



For attention: Mr Nelson Matibe; Dr Jacob Buti Skosana; Dr Mashau Slias Ramaite

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Dear Mr Matibe, Dr Skosana, and Dr Ramaite

The Helen Suzman Foundation is an NGO that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the [Discussion Paper 175: Review of Laws Pertaining to Evidence in Criminal Proceedings](#).

Should you have any queries, it would be appreciated if you could contact me at the following email address: [naseema@hsf.org.za](mailto:naseema@hsf.org.za)

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Naseema Fakir', with a stylized flourish at the end.

**Naseema Fakir**  
Executive Director  
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## **1. Introduction**

- 1.1. The Helen Suzman Foundation (HSF) is a non-governmental organisation that promotes constitutional democracy and the rule of law. HSF's interest in Discussion Paper 175 (the Paper) arises from its commitment to ensuring that the South African criminal justice system remains both constitutionally compliant and practically effective.
- 1.2. HSF recognises that the law of evidence must strike an appropriate balance between ensuring judicial integrity and maintaining public confidence in the administration of justice. This requires an evidentiary framework that is sufficiently robust to safeguard fair trial rights, while also being responsive to the increasing complexity of modern litigation and the rapid advancement of technology.
- 1.3. The Paper focuses on the rules of evidence applicable to criminal procedure and the lacunae arising from the absence of codified standards governing the admissibility of evidence. HSF welcomes the South African Law Reform Commission's (the Commission) attempt to modernise and consolidate aspects of the law of evidence in a manner that strengthens constitutional protections and promotes legal certainty.
- 1.4. At a broader level, the proposed reforms seek to balance the rights of accused persons, the interests of justice, and the prosecutorial discretion exercised within the criminal justice system. Although the scope of the Paper is intentionally limited and does not attempt a comprehensive review of international evidentiary standards, comparative international approaches remain relevant, particularly in relation to the modernisation of hearsay evidence and the admissibility of electronic evidence.
- 1.5. HSF submits that any reform of the law of evidence must prioritise:
  - 1.5.1. Clarity and consistency in evidentiary standards;
  - 1.5.2. The protection of constitutional fair trial rights;
  - 1.5.3. The development of coherent rules governing electronic and digital evidence;
  - 1.5.4. The safeguarding of procedural fairness and judicial integrity; and

1.5.5. Public confidence in the reliability and legitimacy of the criminal justice system.

## **2. Codification of the “Cautionary Rule” under Section 208 of the Criminal Procedure Act 51 of 1977<sup>1</sup>**

2.1. HSF supports the amendment of section 208 of the Criminal Procedure Act 51 of 1977 (CPA) to expressly codify the cautionary rule applicable to single witness testimony.

2.2. As noted by the Commission in Chapter 7 at paragraph 7.12, the current reliance on judicially developed rules has resulted in inconsistent application by the courts. The absence of codified standards has contributed to fragmentation within the law of evidence and has created uncertainty regarding the evidentiary threshold applicable to single witness testimony.

2.3. HSF therefore supports the codification of the requirement that single witness testimony must be “clear and convincing in all material respects.”<sup>2</sup> Codification would strengthen legal certainty, promote consistency in judicial application, and provide an objective and predictable evidentiary standard.

2.4. Importantly, embedding the cautionary rule within legislation would ensure that the quality and reliability of evidence, rather than the mere existence of a witness, remains central to the assessment of guilt. This is particularly important in the context of increasingly complex criminal trials and the growing role of electronic and digital evidence.

## **3. Admissibility of Electronic Evidence and Integration of the Electronic Communications and Transactions Act 25 of 2002 (ECTA)**

3.1. The Paper addresses the increasing shift toward “technological neutrality” and the integration of section 15 of ECTA into the evidentiary framework.

3.2. As identified in Chapter 5, while existing legislation permits the admissibility of electronic data, it fails to adequately regulate the exclusion of unreliable electronic evidence or address the common law exclusionary rules applicable to obtaining and handling of such evidence.<sup>3</sup>

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<sup>1</sup> See Chapter 9, page 74 at para 9.6.

<sup>2</sup> See Chapter 3, page 9 at para 3.9 “the cautionary rule” is a rule of practice which requires the trial court to recognise the dangers inherent in the acceptance of the evidence of a single witness and seeks to strive for a safeguard of some factor which reduces the risk of wrongful conviction.

<sup>3</sup> Page 24 at para 5.3.

- 3.3. The relationship between ECTA and the common law best evidence rule also remains inconsistent. In particular, there are discrepancies as to whether the original document is the best evidence when the content (data messages) adduced could render it inadmissible on the grounds that it is not in its original form.<sup>4</sup>
- 3.4. HSF supports the modernisation of the rules governing documentary evidence, including the proposed amendments to section 208E.<sup>5</sup> However, any expansion of admissibility standards must remain subject to constitutional safeguards and appropriate limitations regarding presumptions of reliability in automated systems.
- 3.5. As recognised by the Commission in Chapter 4, electronic data is uniquely susceptible to manipulation, including through the use of artificial intelligence technologies such as deepfakes. In addition, the growing reliance on cloud-based storage and processing systems raises significant concerns regarding authenticity, reliability, chain of custody, and evidential weight.
- 3.6. These concerns are particularly relevant in the context of organised cybercrime, digital fraud, and investigations involving large volumes of electronic and social media data. The increasing sophistication of digital manipulation necessitates a legislative framework capable of safeguarding the integrity of electronic evidence.
- 3.7. Although HSF supports the proposed expansion of documentary evidence to include electronic and digital evidence, such reforms must pass constitutional muster and adequately address the evidentiary burdens arising from sections 14 and 15 of ECTA.
- 3.8. Accordingly, HSF supports the proposed amendments to section 208E relating to:
  - 3.8.1. The contents of a document may be proved either by primary or secondary evidence;

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<sup>4</sup> See further, page 24 at para 5.5: “secondary evidence such as computer print-outs or copies of a video-recording may be admitted if it’s the only means of proving a document or electronic data. Also, it may be used to prove things other than the contents of the document, for example, communication of a criminal organisation and their relationships.”

<sup>5</sup> See page 74 at para 9.5.1: “the meaning of evidence should be defined to include documentary evidence. The meaning of document should be defined. The meaning should be based on the classification of evidence.”

- 3.8.2. Primary Evidence means the document itself produced for the inspection of the Court;
- 3.8.3. Secondary evidence includes:
  - 3.8.3.1. Certified copies of the original;
  - 3.8.3.2. Copies made from the original by mechanical processes which in themselves ensures the accuracy of the copy; and
  - 3.8.3.3. Copies compared with such copies
- 3.9. HSF further supports the proposed section 208E(7), which regulates the handling and storage of electronic information and "computer output".<sup>6</sup>
- 3.10. However, HSF emphasises that the procedural and substantive safeguards surrounding electronic evidence remain critically important. The constitutional right to privacy, together with the right to a fair trial, requires careful balancing against the state's interest in accessing electronic data.
- 3.11. Any legislative framework governing electronic evidence must therefore ensure adequate safeguards relating to:
  - 3.11.1. The chain of custody;
  - 3.11.2. Authentication of electronic data;
  - 3.11.3. The integrity and preservation of digital evidence; and
  - 3.11.4. Judicial oversight regarding admissibility and evidential weight.
- 3.12. HSF submits that the burden of proving the reliability and integrity of electronic evidence must remain with the state. Failure to do so risks unconstitutionally shifting the evidentiary burden onto accused persons, particularly in circumstances involving automated systems and complex digital data.

#### **4. Refining the Hearsay Standard under Section 3(1) of the Law of Evidence Amendment Act**

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<sup>6</sup> See Chapter 9, pages 78-79, paras 9.11 (7) – (8).

- 4.1. The Paper proposes reforms to the admissibility of hearsay evidence in terms of section 3(1) of the Law of Evidence Amendment Act. HSF supports the Commission's attempt to strengthen alignment between the interests of justice and the constitutional rights of accused persons.
- 4.2. The decision in *Kapa v S* is particularly relevant to this discussion.<sup>7</sup> The case pertains to reforming rules for as it signified prejudice occasioned to the applicant as an accused person insofar as being deprived of their rights to cross examine the credibility and reliability of the witness.
- 4.3. HSF therefore welcomes the proposed amendments in Chapter 9 aimed at providing a more structured framework for assessing credibility, reliability, and admissibility in relation to hearsay evidence.
- 4.4. In particular, HSF supports the proposed provisions under paragraph 9.7 concerning section 208A (Relevancy of facts) including:
  - 4.4.1. Paragraph 9.7(5), relating to the conduct of persons making or receiving hearsay statements; and
  - 4.4.2. Paragraph 9.7(8), relating to prior inconsistent statements.
- 4.5. These amendments would assist courts in undertaking a more structured assessment of hearsay evidence and reduce uncertainty regarding admissibility.
- 4.6. HSF further supports the Commission's broader attempt to develop a more coherent statutory model of evidence law, particularly given the fragmented and predominantly uncodified nature of South African common law.
- 4.7. The proposed reforms draw appropriately from comparative international approaches, including the Indian Evidence Act and Rule 803 of the United States Federal Rules of Evidence.<sup>8</sup>

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<sup>7</sup> [2023] ZACC 1 (the Kapa Case).

<sup>8</sup> See Chapter 6, page at paragraph 6.77 on how the IEA explicitly recognises electronic and digital evidence as primary evidence that extends to hearsay evidence and renders such evidence admissible if it meets the necessary conditions such as unavailability of the declarant. See also, page 58 at para 6.88 regarding the exceptions for admissibility of hearsay under the United States Federal Rules of Evidence.

- 4.8. However, HSF cautions that the expansion of hearsay admissibility should not permit hearsay evidence to replace direct testimony where direct evidence is reasonably available.
- 4.9. An overly permissive approach to hearsay risks undermining sections 35(3)(i) - (j) of the Constitution, including the rights to challenge evidence and protection against self-incrimination.
- 4.10. HSF therefore submits that the proposed reforms should ensure that:
  - 4.10.1. Hearsay evidence remains subject to strict judicial scrutiny;
  - 4.10.2. Direct testimony remains preferable where reasonably available; and
  - 4.10.3. Constitutional fair trial protections remain central to the admissibility enquiry.
- 4.11. Subject to these safeguards, HSF supports the development of a more coherent statutory framework governing hearsay evidence as a necessary step in the constitutional development of South African evidence law in terms of section 39(2) of the Constitution.

## **5. MISCELLANEOUS: ABSENCE OF IMPLEMENTATION COSTS AND RESOURCE ALLOCATION**

- 5.1. HSF submits that a significant deficiency across Chapters 5, 6, and 7 of the Paper is the absence of any meaningful discussion regarding implementation costs, institutional capacity, or financial implications.
- 5.2. Although the Paper advances important proposals aimed at reducing fragmentation and modernising the evidentiary framework, it fails to adequately account for the substantial financial investment required to implement these reforms effectively.
- 5.3. In particular, the proposed expansion of documentary evidence to include complex electronic and digital data will require:
  - 5.3.1. Specialised forensic and technical training;
  - 5.3.2. High-capacity digital storage systems;
  - 5.3.3. Integrated case management infrastructure;

- 5.3.4. Updated technological capabilities within SAPS and the NPA; and
- 5.3.5. Ongoing maintenance and oversight mechanisms.
- 5.4. Without adequate funding and institutional support, there is a substantial risk that the proposed reforms will remain ineffective in practice and contribute to further delays and backlogs within the criminal justice system.
- 5.5. HSF therefore submits that the Commission should include:
  - 5.5.1. A dedicated financial impact assessment addressing the implementation costs associated with the proposed reforms; and
  - 5.5.2. Clear budgetary and institutional planning measures necessary to ensure practical implementation.

## **6. CONCLUSION**

- 6.1. The reforms proposed in Discussion Paper 175 represent an important step toward modernising South Africa's law of evidence and strengthening the constitutional integrity of the criminal justice system.
- 6.2. HSF supports the Commission's broader objective of consolidating fragmented evidentiary rules and developing a more coherent statutory framework capable of responding to the realities of modern litigation and technological advancement.
- 6.3. However, legislative modernisation must remain firmly grounded in constitutional principles, including fair trial rights, procedural fairness, judicial oversight, and the rule of law.
- 6.4. HSF therefore submits that the proposed reforms should prioritise:
  - 6.4.1. Clarity and consistency in evidentiary standards;
  - 6.4.2. Strong safeguards governing electronic and digital evidence;
  - 6.4.3. Careful regulation of hearsay admissibility;
  - 6.4.4. The preservation of constitutional fair trial protections; and

- 6.4.5. Adequate institutional and financial capacity for implementation.
- 6.5. Ultimately, the effectiveness of any reform to the law of evidence will depend not only on the breadth of the proposed amendments, but on whether the resulting framework is constitutionally sound, practically enforceable, and capable of maintaining public confidence in the reliability, credibility, and integrity of the criminal justice system.