

## Evidence Act 1995 No 25

### 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 defendant 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 defendant 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 a defendant 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), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant 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 a defendant 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 a defendant 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 a defendant 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.

## Evidence Act 1995 No 25

### Historical Version- Prior to amendment

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

**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 defendant 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 defendant 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 a defendant 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), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant 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
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(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

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(a) evidence of a previous representation adduced by a defendant 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 a defendant 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 a defendant 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.

## **Criminal Procedure Act 1986 No 209**

### **293 Admissibility of evidence relating to sexual experience**

- (1) This section applies to proceedings in respect of a prescribed sexual offence.
- (2) Evidence relating to the sexual reputation of the complainant is inadmissible.
- (3) Evidence that discloses or implies:
  - (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or
  - (b) has or may have taken part or not taken part in any sexual activity, is inadmissible.
- (4) Subsection (3) does not apply:
  - (a) if the evidence:
    - (i) is of the complainant's sexual experience or lack of sexual experience, or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and
    - (ii) is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed,
  - (b) if the evidence relates to a relationship that was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant,
  - (c) if:
    - (i) the accused person is alleged to have had sexual intercourse (as defined in section 61H (1) of the *Crimes Act 1900*) with the complainant, and the accused person does not concede the sexual intercourse so alleged, and
    - (ii) the evidence is relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person,
  - (d) if the evidence is relevant to:
    - (i) whether at the time of the commission of the alleged prescribed sexual offence there was present in the complainant a disease that, at any relevant time, was absent in the accused person, or
    - (ii) whether at any relevant time there was absent in the complainant a disease that, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person,
  - (e) if the evidence is relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery that took place after the commission of the alleged prescribed sexual offence),
  - (f) if the evidence has been given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question that may, pursuant to subsection (6), be asked,

and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission.

- (5) A witness must not be asked:
  - (a) to give evidence that is inadmissible under subsection (2) or (3), or
  - (b) by or on behalf of the accused person, to give evidence that is or may be admissible under subsection (4) unless the court has previously decided that the evidence would, if given, be admissible.
  
- (6) If the court is satisfied:
  - (a) that it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period:
    - (i) had sexual experience, or a lack of sexual experience, of a general or specified nature, or
    - (ii) had taken part in, or not taken part in, sexual activity of a general or specified nature, and
  
  - (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,  
  
the complainant may be so cross-examined, but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.
  
- (7) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (6) is to be decided by the court in the absence of the jury.
  
- (8) If the court decides that evidence is admissible under subsection (4), the court must, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.
  
- (9) (Repealed)

## **Evidence Act 1995 No 25**

### **137 Exclusion of prejudicial evidence in criminal proceedings**

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

## Evidence Act 1995 No 25

### 76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

**Note.** Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (section 50 (3))
- evidence relevant otherwise than as opinion evidence (section 77)
- lay opinion (section 78)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A)
- expert opinion (section 79)
- admissions (section 81)
- exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

*Examples:*

<sup>1</sup> P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

<sup>2</sup> P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.



## Evidence Act 1995 No 25

### 13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- (a) the person does not have the capacity to understand a question about the fact, or
- (b) the person does not have the capacity to give an answer that can be understood to a question about the fact,

and that incapacity cannot be overcome.

**Note.** See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

- (a) that it is important to tell the truth, and
- (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

## **Evidence Act 1995 No 25**

### **90 Discretion to exclude admissions**

In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

- (a) the evidence is adduced by the prosecution, and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

**Note.** Part 3.11 contains other exclusionary discretions that are applicable to admissions.

## Evidence Act 1995 No 25

### 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 NSW in *R v Hannes* (2000) 158 FLR 359.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

**Notes.** Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60),
- first-hand hearsay:
  - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)
  - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
- contemporaneous statements about a person's health etc (section 66A)
- business records (section 69)
- tags and labels (section 70)
- electronic communications (section 71)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)
- marriage, family history or family relationships (section 73)
- public or general rights (section 74)
- use of evidence in interlocutory proceedings (section 75)
- admissions (section 81)
- representations about employment or authority (section 87 (2))
- exceptions to the rule excluding evidence of judgments and convictions (section 92 (3))
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

*Examples:*

<sup>1</sup> D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

<sup>2</sup> P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

<sup>3</sup> W had bought a video cassette recorder and written 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.