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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 ELECTRONIC EVIDENCE IN CRIMINAL AND CIVIL
PROCEEDINGS: ADMISSIBILITY AND RELATED ISSUES**

The Commission has approved the publication of an Issue Paper on electronic evidence for public comment. The Issue Paper has attempted to draw attention to issues for law reform with regard to matters relating to admissibility of electronic evidence in criminal and civil proceedings. In relation to the longer term objectives of the project, this preliminary research paper has set out to identify shortcomings in the evidential provisions of the Electronic Communications and Transactions (ECT) Act 25 of 2002 and to define a possible scope for further investigation.

The Issue Paper, which reflects information gathered up to the end of January 2010, contains a preliminary survey of the current legal position which is intended to form the basis of the Commission's further investigation and consultation on the issue of the use of electronic evidence in criminal and civil proceedings. As a result, this paper does not contain clearly defined recommendations for law reform. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. Submissions on this Issue Paper coupled with further intensive research will form the basis for a Discussion Paper which is to follow. The Discussion Paper will contain the Commission's preliminary recommendation for law reform, comparative studies and draft legislation.

The Issue Paper raises a number of issues concerning the ECT Act 25 of 2002 and formulates a number of questions on specific areas for reform to stimulate debate. Some of these include:

- **Adequacy of ECT Act 25 of 2002**

Are the provisions in the ECT Act 25 of 2002 sufficient to regulate the admissibility of electronic evidence in court proceedings? Given that the ECT Act 25 of 2002, including the approach of evidence provisions in section 15, is largely based on an electronic commerce Model Law (that only applies to commercial activities), 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 Act?

- **Reviewing Current Definitions in the ECT Act 25 of 2002**

Should the current definition of “data message” in the Act be revised? Should the ECT Act 25 of 2002 or other legislation relevant to admissibility of electronic evidence in criminal proceedings include a definition of “electronic”, “copy” and “original”?

- **Expanding the Sphere of Application of the ECT Act 25 of 2002**

In view of technological developments, should the ECT Act 25 of 2002 be amended to extend its sphere of application to the laws mentioned in Column A of Schedule 1 (namely, the Wills Act 1953; Alienation of Land Act 1981; Bill of Exchange Act 1964; and Stamp Duties Act 1968), specifically including the excluded transactions mentioned in Schedule 2 (namely, 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)?

- **Electronic Signatures**

Should the distinction between “advanced electronic signature” and “electronic signature” as used in the ordinary sense be abolished in the ECT Act 25 of 2002?

- **Biometric Technology**

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

- **Admissibility and Evidential Weight of Data Messages**

Should section 15 of the ECT Act 25 of 2002 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 45 of 1988?

- **Section 15 of the ECT Act 25 of 2002 and Other Statutory Exceptions**

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 25 of 1965) of the Criminal Procedure Act; and Part VI (documentary evidence) of the Civil Proceedings Evidence Act 25 of 1965?

- **Authenticity**

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 in view 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 than for other forms of tangible evidence?

- **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?

- **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 breathe testing devices)?

The project leader for the investigation is Professor PJ Schwikkard, University of Cape Town. The Commission’s researcher is Ms Nerisha Singh.

The Issue Paper will be made available on the Commission’s website at the following address: <http://salawreform.justice.gov.za/ipapers.htm>. Hard copies of the Issue Paper are available free of charge from the Commission’s offices (contact Mr JD Kabini on telephone 012 3929580).

The closing date for comment on this Issue Paper is **30 June 2010**. Written comments and representations are invited and can be addressed to:

The Secretary

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Respondents are not restricted to the issues and questions raised in this Issue Paper and are welcome to draw other relevant matters to the Commission's attention.

THE CONTACT PERSON FOR ENQUIRIES IN RESPECT OF THE MEDIA STATEMENT AND ISSUE PAPER IS THE RESEARCHER, MS NERISHA SINGH:

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DATE: 16 MARCH 2010

**ISSUED BY THE SECRETARY, SOUTH AFRICAN LAW REFORM COMMISSION,
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