PREFACE

This text can been seen as a companion volume to an earlier book I edited, *Electronic Evidence: Disclosure, Discovery & Admissibility* (LexisNexis Butterworths, London, 2007), which covered Australia, Canada, England & Wales, Hong Kong, India, Ireland, New Zealand, Scotland, Singapore, South Africa and the United States of America. An additional four chapters in this text covered the following: the sources of digital evidence, the characteristics of electronic evidence, investigation and examination of digital evidence and the evidential foundations. I wrote each of these chapters, which meant that I was not in a position to include them in this book, and finding authors to cover these areas for a second time proved to be impossible. In addition, Dr Damian Schofield and Ms Lorna Goodwin wrote a useful introductory chapter on Using Graphical Technology to Present Evidence. It may be obvious to the cynic that the production of two books on the same topic with the exclusion of important chapters from one text is an excellent exercise in attempting to increase income. However, the fact that two publishers have published books on the same topic under the auspices of the same editor that cover different jurisdictions is because of timing. The first book was almost complete before I thought it would be a good idea to expand the discussion and include additional jurisdictions. In this instance, timing was all, which is the reason why we have two books covering different jurisdictions.

This text is aimed at judges, lawyers, legal scholars and students—not just in the jurisdictions included in this book, but across the world. This is because digital evidence (electronic evidence is a generative term for two types of evidence: analogue and digital evidence) is now ubiquitous. Mobile telephones, personal digital assistants, computers, Blackberries and a range of other devices permeate our lives, a phenomenon that covers the globe. For this reason, it is incumbent upon every person with a link to the judicial system to make themselves familiar with digital evidence and the complexities that accompany digital evidence. The examples of the use of digital evidence in legal proceedings cover all forms of law—civil, criminal and family—and it is for the judges, lawyers and universities to make sure this topic is understood, and understood quickly. I have used the case of *State of Connecticut v Amero* in Chapter 1 as a study of what can go wrong when the people involved in legal proceedings fail to comprehend the nature of digital evidence, although I hope the discussion in the case of *State of Arizona v Bandy* acts as a balancing exercise. That both cases are from the United States of America reflects the willingness of the Americans to publish legal proceedings, the ready availability of the language, the openness of

their judicial system and the readiness of people to support defendants where they think a wrong is being perpetrated. It would not be a surprise if similar cases have already occurred in other jurisdictions, where individuals have failed to obtain a fair hearing when digital evidence has been introduced into the proceedings, and where the people taking part in the proceedings have illustrated a similar ignorance of digital evidence as illustrated in the case of Julie Amero, or where identical issues have been at the forefront of a prosecutors mind, as in the case of Matthew Bandy. Unfortunately, we tend to learn from the mistakes of others, as well as our own. For this reason, I sincerely hope the case of Julie Amero will act as a catalyst to encourage judges to ensure they are introduced to digital evidence as a matter of urgency; to lawyers, who may find their professional indemnity insurers refuse to cover them for failing to educate themselves in the complexities of digital evidence; and to legal scholars in universities and law schools, who are responsible for teaching future lawyers.

The text comprises an introduction, a chapter covering the Admissibility of Electronic Evidence in Court project, which was partly funded by the European Union, and individual chapters covering separate jurisdictions. The chapter dealing with the Admissibility of Electronic Evidence in Court project provides a flavour of the aims of the project, how it was conducted and some of the main findings. The reader is urged to read the additional materials that are readily available on the Internet about this project, because some of the results are of interest, in particular the opinions of some of the people asked to contribute to the project.

The authors of individual country chapters were requested to cover the following issues, taking into account the peculiarities of their own jurisdiction:

(a) the substantive law of evidence, covering the types of evidence, admissibility of evidence, weight, proof, electronic signatures, presumptions and inferences, computer-generated animations and simulations, videotape and security camera evidence, the role of experts and electronic document management systems.
(b) Civil proceedings, beginning with the pre-trial phase, covering the rights of parties to obtain urgent search and seizure orders, either before or after proceedings commence, and the preservation of evidence; rules on disclosure; confidentiality and privilege; allocation of costs, especially the costs of employing digital evidence specialists; outlining complex litigation and the exchange of electronic evidence and how a court deals with these issues.
(c) Criminal proceedings, beginning with the pre-trial phase, covering the powers of search and seizure; the obligations of both prosecution and defence respecting the disclosure of evidence before trial, including the

consequences of non-disclosure; evidence from other jurisdictions; human rights issues in relation to the gathering of evidence; the trial and how a defendant may challenge the authenticity of digital evidence.

Whilst a homogenous response is useful from the point of view of comparing like with like, this was not possible, given that neither I, nor the authors (with one exception) were remunerated for the time spent on writing, editing and preparing this text. The concept of the book was entirely mine, and the framework was taken and refined from the first book. Whilst the structure reflected an English view of the issues, nevertheless the authors were requested to ignore the suggested outline if it did not fit within their own jurisdiction. Perhaps the world community, either at the level of the United Nations, or through the auspices of regional organs such as the European Community, may find it to be in the interests of justice that the next edition of this text is funded sufficiently to enable a more detailed approach to be taken for a future edition.

This text aims to provide a reasonably authoritative review of electronic evidence in all the jurisdictions it covers. For this reason, where the author was the sole author, a peer review was essential. Where two or more authors jointly wrote the entire content of the chapter, a peer review was not considered necessary. Where two or more authors only wrote particular parts of a chapter, a peer review was necessary.

Great care has been taken to ensure that the legal terms have been translated into English as faithfully as possible. The legal terms have been translated into the equivalent to be found in the law of England and Wales. However, should the reader not be sure of any term in this text, they are requested to verify its meaning with a jurist from the relevant jurisdiction.

Finally, the reader may notice a marked absence of Latin tags. Latin tags have been included where they have become part of our every-day language. The two main reasons for excluding Latin is because Latin is not used in some jurisdictions, and the Latin used in one legal system can be different from the Latin used in another legal system. In addition, there has been a move in England and Wales to exclude the use of Latin tags in legal proceedings. Whilst it has been argued with panache by some that Latin tags can be very useful to lawyers,[1] nevertheless legal proceedings ought to be clear to everybody, especially the parties. This point was made by the Consultative Council of European Judges in Opinion No 7,[2] in which the following comments were made at paragraph 56:

[1] R Munday, 'Lawyers and Latin' (2 October 2004) 168 JP 775, available online at <http://www.francisbennion.com/pdfs/non-fb/2004/2004-002-nfb-lawyers-and-latin1.pdf>.

[2] Opinion No 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on 'Justice and Society', CCJE (2005) OP No 7.

> The language used by the courts in their procedures and decisions is not only a powerful tool available to them to fulfil their educational role (see paragraph 6 above), but it is obviously, and more directly, the 'law in practice' for the specific litigants of the case. Accessibility, simplicity and clarity of the language of courts are therefore desirable.

The learned members of the Consultative Council continued, at paragraph 59:

> The CCJE considers that judicial language should be concise and plain, avoiding—if unnecessary—Latin or other wordings that are difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents.

Reference was also made to paragraph 1 of the 'Conclusions of the Meeting of the Presidents of the Associations of Judges on "Justice and Society"', Vilnius, 13–14 December 1999, which reads:

> In a contemporary society which seeks to be involved in decisions which concern it, judges are exposed to criticism and to attempts to influence their judgements notably through information diffused by the media. In order to be able to do justice in all serenity, judges need to facilitate the understanding by citizens of what they do. Drafting judgements in a clear and comprehensible manner, welcoming visitors to «open days», organising conferences in schools or holding seminars with journalists, are examples of ways of communicating with society at large which allow its expectations to be fulfilled and judicial decisions to be accepted. Associations of Judges are invited to take the initiative in such activities and promote this educative role.

Put simply: if a Latin tag can be translated into the vernacular, the Latin tag is redundant. If a lawyer considers the use of Latin tags to be necessary, the lawyer ought to re-examine his use of language.

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