



Bar Council response to the Law Commission consultation paper 'Electronic execution of documents.'

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper entitled 'Electronic execution of documents.'¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Consultation Question 1.

9.1 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

Tickbox: Yes

¹ [Law Commission \(2018\) Electronic Execution of Documents](#)

Comment box: "While the Court has adopted a practical approach, this has been in circumstances where the Court has been able: (i) to determine that the signature (in whatever form it might be) is easily attributable to the person purporting to enter into the agreement; and (ii) the party intended the signature to give authenticity to that document as a whole."

Consultation Question 2.

9.2 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

Tickbox: Yes

Comment box: "The Law Commission's view is more definitive than the view taken by the Joint Working Party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees in their practice note on electronic signatures, which support the use of video-link, even if it is not considered to be best practice.

We consider the Law Commission's provisional view is correct.

However, it is undesirable that there is not complete clarity as to whether or not some form of remote observation of the signatory is adequate. Any proposal for reform should, in any event, contemplate what happens if the technology fails and how far it actually needs to give the witness sight of the party signing the document."

Consultation Question 3.

9.3 We welcome consultees' views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.

Paragraph 6.19

Comment box: No comment

Consultation Question 4.

9.4 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

Tickbox: Yes

Comment box: We agree that it is not appropriate to carve out specific exceptions in the general law as to execution of documents. We note, in particular, the comments made in relation to the mode of execution of consumer credit agreements in paragraph 6.30 and the footnotes thereto. There is a respectable argument that changes brought about by the Consumer Credit Directive (Directive 2008/48/EC) have weakened the impact of a handwritten signature – previously the 1983 Agreements Regulations (Schedule 5) required the use of a specific signature box containing the following wording - “This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign it only if you want to be legally bound by its terms” – above the space indicated for signature. That is no longer necessary under the 2010 Agreements Regulations, which merely require there to be a space indicated for signature.

We think it would be worthwhile for the Law Commissions to consider whether this project might afford an opportunity to remind those that are contracting with consumers that it is very important to bring home to them that they are entering into a binding commitment, on terms which they should be strongly encouraged to read, even when their signature does not involve a pen and paper.

Consultation Question 5.

9.5 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

Tickbox: Yes

Comment box: As noted in answer to Q1, the caselaw appears prepared to treat an electronic signature, of whatever form, as being capable of being effective at law. We

agree that no legislative reform is required to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature.

Consultation Question 6.

9.6 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

Tickbox: Yes

Comment box: No comment

Consultation Question 7.

9.7 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

Tickbox: Yes

Comment box: As set out in answer to Q2 above, any reform should contemplate what happens if the video-link technology fails or how far it actually needs to give the witness sight of the party signing the document. Any such requirements should be clearly expressed in the reforming statute.

Consultation Question 8.

9.8 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

Tickbox: Signing platform

Comment box: Subject to the position taken in relation to the issues identified in answer to Q7, a signing platform should provide greater assurance that the signatory and witness have both signed the same document.

Consultation Question 9.

9.9 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

Tickbox: No

Comment box: The witnessing of a document is intended to perform an important evidential role in verifying the signatory’s approval to the document. Without some form of direct communication, such as might be provided by video link, there is an increased risk that the signatory is not, in fact, the person claimed to be or that they may not be acting freely.

In this case, it is hard to see what role the “witness” is actually performing. All of the evidential support is provided by the platform provider. The value of this would depend on the details of how platform works and what identity verification procedures it uses. It would be difficult to legislate for appropriate systems for the platform in a technology-neutral way.

Consultation Question 10.

9.10 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

Tickbox: Yes

Comment box: See response to Q7 above

Consultation Question 11.

9.11 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 effected (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

Tickbox: No

Comment box: The circumstances in which deeds are required are limited and, ordinarily, involve some significant act on the part of the maker. It would appear sensible that such acts are accompanied by some measure of attendant formality. Given the limited use made of deeds, we do not anticipate that there will be any significant commercial benefits in departing from traditional concepts.

If "acknowledgment" or some similar concept were to replace witnessing deeds, the acknowledgment would have to occur in person or perhaps by video link if the evidential value of witnessing is to be maintained. This ensures that, in cases of disputed signatures, the person to whom the acknowledgment has been given can identify the signatory with some reliability. If acknowledgment could take place by telephone or email, the scope for abuse is obvious unless it is to be a requirement that the signatory select someone he or she knows to acknowledge the signature too. But that creates a different problem. What if the person does not know the signatory well enough to be confident that it is the signatory on the telephone? It would be impossible to make rules that solve this problem.

Consultation Question 12.

9.12 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

Tickbox: Yes

Comment box: No comment

Consultation Question 13.

9.13 We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree?

Paragraph 8.83

Tickbox: Yes

Comment box: No comment

Consultation Question 14.

9.14 Do consultees think that a review of the law of deeds should be a future Law Commission project?

Paragraph 8.88

Tickbox: Yes

Comment box: As part of any wider review of the law of execution of documents, consideration should be given to the question of whether it should be possible for a company to apply a company seal electronically. At present, s.45(2) Companies Act 2006 requires the company name to be “engraved” upon the company seal, which would appear to preclude an electronic form of company seal. While company seals have fallen out of use, given the authorised signatory options in s.44 Companies Act 2006, it would seem appropriate to examine whether the rules attached to the company seal are appropriately aligned with the rules attached to electronic signatories.

Consultation Question 15.

9.15 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

Tickbox: Yes

Comment box: We consider that the Law Commission's provisional view, of itself, will have a modest effect in increasing confidence in the use of electronic signatures. In any event, we consider that this is the position that has, already, been reached by the general law.

Consultation Question 16.

9.16 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

Comment box: No comment.

Consultation Question 17.

9.17 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?

Paragraph 8.95

Comment box (1): Greater common acceptance of the position between lawyers leading to reduced costs.

Comment box (2): No comment.

Consultation Question 18.

9.18 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.

Paragraph 8.96

Comment boxes: No comment.

Bar Council

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² Prepared by the Law Reform Committee for the Bar Council.