

## Response ID ANON-EVK9-F382-2

Submitted to **Law Commission consultation on the electronic execution of documents**

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### About you

#### What is your name?

**Please enter your name.:**

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The Chancery Bar Association

#### Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

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**Please explain why your answers are confidential.:**

### Electronic signatures and other preliminary questions (Consultation Questions 1 to 6)

**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?(See paragraph 3.87 of the consultation paper.)**

Yes

**Please expand on your answer. :**

1. Yes, but as per the Law Commission Advice in 2001, a statutory requirement for a signature must be interpreted in its own statutory context.

**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? (See paragraph 4.57 of the consultation paper.)**

Yes

**Please expand on your answer. :**

2. Yes. There is considerable case law in the context of the validity of wills as to what it means for a witness to be present – it must be possible for the witness to see the document being signed. Although the Consultation paper is not concerned with wills, the same principle applies, for instance, to deeds.

**Consultation Question 3: We welcome consultees’ views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution. (See paragraph 6.19 of the consultation paper.)**

**Please share your views below. :**

3. None to offer.

**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? (See paragraph 6.41 of the consultation paper.)**

Yes

**Please expand on your answer. :**

4. Yes. However, any reform in legislation expressly to allow documents to be executed electronically could possibly throw up more issues in terms of the protection of consumers and vulnerable individuals and it is important that reform in specific legislation or regulation to protect these vulnerable parties is undertaken in conjunction with any reform in the general law of electronic execution of documents.

**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? (See paragraph 7.20 of the consultation paper.)**

Other

**Please expand on your answer. :**

5. Legislative reform might not be necessary, but legislative reform may nonetheless be desirable to clarify the position (and would require more than just restating any existing legislative provisions), although the comments at §6.12 of the Paper are noted and that "in general, legislation should be made when it is necessary, and not merely "for the avoidance of doubt". Legislation may be necessary in connection with any issues raised by the working group covered by question 6.

**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? (See paragraph 7.28 of the consultation paper.)**

Yes

**Please expand on your answer.:**

6. Yes. This is a technical area that needs input from technical experts but we believe that the working group should be government-led, with contributions from industry.

## **Deeds (Consultation Questions 7 to 14)**

**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? (See paragraph 8.32 of the consultation paper.)**

No

**Please expand on your answer.:**

7. We are concerned about this proposal. First, we think this is trying to solve a problem that does not really exist. It is rarely difficult for a signatory to find a witness who can be physically present for the moment it takes to witness a document (whether electronically or in ink). Secondly, without proper safeguards, it may be easy to fool a witness, e.g. into attesting a completely different document from the one just signed. Thirdly, we think any system which may be legislated for is likely quickly to become outdated.

**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?(See paragraph 8.33 of the consultation paper.)**

Signing platform

**Please expand on your answer.:**

8. Accordingly, if video-link witnessing is to be permitted, we believe it should be subject to safeguards. Option (1) - via a live signing platform – would be our preferred choice.

**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? (See paragraph 8.42 of the consultation paper.)**

Yes

**Please expand on your answer. :**

9. Yes, if the online signing platform presents a live visual representation of the signature of the signing party, as well as of the witnesses; but even if the signing can be seen and the participants have logged securely into the signing platform, there must still be a way effectively to prove that the person logging in is the person named in the document.

**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? (See paragraph 8.50 of the consultation paper.)**

Yes

**Please expand on your answer.:**

10. Yes. The technology to be used needs to satisfy the signing requirements of the document to be signed. In some cases a simple electronic signature, made by typing a name into a Word document, might be sufficient, while other cases might need the security of a public key infrastructure.

**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? (See paragraph 8.60 of the consultation paper.)**

No

**Please expand on your answer.:**

11. No. Again, we think this is trying to solve a problem that does not really exist, given the ready availability of a live witness, either physically or (if the reforms above proceed) digitally present.

**How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?:**

However, if acknowledgment were permitted:

- a. It is important that there is a non-electronic communication to the person acknowledging – by audio or video link or in person – to minimise the possibility of fraud. The electronically signed document should have an identifying code which should be passed on with the acknowledgment.
- b. The acknowledgment and witnessing should take place promptly, but 24 hours seems unnecessarily prompt. We would suggest 7 days.
- c. A prescribed statement, recording the method of acknowledgment and the identifying code. The platform would then confirm successful attestation.

**Do you 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?:**

see above

**How should the witness record the signatory's acknowledgement?:**

see above

**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? (See paragraph 8.70 of the consultation paper.)**

Yes

**Please expand on your answer.:**

12. Yes, the requirement that deeds must be 'delivered' should not impede the electronic execution of deeds in practice. Also, as suggested at §8.67 of the Paper, if deeds are to be considered in a future reform project, reform of "delivery" to reflect modern practices would be beneficial.

**Consultation Question 13: We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree? (See paragraph 8.83 of the consultation paper.)**

Yes

**Please expand on your answer.:**

13. Yes, we agree that legislative reform is unnecessary and inappropriate to address the implications of Mercury.

**Consultation Question 14: Do consultees think that a review of the law of deeds should be a future Law Commission project? (See paragraph 8.88 of the consultation paper.)**

Yes

**Please expand on your answer. :**

14. Yes. The law of deeds arose out of the limitations of its time. Modern technology should be able to capture the solemnity of the act, proof of identity and delivery without the need for a written document executed with the formality currently required of deeds.

## **Impact of reform (Consultation Questions 15 to 18)**

**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? (See paragraph 8.93 of the consultation paper.)**

Yes

**Please expand on your answer. :**

15. Yes. Individuals are becoming more and more comfortable with using their computer devices, particularly mobile smartphones, to carry out different kinds of transactions. They expect the range of activities that can be effected in this way to increase with time. If an electronic signature is capable of satisfying a statutory requirement for a signature, that will tend to increase confidence in the legality of electronic execution. What will be needed is the creation of electronic device applications tailored effectively and securely to satisfy the requirements.

**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%? (See paragraph 8.94 of the consultation paper.)**

**Please provide your answer below.:**

16. Increased confidence in the legality of electronic execution is likely to increase use of these methods, but we rather doubt that that will result in any reduction

in regular transaction costs. On the contrary, we suspect that it is likely to increase costs as parties would presumably have to subscribe to some third-party platform. There may conceivably be a saving in those rare cases where the authenticity of documents is seriously disputed, provided those who run the systems can provide quick, reliable, and intelligible reports of the electronic signature process.

**Consultation Question 17: Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would do any of the following? (See paragraph 8.95 of the consultation paper.)**

**(1) Provide benefits such as reduced transaction costs? If so, how much?:**

17. There is a need for some collaboration between government and industry to find technological solutions to the difficulties involved in creating suitable electronic signature processes. A government led undertaking could result in reduced transaction costs and non-monetary benefits such as increased confidence in the legal system. Individuals from industry could provide insight on current working practices and the state of knowledge but a separate working group is not needed.

**(2) Provide non-monetary benefits? If so, what benefits?:**

see above

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**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 the following. (See paragraph 8.96 of the consultation paper.)**

**(1) The capacity to execute deeds electronically without the physical presence of a witness.:**

18. As stated above, we believe that this is seeking to solve a problem that does not exist in practice, in that it is very rare not to be able to find a witness who can be physically present for the few moments it takes to execute a document, given that witnesses do not, in general, have to be anyone in particular. We therefore doubt that there are any substantial benefits in practice, whereas the IT provision needed will inevitably come at a considerable expense. We suggest that the Law Commission provide recommendations for the electronic signature by a witness physically present with the signatory, but no further.

**(2) Any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.**

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see above

**CQ19:**

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