

THE STRUCTURE OF ELECTRONIC EVIDENCE: HAVE WE GOT IT RIGHT?

Stephen Mason, General Editor of *Electronic Evidence* (Lexis Nexis Butterworths), is revising and updating the text of the third edition, and would like to receive views from judges, practitioners and legal academics on the changes he proposes to make.

In the first edition of *Electronic Evidence* (2007), I asked readers to offer their comments respecting the usefulness or otherwise of the text. The aim was that when future editions were planned, consideration would be given to any suggestions received. To date, I have not received any recommendations or observations, other than one comment from a former agent of the Federal Bureau of Investigation who recommends the text to those whom he teaches forensic accounting: that is, to retain the chapter on encrypted data, because it was now such an important topic.

The absence of remarks from readers does not mean the content will remain static. I am in the process of updating the third edition, and two issues arise that seem to me to be of relevance. The first is whether we should continue to include the current self-contained chapters on individual jurisdictions – whether it is desirable or necessary to cover a number of jurisdictions (Australia, Canada, European Union, Hong Kong, India, Ireland, New Zealand, Scotland, Singapore, South Africa, and the United States of America). Part of the reason for including so many jurisdictions in the first edition was because evidence in digital format knows no state boundaries. It seemed to me that where a court reached a decision in one jurisdiction, it might prove to be of interest to a court in another jurisdiction that faced the same problem. That is not to say that the first judgment would be followed, so much as to act as an initial reference point. However, there does not appear to be much cross-referencing of case law across common law jurisdictions – certainly from the perspective of electronic evidence. For this reason, it might be pertinent to ask whether we should continue to cover such a wide ground, given that decisions from other jurisdictions are incorporated into the main text in any event. Second, the content of the text will benefit from being revised. Chapters presently include discussions that will not necessarily be included in a traditional text on evidence, such as the investigation and examination of digital evidence (which indirectly covers opinion evidence in the context of digital evidence), a more detailed discussion of the issues relating to criminal proceedings in the specific context of digital evidence, and the qualifications of witnesses. I have developed a revised list of contents as follows:

- The sources of digital evidence
- The characteristics of electronic evidence in digital format
- Investigation and examination of digital evidence
- Authenticating digital data
- The presumption that computers are ‘reliable’
- The foundations of digital evidence (direct and indirect evidence; real evidence; best evidence; primary and secondary evidence; admissibility; weight; document; book or paper; instrument; writing; record; ownership of digital data; electronic signatures; video-recorded and

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Encrypted data

Criminal proceedings (before trial; conducting a criminal investigation across state borders; search orders; search and seizure; destruction of evidence; evidence from other jurisdictions; trial)

Qualifications of witnesses

It is proposed to remove electronic disclosure in its entirety. Electronic disclosure was included in the first and subsequent editions because it was a relatively new topic that had an indirect bearing on electronic evidence generally. It is now undoubtedly the case that electronic disclosure is rapidly coming of age, and it is no longer relevant to include this topic in a book on electronic evidence.

Also removed from the current list of contents is the chapter entitled “Using graphical technology to present evidence”. This is an important topic that is widely ignored by lawyers, but possibly not a subject that fits neatly into a text on electronic evidence, if it is thought necessary to restrict a text on electronic evidence to the same limits as a book on traditional evidence. It could remain as an appendix, but the question remains whether, as the parameters of electronic evidence become fixed, it is appropriate or essential to retain this topic in the text.

This is a plea for judges, practitioners and legal academics to add their comments to this expanding area of evidence. I am aware that Sweet and Maxwell intend to publish a book on electronic evidence in due course, and I invite everyone involved in the practical and theoretical aspects of electronic evidence to add their voice to this debate.

All comments, observations and criticisms are welcome though the conduit of *Amicus Curiae* (julian.harris@sas.ac.uk) or direct to me: that is way we can improve the text.

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