



The Law Society

Law Society response to the Law Commission's consultation on electronic execution of documents

November 2018



Preface

1. The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

Introduction

2. The Law Society has a strong interest in the impact of technology and data on the operation of law. Unprecedented technological changes offer organisations, including law firms, an exciting opportunity to innovate in ways that benefit clients and society. At the same time the application of technology must not erode the fundamental principles that make the English & Welsh legal system one of the world's jurisdictions of choice. Technology is one of our public policy priorities¹ and we are happy to work with the Law Commission across all parts of this wide area.
3. The Law Society thanks the Law Commission ("the Commission") for seeking its opinions on the electronic execution of documents. We support the Commission's broad objective to ensure that, to the extent that the current law allows for electronic execution, parties are not hindered by concerns about legal uncertainty. We also note that the consultation does not consider the electronic execution of registered dispositions under the Land Registration Act 2002 nor the making of wills. Our answers to the questions should not automatically be presumed to be relevant to the Law Society's view of electronic execution in these matters.
4. The advance of technology in this area, as so often is the case, challenges the underlying principles of execution and witnessing. What is the purpose of witnessing and does this purpose need to be met by human-to-human interaction? As the consultation paper states, the main purpose of witnessing is authentication that the document was signed by the signatory. Authentication is limited to the fact of signing by a particular person, but not the contents of the document, that the person signing is who they say they are, nor the signatory's state of mind.
5. The paper suggests that witnessing might serve as an extra check against forgery or duress, though it is a matter open to debate as to whether human-to-human interaction is still – or always – the best way to achieve this goal. These debates may be outside the scope of the consultation, but they are matters which are likely to arise in the future, thus the Commission's final conclusions should acknowledge this debate.

¹ For example, we are running a Technology and the Law Policy Commission To help us understand the use of algorithms in the justice system.

Summary of main recommendations

- We agree with the Law Commission's views about the validity of electronic execution.
- To the extent others have doubts about the validity of electronic execution, the best way to remove those would be through legislation. The law should be enabling but not prescriptive.
- The proposed industry working group would be the best place to provide electronic execution solutions that are feasible in light of current and potential future technology.
- We are sceptical that the practice of witnessing an electronic signature via video link will become widespread as the current practice of 'in person' witnessing is not considered to be onerous.
- It is for specific legislation, regulation or regulators to formulate provisions for industry/area documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney),
- The Commission should revisit the concept of delivery and deeds and the law in these areas should be brought up-to-date.
- The use of electronic signatures has the potential to result in time (and therefore cost) savings. We doubt that this translates into a high saving per transaction.

Consultation questions

Consultation Question 1 - Our provisional conclusion is that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document. Do consultees agree? Paragraph 3.87

6. We agree with the Commission's conclusion, which we note draws upon the Law Society's and City of London Law Society's joint practice note². However, there may continue to be those who doubt the validity of electronic execution. In our answers to questions 5 and 15 we suggest that the best way to remove these doubts would be through legislation.

Consultation Question 2. - Our provisional conclusion is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. Do consultees agree? Paragraph 4.57

7. This area of the law is not free from doubt. There is a debate over whether a witness' presence means being physically present in the room, or watching the signature being applied live. Some lawyers believe that there must be a physical presence while others believe that it may be sufficient for a witness to visually see the hand move. There is no case law or legislation to confirm either interpretation.
8. However, it is generally agreed that it is best practice for the witness to be physically present when the document is signed. This is not just because of doubt over the legal position, but also to minimise any evidentiary risk that the person genuinely saw the signature being applied.

² The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on the execution of a document using an electronic signature" (July 2016)

Consultation Question 3. - We welcome consultees' views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution. Paragraph 6.19

9. The Law Commission's research highlights that an ever-increasing number of jurisdictions have legislation in place dealing with electronic execution and electronic signatures. However, although we have not undertaken a systematic study, anecdotal feedback which our committee members have received from overseas practitioners suggests that there is still often uncertainty as to how the courts will interpret this legislation. This may be because the area is new and there is a lack of experience of how courts will view electronic execution. In practice, case by case consideration will need to be given as to whether the requirements in any relevant jurisdiction are satisfied and local law advice sought.

Consultation Question 4. - We believe that where specific provision is necessary in relation to certain types of documents (for example, to protect vulnerable parties, particularly for lasting powers of attorney), that is a matter for specific legislation or regulation, and not for the general law of execution of documents. Do consultees agree? Paragraph 6.41

10. We agree that such risks should be dealt with by specific regulators and legislation.
11. We also agree with the statement in the consultation that *"In the case of lasting powers of attorney, The Office of the Public Guardian (OPG) should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures"*.
12. The Law Society's current position is that we are strongly against a fully digital lasting powers of attorney process without physical signatures. The removal of physical signatures removes an essential safeguard against abuse of a highly vulnerable sector of society, containing those people who are the most susceptible to fraud and duress³. The consideration of how digital process should be used in lasting powers of attorney is a matter for the OPG to consult on.
13. On a broader point, the Law Commission could find it insightful to investigate the division between the use of electronic execution by business-to-business and business-to-consumer cases. These will delivery differing risk assessments and approaches.

Consultation Question 5. - We consider that legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature. Do consultees agree? Paragraph 7.20

14. Whilst we agree that legislative reform is not necessary, it would be desirable. There are some lawyers who do not (as we do) share the Law Commission's view that an electronic signature is capable of satisfying a statutory requirement for a signature, so if the Government wants to remove doubts, it will have to make

³ The creation of a valid Lasting Powers of Attorney once registered enables the attorney to make multiple financial decisions which could result in significant financial abuse. This is not a one-off signature which enables a commercial transaction to be completed.

the law clearer. This would likely lead to greater adoption of electronic execution processes.

15. If the Government decides to consider legislation, there would need to be a full and detailed consultation on how the new laws are drafted. If the legislation is too technical this could cause uncertainty in compliance, which could also put people off using electronic execution. It would also be important that any future legislation be technology neutral and future proofed, to remain relevant as technology advances.

Consultation Question 6. - We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree? Paragraph 7.28

16. We agree that these issues should be considered in full, and that an industry led group is well placed to explore both the current needs and potential future developments. As the Commission is aware the Ministry of Justice has established the Law Tech Delivery Panel which is an industry led group examining the growth of lawtech and how it can make a greater contribution to productivity and growth. This Panel has a specific taskforce considering related questions, and it may be beneficial to consider how this could be dovetailed with the Commission's suggestion of a working group⁴. A multi-disciplinary examination, involves the legal profession, tech developers, businesses that use (or are interested in using) electronic signatures, and commercial providers of e-signing solutions would be a beneficial approach.

Consultation Question 7. - We provisionally propose that it should be possible to witness an electronic signature via video link and then attest the document. Do consultees agree? Paragraph 8.32

17. We agree, but it is important that the different risks of witnessing electronic signatures via video link should be understood. For example:
 - arguments being raised around whether the video link worked sufficiently such that the witness could continually see the signatory sign the document, or
 - increased risk of duress as the witness cannot see whether anyone else is physically present with the signatory.
18. We are also sceptical that the practice of witnessing an electronic signature via video link will become widespread. The current practice of 'in person' witnessing is not considered to be onerous. It is a simple and well understood process. Setting up and establishing a video link is likely to be a lot more cumbersome and time consuming than the signatory simply finding a nearby person to watch them sign the document. In addition, the current signature platform technology is unlikely to support video link technology and it is unlikely to work with handheld devices as they cannot be used to both video the signing and apply the signature at the same time.

⁴ The Law Society is the secretariat to the working group, which is chaired by the president of the Law Society.

19. Although it is true that existing electronic signature platforms do not satisfactorily address witnessing, this is due to the existing functionality of those platforms, rather than any difficulty in locating a physical witness.
20. We recommend that consideration be given to: (a) reducing the circumstances in which a witness is legally required; and (b) to the extent that witnesses are still required, the industry working group, which the Commission proposes be established, being tasked with looking at different options for “witnessing” a signature, including allowing technology⁵ to perform the same function as a human witness, acknowledging that it would be important that any on-line witnessing process, whether performed by a human witness or a technological solution is secure and suitable for witnessing a document. After the industry working group publishes its conclusions the Government should consider changing the law to facilitate the most appropriate technological advances.

Consultation Question 8. - If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation: (1) Via a signing platform which the signatory and witness both log into? (2) With the document being emailed to the witness by the signatory immediately after signing? Paragraph 8.33

21. We do not believe the Commission should be prescriptive about the witnessing process. The witnessing process should be technology-neutral and signature-type agnostic, so the same process can be used irrespective of how a signatory signs a document. See our recommendation in answer to the previous question.

Consultation Question 9. - Do consultees consider that it should be possible to “witness” an electronic signature through an online signing platform in real time, without a video link or any direct communication between the signatory and the witness? Paragraph 8.42

22. The law should be enabling but not prescriptive. As we have suggested in our answers to the preceding two questions, further thought is required as to how electronic witnessing should work. We are not aware that the current technology permits for contemporaneous log in to a platform to watch someone “sign” on a separate screen as referred to in paras 8.29 and 8.38.
23. Any suggested technological proposals need to be deeply explored so it is understood how they would work in practice. The industry working group would be better placed to provide alternative solutions that are feasible in light of current and potential future technology. Whatever solutions are developed it is important that that the process is convenient and robust and no more cumbersome than the current process, otherwise the adoption of new methods will be limited.

⁵ For example, IP addresses, GPS, and audit trails.

Consultation Question 10. - Our view is that the witnessing and attestation requirement for electronic signatures on deeds should not be replaced with a requirement for a particular type of technology, such as a digital signature using Public Key Infrastructure. Do consultees agree? Paragraph 8.50

24. We agree. England & Wales does not have the infrastructure in place to propose a single type of technology for witnessing and attestation like they do in Estonia. The Government should not try to predict what technological solutions will become dominant.

Consultation Question 11. - Do consultees think that there is a case for moving away from the traditional concepts of witnessing and attestation in the context of deeds executed electronically, allowing for electronic acknowledgement? If so: (1) How should electronic acknowledgement be affected (for example, by email, telephone, text message, in person)? (2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which: (a) acknowledgement must occur after signing; and (b) acknowledgement and witnessing must take place? (3) How should the witness record the signatory's acknowledgement? Paragraph 8.60

25. We are against introducing a window for acknowledgment to take place as we cannot see any benefit to doing so. In reality the 24 hour time limit could become a contentious point, with parties arguing about the validity of witnessing if there is dispute over whether the time frame has been met. It would be unfortunate if documents could be found invalid simply because a technicality, such as a 24 hour time limit on witnessing, had not been met.

26. With regard to the remainder of the question, we do not think it is useful for the Commission to seek to specify the detail. It would be better for the industry working group to consider what requirements are needed to create effective electronic execution systems.

27. We think that consideration should be given to reducing the circumstances in which a witness is required for both wet ink and electronically signed documents (while recognising this is outside the scope of the current consultation).

Consultation Question 12. - Our view is that the requirement that deeds must be delivered does not impede the electronic execution of deeds in practice. Do consultees agree? Paragraph 8.70

28. We agree that the requirement for delivery does not impede the electronic execution of deeds.

29. We think that the Commission, as a future project, should revisit the concept of delivery and that the provisions for delivery should be brought up-to-date. There is a good argument that the law of delivery is antiquated and has little effective use in the modern world. If the concept of "delivery" is to be retained as a constituent of the execution of deeds, it should at least be modernised (e.g. be used to set the "effective date of the deed").

Consultation Question 13. - We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree? Paragraph 8.83

30. The advice published by the Law Society and City of London Law Society⁶ in response to the Mercury judgement has been accepted across the profession and there has been no challenge to that advice. If, as we suggest in our answer to question 5, the Government did look at updating legislation to enable technological solutions, then it may be a good opportunity to consider codifying the post-Mercury arrangements. The legislation would have to be carefully drafted to ensure that the current certainty of procedures is not lost. It would be preferable not to change the current (settled) position than to reintroduce uncertainty in this area.

Consultation Question 14. - Do consultees think that a review of the law of deeds should be a future Law Commission project? Paragraph 8.88

31. Yes.

Consultation Question 15. - We provisionally conclude that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document. Do consultees believe that this will result in increased confidence in the legality of electronic execution in England and Wales? Is any more needed? Paragraph 8.93

32. Please see our response to question 5. We do not believe that the Commission's conclusions on their own will convince those who have a concern about the validity of electronic signatures to change their perspective. Many legal practitioners have never used electronic signatures because they do not have difficulty in executing documents in the traditional way, so are not convinced that it is worth bringing any extra risk (however minimal) into the process.

33. For this situation to change, legislation would be needed to remove any doubt about the validity of electronic signatures.

34. One of the biggest influencers of change is the attitude taken by quasi-governmental bodies. For example, Companies House takes an inconsistent approach to accepting electronically executed filings. While they do accept a certified copy of a charging document that has been executed electronically, in other areas it is less clear whether electronic execution is acceptable. If Companies House was to be positive in embracing the technological changes that many businesses take advantage of then a more conducive environment for electronic execution would be created.

⁶ The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on the execution of a document using an electronic signature" (July 2016)

Consultation Question 16. - What do consultees believe would be the financial value of increased confidence in the legality of electronic execution in England and Wales? For example, do consultees think there could be a reduction in transaction costs by as much as 10% to 30%? Paragraph 8.94

35. The use of electronic signatures certainly has the potential to result in time (and therefore cost) savings but we are not sure that this translates into a high saving per transaction. Where businesses execute large volumes of transactions, even a small saving of time on each one could result in a significant saving overall. There may also be initial implementation costs to purchase licences for signature platforms, invest in other technology and train lawyers and other staff on how to use the new tools.
36. Having more documents executed electronically will result in less paper and printing materials being used, which should have a positive environmental impact.
37. It is important to consider the savings in time and effort in both business to business transactions and business to consumer transactions. These are likely to be different and it would be useful to understand the impacts on the different groups.

Consultation Question 17: Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would: (1) provide benefits such as reduced transaction costs? If so, how much? (2) provide non-monetary benefits? If so, what benefits?

38. We agree that any reduction in uncertainty, or helpful guidance, will likely reduce the time spent by others in considering these issues, thus reduce costs. However, it is not at this stage possible to put a figure on this.

Consultation Question 18: We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from: (1) the capacity to execute deeds electronically without the physical presence of a witness; or (2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.

39. We do not have anything to add beyond the points we have already made in answering other questions on the impact of electronic execution.

Conclusion

40. We congratulate the Commission on its analysis of the topic of electronic execution. Creating an environment where such methods become more widespread is naturally an iterative process, which has to be flexible enough to accommodate new technological developments and customer drivers. The key to using technology to improve electronic execution is to put in place structures that can investigate how and when electronic witnessing can be used.
41. The law in this area should be enabling but not prescriptive. As we have suggested in our introduction, further thought is required as to how electronic execution impacts on the need for physical witnesses to be present. Ultimately,

what is important is that the technologies used are appropriately secure and clear in being able to verify that witnessing has taken place.

42. We would welcome the opportunity to be involved in future considerations the Commission has on this matter.

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