

DRAFT MODEL LAW ON ELECTRONIC TRANSACTIONS

1. At their 1999 Meeting, Law Ministers recognised that the development of electronic commerce was of importance to all countries, with the potential to bring about major changes in business practices. The Meeting received a number of papers outlining the steps taken by some Commonwealth countries in developing the legal structure for electronic commerce. While Ministers recognised that existing legal principles could be rendered applicable to new forms of commerce, they stressed the need to ensure that existing rules and laws did not prevent full advantage being taken of new technology. The Meeting also received a presentation from the Secretary- General of the United Nations Commission on International Trade Law, and agreed that the UNCITRAL Model Law provided a suitable basis for legislative action in Commonwealth countries, being both flexible and technological neutral.
2. On the basis of the outcome of the Law Ministers meeting in July 2000, an expert working group was convened to prepare recommendations on the legal aspects of international technology and related evidence; and on computer and computer related crime. The recommendations were presented to the Commonwealth Senior Law Officials Meeting in 2001.
3. At the Commonwealth Senior Law Officials meeting in London, it was recommended that the work on the draft provisions on e-commerce required further development. The Commonwealth Secretariat convened the 2nd meeting of the expert group on the e-commerce model law. The aim of the meeting was to refine and modify the model law taking into consideration the comments of member countries and a report prepared by the Commonwealth Secretariat.
4. The group reconsidered all the issues and decided to redraft the model legislation and to include, in footnotes to the revised model. The group also decided that the related evidentiary issues should be dealt within a separate model law on electronic evidence in order to ensure admissibility of civil evidence. The model law on electronic evidence is the subject of paper LMM(02)12.
5. The draft Model Law on E-Commerce contains provisions that the Secretariat believes address the concerns expressed by Senior Officials. It is appended for consideration by Ministers who may feel it appropriate to recommend it as providing a sound basis for the passage of laws by those member countries which seek to adopt legislation that addresses all major issues covered by the UNCITRAL Model law and is adapted for the specific use of common law jurisdictions.

ELECTRONIC TRANSACTIONS BILL

AN ACT to facilitate electronic transactions

BE IT ENACTED by the Parliament of *..[name of country]* as follows:

- Short title 1. This Act may be cited as the Electronic Transactions Act.¹
- Commencement 2. This Act commences on *[a date fixed by usual provision for enacting country]*.
- Objects 3. The objects of this Act are:
- (a) to eliminate legal barriers to the effective use of electronic communications in transactions;
 - (b) to promote the harmonization of legal rules on electronic transactions across national boundaries;
 - (c) to facilitate the appropriate use of electronic transactions;
 - (d) to promote business and community confidence in electronic transactions; and
 - (e) to enable business and the community to use electronic communications in their transactions with government.²
- Definitions 4. (1) In this Act:
- “electronic” includes created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic, optical or by any other means that has capabilities for creation, recording, transmission or storage similar to those means.³
- “electronic signature” means information in electronic form that a person has created or adopted in order to sign a document and that is in, attached to or associated with a document.⁴
- “public body” [“organ of state”] includes:⁵
- (a) a Minister, ministry or department of government;
 - (b) courts
 - (c) bodies exercising statutory authority, of legislative, executive or judicial nature
 - (d) subnational or local public authorities, including municipalities.⁶

¹ If the enacting state decides on a broader or narrower scope, as discussed at s. 5 below, then the title and short title could change to reflect the actual coverage.

² If more detail is desired, consider section 3 of Singapore’s *Electronic Transactions Act*, with possible exception of paragraph (c) of that Act.

³ This is intended to be an expansive definition, to apply to future developments, without being too closely bound by engineering considerations.

⁴ This definition includes the word “sign” to show that the legal effect of an electronic signature is the same as that of a handwritten signature.

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic communications.

“Rule of law” means the common law, legislation, and subordinate legislation

[Crown/Government/
State] to be bound

5. This Act binds the [Crown/Government/State].⁷

Non-discrimination
against electronic
information

6.(1) Information shall not be denied legal effect, validity or enforcement solely on the ground that it is in electronic form.⁸

(2) In sections 7, 8, 9, 10 and 11,

- (a) where rules of law require information to be in writing, given, signed, original, or retained, the requirement is met if the section is complied with;
- (b) where rules of law provide consequences where the information is not in writing, given, signed, original, or retained, the consequences are avoided if the section is complied with; and
- (c) where rules of law provide consequences if the information is in writing, given, signed, original or retained, the consequences are achieved if the section is complied with.

Writing requirements

7.(1) A rule of law that requires information to be in writing or to be given in writing is satisfied by information in electronic form if the information is accessible so as to be usable for subsequent reference.

(2) In subsection (1), giving information includes, but is not limited to, the following:

- (a) making an application;
- (b) making, filing or lodging a claim;
- (c) giving, sending or serving a notification;
- (d) filing or lodging a return;
- (e) making a request;
- (f) making a declaration;
- (g) filing, lodging or issuing a certificate;
- (h) making, varying or cancelling an election;
- (i) filing or lodging an objection;
- (j) giving a statement of reasons.

⁵ The reasons to include particular rules on public bodies are to ensure their authority to use electronic records, to protect them against unwitting consent to the use of such records, and to permit them expressly to impose technical requirements on incoming electronic records to promote interoperability of systems and the reliability of the records. See sections 14 and 17.

⁶ Enacting countries can create the list that suits them. The list might exclude private bodies doing public functions, like a Law Society. Consider state-owned corporations and entities that are agents of the state. It may be convenient to be avoiding doubt by designating entities as public bodies by regulation.

⁷ Enacting jurisdictions will choose the usual term in their law. This is needed where the Crown (etc) is not bound by legislation unless it is mentioned expressly. The statute generally applies to everyone subject to the law of the jurisdiction, unless there is an express exemption.

⁸ Information here is likely to be interpreted as included recorded speech. Enacting countries may wish to exclude this, or to restrict speech to that which is processed by an automated voice recognition system.

(3) Information in electronic form is not given unless the information is capable of being retained by the person to whom it is given.⁹

Prescribed forms

8. A rule of law that requires a person to provide information in a prescribed non-electronic form to another person is satisfied by the provision of the information in an electronic form that is:

- (a) organized in the same or substantially the same way as the prescribed non-electronic form;
- (b) accessible to the other person so as to be usable for subsequent reference; and
- (c) capable of being retained by the other person.

Signature requirements

9.(1) If a rule of law requires the signature of a person, that requirement is met by an electronic signature.¹⁰

(2) Parties may agree to use a particular method of electronic signature, unless otherwise provided by law.¹¹

Requirement to produce an original document

10. A rule of law that requires a person to produce, examine or keep an original document is satisfied if the person produces, examines or retains the document in electronic form, if:

- (a) having regard to all the relevant circumstances, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
- (b) in a case where an original document is to be given to a person, the document given to the person in electronic form is accessible so as to be usable for subsequent reference and capable of being retained by the person.¹²

Keeping written documents¹³

11. A rule of law that requires a person to keep information either that is in writing or that is in electronic form, is satisfied by keeping the information in electronic form, if:

- (a) having regard to all the relevant circumstances when the electronic form of the document was generated, the method of generating the electronic form of the document provided a

⁹ This section is intended to interpret a rule of law saying “give” or “send” or “deliver” information in writing (like a notice). The point is that the information has to be put within the control of the addressee.

¹⁰ Enacting countries may wish to give power to their regulation making authority to prescribe that signatures for particular purposes must be as reliable as appropriate in the circumstances, including any relevant agreement, or that they must use a method specified in the regulation. If a reliability test is wanted, it may be expressed in the language of Article 6 (1) through (4) of the UNCITRAL Model Law on Electronic Signatures.

¹¹ The Experts’ Group recommended that electronic signatures in general should not have to meet a test of their reliability. Handwritten signatures are subject to no such test. If a person who wants to rely on a signature proves the identity of the person who signed and the signer’s intention to be linked to the information, that should be sufficient to meet a requirement that information must be signed. Having to show in addition that the signature method was appropriately reliable adds uncertainty to proof that would suffice to support a manual signature.

¹² This provision may not be needed for the law of evidence if the enacting country has made other rules about electronic evidence, and that law might then be expressly excluded.

¹³ This section allows people to retain records electronically, whether the original was on paper or electronic, if the rules in this section are followed. It should be noted, however, that keeping records in electronic form means adapting them to new hardware and software from time to time, so that they continue to be accessible for the period required by law. It may turn out to be more practical to keep records stored for very long periods, such as land titles, birth and death records, and the like”.

	<p>reliable means of assuring the maintenance of the integrity of the information contained in the document; and</p> <p>(b) when the electronic form of the document was generated, the information contained in the electronic form of the document is accessible so as to be usable for subsequent reference to any person entitled to have access to the information or to require its production.¹⁴</p>
Integrity of information	<p>12. For the purposes of sections [10 and 11], the integrity of information in a document is maintained if, and only if, the information has remained complete and unaltered, apart from:</p> <p>(a) the addition of any endorsement; or</p> <p>(b) any immaterial change;</p> <p>which arises in the normal course of communication, storage or display.</p>
Recognition of foreign electronic documents and signatures	<p>13. In determining whether or to what extent information in electronic form is legally effective, no regard shall be had to the location where the information was created or used, or to the place of business of its creator.¹⁵</p>
Government uses [public bodies]	<p>14.(1) If a public body has power to create, collect, receive, store, transfer, distribute, publish, issue or otherwise deal with information and documents, it has the power to do so electronically.</p> <p>(2) Subsection (1) is subject to any rule of law that expressly prohibits the use of electronic means or expressly requires them to be used in specified ways.</p> <p>(3) For the purposes of subsection (2), a reference to writing or signature does not in itself constitute an express prohibition of the use of electronic means.</p> <p>(4) Where a public body consents to receive any information in electronic form, it may specify:</p> <p>(a) the manner and format in which the information shall be communicated to it;</p> <p>(b) the type or method of electronic signature required, if any;</p> <p>(c) control processes and procedures to ensure integrity, security and confidentiality of the information;</p> <p>(d) any other attributes for the information that are currently specified for corresponding information on paper.</p> <p>(5) The requirements of subsections 7(1) and (3) and section 8 also apply to information described in subsection (4).</p>

¹⁴ Government departments responsible for record retention rules may wish to consider if additional rules are needed for retaining electronic records for their purposes. Such additional rules would supplement this section because of s. 14 of this Act.

¹⁵ If the enacting country has imposed a reliability test on electronic signatures, then this section should include paragraphs (3) and (4) of the UNICTRAL Model Law on Electronic Signatures.

(6) A public body may make or receive payment in electronic form by any manner specified by the public body [and approved by the Minister of Finance – responsible authority].

Exclusions¹⁶

15. This Act does not apply to:

- (a) the creation or transfer of interests in real property;
- (b) negotiable instruments¹⁷;
- (c) documents of title;
- (d) wills and trusts created by will¹⁸; and
- (e) any class of documents, transactions or rules of law excluded by regulation under this Act.

Certain other laws not affected

16.(1) Nothing in this Act limits the operation of any other rule of law that expressly authorizes, prohibits or regulates the use of information in electronic form, including a method of electronic signature.

(2) Nothing in this Act limits the operation of any other rule of law requiring information to be posted or displayed in a specified manner or requiring any information to be transmitted by a specified method.

(3) A reference to writing or signature does not in itself constitute a prohibition for the purpose of subsection (1) or a legal requirement for the purpose of subsection (2).

Consent

17.(1) Nothing in this Act requires a person to use, provide or accept information in electronic form without consent, but a person's consent to do so may be inferred from the person's conduct.¹⁹

¹⁶ The statute can be given a narrower or wider scope than the "transactions" referred to in its title.

A: It can be limited to commercial transactions only. Footnote **** of the UNCITRAL Model Law on Electronic Commerce 1996 indicates usefully the scope of such an application.

The advantages of such a limit are that parties to commercial transactions usually engage in them voluntarily and thus may be more willing to take the risk of dealing in the new electronic medium, and such transactions will engage public policy considerations less often than others.

The disadvantages of such a limit are that it does not permit the use of electronic communications in areas where many countries are finding them useful, such as communications between citizen and government, and that it is sometimes hard to know if a particular transaction is commercial: consider the provision of services to government or to a not-for-profit organization.

B: The scope can be expanded to all information or documents, not just (commercial) transactions. As a drafting alternative, the expanded statute could focus not on transactions or communications but on electronic records. For example, most Canadian statutes discuss electronic documents or information.

The advantages of such an expansion are that it is very flexible; it makes all laws media neutral. (Most Canadian statutes based on the UN Model Law take this approach); it avoids having to know exactly what a transaction is: consider applications, or the retention of a document. To extent that the main body of incidents not a transaction relates to dealing with government, and the Act contains rules about public bodies' communications – inbound and outbound – then there may be no particular risk in expanding scope to all communications. Risks can be dealt with by exempting particularly risky documents or transactions from the scope and by ensuring that parties to communications have a choice whether to accept them in electronic form, i.e. that they can opt into the electronic system.

¹⁷ This means that bills of lading cannot be done electronically under this Act. To extend the statute to transport documents one would need express legislative authority, not necessarily in this Act.

¹⁸ Probate documents are not listed here because they are issued by a public body – a court – which will determine under section 14 whether and how they may be created and submitted electronically.

¹⁹ This provision allows a person to set conditions on acceptance, based on readiness or trust, or estimations of compatibility of formats or reliability standards, or to accept electronic communications for some purposes and not for others. It does not prevent a person from being bound by other means – such as by contract – to communicate electronically.

(2) Despite subsection (1), the consent of a public body [use the term also used in s. 14 for government] to accept information in electronic form may not be inferred from its conduct but must be expressed by communication accessible to the public or to those most likely to communicate with it for particular purposes.²⁰²¹

(3) Nothing in this Act authorizes a public body [use the term also used in s. 14 for government] to require any person to use, provide or accept information in electronic form without consent.²²

Contracts

18.(1) Unless the parties agree otherwise, an offer, the acceptance of an offer or any other matter that is material to the formation or operation of a contract may be expressed:

- (a) by means of information in electronic form; or
- (b) by an act that is intended to result in electronic communication, such as touching or clicking on an appropriate icon or other place on a computer screen, or by speaking.

(2) A contract is not invalid or unenforceable by reason only of being in electronic form.

Automated contracts

19. A contract may be formed by the interaction of computer programs or other electronic means used to initiate an act or to respond to electronic information, in whole or in part, without review by an individual at the time of the response or act.

Mistakes in partly-automated transactions

20.(1) An electronic transaction between an individual and another person's automated source of information has no legal effect if:

- (a) the individual makes a material error in electronic information or an electronic document used in the transaction;
- (b) the automated source of information does not give the individual an opportunity to prevent or correct the error;
- (c) on becoming aware of the error, the individual promptly notifies the other person; and
- (d) in a case where consideration is received as a result of the error, the individual, returns or destroys the consideration in accordance with the other person's instructions or, if there are no instructions, deals with the consideration in a reasonable manner, and does not benefit materially by receiving the consideration.

²⁰ This provision allows government to opt into electronic communications gradually, department by department, agency by agency, or even program by program. Some enacting countries may wish to compel all parts of government to be ready for electronic communications at the same time. Such countries may state that the consent of government is not needed for electronic communications to it to be legally effective. Nevertheless governments will have legitimate reasons to insist on standards of interoperability, reliability, proof of delivery and the like. These are now dealt with expressly in section 14 of the Act.

²¹ The provision about communicating the consent shows that a means other than a formal regulation may be used.

²² While "nothing in this Act" authorizes a government to require the use of electronic communications, governments may have or give themselves such authority by other means. It was not thought appropriate to do so in generally applicable legislation.

(2) This section does not limit the operation of any other rule of law relating to mistake:

Expressions of will

21. As between the originator and the addressee of a communication in electronic form, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form.²³

Time and place of sending and receiving electronic communications

22.(1) An electronic communication is sent when it enters an information system outside the sender's control or, if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee.

(2) An electronic communication is presumed to be received by the addressee:

- (a) if the addressee has designated or uses an information system for the purpose of receiving communications of the type sent, when it enters that information system and becomes capable of being retrieved and processed by the addressee; or
- (b) if the addressee has not designated or does not use an information system for the purpose of receiving communications of the type sent, or if the addressee has designated or used such a system but the communication has been sent to another system, when the addressee becomes aware of the communication in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.

(3) Subsections (1) and (2) apply unless the parties agree otherwise.

(4) An electronic communication is deemed to be sent from the sender's place of business and received at the addressee's place of business.

(5) If the sender or the addressee has more than one place of business, the place of business for the purposes of subsection (4) is the one with the closest relationship to the underlying transaction to which the electronic communication relates or, if there is no underlying transaction, the person's principal place of business.

(6) If the sender or addressee does not have a place of business, the person's place of habitual residence is deemed to be the place of business for the purposes of subsection (4).

Attribution of electronic communications

23. An electronic communication is that of the person who sends it, if it is sent directly by the person or by an information system programmed by or on behalf of the person to operate automatically.

²³ This section applies to declarations of intention outside the context of a transaction, such as declarations of trust, gifts without delivery, and the like. The usual law about their validity and enforceability continues to apply.

- Consumer protection²⁴ 24.(1) A person using electronic communications to sell goods or services to consumers shall provide accurate, clear and accessible information about themselves, sufficient to allow:
- (a) the legal name of the person, its principal geographic address, and an electronic means of contact or telephone number;
 - (b) prompt, easy and effective consumer communication with the seller; and
 - (c) service of legal process.
- (2) A person using electronic communications to sell goods or services to consumers shall provide accurate and accessible information describing the goods or services offered, sufficient to enable consumers to make an informed decision about the proposed transaction and to maintain an adequate records of the information.
- (3) A person using electronic communications to sell goods or services to consumers shall provide information about the terms, conditions and costs associated with a transaction, and notably:
- (a) terms, conditions and methods of payment; and
 - (b) details of and conditions related to withdrawal, termination, return, exchange, cancellation and refund policy information.

Regulation-making powers

25. The [regulation-making authority] may make regulations:
- (a) to designate an entity as a public body;
 - (b) to provide that electronic signatures for specified purposes shall be as reliable as appropriate for those purposes;²⁵
 - (c) to provide that electronic signatures for specified purposes shall be created by specified means;
 - (d) to provide formats by which information may be communicated electronically, whether or not there exist prescribed non-electronic forms.
 - (e) to exclude classes of transactions, documents, or rules of law from the application of this Act; and
 - (f) for any other purpose for the more effective achievement of the objects of the Act.

²⁴ These provisions could be put in a general statute about consumer protection. Otherwise it may be necessary to state how one decides that someone is a consumer. The provisions are adapted from the OECD Guidelines for Consumer Protection in the context of Electronic Commerce.

²⁵ If such a regulation is made, it may be helpful to incorporate into the regulation, or the statute, the tests of reliability in the UNCITRAL Model Law on Electronic Signatures, Article 6.