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South Australian Law Reform Institute

Computer says no

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.

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SALRI acknowledges that the source of the title to this Issues Paper ('Computer says no') is the BBC television series 'Little Britain' (2003-2006).

THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Terms of reference

The Attorney-General of South Australia, the Hon. John Rau MP, invited the Institute to examine and report on the modernisation of South Australian evidence law to deal with new technologies (the Evidence and Technology Reference). In doing so, the Attorney-General stated that:

- 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;
- despite its outdated language, the *Evidence Act 1929 (SA)* does permit the admission of proof of modern forms of communication by computer-generated documentation of the date, time and destination of that communication, the identity of the sender and, where it is possible to retrieve it, the content of the communication;
- South Australian evidence laws are written in language which does not contemplate new technologies; nor do they make the process of admission transparent - it may be better if they were re-rewritten;
- proof of electronic communications under South Australian evidence laws was considered in 2006 and 2007 in response to initiatives resulting from the Banks Report[1] and in response to proposals to the Standing Committee of Attorneys-General (SCAG) for the Uniform Evidence Act;
- 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;
- the *Evidence Act 1995* (Cth) (known as the Uniform Evidence Act) contains provisions which codify the law about electronic communications. Although South Australia has not adopted the Uniform Evidence Act provisions, it keeps a watching brief on Uniform Evidence Act provisions that might be of use in South Australia and may usefully be adopted into South Australian evidence law; and
- 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.

The Institute's Advisory Board agreed to undertake the project and established a reference group of academic, professional and judicial experts to assist it in this task.

[1] A report of the National Productivity Commission taskforce on reducing the regulatory burdens on business: *Rethinking Regulation,* Report on the Taskforce on Reducing Regulatory Burdens on Business, January 2006.

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Abbreviations

ALRC	Australian Law Reform Commission
Non-UEA jurisdictions	Australian jurisdictions that have not adopted or enacted mirror versions of the *Evidence Act 1995* (Cth) (namely, Queensland, South Australia and Western Australia)
Non-UEA models	Provisions from Evidence Acts in Australia that do not mirror those in the *Evidence Act 1995* (Cth)
NSWLRC	New South Wales Law Reform Commission
Part 6	*Evidence Act 1929* (SA), Pt 6: Telegraphic messages, ss 53-59
Part 6A	*Evidence Act 1929* (SA), Pt 6A: Computer evidence, ss 59A-59C
QLRC	Queensland Law Reform Commission
The Act	*Evidence Act 1929* (SA)
UEA	Uniform Evidence Acts – the 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 the *Evidence Act 1995* (Cth) applies or which have enacted Evidence Acts that mirror the *Evidence Act 1995* (Cth).
VLRC	Victorian Law Reform Commission

Overview

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.[2]

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[3]) 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.[4]

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), not only because that Act governs many proceedings heard in South Australia, but also because most other Australian jurisdictions have now chosen to enact identical provisions to those in the Commonwealth Act to govern all proceedings in their courts.

The achievement of uniformity across the majority of Australian jurisdictions has been the most significant development in Australian evidence law over the past two decades.

The enactment of model provisions in the Commonwealth Evidence Act in 1995 (called the Uniform Evidence Act) was followed, over time, by the enactment of identical provisions within the Evidence Acts of New South Wales,[5] Tasmania,[6] Victoria[7] and the Northern Territory.[8] The Commonwealth Act applies in Commonwealth courts and courts in the Australian Capital Territory.

The Uniform Evidence Act arose from recommendations by the Australian Law Reform Commission for provisions that reflected best practice in evidence law. Uniform

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[2] 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.
[3] 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.
[4] See *Evidence Act 1995* (Cth), s 5.
[5] *Evidence Act 1995* (NSW).
[6] *Evidence Act 2001* (Tas).
[7] *Evidence Act 2008* (Vic).
[8] *Evidence (National Uniform Legislation) Act 2011*(NT).

Evidence Act provisions are applied in all Commonwealth courts Australia-wide and in State courts exercising federal jurisdiction.

Upon its introduction in 1995, the then Federal Minister of Justice described the *Evidence Act 1995* (Cth) as '*one of the most important reforms in the administration of justice in Australia.'*

As the Attorney-General has identified in the Evidence and Technology Reference, South Australia has not yet adopted the Uniform Evidence Act provisions but has always given them due consideration and maintained a vigilant watching brief over continuing developments in uniform evidence law.

The adoption of uniform evidence laws by most Australian jurisdictions 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.

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'.

The desirability of achieving uniformity with the majority of other Australian jurisdictions in the reforms being considered in this Issues Paper cannot be over-emphasised, 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.

This Issues Paper reviews existing provisions about telegraphic messages (Part 6) and computer evidence (Part 6A) and also considers whether the Act should also provide for the admissibility of electronic communications.

It examines a range of reform options, including Uniform Evidence Act models.

The Issues Paper does 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. 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.

Questions asked in this Issues Paper

Question 1 Should the *Evidence Act 1929* (SA) continue to provide a separate way to prove the transmission of telegraphic messages?

Question 2 If the *Evidence Act 1929* (SA) is to continue to provide a separate way to prove the transmission of telegraphic messages, should this be

(a) 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
(b) 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
(c) by a different method, and if so, what?

Question 3 If the *Evidence Act 1929* (SA) 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?[9]

Question 4 What limits, if any, should apply to any new provisions? For example, should they

(a) apply to both criminal and civil proceedings or to civil proceedings only?
(b) apply to any telegraphic message, wherever sent or received, or only to telegraphic messages sent within Australia?
(c) 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?

Question 5 Should the *Evidence Act 1929* (SA) make separate provision for the admission of material that is generated by computer, electronic or digital technology?

Question 6 If so, should these provisions

(a) 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
(b) set out comprehensively how the proof and admission of this particular class of evidence should be governed?

Question 7 If the *Evidence Act 1929* (SA) is to provide separately for the admission of material that is generated by computer, electronic or digital technology, should the provisions

[9] See discussion under *Electronic communications* at page 26 of this Issues Paper.

(a) include a rebuttable presumption that a computer, electronic or digital device or process was functioning properly when it produced the material in question; or
(b) instead, require proof, by certification or otherwise, of these matters by the party adducing this evidence?
(c) 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?
(d) be part of or be cross-referenced with other provisions in the Evidence Act providing for the admission of business records and other apparently genuine documents (ss 45A and 45B), and if so to what extent?

Question 8 If the *Evidence Act 1929* (SA) 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?

Question 9 To what extent, if any, should the *Evidence Act 1929* (SA) make separate provision for the proof and admission of evidence of electronic communications?

Question 10 If the *Evidence Act 1929* (SA) 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?

Question 11 If the *Evidence Act 1929* (SA) is to provide for the separate proof and admission of evidence of electronic communications, should it include

(a) 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
(b) by contrast, set out what must be proved in each case by the party adducing this evidence?
(c) 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?

Question 12 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?

Telegraphic messages

Background

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.

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.

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.*[10]

In 1929, the provisions of the *Telegraphic Messages Act 1873* (SA) (reproduced in Appendix 1 to this paper) were consolidated within the *Evidence Act,*[11] as Part 6. Other States enacted similar consolidations of their versions of the *Telegraphic Messages Act*. Part 6 is reproduced in Appendix 2 to this paper.

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,[12] 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;

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

- 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 sign a false certificate.

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.[13]

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.[14] In short, the methods of communication that the Act sought to regulate have largely disappeared.

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.

> **Question 1** Should the *Evidence Act 1929 (SA)* continue to provide a separate way to prove the transmission of telegraphic messages?

Options for reform

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.

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[15] in their Evidence Acts.

In South Australia, the courts have a power to dispense with formal proof,[16] but this cannot be exercised when the matter is genuinely in dispute.

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13 See *Telegraphic Messages Act 1873* (SA), section 1.
14 See, for example, iTelegrams, Telegrams Online, SendaTelegram.
15 See *Evidence Act 1929* (SA) Part 6; *Evidence Act 1906* (WA) ss 82 -88; and *Evidence Act 1977* (Qld), ss 75-77.
16 *Evidence Act 1929* (SA), s 59J.

In considering whether the Act should continue to provide a way to prove the transmission of telegraphic messages, and, if so, how, two models are examined:

- the model provided by the most recent non-UEA provision (*Evidence Act 1977* (Qld), ss 75-77); and
- the model provided by the UEA provision (*Evidence Act 1995* (Cth), s 162).

These provisions are reproduced in Appendix 3 to this paper.

Queensland model

The Queensland provisions have not been amended since their enactment in 1977, but even so they have a more modern construction than Part 6, enacted almost 50 years earlier.

The scheme is similar to the scheme of Part 6. It is one of procedural notice to another party of the sending and receipt of a telegraphic message by the party seeking to adduce it.

Once notice has been given, and the notice produced in court,

- proof that the message was sent by the person purporting to be the sender to the person to whom the telegram is addressed may be established by production of the telegram itself and evidence that it was received from a telegraphic office; and

- proof that the message was received by the addressee may be established by production of the telegram itself (or a verified copy of it), evidence that the message was sent to or delivered at a telegraph office and evidence that the transmission fees for it (if any) were paid.

The efficacy of these provisions is questionable. Australia Post is unlikely to have kept pre-1993 individual records of receipt and fee payments for messages sent to it for telegraphic transmission.

This provision does not of itself establish proof of an actual or presumed date of sending or receipt of the message. That must still be proved by the party adducing evidence of the message.

The Queensland provisions specifically apply to civil proceedings only. This may be because the parent legislation[17] had that application, or in acknowledgement of the higher standard of proof required in criminal cases, or both.

The Queensland provisions apply only to telegraphic messages sent within Australia. The reason is probably that this was the ambit of the parent legislation.

[17] The *Telegraphic Messages Act 1872* (Qld).

Uniform Evidence Act model

The Uniform Evidence Acts[18] acknowledge that telegraphic messages may still need to be proved in court. Like the non-UEA provisions, the UEA removes the need for the party adducing the telegraphic message to prove every step in the chain of evidence from the delivery of the message to the telegraphic station and its eventual receipt by its addressee. The presumption of delivery to the addressee may be rebutted.

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 presumption is that the message was received within 24 hours of its having been delivered to a post office for telegraphic transmission.[19] 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 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.

The UEA provision applies to both criminal and civil proceedings. This may be explicable by its limited scope: the presumption is not as to the identity of the sender or as to when the telegram was actually sent or received.

By contrast to the UEA presumption for telegraphic messages, the UEA presumptions for electronic communications may establish the identities of the sender and recipient as well as the date the message was sent and the date and time it was received.[20]

The UEA model is not restricted to telegrams or lettergrams sent within Australia.

> **Question 2** If the *Evidence Act 1929 (SA)* is to continue to provide a separate way to prove the transmission of telegraphic messages, should this be
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> (a) 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
>
> (b) 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

[18] I.e. the *Evidence Act 1995* (Cth) and mirror Acts in the Northern Territory, Tasmania, Victoria and New South Wales. Note that the Commonwealth Act applies in the ACT.
[19] *Evidence Act 1995* (Cth), s 162.
[20] See further discussion of the UEA provision for electronic communications later in this paper.

(c) by a different scheme, and if so, what?

Question 3 If the *Evidence Act 1929* (SA) 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?[21]

Question 4 What limits, if any, should apply to any new provisions? For example, should they

(a) apply to both criminal and civil proceedings or to civil proceedings only?

(b) apply to any telegraphic message, wherever sent or received, or only to telegraphic messages sent within Australia?

(c) 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?

[21] See discussion under *Electronic communications* later in this Issues Paper.

Computer evidence

Background

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.

Part 6A was introduced to the Act in 1972 as a result of a recommendation made by the Law Reform Committee of South Australia in 1969[22] as to the admissibility of computer evidence in civil proceedings.

The Law Reform Committee emphasised the 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.

The Law Reform Committee described its proposal for Part 6A as having the same effect as s5 of the *Civil Evidence Act 1968* (UK),[23] with certain additional safeguards. That Act is reproduced in Appendix 1.

Section 5 was repealed and replaced by the *Civil Evidence Act 1995* (UK), and the relevant provisions in that Act[24] are discussed later in this paper as a possible model for reform.

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.[25]

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;

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[22] Tenth Report of the Law Reform Committee of South Australia to the Attorney-General: *Evidence Act – New Part V1a Computer Evidence,* 1969.
[23] This Act is mistakenly referred to in the Tenth Report as the *Civil Defence Act 1968* (UK).
[24] *Civil Evidence Act 1995* (UK), s 8 (Proof of statements contained in documents) and the definition of 'document' in s 13.
[25] 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* (SA).

- 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.[26]

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.

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 also because this Part of the Act is an aid to proof only[27], and the necessary evidence can be admitted under common law or under the 'business records' and 'banking records' provisions of the Act[28] or using the court's power under the Act to admit any 'apparently genuine document'.[29]

In 1985 the Australian Law Reform Commission observed,[30] referring to the leading South Australian cases on Part 6A at the time[31], that

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

Issues

Problems with the approach taken by Part 6A 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,

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26 This description is based on that of the Australian Law Reform Commission in its Report No.26 *Interim Evidence Volume 2*, (Australian Government Publishing Service, Canberra, 1985) at para 94.

27 *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].

28 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.

29 *Evidence Act 1929* (SA), s 45B.

30 Australian Law Reform Commission 26 *Evidence (Interim)*, (Australian Government Publishing Service, Canberra, 1985) at para 499.

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

> 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.[32]

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.[33]

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.

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.[34]

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[32] Australian Law Reform Commission 26 *Evidence (Interim)*, Vol 1, 1985, Australian Government Publishing Service, Canberra at paragraph 705.

[33] Brown, R A, 'Computer–produced evidence in Australia', (1984) 8(1) *University of Tasmania Law Review* 60 (footnotes omitted).

[34] These categories were suggested by (then) Associate Professor Donna Buckingham of the University of Otago Law School, in her article *Electronic Evidence,* New Zealand Law Journal, October 2001 at pages 397 to 404. The article discusses the absence of a digital admissibility regime in New Zealand. Professor Buckingham also contributed Chapter 38: *Evidentiary Issues* to *Electronic Business and Technology Law*, April 2011, LexisNexis, Wellington, New Zealand.

- to what extent, given the ubiquitous nature of computer (or digital) 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.

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'.[35]

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.

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 everyday lives of children and young people aged eight to 17 years, and is used regularly both within school and home environments.[36]

It has been observed that Australia's national critical infrastructures are 'increasingly – if not exclusively – controlled by computers'.[37] 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.[38]

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'), body sensors and implantable drug dispensers, household robots and new computing paradigms and sensor networks within the living body.[39]

Courts often require expert assistance about such matters and the field of digital forensics or e-forensics is an emerging one.[40]

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

36 'Click and Connect: Young Australians' use of online social media', *(*July 2009) *Qualitative Research Report 1*, Australian Communications and Media Authority, 5.

37 Parliamentary Joint Committee on the Australian Crime Commission, Parliament of the Commonwealth of Australia, *Cybercrime* (2004) 53, [5.3]

38 'Managing and reducing social vulnerabilities from coupled critical infrastructures' (2006) *International Risk Governance Council* (IRGC White Paper No 3).

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

40 See McKemmish, R, '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

Dr Anthony Dick of the University of Adelaide's School of Computer Science observed[41] 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.

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.

Part 6A does not 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.[42]

Nor does it 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.[43]

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.

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 rule, but rely on definitions of 'document'[44] and 'business record'[45] that cannot be applied to a digital object.

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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.

41 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.

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

43 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.

44 *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.'

45 *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.'

Section 45C makes an exception to the best evidence rule for documents that reproduce other documents when the reproduction is 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.[46]

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

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, 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.

Options for reform

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

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.

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.[47]

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

[46] *Evidence Act 1929* (SA), s 45C(3).
[47] Australian Law Reform Commission, *Evidence (Interim),* Report No.26 (1985) 388-389.

> 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.[48]

The most recent legislative models in Australia and New Zealand do not establish a separate set of electronically or digitally-referenced principles.

However, they include in their rules for the facilitation of proof a provision for documents or things that are produced by a technological process or device a rebuttable presumption that the technological process or device did in fact produce the asserted output.

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.[49]

The models discussed in this Issues Paper (those of Western Australia, Queensland, New Zealand, the UK, and the Commonwealth) are reproduced in Appendix 4.

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[50] 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
- the probative value of the electronic evidence must substantially outweigh any dangers of unfair prejudice or other harm to the opposing party.[51]

These are useful guides for the construction of a legislated presumption of authenticity or integrity.

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48 Andrew Ligertwood & Gary Edmond, *Australian evidence: A principled approach to the common law and the uniform acts* (5th ed, 2010) [8.197].
49 *Evidence Act 1995 (*Cth), s 48.
50 Judge Grimm, *Lorraine v Markel,* 2007 ILRWeb (P&F)1805, 207 WL 1300739
51 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.

Western Australian model

In Western Australia, a non-UEA jurisdiction, amendments to the *Evidence Act 1906* in 1987 permit the admission into evidence of a statement in a document (defined to include a limited range of data produced by a device) comprising:

> . . . information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.[52]

This evidence is admitted by way of exception to the hearsay rule, and must be adduced through a qualified witness.

The Western Australian model expressly states that it makes such a statement:

> . . . admissible notwithstanding —
>
> - the rules against hearsay;
> - the rules against secondary evidence of the contents of a document;
> - that the person who made the statement or the person who made a statement from which the information in the statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with the statement; or
> - that the statement is in such a form that it would not be admissible if given as oral evidence,
>
> but does not make admissible a statement which is otherwise inadmissible.[53]

When determining what weight or effect to give such evidence, the court is to have regard,

> . . . where the statement wholly or in part reproduces or is derived from information from one or more devices, to the reliability of the device or devices.[54]

Hence, evidence as to reliability must be adduced in every case.

There are related provisions for the admission of reproductions of documents.

The Western Australian provisions, although cast more broadly than Part 6A, and explicitly referring to their relationship with common law rules, arguably suffer similar problems of conceptual redundancy and unduly onerous proof requirements.

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[52] *Evidence Act 1906* (WA), sub-s 79C(1)(b)(ii).
[53] Ibid, s 79C(3).
[54] Ibid, s 79D(1)(e). A computer screen displaying writing or printing has been held to be a "document" and computer output has been held to be a "reproduction" for the purposes of this section: *Markovina v R* (1996) 16 WAR 354.

Queensland model

In Queensland, another non-UEA jurisdiction, s 95 of the *Evidence Act 1977* permits computer evidence to be admitted under a certificate and for these purposes defines a computer to mean

> . . . any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.[55]

Section 95 has been used to admit evidence of computer-based bank records, computer-based fines records and evidence of emails and to identify their content, provenance and destination.

Like Part 6A, the Queensland section requires certification validating the device and its output in every case, using cumulative criteria.

New Zealand model

In New Zealand, there is a rebuttable presumption that when evidence is offered that was produced by a machine, device, or technical process, and the machine, device, or technical process is of a kind that ordinarily produces such material, it did so on this particular occasion.[56]

The NZ legislation also permits parties to offer into evidence documents that have been displayed, retrieved, or collated by use of the machine, device, or technical process in circumstances where the information or matter is stored in a way that cannot otherwise be used by a court. There is a similar provision in the Uniform Evidence Act.[57]

Also, in common with the UEA, the NZ Act defines a document in such a way that all the evidentiary requirements for the admission of documents apply to information that is electronically recorded or stored, and also to material that is digitally produced, whether signed or otherwise authenticated.[58]

United Kingdom model

The UK takes a legislatively minimalist approach.

In 1995, the UK repealed and did not replace statutory restrictions on the use of evidence from computer records in civil proceedings (similar to Part 6A) and presumptions of exception to the hearsay rule (presumptions similar to those later enacted in the UEA).

The new *Civil Evidence Act 1995* (UK) contains no separate reference to computer generated material.

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[55] *Evidence Act 1977* (Qld), s 95(7).
[56] *Evidence Act 2006* (NZ), s 137.
[57] *Evidence Act 1995* (Cth), s48.
[58] See *Evidence Act 2006* (NZ), s 4.

Relevantly, it defines a document[59] in a way that can accommodate any means by which information is recorded or copied:.

> "document" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

The requirements for admissibility of documents are similarly accommodating, giving the court a wide discretion as to authentication and dealing with the inevitable problems with secondary evidence that arise with modern information technology.

Relevant extracts from the *Civil Evidence Act* 1995 (UK) are in Appendix 4.

In 1999 the UK Parliament expressly repealed provisions making evidence from computer records inadmissible in criminal trials unless conditions relating to proper use and operation of computer were shown to be satisfied.[60] The intention behind the repeal was that the admission of such records would be governed by the 'ordinary law on evidence'. According to the explanatory notes to the amending legislation,[61] this means that

> In the absence of any evidence to the contrary, the courts will presume that the computer system was working properly. If there is evidence that it may not have been, the party seeking to introduce the evidence will need to prove that it was working.

Uniform Evidence Act model

In contrast to the UK, the UEA replaces the common law, including the common law on proof of computer-generated material.

The relevant UEA provisions[62] are

- Part 2.2 (Documents): sub-ss 48(1)(c) and (d) (Proof of contents of documents)
- 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).

Proof of contents of documents

Part 2.2. of the UEA abolishes the original document rule[63] and establishes a new regime for proving the contents of documents.

Relevantly, sub-ss 48(1)(c) and (d) are designed

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[59] *Civil Evidence Act 1995* (UK), s 13.
[60] Those restrictions were contained in the *Police and Criminal Evidence Act* 1984 (UK), s 69.
[61] *Youth Justice and Criminal Evidence Act 1999* (UK), ss 60 and 67.
[62] For these purposes, we refer to the provisions in the *Evidence Act 1995* (Cth).
[63] See *Evidence Act 1995* (Cth), Part 2.2 (Documents): s 51 (Original document rule abolished).

> . . . to permit the tendering of secondary evidence of the content of modern information storing media.[64]

For these purposes, a 'document' is defined to include

> . . . anything from which sounds images or writings can be reproduced with or without the aid of anything else.[65]

These sections are preceded by a provision that acknowledges the accuracy of modern reproduction techniques and allows copies to be adduced to prove the contents of the original document whether the original exists or not.[66]

Using these provisions, parties may adduce evidence by tendering

- a transcript of words that have been recorded or converted into code by an article or thing (for example, by audiotape or shorthand); or
- the output of a device, where the information is stored in a way that it cannot be used by the court unless the device is used to retrieve, produce or collate it (for example, computer-generated information).

Facilitation of proof

Sections 146 and 147 create rebuttable presumptions that a process, machine or device did in fact produce the asserted outcome.

Section 146 refers to documents or things produced by processes, machines or other devices and the presumption applies only 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'.

Section 147 refers specifically to documents produced by processes, machines and other devices in the course of business, and the presumption applies without having first to establish that the device or process was one ordinarily used to produce a particular outcome.

These sections remove the onus of proving positively in every case that a particular process, machine or device was working properly at the relevant time. Neither section relieves compliance with the hearsay and opinion evidence provisions of the Evidence Act, being simply provisions for facilitating a mode of proof.[67]

If ss 146 and 147 are used as models, then the provisions in the Act for the admission of business and other documentary records into evidence (ss 45A and 45B, discussed earlier in this Part) will also need attention to ensure their compatibility with the new sections.

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[64] See Australian Law Reform Commission, *Evidence (Interim)* Report 26 (1985) [651] referring to sub-s 48(1)(b) *Evidence Act 1995* (Cth).
[65] See *Evidence Act 1995 (*Cth), Dictionary.
[66] Ibid.
[67] See for example *Hansen Beverage Company v* Bickfords (Australia) Pty Ltd [2008] FCA 406, Middleton J, at paragraph 119 ; *E. & J. Gallo Winery v Lion Nathan Australia Pty Limited* [2008] FCA 934, Flick J at paragraph 128.

There is a model for this in s 48 of the UEA (Proof of contents of documents), which combines the concepts dealt with in these two sections.

Question 5 Should the *Evidence Act 1929 (SA)* make separate provision for the admission of material that is generated by computer, electronic or digital technology?

Question 6 If so, should these provisions

(a) 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

(b) set out comprehensively how the proof and admission of this particular class of evidence should be governed?

Question 7 If the *Evidence Act 1929 (SA)* is to provide separately for the admission of material that is generated by computer, electronic or digital technology, should the provisions

(a) include a rebuttable presumption that a computer, electronic or digital device or process was functioning properly when it produced the material in question; or

(b) instead, require proof, by certification or otherwise, of these matters by the party adducing this evidence?

(c) 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?

(d) be part of or be cross-referenced with other provisions in the Evidence Act providing for the admission of business records and other apparently genuine documents (ss 45A and 45B), and if so to what extent?

Question 8 If the *Evidence Act 1929 (SA)* 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?

Electronic communications

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.[68]

For the sake of this discussion, all these methods of communication are called electronic communications.[69] 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.

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

> 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

[68] ALRC Report 102, NSWLRC Report 112, VLRC Final Report: *Uniform Evidence Law*, (Australian Government Publishing Service, Canberra, 2006) at paragraphs 6.45 to 6.56.
[69] This was the expression recommended by the ALRC, VLRC and NSWLRC in ALRC Report No.102 (Recommendation 6-2).

> 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.[70]

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;
> - 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;[71]
> - 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.

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.

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[70] Richard Raysman and Peter Brown, 'Authentication of Social Media Evidence', (2011) *New York Law Journal*, http://www.newyorklawjournal.com/ at 8 November 2011

[71] 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.

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.

There are two main models for evidentiary laws about electronic communication, described here as the non-UEA model and the Uniform Evidence Act model.

Non-UEA model

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, in every case, much in the way described above by the US commentators.

New Zealand and the UK take the same approach.

Uniform Evidence Act model

The UEA jurisdictions, on the other hand, make separate provision for electronic communications.[72] 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.[73]

The UEA uses the definition of electronic communications from the *Electronic Transactions Acts,*[74] 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

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[72] 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).

[73] ALRC Report 102,NSWLRC Report 112,VLRC Final Report: *Uniform Evidence Law*, (Australian Government Publishing Service, Canberra, 2006), Recommendations 6-2 and 6-3.

[74] 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 SA, 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 Attorney-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 (John Rau, Attorney-General).

> technologies. It is also intended to be sufficiently broad to capture future technologies.[75]

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.[76]

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 recently said, 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.[77]

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.[78]

If South Australia were to enact similar provisions, the logical definitions would be those in its *Electronic Transactions Act 2000*.

However, should it choose to enact different provisions, there are other models for defining electronic communications. Examples from the *Electronic Communications Act 2000* (UK)[79] and in the *Electronic Transactions Act 2002* (NZ)[80] are reproduced in Appendix 5 to this paper.

> **Question 9** To what extent, if any, should the *Evidence Act 1929 (SA)* make separate provision for the proof and admission of evidence of electronic communications?

[75] Explanatory Memorandum to the *Evidence Act 2008* (Vic).
[76] See *Evidence Act 1995* (Cth) , s 161.
[77] *Shah v Minister For Immigration* (2011) FMCA 18, per Cameron FM at paragraph 133.
[78] See *Evidence Act 1995* (Cth), s 71.
[79] *Electronic Communications Act 2000* (UK), s 15.
[80] *Electronic Transactions Act 2002* (NZ), s 5.

Question 10 If the *Evidence Act 1929* (SA) 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?

Question 11 If the *Evidence Act 1929 (SA)* is to provide for the separate proof and admission of evidence of electronic communications, should it include

(a) 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

(b) by contrast, set out what must be proved in each case by the party adducing this evidence?

(c) 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?

The question of uniformity

The models for laws about evidence of computer output and digital and electronic communication that are canvassed in this paper include the relevant UEA provisions.

This part of the paper asks readers to comment on the importance of uniformity in any changes to South Australian law on this topic.

However appealing a non-UEA model may be, or however possible a hybrid of non-UEA and UEA models or even an entirely original new model might seem, it is important to address the advantages of some uniformity. To choose a non-UEA model would be to retain two different sets of rules on this topic in South Australia – one for courts exercising Federal jurisdiction and one for those exercising State jurisdiction. It would also mean that South Australian courts exercising State jurisdiction would continue to treat evidence of computer output and electronic communications differently from courts exercising a similar jurisdiction in most other Australian States and Territories.

At present, within Australia, evidence laws dealing with phenomena that transcend physical boundaries (such as the output of electronic technology) vary between States and Territories except where those jurisdictions have adopted the relevant UEA provisions.

In South Australia (and in the other two jurisdictions that have not adopted the UEA[81]) two different sets of evidence laws operate side by side – one in State courts (laws other than the UEA) and the other in Federal courts (the UEA).

This means, for example, that the question of whether evidence of an electronic communication is proven, or whether that evidence may be admitted as an exception to the hearsay rule, may be answered differently by different courts in South Australia, depending on their jurisdiction.

Some may argue that this is precisely why South Australia should, at least on this topic, go down the path of uniformity.

Others may argue that this, in itself, is no reason for South Australia to base any changes to its laws on the UEA provisions on this topic – that there are other considerations that should influence the decision, and that uniformity for its own sake may bring its own problems. One such consideration is the extent to which the UEA provisions on this topic, as compared to other otherwise suitable models, have stood the test of time and can be adapted to accommodate unforeseen changes in technology with equal rigour.

Logically, this argument depends on a comparison of all suitable models with the UEA model.

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[82] (the Commissions). 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.

These provisions have so far stood the test of time. Their efficacy was reviewed by the Commissions some 10 years after their enactment. Their findings on review were:

- That the UEA provisions for reliability and accuracy of computer-produced evidence (ss 146 and 147 UEA) did not need to be amended or fine-tuned. In saying so, the 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 Act 1929* (SA))[83] for want of any empirical evidence justifying a

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81 Queensland and Western Australia.

82 The Final Report of this review was ALRC Report 102, NSWLRC Report 112,VLRC Final Report: *Uniform Evidence Law*, (Australian Government Publishing Service, Canberra, 2006). Note that the Queensland Law Reform Commission conducted a separate review in 2005 (*A review of the Uniform Evidence Acts,* QLRC R 60, September 2005). The Queensland review did not deal specifically with the UEA provisions examined in this Issues Paper.

83 Ibid., at paragraphs 6.17 - 6.29, in which the Commissions examined sections 45C and 59B *Evidence Act 1929* (SA). These were their conclusions (footnotes omitted):

> '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.

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.'[84] This is still the case in 2012.

- That the (then) UEA provisions for proof of electronic communications should be changed,[85] and that relevant amendments were made by all UEA jurisdictions to their Acts. It is the changed provisions that are the current UEA model described in this paper. No cases have since suggested that there are any problems with the electronic communications provisions in the UEA or that they are not achieving their intended purpose.

Unlike the UEA provisions on this topic, none of the other models canvassed in this paper has been the subject of formal evaluation. Some (like those from the UK and New Zealand 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. Other models have not addressed the very conceptual redundancy that is problematic in the current South Australian law.

> **Question 12** 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?

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."'

[84] ALRC Report 102, NSWLRC Report 112,VLRC, Final Report: *Uniform Evidence Law*, (Australian Government Publishing Service, Canberra, 2006) at paragraphs 6.40 and 6.41.

[85] Ibid, Recommendations 6-2 and 6-3.

Appendices

Parent legislation for Pts 6 & 6a, Evidence Act 1929 (SA)

Telegraphic Messages Act 1873
Civil Evidence Act 1968 (UK), ss 5 and 6

Telegraphic Messages Act 1873

WHEREAS it is desirable to facilitate the proof of Telegraphic Messages in Courts of Justice, and to extend the advantages of the Electric Telegraph - Be it therefore Enacted by the Governor of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

1. It shall be lawful for any party to any action or suit in any Court of civil jurisdiction, at any time after the commencement thereof, to give notice to any other party that he proposes to adduce in evidence at the hearing of the trial of such action or suit any telegraphic messages that before the date of such notice shall have been sent by electric telegraph from any station in South Australia to any other station within the said Province : 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 before the day of such hearing or trial : And every such notice shall specify the of the sender and receiver of such messages, the subject matter thereof, and their dates, as nearly as may be : And any such notice may be served, and the service thereof proved, in the same manner as notices to admit and produce may now be served and proved respectively.
2. In any case in which such notice shall have been given the production of any telegraphic message described in such 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 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.
3. In any cause depending in a Court of civil jurisdiction, the production of any telegraphic message, or of a machine copy or press copy thereof, or a copy thereof verified on oath 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 notice shall be first given by the party adducing the same in evidence to the other party of his intention so to do, and such notice may be given in such manner and at such

times as by the practice of the Court in which the proceeding is taken, notices to produce are required to be given.

4. It shall be lawful for the Governor, any Responsible Minister of the Crown, the President of the Legislative Council, the Speaker of the House of Assembly, the Judges of the Supreme Court, the Commissioner of the Court of Insolvency, any Special Magistrate, and any principal officer of Government, or attorney, or solicitor, to 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:
   I. 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:
   II. 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 shall appear that a true copy of such document has been received by the person to whom it shall have been sent:
   III. When it shall appear 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 shall have been so sent; and shall forthwith, by electric telegraph, inform such person that such certificate has been so endorsed:
   IV. 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.

5. Every copy so endorsed and certified 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 shall have been so received, or who shall be thereby authorized, instructed, or commanded, or who shall or may be 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 such original document duly signed and sealed, or signed or sealed, as the case may be. And in the case of documents 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.

6. Every original document, a copy whereof shall have been transmitted under the fourth section of this Act, shall be kept at the telegraph station at which it was delivered for the purposes of such transmission; and shall, after the expiration of two days from the date of the certificate under sub-section three of that section being endorsed upon it, be open within reasonable hours to the inspection of any person upon payment of a fee of One Shilling.

7. Any person who, being charged with the delivery of any telegraphic message, shall wilfully deliver the same to any person other than the person to whom the same shall be addressed, or his authorized agent in that behalf, shall be guilty of a misdemeanor,

and, being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labor.

8. Whosoever, without lawful authority or excuse (the proof whereof shall be on the person accused), shall sign the name of any other person to any telegraphic message with intent to procure such message to be sent as a message from such other person, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labor.

9. Any Justice or notary public who shall wilfully and false endorse 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 shall by telegraph wilfully and falsely inform any person to whom such document shall have been so sent that a certificate under the provisions of this Act has been endorsed thereon, shall forfeit a sum not exceeding One Hundred Pounds, which may be sued for and recovered by the first person who shall, for his own benefit and without collusion, sue for the same.

10. Any person by 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 felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.

11. The following words within inverted commas shall, for the purposes of this Act, bear the meanings set against them respectively, unless where the context implies otherwise-

    "Electric Telegraph" - Any telegraphic line the property and under the control of the Government, and worked by electricity within the said Province:

    "Telegraphic Message" - Any message or other communication transmitted, or intended for transmission, or purporting to have been transmitted, by electric telegraph:

    "Telegraph Station" - Any station appointed by Government for the receipt and transmission of telegraphic messages.

    And the words "any principal officer of Government" shall include the Auditor-General, the Under Secretary, the Under Treasurer and the Secretaries to each Department presided over by s Minister of the Crown, the Clerk of the Legislative Council, the Clerk of the House of Assembly, the Government Resident at the Northern Territory, the Surveyor-General, the Collector of Customs, the President of the Marine Board, the Postmaster-General, the Superintendent of Telegraphs, the Registrar-General, the Sheriff, the Master of the Supreme Court, the Commissioner of Police, Inspectors of Police, the Returning Officer for the Province - and for the purposes of returns to writs of election, but not otherwise, shall also include Returning Officers of Districts, and Deputy Returning Officers of Electoral Divisions.

This Act may be cited for all purposes as "The Telegraphic Messages Act, 1873."

Civil Evidence Act 1968 (UK)

Part 1 Hearsay evidence[86]

[1-4 omitted, not relevant]

5. (1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are -

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;
(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or
(b) by different computers operating in succession over that period; or
(c) by different combinations of computers operating in succession over that period; or
(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

[86] This Part was repealed by the *Civil Evidence Act 1995* (UK), Schedule 2, s 15(2).

(a) identifying the document containing the statement and describing the manner in which it was produced;
(b) involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act

"computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

6. (1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section. 2, 4 or 5 of this Act it may, subject to any rules of court, be proved by the production of that document or whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 2, 4 or 5 of this Act, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.

(3) In estimating the weight, if any, to be attached to a statement admissible in evidence by virtue of section 2, 3, 4 or 5 of this Act regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement and, in particular

(a) in the case of a statement falling within section 2(1) or 3 (1) or (2) of this Act, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent the facts;
(b) in the case of a statement falling within section 4(1) of this Act, to the question whether or not the person who originally supplied the information from which the record containing the statement was compiled did so contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not that person, or any person concerned with compiling or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts; and

(c) in the case of a statement falling within section 5(1) of this Act, to the question whether or not the information which the information contained in the statement reproduces or is derived from was supplied to the relevant computer, or recorded for the purpose of being supplied thereto, contemporaneously with the occurrence or existence of the facts dealt with in that information, and to the question whether or not any person concerned with the supply of information to that computer, or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent the facts.

(4) For the purpose of any enactment or rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated-

(a) a statement which is admissible in evidence by virtue of section 2 or 3 of this Act shall not be capable of corroborating evidence given by the maker of the statement; and
(b) a statement which is admissible in evidence by virtue of section 4 of this Act shall not be capable of corroborating evidence given by the person who originally supplied the information from which the record containing the statement was compiled.

(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 5(4) of this Act wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both.

Current South Australian provisions

Evidence Act 1929 (SA), ss 45A, 45B, 45C, 53–59, 59A–59C

Electronic Transactions Act 2000 (SA)

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;

(b) 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)[87]

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;

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

Legislative models for telegraphic messages

Evidence Act 1977 (Qld), Division 4 (Proof of telegraphic messages), ss 75-77
Evidence Act 1995 (Cth), s 162

Evidence Act 1977 (Qld)

Part 5

Division 4: Proof of telegraphic messages75 Notice of intention to adduce telegraphic message in evidence

(1) In any proceeding (not being a criminal proceeding), any party may at any time after the commencement thereof give notice to any other party that the party proposes to adduce in evidence at the trial or hearing any telegraphic message that has been sent by telegraph from any place in the Commonwealth to any other place in the Commonwealth.

(1A) However— 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 2 days; and

(b) 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.

(2) Any such notice may be served and the service thereof proved in the same manner as notices to produce may now be served and proved.

76 Proof of message Where a notice under section 75 has been given, the production of a 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 office, shall be evidence that such message was sent by the person so purporting to be the sender thereof to the person to whom the same is addressed.

77 Proof of sending a message

Where a notice under section 75 has been given, the production of a telegraphic message, or a copy thereof verified on oath, together with evidence that such message was sent to or delivered at a telegraph office and that the fees (if any) for the transmission thereof were duly paid shall be evidence that such message was duly delivered to the person named therein as the person to whom the same was to be transmitted.

Evidence Act 1995 (Cth)

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.

Legislative models for computer evidence

Evidence Act 1906 (WA), s 79C
Evidence Act 1977 (Qld), s 95
Evidence Act 2006 (NZ), ss 4 and 137
Evidence Act 1995 (Cth), ss 48(1)(d), 146 and 147

Evidence Act 1977 (Qld)

95 Admissibility of statements produced by computers

(1) In any proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person; and
(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived; and
(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or
(b) by different computers operating in succession over that period; or
(c) by different combinations of computers operating in succession over that period; or
(d) in any other manner involving the successive operation over that period, in whatever order, of 1 or more computers and 1 or more combinations of computers;

all the computers used for that purpose during that period shall be treated for the purposes of this part as constituting a single computer and references in this part to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing all or any of the following things, that is to say—

(a) identifying the document containing the statement and describing the manner in which it was produced;
(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate;

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of the matters stated in the certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) Any person who in a certificate tendered in evidence by virtue of subsection (4) wilfully makes a statement material in that proceeding which the person knows to be false or does not believe to be true is guilty of an offence.

Maximum penalty—20 penalty units or 1 year's imprisonment.

(6) For the purposes of this part—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
(b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(7) Subject to subsection (3), in this section—

computer means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

Evidence Act 1906 (WA)

79C. Documentary evidence, admissibility of

(1) Subject to subsection (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement —

(a) was made by a qualified person; or

(b) directly or indirectly reproduces or is derived from one or other or both of the following —

(i) information in one or more statements, each made by a qualified person;
(ii) information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.

(2) Where a statement referred to in subsection (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless —

(a) he is dead;

(b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;

(c) he is out of the State and it is not reasonably practicable to secure his attendance;

(d) all reasonable efforts to identify or find him have been made without success;

(e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;

(f) having regard to the time which has elapsed since he made the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;

(g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or

(h) he refuses to give evidence.

(2a) Notwithstanding subsections (1) and (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if —

(a) the statement is, or directly or indirectly reproduces, or is derived from, a business record; and

(b) the court is satisfied that the business record is a genuine business record.

(2b) Where a statement referred to in subsection (2a) is made by a qualified person that person shall not be called as a witness unless the court orders otherwise.

(3) This section makes a statement admissible notwithstanding —

(a) the rules against hearsay;

(b) the rules against secondary evidence of the contents of a document;

(c) that the person who made the statement or the person who made a statement from which the information in the statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with the statement; or

(d) that the statement is in such a form that it would not be admissible if given as oral evidence,

but does not make admissible a statement which is otherwise inadmissible.

(4) Notwithstanding subsections (1), (2) and (2a), in any criminal proceedings a statement in a document which was made in the course of or for the purpose of —

(a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceedings;

(b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;

(c) the preparation of a defence to a charge for any offence; or

(d) the preparation of the case of the prosecution in respect of any offence,

shall not be rendered admissible as evidence by this section.

(5) For the purposes of this section a court may —

(a) for the purpose of deciding whether or not a statement is admissible as evidence, draw any reasonable inference from the form of contents of the document in which the statement is contained, or from any other circumstances;

(b) in deciding whether or not a person is fit to attend or give evidence as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner.

(6) For the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility —

(a) may necessitate undue consumption of time; or

(b) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

79D. Evidence admitted under s.79C, weight and effect of

(1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular —

(a) to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated;

(b) to the question of whether or not the qualified person or any person concerned with making or keeping the document containing the statement, had any incentive to conceal or misrepresent the facts;

(c) to the question of whether or not the information in the statement was of a kind which was collected systematically;

(d) to the question of whether or not the information in the statement was collected pursuant to a duty to do so;

(e) where the statement wholly or in part reproduces or is derived from information from one or more devices, to the reliability of the device or devices; and

(f) where the statement reproduces or is derived from any information, to the reliability of the means of reproduction or derivation.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person.

Evidence Act 2006 (NZ)

4 Interpretation

In this Act, unless the context otherwise requires,—

document means—

(a) any material, whether or not it is signed or otherwise authenticated, that bears symbols (including words and figures), images, or sounds or from which symbols, images, or sounds can be derived, and includes—
   i. a label, marking, or other writing which identifies or describes a thing of which it forms part, or to which it is attached:
   ii. a book, map, plan, graph, or drawing:
   iii. a photograph, film, or negative; and

(b) information electronically recorded or stored, and information derived from that information.

137 Evidence produced by machine, device, or technical process

(1) If a party offers evidence that was produced wholly or partly by a machine, device, or technical process (for example, scanning) and the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed that on a particular occasion the machine, device, or technical process did what that party asserts it to have done, in the absence of evidence to the contrary.

(2) If information or other matter is stored in such a way that it cannot be used by the court unless a machine, device, or technical process is used to display, retrieve, produce, or collate it, a party may offer a document that was or purports to have been displayed, retrieved, or collated by use of the machine, device, or technical process.

Civil Evidence Act 1995 (UK)

8 Proof of statements contained in documents.

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved —
   (a) by the production of that document, or

(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

13 Interpretation

. . .

*"**document**"* means anything in which information of any description is recorded, and

*"**copy**"*, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

Evidence Act 1995 (Cth)

Chapter 2 Adducing evidence

Part 2.2 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.

51 Original document rule abolished

The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.

Note 1: Section 182 gives the provisions of this Part a wider application in relation to Commonwealth records and certain Commonwealth documents.

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

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

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.

Legislative models for electronic communications

Evidence Act 1995 (Cth), ss 71 and 161, and extract from Dictionary, Part 1 (Definitions)
Electronic Transactions Act 2002 (NZ), s 5 (Interpretation)
Electronic Communications Act 2000 (UK), s 15 (General interpretation)

Evidence Act 1995 (Cth)

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.

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[88], 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.

[88] Section 162 refers to lettergrams and telegrams.

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.

Dictionary

Part 1 - Definitions

electronic communication has the same meaning as it has in the *Electronic Transactions Act 1999*[89].

Electronic Communications Act 2000 (UK)

15 General interpretation

(1) In this Act, except in so far as the context otherwise requires—

communication includes a communication comprising sounds or images or both and a communication effecting a payment;

electronic communication means a communication transmitted (whether from one person to another, from one device to another or from a person to a device or vice versa)—

(a) by means of an electronic communications network ; or

(b) by other means but while in an electronic form;

record includes an electronic record;

(2) In this Act—

(a) references to the authenticity of any communication or data are references to any one or more of the following—

i. whether the communication or data comes from a particular person or other source;

ii. whether it is accurately timed and dated;

iii. whether it is intended to have legal effect; and

(b) references to the integrity of any communication or data are references to whether there has been any tampering with or other modification of the communication or data.

(3) References in this Act to something's being put into an intelligible form include references to its being restored to the condition in which it was before any encryption or similar process was applied to it.

[89] See Appendix 2, which reproduces the definition in the *Electronic Transactions Act 2000* (SA). The SA Act mirrors the Commonwealth Act.

Electronic Transactions Act 2002 (NZ)

5 Interpretation

In this Act, unless the context otherwise requires,—

> ***data storage device*** means any article or device (for example, a disk) from which information is capable of being reproduced, with or without the aid of any other article or device
>
> ***electronic*** includes electrical, digital, magnetic, optical, electromagnetic, biometric, and photonic
>
> ***electronic communication*** means a communication by electronic means
>
> ***information*** includes information (whether in its original form or otherwise) that is in the form of a document, a signature, a seal, data, text, images, sound, or speech.