Final Report 1 – October 2012

South Australian Law Reform Institute

Modernisation of South Australian evidence law to deal with new technologies

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

Postal address: SA Law Reform Institute
Adelaide Law School
University of Adelaide
Australia 5005

Telephone: (08) 8313 5582

Email: SALRI@adelaide.edu.au

Webpage: www.law.adelaide.edu.au/reform/

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Participants

South Australian Law Reform Institute

Director Professor John Williams

Deputy Director Helen Wighton

Advisory Board

Professor John Williams (Chair)
The Hon. David Bleby QC
Terry Evans
The Hon. Justice Tom Gray
Ingrid Haythorpe
Professor Rosemary Owens
Jonathan Wells QC

Administrative Officer Christine Smith

SALRI Evidence and Technology Reference Group

Nigel Wilson (Chair), Senior Lecturer, Adelaide Law School and Barrister, Bar Chambers
Andrew Ligertwood, Emeritus Fellow, Adelaide Law School
The Hon. Justice Kevin Nicholson, Supreme Court of South Australia
Her Honour Judge Geraldine Davison, District Court of South Australia
Liesl Chapman SC, Barrister, Jeffcott Chambers
Sandi McDonald SC, Deputy Director, Office of the Director of Public Prosecutions (SA)
David Caruso, Lecturer, Adelaide Law School and Special Counsel, Fisher Jeffries

Abbreviations

ALRC - Australian Law Reform Commission

ALRC Evidence (Interim) Report - Australian Law Reform Commission, *Evidence (Interim)*, Report No 26, (1985) Volume 2

ALRC Uniform Evidence Law Report - Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2006), published jointly with the New South Wales Law Reform Commission, Report No 112, (2005) and the Victorian Law Reform Commission, Final Report, (2006)

Non-UEA jurisdictions - Australian jurisdictions that have not adopted *Evidence Act 1995* (Cth) (namely, Queensland, South Australia and Western Australia)

Non-UEA models - Provisions from Evidence Acts in Australia that do not follow those in the *Evidence Act 1995* (Cth)

Part 6, Part 6A - *Evidence Act 1929* (SA), Pt 6: Telegraphic messages, ss 53-59; *Evidence Act 1929* (SA), Pt 6A: Computer evidence, ss 59A-59C

The Act - *Evidence Act 1929* (SA)

UEA - Uniform Evidence Acts – Evidence Acts of the Commonwealth (applying in the ACT), New South Wales, Norfolk Island, Northern Territory, Tasmania and Victoria.

UEA jurisdictions - The jurisdictions in which *Evidence Act 1995* (Cth) applies or which have enacted legislation based on *Evidence Act 1995* (Cth)

About this report

This Final Report arose from a request by the South Australian Attorney-General (the Hon. John Rau M.P.) for the Institute to report on whether and to what extent South Australian evidence law should be modernised to deal with new technologies. Consultation began with the release of an Issues Paper *(Computer says no)* in May 2012, and was followed by a detailed consideration of the responses given in consultation and the preparation of this Final Report.

The Issues Paper reviewed existing provisions in the *Evidence Act 1929* (SA) about telegraphic messages (in Part 6) and computer evidence (in Part 6A) and considered whether the Act should also provide for the admissibility of electronic communications. It examined a range of reform options, including Uniform Evidence Act models.

The Issues Paper did not deal with the impact of technology on the parts of the *Evidence Act 1929* (SA) that provide for suppressing publication of evidence or for using technology to improve the manner in which evidence is taken from vulnerable witnesses. Neither topic was included in this reference.[1]

The people and organisations who responded to the Issues Paper were those who routinely adduce or assess evidence in court or are closely linked to that process.

Submissions were received from:

The Hon. Chris Kourakis, Chief Justice of South Australia;[2]
Elizabeth Bolton, the Chief Magistrate of South Australia;[3]
The Office of the Director of Public Prosecutions (SA);[4]
The Legal Services Commission of South Australia;[5]
The Law Society of South Australia;[6]
The South Australian Bar Association; and[7]
Forensic Science SA.[8]

The Issues Paper and Final Report were prepared by Helen Wighton, Deputy Director of the Institute, with support from the Institute's Evidence and Technology Reference Group (and in particular Nigel Wilson for his contribution on global developments in information and communication technologies as they affect the laws of evidence, and Andrew Ligertwood for his editorial support).

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[1] The impact of technology on suppression laws is the subject of ongoing discussions at a national level through the Standing Council on Law and Justice. The use of technology in taking evidence from vulnerable witnesses was the subject of recent amendments to the *Evidence Act 1929* (SA) that apply to proceedings commenced on and after 4 October, 2009.
[2] Letter from the Chief Justice of South Australia to SA Law Reform Institute, 19 September, 2012.
[3] Letter from Elizabeth Bolton, Chief Magistrate to SA Law Reform Institute, 12 July, 2102.
[4] Email from Sandi McDonald, Managing Prosecutor, and Elizabeth Griffith, Senior Prosecutor, Office of the Director of Public Prosecutions (SA) to the SA Law Reform Institute, 23 August, 2012.
[5] Letter from Gabrielle Canny, Acting Director, Legal Services Commission of South Australia to SA Law Reform Institute, 14 August, 2012
[6] Letter from Ralph Bönig, President, Law Society of SA to SA Law Reform Institute, 2 August, 2012.
[7] Letter from Mark Livesey QC, President, Bar Association of South Australia to SA Law Reform Institute, 25 July, 2012.
[8] Email from Kim Williams, on behalf of Professor Ross Vining, Forensic Science (SA) to SA Law Reform Institute, 31 July, 2012.

Recommendations

Recommendation 1

The *Evidence Act 1929* (SA) should be amended so that it contains provisions for the proof and admission of information that is generated, stored, reproduced or communicated by a technological process or device that reflect modern technologies and can accommodate future, as yet unknown, technologies. Specific recommendations for amendment are set out in Recommendations 2–7.

Recommendation 2

Part 6 of the *Evidence Act 1929* (SA) should be deleted and replaced with a new Part providing for the facilitation of proof and the admissibility of evidence of communications. The new provisions should be modelled on the provisions in the Uniform Evidence Acts that establish a presumptive aid to proof and an exception to the hearsay rule to allow the provenance, destination, addressee and date and time of sending and receipt of a message by an electronic communication to be admissible by adducing a record of the communication. These provisions are *Evidence Act 1995* (Cth), s 71 (*Exception: electronic communications*), s 161 (*Electronic communications*) and s 162 (*Lettergrams and telegrams*).

Recommendation 3

Specifically, the new Part replacing Part 6 of the *Evidence Act 1929* (SA) should:

(1) apply to electronic communications, to be defined by reference to the definition of electronic communications and related definitions in the *Electronic Transactions Act 2000* (SA) (which definition includes lettergrams or telegrams);

(2) apply to the proof and use of electronic communications in both civil and criminal proceedings;

(3) apply to electronic communications regardless of whether their provenance or destination is within or outside Australia;

(4) facilitate the proof of communications by telegram or lettergrams by creating a rebuttable presumption of receipt by the addressee within 24 hours of the delivery of the communication to a post office for transmission as a lettergram or telegram;

(5) facilitate the proof of electronic communications other than telegrams or lettergrams by creating a rebuttable presumption that their sending and making, the identity of their sender or maker, when and where they were sent from or made, and when and where they were received were as it appears from the document;

(6) not permit the presumptive aids to proof described in (4) and (5) to apply when the parties to the proceedings are also parties to a contract which is the subject of the proceedings, and when reliance on the presumption would be inconsistent with the terms of the contract;

(7) create an exception to the hearsay rule for electronic communications (including telegrams or lettergrams) so that the rule does not apply to what is represented in a document recording the electronic communication if this concerns the identity of the person from whom or on whose behalf the communication was sent, or the date on which or the time at which the communication was sent, or the destination of the communication or the identity of the person to whom the communication was addressed.

Recommendation 4

Part 6A of the *Evidence Act 1929* (SA) should be deleted and replaced with new and amended provisions in Part 4 of the Act (*Public Acts and documents*) and with consequential amendments to Part 5 of the Act (*Banking records*), to ensure that these provisions cover evidentiary material produced, recorded, stored or copied using modern technologies. There should not be a separate set of electronically or digitally referenced principles for facilitating the proof of evidence produced electronically and for governing how that evidence may be used in court.

Recommendation 5

The provisions replacing Part 6A of the *Evidence Act 1929* (SA) should aim for consistency with relevant provisions in the Uniform Evidence Acts to the greatest extent possible within the structure of the Act. These provisions are *Evidence Act 1995* (Cth), Part 2.2 (*Documents*): sub-ss 48(1)(c) and (d) (*Proof of contents of documents*); and Part 4.3 (*Facilitation of proof*): section 146 (*Evidence produced by processes, machines and other devices*) and section 147 (*Documents produced by processes, machines and other devices in the course of business*); and Dictionary, Part 1 (definition of *'document'*).

Recommendation 6

The provisions replacing Part 6A of the *Evidence Act 1929* (SA) should

(1) facilitate the proof of evidence generated, recorded or stored not only by traditional computers but also by the internet, modern electronic devices or digital processes;

(2) contemplate the convergence between computer-stored evidence, computer-generated evidence and electronic and digital communications;

(3) recognise that authentication in every case is too heavy a burden for the parties and that it needlessly increases the cost and length of litigation;

(4) provide, instead, for documents or things that are produced, recorded, copied or stored electronically or digitally, a rebuttable evidential presumption that the technological process or device so used did in fact produce the asserted output and did so reliably, so that a party adducing evidence of such documents or things would no longer have to prove the authenticity and reliability of the process or device unless evidence sufficient to raise doubt about it had been adduced;

(5) permit the tendering of a document or business record that has been retrieved, produced or collated by the use of a device when there is no other way that the information that has been stored this way can be used by a court (for example, when there is no hard copy precursor for the electronically-generated material sought to be admitted into evidence);

(6) redefine 'document' and 'business record' to include digital objects.

Part 1 Introduction

1.1. When inviting this report, the Attorney-General of South Australia, the Hon. John Rau M.P. noted several factors that have a bearing on law reform in this area, which are summarised below.

1.2. Other than to provide for the admission into evidence of computer output (contained in Part 6A of the *Evidence Act 1929* (SA)), the *Evidence Act 1929* (SA) has not been updated to reflect modern technological methods of electronic communication.

1.3. Although the *Evidence Act 1929* (SA) permits the admission of proof of modern forms of communication by computer-generated documentation of the date, time and destination of that communication, identity of the sender and, where it is possible to retrieve it, the content of the communication, it does so using language which does not contemplate new technologies and is opaque as to the process of admission.

1.4. The growth in the use of modern forms of technology, for example text messages, has led to an increased use of such evidence in court proceedings in both criminal and civil cases.

1.5. An important aspect of modernising South Australian evidence law to deal with new technologies is to make the law clear and easy to use and, if possible, able to accommodate future changes in technology which society cannot yet contemplate.

1.6. The prospect of modernisation of South Australian law has arisen several times in the past two decades: for example, when the Standing Committee of Attorneys-General (SCAG) proposed uniform evidence laws (enacted in 1995[9]); then in 2005 and 2006 when those laws were reviewed;[10] and later in 2006 when further initiatives aimed at reducing regulatory burdens on business were suggested by the Banks Report.[11]

1.7. The Uniform Evidence Act arose from recommendations by the Australian Law Reform Commission for provisions that reflected best practice in evidence law. The enactment of model provisions in the *Evidence Act* (Cth) in 1995 was followed, over time, by the enactment of substantially matching provisions within the Evidence Acts of New South Wales,[12] Tasmania,[13] Victoria[14] and the Northern Territory.[15] The Commonwealth Act applies in Commonwealth courts and courts in the Australian Capital Territory.

1.8. The achievement of substantial uniformity across the majority of Australian jurisdictions by the adoption of uniform evidence laws has been the most significant development in Australian evidence law over the past two decades.

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[9] *Evidence Act 1995* (Cth).
[10] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2006), published jointly with the New South Wales Law Reform Commission, Report No 112, (2005) and the Victorian Law Reform Commission, Final Report, (2006).
[11] Australian Productivity Commission Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, (*January 2006) Report to the Prime Minister and the Treasurer, Canberra, <http://www.regulationtaskforce.gov.au/finalreport/>.
[12] *Evidence Act 1995* (NSW).
[13] *Evidence Act 2001* (Tas).
[14] *Evidence Act 2008* (Vic).
[15] *Evidence (National Uniform Legislation) Act 2011* (NT).

1.9. South Australia has not adopted the Uniform Evidence Act provisions. As a result, in South Australia, different rules of evidence apply depending upon the court or tribunal in which the case is being heard. There are also some courts and tribunals which are not bound by the rules of evidence and adopt more relaxed procedures for resolving disputes.[16]

1.10. There are two separate statutory sources for the rules of evidence that apply in South Australia: the *Evidence Act 1929* (SA) and the *Evidence Act 1995* (Cth). The *Evidence Act 1929* (SA) applies in proceedings before the Supreme Court of South Australia, the District Court of South Australia, the Magistrates Court of South Australia (except in minor civil actions[17]) and in certain specialist courts, such as the Industrial Relations Court of South Australia, except where the court is exercising federal jurisdiction. The *Evidence Act 1995* (Cth) applies in South Australian proceedings before Commonwealth courts operating in South Australia (the Federal Court of Australia and the Family Court of Australia) and in limited circumstances in proceedings before South Australian courts.[18]

1.11. The *Evidence Act 1995* (Cth) contains provisions which codify the law about the proof and admissibility of computer-generated material and electronic communications. Their enactment coincided with, and was informed by, global developments in information and communication technologies. These developments, principally driven by the rise of the Internet, have spawned business-to-business (B2B) and business–to-consumer (B2C) activity, social networking and other technology-driven activity.

1.12. Uniform technical platforms have underpinned these developments. For example, at the slightly more technical level, these platforms, such as the HTTP (Hypertext Transfer Protocol) and HTML (Hypertext Markup Language) protocols which were developed some 20 years after the Internet, underpin and support those technologies and enable South Australian individuals, businesses, governments and organisations to communicate and conduct business locally, nationally and internationally. These technologies, and their resultant social impacts, form the basis of our digital community and the 'Information Age'.

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[16] Examples include the South Australian Equal Opportunities Tribunal and the South Australian Residential Tenancies Tribunal, and courts and tribunals established by Commonwealth law which operate in South Australia, such as the Administrative Appeals Tribunal.

[17] Section 38 of the *Magistrates Court Act 1991* (SA) provides that in a trial of a minor civil action the Court is not bound by the rules of evidence.

[18] See *Evidence Act 1995* (Cth), s 5.

Part 2 The current law in South Australia

Communication by a technological process

Telegraphic messages

2.1 In the mid 1800s, electric telegraphy was the newest, quickest and cheapest technology for the transmission of messages. It became widely used, globally, by individuals, businesses, governments and the press. South Australia opened its first telegraph line in 1855.

2.2 At that time, written messages were transmitted by hand or post, and the laws of evidence contemplated the original message being received and seen by the addressee. But when a message was sent by electric telegraph, the original written message was given instead to an intermediary (the telegraph operator), who translated it into code and transmitted it by tapping a telegraph key to make and break electrical contact and so produce a sound that the telegraph operator at the destination telegraph station could hear and record. That record would be converted back into code, decoded, and transcribed into text to be delivered to the addressee in the form of a telegram.

2.3 Soon after the Overland Telegraph from Adelaide to Darwin was completed in 1872, Australia was linked telegraphically to the world by a submarine cable from Darwin. This was a strong impetus for colonial governments to devise and legislate a method for proving such messages in court. In 1873, South Australia enacted the *Telegraphic Messages Act.*[19] In 1929, the provisions of the *Telegraphic Messages Act 1873* (SA) were consolidated within the *Evidence Act,*[20] as Part 6. Other States enacted similar consolidations of their versions of the *Telegraphic Messages Act*.

2.4 Broadly, the scheme of Part 6 is this. A party wishing to adduce and prove a message transmitted by electric telegraph within Australia in a trial may give timely notice to the opposing party. A conforming notice triggers rebuttable presumptions that the message was signed and sent by the person purporting to be its sender to the addressee; and that the message was delivered to the addressee, if the original or a verified copy is accompanied by proof of payment of the fee for transmission. Executive, parliamentary, government and judicial authorities,[21] and legal practitioners, may transmit writs, warrants, orders and other documents requiring signature or seal by telegraphic message, if the sending and receipt is done a particular way and is duly witnessed. Copies of messages transmitted this way, if appropriately validated, may be treated as if they were originals. It is an offence to falsely certify that a true copy of a telegraphic message has been sent or to signing a false certificate.

[19] An example of legislation by other colonial governments is the *Telegraphic Messages Act 1871* (Vic).
[20] By the *Evidence (Consolidation) Act 1929* (SA).
[21] For example, including the Governor, Government Ministers, Leaders of the Houses of Parliament, judges, magistrates, Directors of Public Prosecutions, Auditors-General, principal officers of Government (widely defined).

2.5 There are no South Australian cases which have considered or applied Part 6. It specifically applies to any proceedings, in contrast to its parent legislation, which applied only to courts of civil jurisdiction.[22]

2.6 Modern developments in technology have meant that Australia Post ceased its telegram services within Australia in 1993. Western Union closed its international telegram services in 2006. There are private businesses that transmit messages internationally using telegraphic services and electronic message handling systems.[23] In short, the methods of communication that the Act sought to regulate have largely disappeared.

2.7 Although Part 6 describes an outdated telegraphic technology that is no longer in use within Australia, and is written in an outmoded legislative style, it is still possible that a person may need to prove the sending and receipt of a telegraphic message that was once sent through Australian telegraphic services, or that was sent through international telegraphic services.

Electronic communications

2.8 Email and text messaging are now standard methods of personal and business communication. Social networking - through blogs, Twitter, Facebook, MySpace, LinkedIn and the like - allows people to communicate electronically by sending and receiving private and public messages, creating their own personal profiles, writing about what they are doing and posting still and moving images. There is a useful description of the technology as it was in 2006 in the report of the review of the UEA by the Australian, Victorian and New South Wales Law Reform Commissions.[24] For the sake of this discussion, all these methods of communication are called electronic communications.[25]

2.9 The Evidence Act does not refer to electronic communications. The only form of communication it deals with is telegraphic messaging.

Evidence produced by technological processes or devices

2.10 Part 6A (Computer Evidence) is an aid to proof for the admission of evidence of a narrow class of information produced by computer. It requires verification of the data produced by the computer, including certification that the computer is programmed properly and in good working order, that the data entered into it is accurate and the end product or output is correspondingly accurate, amongst other things.

2.11 Part 6A was inserted into the Act in 1972 as a result of a recommendation made by the Law Reform Committee of South Australia in 1969[26] as to the admissibility of computer evidence in civil proceedings. The Law Reform Committee emphasised the

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22 See *Telegraphic Messages Act 1873* (SA), section 1.
23 See, for example, iTelegrams, Telegrams Online, SendaTelegram.
24 ALRC Uniform Evidence Law Report, [6.45 to 6.56].
25 This was the expression proposed by the ALRC Uniform Evidence Law Report in Recommendation 6-2.
26 Law Reform Committee of South Australia, *Evidence Act – New Part V1a Computer Evidence,* Report No 10 (1969).

need for reasonable safeguards 'to prevent accidental and deliberate falsification of the data fed into, or the information produced by, computers'. Part 6A was drafted with this in mind.

2.12 The Law Reform Committee described its proposal for Part 6A as having the same effect as s5 of the *Civil Evidence Act 1968* (UK),[27] with certain additional safeguards. Section 5 was repealed and replaced by the *Civil Evidence Act 1995* (UK), and the relevant provisions in that Act[28] are discussed later in this paper.

2.13 Part 6A originally applied to civil proceedings only, because that was how the corresponding provisions in the *Civil Evidence Act 1968 (UK)* applied. Section 59B of Part 6A was amended in 1979 to extend to criminal proceedings. The explanation given to Parliament was cursory:

> It is felt that, in view of the increasing use of computers for the storage of a wide range of information, computer evidence should now be available for use in criminal proceedings.[29]

2.14 The scheme of Part 6A is that computer-generated data may be admitted into evidence if the court is satisfied that:

- the computer was correctly programmed;
- the data was systematically prepared on the basis of information acceptable in court as evidence;
- no changes were made to the mechanism or process that might adversely affect the accuracy of the output;
- there is no reasonable cause to believe the output was adversely affected by any improper process or procedure or inadequate safeguard;
- the computer was regularly used to produce output of the kind tendered;
- there is no reasonable cause to suspect any departure from the system, any error in preparation of the data or malfunction between input and output that might reasonably be expected to affect the accuracy of the output.[30]

2.15 Part 6A remains the most detailed of all of the provisions enacted in Evidence Acts in Australia before the introduction of the Uniform Evidence Act. The Uniform Evidence Act provisions are less detailed and less rigorous than Part 6A.

2.16 Part 6A is seldom used to admit evidence of computer output. This is in part because its requirements are unduly exacting in a world where almost every piece of business or personal information is produced, recorded and stored electronically. It is

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[27] This Act is mistakenly referred to in the Tenth Report as the *Civil Defence Act 1968* (UK).
[28] *Civil Evidence Act 1995* (UK), s 8 (Proof of statements contained in documents) and the definition of 'document' in s 13.
[29] South Australia, *Parliamentary Debates*, Legislative Council, 14 February 1979, 2614 (B A Chatterton), Second reading report to the *Evidence Act Amendment Bill (No 2) 1979.*
[30] This description is based on that of the Australian Law Reform Commission. See Australian Law Reform Commission, *Evidence (Interim)*, Report No 26, (1985) Volume 2, [94] http://www.alrc.gov.au/report-26 (henceforth abbreviated to 'ALRC Evidence (Interim) Report').

also because this Part of the Act is an aid to proof only[31], and the necessary evidence can be admitted under common law or under the 'business records' and 'banking records' provisions of the Act[32] or using the court's power under the Act to admit any 'apparently genuine document'.[33]

2.17 These provisions (sections 45A and 45B *Evidence Act 1929*) provide for the admission of business records and other apparently genuine documents into evidence, by way of exception to the best evidence rule. However, these provisions rely on definitions of 'document'[34] and 'business record'[35] that cannot be applied to a digital object.

2.18 In addition, section 45C makes an exception to the best evidence rule for documents that reproduce other documents when the reproduction is made—

> by an instantaneous process; or
>
> by a process in which the contents of a document are recorded (by photographic, electronic or other means) and the reproduction is subsequently produced from that record; or
>
> in any other way.[36]

2.19 In 1985 the Australian Law Reform Commission observed,[37] referring to the leading South Australian cases on Part 6A at the time[38]:

> It is ironic that specific computer legislation designed to facilitate proof has been found to be more stringent than the common law.

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[31] *Mehesz v Redman (No 2)* (1980) 26 SASR 244, 254 (per White J) and followed by Robertson J in *R v Koliroff* [2003] SADC 31 [16].

[32] See, for example, Cox J (King CJ and Legoe J concurring) in *Griffiths v Australia and New Zealand Banking Group Limited* (1990) 53 SASR 256, 263:

> 'Sections 59A and 59B [of Part 6A] lay down exacting requirements for the verification of computer print-outs that a party seeks to tender in evidence. For instance, the court must be satisfied that the computer is correctly programmed and that there is no good reason to doubt the accuracy of the computer output. There is nothing like that in s 47, which thus provides a bank with a much simpler and easier way of getting certain computer-derived evidence before a court.'

Judges in other cases where Part 6A has been invoked have expressed similar opinions. See for example, *Mehesz v Redman (No 2)* (1980) 26 SASR 244, *R v Weatherall* (1981) 27 SASR 238, *R v Jarrett* (1994) 73 A Crim R 160 and *R v Koliroff* (2003) 226 LSJS 418.

[33] *Evidence Act 1929* (SA), s 45B.

[34] *Evidence Act 1929* (SA), s 45B:

'document means—
(a) any original document; or
(b) any reproduction of an original document by photographic, photostatic or lithographic or other like process.'

[35] *Evidence Act 1929* (SA), s 45A:

'business record means—
(a) any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business; or
(b) any reproduction of any such record by photographic, photostatic, lithographic or other like process.'

[36] *Evidence Act 1929* (SA), s 45C(3).

[37] ALRC Evidence (Interim) Report, [499].

[38] *Mehesz v Redman (No 2)* (1980) 26 SASR 244 and *R v Weatherall* (1981) 27 SASR 238.

Part 3 Areas for reform

3.1 The Issues Paper identified problems with the way South Australia law treats

- evidence that is generated, recorded, copied or stored by a technological process or device; and
- evidence of messages communicated and recorded by a technological process or device (for example, processes including telegraphic messaging, the internet, social networking, emails, text messaging and the like).

3.2 The Issues Paper suggested a range of reform options, presenting models used in other parts of Australia,[39] including the uniform evidence models[40] and models used in the United Kingdom[41] and New Zealand.[42]

Communication by a technological process

3.3 The Issues Paper considered how the Act treats evidence of information communicated by technological processes. One of these processes (telegraphic messaging) is now obsolete. The other, loosely described here as modern electronic communication, is continually changing.

Telegraphic communications

3.4 Although there has been no public telegraphy service in Australia since 1993, Evidence Acts in Australia all make some provision to obviate the need to prove what happened between the delivery of an original message to the telegraphic office for transmission and the eventual delivery of the transcribed message to the addressee.

3.5 As noted earlier in this Issues Paper, most Australian jurisdictions have codified and modernised their evidence laws by adopting the Uniform Evidence Act (UEA). The non-UEA jurisdictions (South Australia, Western Australia and Queensland) have retained equivalents of the colonial Telegraphic Messages Act provisions[43] in their Evidence Acts. In South Australia, the courts have a power to dispense with formal proof,[44] but this cannot be exercised when the matter is genuinely in dispute.

3.6 In considering whether the Act should continue to provide a way to facilitate proof of the transmission of telegraphic messages, and, if so, how, the Issues Paper examined two models. The first was a relatively modern variant of Part 6, under which the giving of a procedural notice creates a rebuttable presumption that the message was signed and sent by telegraph from the telegraphic office as it appears on the telegram, and that it was sent to the person to whom it was addressed and delivered to that

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39 For example, *Evidence Act 1906* (WA) ss ss 75-77, 79C, 82-88; *Evidence Act 1977* (Qld), ss 75-77, 95.
40 For example, *Evidence Act 1995* (Cth), ss 48, 71, 146, 147, 161, 162.
41 For example, *Civil Evidence Act 1995* (UK), ss 8, 13.
42 For example, *Evidence Act 2006* (NZ), ss 4 and 137 and *Electronic Transactions Act 2002* (NZ), s 5.
43 See *Evidence Act 1929* (SA) Part 6; *Evidence Act 1906* (WA) ss 82 -88; and *Evidence Act 1977* (Qld), ss 75-79.
44 *Evidence Act 1929* (SA), s 59J.

person.[45] The second model was the simpler UEA rebuttable presumption of delivery to the person to whom the telegram was addressed, which does not require procedural notice.[46]

3.7 The efficacy of a model under which a **presumption arises from procedural notice** is questionable in that, to be watertight, it requires proof of delivery of the message to the telegraphic office, receipt by the telegraphic office and proof of payment of any transmission fees.[47] Australia Post is unlikely to have kept pre-1993 individual records of receipt and fee payments for messages sent to it for telegraphic transmission. Even should those records be available, this does not of itself establish proof of an actual or presumed date of sending or receipt of the message, which must still be proved by the party adducing evidence of the message.

3.8 Other flaws in the model are that it applies only to civil proceedings and to telegraphic messages sent within Australia.

3.9 The UEA **rebuttable presumption** model, which applies to both criminal and civil proceedings, is a rebuttable presumption of delivery to the named addressee. The presumption is that the message was received within 24 hours of its having been delivered to a post office for telegraphic transmission.[48] To obtain the benefit of this presumption, a party must prove (a) the existence of a message addressed to the purported recipient; (b) its delivery to a post office for transmission by telegraph; and (c) that this occurred on a certain date. The presumption does not extend to the identity of the sender or as to the actual time when the telegram was sent or received. That must still be proved.

3.10 The UEA presumption is not available in proceedings that relate to a contract where all the parties to the proceeding are also parties to the contract and this presumption is inconsistent with a term of the contract.

3.11 The UEA provision for telegraphic messages is included in a part of the Act that deals with the facilitation of proof of 'matters relating to post and communications', which also includes presumptive proof of receipt of electronic communications and of letters sent by Commonwealth agencies. The UEA model is not restricted to telegrams or lettergrams sent within Australia.

3.12 The Issues Paper asked these questions about the provisions for telegraphic communications in the *Evidence Act 1929* (SA):

- If the Act is to continue to provide a separate way to prove the transmission of telegraphic messages, should this be
    - by a scheme of procedural notice, combined with requirements to prove transmission through the telegraphic office and payments of transmission fees, by which the actual date of sending and receipt can be proved; or

[45] See *Evidence Act 1977* (Qld), ss 75-79.
[46] The Uniform Evidence Acts acknowledge that telegraphic messages may still need to be proved in court.
[47] *Evidence Act 1929* (SA) , ss 54 and 55.
[48] *Evidence Act 1995* (Cth), s 162.

- by a rebuttable presumption, when a document purports to be a record of a message transmitted by telegram or lettergram, that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram; or
- by a different scheme, and if so, what?

- If the Act is to continue to provide for a way to prove the transmission of telegraphic messages, should these provisions be incorporated within, and be consistent with, a part of the Act that deals with proof of modern forms of communication?[49]
- What limits, if any, should apply to any new provisions? For example, should they
  - apply to both criminal and civil proceedings or to civil proceedings only?
  - apply to any telegraphic message, wherever sent or received, or only to telegraphic messages sent within Australia?
  - not apply to proceedings that relate to a contract, where all the parties to the proceeding are also parties to the contract and the presumption is inconsistent with a term of the contract?

Submissions

3.13 Not all commentators responded specifically to the questions about Part 6 (Telegraphic Messages).

3.14 Of those who did, the majority[50] endorsed the need to update the provisions for telegraphic messages and to do so along the lines of the UEA presumption model.

3.15 The Legal Services Commission expressed the sentiments of this group of commentators in saying that modelling the South Australian provisions on electronic and telegraphic communications on the UEA provisions would be a logical and sensible reform.[51]

3.16 Only one respondent (the South Australian Bar Association) thought that the Act should continue to provide separately for the transmission of telegraphic messages, because 'there will remain for some time the possibility that parties to litigation may need to prove a telegraphic message, particularly messages that were communicated some time in the past'.[52]

3.17 While some South Australian Bar Association members support the updating of Part 6, others strongly support retaining the current provisions because they have worked

[49] See discussion below under *Modern electronic communications.*
[50] The Legal Services Commission of South Australia, the Chief Justice of South Australia and the Office of the Director of Public Prosecutions (SA).
[51] Letter from the Legal Services Commission of South Australia to the SA Law Reform Institute, 14 August, 2012.
[52] Letter from South Australian Bar Association to SA Law Reform Institute, 25 July, 2012.

'successfully in the past', saying 'there is no real need to update them for the mere possibility that telegraphic messages might again become a common means of communication'.[53]

3.18 The minority of South Australian Bar Association members who support updating these provisions also support the provisions being amalgamated with those governing other forms of electronic communication.

3.19 The South Australian Bar Association noted generally the benefits of achieving uniformity with the majority of States and Territories in Australia, but thought this should not be the 'overriding aim of the review of the Evidence Act being undertaken.' It made no comment on whether the UEA would be an appropriate model for any amendments to Part 6.

Views of the Institute

3.20 The Institute is not persuaded by arguments opposing any update of these provisions. That these provisions may have worked successfully in the past does not mean that they will work successfully in the future. As pointed out in the Issues Paper, some of the requirements in Part 6 are impossible to meet, because official records of payment of transmission fees are no longer available.

3.21 The Institute believes that the primary considerations in comparing models for facilitating proof of telegraphic messages are (a) the practicality of the model and (b) what it achieves for the party relying on the presumption.

3.22 A law that requires parties to give each other formal notice to establish a prima facie case or presumption is clearly more burdensome for the parties and the court than a law that achieves the same effect without such a requirement.

3.23 Part 6 and the UEA model do not achieve the same thing. The UEA provision creates a presumption of receipt only, upon proof that the message to be transmitted by telegram was delivered to a post office for transmission on a particular day. Part 6, on the other hand, creates a *prima facie* case for two things – that the sender was the person named on the telegram, and that the telegram was in fact delivered to the person to whom it was addressed.

3.24 The Institute is of the view that there is no need for a presumption of authorship of a telegram to be maintained if Part 6 is amended or replaced. There are no cases to demonstrate how Part 6 has been used since 1993, and indeed no evidence that it has been used at all.

3.25 The next best source of information about how such an aid to proof might be used is s161 of the UEA (which applies to electronic communications other than telegrams and, creating a presumption of dispatch and receipt, includes facilitating proof of authorship as well as proof of receipt). The reported cases involving s 161 show it

[53] Ibid.

being used primarily to facilitate proof of the receipt of a message,[54] and only rarely to prove its authorship.[55]

3.26 There are some provisions in Part 6 that were not discussed in the Issues Paper. These provisions make exceptions to the proof requirements for official documents that are sent by telegraph.[56] These provisions are redundant because there is no public telegraph service, and should be repealed.

Recommendation 1

The *Evidence Act 1929* (SA) should be amended so that it contains provisions for the proof and admission of information that is generated, stored, reproduced or communicated by a technological process or device that reflect modern technologies and can accommodate future, as yet unknown, technologies. Specific recommendations for amendment are set out in Recommendations 2 – 7.

Recommendation 2

Part 6 of the *Evidence Act 1929* (SA) should be deleted and replaced with a new Part providing for the facilitation of proof and the admissibility of evidence of communications. The new provisions should be modelled on the provisions in the Uniform Evidence Acts that establish a presumptive aid to proof and an exception to the hearsay rule to allow the provenance, destination, addressee and date and time of sending and receipt of a message by an electronic communication to be admissible by adducing a record of the communication. These provisions are *Evidence Act 1995* (Cth), s 71 (*Exception: electronic communications*), s 161 (*Electronic communications*) and s 162 (*Lettergrams and telegrams*).

Modern electronic communications

3.27 Earlier in this paper[57] we referred to the many technologies by which people communicate socially and professionally, and noted that for the sake of this discussion, all these methods of communication are called electronic communications.[58]

3.28 Many of the considerations raised in this Issues Paper about evidence produced by computers and by electronic and digital technology are also relevant to electronic communications.

3.29 In the USA, lawyers have identified some of the problems of authentication of modern electronic communication in court proceedings:

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[54] For example, by government authorities in cases where people claim ignorance of an obligation or fact on the ground that they did not receive a message about it: See, for example, *Eggu and Minister for Immigration and Citizenship* [2010] AATA 1003, *Seetha v Minister for Immigration & Anor* [2011] FMCA 336, and *Shah v Minister for Immigration & Anor* [2011] FMCA 18.

[55] The only reported case in which a s 161 presumption of authorship was invoked, albeit unsuccessfully, involved a dispute about knowledge of the terms of a contract (*Australian Communications and Media Authority v Mobilegate Ltd, A Company Incorporated in Hong Kong (No 8*) [2010] FCA 1197).

[56] See *Evidence Act 1929* (SA), ss 56-59

[57] In paragraph 2.8.

[58] This was the expression recommended by ALRC Uniform Evidence Law Report(Recommendation 6-2).

> More than 250 million photos are uploaded per day on Facebook, and in all, billions of links, blog posts and other content are shared among users each month. With the staggering amount of electronic communications exchanged on social networks, lawyers quickly realized that these portals were a valuable repository of potential evidence -- snapshots of the past and present -- that could be used for impeachment purposes against parties and witnesses.
>
> However, given the possibility of impersonation and digital fabrication in the online world, the information displayed on social media profiles is not immediately verifiable and presents issues of authentication and admissibility under the Federal Rules of Evidence. In the judicial context, printouts of messages, postings and photographs from a particular social media account generally require additional corroboration that links the printouts to their purported creator before a court will allow such material into evidence.
>
> . . .
>
> Implicit in recent court decisions regarding electronic evidence is the concept that emails, text messages and social media data are subject to the same requirements for authenticity as traditional paper documents. Even though online and social media communications offer unique opportunities for fabrication, such electronic evidence is still evaluated on a case-by-case basis as any other document to determine whether there has been an adequate foundational showing of its relevance and authenticity.
>
> The potential for tampering with electronically stored information on a social networking site poses challenges from the standpoint of authentication. In general, a party's name written as the author of a social media posting or message site is not sufficient alone to authenticate the electronic communication as having been authored or sent by that party. The need for authentication arises because anyone can masquerade under another person's name or otherwise gain access to another's account (or mobile phone). Even with password protection, account holders often remain logged in with their computers and smartphones unattended, and despite best efforts, accounts and computers are always subject to being infiltrated by hackers. Moreover, digital photographs posted online can be altered with readily-available software. See, e.g., *People v. Lenihan*, 30 Misc.3d 289 (N.Y. Sup. Ct. 2010) (defendant properly precluded from confronting witnesses with printouts of MySpace photos depicting him in gang clothing because of the easy ability to digitally edit photographs on the computer). Consequently, proving only that a message or photograph came from a particular account or device, without further authenticating evidence, is inadequate proof of authorship or depiction.[59]

3.30 Their suggestions for counsel seeking to authenticate such material were these:

> Possible avenues for authenticating social network profile postings printed from a social networking site will continue to develop as more parties seek to use such information, but some helpful methods include:
>
> Testimony from the purported creator of the social network profile and related postings;

[59] Richard Raysman & Peter Brown, 'Authentication of Social Media Evidence', (2011) *New York Law Journal,* http://www.newyorklawjournal.com/.

> Testimony from persons who received the messages;
>
> Testimony about the contextual clues and distinctive aspects in the messages themselves tending to reveal the identity of the sender;
>
> Testimony regarding the account holder's exclusive access to the originating computer and social media account;[60]
>
> Expert testimony concerning the results of a search of the social media account holder's computer hard drive;
>
> Testimony directly from the social networking website that connects the establishment of the profile to the person who allegedly created it and also connects the posting sought to be introduced to the person who initiated it; and
>
> Expert testimony regarding how social network accounts are accessed and what methods are used to prevent unauthorized access.

3.31 These suggestions lend force to arguments for there to be two kinds of legislative provisions for electronic communications. One is a legislated presumptive aid to proof. The other is a legislated exception to the hearsay rule to allow the provenance, destination, addressee and date and time of sending and receipt of a message by an electronic communication to be admissible by adducing a record of the communication.

3.32 The Issues Paper canvassed several models for evidentiary laws about electronic communication: non-UEA models, models from the United Kingdom[61] and New Zealand[62] and the Uniform Evidence Act model.[63]

3.33 In non-UEA jurisdictions, including South Australia, the common law governs proof of the transmission of an electronic communication and how the electronic communication itself can be used to identify who sent it, its destination, who received it, and when. There are no special statutory rules for this kind of communication. Authentication of an electronic communication is achieved, in every case, along the lines described above by the US commentators. New Zealand and the UK take the same approach.

3.34 The UEA jurisdictions, on the other hand, make separate provision for electronic communications.[64] The provisions have been refined following a joint review of the UEA by the Australian, Victorian and New South Wales Law Reform Commissions between 2004 and 2006.[65]

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[60] But see *Commonwealth v. Purdy*, 2011 WL 1421367 (Mass. April 15, 2011) where the court clarified that a party is not required to present evidence of exclusive access to authenticate the authorship of an email.
[61] *Electronic Communications Act 2000* (UK), s 15.
[62] The models were the *Electronic Transactions Act 2002* (NZ), s 5.
[63] See *Evidence Act 1995* (Cth), ss 71 and 161, and Dictionary, Part 1.
[64] See *Evidence Act 1995* (Cth): Part 4.3 (Facilitation of proof), Division 3 (Matters relating to post and communications): s 161 (Electronic communications) ; and Part 3.2 (Hearsay), Division 3 (Other exceptions to the hearsay rule): s 71 (Exception: electronic communications).
[65] ALRC Uniform Evidence Law Report, Recommendations 6-2 and 6-3.

3.35 The UEA uses the definition of electronic communications from the *Electronic Transactions Act 1999 (Cth),*[66] which has been described as

> . . . a broad and flexible definition of the technologies which fall within the exception to the hearsay rule for telecommunications. This definition is not device-specific or method-specific and embraces all modern electronic technologies. It is also intended to be sufficiently broad to capture future technologies.[67]

3.36 The UEA provides, firstly, an aid to proof: a rebuttable presumption that a document that purports to record an electronic communication is accurate as to the mode of communication, its provenance, destination, addressee and time and date sent and received.[68]

3.37 As to the relationship between this provision and the presumption as to the admissibility of documents produced by processes, machines and other devices in the course of business, a Federal Magistrate said recently, in a case where the issue was receipt of a fax:

> Rebuttal of the s.161 presumption, by demonstrating that the fax was not received, does not mean that the fax was not sent or that evidence cannot be led to demonstrate this. In this regard the s.147 presumption still operates with the consequence that it is to be taken that the fax in question was transmitted by the Tribunal as recorded by the transmission and send logs.[69]

3.38 The UEA also permits the identity of the sender and recipient and time and date of sending and receipt to be proved by reference to the electronic communication itself, notwithstanding the hearsay rule.[70] Note that the UEA presumption for telegraphic messages, discussed earlier, do not extend this far.

3.39 The Issues Paper asked these questions about whether and, if so, how the *Evidence Act 1929* (SA) should govern the proof and admission of evidence of electronic communications:

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[66] All Australian States and Territories have Electronic Transactions Acts modelled on the Commonwealth Act of that name. Their purpose is to legitimise transactions undertaken electronically.
Note that all Electronic Transactions Acts in Australia are being amended, in part to reflect changes in technology but mostly to recognise the reality of internet trading. The amendments are not relevant to this discussion.
In South Australia, the amendments were by the *Electronic Transactions (Miscellaneous) Amendment Act 2011* (SA). The reason for the amendments was given in the second reading report to the Bill:

> 'In 2005 the United Nations reached agreement on a Convention on the Use of Electronic Communication in International Contracts. This Convention was based on the 1996 provisions but amended them in some respects. Australia wishes to accede to this Convention and so intends to bring its domestic laws into conformity with it. Accordingly, the Standing Committee of Attorneys-General in May 2010 agreed that the Commonwealth and all States and Territories would amend their existing electronic transactions laws, following model provisions prepared by the Parliamentary Counsel's Committee.'
> South Australia, *Parliamentary Debates*, House of Assembly, 9 March 2011, 2783 (The Hon. John Rau, M.P., Attorney-General).

[67] Explanatory Memorandum to the *Evidence Act 2008* (Vic).
[68] See *Evidence Act 1995* (Cth) , s 161.
[69] *Shah v Minister For Immigration* (2011) FMCA 18, per Cameron FM, [133].
[70] See *Evidence Act 1995* (Cth), s 71.

- To what extent, if any, should the Act make separate provision for the proof and admission of evidence of electronic communications?

- If the Act is to contain no separate provision for the proof and admission of evidence of electronic communications, should the provisions for proof and authentication of documents, including the definition of 'document', be revised to refer to such material?

- If the Act is to provide for the separate proof and admission of evidence of electronic communications, should it include
    - a rebuttable presumption that if a document purports to record an electronic communication, the identity of the sender, the date and time it was sent, its destination, and the identity of the addressee are as represented in that document; or
    - by contrast, set out what must be proved in each case by the party adducing this evidence?
    - an exception to the hearsay rule to permit the admission of a representation contained in a document recording an electronic communication insofar as it relates to the identity of the sender, the date or time on which it was sent or its destination or the identity of the addressee?

Submissions

3.40 There was general support by respondents to the proposal that the Act provide for the proof and admission of evidence of electronic communications.

3.41 Some respondents[71] were strongly in favour of amending the Act by inserting provisions modelled on sections 71 and 161 of the Uniform Evidence Acts, which establish a rebuttable presumption as to proof and an exception to the hearsay rule. The Chief Justice spelled out how this would work:

> . . . I support amendments to Part 6 of the *Evidence Act 1929* (SA) which apply generally to electronic communications irrespective of the particular technology by which they are generated or stored. The provisions should facilitate the admission of those communications by providing that the communication itself, or a hard copy form of the communication, is prima facie evidence that the communication was made at the time, and between the senders and recipients, disclosed on the face of the communication. The statutory provisions should, of course, allow for the evidence to be rejected where it is shown not to be reliable.
>
> I favour an approach which allows for the prima facie admissibility of the document because it will encourage the efficient conduct of litigation. Unfortunately it is still rare for the parties to litigation to actively and cooperatively agree in advance to the admission of evidentiary material, even though, almost always, it is accepted as reliable and is non-contentious. For that reason, in my view, the onus for taking objection to the reliability of the

[71] The Chief Justice of South Australia, the Office of the Director of Public Prosecutions (SA) and the Legal Services Commission of South Australia.

> communication should be carried by the person opposing its admission. Based on my experience at the Bar and on the Court, I doubt that objections to the receipt of the material will be made often.
>
> There is, in my view, no reason why the provisions should not apply to communications generated outside of Australia. The technology is likely to be the same. Geographical and national boundaries have no real relevance to modern electronic communications.
>
> Nor is there any reason why the provisions should not apply to criminal proceedings as long as the discretion to exclude unduly prejudicial material is not affected.[72]

3.42 The others had no view, either because this was of no relevance to their organisation[73] or because they were not yet prepared to form one.[74]

Views of the Institute

3.43 There are no special statutory rules, and no facilitative presumptions, for electronic communications in South Australia or in the other non-UEA jurisdictions. There is uncertainty about precisely what the law is in these jurisdictions. What is certain is that a party seeking to rely on evidence of information communicated this way will always carry the burden of proving its authenticity, regardless of whether there is anything to suggest otherwise, and may not be able to use it fully if there are objections to its admissibility on the ground of hearsay.

3.44 The inclusion of these provisions in the Uniform Evidence Acts (as s71 and s161), was to overcome these problems. In 2005 the ALRC, NSWLRC and VLRC jointly reviewed the UEA provision that makes an exception to the hearsay rule for what was then called electronic mail (s 71 *Evidence Act 1995* (Cth)). The Commissions consulted widely and recommended amending s71:

> so as to replace the references to electronic mail, fax, telegram, lettergram and telex with 'electronic communications', defined in accordance with the definition in the *Electronic Transactions Act 1999* (Cth). This would embrace all modern electronic technologies, including telecommunications, as well as the more outmoded fax, telegram, lettergram and telex methods of communication.[75]

3.45 An outline of the Commissions' review of this topic may be found in paragraphs 6.46 to 6.67 of the review report.[76] Section 71 was amended as recommended, and consequential amendments were made to s 161.

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[72] Letter from the Chief Justice of South Australia to the SA Law Reform Institute, 19 September, 2012.
[73] For example, Forensic Science SA.
[74] For example, the South Australian Bar Association, in its submission of 25 July 2012.
[75] Australian Law Reform Commission, *Review of the Uniform Evidence Acts,* Discussion Paper No 69, (2005), [6.66]. < http://www.alrc.gov.au/dp-69>.
[76] Australian Law Reform Commission, *Review of the Uniform Evidence Acts,* Discussion Paper No 69, (2005) < http://www.alrc.gov.au/dp-69>.

3.46 Sections 71 and 161, so amended, are the evidentiary provisions that were discussed in the Issues Paper as models for an exception to the hearsay rule and as an aid to proof for electronic communications in the South Australian Evidence Act.

3.47 Note that all Australian courts must apply s 71 and ss 161 and 162 of the *Evidence Act 1995* (Cth) to electronic communications of Commonwealth official documents.[77]

3.48 No cases have suggested that there are any problems with the electronic communications provisions in the UEA or that they are not achieving their intended purpose.

3.49 The Institute has been offered no reasons against, and can see every reason for, including presumptive aids to proof and admissibility for evidence of electronic communications in the South Australian Evidence Act, and for these provisions to be modelled on the tried and tested provisions in the Uniform Evidence Acts. As noted by the Legal Services Commission of South Australia:

> . . it would seem logical that any evidentiary provisions relating to an electronic communication should be uniform across jurisdictions. Indeed, the *Electronic Communications Act 1995* is based on a model law.

[*Note: this recommendation should be read with* **Recommendation 1**]

Recommendation 3

Specifically, the new Part replacing Part 6 of the *Evidence Act 1929* (SA) should:

(1) apply to electronic communications, to be defined by reference to the definition of electronic communications and related definitions in the *Electronic Transactions Act 2000* (SA) (which definition includes lettergrams or telegrams);

(2) apply to the proof and use of electronic communications in both civil and criminal proceedings;

(3) apply to electronic communications regardless of whether their provenance or destination is within or outside Australia;

(4) facilitate the proof of communications by telegram or lettergrams by creating a rebuttable presumption of receipt by the addressee within 24 hours of the delivery of the communication to a post office for transmission as a lettergram or telegram;

(5) facilitate the proof of electronic communications other than telegrams or lettergrams by creating a rebuttable presumption that their sending and making, the identity of their sender or maker, when and where they were sent from or made, and when and where they were received were as it appears from the document;

(6) not permit the presumptive aids to proof described in (4) and (5) to apply when the parties to the proceedings are also parties to a contract which is the subject of the proceedings, and when reliance on the presumption would be inconsistent with the terms of the contract;

[77] See *Evidence Act 1995* (Cth), s 182.

(7) create an exception to the hearsay rule for electronic communications (including telegrams or lettergrams) so that the rule does not apply to what is represented in a document recording the electronic communication if this concerns the identity of the person from whom or on whose behalf the communication was sent, or the date on which or the time at which the communication was sent, or the destination of the communication or the identity of the person to whom the communication was addressed.

Evidence produced by technological process or device

3.50 Problems with the approach taken by Part 6A *Evidence Act 1929* (SA) were identified by the Australian Law Reform Commission as early as 1985:

> It is true that errors, accidental and deliberate, occur and can occur at every stage of the process of record keeping by computers. The fact is, however, that they are the exception rather than the rule, they tend to occur at the stage when the information is fed into the system, and there are techniques available which can be, and are, employed at each stage of the record keeping process to eliminate error . . . To require extensive proof, on each occasion, of the reliability of the computer records is to place a costly burden on the party seeking to tender the evidence, to give the opposing party a substantial tactical weapon and to add to the work of the courts. In many cases there will be no bona fide issue as to the accuracy of the records. It is more efficient to leave the party against whom the evidence is led to raise any queries and make any challenges it may have.[78]

3.51 Other commentary has been more scathing:

> The law of evidence is perhaps best viewed as a method originally designed to increase the probability that material on which courts, particularly criminal courts, could act, was as reliable as possible. Reliability is the path that leads, hopefully, to 'judicially determined truth'.
>
> Herein lies the flaw of the South Australian legislation which has been paraded by academic writers as a paradigm, yet spurned on technical grounds by the courts. For, in deigning to admit the computer into the evidentiary maze at all, legislators and courts have demanded of it unreasonably high standards of reliability: in fact, I suspect, some quasi-scientific standards of reliability are being demanded in the forensic sphere for computers, when such are not required for other 'scientific instruments', or for witnesses.[79]

3.52 Since Part 6A was enacted, and indeed since this commentary, the ways in which computers and their output can be used and communicated have changed and are continuing to change rapidly.

[78] ALRC Evidence (Interim) Report, [705].
[79] R A Brown, 'Computer–produced evidence in Australia', (1984) 8(1) *University of Tasmania Law Review* 60 (footnotes omitted).

3.53 Part 6A does not contemplate these advances and so fails to achieve its original aims. One must then consider to what extent, if any, Part 6A still has some relevance; what other work, if any, the Act should do to reflect current and future information and communication technology, particularly in respect of authentication, original documents/best evidence, 'real' evidence; and hearsay.[80]

3.54 Another important question is to what extent, given the ubiquitous nature of computer evidence and the application of the Uniform Evidence Act in the majority of contemporary criminal and civil Australian cases by population, the modernisation of South Australian evidence laws to deal with electronic information and communication technology should follow the relevant Uniform Evidence Act provisions.

3.55 These considerations are particularly important because technology today 'consists of more than a number of distinct and isolated things: technology has become the habitat of modern humanity'.[81] Developments in information and communication technologies (ICTs) since the introduction of Part 6A in 1972 have included the internet, mobile phone, social networking, surveillance and encryption technologies and cloud computing.

3.56 Society's reliance upon digital technology has increased in the last decade and will increase in the future - the Australian Communications and Media Authority (ACMA) has found that

> The internet is a regular part of the everyday lives of children and young people aged eight to 17 years, and is used regularly both within school and home environments.[82]

3.57 It has been observed that Australia's national critical infrastructures are 'increasingly – if not exclusively – controlled by computers'.[83] The International Risk Governance Council (IRGC) has identified ICT systems as being in the top five critical infrastructures along with electric power networks, gas supply systems, water supply and waste treatment and rail transport systems.[84]

3.58 In the future, we may expect our laws to have to deal with quantum computing, miniaturization on near to atomic levels, printable electronic appliances, power-scavenging technologies integrated in sensor networks (sometimes called 'smart dust'),

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[80] These categories were suggested by (then) Associate Professor Donna Buckingham of the University of Otago Law School – see Donna Buckingham, 'Electronic Evidence', *New Zealand Law Journal* (October 2001) 397-404. The article discusses the absence of a digital admissibility regime in New Zealand. See also Donna Buckingham, 'Evidentiary Issues' in D. Harvey (Ed.), '*Electronic Business and Technology Law*', Chapter 38 (LexisNexis NZ Ltd, April 2011).

[81] S Strijbos, 'Ethics and the systemic character of modern technology', (1998) 3.4 Society for Philosophy and Technology, 22.

[82] Australian Communications and Media Authority, *Click and Connect: Young Australians' use of online social media*, Qualitative Research Report 1, July 2009, 5. <http://www.acma.gov.au/WEB/STANDARD/pc=PC_311797>.

[83] Parliamentary Joint Committee on the Australian Crime Commission, Parliament of the Commonwealth of Australia, *Cybercrime*, (2004). http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2002-04/cybercrime/report/index.htm.

[84] International Risk Governance Council, *Managing and reducing social vulnerabilities from coupled critical infrastructures*, Policy Brief, 2006, (IRGC White Paper No 3) www.irgc.org/IMG/pdf/IRGC_WP_No_3_Critical_Infrastructures.pdf.

body sensors and implantable drug dispensers, household robots and new computing paradigms and sensor networks within the living body.[85]

3.59 Courts often require expert assistance about such matters and the field of digital forensics or e-forensics is an emerging one.[86]

3.60 Dr Anthony Dick of the University of Adelaide's School of Computer Science observed[87] that Part 6A reflects technologies of the late 1960s and early 1970s and requires cumulative proof of each element according to criteria that are no longer relevant to current technologies. This makes them needlessly time-consuming, expensive and of limited effectiveness.

3.61 Part 6A cannot be used to regulate the admission of evidence of information produced or communicated by the internet and modern electronic devices or digital processes. Nor does it recognise the convergence between computer-stored evidence, computer-generated evidence and electronic and digital communications, about which it has been said:

> . . . [these] activities now involve hybrid technologies. Thus, they cannot be associated with a particular sector any longer. Given their hybrid character, they fall under the ambit of several regulations and regulators.[88]

3.62 Indeed, Part 6A does not recognise that in modern digital technology, there may be no 'original' that is capable of translation into a copy. In 2004 it was observed that

> More than 90% of all documents produced in many organisations today originate in digital objects, and around 70% of these are never printed.[89]

3.63 The kind of authentication contemplated by Part 6A is problematic when there is no hard copy precursor for the electronically-generated material sought to be admitted into evidence.

3.64 This is also a problem for ss 45A, 45B and 45C of the *Evidence Act 1929* (SA). Sections 45A and 45B provide for the admission of business records and other apparently genuine documents into evidence, by way of exception to the best evidence

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[85] W B Teeuw & A H Vedder, 'Security Applications for Converging Technologies – Impact on the Constitutional State and the Legal Order', Telematica Instituut, Enschede, *Report TI/RS/2007/039*, 50.

[86] See R McKemmish, 'What is Forensic Computing?' (1999) 118 *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology). Digital forensics experts are often used in '. . . processes at all levels of litigation: access, acquisition, analysis and reporting. These steps include the early stages of litigation including detection, investigation, pre-trial steps (such as assisting in the obtaining of Anton Piller orders), through to the provision of experts reports. In Australia, as in America, email is the predominant form of digital evidence being considered by the Courts and has become the "very fabric of commercial litigation". Other electronic evidence involving all forms of digital evidence in text, video, audio and photographic format are increasingly being considered by the Courts'. Nigel Wilson, 'Regulating the information age – how will we cope with technological change?' (2010) *33 Australian Bar Review* 119, 138.

[87] The Institute consulted Dr Dick (Senior Lecturer, School of Computer Science, University of Adelaide, PhD (Engineering), M. Phil. (Engineering), B. Math & Comp Sci. (Hons)) in 2011.

[88] P L G Nihoul, 'Authorities, Competition and Electronic Communication: Towards Institutional Competition in the Information Society' (2002) as modified and published in C Graham & F Smith (2004) *Competition, Regulation and the New Economy*, Hart Publishing, 110.

[89] Julian Gillespie, Patrick Fair, Adrian Lawrence, David Vaile, 'Coping when everything is digital? Digital documents and Issues in document retention' (2004) *Baker and McKenzie Cyberspace Law and Policy Centre White Paper*, 4.

rule, but rely on definitions of 'document'[90] and 'business record'[91] that cannot be applied to a digital object. Section 45C makes an exception to the best evidence rule for documents that reproduce other documents when the reproduction is made—

> by an instantaneous process; or
>
> by a process in which the contents of a document are recorded (by photographic, electronic or other means) and the reproduction is subsequently produced from that record; or
>
> in any other way.[92]

3.65 These general provisions of the *Evidence Act 1929* (SA) create problems for the admission of computer evidence and are also, therefore, not used.

3.66 In reviewing the UEA documentary evidence provisions dealing with the reliability and accuracy of computer-produced evidence in 2006,[93] the ALRC summarised its review of relevant South Australian provisions:

> 6.22 The Commissions observed that ss 45C and 59B provide alternative approaches to the admissibility of computer-produced evidence that have the outward appeal of being broad and investing the court with wide judicial discretion to admit into evidence photographic, electronic and other reproductions.
>
> 6.23 However, the Commissions commented that s 45C is flawed in that it relies entirely on the reliability of the 'approved process' without further, or actual, investigation into that process. The Commissions further observed that s 59B is based on the *Civil Evidence Act 1968* (UK), which was criticised by the Law Commission of England and Wales in a 1993 review of that Act. The Law Commission observed:
>
> > [T]here is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. It is at least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned.[41]

3.67 Part 6A sets up a different scheme for the admission of computer-generated evidence than the scheme operating in the majority of Australian jurisdictions (the UEA jurisdictions). That is to say, Part 6A is a scheme which is unique in Australia, despite the fact that civil and criminal trials, and the policing and enforcement of criminal laws,

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[90] *Evidence Act 1929* (SA), s 45B:
'document means—
(a) any original document; or
(b) any reproduction of an original document by photographic, photostatic or lithographic or other like process.'

[91] *Evidence Act 1929* (SA), s 45A:
'business record means—
(a) any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business; or
(b) any reproduction of any such record by photographic, photostatic, lithographic or other like process.'

[92] *Evidence Act 1929* (SA), s 45C(3).

[93] ALRC Uniform Evidence law Report, Part 6.

involve technology-related evidence which has national and, often, international connection.

> It is also not compatible with national initiatives to ensure uniform, national perspectives in relation to technology-related matters, for example, the Commonwealth of Australia's Cyber Security Strategy, the Cyber Safety Plan and the Digital Economy Strategy.

3.68 There is clearly a need to update, if not to replace, South Australia's outdated provisions about computer evidence.

3.69 The question then is whether any new provisions should apply different principles to evidence of information produced by computers or should merely adapt the provisions governing admission of documentary evidence and business documents so that the same principles apply to adducing evidence of a document however it is produced.

3.70 On this question, the ALRC concluded, upon examining legislation in Australia and in the United Kingdom, that there was no need for specific provisions dealing with computer evidence.[94] Ligertwood and Edmond, on the other hand, present the argument in favour of there being computer-specific provisions:

> But the argument for specific provisions is one of practical convenience, to provide a simple means for the authentication of the reliability of information stored in or produced by a computer. The overlap with other statutory exceptions is not to the point. Specific provisions provide lawyers with a simple means of proof. The problem is principally one of the authentication of the reliability of the process. However, such legislation as exists goes beyond merely providing a means of authentication and provides for the admissibility of information supplied by humans to, and recoverable from, a computer, thus making specific exceptions to the hearsay rule.[95]

3.71 Attempts have been made by judges to specify criteria for the admission of electronic evidence (in the absence of a legislated presumption of integrity). A judge in a United States Federal Court case[96] set out five standards that should be met before electronic evidence can be admitted:

- the electronic evidence must be relevant;
- the electronic evidence must be shown to be authentic (although the parties can agree to this);
- the electronic evidence must not be hearsay or must otherwise fit within an existing hearsay exception;
- the evidence must constitute an 'original' under the best evidence rule, or if not, must be able to be admitted pursuant to the secondary evidence rules (although again this can be agreed between the parties); and

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94 ALRC Evidence (Interim) Report, [388-389].
95 Andrew Ligertwood & Gary Edmond, *Australian evidence: A principled approach to the common law and the uniform acts* (5th ed, 2010) [8.197].
96 Judge Grimm, *Lorraine v Markel,* 2007 ILRWeb (P&F)1805, 207 WL 1300739.

- the probative value of the electronic evidence must substantially outweigh any dangers of unfair prejudice or other harm to the opposing party.[97]

3.72 The Issues Paper compared a range of legislative models for evidence of material produced electronically. The models used were those of Western Australia,[98] Queensland,[99] New Zealand,[100] the United Kingdom[101] and the Commonwealth.[102]

3.73 The older models (those of Western Australia and Queensland) require evidence of the reliability of the device in every case. Their provisions for the admission of reproductions of documents do not contemplate the possibility that some material that is produced electronically does not emanate from an original document, as such.

3.74 The most recent legislative models in Australia (i.e. the UEA), the United Kingdom and New Zealand do not establish a separate set of electronically or digitally-referenced principles. However their provisions for the facilitation of proof are cast in terms that include evidence of material produced by technological processes or devices. Critically, these provisions include a rebuttable presumption that the technological process or device did in fact produce the asserted output (so that the reliability of the process or device does not have to be proved in every case). They also place the onus of proof on the party challenging the authenticity of the document or the reliability of the process that produced it. The provisions for tendering documents also permit tendering a document that has been retrieved, produced or collated by the use of a device when there is no other way that the information that has been stored this way can be used by a court.[103]

3.75 The Issues Paper then asked these questions about how the *Evidence Act 1929* might be changed:

- Should the Act make separate provision for the admission of material that is generated by computer, electronic or digital technology?
- If so, should these provisions
    - be simply an aid to proof of material that is generated by computer, electronic or digital technology, supplementing the common law and existing statute on authentication, original documents/best evidence, 'real' evidence and hearsay; or
    - set out comprehensively how the proof and admission of this particular class of evidence should be governed?

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[97] Judge Grimm, ibid. The binding authority of these comments has been questioned because there was no dispute about the admission of the electronic evidence in this case. The parties had already agreed to admit the emails the subject of the proceedings. This list is adapted from the critical essay by Brian W Esler, 'Lorraine v Markel: Unnecessarily raising the standard for admissibility of electronic evidence' (2007) 4 *Digital Evidence and Electronic Signature Law Review*, 80-82.
[98] See *Evidence Act 1906* (WA) s 79C.
[99] See *Evidence Act 1977* (Qld), s 95.
[100] See *Evidence Act 2006* (NZ), ss 4 and 137.
[101] See *Civil Evidence Act 1995* (UK), ss 8, 13.
[102] See *Evidence Act 1995* (Cth), ss 48(1)(d), 146 and 147.
[103] *Evidence Act 1995* (Cth), s 48.

- If the Act is to provide separately for the admission of material that is generated by computer, electronic or digital technology, should the provisions
    - include a rebuttable presumption that a computer, electronic or digital device or process was functioning properly when it produced the material in question; or
    - instead, require proof, by certification or otherwise, of these matters by the party adducing this evidence?
    - explicitly cover situations where, due to the nature of the technology used, there may be no 'original' document? If so, what safeguards will be necessary for effective authentication?
    - be part of or be cross-referenced with other provisions in the Act providing for the admission of business records and other apparently genuine documents (ss 45A and 45B), and if so to what extent?
- If the Act is to contain no separate provision for evidence of material that is generated by computer, electronic or digital technology, should the provisions for proof and authentication of documents, including the definition of 'document', be revised to refer to such material?

Submissions

3.76 There was general endorsement from those responding to the Issues Paper of the need for reform of these provisions.

3.77 Of interest was the description by Forensic Science (SA)[104] of the kinds of technologically-produced evidence it submits to courts:

> FSSA provides scientific evidence of fact and opinion to the various courts within South Australia and indeed beyond our jurisdiction. Much of the evidence and communications provided by FSSA and submitted before the courts is recorded electronically and is generated by complex analyses which are most often facilitated by computer software programs. The results of these analyses may then be housed in various databases. Examples include photographic and medical images, chemical analysis, DNA profile generation and database comparison. FSSA intends implementing a new information management system which will further integrate data within FSSA and has potential to provide links to our external clients hence, the reliance on technology and electronic communications will continue to grow.

3.78 Acknowledging that the submission of electronic evidence had not yet been an issue for it, Forensic Science (SA) supported uniformity of Australian laws in this area:

> As FSSA continues to increase its dependence on electronic systems and exchange and compare data with other jurisdictions and countries, under various legislative constraints, a move toward uniformity in evidence submission would be pragmatically favourable. Any recommendations should not be so prescriptive as to not permit flexibility.

[104] Email from Forensic Science (SA) to SA Law Reform Institute, 31 July, 2012.

3.79 The majority of submissions[105] supported reforming the Evidence Act along the lines of the UEA provisions, under which provisions about presumptive proof and admission of documentary evidence incorporate evidence of computer-generated material, obviating the need for separate digitally reference provisions and resulting in the same principles being applied whether the evidence is computer-generated or not. The Chief Justice was one of these, giving these reasons:

> First, I wish to emphasise the pervasiveness of modern electronic information and communications technology. The rate of change of, and the growth in the use of, these technologies continues to be exponential. It is of critical importance that statutory provisions are not designed by reference only to the technology of today. They must be capable of adaption to forms of technology which we can now only imagine.
>
> Secondly, I observe that successful technological innovations are very quickly adopted and used extensively in social and commercial interactions. The proposed statutory provisions should not erect unnecessary obstacles to the admissibility of communications made over technologies which are used and accepted as reliable, without a second thought, by large sections of the community.
>
> Thirdly, the contemporary integration of the legal systems of the States and the Commonwealth cannot be ignored. Different facets of a commercial controversy are often litigated in several jurisdictions. It is not desirable that the communications or business information at the centre of those controversies which, in the ordinary course, will have been generated by modern information or communication technologies, be subject to different evidentiary regimes depending on the seat of the litigation. Similarly, applications for cross-vesting are common in commercial disputes with a national aspect. The different evidentiary regimes for the admission of electronic information, and whether those regimes will benefit or disadvantage the applicant or respondent to the cross-vesting application, should not be an issue in the exercise of the cross-vesting discretion.[106]

3.80 The Chief Justice also commented that the new provisions for computer generated evidentiary material

> . . .should also recognise and allow for the admission of information generated through the interaction, and communication between, electronic information processing machines.[107]

Views of the Institute

3.81 As noted earlier, in paragraph 3.66, the Australian, New South Wales and Victorian Law Reform Commissions specifically rejected South Australian suggestions for 'a more rigorous requirement for the presumption of reliability and accuracy of computer-produced evidence' (such as those contained in s45C and 59B of the *Evidence*

[105]For example, the Chief Justice of South Australia, the Chief Magistrate, the Office of the Director of Public Prosecutions (SA) and the Legal Services Commission of South Australia.
[106] Letter from the Chief Justice of South Australia to the SA Law Reform Institute, 19 September, 2012.
[107] Ibid.

Act 1929 (SA))[108] for want of any empirical evidence justifying a more rigorous test and on the strength of submissions opposing a 'change in the threshold of proof for computer produced evidence [which highlight] the lack of evidence, both from their own experiences and from knowledge of the case law, of problems arising from the operation of ss 146 and 147.'[109]

3.82 The most obvious source for any modernisation of local South Australian evidence law to reflect changes in information and communication technologies is therefore the *Evidence Act 1995* (Cth), because that Act already governs many proceedings heard in South Australia.

3.83 To choose any other source would be to maintain the current position, where there are two different sets of evidence laws on this topic in South Australia – one for Federal courts and one for State courts.

3.84 It would also mean that South Australian courts would continue to treat evidence of computer output and electronic communications differently from courts exercising a similar jurisdiction in the majority of other Australian States and Territories whose Parliaments have chosen to enact identical provisions to those in the Commonwealth Act to govern all proceedings in their courts.

3.85 The desirability of achieving uniformity with the majority of other Australian jurisdictions in this area was noted in the Issues Paper, not only because the nature of technology-related evidence is that it has a 'network' or 'connected' quality, but also because the Uniform Evidence Act provisions seek to balance reliability, safeguards, protections and freedoms, include modern definitions that are technology-neutral, and are intended to be 'future-proof' to reduce the need for legislative amendment when technologies inevitably change.

3.86 There is no doubt that the UEA approach to this topic is a highly informed one, built on the intensive analysis of Australian court evidence and procedure by the Australian, Victorian and New South Wales Law Reform Commissions[110] (the Commissions).

3.87 The resulting provisions about general and business records, including those produced by computers and those recording electronic and digital communications, acknowledge the latest trends in technology and anticipate unforeseen developments in the future.

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108 ALRC Uniform Evidence Law Report, [6.17 - 6.29], in which the Commissions examined sections 45C and 59B *Evidence Act 1929* (SA).

109 ALRC Uniform Evidence Law Report [6.40 and 6.41].

110 See Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2006), published jointly with the New South Wales Law Reform Commission, Report No 112, (2005) and the Victorian Law Reform Commission, Final Report, (2006) <http://www.alrc.gov.au/publications/report-102>. (abbreviated henceforth to 'ALRC Uniform Evidence Law Report'). Note that the Queensland Law Reform Commission conducted a separate review in 2005. This review did not deal specifically with the UEA provisions examined in this Issues Paper. See Queensland Law Reform Commission, *A review of the Uniform Evidence Acts*, Report No 60 (September 2005) < http://www.qlrc.qld.gov.au/Publications.htm#1>.

3.88 They have so far stood the test of time. Their efficacy was reviewed favourably by the Commissions some 10 years after their enactment and the current UEA provisions include the improvements recommended in that review.

3.89 Unlike the UEA provisions on this topic, none of the other models canvassed in the Issues Paper has been formally evaluated.

3.90 Some (like those from the United Kingdom[111] and New Zealand[112] dealing with computer output) achieve a similar result to the UEA provisions, and one might argue that if that is the case, there is little value in adopting them as models when a model achieving the same result would also achieve the aim of uniformity.

3.91 Other models have not addressed the very conceptual redundancy that is problematic in the current South Australian law.

3.92 The Institute is of the view that the utility and effectiveness of including reference to computer-generated material within the general provisions for the proof and admission of documentary evidence is amply demonstrated by the success, in practice, of the UEA provisions in Part 2.2 (*Documents*) and Part 4.3 (*Facilitation of proof*) of the *Evidence Act 1995* (Cth).

3.93 Added to this is the Institute's view, shared by the majority of respondents and described this way by one of them, that in this particular area of law:

> In the 21st century there is a positive need for uniformity not only across state jurisdictions but also within a state (otherwise the disjunct between state and federal law on the same subject can lead to different evidentiary outcomes within the same state depending on whether state or federal law governs the proceedings.[113]

3.94 The Institute also notes that the amendments it contemplates do not require significant change, in practice, in the way courts admit records of computer-generated material into evidence and how they permit that evidence to be used. The remodelled provisions will, rather, remove outmoded and unused requirements and simplify evidentiary processes.

111 See *Civil Evidence Act 1995* (UK), ss 8, 13.
112 See *Evidence Act 2006* (NZ), ss 4 and 137.
113 Submission of the Office of the Director of Public Prosecutions (SA), 23 August, 2012.

[*Note: these recommendations should be read with* **Recommendation 1**]

Recommendation 4

Part 6A of the *Evidence Act 1929* (SA) should be deleted and replaced with new and amended provisions in Part 4 of the Act (*Public Acts and documents*) and with consequential amendments to Part 5 of the Act (*Banking records*), to ensure that these provisions cover evidentiary material produced, recorded, stored or copied using modern technologies. There should not be a separate set of electronically or digitally referenced principles for facilitating the proof of evidence produced electronically and for governing how that evidence may be used in court.

Recommendation 5

The provisions replacing Part 6A of the *Evidence Act 1929* (SA) should aim for consistency with relevant provisions in the Uniform Evidence Acts to the greatest extent possible within the structure of the Act. These provisions are *Evidence Act 1995* (Cth), Part 2.2 (*Documents*): sub-ss 48(1)(c) and (d) (*Proof of contents of documents*); and Part 4.3 (*Facilitation of proof*): section 146 (*Evidence produced by processes, machines and other devices*) and section 147 (*Documents produced by processes, machines and other devices in the course of business*); and Dictionary, Part 1 (definition of *'document'*).

Recommendation 6

The provisions replacing Part 6A of the *Evidence Act 1929* (SA) should

(1) facilitate the proof of evidence generated, recorded or stored not only by traditional computers but also by the internet, modern electronic devices or digital processes;

(2) contemplate the convergence between computer-stored evidence, computer-generated evidence and electronic and digital communications;

(3) recognise that authentication in every case is too heavy a burden for the parties and that it needlessly increases the cost and length of litigation;

(4) provide, instead, for documents or things that are produced, recorded, copied or stored electronically or digitally, a rebuttable evidential presumption that the technological process or device so used did in fact produce the asserted output and did so reliably, so that a party adducing evidence of such documents or things would no longer have to prove the authenticity and reliability of the process or device unless evidence sufficient to raise doubt about it had been adduced;

(5) permit the tendering of a document or business record that has been retrieved, produced or collated by the use of a device when there is no other way that the information that has been stored this way can be used by a court (for example, when there is no hard copy precursor for the electronically-generated material sought to be admitted into evidence);

(6) redefine 'document' and 'business record' to include digital objects.

Part 4 Achieving uniformity of law

4.1 As well as asking specific questions on technology-related evidence, the Issues Paper also asked this general question:

> If South Australia is to modernise its Evidence Act to deal with new technologies, what value, if any, is there in that modernisation also achieving uniformity on this topic with the majority of States and Territories in Australia?

4.2 Those provisions and the merits of their adoption have been discussed in depth in the Issues paper and in this Final Report.

Submissions

4.3 All respondents to the Issues Paper acknowledged the benefits of achieving uniformity of law in this area, some strongly, and a few more tentatively.

4.4 Those who gave only tentative support[114] did not offer other models for modernising these laws or give reasons against achieving uniformity in this particular area. The position of the SA Bar Association was that:

> The benefits of achieving a high level of uniformity across State and Federal jurisdictions are substantial. However, achieving uniformity should not be the overriding aim of the review of the Evidence Act being undertaken.
>
> The legal process in South Australia has benefited greatly from the unique provisions that are ss45A and 45B. These provisions, and the potential for new unique provisions that operate well, should not be abandoned lightly.[115]

4.5 The Chief Justice was among those who strongly supported achieving uniformity of law in this area. He said:

> In my view, the replacement provisions for Part 6 and Part 6A of the *Evidence Act 1929* (SA) should, in the absence of good reason to the contrary, conform with the provisions of the Uniform Evidence Act. I have not, in the time available, carefully studied those provisions. However, the provisions have been in operation for some time. If there are difficulties in their application, then I expect that the courts in the jurisdictions in which the provisions operate will strive to construe them in a way which allows them to work effectively and fairly. If that is not possible, then legislative amendments, again hopefully made uniformly, will address the defects.
>
> In short, whatever challenge the rapidly changing face of information and communications technology throws up, it can only be for the better to have the combined resources of the courts and legislatures of as many jurisdictions as possible working on a uniform solution than to have individual jurisdictions struggling to find locally based solutions to a global phenomenon. It is important to remember that the purpose of the law is ultimately to facilitate the dealings of the community it regulates. For that reason the search for a "perfect" law must sometimes give way to practicality and certainty.

[114] The SA Bar Association and the Law Society of South Australia.
[115] Letter from the SA Bar Association to the SA Law Reform Institute, 25 July, 2012.

> Uniformity will, generally, better serve the law's purpose in an area of regulation such as this.[116]

Views of the Institute

4.6 For reasons already canvassed in Parts 2 and 3 of this Report, the Institute is of the view that there is benefit to litigants, lawyers and judges in there being uniformity between South Australian technology-related evidence laws and those of the majority of other jurisdictions in Australia.

4.7 The Institute does not share the view of the SA Bar Association that a better option is to use existing South Australian laws on documentary evidence, without change, than to modify or replace them with uniform laws that contemplate modern and unknown future technologies. South Australian[117] arguments that the appropriate model for uniform laws on the reliability and accuracy of computer-produced evidence should be the existing South Australian provisions for documentary evidence were carefully considered, compared with the UEA provisions,[118] and rejected by the combined Australian, New South Wales and Victorian Law Reform Commissions in their review of the Uniform Evidence Acts in 2006.[119] In the absence of any additional argument to the contrary, the Institute accepts the joint Commissions' view.

4.8 The laws under review deal with phenomena that transcend physical boundaries. South Australian courts and lawyers already use the uniform laws on technology-related evidence when the court is exercising its federal jurisdiction. The uniform provisions on this topic were carefully prepared so that the principles of evidence that apply to the proof and admission of information recorded in documents will apply equally to information produced, recorded, transmitted, copied or stored electronically or digitally. The uniform provisions are also designed to accommodate whatever new technologies might emerge in the future. They have withstood thorough evaluation and are working well.

4.9 The Institute's recommendations for reform reflect its view that it is of benefit to South Australia to achieve uniformity with the majority of Australian States and Territories in this area of evidence law. The Institute makes no separate recommendation on this question.

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[116] Letter from the Chief Justice of South Australia to the SA Law Reform Institute, 19 September, 2012.

[117] The Criminal Law Committee of the Law Society of South Australia, Submission E 35, 7 March 2005; Legal Services Commission of South Australia, Submission E 29, 22 February 2005, to the review of the Uniform Evidence Acts by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission.

[118] *Evidence Act 1995* (Cth), ss 146 and 147.

[119] A summary of these considerations appears at paragraphs 6.17 to 6.29 of the ALRC Uniform Evidence Law Report.

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Appendices

Extracts from *Evidence Act 1995* (Cth)

Chapter 2—Adducing evidence

Part 2.2—Documents

47 Definitions

(1) A reference in this Part to a *document in question* is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

48 Proof of contents of documents

(1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

(a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;

(b) tendering a document that:

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;

(d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;

(e) tendering a document that:

(i) forms part of the records of or kept by a business (whether or not the business is still in existence); and

(ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;

(f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:

(i) by the Government Printer or by the government or official printer of a State or Territory; or

(ii) by authority of the government or administration of the Commonwealth, a State, a Territory or a foreign country; or

(iii) by authority of an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament.

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

(3) If the party adduces evidence of the contents of a document under paragraph (1)(a), the evidence may only be used:

(a) in respect of the party's case against the other party who made the admission concerned; or

(b) in respect of the other party's case against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

(a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or

(b) adducing from a witness evidence of the contents of the document in question.

Note 1: Clause 5 of Part 2 of the Dictionary is about the availability of documents.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

Chapter 3—Admissibility of evidence

Part 3.2—Hearsay

Division 3—Other exceptions to the hearsay rule

71 Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent; or

(b) the date on which or the time at which the communication was sent; or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Note 1: Division 3 of Part 4.3 contains presumptions about electronic communications.

Note 2: Section 182 gives this section a wider application in relation to Commonwealth records.

Note 3: *Electronic communication* is defined in the Dictionary.

Chapter 4—Proof

Part 4.3—Facilitation of proof

Division 1—General

146 Evidence produced by processes, machines and other devices

(1) This section applies to a document or thing:

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Note:

*Example:*It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

147 Documents produced by processes, machines and other devices in the course of business

(1) This section applies to a document:

(a) that is produced wholly or partly by a device or process; and

(b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.

(2) If:

(a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and

(b) the device or process is or was at that time used for the purposes of the business;

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a document that was produced:

(a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

(b) in connection with an investigation relating or leading to a criminal proceeding.

Note: Section 182 gives this section a wider application in relation to Commonwealth records and certain Commonwealth documents.

Part 4.3—Facilitation of proof

Division 3—Matters relating to post and communications

161 Electronic communications

(1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:

(a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made; and

(b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made; and

(c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made; and

(d) was received at the destination to which it appears from the document to have been sent; and

(e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.

(2) A provision of subsection (1) does not apply if:

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) the provision is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

162 Lettergrams and telegrams

(1) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.

(2) This section does not apply if:

(a) the proceeding relates to a contract; and

(b) all the parties to the proceeding are parties to the contract; and

(c) subsection (1) is inconsistent with a term of the contract.

Note: Section 182 gives this section a wider application in relation to Commonwealth records.

Dictionary

Section 3

Part 1—Definitions

document means any record of information, and includes:

(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.

Note: See also clause 8 of Part 2 of this Dictionary on the meaning of document.

electronic communication has the same meaning as it has in the *Electronic Transactions Act 1999*.

8 References to documents

A reference in this Act to a document includes a reference to:

(a) any part of the document; or

(b) any copy, reproduction or duplicate of the document or of any part of the document; or

(c) any part of such a copy, reproduction or duplicate.

Extracts from *Evidence Act 1929* (SA)

Part 4—Public Acts and documents

45A—Admission of business records in evidence

(1) An apparently genuine document purporting to be a business record—
   (a) shall be admissible in evidence without further proof; and
   (b) shall be evidence of any fact stated in the record, or any fact that may be inferred from the record (whether the inference arises wholly from the matter contained in the record, or from that matter in conjunction with other evidence).

(2) A document shall not be admitted in evidence under this section if the court is of the opinion—
   (a) that the person by whom, or at whose direction, the document was prepared can and should be called by the party tendering the document to give evidence of the matters contained in the document; or
   (b) that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence; or
   (c) that it would be otherwise contrary to the interests of justice to admit the document in evidence.

(3) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document is produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

(4) In this section—

business means business, occupation, trade or calling and includes the business of any governmental or local governmental body or instrumentality;

business record means—
   (a) any book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business; or
   (b) any reproduction of any such record by photographic, photostatic, lithographic or other like process.

45B—Admission of certain documents in evidence

(1) An apparently genuine document purporting to contain a statement of fact, or written, graphical or pictorial matter in which a statement of fact is implicit, or from which a statement of fact may be inferred shall, subject to this section, be admissible in evidence.

(2) A document shall not be admitted in evidence under this section where the court is not satisfied that the person by whom, or at whose direction, the document was prepared could, at the time of the preparation of the document have deposed of his own knowledge to the statement that is contained or implicit in, or may be inferred from, the contents of the document.

(3) A document shall not be admitted in evidence under this section if the court is of the opinion—

(a) that the person by whom, or at whose direction, the document was prepared can and should be called by the party tendering the document to give evidence of the matters contained in the document; or
(b) that the evidentiary weight of the document is slight and is outweighed by the prejudice that might result to any of the parties from the admission of the document in evidence; or
(c) that it would be otherwise contrary to the interests of justice to admit the document in evidence.

(4) In determining whether to admit a document in evidence under this section, the Court may receive evidence by affidavit of any matter pertaining to the admission of that document in evidence.

(5) For the purpose of determining the evidentiary weight, if any, of a document admitted in evidence under this section, consideration shall be given to the source from which the document was produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

(6) In this section—

document means—

(a) any original document; or

(b) any reproduction of an original document by photographic, photostatic or lithographic or other like process**.**

45C—Modification of best evidence rule

(1) A document that accurately reproduces the contents of another document is admissible in evidence before a court in the same circumstances, and for the same purposes, as that other document (whether or not that other document still exists).

(2) In determining whether a particular document accurately reproduces the contents of another, a court is not bound by the rules of evidence and, in particular—
(a) the court may rely on its own knowledge of the nature and reliability of the processes by which the reproduction was made;
(b) the court may make findings based on the certificate of a person with knowledge and experience of the processes by which the reproduction was made;
(c) the court may make findings based on the certificate of a person who has compared the contents of both documents and found them to be identical;
(d) the court may act on any other basis it considers appropriate in the circumstances.

(3) This section applies to reproductions made—
(a) by an instantaneous process; or
(b) by a process in which the contents of a document are recorded (by photographic, electronic or other means) and the reproduction is subsequently produced from that record; or
(c) in any other way.

(4) Where a reproduction is made by an approved process, it will be presumed that it accurately reproduces the contents of the document purportedly reproduced unless the contrary is established.

(5) The above reference to an approved process is a reference to a process prescribed by regulation for the purposes of this subsection.

(6) Where a court admits or refuses to admit a document under this section, the court must, if so requested by a party to the proceedings, state the reason for its decision.

(7) A person who gives a certificate for the purposes of this section knowing it to be false is guilty of an indictable offence.

Penalty: Division 5 imprisonment.

Part 6 Telegraphic messages

53 Party may give notice of intention to adduce telegraphic message in evidence

(1) Any party to any legal proceedings may at any time after the commencement thereof give notice to any other party that he proposes to adduce in evidence at the trial or hearing any telegraphic message that has been sent by electric telegraph from any station in the Commonwealth to any other station within the Commonwealth: Provided that the time between the giving of such notice and the day on which such evidence shall be tendered shall not in any case be less than two days.

(2) Every such notice shall specify the names of the sender and receiver of the message, the subject matter thereof, and the date as nearly as may be.

54 And thereupon may produce message received with evidence that same received from telegraph station

When such a notice has been given the production of any telegraphic message described in the notice, and purporting to have been sent by any person, together with evidence that the same was duly received from a telegraph station, shall be *prima facie* evidence that such message was signed and sent by the person so purporting to be the sender thereof to the person to whom the same shall be addressed without any further proof of the identity of the sender; but the party against whom any such message shall be given in evidence shall be at liberty, nevertheless, to prove that the same was not in fact sent by the person by whom it purports to have been sent.

55 After notice, sending a message may be proved by production of copy message and evidence of payment of fees for transmission

In any legal proceedings, the production of any telegraphic message, or of a machine copy or press copy thereof, or a copy thereof verified on oath or affirmation together with evidence that such message was duly taken to a telegraph station, and that the fees (if any) for the transmission thereof were duly paid, shall be *prima facie* evidence that such message was duly delivered to the person named therein as the person to whom the same was to be transmitted; and the burden of proving that such message was not in fact received, shall be upon the person against whom such message shall be given in evidence: Provided that the party adducing the same in evidence shall give notice to the other party of his intention so to do in such manner and at such time as the practice of the court requires with respect to a notice to produce documents at the trial or hearing.

56 Certain documents may be transmitted by electric telegraph under restriction

(1) The Governor, any Minister of the Crown, the President of the Legislative Council, the Speaker of the House of Assembly, a Judge of the Supreme Court, a Local Court Judge, or District Criminal Court Judge, the Judge in Insolvency, any special magistrate, and any principal officer of Government, or solicitor, may cause to be transmitted by electric telegraph the contents of any writ, warrant, rule, order, authority, or other communication requiring signature or seal subject to the provisions following, that is to say—

(a) the original document shall be delivered at the telegraph station in the presence and under the inspection of some justice of the peace or notary public;the person to whom the contents of any such document shall be so sent shall, forthwith and in the presence and under the supervision of a justice of the peace or notary public, cause to be sent back by electric telegraph, a copy of the message received by him; and in the event of any error appearing therein, the process shall be repeated under the like supervision, until it appears that a true copy of such document has been received by the person to whom it has been sent;

(c) when it appears that such true copy has been so received, such first-mentioned justice, or notary public, shall endorse upon the original document a certificate that a true copy thereof has been sent, under the provisions of this Act, to the person to whom the same has been so sent; and shall forthwith, by electric telegraph, inform such person that such certificate has been so endorsed;

(d) the person so receiving such true copy shall, upon receiving information of such certificate, endorse upon the copy of the original document received by him a certificate that the same has been duly received, under the provisions of this Act, which certificate shall be signed by him and by the justice or notary public so supervising the receipt of such copy as hereinbefore provided.

(2) In this section—

any principal officer of Government includes the Auditor-General, the Under Secretary, the Under Treasurer, the Solicitor-General, the Crown Solicitor, the Director of Public Prosecutions and the secretary to any department presided over by a Minister of the Crown, the Clerk of the Legislative Council, the Clerk of the House of Assembly, the Surveyor-General, the Registrar-General, the Sheriff, the Master of the Supreme Court, the Commissioner of Police, inspectors of police, the Returning Officer for the State; and for the purposes of returns to writs of election, but not otherwise, also includes any returning officer or deputy returning officer of an electoral district.

57 Copies so transmitted to be as valid and effectual as originals

(1) Every copy so endorsed and certified as aforesaid shall be as valid to all intents and purposes as the original, whereof it purports to be a copy, would have been, and shall be admissible in evidence in any case in which the original would have been so admissible; and any person by whom such copy has been received, or who is thereby authorised, instructed, or commanded, or who is lawfully charged with any duty in respect thereof, shall have and become liable to the same rights and duties in respect thereof as if he had received the original document duly signed and sealed, or signed or sealed, as the case may be.

(2) In the case of any document intended to be served, or the efficacy or use whereof depends upon service, every such copy shall for the purpose of such service be deemed to be the original document whereof it purports to be a copy.

58 Penalty for false certificate of sending message

Any justice or notary public who wilfully and falsely endorses upon any original document, delivered at a telegraph station for the purpose of being transmitted under the provisions of this Act, a certificate that a true copy thereof has been sent under this Act, or who by telegraph wilfully and falsely informs any person to whom such has been so sent that a certificate under the provisions of this Act has been endorsed thereon, shall forfeit a sum not exceeding two hundred dollars, which may be sued for and recovered by the first person who shall, for his own benefit and without collusion, sue for the same.

59 Signing false certificate upon copy

Any person by this Part of this Act required to sign a certificate upon any copy of a document that such copy has been duly received under the provisions of this Act, who shall wilfully sign such certificate, knowing the same to be false, shall be guilty of an offence, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding two years.

Part 6A Computer evidence

59A Interpretation

In this Part, unless the contrary intention appears—

computer means a device that is by electronic, electro-mechanical, mechanical or other means capable of recording and processing data according to mathematical and logical rules and of reproducing that data or mathematical or logical consequences thereof;

computer output or ***output*** means a statement or representation (whether in written, pictorial, graphical or other form) purporting to be a statement or representation of fact—

(a) produced by a computer; or

(b) accurately translated from a statement or representation so produced;

data means a statement or representation of fact that has been transcribed by methods, the accuracy of which is verifiable, into the form appropriate to the computer into which it is, or is to be, introduced.

59B Admissibility of computer output

(1) Subject to this section, computer output shall be admissible as evidence in any civil or criminal proceedings.

(2) The court must be satisfied—

(a) that the computer is correctly programmed and regularly used to produce output of the same kind as that tendered in evidence pursuant to this section; and

(b) that the data from which the output is produced by the computer is systematically prepared upon the basis of information that would normally be acceptable in a court of law as evidence of the statements or representations contained in or constituted by the output; and

(c) that, in the case of the output tendered in evidence, there is, upon the evidence before the court, no reasonable cause to suspect any departure from the system, or any error in the preparation of the data; and

(d) that the computer has not, during a period extending from the time of the introduction of the data to that of the production of the output, been subject to a malfunction that might reasonably be expected to affect the accuracy of the output; and
(e) that during that period there have been no alterations to the mechanism or processes of the computer that might reasonably be expected adversely to affect the accuracy of the output; and
(f) that records have been kept by a responsible person in charge of the computer of alterations to the mechanism and processes of the computer during that period; and
(g) that there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

(3) Where two or more computers have been involved, in combination or succession, in the recording of data and the production of output derived therefrom and tendered in evidence under this section, the court must be satisfied that the requirements of subsection (2) of this section have been satisfied in relation to each computer so far as those requirements are relevant in relation to that computer to the accuracy or validity of the output, and that the use of more than one computer has not introduced any factor that might reasonably be expected adversely to affect the accuracy or validity of the output.

(4) A certificate under the hand of a person having prescribed qualifications in computer system analysis and operation or a person responsible for the management or operation of the computer system as to all or any of the matters referred to in subsection (2) or (3) of this section shall, subject to subsection (6) of this section, be accepted in any legal proceedings, in the absence of contrary evidence, as proof of the matters certified.

(5) An apparently genuine document purporting to be a record kept in accordance with subsection (2) of this section, or purporting to be a certificate under subsection (4) of this section shall, in any legal proceedings, be accepted as such in the absence of contrary evidence.

(6) The court may, if it thinks fit, require that oral evidence be given of any matters comprised in a certificate under this section, or that a person by whom such a certificate has been given attend for examination or cross-examination upon any of the matters comprised in the certificate.

59C Regulations

The Governor may make such regulations as he deems necessary or expedient for the purposes of this Part, and without limiting the generality of the foregoing those regulations may—

(a) make any provision for the purposes of this Part with respect to the preparation, auditing or verification of data, or the methods by which it is prepared; and
(b) prescribe the qualifications of a person by whom a certificate may be given, or a translation made, under this Part.

Electronic Transactions Act 2000 (SA)[120]

5—Interpretation

(1) In this Act, unless the contrary intention appears—

addressee of an electronic communication means a person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication;

automated message system means a computer program or an electronic or other automated means used to initiate an action or respond to data messages in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

data includes the whole or part of a computer program within the meaning of the *Copyright Act 1968* of the Commonwealth;

electronic communication means—

(a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or
(b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system;

information means information in the form of data, text, images or sound;

[120] As amended by the *Electronic Transactions (Miscellaneous) Amendment Act 2011* (SA).