



[South Africa publishes issue paper on electronic evidence in criminal and civil proceedings](#)

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The South Africa Law Reform Commission has approved the publication of its Issue Paper on “Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues” for general information and comment. The 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. 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. The closing date for comment is 30 June.

A recent survey of South African litigation practitioners revealed that less than 30% of documents produced during discovery or at trial are produced in electronic form, despite the fact that more than 90% of litigious documents are created electronically. In its 2009 year-end review of the world-wide electronic discovery software market, Gartner mentioned the growing need and demand of e-discovery software in South Africa. Many South African law commentators have discussed that current litigation practice falls short of best practice. All of these developments explain the issuance of the issue paper.

The Issue Paper raises a number of issues and formulates a number of questions on specific areas for reform to stimulate debate. The Commission provided us the following summary:

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 Issue Paper has been made available on the Commission’s website and you can access a full copy [by clicking here](#).

Gregory P. Bufithis is the founder and chairman of The Posse List and its sister sites The Electronic Discovery Reading Room (<http://www.ediscoveryreadingroom.com>) and The Posse Ranch (www.theposseranch.com). He is also founder and chairman of Project Counsel (www.projectcounsel.com).