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From the  
[Redacted]

8 November 2004

Mrs Glynis McKeand  
Secretary to the Sheriff Court Rules Council  
Scottish Executive Justice Department  
St Andrews House  
Regent Road  
Edinburgh  
EH1 3DG

Dear Mrs McKeand

**Sheriff Court Rules Council Consultation Paper**

I refer to your letter of 15<sup>th</sup> September 2004. I am aware that Sheriff Principal Macphail has responded to you on behalf of all the sheriffs principal, and I am happy to endorse what he has said. But I thought that it might be helpful to add some more detailed comments of my own, chiefly about the manner in which the various recommendations in the Consultation Paper would be put into effect. In what follows, the opening number refers to the number of a recommendation.

1. As I understand the purpose behind this recommendation, the intention is that in due course the whole process in an action should be capable of being transmitted and lodged electronically. I can understand why the subject of productions is to be considered separately. But in the meantime I wonder why only the documents listed at (a) to (f) are included in this recommendation. There is a large number of other documents, apart from those listed, which might conveniently be transmitted, lodged and stored by electronic means. I have in mind, for example (and in no particular order), notes of appeal, notes under rule 22.1, correspondence to and from solicitors (including letters under rule 24.1), affidavits, certificates of execution of service, applications for time to pay, reponing notes and notices of opposition. In truth, it seems to me that in order to identify all the possible candidates for electronic transmission, lodging and storage one would have to work through the whole of the Ordinary Cause Rules (and perhaps also Sheriff Principal Macphail's own book on Sheriff Court Practice). At the end of the day, rather than specifying all those documents which

could competently be transmitted, lodged and stored electronically, it might be simpler to specify those which could not be dealt with in this way.

2. In principle, I am sure that this recommendation is an excellent idea. But I wonder what would happen where, for example, it was necessary to serve a warrant or certified copy interlocutor upon someone. And what would be done in other situations in which a properly authenticated copy of a court order was required? An experienced solicitor would be far better qualified than I am to identify all such situations. The production of an extract as a link in title to land is one possibility that occurs to me.

It would be essential to set up such a system so that the sheriff would have a completely free hand to determine what an interlocutor or warrant granted by him or her should say. In the years since computers were introduced into the courts, I have from time to time come across a situation in which I have been told by the clerk that the computer will not allow me to do something, or else can only be persuaded to do so with considerable difficulty. Occasionally, I have gone so far as to wonder whether the sheriff or the computer is in charge, and I think it is essential that any system that is set up has the necessary flexibility built into it to allow the sheriff to remain in charge.

3. I have supported this recommendation since I am sure that it is a good idea that there should be some system for positive confirmation of receipt of a document. But I must be frank and state that I do not begin to understand the technical aspects of email submission on the one hand and website submission on the other. If a website-based system is to be adopted, what would happen if, for example, a solicitor who wished urgent access to a process was unable to open the website?
4. In principle, I am sure that it would be better to introduce this system in all the courts in Scotland after only a short pilot scheme. On the other hand, since there would only be a short pilot scheme, it would be all the more important to think carefully through the whole system before implementing it.
5. If I understand this recommendation correctly, it means that in due course in cases in which all parties are represented by solicitors the whole process will be in electronic form. If this is correct, then it seems to me that there are a number of important issues which would have to be considered. There may, for example, be issues of confidentiality in cases involving the welfare of children. In what form would a child welfare report be transmitted, lodged and stored? And what about the views of the child? Presumably such a system would allow for the transfer and remit of causes, and also for the transmission of a process in the case of an appeal either to the sheriff principal or to the Court of Session. What would the solicitor do if he found that the system had crashed just as the time limit for lodging a document expired? Would he no longer be able to send a runner to the court to lodge the document manually? In this context, for example, one can foresee some interesting discussions under sections 17 and 19A of the Prescription and Limitation (Scotland) Act 1973.

If the whole of a process were to be stored electronically, it would be essential to devise a system whereby every single item in the process was accurately recorded

and readily accessible. My present job involves a certain amount of travelling and as a result I have learnt, if I did not already know, that there is very often no adequate substitute for examining the physical contents of a process. I say this because it is not unusual in my experience to find tucked away at the back of a process an item of process or a letter which has a significance which has perhaps not hitherto been appreciated by those who have seen the process, or indeed those who have not. At present the process in an appeal to myself is sent in the first instance to my secretary in Aberdeen. If I am working elsewhere, she typically scans or faxes to me the note of appeal, the interlocutor under appeal, the closed record and the sheriff's note and this allows me to form a preliminary view about the appeal and give appropriate directions. But it is only when I have seen the process itself that I can be reasonably confident that there are not other matters which require to be considered and, if the whole of a process was to be stored electronically, I would want to be sure that the system was set up in such a way that I could in effect examine the process and see everything in it with the same ease with which I can do so when I have the process in front of me.

Consideration would also have to be given here to what would happen where a solicitor withdrew from acting for a party. I recall, for example, one appeal in which a party litigant was given access to a process which contained copies of certain correspondence to and from the sheriff clerk which would have been better not seen by that party. Plainly, care would have to be taken to ensure that a party litigant saw everything in a process which he was entitled to see, or which might have a bearing on the outcome of a case. At the same time, it might be appropriate to arrange matters so that confidential material and correspondence to and from the sheriff clerk in connection with an action should not be accessible to a party.

6. In principle this must be a good idea. As to the areas of primary or subordinate legislation that would require to be altered in order to achieve this intention, I think you would have to comb not only through the Ordinary Cause Rules but also through the whole contents of parts A, B, C and D of the Parliament House Book. And this I am sure would not be an end of the matter. For example, you would have to consider the Citation Act 1592 – as to which see *McKie v Jack Robinson (Trawlers) Limited* (Portree Sheriff Court, 13 July 2004). Perhaps a skilful parliamentary draftsman would be able to devise some all embracing clause that would take care of this particular problem. But I would hesitate to try to do so myself.

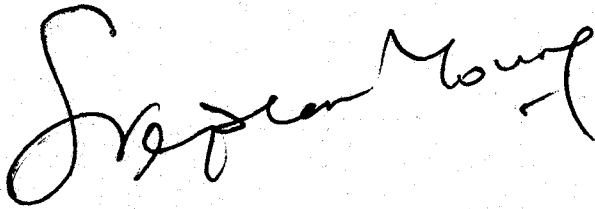
In this context it would be essential to devise some system which guaranteed the authenticity of a signature, be it that of, for example, a sheriff, sheriff clerk, solicitor or counsel.

7. I would only observe here that it would be essential properly to consider issues of confidentiality, especially in cases involving the welfare of children, including not only ordinary causes but also applications, for example, to adopt a child or to free a child for adoption.

8. In principle, again I think that this would be a good idea. At the same time I would be unhappy to think that such a centralised virtual court might acquire a reputation similar to that of, for example, certain Government departments or other large institutions. I dare say that there can be few people nowadays who have not experienced the frustration of having to deal at a distance with such an entity. There is much to be said for being able to walk into an office and speak to someone face to face and it would be desirable that there should be some sort of link between the centralised court and the individual sheriff courts so that a member of a staff at a local sheriff court would be in a position satisfactorily to respond to an enquiry about a particular case that was being handled in the centralised court.
9. I should be content to see this happen. But it would be essential to set the system up in such a way that there was no scope for delay in the service of summary cause and small claims actions.
10. As I have already indicated, I am sure that this is correct, and I will only say that I do not envy the Secretariat in the magnitude of the task ahead of them.

I hope these comments are helpful [REDACTED]

Yours sincerely,



Sir Stephen S T Young Bt QC