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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) DISCUSSION PAPER ON THE REVIEW OF THE LAW OF EVIDENCE  
DEALING WITH HEARSAY, RELEVANCY) THE ADMISSIBILITY OF ELECTRONIC  
EVIDENCE IN CIVIL AND CRIMINAL PROCEEDINGS**

1. The South African Law Reform Commission has completed its Discussion Paper on the review of the law of evidence and published it for general information and comment. The review of the law of evidence was included for research in the Commission's 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. The reasons for this were, mainly, that the rules of evidence were contained in various Acts and that a large part of the law of evidence is not codified, but is contained in case law built up over a long period. The Commission decided to take an incremental and cautious approach to the codification of the law of evidence and not to recommend codification. Instead it decided to ascertain through research which aspects of the law of evidence were unsatisfactory or do not meet current needs and to formulate suggestions for their reform. The Commission came to the conclusion that reform was desirable in respect of a number of issues which included hearsay evidence. This resulted in the passing of the Law of Evidence Amendment Act, 45 of 1988, which regulated hearsay evidence.
2. The Commission's current investigation started off with a preliminary investigation aimed at identifying and analysing the investigations currently on the Commission's programme and the extent to which they deal with a review of the rules of evidence; conducting research on the current legal position with the view to identify shortcomings in the existing rules of evidence relating to both civil and criminal law.
3. Following its preliminary investigation, the publication of two Issue Papers and one Discussion Paper, the Commission concluded that it should consolidate all matters identified for investigation in one Discussion Paper.
4. The discussion paper covers the following aspects and presents a number of options for reform of the law relating to the topics identified for reform:

## Hearsay evidence

The application of the hearsay evidence rule is one of the core concerns which are relevant to the admissibility of electronic evidence. The hearsay rule has increasingly come under scrutiny in the past two decades. The Commission's Discussion Paper categorises four possible approaches to the reform of hearsay evidence. The four possible approaches are outlined below. The Commission invites comments on the following options for reform:

- Option 1: Retain the status quo (with or without the introduction of a notice requirement)
- 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.
- Option 3: Free admission coupled with decision rules pertaining to weight  
This option 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."
- 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 (section 3) Law of Evidence Amendment Act would apply.

## The admissibility of electronic evidence

5. The Discussion Paper identifies a number of issues for comment and certain concerns that may arise out of the formulation of section 15 and related provisions of the Electronic Communications and Transactions Act and requests public comment on a number of issues including the following questions:

- Issue 1: Should the Electronic Communications and Transactions Act be reviewed on a regular basis to take account of advances in technology?
- Issue 2: Are the provisions in the Electronic Communications and Transactions 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?  
For consistency and clarity, should the Electronic Communications and Transactions 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 Electronic Communications and Transaction Act be amended to extend its sphere of application to the other relevant legislation, ie the Wills Act, the Alienation of Land Act, the Bills of Exchange Act and the Stamp Duties Act) and include the excluded transactions mentioned.
  - Issue 5: Signatures: Should the distinction between 'advanced electronic signature' and 'electronic signature' be abolished in the Electronic Communications and Transaction Act. Should physiological features of biometrics (including fingerprint, iris recognition, hand and palm geometry) be included in the Electronic Communications and Transactions Act as a form of assent and electronic identity?
  - Issue 6: The question of hearsay and admissibility in terms of section 15 of the Electronic Communications and Transactions Act and the interaction of section 15 with other statutory exceptions. Should section 15 of the Electronic Communications and Transactions 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 s 15(3)? Should a 'data message' constitute hearsay within the meaning of section 3 of the Law of Evidence Amendment Act?
  - Issue 7: Should the Electronic Communications and Transactions 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 s 15(4) be reviewed to give a restrictive interpretation to the words 'in the ordinary course of business? Should s 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 breathe testing devices)?
  - Issue 11: In general, are the provisions in the Electronic Communications and Transactions Act sufficient to regulate the admissibility of computer generated evidence?
6. In considering the above and related issues in the 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:

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 some minor statutory reform (for example the substitution of current definitions in the Criminal Procedure Act and the Civil Proceedings and Evidence Act). The advantages of such an approach is that fewer changes would be required, which would be less disruptive to the legal profession, and changes would most likely be introduced more rapidly. However, this conservative approach means that multiple laws would still apply and the disadvantages of this include the likelihood that confusion would continue to exist around certain laws and principles including: 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 s 15(4) of the Electronic Communications and Transactions 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) but in addition would introduce legislation more detailed than section 15 of the Electronic Communications and Transactions Act, specifically to address the admissibility (with a focus on issues such as authentication and reliability) of electronic evidence. The content of such legislation may be informed by the provisions of the Draft Model Law on Electronic Evidence, 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. Option 2 would provide greater clarity on the admissibility, and production, of electronic evidence than option 1. Option 2 would however not resolve potential confusion (and possible deviation from the functional equivalence approach) caused by the multiple sources of law that 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 Criminal Procedure Act, Civil Proceedings and Evidence Act, Law of Evidence Amendment Act and the Electronic Communications and Transactions Act and the introduction of a single statute that would regulate the admissibility (in terms of the hearsay rule, authentication, and the best evidence rule) of this evidence. Option 3 would require the enactment of legislation along the lines of that set out in the Discussion Paper. Option 3 would achieve the objectives of both options 1 and 2 and would also reduce opportunities for confusion that arise

from the current multiple sources of law which regulate the admissibility of such evidence. For this reason, the SALRC provisionally recommends Option 3.

9. The Discussion Paper will be made available on the Internet at the following site: <http://www.doj.gov.za/salrc/index.htm>. The closing date for comment is 31 March 2015.

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**ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, PRETORIA**

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