Daddy”

Did you specifically refer to the **person’s name**?

- *Benz* – would seem odd to refer to mother that it someone else and not standing next to her, in response to a Q. Did the maker of representation intend to assert that this was her mother? If it was not intended, evidence is admissible

Was the **statement spontaneous**?

- More likely did not intend to assert the fact (*Benz*)
- But do other factors show that the statement was intended?

**Element of intention will rarely be an issue** – bigger consideration is usually the purpose for which the evidence is being adduced.

### **EXAM:**

Because the **evidence is hearsay** it is **prima facie inadmissible** per **s 59(1)**

It is then necessary to consider if any **exceptions** to the hearsay rule apply

Before that, need to consider whether it is **first or second-hand** hearsay as different exceptions apply

## EXCEPTIONS TO HEARSAY

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### FIRST & SECOND-HAND EXCEPTIONS

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#### DUAL PURPOSE: S 60

The HSR **does not apply** to evidence **relevant for a non-hearsay purpose**

First, outline that this is a divergence from the CL. The CL said that evidence which is admitted for a non-hearsay purpose cannot be used for a hearsay purpose (**Walton**)

Now, **s 60** says that ***E adduced for a non-hearsay purpose, can also be used for its hearsay purpose.***

The hearsay rule does not apply to E of a previous representation that is admitted for a purpose other than proof of an asserted fact

\* **s60(2)**: applied to second hand hearsay

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#### CONTEMPORANEOUS STATEMENTS: S 66A

The HSR **does not apply** to **contemporaneous statements**

**S 66A:** *The HSR does not apply to a contemporaneous representation about the person's health, feelings, sensations, intentions, knowledge or state of mind*

Must be describing their current feelings

- **Health** (W overheard C say 'I feel sick' after seating poisoned soup)
- **Feelings** (I love/hate him)
- **Intention** (Evince of D saying "I'm going into town to meet J (Walton))
- **State of mind:**
  - "I'm going to drive up the Saddle"
  - "She shook the baby"

*Rationale?* This is the best evidence we have about how someone is feeling/state of mind.

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## **BUSINESS RECORDS: s 69**

The HSR **does not apply** to **business records**

*[X] will claim that the document is an exception to the HSR under the business record exception and therefore admissible: s 69*

*Rationale?* If docs are kept for the purpose of the business, they are seen to be more reliable

### **The following must be satisfied:**

#### **1) Must be a business document: s 69(a)**

**Document** = 'record of info' in which there is writing (**Dic Cl. 8 Pt 2**)

#### **A business document: s 69(1)(a):**

- a document that forms part of the business records (of a person or organisation) or is kept for the purpose of the business; or
- at any time, formed part of the business records
- Can be a business diary

### **AND**

**s 69(1)(b):** Contains a previous representation made in the course of, or for the purpose of, the business

Consider:

- Did the document relate to business activities or was it made for personal reasons?
- E.g. a brochure is not a business record because not kept for the purpose of the business

#### **2) Personal Knowledge: s 69(2)**

**s 69:** HSR does not apply if the representation was made:

**s 69(a):** By a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or

**s 69(b):** On the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact

### 3) The business exception DOES NOT apply: s 69(3)

Does not apply where document **prepared for or in contemplation of proceeding in Australia/overseas** (*Vitalu*)

**s 69(3): HSR STILL APPLIES** and business exception does not apply if the representations/record were **prepared in contemplation** of:

- a) **Civil proceedings**; or
- b) **Criminal investigations**

#### FIRST HAND HEARSAY EXCEPTION

	Civil	Criminal
<b>Maker not available</b>	S 63	S 65
<b>Maker available</b>	S 64	S 66

#### STEP 1: FIRST HAND HEARSAY (s 62)

**Section 62** definition of first-hand hearsay:

Person **who made the previous representation** had **personal knowledge** of the fact(s) asserted in representation

- **“Personal knowledge”** of an asserted fact comes from the person having seen/heard/perceived things – the person was an eye witness when the facts/events transpired
- it is always about the MAKER of the statement – Mary says, ‘John hit me’ – she is the maker, she has personal knowledge. So, Elizabeth giving evidence of Mary’s statement is first-hand hearsay.

#### STEP 2: IS THE MAKER/DOCUMENT OF THE REPRESENTATION AVAILABLE?

**MAKER (Part 2, s 4(e) dictionary):**

Person deemed unavailable if:

- (a) Person is **dead**
- (b) Person is **not competent** to give E about the fact
- (c) It would be **unlawful** for the person to give E about the fact
- (d) A provision of the Act prohibits E being given
- (e) All **reasonable steps** have been taken by the party seeking to prove the person is not available **to find the person** and secure their attendance, but without success
- (f) All **reasonable steps** have been taken **to compel** the person to give evidence but without success
  - Reasonable steps will depend on if criminal/civil, seriousness of the crime, how important e is etc.
- (g) Person is **mentally or physically unable** to given E and cannot be practically overcome

### DOCUMENT (dictionary):

Document deemed unavailable if:

- (a) It cannot be found after reasonable inquiry and search by the party
  - (b) It was destroyed in good faith by the party or was destroyed by another person
  - (c) It would be impractical to produce the document or thing during the proceeding
  - (d) production of the document/thing during the proceeding could render a person liable to conviction for an offence; (i.e. production would be illegal) or
  - (e) it is not in the possession or under the control of the party and—
    - i. can't be obtained by any judicial procedure of the court; or
    - ii. in the possession/control of another party to the proceeding who knows/might know it is relevant in the proceeding; or
    - iii. (iii) it was in the possession/control of such a party when that party knew/might reasonably have known that such evidence was likely to be relevant in the proceeding
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### STEP 3A: CIVIL PROCEEDINGS

First-hand hearsay exceptions in civil proceedings are very broad

#### THERE ARE THREE SITUATIONS WHERE FIRST-HAND HEARSAY IS ADMISSIBLE:

1) Where the person who made the previous representation is “**not available**” (s 63)

**S 63:** Where person who made the rep is not available, first hand hearsay evidence **IS admissible**

*not available = see above*

2) **Maker IS available (s 64)**

**S 64(2):** Where the person who made the previous representation is available but to call the person “would cause **undue expense or undue delay**, or would **not be reasonably practicable**”

- e.g. witness is in the middle of a 6-month trek in Nepal

3) **Maker is available and is called to give evidence (s 64(3))**

**S 64(3):** Where **person who made the previous representation** is **available** and is **called to give evidence**



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### STEP 3B: CRIMINAL PROCEEDINGS

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#### MAKER NOT AVAILABLE:

The HSR does NOT APPLY and E is prima facie admissible if:

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#### S 65(2)(a):

The maker was **under a duty** to make that representation, or representations of the kind  
e.g. duty to report sexual abuse, doctors, suspicious disease. Why would you make that up?

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#### S 65(2)(b):

The representation was made **when or shortly after the asserted fact** occurred and in circumstances that make it **unlikely that the representation is a fabrication**

#### Requirements:

- 1) "When (as it is occurring) or shortly after" the fact occurred
  - requires 'approximate contemporarily'
  - statement to police 24 hours after assault = shortly after (*Harris*)
  - statement to police 5 days after armed robbery = not shortly after (*Williams*)
- 2) "Unlikely that the rep is a fabrication"
  - if person has time to reflect, discuss with others, more likely to be a fabrication
  - unlike the CL, it is not necessary to be able to disregard the possibility of concoction
  - the test is whether, in the circumstances, it is unlikely to be a fabrication
  - If **other witnesses**, less likely to be fabrication bc knew other Ws could verify/undermine his account (*Harris*)
  - As it is a **spontaneous utterance** (in response to a dramatic event) it is less likely that it is a fabrication (*Benz*)

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#### S 65(2)(c):

It may also fall within s 65(2)(c); where the representation is made in circumstances that make it **HIGHLY PROBABLY THAT THE REPRESENTATION IS RELIABLE**

- This test is a much higher test of reliability and is drawn from the suggested CL exception (*Walton; Benz*)

Many of the same factors apply (as above) and the circumstances are such that this statement made by [] may be said to be such that it is highly probable it is reliable

NO time limit → although s 65(2)(b) exception does not apply because the representation was not made "when or shortly after" the asserted fact, s 65(2)(c) does not contain any time restraints

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### S 65(2)(d):

HSR won't apply (and admissions will be admissible) if representation was made:

- **Against the interests of the person** who made the rep; and
- Made in circumstances that **make it likely that the representation is reliable** (not highly reliable)

**S 65(7)** - 'Against the interest' if tends to:

- Damage []'s reputation
- Show [] has committed an offence which hasn't been convicted for
- Show that [] is liable in action for damages
- Not exhaustive

**E.g.:** A statement made by a fine upstanding person that he had an affair would be reliable bc why would they want to damage their reputation?!?!

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### S 65(3):

HSR doesn't apply if the maker of the representation **has already been cross-examined** by D's (or D had reasonable opportunity to do so) in earlier proceedings (e.g. committal proceedings)

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### MAKER IS AVAILABLE:

**S 66:** The HSR **does not apply** to evidence of the representation:

If when the **representation was made**, the **occurrence of the asserted fact** (event) was **fresh in the memory** of the person who made the representation

**"Fresh in the memory"**

- NOT confined to how much time has elapsed
- **Graham** said that 6-year gap meant the event was not FIM

It now **depends on the relevant matters** in **S 66(2A):**

- (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:** added **restriction for prosecution** – can't use s 66 to have their witnesses tender their statements which they made to police: **s 66(3)**