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MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING ITS INVESTIGATION INTO THE REVIEW OF THE LAW OF EVIDENCE (PROJECT 126)

- **ISSUE PAPER ON THE SCOPE OF THE REVIEW OF THE LAW OF EVIDENCE**
- **DISCUSSION PAPER ON THE REVIEW OF THE LAW OF EVIDENCE (HEARSAY AND RELEVANCY)**

The South African Law Reform Commission has completed two publications for general information and comment in its investigation into the Review of the Law of Evidence.

ISSUE PAPER

The Commission is giving consideration to the review of the rules of evidence with a view to simplifying this area of the law and, as a result of technological developments, to align it to new developments. It is very difficult to determine whether reform is necessary without some criteria against which to measure both the *status quo* and the proposed reform. For this reason the Commission has resolved to publish an Issue Paper as the first step in the investigation. The purpose of the Issue Paper is to facilitate a focused debate by identifying some of the issues that need to be considered for reform and to allow all role players and practitioners the opportunity to identify issues in theory and in practice for investigation and review.

The Issue Paper contains a preliminary survey of the current legal position which is intended to form the basis of the Commission's further investigation and consultation. Because of the wide scope of the project it has not been possible to deal with all relevant topics in detail. In most instances rules of considerable importance are dealt with in a rather cursory fashion (e.g. the rules regulating documentary evidence), because realistically they can only be properly addressed in a dedicated Discussion Paper after eliciting submissions from practitioners. This Issue Paper will therefore be followed by the publication of Discussion Papers where the issues identified for review and reform will be discussed in detail and preliminary recommendations for reform considered.

The Issue Paper raises a number of issues and formulates a number of questions on specific areas for reform to stimulate debate. These include:

Formulating principles for reform

What is the scope of the law of evidence? Should the focus of evidence law be exclusively on the trial or should other stages of the process be considered as well? Should the exclusionary rules historically directed at controlling juries in the exercise of their fact finding function be re-placed by judicial discretion? To what extent should relevance and weight be regulated? To what extent should public and social interests be reflected in evidence law? Should there be different rules for different courts and tribunals? What should be the primary purpose of the rules of evidence in the trial process? In particular to what extent should evidence law facilitate all or any of the policies relating to rationality and truth-finding, party freedom, procedural fairness, public interest, efficiency and finality? What areas of law need to be reformed?

The impact of lay assessors

Do lay assessors need to be protected from unduly prejudicial evidence to a greater extent than judges? Does that fact that presiding officers frequently have sight of the prohibited evidence prior to its exclusion substantially undermine the function of the exclusionary rules? Should the exclusionary rules that are historically directed at controlling juries in the exercise of their fact finding function be re-placed by judicial discretion?

Adversarial nature of civil and criminal proceedings

A thorough review of the law of evidence would also require consideration of the adversarial/inquisitorial balance in the different tribunals that administer justice. Should different procedural approaches require different application of the rules of evidence?

The efficacy of the rules of evidence in civil and criminal trials

Do the rules facilitate the fact finding function of the court? Does public policy require the exclusion of probative and relevant evidence in particular circumstances? Do the rules give rise to uncertainty? Can the rules be easily understood? What are the particular time and cost implications of any particular rule?

Codification of the rules of evidence

Is a single comprehensive code desirable? What polices or principles should an evidence code express? How detailed should codified rules be? Should a code include instructions as to interpretation that would differentiate it from other Acts?

Other areas for reform

Other areas in which comment and proposals for reform are invited include the burden of proof and the duty to adduce evidence; the standard of proof; the cautionary rules; presumptions; formal admissions; competence to testify and compellability; private and state privilege; the presentation of evidence by witnesses; real evidence; documentary evidence; computer evidence; previous statements ; hostile witnesses; similar fact evidence; opinion evidence; expert evidence and informal admissions and confessions.

DISCUSSION PAPER

The Discussion Paper on Hearsay Evidence and Relevancy has been identified by the Commission as the first part of an incremental approach to deal with all the areas for possible reform.

HEARSAY EVIDENCE

There are a number of competing arguments and consequentially a number of approaches that may be taken in attempting to rationalise the application of the hearsay rule. The Commission puts forward a number of options for reform of the hearsay rule and considers the arguments in favour and against these options. The Commission invites comments and views on the following options:

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

The hearsay rule, as formulated in Act 45 of 1988, was a product of much research directed at eliminating the inflexibility and complexities of the common law system. Given that our procedural systems in both criminal and civil proceedings remain at their core adversarial, there would seem to be good reason to retain the safeguards embedded in an exclusionary rule and a strong argument can be made that it is constitutionally necessary to protect the right to challenge evidence.

Alternatively, section 3 of Act 45 of 1988 makes it unnecessary to formulate separate rules for civil and criminal trials as one of the criteria the court is required to take into account is the nature of the proceedings. However, there could be advantages to introduce a notice requirement in both civil and criminal trials. The giving of notice by a party of his or her intention to rely on hearsay evidence should be a factor taken into

account by the court in determining the prejudicial effect of the hearsay evidence. A notice requirement would eliminate the disadvantage of “surprise” and should therefore count as a factor in favour of the admission of the hearsay evidence.

In the absence of an Evidence Code, the Commission proposes that the Criminal Procedure Act, 1977, as well as the Rules of the High Court and Magistrate’s Court be amended to provide for notice requirements in the following terms:

- A notice of a proposal to offer a hearsay statement in trial proceeding must be given in writing to every other party to the proceeding and include the contents of the statement and the name of the maker of the statement.
- The notice must be lodged in sufficient time before the hearing to provide all other parties to the proceeding with a fair opportunity to prepare to meet the statement.
- 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.
- The presiding officer may dispense with the requirement to give notice.

Option 2: Free admission

In terms of this approach 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.

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

Free admission of hearsay coupled with decision rules pertaining to weight would eliminate the inefficiencies arising from determining the admissibility of hearsay (as well as doubt in respect of admissibility), but would require presiding officers to articulate the basis on which they have accorded a particular weight to an item of hearsay evidence. This would provide a safeguard against potential misuse of the hearsay evidence.

Option 4: Apply different rules in civil and criminal trials

It is proposed that the primary approach to hearsay in civil trials should be an inclusionary one subject to safeguards while the admission of hearsay in criminal

trials should be subject to provisions substantially similar to those contained in section 3 of the Law of Evidence Amendment Act, 1988.

Legislation could provide that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. Safeguards in relation to hearsay evidence in civil proceedings could provide that a party proposing to adduce hearsay evidence in civil proceedings must give to the other party or parties to the proceedings such notice of that fact, and on request, such particulars relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling the parties to deal with any matters arising from it being hearsay. Provision may be made by rules of court specifying classes of proceedings or evidence in relation to which the above rule does not apply, and as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

Legislation on the admissibility of hearsay evidence in criminal proceedings could provide that, subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal proceedings, unless –

- each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- the person upon whose credibility the probative value of such evidence depends, him/herself testifies at such proceedings; or
- the court, having regard to the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the admission of such evidence might entail, and 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.

Hearsay evidence may be provisionally admitted if the court is informed that the person upon whose credibility the probative value of such evidence depends, will him/herself testify in such proceedings.

RELEVANCE

It is widely accepted that a system of evidence that is directed at promoting the rational ascertainment of facts is going to adopt the general principle that relevant

evidence is admissible. In terms of the general rule evidence that is irrelevant or lacks sufficient relevancy is inadmissible. However, because the law of evidence is subject to a number of policy considerations which may require the exclusion of relevant evidence, the general principle that relevant evidence is admissible is qualified.

In South Africa the common law rule on relevance has been codified in civil and criminal law (section 210 of the Criminal Procedure Act 51 of 1977 and section 2 of the Civil Proceedings Evidence Act 25 of 1965). However, neither Act codifies a definition of relevance and the anomaly with this "rule" of relevance, that underpins the law of evidence, is that there is no test for determining relevance. The greatest difficulty with the relevance rule is therefore the fact that ultimately its 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.

The Commission proposes that legislative guidelines be introduced to determine relevance. It proposes that section 210 of the Criminal Procedure Act 1977 and section 2 of the Civil Proceedings Evidence Act 1965 be repealed and that legislation provide that:

- Relevant evidence is evidence that, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding.
- Evidence is not irrelevant because it relates only to the credibility of a witness; or the admissibility of other evidence; or a failure to adduce evidence.
- Evidence that is relevant is admissible and evidence that is not relevant is not admissible.
- A court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party; or cause or result in undue waste of time.
- 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.
- A court may provisionally admit evidence subject to evidence being later offered which establishes its admissibility.

The Issue Paper and Discussion Paper will be made available on the Internet at the following site: http://www.doj.gov.za/salrc/index.htm and is also available from Mr JD Kabini

(Tel 012 3929580). **The closing date for comment in respect of both publications is 30 June 2008.**

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ISSUED BY THE SECRETARY
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PRETORIA

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