South African
Law Reform Commission

SOUTH AFRICAN LAW REFORM COMMISSION

DISCUSSION PAPER 131

(For general information and comment)

PROJECT 126

# THE REVIEW OF THE LAW OF EVIDENCE

Discussion Paper on the review of the law of evidence

CLOSING DATE FOR COMMENT 31 MARCH 2015

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# INTRODUCTION

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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Judge Narandran Kollapen (Vice-Chairperson)

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An Advisory Committee on the review of the law of evidence was responsible for this project. The project leader for this project was Professor PJ Schwikkard. The members of the committee are –

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The Honourable Madam Justice N Mhlantla

The Honourable Madam Justice T Ndita

Dr D Collier (University of Cape Town)

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Adv T Masuku

# ABBREVIATIONS

| | |
|---|---|
| CPA | Criminal Procedure Act 51 of 1977 |
| CPEA | Civil Proceedings Evidence Act 25 of 1965 |
| ECT | Electronic Communications and Transactions Act 25 of 2002 |
| LEAA | Law of Evidence Amendment Act 45 of 1988 |
| LSSA | Law Society of South Africa |
| NPA | National Prosecuting Authority |
| UNCITRAL | United Nations Commission on International Trade Law |

## PREFACE

This discussion paper (which reflects information gathered up to the end of January 2013 was prepared by Dr D Collier on behalf of the Advisory Committee to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are asked to submit **written** comments, representations or requests to the Commission at the address appearing on the previous page. **The closing date for comment is 31 October 2014.** The researcher will endeavour to assist you with any difficulties you may encounter. Comment already forwarded to the Commission should not be repeated. In such event, you should merely indicate that you abide by your previous comment, if that is the case. The researcher allocated to this project is Mr Willie van Vuuren and he may be contacted for further information.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked "Confidential". Respondents should be aware that the Commission may in any event be required under the Constitution of the Republic of South Africa Act 108 of 1996 to release information contained in representations.

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# CHAPTER 1

# BACKGROUND TO THE DISCUSSION PAPER

1.1. This Discussion Paper forms part of an ongoing study by the SALRC on the review of evidence. It was preceded by Issue Paper 27 *Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues*, which discussed a number of concerns about electronic evidence in criminal and civil proceedings; Issue Paper 27 was published for comment in 2010.

1.2. A review of the law of evidence was included in the SALRC's research programme soon after its establishment in 1973. The Commission's original intention was to codify the South African law of evidence in its entirety and to consolidate it in one Act. However, the Commission gradually realised the enormity of such an undertaking and abandoned the codification of the law of evidence. The Commission decided rather to ascertain which aspects of the law of evidence were unsatisfactory or did not meet current needs, and to formulate suggestions for their reform.

1.3. In 2003 in a preliminary study by the SALRC, Professor PJ Schwikkard identified several areas of law for possible reform and outlined these in Committee Paper 1024 titled Project 126 *Review of the Law of Evidence* (2003). The areas under discussion included the following:

- the principle of relevance;
- the approach to hearsay evidence; and
- various structural features of the court system (that is, the limited role of lay assessors and the adversarial nature of proceedings.)

1.4. Paper 1024 recognised that the function of the law of evidence differs in civil and criminal trials and that there are different policy considerations underlying each. Whereas civil trials are intended to resolve disputes to order relationships, criminal evidence and procedure is "an applied branch of moral and political philosophy"[1] in which the rights and responsibilities of citizenship are articulated. As a point of policy therefore, the paper concluded that a more cautious approach should be taken to the admissibility of evidence in criminal trials.

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1 P Roberts "Rethinking the Law of Evidence: A twenty-first Century Agenda for Teaching and Research" 2002 (55) *Current Legal Problems* 297 cited in South African Law Reform Commission, Discussion Paper 113, Project 126, *Review of the Law of Evidence (Hearsay and Relevance)* 2008 at 13.

1.5. That preliminary study was followed by Issue Paper 26 *Review of the Law of Evidence* and Discussion Paper 113 *Review of the Law of Evidence (Hearsay and Relevance)*. Both of these papers were published in 2008.

1.6. Issue Paper 26 identified several issues in theory and in practice for further investigation and review. These included issues related to the concepts of real evidence, documentary evidence and computer generated evidence. The Issue Paper asked the following questions (among others) which are relevant to the current Discussion Paper:

- To what extent (if any) do the rules regulating the admission of electronic recordings need to be clarified?
- Which rules (if any) regulating the admission of documentary evidence require reform?
- Are the provisions in the ECT Act[2] sufficient to regulate the admissibility of computer generated evidence?

These questions were expanded upon in 2010 in Issue Paper 27 *Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues*, which is discussed in detail below (see paragraph 1.27 and Chapter 4). Before dealing with the above questions, the following section discusses the SALRC proposals on hearsay and relevance.

*Discussion Paper 113: Hearsay and Relevance*

1.7. Discussion Paper 113 contained various options for reform of the law relating to hearsay evidence and the principles governing relevance, and invited public comment on these options. These options are discussed in this section.

1.8. Application of the hearsay evidence[3] rule is one of the core concerns with regard to electronic evidence. More generally, hearsay rule has increasingly come under scrutiny in the past two decades. Within this context, Discussion Paper 113 categorised four possible approaches to hearsay evidence. As these are relevant to a discussion on the admissibility of electronic evidence, the four possible approaches are briefly set out below:

- Option 1: Retain the status quo (with or without the introduction of a notice requirement)

  If the option requiring notice were adopted, Discussion Paper 113 proposes amendments to the Criminal Procedure Act (CPA) as well as the Rules of the

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2 Electronic Communications and Transactions Act 25 of 2002 (ECT Act)

3 Hearsay evidence means "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence" – Section 3(4) of the Law of Evidence Amendment Act 45 of 1998. The general rule is that hearsay evidence is not admissible unless one of the exceptions applies.

High Court and Magistrates' Court to make provision for notice, along the following lines:

> 6.1 A notice of a proposal to offer a hearsay statement in a trial proceeding must be given –
>
> (a) in writing to every other party to the proceeding, and must include the contents of the statement and the name of the maker of the statement; and
>
> (b) ... [in] sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.
>
> 2 A party to the proceeding who is given notice of a proposal to offer a hearsay statement as evidence must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.
>
> 3 The presiding officer may dispense with the requirement to give notice under subsection (1) or (2)
>
> (a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection (1); or
>
> (b) if giving notice was not reasonably practicable in the circumstances; or
>
> (c) in the interests of justice.

- Option 2: Free admission

  In terms of this option, "... the hearsay rules in their entirety would be considered obsolete and hearsay would be freely admitted unless excluded on some other ground, e.g. irrelevancy."[4]

- Option 3: Free admission coupled with decision rules pertaining to weight

  Option 3 would allow for the free admission of hearsay, with decision rules that would require the presiding officer to "articulate the basis on which they have accorded a particular weight to an item of hearsay evidence."[5] The decision rules and weightings would guard against the misuse of hearsay evidence.

- Option 4: Apply different rules

  This option envisages an inclusionary approach being taken in respect of hearsay evidence in civil trials; whereas in criminal trials, an approach similar to that in the current (s 3) Law of Evidence Amendment Act would apply.

  Discussion Paper 113 sets out a Draft Bill on the Law of Evidence that contains proposed legislation for each preferred approach.

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4 Issue Paper 113 at 52.

5 Issue Paper 113 at 53.

1.9 Public submissions were received on the proposed amendments to the hearsay rule. These submissions are discussed below, after a description of the proposed amendments to the law governing relevance.

1.10 In addition to its comments on hearsay, Discussion Paper 113 raised a concern with the relevance rule, which in its current application is "determined by each presiding officer's common sense which is shaped by his or her own personal experience and therefore has the potential to be discriminatory."[6] Discussion Paper 113 therefore recommends that section 210 of the Criminal Procedure Act 1977 and section 2 of the Civil Proceedings Evidence Act 1965 be repealed[7] and be replaced by a more prescriptive approach to relevance, as follows:

A. (1) "Relevant evidence" is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) Evidence is not irrelevant because it relates only to:
(a) the credibility of a witness; or
(b) the admissibility of other evidence; or
(c) a failure to adduce evidence.

B. (1) Subject to the provisions of any other law, evidence that is relevant is admissible.

(2) Evidence that is not relevant is not admissible.

C. (1) A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
(a) be unfairly prejudicial to a party; or
(b) cause or result in undue waste of time.

(2) When determining whether the probative value of evidence is outweighed by the risk that evidence will have an unfairly prejudicial effect, a presiding officer may not adopt assumptions or make generalisations that are in conflict with the constitutional values embodied in the Constitution of the Republic of South Africa Act 108 of 1996.

D. A court may provisionally admit evidence subject to further evidence being offered later which would establish its admissibility.

*Public submission to the SALRC on Hearsay and Relevance*

1.11 On the question of relevance, support for the SALRC formulation (with minor modifications) of the principles governing relevance was received from several sources. These included the Johannesburg Bar Council,[8] the Legal Aid Board,[9] the

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6 Issue Paper 113 at 25.

7 These sections provide simply that evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall not be admissible.

8 The Johannesburg Bar Council did not see the need for section 4(1)(b) [C(1)(b) above], arguing that evidence which is relevant ought in principle to be admitted; and did not support section 4(2) [C(2) above] which it argued is unnecessary (and complex) in light of the existing constitutional imperative to interpret all law in a manner that does not conflict with constitutional values.

Law Society of the Northern Provinces, and the Laws and Administration Committee of the General Council of the Bar.[10]

1.12 By contrast, academic analysis[11] and further comment received in response to Discussion Paper 113 have questioned the wisdom of codifying the principles governing relevance. In a submission by IM Bredenkamp of the Pretoria High Court Chambers the view is expressed that "To legislate a catalogue of factors to be taken into account when relevance is determined, will limit the discretion of a presiding officer ... and consequently not be in the interest of justice."

1.13 *In the absence of consensus on the issue, the SALRC provisionally recommends that the current approach to relevance remain unchanged; and invites submissions in this regard.*[12]

1.14 On the question of hearsay evidence, despite a compelling argument in favour of a shift toward a more inclusive approach to the admissibility of hearsay evidence,[13] which may be conceptualised along the lines of an inquisitorial system, such an approach is resisted by practitioners. This is largely because such an approach raises concerns about the constitutionally protected rights of litigants and accused persons.

1.15 Prof Dana van der Merwe, in his submission to the SALRC, asks: "Has the time not perhaps come, in the light of the absence of juries from our courts for more than fifty years now, to admit all hearsay evidence and to leave it to the trained jurist and assessors to accord the necessary weight to such evidence?" He adds that "The U.K seems to be doing well in this regard."

1.16 By contrast, arguments against the free admission of hearsay were received from the following bodies: the Laws and Administration Committee of the General Council of the Bar, the Johannesburg Bar Council,[14] the Legal Aid Board, the Department of Home Affairs[15] and the Law Society of the Northern Provinces. The Johannesburg Bar Council points out that the problem with "rendering all relevant hearsay admissible ... is that it encourages the deliberate use of hearsay in preference to original evidence in circumstances where the evidence is known or suspected to be

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9 The Legal Aid Board would seek to clarify, on the provisional admission of relevant evidence, that a final decision must be made by the time the party seeking to rely on such evidence closes its case, to allow the opposing party to know what it must reply to.

10 This submission noted that the proposed section would replace existing definitions of "relevance", which should be made explicit.

11 See Schwikkard and Van der Merwe *Principles of Evidence* 3 ed (Juta & Co, Cape Town 2008) 58.

12 Paragraphs that appear in italics contain the provisional recommendations of the SALRC. These paragraphs will be repeated in Chapter 5 [the concluding chapter of this paper).

13 See generally the discussion on hearsay evidence in Issue Paper 113.

14 Extensive submissions on the hearsay rule were submitted to the SALRC by the Ad-hoc Sub-committee of the Johannesburg Bar, which proposed the incremental reform of section 3 of the Law of Evidence Amendment Act.

15 Chris Mogami of the Legal Services of Home Affairs, who argued for inserting a requirement for "... good reason why the party upon whom the probative value of such evidence depends on his/her credibility cannot testify at the proceedings."

unreliable." The Bar Council therefore argues that "statutory reform of the hearsay rule should be formulated on the basis that the rule stands, subject to exception, rather than that as a starting point the hearsay rule be abolished, subject to statutory safeguards." The Council supports the innovation of prior notice of an intention to adduce hearsay evidence, although it does not support the manner in which it is sought to be introduced and suggests a simpler formulation of the notice requirement. The Council argues that "Generally speaking, where the witness who is able to give direct evidence is available, hearsay evidence ought not to be received." This is particularly the case if the issue is contentious.

1.17 Similarly, Adv Bredenkamp of Pretoria High Court Chambers rejects the "free admission" approach, and argues that "the free admission of hearsay evidence will infringe on the accused's constitutional right to a fair trial." For similar reasons, Bredenkamp also rejects Option 3 (free admission with direction as to ascertaining weight), and emphasises that "a very cautious approach to hearsay evidence must be followed, so as not to infringe especially an accused's right to a fair trial".[16] On Option 4, Bredenkamp expresses the view that a distinction should not be drawn between civil and criminal cases so that the hearsay rule is applicable only in criminal cases. He points out that in any event, the nature of the proceedings is a factor to be considered in terms of section 3 of the Law of Evidence Amendment Act of 1988. Bredenkamp states that he ultimately supports Option 1 and that "what is required is an amendment of section 3 of Act 45 of 1988 in order to insert a notice requirement."[17]

1.18 The introduction of a requirement for notice would in fact not be out of kilter with developments in other Commonwealth countries. A perusal of the statutory regimes regulating hearsay evidence in a number of comparative countries[18] reveals a tendency toward retaining the hearsay rule and providing for (sometimes extensive) exceptions,[19] with the inclusion of a requirement for notice to be given of an intention to produce hearsay evidence.[20] The requirement for such notice is more limited in some jurisdictions than others.[21]

1.19 In light of the above, the SALRC proposes an approach to hearsay along the lines of Option 1 in Discussion Paper 113. It should be noted that failure to provide notice does not per se render the evidence inadmissible. Further, in view of the confusion about automated electronic documents, the SALRC proposes that requisite notice also be required if such documents are to be produced with the intention that the

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16 Submission by Bredenkamp titled "Commentary on Project 126 of the South African Law Reform Commission" (2010) 23.

17 Bredenkamp (n 16) 24.

18 The statutory position in Australia, Canada, New Zealand and England and Wales was considered.

19 See for example the exceptions to the hearsay rule contained in the Australian Evidence Act 1995.

20 See for example section 67 of Australia's Evidence Act 1995; section 28 of the Canada Evidence Act R.S.C., 1985, c.C-5; section 22 of New Zealand's Evidence Act 2006; and section 2 of the Civil Evidence Act 1995, applicable in England and Wales, and certain aspects in Northern Ireland.

21 For example in New Zealand, in any criminal proceedings a hearsay statement may not be offered in evidence unless a party who proposes to offer the hearsay statement has provided every other party with written notice in terms of section 22 of the Evidence Act 2006.

document be admissible as evidence of the facts contained in the document. This proposal is along the lines suggested in clause 6 of Annexure A, namely:

**Notice of intention to produce hearsay evidence and documentary evidence**

6.1 Notice of an intention to produce evidence in terms of subsections 3, 4 and 5 must be given –

(a) in writing to every other party to the proceeding, and must include the contents of the statement and where applicable the name of the maker of the statement, and if a document is to be produced, the document including any related metadata must be attached to the notice; and

b) in sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.

6.2 A party to the proceeding who is given notice in terms of subsection (1) must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.

6.3 Subsections (1) and (2) may be excluded by agreement of the parties, or by waiver of the party to whom notice is required to be given,[22] or the presiding officer may dispense with the requirement to give notice under subsections (1) or (2)

(a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection (1); or

(b) if giving notice was not reasonably practicable in the circumstances; or

(c) if giving notice is not in the interests of justice.

6.4 In any civil proceedings, where the notice in terms of subsection (1) relates to documentary evidence, and no party objects to the notice in terms of subsection (1), or if the court dismisses an objection on the ground that no useful purpose would be served by requiring the party concerned to call a witness to produce the documents,

(a) the document, if otherwise admissible, may be admitted in evidence; and

(b) it will be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.[23]

6.5 Provision may be made by the Rules of Court specifying the manner in which, including the time within which, the duties imposed by this section are to be complied with.[24]

6.6 A failure to comply with this section or any Rules of Court provided in terms of subsection (5) does not affect the admissibility of the evidence but may be taken into account by the court –

(a) in considering the exercise of its powers over the proceedings and in respect of costs; and

(b) as a matter possibly adversely affecting the weight to be given to the evidence.[25]

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22 Adaptation of section 2, Civil Evidence Act 1995 applicable in England in Wales.

23 Adaptation of section 130, New Zealand Evidence Act 2006

24 Adaptation of section 2(2), Civil Evidence Act 1995 applicable in England in Wales.

25 Adaptation of section 2(4), Civil Evidence Act 1995 applicable in England in Wales.

1.20 The SALRC invites comment on the proposed requirement for notice and the presumption (applicable in civil proceedings) that a document, including its contents, is what it purports to be in the event that no objection is received to the notice duly given [see clause 6(4) above]. Furthermore, the SALRC proposes that the Rules Board for Courts of Law (the Rules Board) should specify the manner in which, and time within which, notice is to be given [see clause 6(5)], and provides also that a failure to give notice is not fatal to the admissibility of such evidence but, as provided for in New Zealand,[26] may affect the weight of such evidence.

1.21 In light of the classification of evidence provided for in the proposed legislation (that is, as hearsay or as business and automated records), a matter for consideration is whether the distinction between real and documentary evidence should be dealt with more decisively in any statutory reform. This distinction is often described as the categorising of a document into either circumstantial (real) or testimonial evidence.

1.22 *The SALRC provisionally proposes the introduction of a statutory requirement for notice to be given of an intention to produce hearsay evidence or automated electronic evidence (see clause 6 of the proposed Bill in Annexure A.) The SALRC invites feedback on the need for clarification of the distinction between real and documentary evidence.*

1.23 The discussion above has focused primarily on aspects of Discussion Paper 113 and commentary on that paper that is relevant to the debate on electronic evidence. In the discussion that follows, additional matters raised for consideration in Issue Paper 27 are presented. The Commission invites feedback on these issues and will subsequently report on and propose legislative reform on Relevance and Hearsay simultaneously with Electronic Evidence.

*Electronic Evidence: Background and possible options for consideration*

1.24 In 2010, the admissibility of electronic evidence was discussed at length in Issue Paper 27 *Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues.*

1.25 In Issue Paper 27 we identified the characteristics[27] of electronic evidence that raise concerns about its accuracy and authenticity. We also assessed the approach to electronic evidence in both civil[28] and criminal proceedings[29] in South Africa since the

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26 Section 130, New Zealand Evidence Act 2006.

27 See Chapter 2 of Issue Paper 27 for a comprehensive discussion of the nature of electronic evidence.

28 See Chapter 4 of Issue Paper 27, which traces the admissibility of electronic evidence in civil proceedings prior to the enactment of the ECT Act. In particular the chapter discusses the provisions of the Computer Evidence Act 57 of 1983 (repealed by the ECT Act) and certain provisions of the Civil Proceedings Evidence Act 25 of 1965.

29 See Chapter 5 of Issue Paper 27 for a discussion of the admissibility of electronic evidence in criminal proceedings in terms of section 221 and section 236 of the Criminal Procedure Act. Chapter 5 discusses *S v Harper* 1981 (1) SA 88 (D) and the conflicting interpretations of the decision in *Harper* as it relates to the term "document". Subsequent decisions in *S v De Villiers* 1993 (1) SACR 574 (Nm) and *S v Mashiyi and Another* 2002 (2) SACR 387 (Tk) are also discussed.

judgment in *Narlis v South African Bank of Athens*[30] first raised concerns about the admissibility of electronic evidence.

1.26 In 1982, after the decision in *Narlis*, the SALRC drafted the *Report on the Admissibility in Civil Proceedings of Evidence Generated by Computers*, Project 6, Review of the Law of Evidence (1982). This report ultimately resulted in the passing of the Computer Evidence Act 57 of 1983 applicable to civil proceedings. The SALRC's deliberations on the admissibility of computer generated evidence in criminal proceedings (Project 108) were superseded by the enactment of the Electronic Communications and Transactions Act 25 of 2002 (ECT Act), which repealed the Computer Evidence Act and provided for the admissibility of electronic evidence in civil and criminal proceedings as follows:

> **15. Admissibility and evidential weight of data messages**
>
> 1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence
>
> a) on the mere grounds that it is constituted by a data message; or
>
> b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
>
> 2) Information in the form of a data message must be given due evidential weight.
>
> 3) In assessing the evidential weight of a data message, regard must be had to
>
> a) the reliability of the manner in which the data message was generated, stored or communicated;
>
> b) the reliability of the manner in which the integrity of the data message was maintained;
>
> c) the manner in which its originator was identified; and
>
> d) any other relevant factor.
>
> 4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

1.27 Issue Paper 27 identified certain concerns that may arise out of the formulation of section 15 and related provisions of the ECT Act, and requested public comment on the following questions or issues (raised in Chapter 6 of the Issue Paper):

- Issue 1: Should the ECT Act be reviewed on a regular basis to take account of advances in technology?
  - If so, what should such a review entail?
  - When / how often should such a review take place?
  - Who should undertake the review?

- Issue 2: Are the provisions in the ECT Act adequate to regulate the admissibility of electronic evidence in criminal and civil proceedings?

- Issue 3: Should the current definition of "data message" in the Act be revised?

[30] 1976 (2) SA 573 (A).

- For consistency and clarity, should the ECT Act or other legislation relevant to admissibility of electronic evidence in criminal proceedings include a definition of "electronic', "copy" and "original"?

- Issue 4: In view of technological developments, should the ECT Act be amended to extend its sphere of application to the laws mentioned in Column A of Schedule 1 (ie Wills Act, Alienation of Land Act, Bills of Exchange Act and Stamp Duties Act)? Should the ECT Act include the excluded transactions mentioned in Schedule 2 (ie agreements for the alienation of immovable property; agreements for long-term leases; execution, retention and presentation of a will; and execution of a bill of exchange)?

- Issue 5: Signatures:
  - Should the distinction between "advanced electronic signature" and "electronic signature" be abolished in the ECT Act?
  - Should physiological features of biometrics (including fingerprint, iris recognition, hand and palm geometry) be included in the ECT Act as a form of assent and electronic identity?

- Issue 6: The question of hearsay and admissibility in terms of section 15 of the ECT Act and the interaction of section 15 with other statutory exceptions:
  - Should section 15 of the ECT Act prescribe that a data message is automatically admissible as evidence in terms of section 15(2) and a court's discretion merely relates to an assessment of evidential weight based on the factors enumerated in section 15(3)?
  - Should a "data message" constitute hearsay within the meaning of section 3 of the Law of Evidence Amendment Act?
  - What is the effect of section 15(1) on other statutory exceptions such as section 221 (admissibility of certain trade or business records) and section 222 (application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act) of the Criminal Procedure Act; and Part VI (documentary evidence) of the Civil Proceedings Evidence Act?

- Issue 7: Should the ECT Act (or other relevant legislation) make a clear distinction between *mechanically produced evidence without the intervention of the human mind* (akin to real evidence) and *mechanically produced evidence with the intervention of the human mind* (hearsay)?

- Issue 8: Is a review of the principle of authentication necessary in view of the nature and characteristics of electronic evidence that raise legitimate concerns about its accuracy and authenticity?

- Issue 9: The admissibility of business records:
  - Should section 15(4) be reviewed to give a restrictive interpretation to the words "in the ordinary course of business"?
  - Should section 15(4) as applicable in criminal cases be reviewed in view of the current law on reverse onus provisions?

- Issue 10: A presumption of regularity:
    - Should the law of evidence prescribe a presumption of regularity in relation to mechanical devices (involving automated operations such as speedometers and breath-testing devices)?

- Issue 11: In general, are the provisions in the ECT Act sufficient to regulate the admissibility of computer generated evidence?

1.28 In considering these and related issues in the current Discussion Paper, the SALRC highlights several areas of confusion, and considers three broad options or possible approaches to law reform that may be pursued. The SALRC invites public comment and feedback on these three options, which are as follows:

1.29 Option 1 : Retention of the current regulatory landscape (possible minor reform)

This approach would result in the retention of the current regulatory framework, possibly with the introduction of minor statutory reform (for example the substitution of current definitions in the CPA and the CPEA). The advantage of such an approach is that relatively few changes to the current regulatory framework would be required, which would cause minimal disruption to the legal profession and would most likely be introduced fairly rapidly. However, this conservative approach would mean that multiple laws would still apply. The disadvantages of this scenario include the likelihood that confusion would continue to exist about certain laws and principles, including the following:

- hearsay as it applies to automated electronic evidence (and the seeming hesitance to treat electronic evidence as real evidence);
- the authentication of electronic evidence;
- the admissibility of business records in terms of section 15(4) of the ECT Act; and
- the interaction between (and applicability of) the various laws that regulate exceptions to the hearsay rule.

1.30 Option 2: Introduction of Electronic Evidence specific legislation or guidelines

This option would also largely retain the current regulatory framework (with possible minor statutory reform) but in addition would introduce legislation[31] more detailed than section 15 of the ECT Act, specifically to address the admissibility of electronic evidence. The question of admissibility would focus on issues such as the authentication and reliability of electronic evidence. The content of such legislation

[31] Or possibly Regulations in terms of the ECT Act.

may be informed by the provisions of the Draft Model Law on Electronic Evidence[32] commissioned and published in 2002 by the Commonwealth Secretariat. The Model Law was published to assist Commonwealth jurisdictions grappling with legislative reform in the context of electronic evidence, and was endorsed by the Commonwealth Law Ministers as a Commonwealth model of good practice. The Model Law is attached as Annexure D.

Option 2 would provide greater clarity on the admissibility and production of electronic evidence than Option 1. However, Option 2 would not resolve the potential confusion – and possible deviation from a functional equivalence approach[33] – caused by the multiple sources of law that would still apply to hearsay and documentary evidence.

1.31 Option 3: Reform of the current regulatory landscape

The third option involves a more extensive overhaul of the regulatory framework for hearsay and certain types of documentary evidence. This approach would include two aspects:

- The repeal of existing provisions on the admissibility of hearsay evidence and certain types of documentary evidence (primarily business records, including banking records) in terms of the CPA, CPEA, LEAA and the ECT Act.
- The introduction of a single statute to regulate the admissibility of such evidence, in terms of the hearsay rule, authentication, and the best evidence rule.

Option 3 would require the enactment of legislation along the lines of that set out in Annexure A. Option 3 would achieve the objectives of both Options 1 and 2, and would also reduce the opportunity for confusion that arises from the current multiple sources of law regulating the admissibility of such evidence. For these reasons, the SALRC provisionally recommends Option 3. However, Option 3 presents a relatively extensive departure from the current regulatory framework and would therefore require further reflection and feedback from various stakeholders.

1.32 When considering these three options for the most appropriate regulatory regime in the South African context, commentators are invited to bear in mind the challenges that computer-related evidence presents to the law of evidence. One comment on the current legal response is that "it has endeavour[ed] to force the products of modern technology into the limited categories of either real or documentary evidence."[34]

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32 Draft Model Law on Electronic Evidence (2002) available at *http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BE9B3DEBD-1E36-4551-BE75-B941D6931D0F%7D_E-evidence.pdf* Accessed 31 July 2012.

33 On the meaning of "functional equivalence" see n 41.

34 DP van der Merwe "Appliances and Devices" in "Evidence" by CWH Schmidt and DT Zeffert (updated by DP van der Merwe) *LAWSA* (LexisNexis Butterworths 2005) 8.4. The difference between evidence that is tendered "circumstantially" and evidence that is tendered "testimonially" therefore becomes important in determining how the courts should assess a particular piece of evidence.

1.33 What has clearly emerged in the debate is that *the* crucial concern, particularly where the evidence is derived from a computer that has performed a computational function, is the integrity (reliability) of computers and computer systems. This concern is compounded by the fact that a computer "no longer works with analogue data, but with data in a digital form, which makes it very susceptible to manipulation."[35] Even if a computer served merely as a recording tool in compiling the piece of evidence, alteration of that electronic document may occur without detection – unlike alteration of a paper-based document. This scenario requires a new approach to addressing the question of authentication. It also raises questions about what constitutes the best evidence and what is the "original" in the case of electronic evidence.

1.34 Questions about integrity (reliability) and authentication are therefore critical considerations in deciding the way forward. As Prof Dana van der Merwe explains, "[A] worldwide need exists for universal standards as far as e-commerce, e-documents and digital signatures are concerned, and South Africa would probably need new dedicated legislation in this regard."[36]

1.35 These concerns were reflected in the comments received by the SALRC. Together with the case law analysed and the comparative law studied in the preparation of this Discussion Paper, such comments indicate a gap in South African law with regard to the admissibility of electronic evidence. The manner in which we address this gap is likely to be shaped by the common law origins and the adversarial nature of South Africa's legal system. The rules on the admissibility of evidence are notably lenient in inquisitorial systems,[37] such as those reflected primarily in civil law countries. However, this is not the case in the adversarial systems found in common law countries such as South Africa. Adversarial systems typically have well developed categories of inadmissible evidence – a feature that largely seems to be a response to the use of juries (which are less commonly used in inquisitorial systems) and a concern that juries "don't have training on the weight that should be given to certain evidence."[38] Although South Africa no longer has a jury system,[39] the rules on the admissibility of evidence remain firmly entrenched in our law. Notwithstanding the attractive features of an inquisitorial approach, the nature of legal culture and the piecemeal approach to reforming the law of evidence militate against reform that would move away from the adversarial Commonwealth approach.[40]

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35 Ibid.

36 Dana Van der Merwe et al *Information and Communications Technology Law* (LexisNexis Durban 2008) 123.

37 Ministry of Justice, New Zealand "Appendix B: a comparison of the inquisitorial and adversarial systems" in *Alternative Pre-trial and Trial Processes for Child Witnesses in New Zealand's Criminal Justice System* (Issues Paper 2010) available online at *http://www.justice.govt.nz/publications/global-publications/a/* Accessed 31 July 2012. See also Stephen Mason (ed) *International Electronic Evidence* (British Institute of International and Comparative Law 2008) and Mason's discussion of approaches from jurisdictions other than Commonwealth countries: see for example the chapter on "Denmark" for a clear description of a very different approach to the law of evidence.

38 Ibid.

39 "Juries were finally abolished for all courts in 1969." A Barratt and P Snyman *Researching South African Law* (2005) available online at *http://www.nyulawglobal.org/globalex/south_africa.htm* Accessed 31 July 2012.

40 See LTC Harms "Demystification of the inquisitorial system" (2011) Volume 14 No 5 PER.

1.36 The balance that should at least be achieved in our regulatory framework for electronic evidence is to address any anomalies between criminal and civil law, and between treating any one form of evidence more leniently than another form (from a functional equivalence perspective[41]).

1.37 *The SALRC provisionally recommends the adoption of Option 3 (see Annexure A) – an overhaul of the current regulatory framework to better address functional equivalence and to address the current confusion about definitions and the admissibility of certain types of electronic evidence.*

1.38 The paragraphs above summarise the background to this paper and provide an introduction to the issues that will be discussed in the paper. We have also outlined the provisional recommendations and direction of the SALRC. The remainder of the Discussion Paper is structured as follows:

- Chapter 2 indicates the extent of public comment on Issue Paper 27 and the preceding Issue and Discussion Papers.
- Chapter 3 clarifies the terms "electronic evidence" and "document" and discusses relevant aspects of the law of evidence.
- The eleven issues identified for comment in Issue Paper 27 are explored in Chapter 4, together with recent case law, some comparative law, and the comments received in response to the issues raised for comment.
- Chapter 5 summarises the possibilities for law reform and the SALRC's provisional recommendations in this regard.

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41 Functional equivalence, or media neutrality, means that the law should treat paper-based and electronic transactions in the same way, without prejudicing either or favouring one above the other. W Jacobs "The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts" 2004 *SA Merc LJ* 556, 557 cited in Issue Paper 27 at 40. See also paragraph 3.14 in Chapter 3 of this paper.

# CHAPTER 2

# PUBLIC RESPONSE TO ISSUE PAPER 27 (AND PRIOR PAPERS)

2.1 Comments on Issue Paper 27 were received by the SALRC and the project researcher from the following respondents:

- Adv GTS Eiselen (In re Nedbank);
- The National Commissioner, South African Police Service (SAPS);
- Roux Krige of the National Prosecuting Authority (NPA);
- Raj Daya, CEO of the Law Society of South Africa (LSSA);
- Legal Aid, South Africa;
- Infology, an information management service provider with a specialised focus on legal risk management;
- Mark Heyink of Information Governance (Pty) Ltd; and
- Stephen Mason, general editor of the comparative law volumes *Electronic Evidence: Disclosure, Discovery & Admissibility* (2007) and *International Electronic Evidence* (2008).

2.2 These comments have been considered in the formulation of this Discussion Paper and, where appropriate, the content of the comments has been incorporated in Chapter 4.

2.3 In addition to the comments received in response to Issue Paper 27, this Discussion Paper (especially Chapter 1) refers to certain submissions received in response to Discussion Paper 113 and Issue Paper 26, insofar as these submissions deal with hearsay and relevance rules. Of specific concern to the matters discussed in this paper, comments received from the following respondents were considered:

- Prof D van der Merwe (University of South Africa);
- Adv Letseku, Adv Malowa, and Ms Mafunganyika (University of Limpopo);
- The Laws and Administration Committee of the General Council of the Bar (Adv F Ackerman, High Court Chambers);
- Ad-hoc Sub-committee of the Johannesburg Bar Council (chaired by Adv CE Watt-Pringle SC);
- Legal Aid Board;
- Criminal Law and Procedure Committee of the Law Society of the Northern Provinces (chaired by Mr JH Gresse); and
- Adv Bredenkamp (High Court Chambers, Pretoria).

2.4 Submissions received by the SALRC that deal with issues other than relevance and hearsay have not been referenced in this paper. Such submissions will be considered by the SALRC in appropriate forums.

# CHAPTER 3

# "ELECTRONIC EVIDENCE", "DOCUMENTS" AND OTHER ISSUES OF TERMINOLOGY

3.1. Advances in technology have resulted in the frequent production of *electronic evidence* as evidence in criminal and civil proceedings. Such evidence can present challenges to the conventional meaning of established concepts in the law of evidence, of importance to the *best evidence* rule. These concepts include *hearsay*, *real* and *documentary* evidence; the distinction between an *original* document and a *copy* thereof; and the distinction between *primary* and *secondary* evidence. Various legal responses to these challenges are briefly discussed in this chapter as a supplement to the discussion in Chapter 4.

*Electronic evidence, data messages (and records) and paper-based evidence*

3.2. Although the term "electronic evidence" is commonly employed as an umbrella term encompassing a particular type of evidence, in South Africa the ECT Act (and the UNCITRAL Model Law on Electronic Commerce 1996, from which the ECT draws much of its content) instead uses the term "data message". The ECT Act[42] defines the term as follows:

> "**data message**" means data generated, sent, received or stored by electronic means and includes—
> (a) voice, where the voice is used in an automated transaction; and
> (b) a stored record;
> "**data**" means electronic representations of information in any form; ...

3.3. This definition of "data message" in any event appears largely consistent with the term "electronic evidence," which Mason defines as follows:

> Data (comprising the output of analogue devices or data in digital format) that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system, that is relevant to the process of adjudication.[43]

3.4. It should be noted that the Electronic Communications and Transactions Amendment Bill of 2012 (published in October 2012) proposes to amend the definition of "data message" to the following:

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[42] Article 2 of the UNCITRAL Model Law defines a "data message" as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

[43] Stephen Mason (ed) *International Electronic Evidence* (British Institute of International and Comparative Law 2008) xxxv.

'data message' means electronic communications including –
(a) voice, where the voice is used in an automated transaction; and
(b) any other form of electronic communications stored as a record

In terms of the Bill, "electronic communications" shall have the meaning given to it in the Electronic Communications Act, namely:

'electronic communications' means the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or a combination thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of a like nature, whether with or without the aid of tangible conduct, but does not include content service.

3.5. Two preliminary observations or queries on this proposed definition are as follows:
1. Is it necessary to limit "voice" to automated transactions (noting that the Electronic Communications Act merely refers to "voice")?
2. What is the effect of excluding "content service" from the definition of "data message"?

3.6. Both analogue[44] and digital data may constitute electronic evidence. However, digital data – which includes software, emails, sms's, MP3s, electronic databases, the internet, and documents typed on a computer – do not display the persistent or stable state that typifies analogue evidence. Despite this instability, digital data constitute an increasingly prevalent and important form of evidence in both criminal and civil proceedings. A core concern arises that "Computer records ... may be more prone or vulnerable to alteration and degradation than are records on paper."[45]

3.7. As far as the definitions are concerned, although the term "message" is used, the word takes on a broader meaning than that conventionally understood in common language,[46] as the definition above reflects.

3.8. The ECT Act provides that "'data' means electronic[47] representations of information in any form." The question arises whether a paper printout is one of the forms in which electronic representations of information may be displayed, or whether the provisions of the ECT Act apply only to data messages produced in court through the use of an electronic device such as a data projector. South African courts have also considered – often obliquely – the status of a paper-based *computer printout*, which is still the

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44 "Examples of evidence obtained from analogue devices include vinyl records, audio tape, photographic film, and telephone calls made over the public switched telephone network." Mason (n 43). The general trend is to admit such evidence as items of real evidence, the authenticity and reliability of which should be demonstrated by the party seeking to rely on the evidence.

45 Draft Model Law on Electronic Evidence (n 32) para [2].

46 "Message" in the *Oxford English Dictionary* contains a modern definition of *message* in computing as "Information and instructions generated by a computer program for a user's benefit."

47 The term *electronic* is not defined in the ECT Act, and neither is it defined in the UNCITRAL Model Law, which explicitly seeks to establish law applicable to alternatives to paper-based forms of communication and storage of information. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 *bis* as adopted in 1998 at p 75.

preferred medium for producing documentary evidence in court,[48] as a *data message* in terms of the Act.

3.9. The term "printout" is used in section 15(4) but not in section 15(1) of the ECT Act. Section 15(1) refers generally to the "admissibility of data messages", whereas section 15(4) deals with the admissibility of data messages in the ordinary course of business and refers specifically to the production of "A data message made by a person in the ordinary course of business, or a copy **or printout of** ... such data message" [emphasis added]. The question arises whether this distinction has any effect on the production of electronic evidence in the form of a computer printout when section 15(4) does not apply. The decision in *Ndlovu v Minster of Correction Services*[49] (and subsequent cases) suggests not; in this case the court admitted a computer printout in terms of section 15 and, because the printout constituted hearsay evidence, section 3 of the Law of Evidence Amendment Act was then invoked. However, a different approach might arguably be inferred by the decision in *Trend Finance (Pty) Ltd v Commissioner for SARS,*[50] where the court maintained with reference to section 15(4) that –

> [W]hen that subsection refers to a "data message" being admissible, it is referring to the adducing of evidence in electronic form such as the handing in of a computer disc and envisages the possibility that a "copy or printout of or an extract from" the data message might be adduced instead of the "data message" itself, provided that it is certified to be correct by an officer in the service of the person who made the data message.[51]

Of course, these comments may simply have arisen because of the wording (and the placement of punctuation) in section 15(4), and possibly should not influence our broader understanding of section 15.

3.10. Having said this, however, the possible inferiority of a printout should not be lost in the consideration of how to regulate electronic evidence. As Hughes explains:

> Where an electronic copy of an electronic document exists, could a printout of that information be regarded as the "best evidence" that the adducer could reasonably be expected to obtain? The answer in most cases should be no, because a printed copy would lack the embedded information normally retained in an electronic copy that evidences when, and by whom, the document was originally created, whether it was revised or edited, to whom it may have been sent and when it was received.[52]

3.11. Given that in most cases (at least in the short to medium term) so-called "electronic" evidence will be produced in court in the form of a printout, it may be prudent to clarify the position on printouts, and on the best evidence rule more generally.[53] This

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48 However, printouts have limitations: see Brendan Hughes "The rise of electronic evidence" *De Rebus* (2012).

49 [2006] 4 All SA 165 (W).

50 [2005) 4 All SA 657 (C).

51 At para [49].

52 Brendan Hughes "The rise of electronic evidence" *De Rebus* (2012).

53 The question is whether section 15(1)(b) of the ECT Act is adequate in this regard.

may be done through the amendment or introduction of definitions, along the lines of the following:

> **"Copy"** in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly, and regardless of how many removes from the original;
>
> **"Document"** means anything in which information of any description is recorded, and includes a copy;
>
> **"Electronic document"** means data that is recorded or stored on any medium in or by a computer system or other similar device that can be read or perceived by a person and includes a display, printout or other output of that data;

The definitions of "copy" and "document" provided above are adapted from the Civil Evidence Act 1995 (section 13) applicable in England and Wales. The definition of "electronic document" is an adaptation of that contained in section 31(8) of the Canada Evidence Act 1985 and in the Draft Model Law on Electronic Evidence.

3.12. Mindful of Hughes' point regarding the value of electronic evidence in electronic form,[54] use may be made of the rules of discovery, which should be amended where they are found wanting in this regard.[55] In addition, measures may be provided – such as the proposed section 6(1) (a) and (b) – to allow parties to obtain electronic evidence and electronic metadata[56] in order to assess issues pertinent to the admissibility and weight of that evidence prior to its production in court. The issue of discovery is discussed further below.

3.13. *The SALRC proposes to clarify the status of a printout as a form of electronic evidence, through statutory reform such as the amendment or introduction of definitions along the lines of "copy", "document" and "electronic document" (see clause 1 of the proposed Bill in Annexure A). The SALRC invites submissions in this regard.*

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54 Hughes points out the benefits of evidence in electronic form: for example, quick keyword searches can be performed, and multiple copies can be provided to legal teams without the expense, space and labour required by paper copies.

55 See in this regard the facilitative provisions in Rule 35(9) or (10) and the recommendations for amendments (in [4.139] below) to the rules of discovery to extend these to include metadata. Note also the inclusion of "electronic, digital or other forms of recordings" in Rule 23(1)(a) of the Magistrates' Court rules, which provides that: "Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape, electronic, digital or other forms of recordings relating to any matter in question in such action, whether such matter is one arising between the party requiring discovery and the party required to make discovery or not, which are or have at any time been in the possession or control of such other party."

56 "Metadata" refers to the embedded information in an electronic document. According to Hughes (n 51), "In the case of an e-mail ... an astonishing amount of detail is usually contained in the metadata of most messages, including the time a message was dispatched or received by the sending and receiving mail servers and the precise delivery path the message followed en route."

*The idea of "functional equivalence" and a "technology neutral" approach*

3.14. To a great extent, the UNCITRAL Model Law on Electronic Commerce 1996 informs the content of the ECT Act. The UNCITRAL Model Law is premised on the fundamental principles of non-discrimination, technological neutrality and functional equivalence.[57] Non-discrimination ensures that a document is not denied legal effect solely on the grounds that it is in electronic form. Technological neutrality entails regulatory provisions that are neutral with respect to technology used, so that future technological developments do not require further legislative intervention.[58] The functional equivalence principle recognises the differences between a data message and a paper document (or a "wet" signature); it also enables the analysis of existing requirements in a paper-based environment (for example, form requirements such as "written", "signed", "original" and "authenticated"), and then provides criteria which, if met, would enable data messages "to enjoy the same level of legal recognition as corresponding paper documents performing the same function."[59] Functional equivalence is therefore a core principle that should guide law reform in this area. An example may be drawn from the Irish context – a high-tech society that has a similar mix, compared with South African law, of common law and statutory rules governing evidence. In Ireland, it is argued that the desired approach is one in which "there would be no fundamental differences in the law of evidence between traditional documentary evidence and electronic evidence and that there would be no evidential preference applied to any particular technology or mechanical device in adducing documentary evidence."[60]

3.15. A further important aspect of the UNCITRAL Model Law on Electronic Commerce to be noted, and which should inform the debate on the extent to which legislative reform might be desirable, is that the Model law was –

> ... intended to provide essential procedures and principles for facilitating the use of modern techniques for recording and communicating information in various types of circumstances ... [and] is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those techniques in an enacting state.[61]

3.16. The ECT Act explicitly facilitates electronic transactions and espouses the principle that "promote[s] technology neutrality in the application of legislation to electronic communications and transactions."

3.17. Under the current statutory configuration, data messages made in the ordinary course of business are admissible as "rebuttable proof" in terms of section 15(4) of the ECT Act. Such proof may – particularly where no other statutory exemptions to the hearsay rule are applicable – face fewer hurdles than paper-based documents made in the ordinary course of business and produced in terms of the Criminal

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57 *http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/1996Model.html* Accessed 31 July 2012.

58 Ibid.

59 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) 21.

60 ILRC CP 57 – 2009 at 1-2.

61 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) 19.

Procedure Act and/or the Civil Proceedings Evidence Act and/or the Law of Evidence Amendment Act (whichever is applicable).[62] This suggests not only a complex regulatory system that may generate unnecessary confusion, but also a need for greater alignment between the laws that regulate the admissibility of certain types of evidence in legal proceedings.

3.18. *Promoting functional equivalence between paper-based and electronic business records, by aligning the various statutory provisions for the admissibility of documents, is a matter which the SALRC provisionally proposes to address through statutory reform. The SALRC invites submissions in this regard.*

*Categories of Evidence*

3.19. The production of electronic evidence in court proceedings challenges the conventional categories of evidence and the rules that govern them. Typical classifications include the following: hearsay evidence; oral evidence; documentary evidence (usually presented in terms of one of the exemptions to the hearsay rule); and real evidence (the production of a material thing, which may be a document, for inspection by the court). These categorisations as well as the concepts "original and copy" and "primary and secondary evidence", and the challenges which electronic evidence presents to these concepts, are discussed below.

*"Documents" and the Admissibility of Documentary Evidence*

3.20. Traditionally, in the absence of consensus between the parties, documentary evidence has – for good reason – been subjected to a largely exclusionary approach. To prove that the document is what it purports to be, it must generally be the original document and its authenticity must be proved; and to prove the truth of the contents, the document must also be admissible in terms of the hearsay rule. Where a document is produced as real evidence, generally a witness's testimony on the authenticity and reliability of the evidence is required, from which the court may draw inferences.

3.21. The burden placed on the party wishing to produce the evidence has been eased by the so-called hearsay exemptions, such as the provisions in the CPA and the CPEA which facilitate the admissibility of certain documents; in particular, documents made by a person in the ordinary course of business. To make use of these provisions, what constitutes a document becomes an important question. The term "document" has been defined both in common law and in statute. In common law, a document has been broadly defined as "any written thing capable of being evidence."[63] In terms

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62 In addition, case law demonstrates some confusion around section 15(4) and in some cases around what constitutes "electronic data" and a certified printout thereof. On section 15(4) see for example *DDP v Modise & Another* 2012 (1) SACR 553 (GS); *Le Tour Distributors CC v The Attorneys Fidelity Fund Board* [2006] JOL 18276 (C); and *Trend Finance (Pty) v SARS Commissioner* [2005] 4 All SA 657 (C)

63 *R v Daye* [1908] 2 KB 333.

of this definition, the medium on which the characters are inscribed is not important.[64] Current statutory definitions include the following:

In terms of the Civil Proceedings Evidence Act of 1965 –

> 'document' includes any book, map, plan, drawing or photograph;

and in terms of the Criminal Procedure Act of 1977 –

> 'document' includes any device by means of which information is recorded or stored;

3.22. The definition of a "document" is open-ended in both statutes, and the Criminal Procedure Act explicitly includes a device which records information. In *S v Harper & Another*[65] this definition was interpreted to exclude documents generated purely through the computational function of a computer; however, the court in *Ndiki* rightly pointed out that such documents would still be admissible as real or direct evidence. The statutes facilitate the production of certain "qualifying" documents only – for example where the document is "made by a person" or constitutes a certain type of business record. Discrepant rules sometimes apply in criminal and civil proceedings. For example, the admissibility of certain trade or business records is facilitated in terms of sections 221, 222 and 236 of the Criminal Procedure Act, and of data messages in terms of section 15(4) of the ECT Act; and in civil proceedings, in terms of the provisions of the CPEA. In civil proceedings, documents that are not bankers' books, in order to be admissible, must comply with the provisions of section 34 of the CPEA. This section requires, among other things, that a statement –

> ... shall not ... be deemed to have been made by a person unless the document or the material part thereof was made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.[66]

By contrast, section 221 of the CPA (Criminal Procedure Act) does not contain a similar restriction. Both the CPEA and the CPA contain a provision regarding the availability of the person who supplied the information recorded in the statement to the effect that it is impossible or unreasonable for that person to testify; however, the ECT Act contains no such equivalent provision.

3.23. Van der Merwe notes the following differences between the criminal and civil statutes:[67]

> The definition of "document" in the Criminal Procedure Act is much wider than its civil equivalent, namely: "any device by means of which information is recorded or stored".[68] Although the Criminal Procedure Act is also based on English law, it has managed to avoid many of the

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64 Schwikkard (n 11) 404; ILRC CP 57 – 2009 at 8.

65 1981 (1) SA 88 (D).

66 S 34(3) of the CPEA.

67 Van der Merwe (n 36) 106.

68 S 221(5) of Act 51 of 1977 (emphasis added).

computer-related pitfalls that have laid low the South African Civil Proceedings Evidence Act. One such example is that the former Act simply speaks of "any statement contained in a document",[69] instead of the latter Act's "any statement made by *a person* in a document".[70] The "document" of the Criminal Procedure Act also does not have to be or form part of a "continuous record", as required by the Civil Proceedings Evidence Act.[71]

3.24. The above discussion raises a concern about the current formulation for the admissibility of certain documents in criminal and civil proceedings. Documents produced in terms of section 221 of the Criminal Procedure Act have fewer admissibility hurdles to overcome than documents produced in terms of section 34 of the Civil Proceedings Evidence Act. Furthermore, both the CPA and the CPEA are more restrictive in terms of admissibility of documentary evidence than section 15(4) of the ECT Act.

3.25. *Ensuring parity in the law relating to the admissibility of documents produced in civil and in criminal proceedings is a matter which the SALRC proposes should be addressed through statutory reform.*

3.26. With regard to the definition of a document, as stated above the approach in England and Wales (Criminal Justice Act 2003 section 134(1) and Civil Procedure Rules Part 31.4) is to define a document broadly as "anything in which information of any description is recorded". A fuller definition is contained in Australia's Uniform Evidence Act, which defines a document as any –

> ... record of information including:
>
> (a) anything on which there is writing; or
> (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
> (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
> (d) a map, plan, drawing or photograph.

3.27. Similarly, a fuller definition is provided in New Zealand, section 4 of the Evidence Act 2006, which defines a document to mean:

> (a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes—
>  (i) a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached:
>  (ii) a book, map, plan, graph, or drawing:
>  (iii) a photograph, film, or negative; and
> (b) information electronically recorded or stored, and information derived from that information[.]

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69 S 221(1).

70 S 34(1) of Act 25 of 1965 (emphasis added). "A person" presented the court with difficulties in *Narlis v SA Bank of Athens* 1976 (2) SA 573 (A), which led to the introduction of the Computer Evidence Act 57 of 1983.

71 S 34(1)(*a*) of Act 25 of 1965.

3.28. The English approach – "anything in which information of any description is recorded" – remains true to the principle of technological neutrality. The SALRC proposes adopting this definition and has included it in the draft Law of Evidence Amendment Bill (see Annexure A).

3.29. *Providing clarity on the definition of "document" and parity between the definition in civil and in criminal proceedings, and parity between paper-based and other forms of documents, are matters which the SALRC proposes to address through statutory reform (see clause 1 of Annexure A).*

*Real and Documentary Evidence: and the applicability of the Hearsay Exceptions*

3.30. As mentioned earlier, real evidence is evidence that usually has a physical or tangible form; and which is produced in court, typically by a witness who explains the evidence, for observation; and from which the court will draw conclusions based on its own perception.[72] The trend is to treat visual and audio recordings as documents in the form of real evidence.[73] However, as Murphy explains, "The court must, before admitting recordings as evidence, be satisfied that the evidence which may be yielded is relevant and that the recording produced is authentic and original."[74] Zeffertt and Paizes confirm this requirement in the South African context.[75]

3.31. When a party introduces a document as documentary evidence seeking to rely on the truth of the content of the document, the rules relating to documentary evidence become applicable. These are as follows: the rule against hearsay evidence, and the statutory provisions that facilitate the production of hearsay evidence; the best evidence rule; and the requirement for authentication. To ameliorate these requirements various statutory provisions facilitate the production of documents in court, in both criminal and civil law; these provisions are as follows: the CPEA, the CPA (mentioned above), the ECT Act, and the LEA Act and its provisions on hearsay evidence.

3.32. Mason advises that emerging jurisprudence, globally, seems to suggest that computer printouts may constitute real evidence, but that "the truth of the content of the printout will be a matter of further testimony."[76] This seems to echo the earlier view of Tapper, who states that –

> Evidence derived from a computer constitutes real evidence when it is used circumstantially rather than testimonially, that is to say that the fact

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72 "Real evidence is an object which, upon proper identification, becomes, of itself evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness-box)." *S v M* 2002 2 SACR 411 (SCA) at (31]. The production of real evidence typically requires a witness who will explain the evidence. Schwikkard (n 11) 295.

73 The *locus classicus* for this is the decision in *The Statue of Liberty* (1968] 2 All ER 195. In the South African context see for example *S v Mpumlo* 1986 3 SA 482 (E) and *S v Ramgobin* 1986 4 SA 117 (N).

74 P Murphy *Murphy on Evidence* 11 ed (Oxford University Press 2009) 667. Original footnotes omitted.

75 DT Zeffertt and AP Paizes *The South African Law of Evidence* 2 ed (LexisNexis Butterworths 2009) 852-857.

76 S Mason (ed) *Electronic Evidence: Disclosure, Discovery and Admissibility* 1 ed (LexisNexis Butterworths London 2007) 181.

> that it takes one form rather than another is what makes it relevant, rather than the truth of some assertion which it contains.[77]

3.33. Murphy comments on the confusion about the status of an automated document produced by a computer without human intervention, and whether such a document is subject to the hearsay rule. Murphy explains the position in English law as follows: "[W]here a computer or other mechanical device is used to perform calculations or other automatic function without human intervention, no hearsay issue arises, and the printouts of the machine's functions are admissible as real evidence."[78]

3.34. In South Africa, discussion in the *Ndiki* case seems to reflect similar developments; in this regard a useful observation in the *Ndiki* judgment was that –

> ... it is not desirable to attempt to deal with computer print-outs as documentary evidence simply by having regard to the general characteristics of a computer. It is an issue that must be determined on the facts of each case having regard to what it is that the party concerned wishes to prove with the document, the contents thereof, the function performed by the computer and the requirements of the relevant section relied upon for the admission of the document in question.

3.35. The aspect of the "function performed by the computer" is important in the context of the distinction between "manually executed" electronic documents and "automated" electronic documents – a distinction that has caused confusion. Manually executed electronic documents might satisfy the requirement of personality, which invokes the provisions of section 34 of the CPEA, section 3 of the LEA Act, and section 15(4) of the ECT Act. Data messages or printouts in which human authorship is lacking do not satisfy this requirement, but would constitute real or direct evidence. Prior to the ECT Act, the courts were divided on the status of such "automated" electronic documents. The two views are summarised below.

- Some courts took the view that such documents, which were not made "by a person", were inadmissible. See for example *S v Mashiyi and Another.*[79]

- Other courts argued that the above approach was based on an incorrect reading of earlier cases, in which judges were confined to the matters as pleaded. Proponents of this second view stated that although printouts are inadmissible in terms of the legislative provisions facilitating the production of hearsay evidence, this does not mean printouts are inadmissible as real or direct evidence. In *Ex parte Rosch*,[80] for example, the court found that a computer printout from a telecommunication company containing information on the time and length of phone calls and the number to which the calls were made – details that had been mechanically recorded by a computer –

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77 Tapper (1989) at 373 cited in Mason (n 76) at 178.

78 *Minors* (1989) 1 WLR 441 and *DPP v McKeow* [1997) 1 WLR 295, both cited in Murphy (2009) at 302.

79 2002 (2) SACR 387 (Tk).

80 [1998] 1 All SA 319 (W).

constituted direct evidence[81] and not hearsay evidence. This approach was also preferred in *S v Ndiki & Others* 2008 (2) SACR 252 (Ck),[82] where it was held that "In such a case the acceptance of the evidence is dependent upon the accuracy and reliability of the operating system. Doubts as to the accuracy of the operating system may affect the reliability of the evidence and the evidential weight to be given thereto."[83]

3.36. In an *obiter* statement in *Ndiki*, the court went on to suggest that all electronic evidence be treated as hearsay evidence, which would eliminate "the necessity to distinguish in each case between what would constitute hearsay and what real evidence" (para [33]). Such an approach, which arguably is possible under our current definition of hearsay,[84] runs counter to trends emerging in comparative jurisdictions (as mentioned above) and, at least conceptually, might best be avoided. However, and in line with international developments, we should ensure through our legislative framework that "automated" electronic documents are admissible. Thus, in the draft statute under consideration, the relationship between hearsay evidence and machine generated evidence is clarified.

3.37. To prevent further confusion on these issues, the SALRC proposes statutory reform that would facilitate the admissibility of both a "statement made by a person" and a "statement made by a machine, device or technical process". Furthermore, such statutory reform should provide for the admissibility of both types of statement in a manner that is intended to adhere to the principle of functional equivalence.

3.38. *Providing clarity on the admissibility of automated electronic documents and the rules for the admissibility of such documents is a matter which the SALRC provisionally proposes should be addressed through statutory reform (see in particular draft clauses 5 and 6 of Annexure A).*

*Primary and Secondary Evidence; Originals and Copies; and the Best Evidence Rule*

3.39. Where documents are concerned, a distinction is also drawn between primary and secondary evidence. Evidence is secondary when, by its very nature, it suggests that better evidence may be available.[85] For example, whereas the original of a document is considered primary evidence, typically a copy of that document would amount to

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81 Direct evidence is described by Murphy (n 74) 22 as "evidence which requires no mental process on the part of the tribunal of fact in order to draw the conclusion sought by the proponent of the evidence, other than acceptance of the evidence itself." On the other hand, as Murphy explains, circumstantial evidence "requires the tribunal of fact not only to accept the evidence tendered, but also to draw an inference from it "The term 'direct evidence' is sometimes also used to mean the opposite of hearsay evidence." Murphy (n 74) 24. However, Murphy suggests that it is more appropriate to describe the opposite of hearsay evidence as "percipient evidence".

82 See also *R v Wood* (1983) 76 Cr App R 23; and *R v Minors; R v Harper* [1989] 2 All ER 208 (CA) at 212, cited in *S v Ndiki & Others* 2008 (2) SACR 252 (Ck) at para [32].

83 At para [32].

84 See note 3 for the definition, which does not expressly require a statement to be made "by a person".

85 Schwikkard et al (2008) para 2 10.

secondary evidence. As a general rule (the "best evidence" rule), the contents of a document should be proved by the production of the original. However, the rule is not inflexible, as section 15 – specifically section 15(1)(b) – of the ECT Act confirms in the context of electronic evidence. Section 15(1)(b) provides that the rules of evidence must not be applied so as to deny the admissibility of a data message on the grounds that it is not in its original form, if that message is the best evidence that the person adducing it could reasonably be expected to obtain. However, this provision leaves room to challenge the form in which a data message is produced, and possibly requires revision.

3.40. In addition, section 14 and section 17 of the ECT Act provide that where any law requires a person to produce a document (including an original), that person may produce an electronic copy of a data message, provided that the information is capable of being displayed and the integrity of the information from the time it was generated can be demonstrated. Section 14 provides as follows:

> **14. Original**
>
> 1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if-
>
> a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and
>
> b) that information is capable of being displayed or produced to the person to whom it is to be presented.
>
> 2) For the purposes of subsection 1(a), the integrity must be assessed.
>
> a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;
>
> b) in the light of the purpose for which the information was generated; and
>
> c) having regard to all other relevant circumstances.

Section 17 provides as follows:

> **17 Production of document or information**
>
> (1) Subject to section 28,[86] where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, and if-

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[86] Section 28 regulates the requirements which may be specified in the case of e-government services. Specifically, section 28 provides that a body of government must –

> ... specify by notice in the Gazette-
>
> a) the manner and format in which the data messages must be filed, created, retained or issued;
> b) in cases where the data message has to be signed, the type of electronic signature required;
> c) the manner and format in which such electronic signature must be attached to, incorporated in or otherwise associated with the data message;
> d) the identity of or criteria that must be met by any authentication service provider used by the person filing the data message or that such authentication service provider must be a preferred authentication service provider;
> e) the appropriate control processes and procedures to ensure adequate integrity, security and confidentiality of data messages or payments; and

(a) considering all the relevant circumstances at the time that the data message was sent, the method of generating the electronic form of that document provided a reliable means of assuring the maintenance of the integrity of the information contained in that document; and
(b) at the time the data message was sent, it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference.

(2) For the purposes of subsection (1), the integrity of the information contained in a document is maintained if the information has remained complete and unaltered, except for-
(a) the addition of any endorsement; or
(b) any immaterial change, which arises in the normal course of communication, storage or display.

3.41. As Mason points out,

> [In] practise, primary evidence [a hard drive or storage device] containing digital data is not tendered into evidence. Courts rely on the production of the output of digital data in human-readable format and printed on paper, which can be considered as secondary evidence of the digital data. Where the credibility of the data is in question, foundation testimony will have to be introduced and tested to determine whether it can be accepted into evidence.[87]

3.42. In the United Kingdom, the Civil Evidence Act 1995 provides clarity on the production of a copy. In this regard, section 8 of the Civil Evidence Act reads as follows:

**8 Proof of statements contained in documents**

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—
(a) by the production of that document, or
(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,
authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

3.43. A similar provision in the United Kingdom's Criminal Justice Act 2003 facilitates the production of digital evidence in criminal proceedings. Section 133 of the Act provides as follows:

**133 Proof of statements in documents**

Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either—

(a) the document, or
(b) (whether or not the document exists) a copy of the document or of the material part of it,

authenticated in whatever way the court may approve.

These provisions illustrate the extent to which the best evidence rule has fallen by the wayside. According to *Blackstone's Criminal Practice*, "The best evidence rule, which was used in the 18th and early 19th centuries as an exclusionary principle, ie to

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f) any other requirements for data messages or payments.

87 Mason (n 76) 187.

prevent the admission of certain evidence where better evidence was available, is now all but defunct."[88]

3.44. Testimony to the above trend is provided by Australia's Evidence Act 1995, which expressly abolishes the original document rule. Section 51 of the Act (titled "Original document rule abolished") provides that "The principles and rules of the common law that relate to the means of proving the contents of documents are abolished."

3.45. As already mentioned, the SALRC proposes that the definition of "document" should include a copy of the document. The question arises whether additional reform, such as the outright abolition of the original document rule (as in Australia) is desirable, or whether in principle the best evidence rule should be retained with the carving out of specific exclusions, such as the ECT Act (in particular section 14 and 15). The introduction of a provision such as section 8 of the Civil Evidence Act 1995 in England (see 3.42 above) might also be worthy of consideration.

3.46. The Canada Evidence Act (section 31.2) deals with the best evidence rule by specifying that the rule is satisfied if the integrity of the electronic document system is proven, or if the evidentiary presumption established in terms of the Act (section 31.4) applies.

3.47. *Providing clarity on the "best evidence" rule in the context of documentary evidence is a matter which the SALRC proposes to address through statutory reform; and invites further comment on the preferred approach in this regard.*

3.48. In the context of modern forms of communication, Mason suggests that when considering digital data, the focus should not be directed at whether the data are original or constitute a copy, but rather at the authenticity or reliability of the digital file.[89]

3.49. Electronic evidence arguably requires a shift in emphasis away from the exclusion from admissibility based on hearsay and the best evidence rule, to the question of reliability. For reliability, the concepts of authentication and integrity (dealt with in the section below) become important. This is particularly so given the concern that electronic records may be more susceptible to undetected modification than are traditional paper-based records.

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88 Hooper, Ormerod, Murphy and Ors, *Blackstone's Criminal Practice* (Oxford, 2008) at 2285 cited in ILRC CP 57 – 2009 at 50.

89 Mason (n 43) 191. Mason suggests that "it might be more relevant, when referring to digital data, to concentrate on establishing which version of the data is required and then to provide evidence, if such is necessary, of the authenticity of the history of the data to establish reliability, rather than debate about whether digital data is a copy of the original."

*Reliability: Authentication and Integrity*

3.50. Issues of authentication and integrity are particularly important in the electronic domain, because fabrications and alterations of electronic data may occur without detection more easily than in the case of paper-based records. Such fabrications and alterations must be guarded against by appropriate rules and standards. As Prof Dana van der Merwe points out,

> ... the specific shape of a signature, the condition of the paper and the spacing of letters and numbers ... together used to guard the authenticity of a cheque. Most of these "guarantees of authenticity" vanish once the information they transcribe has been digitised as a computer record. This is well expressed by Khaled who remarks that when "we bring in the Internet factor we ... have a certain amount of anonymity associated with the data". As a result, counts now have to look at circumstantial evidence to establish the authorship and authenticity of computer records.[90] [original footnotes omitted]

3.51. According to Zeffertt and Paizes, typically "A party who tenders a document is ... required to adduce evidence to satisfy the court of its authenticity. This will usually mean proving that the document was written or executed by the person who purports to have done so".[91] The manner in which a document should be authenticated will depend on the nature of the document. An Irish Law Reform Commission report states that "While traditional paper documents may be authenticated by the testimony of the author or by the testimony of a person who witnessed the author sign the document, this may not be suitable for electronic evidence."[92] In the South African context, the ECT Act provides some assistance to a party seeking to rely on a data message.[93]

3.52. It should be noted further that the Rules of Court [Rule 35(9)] provide an opportunity in civil proceedings to prove the authenticity of documents by serving a notice upon the other party or parties to admit the proper execution and authenticity of the document, prior to trial. Failure to object amounts to an admission that the document is what it purports to be, but does not amount to an admission of the contents of the document.[94]

3.53. The manner in which integrity and reliability can be demonstrated depends on the nature of the evidence and the role which a computer played in the creation of the evidence. Did the computer calculate or compute, or did it merely store the evidence? Integrity requires a consideration of whether the content has been altered, and whether the computer system on which the evidence was created was reliable.

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90 Van der Merwe (n 36) 104.

91 Zeffertt and Paizes (n 75) 837.

92 ILRC CP 57 – 2009 at 25.

93 See for example ss 13 - 17 of the ECT Act, and the provisions therein for establishing integrity, reliability and authenticity.

94 *Selero (Pty) v Chavier* 1982 (2) SA 208 (T) cited by LTC Harms *Civil Procedure in the Superior Courts* (LexisNexis 2012) at B35.19.

3.54. Electronic signatures and other authentication and cryptography products and services are important in demonstrating the authenticity and integrity of an electronic document.[95] Metadata[96] also become relevant in this regard. As Hughes points out, "In the absence of credible metadata, the admissibility and evidential weight of any electronic document may fall to be challenged."[97] Hughes explains the strategic value of metadata and cautions lawyers of the prejudice which could result from a failure to understand the importance of metadata. Hughes ultimately proposes amendments to the rules of court relating to discovery (see paragraph 4.139 below).

3.55. According to the Draft Model Law on Electronic Evidence,[98] the complexity of modern technology has resulted in "common law rules of evidence [that] were not adequate to deal with technological advances and needed to be modernised."[99] This scenario led the Law Ministers and Attorney-Generals of Small Commonwealth Jurisdictions to recommend a set of rules (the Draft Model Law on Electronic Evidence) that would "impose a minimum level of reliability for admissibility of documents ... by focusing not on the document itself but rather on the method (system) by which the document was produced."[100] The idea was that "it is very difficult to show anything about the electronic document per se. By showing the reliability of the system one can lay the basis for admissibility of the document which is the product of that system."[101]

3.56. This Commonwealth Model Law (see Annexure D) addresses the following issues, among others:

- General admissibility;
- Authentication;
- Application of the best evidence rule;
- Presumption of integrity;
- Standards;
- Proof by affidavit;
- Cross examination;
- Agreement on admissibility of electronic records; and
- Admissibility of electronic signature.

As far the implementation of these provisions is concerned, the Model Law suggests that states may proceed by way of –

- a separate piece of legislation;
- part of a law on electronic transactions;
- as amendments to existing laws on evidence; or

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95 (Advanced) electronic signatures; authentication and cryptography products and services are regulated in the ECT Act as well as by Regulations including the Cryptography Regulations (GN R216 in GG 28594 of 10 March 2006) and the Accreditation Regulations (GN 504 in GG 29995 of 20 June 2007).

96 See note 56.

97 Hughes (n 52). Hughes explains further that "(m]etadata is ... often referred to as the 'digital fingerprint' of a document and is increasingly being used to prove or disprove a broad range of issues in dispute between litigants."

98 The Model Law and Explanatory Note is attached as Annexure D.

99 Ibid.

100 Ibid.

101 Ibid. Various international standards and best practice for demonstrating the reliability of computer systems have been developed.

- as part of a process of modernisation of evidence laws.

3.57. In the South African context, Chapter 3 of the ECT Act provides some guidance for establishing authenticity and integrity in the case of data messages. This includes section 12 (on "writing"); section 13 (on "signature"); section 14 (on "original"); and section 15, of which section 15(3), in addressing the issue of evidential weight, provides the following basic principles:

> ... that regard must be had to:
>
> a) the reliability of the manner in which the data message was generated, stored or communicated;
> b) the reliability of the manner in which the integrity of the data message was maintained;
> c) the manner in which its originator was identified; and
> d) any other relevant factor.

See, in addition, sections 16, 17, 18 and 19 (Annexure C attached) and also the provisions of Part 2 of Chapter 3 of the Act, which provide explicit guidance for establishing the originator of an email, and the time and place for the conclusion of a contract.

3.58. The above provisions are an important aspect of the law of evidence and its accommodation of the tools of modern communication devices. However, these provisions (contained in an Act that has been described as an "omnibus"[102] Act) have received little attention over the past decade. Although they provide broad principles, they do not give a detailed account of or guidance on how to establish reliability in the context of electronic evidence. The SALRC therefore proposes regulatory reform, largely modelled on the Commonwealth approach to electronic evidence, to provide guidance on how to establish (and measure) the authenticity and integrity of documentary evidence in the context of certain documentary evidence (see clause 7 of Annexure A and set out below). The amended provisions confirm the burden of proving authenticity and integrity, and provide guidance on the type of evidence that may be produced to establish the authenticity and integrity of a document.

3.59. In a similar exercise, the Irish Law Reform Commission concludes that in the context of modern electronic communications, an extrinsic report on "how the document was generated or otherwise brought into existence; on the reliability of the processes and on the accuracy of the electronic systems or devices which were used to store, transmit or generate the document, may be necessary to establish authenticity."[103] Furthermore, it may be necessary to establish "that the document and its text has not been altered or been subject to any attempted spoliation over the course of its lifetime."[104]

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[102] Van der Merwe (n 36) 110.

[103] ILRC CP 57 – 2009 at 25.

[104] Ibid.

3.60. Presumptions such as the presumption of the integrity of electronic documents systems[105] in the Canada Evidence Act 1985 and in the Draft Model Law, and in provisions that expressly address the authentication of electronic documents,[106] may facilitate the process of authentication. Application of such a presumption would cast an evidentiary burden on the other party.

3.61. In light of this, the SALRC proposes the introduction of a statutory provision (included as clause 7 in Annexure A), which is modelled along the lines of the Canadian and Model Law on Electronic Evidence approaches to regulating the authenticity and integrity of documentary evidence. This provision sets out how authenticity and integrity may be established, as follows:

> **Authenticity and integrity of documentary evidence**
>
> 7.1 Subject to the provisions of this Act, a person seeking to admit documentary evidence in terms of the Act has the burden of proving the authenticity and integrity of the document.[107]
>
> 7.2 For the purposes of determining whether an electronic document is admissible in terms of this section, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.
>
> 7.3 The integrity of an electronic documents system may be established by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system.
>
> 7.4 Evidence in terms of subsections (2) and (3) may be produced orally or by affidavit.
>
> 7.5 A party may cross-examine a deponent of an affidavit introduced into evidence in terms of subsection (4) if the deponent is an adverse party or is under the control of an adverse party; or with leave of the court.[108]
>
> 7.6 In any civil proceeding where a party is permitted under the Rules of Court relating to discovery to inspect a document –
> (a) the requirement to prove the authenticity of the document may be dispensed with in circumstances described in those Rules; and
> (b) the procedure to be adopted by a party seeking to require proof of the authenticity of the document is that set out in those Rules; and
> (c) the production of secondary evidence to prove the authenticity of the document may be permitted in circumstances described in those Rules.[109]

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105 Section 31.3 Canada Evidence Act 1985 which provides a presumption of integrity provided that evidence is produced which demonstrates that the computer system was operating properly and that the document was recorded or stored by a party who is adverse in interest or the party seeking to introduce it; or that the document was recorded or stored in the ordinary course of business by a neutral person.

106 Section 31.1 Canada Evidence Act 1985; see also the provisions facilitating proof of documents in the Australian Evidence Act 1995.

107 Adaptation of section 31.1 of the Canadian Evidence Act

108 Adapted from the Canadian Evidence Act (s 31.6).

109 Adapted from the New Zealand Evidence Act (s 134).

7.7 The signature, execution, or attestation of a document that is required by law to be attested may be proved by any satisfactory means, provided that an attesting witness need not be called to prove that the document was signed, executed or attested as it purports to have been signed, executed, or attested.

3.62. The concept of a signature is traditionally related to authentication, and in this regard the provisions of the Model Law on Electronic Evidence (clause 12)[110] address the admissibility of an electronic signature and provide a manner in which an electronic signature may be proved. The ECT Act contains similar provisions in section 13, the effectiveness of which the SALRC proposes should be considered by a specialised committee qualified to make recommendations in this regard.

3.63. *Providing clarity on the method of authenticating documentary evidence, and ensuring reliability, specifically in the context of computer generated evidence is a matter which the SALRC proposes should be addressed through statutory reform (see clause 7 of Annexure A). The SALRC invites submissions in this regard.*

[110] See Annexure D for the text of the Model Law.

# CHAPTER 4

# THE ADEQUACY OF THE ECT ACT: QUESTIONS RAISED IN ISSUE PAPER 27

4.1. In this chapter, the issues set out for discussion in Issue Paper 27 are reviewed, together with the public responses to Issue Paper 27. This chapter follows on from the discussion of broader issues presented in Chapter 3.

## ISSUE 1: SHOULD THE ECT ACT BE REVIEWED REGULARLY?

*Extract from Issue Paper 27 p 28*

**1. BRIDGING THE TECHNOLOGY / LAW DIVIDE: QUESTION FOR COMMENT**

- Should the ECT Act 25 of 2002 be reviewed on a regular basis to take account of advances in technology?
  - If so, what should such a review entail?
  - When / how often should such a review take place?
  - Who should undertake the review?

4.2. Issue Paper 27 raised a concern that new technologies, which are constantly being introduced, challenge existing legal concepts. The Paper asked whether regular review of the ECT Act is therefore desirable. In addition, as pointed out by the Memorandum on the Objects of the Electronic Communications and Transactions Amendment Act, published in October 2012: "[W]e have experienced a significant increase in hacking, security breaches, data mining for economic purposes, misuse of personal information, cyber security threats and cyber crime."[111] This scenario requires law review and reform from time to time.

4.3. In an opinion on Issue Paper 27, which is expressly stated to be mindful of the needs of the banking community, Adv GTS Eiselen highlights the principle of technological neutrality (see 3.14) central to the UNCITRAL Model Law as well as the ECT Act, premised on the Model Law. Eiselen states that "The principle of technological neutrality aims to provide rules that will remain valid and relevant despite the type of technology being used."[112] Although expressing the view (p 3) that "the provisions of the ECT Act have remained relevant and up to date", Eiselen nonetheless recommends "a systematic review of the Act in the light of newer technologies or the convergence of technologies." This would ensure that newer technologies are neither

111 Electronic Communications and Transactions Amendment Bill (published in *Government Gazette* 35821, Notice 888 of 2012) at 36.

112 Eiselen (2010) 2.

prejudiced nor favoured by the rules of evidence, in terms of the principle of technological neutrality.

4.4. Eiselen suggests that reviews should take place when problems arise in practice, and points out that the regulation of electronic signatures in the ECT Act is a particularly problematic area. Eiselen further identifies either the Department of Communications or the SALRC as an appropriate body to conduct a review, concluding that "it would probably be better if the task was undertaken by the South African Law Reform Commission from time to time." The issue of reform in respect of electronic signatures is taken up by the Department of Communications in the Electronic Communications and Transactions Amendment Bill, 2012 (ECT Amendment Bill); however, some concerns still remain. The question of electronic signatures is discussed in Issue 5 below.

4.5. In its submission on Issue Paper 27, the South African Police Service (SAPS) suggests that the SALRC undertake a review of the ECT Act every two to three years, in view of evolving technologies and trends in international criminal incidents. This is the purpose of the recently proposed ECT Amendment Bill, drafted under the auspices of the Minister of the Department of Communications.

4.6. The Law Society of South Africa (LSSA) expresses the following view:

> [A] regular review should take place, especially in view of the rapid grow[th] of "information technology structures driving social and economic trends... ." From a practical point of view it seems that such a review should take place every five years. ... The parties involved in such a review should ideally be the Law Commission ..., a practicing advocate and attorney who deal with this kind of evidence in practice, and preferably somebody from an IT company who is *au fait* with electronic processes and the development thereof."

4.7. Legal Aid South Africa (LASA) also supports regular review, and submits as follows:[113]

> [A] standing committee consisting of both computer and legal experts should be formed to review the latest developments in computer technology and the extent to which these may require amendments to the ECT Act. This committee should make an annual report to the Minister of Communications, whose responsibility it will then be to introduce and pilot the relevant legislation.

4.8. The National Prosecuting Authority (NPA) expresses the view that "The number of reported cases will indicate whether there are indeed difficulties with the application of the Act and ... [whether] it is time to review the Act." The NPA indicates that reported cases seem to be rare, suggesting that the Act is under-utilised, possibly because of uncertainties in respect of interpretation and application of the Act.

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[113] Legal Aid submission, p 2.

4.9. In light of the technological complexities and the trade and commercial imperatives involved, as well as the multiple stakeholders with a multitude of interests in the various matters regulated by the ECT Act, the SALRC is unlikely to be best placed – or to be adequately responsive – to handle the type of review that would satisfactorily address practical concerns as they arise. The SALRC therefore proposes instead that an appropriate committee should conduct regular reviews. This may be either a new or an existing body – for example, a Working Group at the Department of Communications (DOC), which is the body responsible for the ECT Act. The DOC has recently demonstrated its responsiveness by publishing the Electronic Communications and Transactions Amendment Bill, and has a key programme on ICT Policy Development. An alternative, given the multiple stakeholders involved, could be a committee within the Department of Trade and Industry that would be allocated the task of regularly reviewing the commercial implications of the ECT Act. Ideally, representatives from diverse fields should be identified to participate as members of any body established to deliberate on ICT-related developments. Such representatives should include experts in business, government, technology (particularly people with expertise in electronic signatures and document security), and law. Representation should also be provided by the Department of Justice and the Rules of Court Board, being bodies which the SALRC suggests might take on the responsibility of drafting appropriate guidelines or manuals on producing electronic evidence in court for use by judicial officers. [114] Developments in this regard should also take into account South Africa's Cyber Security Policy Framework as well as the Draft African Union Convention on the Establishment of a Credible Legal Framework for Cyber Security in Africa.[115]

4.10. As and when such a committee is of the view that law reform would be appropriate, the SALRC might then become more involved in the process of possible law reform.

4.11. *On issue 1: By and large, there seems to be consensus on the need for regular review of the provisions of the ECT Act. The SALRC invites further suggestions on the appropriate technical forum (which must be in a position to facilitate the engagement of multiple stakeholders) for such review.*

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[114] See for example in the context of criminal proceedings, the United States Office of Legal Education Manual *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009) available at *http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.*

[115] Draft African Union Convention on the Establishment of a Credible Legal Framework for Cyber Security in Africa, Version 01/01.2011, AU Draft0 010111.

## ISSUE 2: ARE THE PROVISIONS IN THE ECT ACT ADEQUATE TO REGULATE THE ADMISSIBILITY OF ELECTRONIC EVIDENCE IN CRIMINAL AND CIVIL PROCEEDINGS?

*Extract from Issue Paper 27 p 30*

**2. THE ECT ACT 25 OF 2002 – QUESTION FOR COMMENT**

- Adequacy of the ECT Act 25 of 2002 to govern use and admissibility of electronic evidence in criminal and civil proceedings:-

  Given that the Act, including the approach of evidence provisions in section 15, is largely based on an electronic commerce Model law (that only applies to commercial activities),[116] should the evidence provisions relating to the use and admissibility of electronic evidence in criminal and civil proceedings be regulated outside the provisions of the ECT Act 25 of 2002?

4.12. On this issue, see generally also the discussion in Chapter 3 above (in particular paragraphs 3.21 to 3.25).

4.13. Section 15 of the ECT Act provides as follows:

> **15. Admissibility and evidential weight of data messages**
>
> 1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence
>
>  a) on the mere grounds that it is constituted by a data message; or
>
>  b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
>
> 2) Information in the form of a data message must be given due evidential weight.
>
> 3) In assessing the evidential weight of a data message, regard must be had to
>
>  a) the reliability of the manner in which the data message was generated, stored or communicated;
>
>  b) the reliability of the manner in which the integrity of the data message was maintained;
>
>  c) the manner in which its originator was identified; and
>
>  d) any other relevant factor.
>
> 4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

[116] The long title of the ECT Act 25 of 2002 provides as follows: "To provide for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access to electronic communications and transactions and the use of electronic transactions by SMME's [small medium and micro-enterprises]; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected therewith."

4.14. The Electronic Communications and Transactions Amendment Bill of 2012 proposes to amend section 15 by inserting "which may include by way of electronic signature" after "the manner in which its originator was identified" in section 15(3)(c).

4.15. In Issue Paper 27, the SALRC pointed out that the UNCITRAL Model Law – which informed the content of the ECT Act – applies only to commercial activities. The SALRC therefore questioned whether the provisions of the Act are adequate to govern the use and admissibility of electronic evidence in both criminal and civil proceedings. The question for comment in Issue Paper 27 was as follows: "Should the evidence provisions relating to the use and admissibility of electronic evidence in criminal and civil proceedings [should] be regulated outside the provisions of the ECT Act?"

4.16. This issue overlaps to some extent with Issue 6, which deals with the interaction of section 15 with other statutory provisions (outside of the ECT Act) that facilitate the admissibility of certain documents. These include section 221 (admissibility of certain trade or business records) and section 222 (application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act) of the Criminal Procedure Act; and Part VI (documentary evidence) of the Civil Proceedings Evidence Act. These provisions are reproduced in Annexure C. As discussed in paragraphs 4.78 to 4.85 (below) of this paper, section 15 of the ECT Act merely removes any hurdles in these other provisions that might have rendered evidence inadmissible simply on the basis that the evidence was in the form of a data message. Over and above this, where the statutory provisions of the CPA, the CPEA, and the Law of Evidence Amendment Act are applicable, then to the extent that they are applicable they must be applied.[117] The production and admissibility of electronic evidence is facilitated by the ECT Act and regulated by the ECT Act and other statutory provisions outside of the ECT Act. The question that arises is whether this is desirable, or whether amendments should be enacted that would result in electronic evidence being regulated entirely outside of the ECT Act.

4.17. The fact that the admissibility of electronic evidence is regulated by not only the provisions of the ECT Act, but also by common law principles and by provisions in the CPA and CPEA, may take the pressure off the ECT Act to accommodate nuanced differences in criminal and civil proceedings. However, there do appear to be some inconsistencies in the approaches adopted by these statutes. Although multiple sources of law governing the production of evidence is not uncommon in other jurisdictions, arguably a more cohesive approach in all legal proceedings is desirable. A cohesive approach would mean that one statute addresses the admissibility and weight to be attached to documentary evidence, whether electronic or not, in all legal proceedings. Such a statute could address the concerns raised in Chapter 3 above. The question therefore remains whether the current approach to admissibility in civil and criminal proceedings is optimal.

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[117] See for example the recent SCA decision in *Sublime Technologies v Jonker* 2010(2) SA 522 (SCA). See generally also *Ndlovu v Minister of Correctional Services* [2006] 4 All SA 165 (W).

4.18. The Law Society of SA (LSSA) in its submission to the SALRC gives a broad definition of the term "evidence" as follows: "[A]ll information submitted to a Court in order to enable it to decide a factual dispute before it."[118] The LSSA points out that evidence submitted in criminal or civil proceedings is essentially the same, but that "the onus of proof ... in criminal and civil matters ... will differ. The yardstick is *proof beyond reasonable doubt* in criminal matters and a lower one in civil matters namely, *a balance of probabilities.*"[119] Given this scenario, the LSSA submits that it is not necessary to regulate the use and admissibility of electronic evidence outside the provisions of the ECT Act 25 of 2002.

4.19. Legal Aid, in its submission to the SALRC, gives a detailed account of the forms of electronic evidence that are relied upon in criminal proceedings: "CCTV camera footage, facial recognition technology, DNA tests, breathalyser tests, speed traps and cellphone technology."[120] Legal Aid submits that the current approach in statute is fragmented and that the common law approach is inadequate. They submit that "legislation dealing with all these aspects in a single piece of legislation is eminently desirable."[121]

4.20. Largely mirroring the observations in paragraphs 3.22 and 3.23 above, Adv Eiselen points out possible difficulties in the admission of electronic evidence under current definitions and interpretations of applicable provisions of the CPEA (sections 26 to 32, and section 34), as opposed to the more inclusive approaches in section 221 of the CPA and section 15 of the ECT Act. Eiselen submits that:

> [T]here are good grounds for streamlining this part of the law of evidence by aligning the provisions of section 26-32 of the CPEA , section 221 of the CPA and section 15(4) of the ECT Act. We further submit that the approach contained in section 221 of the CPA and section 15(4) of the ECT Act is preferable to that contained in the CPEA.

On this point, Adv Eiselen concludes that "[T]here is no reason why the civil law should be more restrictive than criminal law when dealing with business records."

4.21. The NPA submits that "There is no real reason why there should be a separate piece of legislation to provide for the admissibility of electronic evidence in criminal and civil proceedings outside the provisions of the ECT Act 25 of 2002."

4.22. *On issue 2: although the ECT Act is largely adequate in facilitating the admissibility of electronic evidence, there is apparent inconsistency between the approach in criminal and civil proceedings arising from the provisions of the CPA and the CPEA. There is support for a less fragmented approach to the admissibility of documentary evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or, as the SALRC recommends, through a proposed repeal of these provisions and the introduction of a single statute to regulate documentary evidence or hearsay and documentary evidence, as set out in Annexure A.*

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118 LSSA submission, p 3
119 LSSA submission, p 4
120 Ibid.
121 LSSA submission, p 3

## ISSUE 3: SHOULD THE DEFINITION OF "DATA MESSAGE" IN THE ECT ACT BE REVISED?

*Extract from Issue Paper 27 p 33*

**3. DEFINITIONS – QUESTIONS FOR COMMENT**

- Should the current definition of "data message" in the Act be revised?
- For the purposes of consistency and clarity, should the ECT Act 25 of 2002 or other legislation relevant to admissibility of electronic evidence in court proceedings include definitions of "electronic", "copy" and "original"?

4.23. On this issue, see generally also the discussion in Chapter 3 above, particularly paragraphs 3.2 to 3.18.

4.24. The ECT Act stipulates that "data message" means data generated, sent, received or stored by electronic means and includes –

> (a) voice, where the voice is used in an automated transaction; and
> (b) a stored record;
>
> In terms of the UNCITRAL Model Law, "data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

4.25. As pointed out in paragraph 3.4, the Electronic Communications and Transactions Amendment Bill of 2012 proposes to amend the definition of "data message". Concerns about the proposed amendments in this regard are set out in paragraph 3.5.

4.26. Given the explicit reference in the ECT Act to "voice ... used in an automated transaction" – a reference not included in the UNCITRAL Model Law – the question arises whether the ECT Act should be more broadly stated to include voice outside of an automated transaction. Hofman comments that the current definition "would make it difficult for anyone doing business by voice to comply with legislation that required a written record of a transaction."[122] Hofman points out that a narrow interpretation runs counter to the existing interpretation of section 3 of the Interpretation Act 33 of 1957,[123] which includes "voice" in the definition of "writing".

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[122] Mason (n 76) 463 [para 15.07].

[123] Section 3 of the Interpretation Act reads as follows:
**3 Interpretation of expressions relating to writing**
In every law expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.

4.27. Similarly, with reference to section 4 of the ECT Act, the LSSA suggests that the narrow definition of "voice" conflicts with the purpose of the Act. The LSSA submits that the words "where the voice is used in automated transaction" should be deleted.

4.28. Adv Eiselen takes a contrary view to that of Hofman and the LSSA. Eiselen argues as follows:[124]

> [T]here is no need to extend the meaning of writing to include voice recordings other than in automated transactions as is the case currently. The current extension to automated transactions is sufficient, unless a clear need arises from practice. In our view extending the definition of writing to (recorded) voice messages would seriously impair legal certainty.

4.29. The NPA suggests that the wording in the definition of a "data message" is in fact inclusive and was "never intended to exclude an electronically recorded voice, not used in an automated transaction."[125] However, because of the confusion, the NPA proposes that the definition be amended to read as follows:

> includes –
>
> *(a) voice, where the voice was recorded in electronic form; and*
> *(b) a stored record.*

4.30. Legal Aid suggests that the term "message", which implies a communication, is confusing and should be replaced by the term "record".[126]

4.31. Mark Heyink, while agreeing that the term "data message" has created some confusion, expresses caution and argues that care should be taken not to move away from internationally accepted terminology if this can be avoided.

4.32. There is clearly concern around the inclusion of the term "voice, where the voice is used in an automated transaction" in the definition of data message, and there do not appear to be compelling reasons to retain the term in the definition. The SALRC therefore proposes that the term be deleted or amended.

4.33. Issue Paper 27 also raises the following question: *Should the ECT Act or other legislation relevant to admissibility of electronic evidence in criminal proceedings include a definition of "electronic", "copy" and "original"?* Although the term "copy" is not defined in the Act, the term "original" receives treatment in section 14, which provides as follows:

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[124] Adv Eiselen submission.
[125] NPA submission, p3.
[126] LSSA submission, p 4.

**Original**

(1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if –

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

(2) For the purposes of subsection 1(a), the integrity must be assessed –

(a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;

(b) in the light of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances.

4.34. Adv Eiselen suggests that section 14 is limited only to instances where writing is required by statute, and that a definition of "copy" should be provided that would align the common law with section 14, but that "electronic" need not be defined.

4.35. The SAPS, in its submission to the SALRC, proposes as follows: "[F]or consistency and clarity, there has to be a definition of these terms ["copy" and "original"] as the situation currently creates confusion."

4.36. By contrast, the LSSA submits that "copy" and "original" should not be defined in the Act, because of rapid technological advancements. Legal Aid also does not express concern about the definition of "copy" but submits that the term "electronic" should be defined.

4.37. Infology raises the concern that a "copy" in the form of a printout may constitute inferior evidence, to the extent that the printout does not contain metadata which would reveal important information about the evidence. Infology proposes that this concern should be dealt with at the discovery stage of litigation. Their proposals in this regard are discussed below, from paragraph 4.137.

4.38. The NPA expresses the view that "it will be unwise [due to rapid development] to attempt to set a definition for "*electronic*". On the question of "original" and "copy", however, the NPA submits that it would be prudent –

> ... for the [ECT] Act to provide that, a printout from a computer or electronic equipment and information on a screen of electronic equipment or a projection by a data projector is the *"original"* for purposes of the law of evidence. This would be in line with the case law [*De Villiers* 1993 (1) SACR 574 (Nm) 579d-e and *HNP v SA Sekretaris van Binnelandse Sake* 1979 (4) SA 274 (T)] sited [sic] above. Consequently, a data message reflected in a printout or on an electronic screen or projected by a data projector will be the original. This will greatly clarify section 15 in general

> and section 15(4) of the Act in particular. ... [M]y recommendation is that the Act should define *"original"*. If the Act defines *"original"* along the lines proposed above, it would not be necessary to define *"copy"*.[127]

The NPA proposes amendments to section 15 that include the above suggestion; their proposed amendments are set out in full in Annexure B.

4.39. The discussion in Chapter 3 (paragraphs 3.39 to 3.49) reveals a move away from requiring an "original", a definition of which is contained in the provisions of section 8 of the UK Civil Evidence Act and section 133 of the Criminal Justice Act of 2005 (set out in paragraph 3.42 above). Given this trend and the proposed definition of "copy" (see Annexure A) and the adequate descriptions of "original" in the ECT Act, the SALRC proposes no further amendments at this stage. Feedback and comment are requested in this regard.

4.40. *On issue 3: there are two aspects: (a) concern has been expressed about the inclusion of "voice, where the voice is used in an automated transaction" which does not appear in the UNCITRAL Model Law definition of a data message; the SALRC proposes either deleting this from the definition or amending the expression to "voice, where the voice was recorded in electronic form". The second aspect (b) is the question of further clarity on the "original" and "copy" of a document. The SALRC proposes a wide definition of copy; however, given the existing provisions of the ECT Act regarding an "original" and the "best evidence rule', no further reform is proposed at this stage. The SALRC invites feedback on the desirability of abolishing or further clarifying the "best evidence" rule; section 15(1)(b) may still result in the rejection of evidence if it is not in its original form.*

## ISSUE 4: SHOULD THE SCOPE OF THE ECT ACT BE EXPANDED?

*Extract from Issue Paper 27 p 35*

**4. SPHERE OF APPLICATION – QUESTIONS FOR COMMENT**

- In view of technological developments, should the ECT Act be amended to extend its sphere of application to the laws mentioned in Column A of Schedule 1? [ie Wills Act, Alienation of Land Act, Bills of Exchange Act and Stamp Duties Act], specifically including the excluded transactions mentioned in Schedule 2? [ie agreement for alienation of immovable property; agreement for long-term lease; execution, retention and presentation of a will; and execution of a bill of exchange]

4.41. Advocate Eiselen submits that it would be unwise to expand the scope of the ECT Act until the issue of advanced electronic signatures has been resolved. He states that "The types of documents and transactions regulated by the Acts in Schedule 1 are important transactions and documents with high risks involved"; and that

[127] p 5

electronic signatures on such documents must be able to fulfil the functions of identification, authentication and assent. The NPA echoes these reservations and also suggests that "The excluded transactions mentioned in Schedule 2 should not be included in the ECT Act, at this stage of the electronic commerce development."[128]

4.42. By contrast, the LSSA answers this question with a "definite "yes",[129] and submits that "[Once] the accuracy and authenticity of the data message is satisfactorily established, there is no reason why it cannot be used to conclude a valid argument." Similarly, Legal Aid expresses the view that "Provided that the necessary technological advances have been made, we feel that electronic contracts such as those referred to above should no longer be excluded."[130]

4.43. Mark Heyink points out the need to consider the functional purpose of signatures in these transactions and how this may be achieved electronically. He states that there is no reason why advanced electronic signatures should not be used in relation to a will or a document relating to the alienation of land. Heyink states that from a functional equivalence perspective, however, this matter should be considered by an appropriate body with adequate technological and legal expertise, and the views of national departments under which the respective legislation falls should be duly considered.

4.44. The question of extending the application of the ECT Act is a matter beyond the scope of a consideration of the principles of the law of evidence and their applicability to electronic evidence. It requires further reflection on the regulation of advanced electronic signatures and other technical matters, as well as input from the ministerial departments having regulatory control over the matters currently excluded.

4.45. *On issue 4: concerns about extending the scope of the application of the ECT Act to the transactions in Schedule 2 revolve around issues of authentication and reliability. The SALRC proposes that an appropriate body (such as the standing committee proposed in terms of Issue 1) consider amendments to the ECT Act, taking into account the views expressed by the national departments that have control over the legislation listed in Schedule 1.*

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128 NPA submission, p 6.

129 LSSA submission, p 5–6.

130 Legal Aid submission, p 5

## ISSUE 5: ELECTRONIC SIGNATURES AND THE ISSUE OF BIOMETRIC TECHNOLOGY

*Extract from Issue Paper 27 p 39*

**5. SIGNATURE – QUESTIONS FOR COMMENT**

**Section 13**

- Having regard to the provisions of sections 33-41 of the Act which govern the establishment and functions of a national accreditation authority *coupled* with the definition of "advanced electronic signature" in section 1 of the Act, will internationally accepted and widely used electronic signatures, not accredited by national authorities obtain legal status provided for in section 13(4) of the Act?[130]
- Should the distinction between "advanced electronic signature" and "electronic signature" as used in the ordinary sense be abolished?

**Biometric Technology**

- In view of developments in biometric technology, should physiological features of biometrics (such as, but not limited to, fingerprints, iris recognition, hand and palm geometry) be included in the ECT Act 25 of 2002 as a form of assent and electronic identity?

4.46. Electronic signatures and biometric technology provide mechanisms to identify the origin of a message – that is, to authenticate the message. On authentication and reliability generally, see also the discussion in Chapter 3 above, especially paragraphs 3.50 to 3.63).

*Definitions of electronic and advanced electronic signatures*

4.47. The ECT Act distinguishes between "advanced electronic signatures" and other "electronic signatures". Advanced electronic signatures are the result of a process accredited by an Accreditation Authority[131] established under the ECT Act; this type of electronic signature must be used where the signature of a person is required by law and such law does not specify the type of signature. Other electronic signatures are not accredited by the Accreditation Authority and include "data attached to, incorporated in, or logically associated with other data and which is intended by the use to serve as a signature."[132] Amendments proposed in the Electronic Communications and Transactions Bill of 2012 retain this distinction, but propose to amend the respective definitions. In the case of advanced electronic signatures, the proposed amendment includes the insertion of "which is admissible in legal proceedings". The value of this insertion is questionable and requires further scrutiny.

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131 Details on the accreditation body can be found *at http://www.saaa.gov.za/.*

132 Section 1, ECT Act.

The proposed amendments to the definition of "electronic signature" are more extensive, and more problematic in that they may be unnecessarily restrictive of what would classify as an electronic signature. These amendments require revision after further deliberation.

*Submissions on foreign products and on the distinction between advanced and other electronic signatures*

4.48. On the question of international recognition of electronic signatures, the LSSA points out that "[I]t is indeed doubtful whether international signatures not accredited by the South African Accreditation Authority will have a legal effect as far as the Republic of South Africa is concerned." However, the LSSA acknowledges the value of an advanced electronic signature and suggested that the approach of the ECT Act in not "simply accepting certain existing international vendors and their products ... may be unwise."[133]

4.49. Legal Aid indicates that "An advanced electronic signature is clearly something more than an electronic signature" and argues, therefore, that "the distinction should be retained."[134]

4.50. By contrast, the SAPS submission to the SALRC on Issue Paper 27 states that "[T]he distinction should be abolished as it is not even clear that section 13(1) and (4) read together apply to international signatures not accredited by a South African accreditation authority."[135]

4.51. On the question of foreign service providers, Adv Eiselen cautions that "[T]here will be little incentive for the vast array of foreign service providers to apply for South African accreditation." Indeed, this seems to be true even for local service providers. While the Accreditation Authority indicates on its website that it has not yet accredited any products, in an article published on *ITWeb* on 5 March 2012, LAWTrust reported that "The process of accreditation is an expensive and lengthy exercise and we at LAWtrust have been through it and have become the first private company to have applied to become accredited."[136]

4.52. It should be noted that in terms of foreign products and service, section 40 of the ECT Act – although yet to be invoked – provides a potential avenue to address concerns. Section 40 ("Accreditation of foreign products and services") provides that "The Minister may, by notice in the Gazette and subject to such conditions as may be determined by him or her, recognise the accreditation or similar recognition granted to any authentication service provider or its authentication products or services in any foreign jurisdiction." Amendments to section 40 proposed in the Electronic Communications and Transactions Act of 2012 extend the opportunity for the accreditation and registration of foreign products and services, and may well facilitate

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133 LSSA submission.

134 Legal Aid submission, p 7.

135 SAPS submission, p 2.

136 "The facts regarding Advanced Electronic Signatures" (5 Mar 2012) online at *http://www.itweb.co.za/index.php?option=com_content&view=article&id=52249.*

this process. These proposals furthermore indicate that the Department of Communications is aware of this issue.

4.53. The NPA points out that section 13(1) of the ECT Act, which requires an advanced electronic signature where the law does not specify otherwise, might create a problem in respect of section 222 of the Criminal Procedure Act [section 34(4) of the Civil Proceedings Evidence Act]. Section 222 refers to a written or signed document as opposed to a signature in electronic form, but indicates that in practice "the signature, if any will be in handwriting." On the distinction between electronic signatures and advanced electronic signatures, the NPA points out that if the distinction is abolished then "[T]he safeguard provided for by section 13(1) on the one hand and the corporate freedom to regulate the situation under section 13(3) on the other hand will be undermined."[137] However, the NPA goes on to argue that the distinction could be abolished (along with the accreditation authority) "[I]f it is possible to safely adopt the method, to ascertain reliability and trustworthiness of the origin of an electronic signature...".

4.54. Adv Eiselen suggests that section 13(1) and section 13(4), both of which regulate the use of "advanced electronic signatures" be repealed, and that government departments should prescribe their specific requirements for electronic signatures in terms of section 28. Section 13(2) and section 13(3) would remain to accommodate private commercial needs.

4.55. Acceptable signatures are of particular concern to the banking community in the context of provisional and summary judgments in the Magistrates and High Court. Adv Eiselen points out that –

> ... to be successful with an application for provisional judgment, a party must rely on a **liquid document** ... In practice it is a requirement that the document must be signed. At present it would seem that in the absence of a valid advanced electronic signature, a party will struggle to obtain provisional sentence due to the signature requirement.
>
> It is recommended that section 13 of the ECT Act be amended to ensure that electronic signature to which the parties have agreed, will be sufficient to meet the requirements for provisional sentence.
>
> ... Amending the ECT Act for purposes of provisional sentence will ... also assist in instances of summary judgment where the creditor is relying on a liquid document.

Adv Eiselen therefore recommends that the distinction between "advanced electronic signature" and "electronic signature" be abolished.

4.56. Mark Heyink expresses a similar view – that is, that the distinction be abolished – and proposes that the provisions of the Model law on Electronic Signatures[138] should

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137 P 8

138 UNCITRAL Model Law on Electronic Signatures (2001) available online at *http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2001Model_signatures.html* (accessed on 31 July 2012). The UNCITRAL Model Law on Electronic Signatures, unlike the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, provides a comprehensive framework for the regulation of electronic signatures but does not distinguish between "electronic signatures" and "advanced electronic signatures".

be considered in determining an alternative approach. Heyink stresses the importance of the functional equivalence principle and what this would mean in the context of electronic signatures.

4.57. The concerns relating to the current regulatory framework for electronic signatures and advanced electronic signatures are significant. The SALRC therefore suggests a need for further consultation with all relevant stakeholders, and deliberations by a technical body prior to making changes to the regulatory structure. Such deliberations should be informed by international or foreign practice such as that established by the UNCITRAL Model Law on Electronic Signatures (2001) and Directive 1999/93/EC on a Community framework for electronic signatures.[139]

*Biometric Technology*

4.58. Biometric technology encompasses methods for the biological identification of a person based upon one or more intrinsic physical or behavioural traits; for example, facial features, iris and retina patterns, hand geometry, and voice.

4.59. On the question of biometric technology, Adv Eiselen expresses the view that "section 13(2) and s13(4) are sufficiently wide to encompass the use of biometrics as a method of electronic signature either in itself or in combination with other methods." However, he adds that –

> [I]f the acceptability of biometrics could be facilitated by an amendment to section 13, that would be beneficial as biometrics provide a relatively high level of certainty and authentication, that is not necessarily the case with other forms of simple electronic signatures such as scanned signatures or even pin codes and access cards.[140]

4.60. The NPA reiterates the same view, maintaining that "[F]ingerprint, iris recognition, hand and palm geometry in electronic form and any record of such electronic data ... falls within the definition of 'data' and 'data message' and it is therefore not necessary to make additional provision for these types of evidence."[141]

4.61. SAPS, in its submission, proposes that "The use of biometric technology must be included in the Act as it can help in the verification of any suspected manipulation."

4.62. Legal Aid proposes, in its submission to the SALRC, that biometric technology should be regulated in other statutes as far as criminal proceedings are concerned, and for civil proceedings should be regulated under the ECT Act.

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On the other hand, the approach in the EU in terms of Directive 1999/93/EC is to distingulsh between, and provide definitions for, an "electronic signature" and an "advanced electronic signature". Similarly to the position in South Africa, the Directive requires an advanced electronic signature where a signature is required by law.

139 See note 138.

140 Adv Eiselen submission.

141 NPA submission, p 9.

4.63. Mark Heyink agrees that biometric records fall within the definition of data in terms of the ECT Act.[142] However, he raises a concern that the biometric verification of identity is a factor of authentication that will in most instances remain in electronic form. This requires additional consideration because it remains a data message and is subject to some of the difficulties inherent in electronic technologies. Specifically, Heyink points out that –

> ... immediately biometric information is retained electronically, it constitutes a data message and has no greater evidential value than, for instance, a scanned signature that has also been retained as a data message. It is relatively easy to "replay" a data message containing details of a biometric identifier by "forging" a biometric identifier either physically (copies of fingerprints made using glycerine-type substances would be an example), alternatively electronically by intercepting or "stealing" the data messages in which the biometric information is communicated or stored. As the use or storage of biometric information is not typically physical (actually affixing a copy of the fingerprint to a piece of paper or document, as an example) the biometric information will almost always be in the form of a data message.

Heyink points out that the security and integrity of biometric data (as with any other data message) would be "dependent upon the technologies used, the processes governing and safeguarding the use of the technologies[,] and the conduct of the persons using the technologies." He submits that "[T]here is no point in including separate provisions in the ECT Act as a form of assent or electronic identity associated with biometric information."[143]

4.64. Questions about electronic signatures, advanced electronic signatures and biometric technology require further reflection before the SALRC can advise on possible reform. The input of technical experts as well as legal experts should inform further deliberations in this regard.

4.65. *Issue 5: The SALRC recommends that a technical and expert standing committee or body (such as that established as recommended in issue 1) be tasked to consider (as a priority matter) the current regulatory regime that recognises a distinction between electronic signatures and advanced electronic signatures, and in particular to make recommendations in respect of the accreditation of foreign signatures. It is furthermore recommended that such body deliberate on the issue of biometric technology and provide guidance in this regard.*

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142 Heyink indicates "that the ECT Act already caters for the use of biometrics in that electronic signatures may be any data (which could be data relating to a fingerprint, iris scan or hand and palm geometry), any other biometric information which is incorporated in or logically associated with other data and which is intended to be used as a signature."

143 Heyink submission.

## ISSUE 6: SECTION 15 AND HEARSAY AND ADMISSIBILITY AND INTERACTION WITH OTHER STATUTORY EXCEPTIONS

*Extract from Issue Paper 27 p 41*

**6. ADMISSIBILITY OF DATA MESSAGES AS EVIDENCE IN LEGAL PROCEEDINGS – QUESTIONS FOR COMMENT**

- Section 15 interaction with the rules against hearsay :-
  - Should section 15 of the ECT Act prescribe that a data message is automatically admissible as evidence in terms of section 15(2) and a court's discretion merely relates to an assessment of evidential weight based on the factors enumerated in section 15(3)?[144]
  - Should a "data message" constitute hearsay within the meaning of section 3 of the Law of Evidence Amendment Act?[145]
    - ❖ If yes, does section 15(1) therefore make all data messages, including hearsay data, admissible? In doing so, should section 15 of the ECT Act 25 of 2002 exempt a data message from the rules relating to hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988?
    - ❖ If not, should section 3 of the Law of Evidence Amendment Act prescribe a rule of admissibility for hearsay representations made by a person via the mechanical agency of a machine?
  - What is the effect of section 15(1) on other statutory exceptions such as section 221 (admissibility of certain trade or business records) and section 222 (application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act) of the Criminal Procedure Act; and Part VI (documentary evidence) of the Civil Proceedings Evidence Act?

4.66. On this issue, see generally also the discussion in Chapter 3, especially paragraphs 3.30 to 3.38.

*Electronic evidence and the hearsay rule: should electronic evidence be exempt from the hearsay rule?*

4.67. On the question of hearsay evidence, we should be reminded that one of the underlying principles of the ECT Act is that of functional equivalence:

> Functional equivalence, or media neutrality, means that the law should treat paper-based and electronic transactions in the sam-e way, without prejudicing either or favouring one above the other.[146]

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144 See *S v Ndiki and others* 2008 (2) SACR 252 (Ck).

145 See Zeffertt et al *The South African Law of Evidence* (2003) 393-395.

4.68. With functional equivalence in mind, if section 15 prescribed that a data message is automatically admissible, regardless of it being hearsay evidence, this would favour hearsay evidence in the form of electronic evidence. In addition, concerns about the ease of manipulating electronic records suggest that a cautious approach should be adopted.

4.69. The approach taken by our courts, in interpreting the impact of section 15 of the ECT Act on the hearsay rule, is that electronic evidence is not exempt from the hearsay rule [*Ndlovu v Minister of Correctional Services and Another* 2006 (4) All SA 165 (W)].

4.70. It appears to be a broadly accepted approach that if a data message contains a statement of which a person has personal knowledge, its use in evidence depends on the credibility of an identifiable person and would therefore constitute hearsay.

4.71. There is less consensus, however, on the approach to be followed when the probative value of a statement in the printout is dependent upon the "credibility" of the computer itself. The court in *Ndlovu* indicated that in this case section 3 did not apply; however, a contrary position was promoted in an *obiter* statement in *S v Ndiki* 2008 (2) SACR 252 (Ck), where the court expressed its support for a uniform approach to electronic data, regardless of whether the probative value of the evidence depends on the credibility of a person or a computer. The court in *Ndiki* suggested that both should constitute hearsay, and that the test contained in section 3(1)*(c)* of the Law of Evidence Amendment Act – that hearsay evidence may be admitted if it is in the interests of justice to do so – is sufficiently flexible to accommodate both. The court in *Ndiki* also indicated that this does away with the necessity to distinguish (in each case) between what would constitute hearsay evidence and what real evidence, which may be difficult to do.

4.72. In its submission to the SALRC, the LSSA suggests that "[T]he admissibility of the [electronic] evidence should be considered before it is accepted as such before the Court." The LSSA supports the approach suggested in the *Ndiki obiter* and proposes "[T]hat all data messages in fact constitute hearsay within the meaning of Section 3 of Act 45 of 1988."[147] Similarly, the SAPS submission to the SALRC states that "data messages" should constitute hearsay evidence and that section 15 does not make all data messages admissible.[148]

4.73. By contrast, the NPA responds "yes" – in other words that section 15 should prescribe that information in the form of a data message must be admitted if relevant and authentic; and that its evidential weight should be determined on the reliability of the evidence contained in the data message.[149]

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[146] W Jacobs "The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts" 2004 *SA Merc LJ* 556, 557 cited in Issue Paper 27 at 40.

[147] LSSA submission,p. 13.

[148] SAPS submission, p.P 3.

[149] NPA submission, p.P 9.

4.74. Legal Aid submits that "a data message duly authenticated where necessary may contain both hearsay and non-hearsay elements. If duly authenticated, it would not be hearsay, if it was produced by a computer or database on the basis of data entered therein without further human intervention."[150] In support of this stance, reference was made to the approach in civil proceedings in the US Federal Rules of Evidence. Legal Aid therefore does not support an extended meaning of hearsay.

4.75. Adv Eiselen focuses on section 15(4) of the ECT Act and related exemptions, arguing that these should be liberally interpreted and streamlined. He suggests that –

> [T]here is no need for a specific provision in section 3 of the Law of Evidence Amendment Act for data messages, provided that the current exception to data messages made in the ordinary course of business is retained in some or other format ... If the exception is applied sensibly as was done in *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC t/a LA Enterprises & other* [2009] JOL 23394 (W) it obviates the need for more drastic changes.[151]

4.76. In his submission on Discussion Paper 113, Prof Dana van der Merwe considers three options to address the concerns about "hearsay", as follows: (1) that "everything to do with a 'machine' [be treated] as real evidence, taking the printout at face-value, or having an expert explain ... the possible weight of such evidence" (this approach has been called the "protocol approach", and may require adherence to certain protocols and standards to demonstrate reliability); (2) that the ECT Act "completely superceded the hearsay legislation ... so far as computer-based evidence is concerned" (an approach which Prof van der Merwe states is contrary to the *generalia non specialibus derogant* principle); and (3) "to admit all hearsay evidence and to leave it to the trained jurist and assessors to accord the necessary weight to such evidence", which Prof van der Merwe points out, is the approach adopted in the United Kingdom.

4.77. At this stage, the SALRC proposes retaining the position that evidence containing a hearsay statement made by a person should not be exempt from the hearsay rule, but that the question of the production and admissibility of automated electronic evidence should be clarified (see Issue 7 below).

*The effect of section 15 on other statutory provisions for admissibility of documentary evidence*

4.78. Statutory provisions that facilitate the admissibility of documentary evidence include sections 221, 222 and 236 of the CPA and Part VI of the CPEA, as well as section 3 of the LEAA (see Annexure C). Our courts have, to a large extent, settled the relationship between these provisions and the ECT Act (section 15) in a manner which treats the ECT Act largely as a facilitative mechanism for the admissibility of data that might otherwise not have been admitted as evidence. In other words, other

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150 Legal Aid submission, p. 9.

151 Adv Eiselen submission.

statutory provisions that regulate the admissibility of certain types of evidence (eg hearsay, and trade or business records) remain relevant if they are applicable, even if the evidence consists of a "data message".

4.79. The question of the applicability of section 3 of the LEA Act first arose in *Nhlovu v Minister of Correctional Services* [2006] 4 All SA 165 (W) at 173F, where the court maintained that "there is no reason to suppose that section 15 seeks to override the normal rules applying to hearsay". This decision was recently confirmed in *MTN Service Provider (Pty) Ltd v LA Consortium & Vending CC t/a LA Enterprises* 2011 (4) SA 562 (WLD).

4.80. In *Sublime Technologies (Pty) Ltd v Jonker and Another* 2010 (2) SA 522 (SCA), the court was required to rule on the interaction between section 15 of the ECT Act and certain provisions in the CPEA. The case involved the production of various bank statements by the appellant, which the appellant had obtained from the police docket in a criminal investigation against the respondents.

4.81. The respondent argued that section 30(1) of the CPEA required ten days' notice to be given of a party's intention to adduce evidence of accounting records from a bank, and that this had not been done. The appellant had then sought to rely on section 15 of the ECT Act, which it argued allowed the appellant to place the documents before the court without complying with any notice period. The trial judge upheld the respondent's objection, concluding that the bank records would be inadmissible unless the prescribed notice had been given. The trial judge then granted a postponement (with the appellant to pay costs – which was the issue before the appeal court) to allow for notice to be given. The SCA ruled that the matter of wasted costs should stand over for later determination.

4.82. Similarly, in criminal proceedings, the court confirmed in *S v Ndiki* 2008 (2) SACR 252 (CKHC) that the admission of "data messages" that fall within the definition of hearsay are to be regulated by the statutory provisions, outside of the ECT Act, which are applicable to hearsay.

4.83. Recent case law, however, does suggest some inefficiency or potential confusion over the applicability of multiple sources of law. See, for example, *DDP v Modise & Another* 2012 (1) SACR 553 (GS); *LA Consortium v MTN* 2011(4) SA 577 (GSJ); *Sublime Technologies v Jonker* 2010 (2) SA 522 (SA); *Mohlabeng v Minister S & S* 2008 JOL 21389 (T); *Le Tour Distributors CC v The Attorneys Fidelity Fund Board* [2006] JOL 18276 (C); *Nedbank LTD v Mashiya and Another* 2006 (4) SA 422 (T); and *Trend Finance (Pty) v SARS Commissioner* [2005] 4 All SA 657 (C).

4.84. By way of examples of confusion: in the *Trend Finance* case, SARS navigated the provisions of three pieces of legislation in its endeavour to have particular documents admitted; this points to inefficiencies and potential confusions in the current system with multiple sources of law. In the *Modise* case, the magistrate in the court *a quo* (wrongfully) rejected expert oral testimony in the absence of documentary evidence being produced in terms of either the CPA or the ECT Act, thus demonstrating the potential confusion about the permissible categories of evidence (oral, real, or

documentary) and the requirements for the admissibility in each category. Case law seems to suggest that clarifying the law would provide for greater certainty and fewer opportunities for misunderstanding and wrong interpretations of the law.

4.85. The NPA argues that the current interpretation by the courts of section 15 is ambiguous, and proposes that section 15 should be interpreted as follows:[152]

- The Act should make clear that section 15(1) to (3) operates independently from section 15(4). Both sections should allow for the admissibility of hearsay evidence without having to apply section 3 of the Law of Evidence Amendment Act. However, "A court will still read subsections (1) and (2) against the background of the common law in respect of authenticity."

- The NPA states that "Section 15(1), (2) and (3) on the one hand and subsection 15(4) on the other hand, can ... also operate as alternatives to sections 221, 222 and 236 of the Criminal Procedure Act with a wider field of application than the last mentioned sections, relative to electronically emanated evidence."

- With regard to section 15(4), the NPA points out that this section limits the admissibility of a data message to "a data message made by a person in the ordinary course of business." By contrast, section 15(1) to (2) is more broadly stated. As far as section 15(4) is concerned, the NPA states that the following points require clarity:
    - "*a data message made by a person*" – the NPA asks whether this wording is intended to exclude a data message made by a computer, without human intervention or where the computer has been involved in calculating or sorting data (such as in the *Narlis* and *Ndiki* cases).

      "*a data message ... or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person*" – the NPA points out that
        - it is not clear whether the section intends that a printout from computer equipment is a copy or an original;
        - it is not clear whether the certification referred to also applies to the "*data message*" or only to the copy, printout and extract.

    - "*... admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract*" – the NPA is of the view that "the underlined words sound foreign and out of place in South Africa[n] legislation. It would be more congruent with standard usage to use *"prima facie proof"*.

The NPA therefore proposes that section 15, including section 15(4), be redrafted (see Annexure B for their proposals).

4.86. From the comments received and the case law analysed, it does appear that some level of reform is desirable. Such reform may adopt one of the following approaches:

- a revision of the existing provisions to ensure consistency (functional equivalence) between the various laws;
- the introduction of provisions on the admissibility of electronic evidence (which could be included in existing legislation or a stand-alone Act);

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[152] NPA Submission, p 11-12.

- replacing the existing provisions with a single statute to regulate admissibility of hearsay and admissibility of certain documentary evidence.

4.87. Perhaps more important than law reform would be the publication of a handbook on obtaining and producing electronic evidence in court. This book should clarify the status quo of the law and provide judicial officers, legal practitioners and forensic experts with appropriate guidance and clarity on how to comply with the legal framework for producing electronic evidence in civil and criminal proceedings. The drafting of a manual or handbook of this nature is a matter for further discussion between interested parties, and it is envisaged that the Department of Justice would play a key role in this regard.

4.88. On the question of law reform, as a provisional position, the SALRC is of the view that section 15(4) should be repealed, that electronic evidence should not be exempt from hearsay evidence, but that the hearsay rule should not apply to automated electronic evidence (see Issue 7 below).

4.89. *Issue 6: in line with the principle of technological neutrality, the SALRC supports the view that hearsay evidence made by a person in an electronic document should be treated in the same way as hearsay evidence in a paper-based document. On the interaction of the ECT Act with the CPEA, the CPA and the LEAA, the SALRC supports a less fragmented approach to the admissibility of documentary evidence and therefore proposes reform: either through amending and supplementing existing provisions or, preferably, through a proposed repeal of these provisions and the introduction of one statute to regulate hearsay evidence and certain types of documentary evidence. The SALRC also invites comment on whether its assessment of the provisions for the admissibility of documentary evidence is sufficiently broad in scope, or whether (for example) the SALRC should also consider the provisions relating to official and public documents, foreign documents, affidavits and so on. Furthermore, the SALRC supports the development of a handbook on obtaining and producing electronic evidence, which would provide clarity to practitioners and judicial officers regarding the legal position and would also offer advice on technical aspects of producing electronic evidence in court. The SALRC proposes that the Department of Justice should take a leading role in developing such a handbook, and invites feedback in this regard.*

## ISSUE 7: DISTINGUISHING BETWEEN VARIOUS TYPES OF ELECTRONIC EVIDENCE

*Extract from Issue Paper 27 pp 43–44*

**7. SECTION 15: TWO TYPES OF EVIDENCE – QUESTIONS FOR COMMENT**

- For the purposes of facilitating admissibility of data messages, should the ECT Act 25 of 2002 (or other relevant legislation) make a clear distinction between *mechanically produced evidence without the intervention of the human mind* (akin to real evidence) AND *mechanically produced evidence with the intervention of the human mind* (hearsay)?

- If so, should a free-standing provision prescribe that representations made by machines, based on information supplied by a person, is only admissible if the information is proved accurate?

- In an obiter statement Van Zyl J in *Ndiki* states, "a more preferable approach to computer generated evidence" is to extend the meaning of hearsay to include evidence that depends upon the accuracy of the machine which would do "away with the necessity to distinguish in each case between what would constitute hearsay evidence and what real evidence". Is such an approach practicable? Should provision be made in the ECT Act 25 of 2002 for such an approach[?]

4.90. On this issue, see generally also the discussion in Chapter 3 of this paper, especially paragraphs 3.26 to 3.38.

4.91. In the *Ndlovu* case, Gautschi AJ expressed the following view:

> Where the probative value of the information in a data message depends upon the credibility of a (natural) person other than the person giving evidence, there is no reason to suppose that section 15 seeks to override the normal rules applying to hearsay evidence. On the other hand, where the probative value of the evidence depends upon the "credibility" of the computer (because information was processed by the computer), section 3 of the Law of Evidence Amendment Act 45 of 1988 will not apply, and there is every reason *to suppose* that section 15(1), read with sections 15(2) and (3), intend for such "hearsay" to be admitted, and due evidential weight to be given thereto according to an assessment having regard to certain factors.[153]

4.92. The question is whether such a distinction should be bedded down in statute in order to avoid further confusion and to facilitate the admissibility of data messages.

4.93. The LSSA expresses the following view:[154]

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[153] At 173.

[154] LSSA submission, p 15.

> [A]ll electronically produced evidence is to a certain extent the product of the intervention of the human mind. For example, the computer printout of a telephone recorded message is the result of the software in the computer system which was in turn created by the human mind ... [I]t could be extremely difficult to distinguish in each case what is the result of the intervention of the human mind and what is not. Therefore it is preferable not to make such a distinction.

4.94. Adv Eiselen also suggests that making such a distinction would be a difficult task, and argued that the current approach "which sets relatively low hurdles for admissibility and shifts the focus to the evidential weight that should be attached to the evidence is ... the most acceptable approach as meeting the requirements of business efficacy without necessarily overburdening courts with irrelevant evidence."[155]

4.95. By contrast, Legal Aid argues for retaining the distinction between these two types of evidence.

4.96. On the question of a free-standing provision that would prescribe that representations made by machines (but based on information supplied by a person) would be admissible only if the information was proved accurate, Adv Eiselen submits that such a provision would be overly burdensome; Eiselen states that the current position is sufficiently balanced. The LSSA expresses a similar sentiment[156] and therefore would not support a free-standing provision.

4.97. Both the LSSA and Adv Eiselen are supportive of the *obiter* statement in *Ndiki*. In addition, Eiselen adds a proviso that the hearsay exceptions for business documents or statements created in the ordinary course of business should be retained and streamlined.

4.98. In its submission, the SAPS argues as follows:[157]

> [T]he ECT Act 25 of 2002 must set a clear distinction between mechanically produced evidence without intervention of human kind and mechanically produced evidence with the intervention of human kind. This will clarify the issue of the kind of evidence one is dealing with as well as what the requirements of admissibility are.

The SAPS proposes a free-standing provision which regulates that representations made by machines based on information supplied by a person is only admissible if the information is proved accurate. SAPS do not agree, however, that the meaning of hearsay should be extended to include evidence that depends upon the accuracy of the machine, as this would mean that the reliability of the machine would have to be proved before the evidence can be regarded as admissible.

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155 Adv Eiselen submission, p 12.

156 LSSA submission, p 16.

157 SAPS submission, p 3–4.

4.99. The NPA suggests that it is not necessary to distinguish between the two types of evidence, and that section 15(1) and (2) provides for the admissibility of both types; in addition, section 15(4) provides for mechanically produced evidence with the intervention of the human mind. In light of these comments, the NPA then suggests that section 15 be redrafted as set out in Annexure B.

4.100. Mark Heyink urges the SALRC to consider international developments, and not to venture too far from the conventional position in international practice.

4.101. From the jurisdictions surveyed, it would appear that the predominant practice is to treat "statements made by a person" that are contained in a document as hearsay. By contrast, the focus in the context of automated evidence is more specifically the reliability and integrity of the system that generated the evidence.

4.102. The SALRC has studied the laws applicable in Canada and Australia, as well as the draft Model Law on Electronic Evidence commissioned by the Commonwealth Secretariat.[158] Based on this analysis, the SALRC suggests an approach that would provide guidance on the production of electronic evidence, and which would recognise that electronic evidence containing statements "made by a person" may constitute hearsay evidence; whereas automated electronic evidence would depend on evidence to show the reliability of such evidence.

4.103. To provide clarity on this issue, statutory provision may be made for the explicit exclusion from the hearsay rule of automatically generated evidence. The suggested provision appears in Annexure A of this paper, clause 5(2) of which reads as follows:

> A statement which has been generated wholly by a machine, device or technical process does not constitute hearsay evidence.

4.104. *Issue 7: the SALRC supports the maintenance of a distinction between automated data messages and data messages "made by a person" and proposes statutory reform (see Annexure A) to guide the production and proof of both types of evidence in court. In addition, the SALRC supports the development of a handbook on obtaining and producing electronic evidence that will provide clarity, to practitioners and judicial officers, on the legal position and advice on technical aspects of producing electronic evidence in court to avoid unnecessary confusion.*

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158 See Annexure D.

## ISSUE 8: EVIDENTIAL WEIGHT AND THE QUESTION OF AUTHENTICITY

*Extract from Issue Paper 27 p 44*

**8. ASSESSING THE EVIDENTIAL WEIGHT OF A DATA MESSAGE – QUESTIONS FOR COMMENT**

- In view of the fragmented nature of case law focusing on authentication of specific types of evidence, is a review of the principle of authentication necessary [because of] the nature and characteristics of electronic evidence that raise legitimate concerns about its accuracy and authenticity?

- While section 15(3) provides guidelines for assessing the evidential weight of data messages, should courts apply a higher admissibility hurdle in the context of authentication (as an aspect of relevance) for electronic evidence, [compared with] other forms of tangible evidence?

- Given the concerns raised in chapter 2 [of the Issue Paper], what standard of proof, applicable to the authentication of evidence, is necessary, if at all? Will a prima facie showing (in a sufficiency sense) that the evidence is what it purports to represent suffice? Or should conclusive evidence of authenticity (again as an aspect of relevance) be required?

4.105. On this issue, see generally also the discussion in Chapter 3, especially paragraphs 3.50 to 3.63.

4.106. Section 15(3) of the ECT Act provides valuable guidance as follows:

> (3) In assessing the evidential weight of a data message, regard must be had to-
> (a) the reliability of the manner in which the data message was generated, stored or communicated;
> (b) the reliability of the manner in which the integrity of the data message was maintained;
> (c) the manner in which its originator was identified; and
> (d) any other relevant factor.

4.107 As Prof Van der Merwe points out,

> Factors (a) and (b) deal with the "chain of evidence" and how well the witness can indicate that what the court is seeing is what the data message originally consisted of.[159] ... Factor (c) deals with the very important factors of authorship and source which constitute the heart of authentication. Factor (d) is simply a catch-all clause in case the legislature has "forgotten" anything.[160]

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159 On establishing this, Van der Merwe suggests that "witnesses should consider finding guarantees of reliability in encryption programs and programs that make 'check-sums' of all the bits and bytes on departure and on arrival of a data message at the computer of the witness. If any of these sums show discrepancies, the integrity of the data message has been lost and the message no longer constitutes reliable evidence." Van der Merwe (n 36) 115.

160 Van der Merwe (n 36) 115.

4.108 The question ultimately is whether these guidelines for evidential weight are adequate to guide parties and the courts when addressing issues of admissibility, authentication or reliability; or whether additional guidance should be provided. In this respect, Prof Van der Merwe's reflections on the failure of the Computer Evidence Act are instructive. He states as follows:

> A more sophisticated view might be that the Act failed for two reasons: it failed to make reference to, or incorporate, "respected international standards" and did not "determine clearly how the archival requirements set by a number of statutes is affected by the new medium of the computer."[161]

4.109 Although the ECT Act goes some way in addressing the second observed failure of the Computer Evidence Act (in particular), the ECT Act – an "omnibus" Act – is somewhat laconic on "best practice" and "international standards". This might suggest a need for further details to be provided elsewhere, which would specifically address matters relating to production and proof in the law of evidence. Van der Merwe, who welcomes the ECT Act and the regulations on accreditation service providers,[162] nonetheless concludes that "Still, new and internationally harmonised legislation is probably necessary to eliminate any further complications. Obviously, in this regard, international standards will play a key role in any such legislation."[163]

4.110 In his comment on Issue Paper 27, Adv Eiselen submits that the provisions of section 15(3) provide clear guidance, and that this is an issue that should be considered on a case by case basis rather than by tying the courts' hands. Eiselen submits that a "prima facie showing should be sufficient. It is always open to a party to proceedings to [argue] that the evidence proffered is or is likely to be inaccurate based on the general requirements set out in section 15(3)."[164]

The LSSA also states that a review is not necessary at present, and that "the Court should be allowed to test the aspect of authenticity further."[165] The NPA similarly suggests that review is not necessary, and cautions that "Authenticity [that a document is what it purports to be] should not be conflated with proof of the truth of the contents."[166] The NPA points out that authenticity is usually proved through *viva voce* evidence unless certification is provided for (eg in section 236 of the CPA and section 15(4) of the ECT Act).

4.111 The SAPS submits that such a review "could bring certainty to evidence produced without intervention of human kind."[167]

4.112 On the question of a higher admissibility hurdle in the context of authentication with electronic evidence, Legal Aid argues that there is no reason to apply a higher

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161 Van der Merwe (n 36) 108. Original footnotes omitted.

162 Accreditation Regulations (GN 504 in GG 29995 of 20 June 2007). The Regulations provide technical standards for authentication service providers.

163 Van der Merwe (n 36) 129.

164 Eiselen submission, p. 14.

165 LSSA submission, p. 17.

166 NPA submission, p. 21.

167 SAPS submission, p. 4.

admissibility hurdle. Legal Aid draws attention to the guidelines set out in section 15(3). The LSSA similarly argues that "A higher admissibility hurdle to authenticity is not required" and that "the necessary safeguards (relating to authenticity) will be developed by the Courts."[168] The LSSA points out that in civil matters, parties often agree that "documents (including computer printouts) are what they purport to be" and that this consensus speeds up the proceedings, but that the question of authenticity is often raised in criminal proceedings. In criminal cases, according to the LSSA, "A prima facie indication that documents are what they purport to be will ease the evidential burden of the prosecution. It is up to the accused to challenge the authenticity of documents. Should the accused not challenge it, why then the enforcement of stricter rules?"[169]

4.113 Mark Heyink, while supportive of some form of "judicial guideline", cautions against fettering the discretion of judicial officers.

4.114 On the issues of authentication and weight, the SALRC has considered the approach in various foreign jurisdictions; our recommendations are influenced by legal developments in Australia, Canada, New Zealand and the United Kingdom, as well as the draft Model Law on Electronic Evidence commissioned by the Commonwealth Secretariat.[170] The SALRC proposes that legislative reform, or guidelines introduced (for example) through regulations in terms of section 94 of the ECT Act, be implemented along the lines of the following:

**Authenticity and integrity of documentary evidence**

7.1 Subject to the provisions of this Act, a person seeking to admit documentary evidence in terms of the Act has the burden of proving the authenticity and integrity of the document.[171]

7.2 For the purposes of determining whether an electronic document is admissible in terms of this section, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

7.3 The integrity of an electronic documents system may be established by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system.

7.4 Evidence in terms of subsections (2) and (3) may be produced orally or by affidavit.

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168 LSSA submission, p. 17–18.

169 LSSA submission, p. 18.

170 See Annexure D.

171 Adaptation of section 31.1 of the Canadian Evidence Act

7.5 A party may cross-examine a deponent of an affidavit introduced into evidence in terms of subsection (4) if the deponent is an adverse party or is under the control of an adverse party; or with leave of the court.[172]

7.6 In any civil proceeding where a party is permitted under the Rules of Court relating to discovery to inspect a document –

(a) the requirement to prove the authenticity and integrity of the document may be dispensed with in circumstances described in those Rules; and

(b) the procedure to be adopted by a party seeking to require proof of the authenticity and integrity of the document is that set out in those Rules; and

(c) the production of secondary evidence to prove the authenticity and integrity of the document may be permitted in circumstances described in those Rules.[173]

7.7 The signature, execution, or attestation of a document that is required by law to be attested may be proved by any satisfactory means, provided that an attesting witness need not be called to prove that the document was signed, executed or attested as it purports to have been signed, executed, or attested.

**Weight to be attached to documentary evidence**

In estimating the weight to be attached to documentary evidence admitted in terms of this Act, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the information contained in the document, and in particular –

(a) where the information was directly provided by a person, regard shall be had to whether or not the person who supplied the information did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.[174]

(b) where the information is contained in an electronic document, regard shall be had to –

(i) the reliability of the manner in which the data message was generated, stored or communicated;

(ii) the reliability of the manner in which the integrity of the data message was maintained;

(iii) the manner in which its originator was identified; and

(iv) any other relevant factor.[175]

4.115 *Issue 8: the SALRC supports the clearer articulation of both statutory and non-statutory (in the form of a handbook / manual) guidelines for the authentication (and weight) of documentary evidence, in particular electronic evidence, and in addition proposes that the court be expressly vested with the discretion to exclude unfairly prejudicial evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or through a proposed repeal of existing provisions and the introduction of a unitary statute containing provisions such as those articulated in clauses 7 and 8 of Annexure A, and invites further comment in this regard.*

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172 Adapted from the Canadian Evidence Act (s 31.6).

173 Adapted from the New Zealand Evidence Act (s 134).

174 Adaptation of section 221(3) of the Criminal Procedure Act.

175 Adaptation of s 15(3) of the Electronic Communications and Transactions Act.

## ISSUE 9: THE ADMISSIBILITY OF BUSINESS RECORDS

*Extract from Issue Paper 27 p 46*

**9. ADMISSIBILITY OF BUSINESS RECORDS – QUESTIONS FOR COMMENT**

- Should section 15(4) be reviewed to give a restrictive interpretation to the words "in the ordinary course of business"?
- Should section 15(4) as applicable in criminal cases be reviewed in view of the current law on reverse onus provisions?

4.116 On this issue, see generally also the discussion in Chapter 3.

4.117 Although section 15 of the ECT Act is modelled on the UNCITRAL Model Law on Electronic Commerce, section 15(4) of the ECT Act is a departure from the Model Law. Prof Hofman has argued that section 15 "goes against the functional equivalence that should apply between data messages and written documents."[176] Hofman questions the constitutionality of section 15(4) and highlighted six main difficulties, which primarily relate to the over-broad scope of exceptions accommodated by section 15(4). These are reproduced on p 46 of Issue Paper 27.

4.118 The LSSA suggests that a review of section 15(4) is not necessary, and submits that a restrictive interpretation should not be given to the words "in the ordinary course of business". The LSSA argues that "A restrictive interpretation could only hamper economic activities in the field of electronic commerce."[177] As far as criminal proceedings are concerned, the LSSA does not suggest a review of section 15(4) and points out that –

> The onus to prove the admissibility and also the authenticity of the data message ... is still on the prosecution. It has to prove beyond a reasonable doubt for instance that the data message is authentic, and the information contained therein is correct. The presumption merely enables the prosecution to speed up proceedings. ... The presumption ... merely places an onus to rebut on the accused.[178]

4.119 The NPA expresses a similar view to that of the LSSA. In a similar vein and arguing on behalf of the banking industry, Adv Eiselen states that section 15(4) should not be given a restrictive interpretation or be reviewed. He suggests that "the exceptions for business records in the ECT Act, the CPA and the CPEA should [be] aligned, streamlined in a manner that is consistent and in line with the more liberal provisions in section 15(4) o[f] the CPA [ECT Act?]."

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176 Hofman in Mason (n 43) 15.26.

177 LSSA submission, p.18–19.

178 LSSA submission, p.P 19–20.

4.120 By contrast, in its submission to the SALRC the SAPS expresses the view that section 15(4) "should be reviewed as the section unjustly shifts the onus of proof onto the accused."[179]

4.121. Similarly, Legal Aid argues as follows: "[S]ections 15(1)-(3) on their own are adequate to deal with the admissibility or inadmissibility of data messages. Section 15(4) does not add anything and may well in any event be unconstitutional at least in criminal matters as it creates a reverse onus in our view."

4.122. In line with the principle of functional equivalence, the SALRC recommends repealing section 15(4) and proposes legislative amendments that will provide for the admissibility of business records, whether in electronic format or otherwise. In particular, the SALRC proposes that the admissibility of business records, regardless of the origin of the statement contained in the record, be regulated as follows:

**Admissibility of business records in legal proceedings**

4.1 In any proceedings in which direct evidence of a fact would be admissible, any statement, whether made by a person or wholly or partially by a machine, device or technical process,[180] in the ordinary course of business and contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact.

4.2 In the absence of a witness or witnesses to produce and give testimony regarding the admissibility of the document produced in terms of this section –

(i) such document must be accompanied by a certificate to the effect that the document forms part of the records of a business or public authority signed by an officer of the business or public authority to which the records belong.

For this purpose-

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear an electronic signature or a facsimile of his signature.[181]

(ii) the party intending to produce the document must give notice in terms of section 6.

4.3 Nothing in this section shall render admissible as evidence in any legal proceedings a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding.[182]

4.4 The court may, having regard to the circumstances of the case, require additional evidence, whether oral or in writing, including an affidavit, in respect of a document produced in terms of this section, or may direct that all or any of the provisions of this

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179 SAPS submission, p. 4.

180 Adaptation of section 146 / 147 Australia Evidence Act 1995 and NZ section 136 which says "machine, device or technical process (for example scanning)."

181 Adaptation of section 9 of the UK Civil Evidence Act.

182 Adaptation of section 30(10)(i) Canada Evidence Act, but see also section 34(3) of the Civil Proceedings Evidence Act.

section do not apply in relation to a particular document or record made in the ordinary course of business.[183]

4.123. The proposed section 4.2(i)(a) may go some way in addressing the concern that such a certificate might be challengeable in terms of the hearsay rule. More generally, the SALRC invites comment on whether or not reform is necessary to provide clarity on the status – as hearsay or otherwise – of certificates or affidavits which confirm the status of a business record.

4.124. *Issue 9: The SALRC is concerned about a possible preference to electronic evidence afforded by section 15(4) and suggests greater alignment with existing statutory provisions facilitating the admissibility of documentary evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or through a proposed repeal of existing provisions and the introduction of one statute to regulate documentary evidence or hearsay and documentary evidence (see in particular clause 4 of Annexure A). Further, the SALRC invites submissions on the status of certificates confirming business records as hearsay or otherwise.*

[183] Adaptation of section 9(5) of the UK Civil Evidence Act.

## ISSUE 10: A PRESUMPTION OF REGULARITY

*Extract from Issue Paper 27 p 47*

**10. PRESUMPTIONS – QUESTIONS FOR COMMENT**

- The presumption of regularity expressed in the maxim *Omnia praesumuntur rite esse acta* is described by Stephen Brown LJ in *Castle v Cross* [1984] 1 WLR 1372 (QBD) as "in the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time."
    - Should the law of evidence prescribe a presumption of regularity in relation to mechanical devices (involving automated operations such as speedometers and breath testing devices)?

4.125. On this issue, see generally also the discussion in Chapter 3 of this paper, especially with regard to the reliability of computers.

4.126. The LSSA states that "[S]uch a presumption should be included in the law of evidence [and] ... Such a presumption would be a factual presumption and will not affect the onus of proof."[184] The LSSA also points out that "[T]o expect the prosecution to prove the workings or functioning of a computer, especially in circumstances where such function is not challenged by the accused, would place an unnecessary and time consuming burden on the prosecution."[185]

4.127. By contrast, Legal Aid submits that such a presumption in criminal cases "[W]ould have the effect of placing at the very least an evidential burden on an accused person who would normally not have the resources to meaningfully rebut as it would involve the leading of expert evidence."[186] Legal Aid are thus of the view that "the presumption of regularity should not be of application."

4.128. The NPA also expresses caution in this regard, arguing that "[I]t would be prudent to lay a sufficient factual basis for reliability and then to apply this ... presumption ... to prove that the evidence in the instant case is reliable."[187]

4.129. Mark Heyink similarly cautions against the inclusion of a presumption of regularity, pointing out the dangers of assuming that all devices perform correctly. Heyink argues against a shift in the onus away from the party who relies on the device.

4.130. In his letter to the SALRC, Stephen Mason points out his concerns – which he has published widely – about adopting the presumption that a computer is working

184 LSSA submission, p. 21.
185 LSSA submission, p. 21.
186 Legal Aid submission, p. 16.
187 NPA submission, p. 27.

correctly. Mason argues that the presumption fails to take into account the complex nature of electronic evidence.

4.131. In light of the concerns raised, and despite noting the presumption of integrity that appears in both Canadian law and in the draft Electronic Evidence Model Law (see Article 7 of Annexure D), the SALRC proposes rather to introduce (in clause 6.4) a presumption in civil proceedings only, if and when, upon receiving notice of an intention to produce documentary evidence, no objection is raised by the party against whom such evidence is intended to be produced. The presumption is that "the nature, origin, and contents of the document are as shown on [the document's] face" and places an evidential burden on the other party to show evidence to the contrary. Clause 6(4) proposed that:

> 6.4 In any civil proceedings, where the notice in terms of subsection (1) relates to documentary evidence, and no party objects to the notice in terms of subsection (1), or if the court dismisses an objection on the ground that no useful purpose would be served by requiring the party concerned to call a witness to produce the documents, –
> (a) the document, if otherwise admissible, may be admitted in evidence; and
> (b) it will be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.[188]

4.132. Presumptions in relation to technology are a matter which a standing committee or working group might from time to time consider, and provide advice on to the SALRC. The SALRC proposes the establishment of such a working group. The working group or standing committee should consider the technological presumptions in light of the ongoing development, globally, of standards and best practice.

*4.133. Issue 10: the SALRC provisionally recommends that the law of evidence should not prescribe a presumption of regularity in relation to mechanical devices but should include, in civil proceedings, a limited presumption (placing an evidential burden on the other party who did not object on notice). The SALRC further recommends that the question of presumptions receive the attention of a standing committee / working group established in terms of the recommendations of this Discussion Paper.*

[188] Adaptation of section 130, New Zealand Evidence Act 2006.

## ISSUE 11: THE GENERAL ADEQUACY OF THE ECT ACT IN TERMS OF COMPUTER GENERATED EVIDENCE

*Extract from Issue Paper 27 p 48*

**11. IN GENERAL – QUESTIONS FOR COMMENT**

- Are the provisions in the ECT Act sufficient to regulate the admissibility of computer generated evidence?

4.134. See generally also the discussion in Chapter 3.

4.135. In his comments on Issue Paper 27, Adv Eiselen, on behalf of Nedbank, concludes as follows:

> We submit that in general the provisions of the ECT Act have proven to be effective and sufficient to regulate the admissibility of electronic evidence. We submit that there may be a need for some smaller amendments to the Act, especially in regard to the section 13 dealing with electronic signatures. In regard to admissibility we submit that the liberal approach taken in the ECT Act is preferred to a more restrictive approach which tends to exclude relevant evidence wholesale and mechanically because the reliability or authenticity may be low.[189]

For the various reasons set out in this Discussion Paper, the SAPS in its submission to the SALRC concludes that "The provisions in ECT Act are not sufficient to regulate the admissibility of electronic evidence in court proceedings."[190]

4.136. Infology raises a concern with section 15(1)(b), which deals with the production of a data message that is not in its original form "if it is the best evidence that the person adducing it could reasonably be expected to obtain". Infology points out that a printed copy of a data message "would lack the embedded information [metadata] normally retained in an electronic copy that evidences when, and by whom, the document was originally created, whether it was revised or edited, to whom it may have been sent and when it was received." Infology express the view that "In the absence of credible metadata, the admissibility and evidential weight of any electronic document is not capable of proper assessment."[191]

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189 Eieselen submission, p. 14.

190 SAPS submission, p. 4.

191 Infology submission, p. 7.

4.137. In this regard, Infology refers to legislation and rules regulating the discovery and production of evidence, in particular Rule 35 of the Uniform Rules applicable to the High Court. Rule 35 regulates such discovery and inspection, but does not expressly address the manner or format in which discovered documents must be produced, except at the hearing of a matter where the "original" may be required by a party to the proceedings. The production of an "original" data message is further circumscribed by section 14 of the ECT Act, read with section 4(2)(a).[192] Infology argues that there are "significant shortcomings in the procedural rules regulating the discovery and production of electronically stored evidence." After discussing amendments to procedural law in the United States and the United Kingdom (discussed below), Infology suggests amendments to the procedural rules of court as well as the ECT Act.

4.138. In the UK Civil Procedure Rules,[193] the definition of "document" was amended in 2005 to specifically include "additional information stored and associated with electronic documents known as metadata." In addition, parties are required to co-operate at an early stage to determine the format in which electronic documents must be provided on inspection. Where there is "difficulty or disagreement, the matter should be referred to a Judge for directions at the earliest practical date." Infology also points out the relevant amendment in the United States, Rule 34 of the Federal Rules of Procedure, which indicates that a party requiring the production of electronically stored information "may specify the form or forms in which electronically stored information is to be produced."[194]

4.139. Infology therefore recommends the following amendments to Rules 35(1), 35(2)(a) and 35(6) of the High Court Rules, and to the equivalent rules of the Magistrates[195] and other courts:

1. substituting the phrase *"documents and tape recordings"* with the phrase *"documents and tape recordings including electronically stored information and related metadata"*;

2. inserting the following words at the end of section 35(2)(a): "*...and the manner in which such documents and tape recordings are retained including, in the case of electronically stored information, the electronic file formats in which they are retained*"; and

3. inserting the words "*in a format reasonably specified by such party or, if not so specified, in the form in which they are ordinarily retained or another reasonably usable form*" after the words *"make available for inspection"* in Rule 35(6).

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[192] Section 4(1)(a) provides that the Act should not be construed as requiring any person to generate, communicate, produce, process, send, receive, record, retain, store or display any information, document or signature by or in electronic form.

[193] UK Civil Procedure Rules, 2005, Vol. 1, *Practice Direction – Disclosure and Inspection* Part 31 2a. 1-5 (Supplement to Part 31) cited by Infology (2010) 8.

[194] Rule 34(b)(1)(C)

[195] The Magistrates' Courts Rules seem better geared already toward electronic evidence (see n 55).

4.140. In Issue Paper 27, we concluded that the "unique nature and characteristics of electronic evidence ... [require that] ... attention will have to be given to demonstrating its reliability, both at the investigative stage and at trial proceedings".[196] We also suggested that "[good] practice and procedure guidance (national and international standards) on technical and organisational criteria such as hash values, metadata, [and] long-term preservation strategies due to technological obsolescen[ce], are likely to inform the court in assessing the work of evidence before it."[197]

4.141. This sentiment seems to echo the comments submitted to the SALRC by Infology, which argues that "[T]he way that South Africans produce, communicate and store information do not necessarily require significant changes to the legal *principles* impacting on litigation but that the *practice* of litigation in South Africa must evolve to remain suited to the modern information environment."[198] Infology therefore motivates for amendments to the rules of procedure that would enable early case assessment of the integrity and potential admissibility of electronic evidence.

4.142. The SAPS, in its submission on Issue Paper 27, also indicates the need for "new measures ... to ensure that collection of evidence remain effective."[199] This is a matter which a technical body established in terms of the SALRC proposals might consider.[200]

4.143. In addition, Mason asserts that if the authenticity of a document is disputed, this should be done early in the proceedings to allow the party who produces such evidence "the opportunity of gathering evidence to prove the veracity of the document."[201]

4.144. *On issue 11: the SALRC recommends that the Rules Board for Courts of Law (the Rules Board), perhaps assisted by a standing committee / working group with technical expertise consider amendments to the rules of court to provide for the discovery and inspection of electronic documents. The SALRC notes also that the Rules of Court may require amendment in the event of statutory reform that requires notice prior to trial to be given in respect of an intention to rely on hearsay or documentary evidence, as well as notice of any objections to the use thereof to enable parties to prepare for trial.*

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196 At para [2.20).

197 Ibid.

198 Infology submission, p 2.

199 SAPS submission, p 2.

200 The position in other jurisdictions might be informative: consider for example the United States Office of Legal Education Manual *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009) available at *http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.*

201 Mason (n 87) 190.

# CHAPTER 5

## POSSIBLE AREAS OF REFORM AND RECOMMENDATIONS

This chapter contains a restatement of the proposals and observations that are set out in italics in the preceding chapters of this Discussion Paper.

Insofar as the law of evidence on Relevance and Hearsay (the principles canvassed in Discussion Paper 113) is concerned, the SALRC invites comments on the following proposals:

0.1. *In the absence of consensus on the issue, the SALRC provisionally recommends that the current approach to relevance remain unchanged; and invites submissions in this regard. [1.13]*

0.2. *The SALRC provisionally proposes the introduction of a statutory requirement for notice to be given of an intention to produce hearsay evidence or automated electronic evidence (see clause 6 of the proposed Bill in Annexure A.) The SALRC invites feedback on the need for clarification of the distinction between real and documentary evidence. [1.22]*

In light of the discussion in Chapter 3, the SALRC invites further comments on the following proposals, observations and recommendations:

0.3. *The SALRC proposes to clarify the status of a printout as a form of electronic evidence, through statutory reform such as the amendment or introduction of definitions along the lines of "copy", "document" and "electronic document" (see clause 1 of the proposed Bill in Annexure A). The SALRC invites submissions in this regard. [3.13]*

0.4. *Promoting functional equivalence between paper-based and electronic business records (by aligning the various statutory provisions for the admissibility of documents) is a matter which the SALRC provisionally proposes to address through statutory reform and invites submissions in this regard. [3.18]*

0.5. *Ensuring parity in the law relating to the admissibility of documents produced in civil and in criminal proceedings is a matter which the SALRC proposes should be addressed through statutory reform. [3.25]*

0.6. *Providing clarity on the definition of "document" and parity between the definition in civil and in criminal proceedings, and parity between paper-based and other forms of documents, are matters which the SALRC proposes to address through statutory reform (see clause 1 of Annexure A). [3.29]*

0.7. *Providing clarity on the admissibility of automated electronic documents and the rules for the admissibility of such documents is a matter which the SALRC provisionally proposes should be addressed through statutory reform (see in particular draft clauses 5 and 6, Annexure A). [3.38]*

0.8. *Providing clarity on the "best evidence" rule in the context of documentary evidence is a matter which the SALRC proposes to address through statutory reform, and invites further comment on the preferred approach in this regard. [3.47]*

*0.9. Providing clarity on the method of authenticating documentary evidence, and ensuring reliability, specifically in the context of computer generated evidence is a matter which the SALRC proposes should be addressed through statutory reform (see clause 7 of Annexure A) and invites submissions in this regard. [3.63].*

<u>As far as the issues set out in Issue Paper 27 are concerned, the SALRC proposes, and invites further comments on, the following:</u>

0.10. *Issue 1: there seems to be, by and large, consensus on the need for regular review of the provisions of the ECT Act. The SALRC invites further suggestions on the appropriate technical forum (which must be in a position to facilitate the engagement of multiple stakeholders) for such review. [4.11]*

*5.12 Issue 2: although the ECT Act is largely adequate in facilitating the admissibility of electronic evidence, there is apparent inconsistency between the approach in criminal and civil proceedings arising from the provisions of the CPA and the CPEA. There is support for a less fragmented approach to the admissibility of documentary evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or, as the SALRC recommends, through a proposed repeal of these provisions and the introduction of a single statute to regulate documentary evidence or hearsay and documentary evidence, as set out in Annexure A. [4.22]*

*5.13 Issue 3: there are two aspects: (a) concern has been expressed about the inclusion of "voice, where the voice is used in an automated transaction" which does not appear in the UNCITRAL Model Law definition of a data message; the SALRC proposes either deleting this from the definition or amending the expression to "voice, where the voice was recorded in electronic form". The second aspect (b) is the question of further clarity on the "original" and "copy" of a document. The SALRC proposes a wide definition of copy; however, given the existing provisions of the ECT Act regarding an "original" and the "best evidence rule', no further reform is proposed at this stage. The SALRC invites feedback on the desirability of abolishing or further clarifying the "best evidence" rule; section 15(1)(b) may still result in the rejection of evidence if it is not in its original form. [4.40]*

*5.14 Issue 4: concerns about extending the scope of the application of the ECT Act to the transactions in Schedule 2 revolve around issues of authentication and reliability. The SALRC proposes that an appropriate body (such as the standing committee proposed in terms of Issue 1) consider amendments to the ECT Act, taking into account the views expressed by the national departments that have control over the legislation listed in Schedule 1. [4.45]*

*5.15 Issue 5: the SALRC recommends that a technical and expert standing committee or body (such as that established as recommended in issue 1) be tasked to consider (as*

*a priority matter) the current regulatory regime that recognises a distinction between electronic signatures and advanced electronic signatures, and in particular to make recommendations in respect of the accreditation of foreign signatures. It is furthermore recommended that such body deliberate on the issue of biometric technology and provide guidance in this regard. [4.65]*

5.16 *Issue 6: in line with the principle of technological neutrality, the SALRC supports the view that hearsay evidence made by a person in an electronic document should be treated in the same way as hearsay evidence in a paper-based document. On the interaction of the ECT Act with the CPEA, the CPA and the LEAA, the SALRC supports a less fragmented approach to the admissibility of documentary evidence and therefore proposes reform: either through amending and supplementing existing provisions or, preferably, through a proposed repeal of these provisions and the introduction of one statute to regulate hearsay evidence and certain types of documentary evidence. The SALRC also invites comment on whether its assessment of the provisions for the admissibility of documentary evidence is sufficiently broad in scope, or whether (for example) the SALRC should also consider the provisions relating to official and public documents, foreign documents, affidavits and so on. Furthermore, the SALRC supports the development of a handbook on obtaining and producing electronic evidence, which would provide clarity to practitioners and judicial officers regarding the legal position and would also offer advice on technical aspects of producing electronic evidence in court. The SALRC proposes that the Department of Justice should take a leading role in developing such a handbook, and invites feedback in this regard. [4.89]*

5.17 *Issue 7: the SALRC supports the maintenance of a distinction between automated data messages and data messages "made by a person" and proposes statutory reform (see Annexure A) to guide the production and proof of both types of evidence in court. In addition, the SALRC supports the development of a handbook on obtaining and producing electronic evidence that will provide clarity, to practitioners and judicial officers, on the legal position and advice on technical aspects of producing electronic evidence in court to avoid unnecessary confusion. [4.104]*

5.18 *Issue 8: the SALRC supports the clearer articulation of both statutory and non-statutory (in the form of a handbook/manual) guidelines for the authentication (and weight) of documentary evidence, in particular electronic evidence, and in addition proposes that the court be expressly vested with the discretion to exclude unfairly prejudicial evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or through a proposed repeal of existing provisions and the introduction of a unitary statute containing provisions such as those articulated in clauses 7 and 8 of Annexure A, and invites further comment in this regard. [4.115]*

5.19 *Issue 9: The SALRC is concerned about a possible preference to electronic evidence afforded by section 15(4) and suggests greater alignment with existing statutory provisions facilitating the admissibility of documentary evidence. The SALRC proposes reform: either through amending and supplementing existing provisions or through a proposed repeal of existing provisions and the introduction of one statute to regulate documentary evidence or hearsay and documentary evidence (see in particular clause 4 of Annexure A). Further, the SALRC invites submissions on the status of certificates confirming business records as hearsay or otherwise. [4.123]*

5.20 *Issue 10: the SALRC provisional recommends that the law of evidence should not prescribe a presumption of regularity in relation to mechanical devices but should include, in civil proceedings, a limited presumption (placing an evidential burden on the other party who did not object on notice). The SALRC further recommends that the question of presumptions receive the attention of a standing committee / working group established in terms of the recommendations of this Discussion Paper. [4.133]*

5.21 *Issue 11: the SALRC recommends that the Rules Board for Courts of Law (the Rules Board), perhaps assisted by a standing committee/working group with technical expertise be requested to consider amendments to the rules of court to provide for the discovery and inspection of electronic documents. The SALRC notes also that the Rules of Court may require amendment in the event of statutory reform that requires notice prior to trial to be given in respect of an intention to rely on hearsay or documentary evidence, as well as notice of any objections to the use thereof to enable parties to prepare for trial. [4.144]*

Additional matters on which the SALRC would welcome feedback include the following:

5.22 *The SALRC has not expressly raised the following issues in this Discussion Paper, but would welcome feedback in this regard:*

(a) *Whether or not there is a need also to reconsider and possibly reform the law of evidence provisions relating to the admissibility and proof of public and official documents in light of modern technological advances;*
(b) *Whether or not bankers' books need additional regulation if the provisions relating to bankers' books in the CPA and CPEA are repealed and are implicitly included in a "business records" clause;*
(c) *Whether or not any regulatory reform should expressly state the position on the common law (what remains of common law), in particular on the position of electronic records as "real evidence"; and also whether other items of real evidence should be expressly listed in any regulatory reform.*

Finally, and in light of the issues and questions raised above for consideration, the SALRC invites feedback on the choice of options for reform:

Option 1: Retention of the current regulatory landscape, with possible minor reform

This approach would result in the retention of the current regulatory framework, possibly with the introduction of some minor statutory reform (for example, the substitution of current

definitions in the CPA and the CPEA). The advantage of such an approach is that fewer changes would be required – which would be minimally disruptive to the legal profession, and changes would likely be introduced more quickly than if more substantive regulatory reform is undertaken. However, this conservative approach would mean that multiple laws would still apply; the disadvantages of this scenario include the likelihood that confusion would continue to exist around certain laws and principles, including the following: hearsay as it applies to automated electronic evidence (and the seeming hesitance to treat electronic evidence as real evidence); the authentication of electronic evidence; the admissibility of business records in terms of section 15(4) of the ECT Act; and the interaction between, and applicability of, the various laws which regulate exceptions to the hearsay rule.

Option 2: Introduction of Electronic Evidence specific legislation or guidelines

This option would also largely retain the current regulatory framework, with possible minor statutory reform. However, it would introduce additional legislation[202] that would be more detailed than the current section 15 of the ECT Act, specifically to address the admissibility of electronic evidence (with a focus on issues such as authentication and reliability). The content of such legislation may be informed by the provisions of the Draft Model Law on Electronic Evidence,[203] commissioned and published in 2002 by the Commonwealth Secretariat to assist Commonwealth jurisdictions grappling with legislative reform in the context of electronic evidence, and endorsed by the Commonwealth Law Ministers as a Commonwealth model of good practice. The Model Law is attached as Annexure D.

Option 2 would provide greater clarity than Option 1 on the admissibility and production of electronic evidence. Option 2 would not, however, resolve the potential confusion and possible deviation from the functional equivalence approach that results from the multiple sources of law which would still apply to hearsay and documentary evidence.

Option 3: Reform of the current regulatory landscape

The third option involves a more extensive overhaul of the regulatory framework for hearsay and certain types of documentary evidence. This approach envisages the repeal of existing provisions on the admissibility of hearsay evidence and certain types of documentary evidence (primarily business records, including banking records) in terms of the CPA, CPEA, LEAA and the ECT Act. Option 3 would require the introduction of a single statute to regulate the admissibility of such evidence in terms of the hearsay rule, authentication, and the best evidence rule. Option 3 would require the enactment of legislation along the lines of that set out in Annexure A.

Option 3 would achieve the objectives of both Options 1 and 2, and would also reduce the opportunity for confusion that arises from the current multiple sources of law regulating the admissibility of such evidence. For this reason, the SALRC provisionally recommends Option 3. This option does, however, present a fairly extensive departure from the status quo and would therefore require further reflection and feedback from the various stakeholders.

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202 Or possibly Regulations in terms of the ECT Act.

203 Draft Model Law on Electronic Evidence (2002) available at *http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BE9B3DEBD-1E36-4551-BE75-B941D6931D0F%7D_E-evidence.pdf* (accessed 31 July 2012).

In Annexure A the SALRC provides draft clauses that are largely reflective of practice in several Commonwealth countries (see in particular the Model Law in Annexure D). These clauses may be assessed and modified for use under any of the three options presented above. The SALRC invites submissions in this regard.

**ANNEXURE A:**

***DRAFT* LAW OF EVIDENCE BILL**
REPUBLIC OF SOUTH AFRICA

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# LAW OF EVIDENCE

# BILL

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*(As introduced)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B B2014]**

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REPUBLIEK VAN SUID-AFRIKA

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# WETSONTWERP OP BEWYSREG

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*(Soos ingedien)*

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(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

**[W B2014]**

**GENERAL EXPLANATORY NOTE:**

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

# BILL

**To regulate the admissibility of evidence so as to provide for the admissibility of hearsay evidence, and for the admissibility and proof of business records and evidence produced by processes, machines and other devices in all legal proceedings; and to provide for matters connected therewith.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

Preamble[204]

## 1. Definitions

**"Business"** includes any activity regularly carried on, whether for profit or not, by any organ of state or any organisation or person;

**"Business records"** includes those records created or received in the ordinary course of business by any organ of state or any trade, profession or other organisation or person;

**"Computer system"** means a device or a group of interconnected or related devices, which perform functions pursuant to computer programs;

**"Copy"** in relation to a document means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly, and regardless of how many removes from the original;

**"Document"** means anything in which information of any description is recorded, and includes a copy;

**"Electronic document"** means data that are recorded or stored on any medium in or by a computer system or other similar device, and includes a display, printout or other output of that data;

**"Electronic documents system"** includes a computer system or other similar device by or in which data are recorded or stored, and any procedures related to such recording or storage or electronic document;

**"Electronic signature"** means electronic representations of information attached to, incorporated in, or logically associated with other information and which are intended by the user to serve as a signature;

**"Hearsay evidence"** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of a person other than the person giving such evidence;

[204] The Act is intended to clarify, consolidate and align the rules for the admissibility of business records and evidence produced by processes, machines and other devices, while leaving intact existing legislation on (for example) the admissibility of official and public documents.

**"Records"** means anything in which information of any description is recorded;

**"Officer"** includes any person occupying a responsible position in relation to the relevant activities of a business or public authority, or in relation to its records;

**"Public authority"** includes any public or statutory undertaking, or any government department;

**"Statement"** means any representation of fact or opinion, however made;

**"writing"** means information contained in a document.

**2. Application**

2.1 This Act applies to all criminal and civil proceedings or the legal proceedings before any tribunal in which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.

2.2 The provisions of this Act do not affect any rule of law relating to the admissibility of evidence, except the rules relating to hearsay, authentication and best evidence in relation to certain types of documentary evidence.

**3. Admissibility of hearsay evidence**

3.1 Subject to the provisions of this Act or any other law, hearsay evidence, whether oral or in writing, shall not be admissible as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or
(b) the person upon whose credibility the probative value of such evidence depends, testifies at such proceedings; or
(c) the court, having regard to -
    (i) the nature of the proceedings;
    (ii) the nature of the evidence;
    (iii) the purpose for which the evidence is tendered;
    (iv) the probative value of the evidence;
    (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
    (vi) any prejudice to a party which the admission of such evidence might entail; and
    (vii) any other factor which should in the opinion of the court be taken into account,

    is of the opinion that such evidence should be admitted in the interests of justice.

3.2 Hearsay evidence admitted in terms of subsection 3.1(b) may be left out of account if the person upon whose credibility the probative value depends subsequently does not testify at the proceedings, unless the hearsay evidence is admitted in terms of paragraph (a) or (c) of subsection 3.1.

3.3 No hearsay evidence shall be admitted in evidence under this section unless the party intending to produce the hearsay evidence has given notice in terms of section 6.

**4. Admissibility of business records in legal proceedings**

4.1 In any proceedings in which direct evidence of a fact would be admissible, any statement made in the ordinary course of business, whether by a person or wholly or partially by a machine, device or technical process; and contained in a document and tending to establish that fact, shall, upon production of the document, be admissible as evidence of that fact.

4.2 In the absence of a witness or witnesses to produce and give testimony regarding the admissibility of the document produced in terms of this section –

(i) such document must be accompanied by a certificate to the effect that the document forms part of the records of a business or public authority, signed by an officer of the business or public authority to which the records belong.

For this purpose –

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him or her; and
(b) a certificate shall be treated as signed by a person if it purports to bear an electronic signature or a facsimile of his or her signature.

(ii) the party intending to produce the document as evidence must give notice in terms of section 6.

4.3 Nothing in this section shall render admissible as evidence in any legal proceedings a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding.

4.4 The court may, having regard to the circumstances of the case, require additional evidence, whether oral or in writing, including an affidavit in respect of a document produced in terms of this section; or may direct that all or any of the provisions of this section do not apply in relation to a particular document or record made in the ordinary course of business.

**5. Evidence produced by processes, machines and other devices**

5.1 Subject to the provisions of this Act and any other law, evidence that is produced wholly or partly by a machine, device, or technical process –

(i) is admissible in all legal proceedings; and
(ii) may be produced as an electronic document.

5.2 A statement which has been generated wholly by a machine, device or technical process does not constitute hearsay evidence.

5.3 Subject to the provisions of this Act or unless the Court orders otherwise, the admissibility of evidence produced in terms of this section should be established by the oral testimony of a witness or witnesses.

**6. Notice of intention to produce hearsay evidence and documentary evidence**

6.1 Notice of an intention to produce evidence in terms of subsections 3, 4 or 5 must be given –

(a) in writing to every other party to the proceeding, and must include the contents of the statement and (where applicable) the name of the maker of the statement; and if a document is to be produced, the document including any related metadata must be attached to the notice; and

(b) in sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.

6.2 A party to the proceeding who is given notice in terms of subsection (1) must, if that party objects to the admission of the statement as evidence, give notice of objection as soon as practicable to the party proposing to offer the statement.

6.3 Subsections (1) and (2) may be excluded by agreement of the parties, or by waiver of the party to whom notice is required to be given; or the presiding officer may dispense with the requirement to give notice under subsections (1) or (2) –

(a) if having regard to the nature and contents of the hearsay statement, no party is substantially prejudiced by the failure to give notice under subsection (1); or

(b) if giving notice was not reasonably practicable in the circumstances; or

(c) in the interests of justice.

6.4 In any civil proceedings, where the notice in terms of subsection (1) relates to documentary evidence and no party objects to the notice in terms of subsection (1), or if the court dismisses an objection on the ground that no useful purpose would be served by requiring the party concerned to call a witness to produce the documents, –

(a) the document, if otherwise admissible, may be admitted in evidence; and

(b) it will be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.

6.5 Provision may be made by the Rules of Court specifying the manner in which the duties imposed by this section are to be complied with, including the time allowed for such compliance.

6.6 A failure to comply with this section or any Rules of Court provided in terms of subsection (5) does not affect the admissibility of the evidence, but may be taken into account by the court –

(a) in considering the exercise of its powers over the proceedings and in respect of costs; and

(b) as a matter that might adversely affect the weight to be given to the evidence.

**7. Authenticity and integrity of documentary evidence**

7.1 Subject to the provisions of this Act, a person seeking to admit documentary evidence in terms of the Act has the burden of proving the authenticity and integrity of the document.

7.2 For the purposes of determining whether an electronic document is admissible in terms of this section, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored; having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document, and the nature and purpose of the electronic document.

7.3 The integrity of an electronic documents system may be established by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly; or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds for doubting the integrity of the electronic documents system.

7.4 Evidence in terms of subsections (2) and (3) may be produced orally or by affidavit.

7.5 A party may cross-examine a deponent of an affidavit introduced into evidence in terms of subsection (4) if the deponent is an adverse party or is under the control of an adverse party; or with leave of the court.

7.6 In any civil proceeding where a party is permitted under the Rules of Court relating to discovery to inspect a document –

(a) the requirement to prove the authenticity and integrity of the document may be dispensed with in circumstances described in those Rules; and

(b) the procedure to be adopted by a party seeking to require proof of the authenticity and integrity of the document is that set out in those Rules; and

(c) the production of secondary evidence to prove the authenticity and integrity of the document may be permitted in circumstances described in those Rules.

7.7 The signature, execution, or attestation of a document, whether electronic or otherwise, that is required by law to be attested may be proved by any satisfactory means, provided that an attesting witness need not be called to prove that the document was signed, executed or attested as it purports to have been signed, executed, or attested.

**8 Weight to be attached to documentary evidence**

In estimating the weight to be attached to documentary evidence admitted in terms of this Act, regard shall be had to all the circumstances from which any inference may reasonably

be drawn as to the accuracy or otherwise of the information contained in the document, and in particular –

(d) where the information was directly provided by a person, regard shall be had to whether or not the person who supplied the information did so contemporaneously with the occurrence or existence of the facts stated; and to whether or not that person or any person concerned with making or keeping the record containing the statement had any incentive to conceal or misrepresent the facts.

(e) where the information is contained in an electronic document, regard shall be had to –
    (i) the reliability of the manner in which the data message was generated, stored or communicated;
    (ii) the reliability of the manner in which the integrity of the data message was maintained;
    (iii) the manner in which its originator was identified; and
    (iv) any other relevant factor.

**9. Discretion to exclude or limit the use of documentary evidence**

The court may refuse to admit documentary evidence or may limit the use to be made of such evidence; if a particular use of the evidence might be unfairly prejudicial to a party or might be misleading or confusing.

**10. Provisional admission of evidence**

If a question arises concerning the admissibility of any evidence, the Judge may admit the evidence in question, subject to further evidence being offered later on to establish its admissibility.

**11. Repeal of sections of statutes**

Repeals: section 3 of the Law of Evidence Amendment Act
Repeals: section 15(4) of the ECT Act [whole of section 15 and incorporate it in an Amendment Bill?]
Repeals: sections 27 – 38 of the Civil Proceedings Evidence Act
Repeals: sections 221, 222, and 236 of the Criminal Procedure Act

## ANNEXURE B: AMENDMENTS TO SECTION 15 OF THE ECT ACT PROPOSED BY THE NPA

15. (1) In any legal proceedings, the rules of evidence must not be applied to deny the admissibility of a data message as evidence –

(a) on the mere grounds that it is constituted by a data message; or

(b) on the grounds that it is not in its original form, if it is the best evidence that the person adducing it could reasonably be expected to obtain; and in addition taking into account that a printout from electronic equipment or the information reflected on an electronic screen or projected by a data projector is considered an "original" for purposes of the law of evidence.

(2) Information in the form of a data message must be admitted if relevant and authentic.

(3) Information in the form of a data message must be given due evidential weight.

(4) In assessing the evidential weight of a data message, regard must be had to

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(5) A printout from electronic equipment or the information reflected on an electronic screen is an original for purposes of the law of evidence.

(6) Notwithstanding the admissibility of a data message under subsections (1), (2) and (3), a data message made by a person in the ordinary course of business, or a copy or printout of or extract from such data message, shall be admissible against any person, on the mere production of the data message or copy or printout or extract; in any civil, criminal, administrative or disciplinary proceedings under any law or under the rules of a self-regulatory organization or under any other law or the common law, in any proceedings where direct oral evidence of a fact would be admissible as *prima facie* proof of that fact; provided that –

the data message or copy or printout or extract thereof is certified under oath to be correct, by an officer in the service of such person.

# ANNEXURE C: EXTRACTS FROM CPEA, CPA, LEAA and the ECT Act

Extract from:

## CIVIL PROCEEDINGS EVIDENCE ACT 25 OF 1965

### *PART V*
### *DOCUMENTARY EVIDENCE (SPECIAL PROVISIONS AS TO BANKERS' BOOKS) (ss 27-32)*

**27 Definition of 'bank'**
In this Part **'bank'** means a 'banking institution' as defined in the Banks Act, 1965, and includes the Land and Agricultural Bank of South Africa, and a building society.

**28 Entries in bankers' books admissible in certain cases**
The entries in ledgers, day-books, cash-books and other account books of any bank, shall be admissible as *prima facie* evidence of the matters, transactions and accounts therein recorded, on proof being given by affidavit in writing of a director, manager or officer of such bank, or by other evidence, that such ledgers, day-books, cash-books or other account books are or have been the ordinary books of such bank, and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank.

**29 Examined copies of entries in bankers' books admissible**
Copies of all entries in ledgers, day-books, cash-books or other account books used by any bank, may be proved as evidence of such entries without production of the originals, by means of the affidavit of a person who has examined the same, stating the fact of the examination and that the copies sought to be put in evidence are correct.

**30 Notice of intention to adduce evidence relating to entries in bankers' books**
(1) No ledger, day-book, cash-book or other account book of any bank, and no copies of entries therein contained, shall be adduced or received in evidence under this Part, unless at least ten days' notice in writing, or such other notice as may be ordered by the person presiding at the proceedings concerned, containing a copy of the entries proposed to be adduced in evidence, has been given by the party proposing to adduce the same in evidence to the other party.
(2) On the application of any party who has received such notice, the person presiding at the proceedings may order that such party be at liberty to inspect and take copies of any entry in the ledgers, day-books, cash-books or other account books of the bank concerned, relating to the matters in question, and such order may be made in the discretion of the person so presiding, either with or without summoning before him such bank or the other party, and shall be intimated to such bank at least three days before such copies are required.
(3) On the application of any party who has received such notice, the person presiding at the proceedings may order that the entries and copies mentioned in the notice shall not be admissible as evidence of the matters, transactions and accounts recorded in such ledgers, day-books, cash-books or other account books.

**31 Bank not compelled to produce books unless ordered to do so**
No bank shall be compelled to produce its ledgers, day-books, cash-books or other account books in any civil proceedings unless the person presiding at such proceedings orders that they shall be so produced.

**32 This Part not to apply to proceedings to which bank is a party**

Nothing in this Part contained shall apply to any civil proceedings to which any bank whose ledgers, day-books, cash-books or other account books are required to be produced in evidence, is a party.

## *PART VI*
## *DOCUMENTARY EVIDENCE (MISCELLANEOUS PROVISIONS) (ss 33-38)*

**33 Definitions**

In this Part, unless the context otherwise indicates-

'document' includes any book, map, plan, drawing or photograph;

'statement' includes any representation of fact, whether made in words or otherwise.

**34 Admissibility of documentary evidence as to facts in issue**

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-

*(a)* the person who made the statement either-

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

*(b)* the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings-

*(a)* notwithstanding that the person who made the statement is available but is not called as a witness;

*(b)* notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.

**35 Weight to be attached to evidence admissible under this Part**

(1) In estimating the weight, if any, to be attached to a statement admissible as evidence under this Part, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the person who made the statement had any incentive to conceal or misrepresent facts.

(2) A statement admissible as evidence under this Part shall not, for the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, be treated as corroboration of evidence given by the person who made the statement.

**36 Proof of instrument to validity of which attestation is necessary**

In any civil proceedings an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive: Provided that nothing in this section contained shall apply to the proof of wills or other testamentary writings.

**37 Presumptions as to documents twenty years old**

There shall in any civil proceedings, in the case of a document proved or purporting to be not less than twenty years old, be made any presumption which on the fifteenth day of March, 1962, would have been made in the case of a document of like character proved or which purported to be not less than thirty years old.

**38 Savings**

Nothing in this Part shall-

*(a)* prejudice the admissibility of any evidence which would apart from the provisions of this Part be admissible; or

*(b)* render admissible documentary evidence as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Part had not been enacted.

## Extract from
## CRIMINAL PROCEDURE ACT 51 OF 1977

**221 Admissibility of certain trade or business records**

(1) In criminal proceedings in which direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, upon production of the document, be admissible as evidence of that fact if-

*(a)* the document is or forms part of a record relating to any trade or business and has been compiled in the course of that trade or business, from information supplied, directly or indirectly, by persons who have or may reasonably be supposed to have personal knowledge of the matters dealt with in the information they supply; and

*(b)* the person who supplied the information recorded in the statement in question is dead or is outside the Republic or is unfit by reason of his physical or mental condition to attend as a witness or cannot with reasonable diligence be identified or found or cannot reasonably be expected, having regard to the time which has elapsed since he supplied the information as well as all the circumstances, to have any recollection of the matters dealt with in the information he supplied.

(2) For the purpose of deciding whether or not a statement is admissible as evidence under this section, the court may draw any reasonable inference from the form or content of the document in which the statement is contained, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a registered medical practitioner.

(3) In estimating the weight to be attached to a statement admissible as evidence under this section, regard shall be had to all the circumstances from which any inference may reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement, did so contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not that person or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) No provision of this section shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this section.

(5) In this section-
**'business'** includes any public transport, public utility or similar undertaking carried on by a local authority, and the activities of the Post Office and the Railways Administration;
**'document'** includes any device by means of which information is recorded or stored; and
**'statement'** includes any representation of fact, whether made in words or otherwise.

**222 Application to criminal proceedings of certain provisions of Civil Proceedings Evidence Act, 1965, relating to documentary evidence**

The provisions of sections 33 to 38 inclusive, of the Civil Proceedings Evidence Act, 1965 (Act 25 of 1965), shall *mutatis mutandis* apply with reference to criminal proceedings.

**236 Proof of entries in accounting records and documentation of banks**

(1) The entries in the accounting records of a bank, and any document which is in the possession of any bank and which refers to the said entries or to any business transaction of the bank, shall, upon the mere production at criminal proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

*(a)* that he is in the service of the bank in question;

*(b)* that such accounting records or document is or has been the ordinary records or document of such bank;

*(c)* that the said entries have been made in the usual and ordinary course of the business of such bank or the said document has been compiled, printed or obtained in the usual and ordinary course of the business of such bank; and

*(d)* that such accounting records or document is in the custody or under the control of such bank,

be *prima facie* proof at such proceedings of the matters, transactions and accounts recorded in such accounting records or document.

(2) Any entry in any accounting record referred to in subsection (1) or any document referred to in subsection (1) may be proved at criminal proceedings upon the mere production at such proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

*(a)* that he is in the service of the bank in question;

*(b)* that he has examined the entry, accounting record or document in question; and

*(c)* that a copy of such entry or document set out in the affidavit or in an annexure thereto is a correct copy of such entry or document.

(3) Any party at the proceedings in question against whom evidence is adduced in terms of this section or against whom it is intended to adduce evidence in terms of this section, may, upon the order of the court before which the proceedings are pending, inspect the original of the document or entry in question and any accounting record in which such entry appears or of which such entry forms part, and such party may make copies of such document or entry, and the court shall, upon the application of the party concerned, adjourn the proceedings for the purpose of such inspection or the making of such copies.

(4) No bank shall be compelled to produce any accounting record referred to in subsection (1) at any criminal proceedings, unless the court concerned orders that any such record be produced.

(5) In this section-

**'document'** includes a recording or transcribed computer printout produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and

**'entry'** includes any notation in the accounting records of a bank by any means whatsoever.

## Extract from
# LAW OF EVIDENCE AMENDMENT ACT 45 OF 1988

**3 Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

*(a)* each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

*(b)* the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

*(c)* the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) *(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.

(4) For the purposes of this section-
**'hearsay evidence'** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
**'party'** means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.

Extract from:

## ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT 25 OF 2002

**13 Signature**

(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.

(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-

(a) a method is used to identify the person and to indicate the person's approval of the information Communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.

(5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that-

(a) it is in the form of a data message; or

(b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.

**14 Original**

(1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if-

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

(2) For the purposes of subsection 1 (a), the integrity must be assessed-

(a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;

(b) in the light of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances.

**15 Admissibility and evidential weight of data messages**

(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings

under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

**16 Retention**

(1) Where a law requires information to be retained, that requirement is met by retaining such information in the form of a data message, if-

(a) the information contained in the data message is accessible so as to be usable for subsequent reference;

(b) the data message is in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) the origin and destination of that data message and the date and time it was sent or received can be determined.

(2) The obligation to retain information as contemplated in subsection (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.

**17 Production of document or information**

(1) Subject to section 28, where a law requires a person to produce a document or information, that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, and if-

(a) considering all the relevant circumstances at the time that the data message was sent, the method of generating the electronic form of that document provided a reliable means of assuring the maintenance of the integrity of the information contained in that document; and

(b) at the time the data message was sent, it was reasonable to expect that the information contained therein would be readily accessible so as to be usable for subsequent reference.

(2) For the purposes of subsection (1), the integrity of the information contained in a document is maintained if the information has remained complete and unaltered, except for-

(a) the addition of any endorsement; or

(b) any immaterial change, which arises in the normal course of communication, storage or display.

**18 Notarisation, acknowledgement and certification**

(1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the advanced electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.

(2) Where a law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true reproduction of the document or information.

(3) Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature.

**19 Other requirements**

(1) A requirement in a law for multiple copies of a document to be submitted to a single addressee at the same time, is satisfied by the submission of a single data message that is capable of being reproduced by that addressee.

(2) An expression in a law, whether used as a noun or verb, including the terms 'document', 'record', 'file', 'submit', 'lodge', 'deliver', 'issue', 'publish', 'write in', 'print' or words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided for in this Act.

(3) Where a seal is required by law to be affixed to a document and such law does not prescribe the method or form by which such document may be sealed by electronic means, that requirement is met if the document indicates that it is required to be under seal and it includes the advanced electronic signature of the person by whom it is required to be sealed.

(4) Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender.

## ANNEXURE D

# DRAFT MODEL LAW ON ELECTRONIC EVIDENCE

**ANNEX**

## ELECTRONIC EVIDENCE MODEL LAW

AN ACT to make provision for the legal recognition of electronic records and to facilitate the admission of such records into evidence in legal proceedings.

BE IT ENACTED by the Parliament *[name of legislature]* of ..... *[name of country]* as follows:

Short Title

1. This Act may be cited as the Electronic Evidence Act, 2002

Interpretation

2. In this Act,

"data" means representations, in any form, of information or concepts;

"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, print out or other output of that data.

"electronic records system" includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and preservation of electronic records.

"legal proceeding" means a civil, criminal or administrative proceeding in a court or before a tribunal, board or commission.

General Admissibility

3. Nothing in the rules of evidence shall apply to deny the admissibility of an electronic record in evidence on the sole ground that it is an electronic record.

4. (1) This Act does not modify any common law or statutory rule relating to the admissibility or records, except the rules relating to authentication and best evidence.

Scope of Act

(2) A court may have regard to evidence adduced under this Act in applying any common law or statutory rule relating to the admissibility of records.

Authentication

5. The person seeking to introduce an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Application of Best Evidence Rule

6. (1) In any legal proceeding, subject to subsection (b), where the best evidence rule is applicable in respect of electronic record, the rule is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or stored.

(2) In any legal proceeding, where an electronic record in the form of printout has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, the printout is the record for the purposes of the best evidence rule.

Presumption of Integrity

7. In the absence of evidence to the contrary, the integrity of the electronic records system in which an electronic record is recorded or stored is presumed in any legal proceeding:

(a) where evidence is adduced that supports a finding that at all material times the computer system or other similar device was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the integrity of the record was not affected by such circumstances, and there are no other reasonable grounds to doubt the integrity of the record.

(b) where it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it; or

(c) where it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

Standards

8. For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved, having regard to the type of business or endeavour that used, recorded or preserved the electronic record and the nature and purpose of the electronic record.

Proof by Affidavit

9. The matters referred to in sections 6, 7, and 8 may be established by an affidavit given to the best of the deponent's knowledge or belief.

Cross Examination

10. (I) A deponent of an affidavit referred to in section 9 that has been introduced in evidence may be cross-examined as of right by a party to the proceedings who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced.

(2) Any party to the proceedings may, with leave of the court, cross-examine a person referred to in subsection 7(c).