

Crown Office and Procurator Fiscal Service

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Dear Mr McMillan

Thank you for providing the Scottish Law Commission's Ninth Programme of Law Reform Consultation to the Crown Office and Procurator Fiscal Service.

In terms of reform of the criminal law, we note that the Commission will be looking at the law of homicide, and that the Cabinet Secretary for Justice has announced his intention to refer to the Commission a review of the not proven verdict. We welcome review of these areas of criminal law and procedure.

In his speech to the Criminal Law Conference on 9 May 2013, the Lord Justice Clerk stated that

"...the system of criminal justice which exists in Scotland is one which remains to a large extent geared to the values and conditions of the Victorian age."

We would welcome not only as suggested in the Lord Justice Clerk's speech a review of the how evidence can be lead at trial in the digital age, but to include the proof of digital evidence. The pace of development of technology, not just in relation to how we can use this to improve the working of the courts, but also in the way that people communicate and store information which is required for proof, has resulted in traditional notions of proof not being necessarily easy to adapt to evidence which is required for proof in the modern age. There are 2 examples which may helpfully illustrate this point.

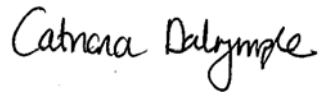
An example of this has been recently been considered by the Appeal court, who considered the law of search in the context of the extent of material that individuals carry with them on mobile devices. The issue of whether search of a mobile phone was lawful was considered in the case of JL and EI V HMA [2014] HCJAC 35, the question of whether search of information which could be accessed by a mobile phone was not considered. There is authority from USA Supreme Court case of Riley v California from 2013 which held that a warrant would be required to search for information which could be accessed by the phone. The jurisdiction of any information which could be accessed by a phone is not straightforward. Where the physical evidence is based i.e. on which server on which computer in which country can change on a second by second basis. Although warrants could be granted in Scotland, the search may be in a

different country. It is noted that Belgium has introduced provision in its criminal code to allow such searches to take place. Certainty about what is required to lawfully obtain evidence and admissibility would be welcome.

The law of backing of warrants for execution in different jurisdictions is old and outdated, for instance, the backing of summary processes issued under summary jurisdiction Acts for execution in England and Wales is regulated by the Summary Jurisdictions Act 1881. It is questionable if there is a need for such procedure now and whether statutory warrants are covered by this provision.

We would be of course be happy to discuss these proposals further.

Yours sincerely



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Head of Policy Division