

EVIDENCE AND PROOF: ADMISSIBILITY CHART:

EVIDENCE ACT 2008:	
HEARSAY:	
Ask → <i>is the accused making an admission? If yes, then go to the admissions section</i>	
RULE: Evidence of a <u>previous representation made by a person</u> is not admissible to <u>prove the existence of a fact</u> that it can reasonably be supposed that the person intended to assert by the representation	S 59(1)
• A previous representation • Is there a previous representation? • Made by a person • Was the representation made by a person? • Containing a factual assertion • Is there an assertion of fact in the representation? i. For the purposes of s59, a factual assertion is: 1. Made out of court (<i>Walton v The Queen 1989</i>) 2. By any person other than the witness actually testifying 3. Brought into evidence either as a. A representation of the truth of that assertion b. To contradict the truth as represented by another witness • Intended to be asserted by the maker • Note → this is an objective test ***** • Did the person who made the representation intend to assert that fact? i. Unintended assertions are outside the HR 1. <i>For example, if there is evidence that says something like 'Hello Dad', even though this seems like a person is intending to assert the identity of someone, it is highly unlikely that was intended to be asserted. Therefore, not hearsay</i> ii. Intended assertions fall under the HR • To prove the asserted fact • Was the representation adduced to prove the asserted fact? i. What is the purpose of this fact? Is it being adduced for the purposes of proving the asserted fact contained in it 1. No = the evidence is prima facie admissible 2. Yes = the evidence is being adduced for a hearsay purpose and s 59 would exclude it	
Representation includes – a) An express or implied representation (whether oral or in writing) or b) A representation to be inferred from conduct; or c) A representation not intended by its maker to be communicated to or seen by another person; or d) A representation that for any reason has not been communicated	
Previous representation = Essentially a representation made otherwise than in the course of giving evidence in the proceeding	
For the purposes of determining under subsection 59(1) the court may have regard to the circumstances under which the representation was made, to figure out whether it can reasonably be supposed that the person intended to assert a particular fact by the representation	S59(2)
SAMPLE: Bob's out-of-court statement that he saw the accused climbing through a window at 12am is hearsay under s 59(1) of the <i>Evidence Act</i>. It is a previous representation, made by a person, which is asserting a fact and being introduced to prove the truth of what was asserted, which is that the accused was at the scene. As Bob is not giving evidence himself, the statement is inadmissible unless an exception applies.'	

Evidence Act – full list of exceptions		Evidence Act – full list of exceptions continued	
s60	Evidence relevant for a non-hearsay purpose	s72	Aboriginal and Torres Strait Islander traditional laws and customs
s63	First-hand hearsay in civil proceedings if the maker of the representation is unavailable	s73	Marriage, family history or family relationships
s64	First-hand hearsay in civil proceedings if the maker of the representation is available	s74	Public or general rights
s65	First-hand hearsay in criminal proceedings if the maker of the representation is unavailable	s75	Use of evidence in interlocutory proceedings
s66	First-hand hearsay in criminal proceedings if the maker of the representation is available	s81	Admissions
s66A	Contemporaneous statements about a person's health	s87(2)	Representations about employment or authority
s69	Business records	s92(3)	Exceptions to the rule excluding evidence of judgments and convictions
s70	Tags and labels	s110-111	Character of and expert opinion about an accused
s71	Electronic communications		

HEARSAY EXCEPTIONS – GENERAL

Evidence relevant for a non-hearsay purpose	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. Can use it for both purposes. MEANING: • If a representation is relevant for a non-hearsay purpose, it is admissible. • It does not invoke the pre-requisites to engage the hearsay rule. • Whenever evidence relevant for a non-hearsay purpose is admitted, it can be admitted also as evidence of the fact stated. Examples of a non-hearsay purpose: • Admissions • Prior consistent or inconsistent statements. • Evidence of words spoken, or representations made where the evidence is led to prove the fact of what was said within a particular context or to show something about the event, or to explain a sequence of events. • Evidence which sheds light on the nature of a relationship.	S 60(1)
	This section applies whether or not the person who made the representation had personal knowledge of the asserted fact.	S60(2)
	This section does not apply in a criminal proceeding to evidence of an admission	S60(3)

SAMPLE PARAGRAPH ON USING EVIDENCE FOR A NON-HEARSAY PURPOSE (to therefore get a hearsay statement in):

The prior statement is admissible under s103 to support the witness' credibility. Although it is hearsay if used to prove the truth of its contents, the court may use it to but rather to establish Jane's consistency across her testimonies, which heightens her credibility. Pursuant to s60, once this evidence is admitted for the non-hearsay purpose of demonstrating Jane's credibility, it is also admissible as proof of the truth of the representation contained within the statement; that is, [insert statement].

EXCEPTIONS – FIRST HAND HEARSAY:

Breakdown of relevant provisions:

- **S62(1):** First-hand hearsay is a previous representation made by someone who had **personal knowledge** of that asserted fact.
- **S62(2):** a person has **personal knowledge** of the asserted fact if their knowledge of the fact was, or might reasonably be supposed to have been, based on something they saw, heard or otherwise perceived.
- **S62(3):** a person is taken to have personal knowledge if it relates to their own **state of mind** at the time of the representation, including their health, feelings, sensations, intention, knowledge or state of mind at the time the representation was made (works in conjunction with s66A)
- **s66A:** hearsay rule doesn't apply to previous representations made by a person that was a contemporaneous representation about their health, feelings, sensations, intention, knowledge or state of mind.
- **Sample Paragraph:** *The witness's statement that "my neighbour, Bob, told me he saw the accused climb through the window at 12am" is hearsay if used to prove the break-in occurred. Under s 62, a person has personal knowledge if their knowledge is based on what they saw, heard, or otherwise perceived. Here, Bob claimed to have directly witnessed the break-in, so the representation is based on personal knowledge. As such, it is first-hand hearsay, and may be admissible pursuant to the rules in s65 or s66.*

ASK YOURSELF →

S62 Step by Step:

1. Who is the maker of the previous representation?
2. Does this maker of the previous representation have **personal knowledge** of the asserted fact?

Yes = it is first-hand hearsay.

THEN, once established that it is hearsay, we state that 'first hand hearsay will be admissible if certain requirements are satisfied.

ASK → Is the maker available (s55) or unavailable (s65)

If unavailable → s65 (DO ANY OF THESE POINTS BELOW APPLY?)

- **(s65(2)): the hearsay rule doesn't apply to evidence of a previous representation given by a person who saw, heard or otherwise perceived the representation being made, if the representation:**
 - i. Was made under a duty to make that representation of that kind; or
 - ii. Was made when or shortly after the asserted fact occurred and in circumstances unlikely that it was a fabrication; or
 - iii. Was made in circumstances that make it highly probable it is reliable; or
 - iv. (i) against the interest of the person who made it at the time AND (ii) made in circumstances that make it likely the representation is reliable.

If available → s66 (DO ANY OF THESE POINTS BELOW APPLY?)

- **(s66(2)): the hearsay rule does not apply to evidence of a representation given by a person who made the representation, or a person who saw, heard or otherwise perceived the representation being made if:**
 - i. The person is called to give evidence AND
 - ii. (i) When the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation...

THEN, USE S66(2)(A) TO DETERMINE WHETHER S66 APPLIES!

- **(s66(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 relevant to the question, including:**
 - iii. The nature of the event concerned; and
 - iv. The age and health of the person; and
 - v. The period of time between the occurrence of the asserted fact and the making of the representation.

THEN ACKNOWLEDGE NOTICE REQUIREMENT, PER S67

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.

S 62(1)

A person has personal knowledge of the asserted fact if his or her knowledge 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.

S 62(2)

MEANING:

- Section 62(2) means that for a previous representation to be admissible as an exception to the hearsay rule (as "first-hand hearsay"), the original maker of the statement must have had direct, personal experience of the fact.
- **Note, this provision is NOT AN EXCEPTION !!**
- This provision just defines what "personal knowledge" means for the purposes of the first-hand hearsay exceptions found in later sections (such as sections 63, 64, 65, and 66)