Law Commission
Reforming the law

Electronic execution of documents

HC 2624

Law Com No 386

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(Law Com No 386)

Electronic execution of documents

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The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The text of this report of this report is available on the Law Commission's website at https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

Contents

Glossary

advanced electronic signature: A signature which meets the requirements of article 26 of eIDAS.

asymmetric cryptography: The process of encrypting and decrypting data using public and private keys. This is also known as "public key cryptography".

attestation: The process by which a witness records, on the document itself, that they have observed that document's execution.

biometrics: Physical characteristics, such as fingerprints, which may be used to verify a signatory's identity.

certificate: An electronic certificate issued by a certification authority which confirms the connection between a public key and an individual or entity.

certification authority: An entity which issues certificates. See also "certificate".

consideration: In general terms, this is payment under a contract. A more technical definition is that consideration is an element of a valid contract, consisting of a right, interest, profit or benefit accruing to one party to an agreement, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party (*Currie v Misa* (1875) LR 10 Exch 153 at 162).

consultation paper: Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237, https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

deed: A document which is executed with a high degree of formality, and by which an interest, a right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.

delayed delivery: A means of delivering a deed without the deed taking effect immediately. Delayed delivery can be achieved by delivering a deed into escrow, or by delivering it to an agent with instructions to deal with the deed in a certain way at a given time.

delivery: A requirement for the valid execution of deeds in which the maker signifies that they intend the deed to become binding and effective.

digital signature: An electronic signature produced using asymmetric or public key cryptography (see Appendix 2).

EDI: Electronic data interchange. This refers to the exchange of digital information, where the data is structured in such a way that it can be automatically understood and acted upon by the software of the recipient system. For example, stock re-ordering systems operated by large retailers and their suppliers.

eIDAS: Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

electronic signature: A signature in electronic form.

escrow: A deed delivered into escrow is one which does not take effect until the condition or conditions of escrow are fulfilled. See also “delayed delivery”.

formalities: A formality is a procedure which a party must follow in order to give legal effect to a transaction. Formalities include requirements that certain transactions are made “in writing” or signed.

information digest: A unique fingerprint of an electronic document, used to create a digital signature.

Intention to authenticate: By “intention to authenticate”, we mean an intention to sign and be bound by the document being signed

IP address: A number allocated to a device that connects to the internet.

Key (public or private): A cryptographic key is a very large number, usually represented by a long string of characters. A digital signature uses a “private key” to digitally sign a document, which can be verified using the signatory’s “public key”.

lasting power of attorney: A legal document used by an individual (“the donor”) to confer authority on another person to make decisions about the donor’s personal welfare, and/or property and affairs, made under the Mental Capacity Act 2005.

public key infrastructure: A system in which a person’s public key is the subject of a digitally-signed certificate provided by a certification authority. See “certificate” and “certification authority”.

qualified electronic signature: A signature which meets certain requirements under articles 26, 28, 29, and annexes I and II, of eIDAS.

signing platform: Software providing an interface through which people can both create and upload documents to be signed electronically and affix electronic signatures to those documents. Such platforms may also provide an “audit trail” of a particular electronic document, which includes data such as the time at which it was signed and the IP address through which it was accessed.

trust deed: A deed which creates an express trust.

trust service provider: An entity which provides services such as the creation, verification and validation of electronic signatures.

wet ink signature: A signature affixed to paper using, for example, a pen or pencil. In this consultation paper we use the terms “wet ink” and “handwritten” interchangeably, to refer to non-electronic signatures.

witness: An individual who observes a person sign a document. A witness may also “attest” a document.

List of Abbreviations

BVCA: British Private Equity and Venture Capital Association

CILEx: Chartered Institute of Legal Executives

CLLS: The City of London Law Society

CMS LLP: CMS Cameron McKenna Nabarro Olswang LLP

CP 237: Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237, https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

ECA 2000: Electronic Communications Act 2000

EDI: Electronic Data interchange

eIDAS: Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC

E-Signatures Directive: Directive on a Community framework for electronic signatures 1999/93/EC, Official Journal L 013 of 19/01/2000 p 12.

FCO: UK Foreign and Commonwealth Office Consular Document Policy Team

ICAEW: The Institute of Chartered Accountants in England and Wales.

ILAG: Investment and Life Insurance Group

IP: Internet Protocol

LPA 1925: Law of Property Act 1925

LPMPA 1989: Law of Property (Miscellaneous Provisions) Act 1989

MoJ: Ministry of Justice

OPG: Office of the Public Guardian

PKI: Public Key Infrastructure

PIN: Personal Identification Number

STEP: The Society of Trust and Estate Practitioners

UNCITRAL: United Nations Commission on International Trade Law

2016 note: 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), http://www.citysolicitors.org.uk/attachments/article/121/LSEW%20%20CLLS%20Joint%20Working%20Party%20-%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf.

2009 note: The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf.

2001 Advice: Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/.

1998 Report: The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253, https://www.lawcom.gov.uk/project/the-execution-of-deeds-and-documents-by-or-on-behalf-of-bodies-corporate/.

1987 Report: Deeds and Escrows (1987) Law Com No 163, https://www.lawcom.gov.uk/project/deeds-and-escrows/.

1985 Working Paper: Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, https://www.lawcom.gov.uk/project/transfer-of-land-formalities-for-deeds-and-escrows/.

WEBSITES

All websites last visited 22 August 2019.

Executive summary: statement of the law

1.1 This executive summary prefaces the Law Commission's report on electronic execution of documents. We were asked by the Ministry of Justice to review the law in this area, particularly as regards the validity of electronic signatures, and consider whether legislation was required to ensure that organisations and individuals can use electronic signatures with confidence, should they wish to do so.

1.2 This is an important issue, relevant across the public and private spheres. We have found that the law does accommodate the use of electronic signatures, but this is not contained in a single source, making the law inaccessible to many. We have therefore prepared a short, referenced, statement of the law, with which we begin this report. We hope that it will assist users and potential users of electronic signatures to proceed with confidence.

1.3 This statement sets out the high-level conclusions of the Law Commission as to the law regarding the validity of electronic signatures, summarised in a series of propositions. It applies both where there is a statutory requirement for a signature and where there is not. Because of the way the law has developed, it also has broad application and is not restricted to commercial and consumer documents. This summary is based upon EU and domestic legislation, case law and upon reasonable inferences that can be properly drawn from case law.

1.4 A more detailed analysis of the law relating to electronic signatures, which goes beyond these high-level conclusions, is set out in Chapter 3 of this report. In the report, we also discuss other relevant issues such as whether legislation would improve the accessibility of the law, the context within which electronic signatures are used, including security and technology, and matters relating to deeds.

1.5 Insofar as there are ambiguities or uncertainties in the law it is open to the common law and to the courts to resolve such ambiguities or lacuna.

1.6 This statement addresses the law relevant to the use of electronic signatures. It does not cover the general law on execution of documents, for example in respect of estoppel, fraud or mistake in relation to the identity of one of the parties to a document.

STATEMENT OF THE LAW: EXECUTION WITH AN ELECTRONIC SIGNATURE

(1) An electronic signature is capable in law of being used to execute a document[1] (including a deed) provided that (i) the person signing the document[2] intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied.

(2) Such formalities may be required under a statute or statutory instrument, or may be laid down in a contract or other private law instrument under which a document is to be executed. The following are examples of formalities that might be required: (i) that the signature be witnessed; or (ii) that the signature be in a specified form (such as being handwritten).

(3) An electronic signature is admissible in evidence in legal proceedings.[3] It is admissible, for example, to prove or disprove the identity of a signatory and/or the signatory's intention to authenticate the document.[4]

(4) Save where the contrary is provided for in relevant legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion,[5] the common law adopts a pragmatic approach and does not prescribe any particular form or type of signature. In determining whether the method of signature adopted demonstrates an authenticating intention the courts adopt an objective approach considering all of the surrounding circumstances.

(5) The Courts have, for example, held that the following non-electronic forms amount to valid signatures:

(a) signing with an 'X';[6]

(b) signing with initials only;[7]

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1 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS") Article 25(1), Article 3(10) and Recital 49. Also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [28]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21], *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95]; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1205 (Ch) at [44]; *WS Tankship II BV v Kwangju Bank Ltd and another; WS Tankship III BV v Seoul Guarantee Insurance Co; WS Tankship IV BV v Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) at [153] and [155]; and *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [42] and [43].

2 Or, as the case may be, the person on whose behalf the document is being signed.

3 Electronic Communications Act 2000, s 7.

4 This is the case for both electronic and non-electronic signatures.

5 As the Law Commission has concluded is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15.

6 *Jenkins v Gaisford & Thring (1863)* 3 Sw & Tr 93. Also S Mason, *Electronic signatures in law* (4th ed 2016) para 1.38.

7 *Phillimore v Barry (1818) 1 Camp 513, Chichester v Cobb (1866)* 14 LT 433. Also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [26].

(c) using a stamp of a handwritten signature;[8]

(d) printing of a name;[9]

(e) signing with a mark, even where the party executing the mark can write;[10] and

(f) a description of the signatory if sufficiently unambiguous, such as "Your loving mother"[11] or "Servant to Mr Sperling".[12]

(6) Electronic equivalents of these non-electronic forms of signature are likely to be recognised by a court as legally valid. There is no reason in principle to think otherwise.

(7) The courts have, for example, held that the following electronic forms amount to valid signatures in the case of statutory obligations to provide a signature where the statute is silent as to whether an electronic signature is acceptable:

(a) a name typed at the bottom of an email;[13]

(b) clicking an "I accept" tick box on a website;[14] and

(c) the header of a SWIFT message.[15]

(8) Our view 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.[16] This is the case even where both the person executing the deed and the witness are executing / attesting the document using an electronic signature.

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8 *Goodman v J Eban LD* [1954] 1 QB 550 page 557.

9 *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215; *Tourret v Cripps* (1879) 48 L J Ch 567.

10 *Baker v Dening* (1838) 8 Ad & E 93.

11 *In re Cook* [1960] 1 All ER 689.

12 *In re Sperling* (1863) 3 Sw & Tr 272.

13 *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [32]. Also the following in which the court has said that, in principle, an email chain containing an electronic signature would be sufficient: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [30]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21], *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95]; and *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1205 (Ch) at [44].

14 *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [43] and [44].

15 *WS Tankship II BV v Kwangju Bank Ltd and another; WS Tankship III BV v Seoul Guarantee Insurance Co; WS Tankship IV BV v Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) at [155].

16 Law of Property Miscellaneous Provisions Act s 1 and Companies Act 2006 s 44(2)(b); N P Ready, *Brooke's Notary* (14th ed 2013), para 11-09; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 236; *Freshfield v Reed* (1842) 9 M&W 404, 405; *Ford v Kettle* (1882) 9 QBD 139, 144 to 145.

Electronic execution of documents

To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice

Chapter 1: Introduction

1.1 In today's world, individuals and businesses demand modern, convenient methods of making binding transactions. Increasingly, parties are concluding agreements entirely electronically. However, we have been told that lingering uncertainty around the legal validity of documents executed electronically, at least in some circumstances and for certain transactions, is discouraging some parties from making use of technological solutions which could increase efficiency.

1.2 Most agreements concluded under the law of England and Wales do not need to be recorded in any particular form. However, for those transactions which are subject to certain requirements, such as to be "in writing" or "signed", some stakeholders have questioned whether these requirements can be satisfied electronically. Stakeholders highlighted particular concerns in relation to the electronic execution of deeds, which must be signed "in the presence of a witness" and "attested".

1.3 In fact, a combination of legislation, case law and common law principles already provides for the legal validity of electronic signatures, and they are used effectively in transactions every day, including those which are required to be signed. However, it appears that doubts over legal certainty remain. Commercial parties demand clarity and consistency. A lack of accessibility in the law may disproportionately affect small businesses and start-ups, who may not have ready access to legal expertise. Consumers and vulnerable people need to be adequately protected to ensure they understand the consequences of "signing" a document, in any form.

1.4 This report aims to provide an accessible explanation of the law governing the electronic execution of documents, including the use of electronic signatures and electronic execution of deeds. It recommends that an industry working group should be established, convened by Government, to consider practical and technical issues associated with the electronic execution of documents. It does not make a formal recommendation for legislative reform confined within the terms of reference, but sets out an option for Government to consider whether a more general legislative statement should be introduced. Finally, it makes recommendations specifically about video witnessing of deeds and a possible future review of the law of deeds.

BACKGROUND TO THE PROJECT

1.5 The Law Commission previously considered the law relating to the execution of documents in 1987,[17] 1998[18] and 2001.[19] The most relevant to our current work was the 2001 Advice to Government, which found that commercial transactions could validly be concluded electronically.[20]

1.6 This current project was suggested by stakeholders as part of our Thirteenth Programme of Law Reform. We agree that this is the right time to revisit some of these issues, and to consider others for the first time. Not all stakeholders are convinced that an electronic signature fulfils a statutory requirement for a signature, and this doubt can slow down transactions and lead to disputes about the validity of documents. In addition, there is currently increased focus on the electronic execution of transactions because of interest in the use of blockchain and automated "smart" contracts to enter into legally binding transactions. The UK Jurisdiction Taskforce has noted the need to consider the circumstances in which a statutory signature or "in writing" requirement may be met in the context of smart legal contracts.[21]

1.7 Execution of documents affects individuals and businesses in many different contexts. It is important that parties are certain about what they can and cannot validly do electronically, and that the law on this key issue is sufficiently accessible.

The notes issued by the Law Society and the City of London Law Society

1.8 A joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees has published two notes which deal with the execution of documents. Both were written with the advice of Mark Hapgood QC.

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17 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, https://www.lawcom.gov.uk/project/transfer-of-land-formalities-for-deeds-and-escrows/; Deeds and Escrows (1987) Law Com No 163, https://www.lawcom.gov.uk/project/deeds-and-escrows/.

18 The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc253_Execution_of_Deeds_and_Documents.pdf.

19 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) ("2001 Advice"), https://www.lawcom.gov.uk/project/the-execution-of-deeds-and-documents-by-or-on-behalf-of-bodies-corporate/.

20 2001 Advice, para 1.5.

21 UK Jurisdiction Taskforce of the LawTech Delivery Panel, "Public consultation: The status of cryptoassets, distributed ledger technology and smart contracts under English private law" (May 2019), para 3.2, https://www.lawsociety.org.uk/news/documents/ukjt-consultation-cryptoassets-smart-contracts-may-2019/.

1.9 The first of these notes, published in 2009, deals with the execution of documents at virtual signings.[22] The second, published in 2016, considers the execution of documents using an electronic signature.[23]

1.10 We understand that these notes have alleviated some of the uncertainty around the execution of documents.[24] We agree with and endorse the conclusions outlined in these notes. However, we consider that there is still a need for further clarification. The 2016 note was limited in scope to commercial contracts entered into in a business context, and did not apply to transactions involving consumers, or individuals outside of a business context.

TERMS OF REFERENCE

1.11 The Ministry of Justice asked the Law Commission:

(1) To consider whether there are problems with the law around the electronic execution of documents and deeds (including deeds of trust) which are inhibiting the use of electronic documents by commercial parties and, if appropriate, consumers, particularly with regard to:

(a) electronic signatures;

(b) witnessing;

(c) delivery; and

(d) the consequences of the decision in *R (on the application of Mercury Tax Group Ltd) v HMRC* [2008] EWHC 2721 (Admin).

(2) Following consultation with relevant stakeholders, to consider whether and, if so, what legislative reform or other measures are needed to address these issues.

(3) This consideration is not expected to extend to the electronic execution of:

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22 The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010) ("the 2009 note"), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf.

23 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) ("the 2016 note"), http://www.citysolicitors.org.uk/attachments/article/121/LSEW%20%20CLLS%20Joint%20Working%20Party%20-%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf.

24 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237, Chs 3, 7 and 8, https://www.lawcom.gov.uk/project/electronic-execution-of-documents ("CP 237").

(a) registered dispositions under the Land Registration Act 2002, which is being dealt with by HM Land Registry's project on electronic conveyancing and registration; and

(b) wills, which are being dealt with by the Law Commission's project on "Making a Will".

1.12 This project extends to England and Wales only.

To whom does this project apply?

1.13 Our terms of reference cover commercial and consumer documents, and deeds, such as powers of attorney and trust deeds. The project covers documents which are signed, including those required by law to be "signed" and documents which are required by law to be executed as deeds. We set out the requirements for a deed in detail in Chapter 5. In brief, to be validly executed a deed must be signed, witnessed and delivered as a deed.

1.14 The scope of this project covers a wide range of documents, including, but not limited to:

(1) deeds executed under section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") or sections 44 and 46 of the Companies Act 2006, including:

(a) a deed giving effect to a unilateral promise;[25]

(b) trust deeds;

(c) powers of attorney under the Powers of Attorney Act 1971;[26]

(d) lasting powers of attorney under the Mental Capacity Act 2005;[27] and

(e) powers of appointment under the Law of Property Act 1925 ("LPA 1925");[28]

(2) contracts for sale or other disposition of an interest in land under section 2 of the LPMPA 1989; and

(3) consumer contracts which are required to be "signed", such as regulated credit agreements under the Consumer Credit Act 1974.

1.15 There are two significant types of document which are excluded from the scope of this project. The first of these is wills. A will is generally a document which expresses a person's wishes as to the disposition of their estate and which is intended to take

25 That is, a contract made without consideration.

26 Powers of Attorney Act 1971, s 1.

27 Mental Capacity Act 2005, s 9.

28 LPA 1925, s 159.

effect upon their death.[29] Wills are distinct from deeds. Formalities relating to wills are dealt with under the Wills Act 1837 and are being addressed in the Law Commission's current project on Making a Will.[30]

1.16 The second type of document which is excluded is registered dispositions under the Land Registration Act 2002.[31] Section 91 of the 2002 Act, the introduction of which was recommended in work conducted jointly by the Law Commission and HM Land Registry,[32] sets out a regime for the registration of electronic documents which are deemed to be deeds.[33] The first step in implementing this system was the enactment of a rule enabling electronic conveyancing for registered estates and charges to take place, as and when specified by HM Land Registry.[34] Nothing in this project is intended to disrupt that work. Although our recommendations for reform may affect a contract for the sale of land, they will not affect the registration of any resulting interest at HM Land Registry.

Scope of our conclusions as to the current law on electronic signatures

1.17 This report's conclusions on the current law on electronic signatures have broad application and, unlike our terms of reference, are not restricted to commercial and consumer documents. The enactments and case law relevant to electronic signatures do not generally distinguish between different types of situation in which electronic signatures may be used, or different types of signatory, and this has been reflected in the scope of our conclusions. While we conclude that the current law generally accommodates the use of electronic signatures, we acknowledge that there are situations in which the law is more prescriptive as to the form or type of signature required. This occurs, for example, where there is something explicit in an enactment, or case law on the relevant document, that requires a particular kind of signature.[35]

1.18 The broad scope of our conclusions confirm that an electronic signature is capable in law of being used in commercial and consumer situations, as well as non-commercial situations. These could include, for example, criminal proceedings, or in a medical or family law context. Indeed, we have found many examples of government departments and public bodies moving to digitising their interactions with members of the public, such as for passport applications and medical prescriptions.

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29 L King, K Biggs and P Gausden, *A Practitioner's Guide to Wills* (2010) p 5. Also Making a Will (2017) Law Commission Consultation Paper No 231, para 1.7.

30 Making a Will (2017) Law Commission Consultation Paper No 231.

31 Registrable dispositions include transfers, the grant of a lease for a term of more than seven years and the grant of a legal charge. Land Registration Act 2002, s 27.

32 Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, paras 13.11 to 13.33.

33 The Law Commission's recent report on land registration also discusses electronic conveyancing: Updating the Land Registration Act 2002 (2018) Law Com No 380, Ch 20.

34 Land Registration Rules 2003, SI 2003 No 1417, rr 53A and 54B.

35 The Law Commission has concluded that this is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15. Also, for example, National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, reg 2.

1.19 Of course, the use of electronic signatures will not always be appropriate even where the law allows it, for example due to the vulnerability of the signatory or the pressurised nature of the circumstances. This report aims to provide an accessible explanation of the law on electronic signatures. It does not seek to mandate the use of electronic signatures in any particular situation. The desirability or otherwise of electronic signatures will be for the parties to a document or relevant public body to decide, and they should design their systems and practices accordingly.

THE CONSULTATION EXERCISE

1.20 We published a consultation paper in August 2018 ("the consultation paper").[36]

1.21 The consultation paper reviewed the electronic execution of documents. It set out the formalities for various types of documents, and the current law on electronic execution and electronic signatures. It provisionally concluded that the existing law on electronic signatures was sufficient and did not require further legislation. However, it suggested that an industry working group could helpfully look at practical issues surrounding electronic execution, such as security and reliability considerations. It also set out various potential options to assist electronic execution of deeds.

1.22 We received 177 responses.[37] We have read and analysed these responses carefully and they have influenced the content of this report and the recommendations it contains. We summarise the results of the consultation exercise in this report; a fuller summary of responses is published separately.

ACKNOWLEDGEMENTS AND THANKS

1.23 We are grateful to all those individuals and organisations who have met or corresponded with us or responded to our consultation paper.[38]

1.24 This project concerns the intersection between the law and technology. As such, we have drawn on an Advisory Panel of experts. The panel has commented on draft proposals and shared their expertise and experience with us. Their assistance and feedback has been invaluable. We extend our thanks to Nicholas Bohm (retired solicitor, General Counsel to the Foundation for Information Policy Research), Lorna Brazell (Consultant, Osborne Clarke LLP), Russell Hewitson (Associate Professor of Law, Northumbria University and Chair of the Conveyancing and Land Law Committee, Law Society of England and Wales), James Marquette (Senior Policy Adviser, Finance & Leasing Association), Stephen Mason (Barrister), Chris Reed (Professor of Electronic Commerce Law, Centre for Commercial Law Studies, Queen Mary University of London), Graham Smith (Partner, Bird & Bird LLP) and Elizabeth Wall (Head of Know-How for the Global Corporate Practice, Allen & Overy LLP and Chair of the Company Law Committee, Law Society of England and Wales).

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36 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237, ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

37 These included 76 identical or near-identical responses which were concerned principally with lasting powers of attorney.

38 These individuals and organisations are listed at Appendix A.

THE STRUCTURE OF THIS REPORT

1.25 This report is divided into 5 further chapters.

1.26 Chapter 2 discusses the wider context affecting electronic execution: the purposes of formalities, the types of available technologies for electronic execution and practical issues such as evidential value, security and reliability. It also discusses scenarios that require special consideration, such as cross-border transactions, the approach of registries to electronic documents, and the need to ensure that consumers and vulnerable people are protected in relation to documents such as lasting powers of attorney.

1.27 Chapter 3 summarises the current law around electronic signatures and explains our conclusion that the current law already provides for their validity through a combination of legislation (primarily the eIDAS Regulation[39]) and case law.

1.28 In Chapter 4, we revisit the question of codifying the law in a single statement confirming the validity of electronic signatures. Although we do not make a recommendation here, we suggest that Government may wish to consider a broad legislative provision, extending beyond commercial and consumer documents to which our terms of reference are limited. We suggest that this could improve the accessibility of the law in this area. We also recommend that an industry working group should be convened and should consider practical and technical issues and provide best-practice guidance.

1.29 Chapter 5 discusses the current law of deeds and their formalities, including the requirements that deeds must be witnessed and delivered, and the decision in *Mercury*[40] which affects "virtual signings". We conclude that the current law requires the witness to be physically present.

1.30 Chapter 6 considers consultees' responses to our options for law reform, including video witnessing or "acknowledgement" in the absence of actual witnessing. We explain that consultees were generally not in favour, although we recommend that some of the issues could be revisited after the industry working group has considered practical issues, or as part of a more general review of deeds. Reflecting the views of some stakeholders that the formalities for deeds, and even the concept of deeds in general, may not be fit for purpose in the twenty-first century, we recommend that the law relating to deeds should be reviewed as a separate future workstream.

THE TEAM WORKING ON THE PROJECT

1.31 The following members of the Commercial and Common Law team have contributed to this report: Laura Burgoyne (team manager); Siobhan McKeering (team lawyer);

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39 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS").

40 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

Teresa Trepak (team lawyer); Erica Li, Theodora Papadopoulou, Sarosh Sethna and Daniel Zwi (research assistants).

Chapter 2: Electronic execution in context

2.1 Although most transactions are not required to be executed in a particular manner, the few documents which do require a signature may arise in a wide variety of contexts. A power of attorney, for example, may be executed by a vulnerable person in order to give a family member the right to make decisions about that person's property and personal care. Equally, a power of attorney may be conferred by way of security by a sophisticated commercial borrower so that the lender may act in the case of the borrower's inaction or default in respect of its obligations under the finance agreements between the parties. Obviously concerns over the need to protect parties will apply differently depending on the nature of the document.

2.2 Documents may only ever be seen by the parties to the agreement, or they may have to be filed with a public registry which must be willing to accept the documents as validly executed. Although the position of a registry may not affect the validity of a document in principle, a document may be required to be registered in order to be enforceable, either domestically or internationally. Whether a registry can or will accept a signature in a particular form is, therefore, of real significance.

2.3 The ability of different parties to use electronic signatures will of course depend on their access to appropriate technology, which is developing all the time. Whether it is desirable to use electronic signatures may depend on the vulnerability of the parties, the security of the proposed technology, and the time for which the agreement must endure.

2.4 Our project focuses on the legal status of documents executed electronically, and we look at the current law around electronic signatures in Chapter 3. However, the question of legal validity does not exist in a vacuum. We must be aware of underlying practical, technical and social considerations. In this chapter we look at other factors which are relevant to the execution of documents, including the decision to use electronic signatures. We discuss the purpose of formalities and their significance in different circumstances. We explain our approach to technology in this project, and touch on issues of security and reliability. We discuss documents where one of the signatories may be particularly vulnerable, as in the case of lasting powers of attorney, and documents which require registration or have a cross-border element.

"FORMALITIES"

What are formalities?

2.5 Formalities are procedures which have to be followed in order to give legal effect to certain agreements or transactions. They typically include that the substance of the arrangement has to be recorded "in writing" or in a "document", and "signed" by the relevant party or parties.

2.6 In some cases, even more formalities are required, typically that a witness must observe the party applying their signature, with the witness recording on the face of the document that they have done so, applying their own signature (this is "attesting").

When are formalities relevant?

Most documents do not require them

2.7 Most contracts and agreements governed by the law of England and Wales can be made informally; they are not required even to be recorded in writing, and may be created orally or by conduct.[41] In most cases, therefore, agreements and contracts do not require a signature at all. Of course, parties very often wish to record the terms of their agreement in writing, and it is common for the parties to sign the document to signify their agreement to the terms. This helps prove the parties' intentions when the agreement was made, especially in the event that things go wrong.

2.8 In these circumstances, it is for the parties to decide whether and how to record their agreement in a way that they consider will provide sufficient evidence should that be required. If the parties choose to sign the agreement, there is no question as to whether the method of signing is legally valid, because no signing is required in the first place. However, they will want to know that an electronic signature will be accepted as evidence should there be a dispute; as we discuss in Chapter 3, UK law provides this assurance in section 7 of the Electronic Communications Act 2000.

When formalities are relevant

2.9 Where specific circumstances, agreements or transactions are subject to certain formalities, these are usually set out in legislation. The formalities required vary depending on the transaction. In particular, some documents have to be "in writing", "signed" or executed as deeds. A deed is a document executed with a high degree of formality, including the need for a witness.[42] In some cases, the parties will themselves agree that additional formalities are required. For example, a written contract may provide that no amendments to that contract will be valid unless they are in writing and signed by the parties.[43] While our focus is largely on statutory requirements, our conclusions apply equally to formalities set out elsewhere.

2.10 The table below sets out some examples of transactions which are subject to formalities, and the particular formalities required for each:

Type of transaction	**Formality requirement**
Guarantee agreement	Writing, or evidenced by writing, and signed.[44]

41 *Goode on Commercial Law* (5th ed 2016) para 3.29; *Halsbury's Laws of England* (2012) vol 22 *Contract* para 220.

42 We discuss the formalities for deeds from para 5.6.

43 *C&S Associates UK Limited v Enterprise Insurance Company Plc* [2015] EWHC 3757 (Comm), [2015] 12 WLUK 703.

44 Statute of Frauds 1677, s 4.

Transfers of registered securities under the Stock Transfer Act 1963	Made "under hand"[45] (that is, in writing otherwise than by deed) in the form set out in Schedule 1 to the Stock Transfer Act 1963.
Contract for the sale of land	In writing and signed, incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each document.[46]
Regulated credit agreement under the Consumer Credit Act 1974	In writing in a prescribed form, including information such as the remedies available under the Act to the consumer.[47]
A unilateral promise[48]	Executed as a deed.[49]
Lasting power of attorney	Executed as a deed, in a prescribed form. Includes prescribed information as to the purpose and effect of the instrument. Also includes a certificate by a third party who confirms that the grantor of the power understands the purpose and scope of the document and that no fraud or undue pressure is being used to induce them.[50]

45 We discuss the meaning of the phrase "under hand" in Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/, para 3.81.

46 Law of Property (Miscellaneous Provisions) Act 1989, s 2.

47 Consumer Credit Act 1974, ss 60 to 61 and Consumer Credit (Agreements) Regulations 2010, SI 2010 No 1014, reg 4(3)(a). The Consumer Credit Act 1974, s 88 and the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983 No 1561, reg 2(4A) provide that notices given to consumers under the regulations must be provided "in paper form".

48 That is, where the person receiving the promise does not do or promise anything in return.

49 J Cartwright, *Formation and Variation of Contract* (2014) para 4-17; also discussed in *Halsbury's Laws of England* (2012), vol 32 *Deeds and other Instruments*, para 259; The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253, https://www.lawcom.gov.uk/project/the-execution-of-deeds-and-documents-by-or-on-behalf-of-bodies-corporate/, para 2.5; and from para 4.14 below on the execution requirements for deeds.

50 Mental Capacity Act 2005, s 9 and sch 1; Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253.

What is the purpose of formalities?

2.11 Formalities for documents appear to have three main aims,[51] which are well established in the literature in relation to deeds and other transactions.[52]

(1) Evidential: providing evidence that the maker entered into the transaction, and evidence of its terms.

(2) Cautionary: trying to ensure that the maker does not enter into the transaction without realising what they are doing and protecting weaker parties to a transaction (for example, tenants, employees and consumers).

(3) Labelling: making it apparent to third parties what kind of a document it is and what its effect is to be.

2.12 The formalities for a particular document depend on what the transaction is trying to achieve. Generally, the circumstances where formalities apply are where the transaction has been considered to be sufficiently important – because of the subject matter or where it embodies a unilateral promise – that it must have some additional element of formality.

"In writing" and "document"

2.13 This report is focused mainly on the use of electronic signatures, including whether they can be witnessed and therefore be used in the execution of deeds. This is principally because it is the status of signatures which we have been told still causes problems for lawyers, businesses and individuals. It does not appear that the concepts of "in writing" or "document" have given rise to the same problems.

2.14 In 2001, the Law Commission published an advice to Government[53] which explained the concepts of "in writing" and "document" and concluded that they could be satisfied electronically. We include a brief summary below for completeness. We address signatures separately and in more detail in Chapter 3.

"In writing"

2.15 Schedule 1 of the Interpretation Act 1978 defines "writing" as including any "modes of representing or reproducing words in a visible form". The 2001 Advice concluded that this was capable of including technological developments.[54]

2.16 Although "words in a visible form" limits the definition, the 2001 Advice said that the definition would be satisfied as long as the binary (digital) information was also

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51 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, para 3.2. We also discussed formalities in CP 237 at para 2.3 onwards.

52 L Fuller, "Consideration and form" (1941) 41 *Columbia Law Review* 799 at 801 and S Mason *Electronic Signatures in Law* (4th ed 2016) pp 8 to 11. Also Guide to Enactment of the UNICTRAL Model Law on Electronic Commerce (1996), http://www.uncitral.org/pdf/english/texts/electcom/V1504118_Ebook.pdf, para 48, which sets out a summary of functions traditionally performed by "writing".

53 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/.

54 2001 Advice, para 3.7. *Bennion on Statutory Interpretation* (7th ed 2017) paras 14.1 and 14.2.

represented or displayed on a screen.[55] Emails and websites would generally satisfy the definition,[56] but electronic data interchange ("EDI") messages would not,[57] because they are exchanged between computers – they are not intended to be read by any person and are not in a form which can be read.[58]

2.17 There appears to be broad support for, and continued reference to, the Law Commission's approach and conclusions in the 2001 Advice.[59] Recent cases have also confirmed that electronic documents will, in general, satisfy a statutory requirement for writing.[60]

"Document"

2.18 The 2001 Advice dealt briefly with the meaning of "document", noting that there was general consensus that information stored in an electronic form is a "document" satisfying a statutory requirement for a document.[61]

2.19 *Phipson on Evidence* states that it has become "accepted" that "document" may include computer files, including text messages.[62] Recent case law dealing with disclosure of documents in litigation has held that "documents" extend to electronic documents, including email and databases.[63]

OUR TECHNOLOGY NEUTRAL APPROACH

2.20 This report, like the consultation paper,[64] is "technology neutral". By this, we mean that we do not focus on or favour a particular type of technology. We take this approach in order to minimise the chances of our conclusions being overly limited, with the risk that they become outdated or obsolete as new technology is developed.

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55 2001 Advice, paras 3.8, 3.14 and 3.17.

56 2001 Advice, para 3.23.

57 EDI refers to the exchange of digital information designed to be acted upon by the software of the recipient system without the need for human intervention: for example, stock re-ordering systems operated by large retailers and their suppliers.

58 2001 Advice, para 3.19. This reasoning has implications for smart contracts if used for contracts which are required to be "in writing". We think that this would only affect cases where the smart legal contract is not in a form which can be read and where there is a requirement that the contract must be in "writing".

59 J Cartwright, *Formation and Variation of Contract* (2014) para 4-06.

60 *Golden Ocean Group v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 and *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543. Also G Smith, "Can I use an electronic signature?" *Digital Business Law* (12 May 2017), http://digitalbusiness.law/2017/05/can-i-use-an-electronic-signature/.

61 2001 Advice, para 3.41.

62 H Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 41-01and *R v Taylor (George Charles)* [2011] EWCA Crim 728, [2011] 1 WLR 1809. The meaning of "document" is discussed in S Mason, "Documents signed or executed with electronic signatures in English law" [2018] 34(4) *Computer Law & Security Review* 933.

63 *Marlton v Tectronix* [2003] EWHC 383 (Ch), [2003] 2 WLUK 269 at [13] to [14]. Also, *White Book 2018* vol 1, para 31.4.1 and *Atkin's Court Forms* (2014) vol 15 *Disclosure and information requests* para 213.

64 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

2.21 We use the term “electronic signatures” broadly, to cover everything from a scanned manuscript signature added to documents, typed signatures and clicking “I accept” on a website, to digital signatures and Public Key Infrastructure. All are intended to link an identifiable person to information held in electronic form. The various technological approaches have differing degrees of trustworthiness of the information and the identity of the person signing the information.

2.22 In Appendix B we provide a brief summary of the main types of electronic signatures, including explaining some of the more advanced technology. This summary is taken from the consultation paper.[65]

2.23 We do not think there is a legal reason to draw distinctions between different types of technology.[66] However, as we discuss below, this does not mean that all technologies are created equal from the perspective of non-legal matters such as trust, security and reliability.

OTHER ISSUES TO CONSIDER WHEN USING ELECTRONIC SIGNATURES

2.24 We have been told that it is not only legal uncertainty which impedes the use of electronic signatures for certain types of transactions. Practical issues, such as the security of electronic signatures and the extent to which this may be compromised, are also important.

2.25 Three fundamental questions should be considered for any document, whether signed electronically or in wet ink.

(1) How can one be confident that person A signed the document, and not another person pretending to be person A?

(2) Does person A have capacity and the requisite authority to sign the document, either for themselves or for their principal, usually a body corporate?

(3) What is the document that is being signed?

2.26 Users of electronic signatures should satisfy themselves that the system they have adopted will have sufficient evidential weight to answer these questions for the purposes of their transaction. Although the notion of an entirely electronic method of execution is attractive, it may not be suitable in the circumstances of the particular transaction. Parties should consider whether there may be additional methods, even if slightly less convenient, of establishing the trust and evidence necessary to provide more certainty in their particular circumstances. For example, a signatory could telephone their counterpart, confirming their identity and what they are signing.

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65 CP 237, paras 2.11 to 2.34.

66 In UK law at least; we note that eIDAS does exactly this. At para (4) of our statement of the law in the executive summary of this report, we note that “save where the contrary is provided for in relevant legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion, the common law adopts a pragmatic approach and does not prescribe a particular form or type of signature”. We discuss the risks of legislating for particular technology from para 4.58.

Evidential weight of electronic signatures

2.27 It is important to distinguish between the legal validity of an electronic signature and its evidential weight.[67]

2.28 An electronic signature may satisfy a legal requirement for a document to be "signed" and it can be admitted in evidence in legal proceedings.[68] However, parties will also need to consider the evidential weight (or probative value) which may be given to that signature if there is a dispute about, for example, who in fact signed the document, whether they intended to be bound, or about the content of the document.[69]

2.29 Should a dispute arise, one or more of the parties propounding the document may allege and seek to prove that the relevant party or parties applied their signature to the document, and that the document alleged to have been signed is what was signed. These issues could arise whether the signature used is electronic or non-electronic.

2.30 Whether a signature is electronic or otherwise, there may have been correspondence or meetings about the transaction and/or document which connects the alleged signatory to the signature.[70]

2.31 For an electronic signature, technical expert evidence may be able to assist. Different electronic signatures may have more or less potential to be substantiated by evidence such as:

(1) that the electronic document was accessed via a certain email account or computer, and the location;

(2) that the document was accessed through the use of a password, PIN, encryption key and/or other authentication process;

(3) as to the time at which the signature was applied; and

(4) whether the document was amended after signing, and whether there are differences between the versions of the signed document held by different parties.

2.32 Where a dispute arises over the authenticity of a handwritten signature, there may equally be forensic evidence to show whether the signature is original and whether it has the features of natural writing, in order to establish whether it was made by a

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67 G Smith, "Can I use an electronic signature?" *Digital Business Law* (12 May 2017), http://digitalbusiness.law/2017/05/can-i-use-an-electronic-signature/.

68 We discuss the legal validity of electronic signatures from para 3.6 and the admissibility in evidence of electronic signatures from para 3.35.

69 S Mason, "Documents signed or executed with electronic signatures in English law" (2018) 34(4) *Computer Law & Security Review* 933.

70 N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1 at 2. This is also the case for wet ink signatures. Any witness to a signature may also provide evidence (for example, in the case of a deed): L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) paras 9-010 and 9-011.

particular person.[71] However, handwritten signatures are themselves not impervious to risk. A signature may be forged, particularly where it is simply the signatory's initials or a manuscript "X".[72] It is also possible that a wet ink signature could be applied to a document other than that intended to be signed or that the signature page could be removed and reattached to another document.

Security and reliability

2.33 Like its evidential value, whether an electronic signature is secure or reliable does not affect its legal validity,[73] but it is still a significant question for the parties.[74]

2.34 Certain types of electronic signature will obviously be less secure than others. For example, a typed name at the end of a document is extremely simple to forge.[75] Likewise, anyone with access to a scanned manuscript signature may affix it to any document.

2.35 However, even more complex and secure types of technology may also be at risk of being compromised.[76] These risks may arise from various sources. Software is written by humans and, therefore, is unlikely to be free from errors.[77] Users of this technology may not understand the underlying system and may not be able to assess the reliability of the system. This may lead them to presume, perhaps wrongly, that the system is reliable[78] and not to question whether the system may have been compromised.

2.36 Similarly, where a system, such as a private key, is protected by a PIN or password, it will only be as secure as that password.[79] Thought should also be given to where keys are kept.[80] Breaches may involve unauthorised transactions, actions under duress and

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71 Making a Will (2017) Law Commission Consultation Paper No 231, paras 6.53 to 6.56. Also, N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1.

72 2001 Advice, para 3.35. Also, G Smith, "Legislating for electronic transactions" (2002) *Computer and Telecommunications Law Review* 58 when discussing the reliability of paper as a medium.

73 As the 2001 Advice noted, "reliability is not essential to the validity of a signature": 2001 Advice, para 3.35.

74 S Mason, "Documents signed or executed with electronic signatures in English law" [2018] 34(4) *Computer Law & Security Review* 933.

75 N Bohm and S Mason, "Electronic signatures and reliance" (2018) 110 Summer *Amicus Curiae The Journal of the Society for Advanced Legal Studies* 1 at 4.

76 Questions of liability fall outside the scope of this project. Liability is discussed in L Brazell, *Electronic Signatures and Identities Law & Regulation* (2nd ed 2008) paras 5-094 and 5-095; L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 10-054 and S Mason, *Electronic signatures in law* (4th ed 2016) ch 15.

77 S Mason and T S Reiniger, "'Trust' Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?" (2015) 21(5) *Computer and Telecommunications Law Review* 135 at 138.

78 S Mason and T S Reiniger, "'Trust' Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?" (2015) 21(5) *Computer and Telecommunications Law Review* 135 at 139.

79 N Bohm and S Mason, "Identity and its verification" (2010) 26 *Computer Law & Security Review* 43, 50.

80 For example, keys may be kept in a "key store" (a database) on an individual's computer, phone, tablet, or on the cloud.

impersonation of parties or certificate authorities.[81] They may even involve inducing a signatory to approve one document for signature, only to replace it with another document at the time the signature is applied.[82]

2.37 As we discuss in Chapter 4,[83] we think the evidential value, and security and reliability, of different types of electronic signatures should be considered by an industry working group, with a view to developing advice or best practice.

CROSS-BORDER DIMENSION

2.38 Given the increasingly cross-border nature of business, it is not appropriate to consider the domestic landscape in isolation. In international transactions, parties will want to ensure that their documents are executed in such a way as to enable their recognition, registration or enforcement in other jurisdictions. These issues will also arise when a document executed in this country needs to be notarised and used in another jurisdiction outside a transactional context – for example, a marriage certificate or divorce decree.

2.39 Although the general position is that parties to a document are free to execute it in accordance with the formal requirements of the law of the place of execution,[84] the formal requirements of the place of enforcement remain relevant.[85]

2.40 In the consultation paper, we considered the law on electronic signatures in six jurisdictions: Estonia, Hong Kong, New South Wales (Australia), New York, Scotland and Singapore.[86] With the exception of Estonia, all are common law jurisdictions, with principles of property and commercial law similar to our own. We noted that each has introduced legislation dealing specifically with electronic signatures and electronic execution. We also discussed the eIDAS Regulation ("eIDAS"), which is part of UK law. We return to eIDAS in Chapter 3.[87]

2.41 In the consultation paper, we asked consultees for their views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.

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81 C Ellison and B Schneier, "Ten Risks of PKI: What You're not Being Told about Public Key Infrastructure" (2000) vol XVI(1) *Computer Security Journal* 1.

82 C Ellison and B Schneier, "Ten Risks of PKI: What You're not Being Told about Public Key Infrastructure" (2000) vol XVI(1) *Computer Security Journal* 1, 5; N Bohm, "Watch what you sign!" (2006) 3 *Digital Evidence and Electronic Signature Law Review* 45.

83 In Chapter 4 we recommend that an industry working group should be established to consider practical and technical issues associated with the electronic execution of documents: Recommendations 1, 2 and 3 from para 4.127.

84 N P Ready, *Brooke's Notary* (14th ed 2013), paras 8-51, 11-04, 11-31.

85 N P Ready, *Brooke's Notary* (14th ed 2013), para 11-04 and Request for a preliminary ruling from the Oberster Gerichtshof (Austria), Case C342/15 *Leopoldine Gertraud Piringer* [2017] 3 CMLR 587. Also comments from the FCO discussed at para 2.51.

86 CP 237, Chapter 5 and Appendix B.

87 From para 3.7.

Consultees' views

Cross-border issues add complexity to transactions

2.42 Some consultees confirmed that the use of electronic signatures in cross-border transactions is a challenging issue. For example, CMS LLP said that "dealing with a range of different process and formality requirements can add significantly to the signing complexities and costs".

2.43 Others observed that, in their experience, the use of electronic signatures in particular can add complexity to cross-border transactions. For example, BVCA[88] said that, for its members, cross-border issues surrounding electronic execution were "one of the more significant deterrents" to use of electronic signatures:

> In each transaction involving a non-England or Wales party or a non-English law element, the time and cost involved in obtaining local legal advice for the relevant jurisdiction can deter adoption of electronic signatures. However, over time the market may become more comfortable with electronic execution, and we think that it is useful that England & Wales are leading in this respect.

The existing EU legislative scheme: eIDAS[89]

2.44 A number of consultees commented on the existing electronic signature regime under eIDAS. eIDAS confirms the principle that electronic signatures are generally capable of having legal effect and also seeks to provide a common standard of electronic signature (a qualified electronic signature) which can be recognised in all member states. Some consultees implied that the UK has not embraced this regime in the same way as other European countries and that it would be beneficial for it to do so. For example, Richard Oliphant suggested that parties in the UK should consider making use of digital signatures:

> The Law Commission has decided against prescribing the use of digital signatures. However, given the prevalence of digital signatures in civil law jurisdictions, it may be prudent for lawyers handling high value cross-border transactions to use digital signatures. This will help to mitigate the risk of repudiation by the other party to the transaction.

2.45 Icon UK Ltd agreed, saying that eIDAS is "not only fit for purpose, but represents the optimum balance of security and evidential auditability". It emphasised the advantages of utilising a regime which is "fully compliant with the laws of our closest trading partner countries".

2.46 On the other hand, RBS[90] considered that requiring certification of digital signatures, and setting conditions for foreign certification, "would not seem to be advantageous against the background of existing UK case law".

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88 The British Private Equity and Venture Capital Association.

89 We discuss eIDAS in more detail from para 3.7.

90 The Royal Bank of Scotland plc.

Legislation on electronic execution is not a cure-all

2.47 Clifford Chance LLP observed that although many jurisdictions have legislation dealing with electronic execution, "there is often reluctance to rely on the legislation in the types of transaction on which we usually advise". It suggested that where there is legislation with strict criteria which need to be fulfilled for an electronic signature to be valid, there is uncertainty how courts will interpret this given lack of precedent. However, where there is legislation without specific criteria, there is a concern that courts will accord lower evidential weight to electronic signatures compared with handwritten signatures.

2.48 The Law Society said:

> an ever-increasing number of jurisdictions have legislation in place… however… anecdotal feedback… 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.

Legalisation of official documents for overseas use

2.49 The complexity involved in the registration and enforcement of transactions in other jurisdictions is highlighted by the issue of the legalisation of official documents for overseas use. The Society of Scrivener Notaries explained the use by the UK Foreign and Commonwealth Office of "apostilles", which are stamped certificates issued by the Legalisation Office to confirm that a signature, stamp or seal is from a UK public official:[91]

> The majority of notarial documents which leave the UK for use overseas must also be legalised by way of an 'Apostille' issued by the UK Foreign & Commonwealth Office (for countries that have ratified the Hague Convention 1961) and further legalisation with the Consulate of the country where the document is to be used (for countries that have not ratified the Hague Convention 1961). The FCO is currently only able to issue Apostilles in paper format attached to an original physical document. Until the FCO can attach electronic Apostilles to electronically signed and notarised documents, there will continue to exist a disincentive for notarial documents emanating from the UK to be issued electronically.

2.50 The Notaries Society agreed that:

> The longer term "success" of e-notarisation remains dependent not only on the acceptance of such electronic instruments in a wider cross-border scenario, but also on the implementation of the e-apostille by the Legalisation Department of the Foreign and Commonwealth Office.

2.51 In its own response to our consultation, the UK Foreign and Commonwealth Office Consular Document Policy Team ("FCO") confirmed that the FCO supports the "digital by default" agenda and has already digitised some of its services. However, it emphasised that there are practical issues which prevent its legalisation services

[91] Information about document legalisation is available at: https://www.gov.uk/get-document-legalised.

being provided electronically with regard to overseas recognition of electronic documents:

> Those concerns are particularly acute for official documents, that record 'life events' or identity, these include: birth registrations, marriage registrations, death registrations, divorce decrees, adoption certificates, and, name/gender change. Digital copies are not accepted in many countries overseas. Wet ink signatures are still required by many national authorities. …
>
> Where documents are not recognised by overseas authorities or are unable to be legalised (because there is no written signature or stamp/seal to verify the document) this could in some cases deny British Nationals overseas basic civil rights. For example, the FCO is aware of a small number of cases where British Nationals resident overseas, have not been able to (re)marry where they reside. This is because they have not been able to prove to the local authority's satisfaction that they are free to marry, because the local authorities do not accept the E-divorce decree from the family court in the U.K.

2.52 The FCO focused on the possibility of UK public bodies increasingly moving towards issuing only electronic documents. It stressed that the relevant authorities in the UK must bear in mind the documentary requirements for UK citizens overseas and suggested that there would need to be some flexibility around issuing documents with wet ink signatures upon request, even if the default was digital. It also said:

> The FCO would need robust assurance that any electronically produced U.K. documents are genuine to a) prevent any reputational damage to both FCO and HMG, and b) mitigate against the risk of fraud. The FCO would require a higher level of assistance from the issuing authority when ascertaining the provenance of such documents.

A need for harmonisation

2.53 In general, consultees felt there was a need for international consistency of approach. The Society of Scrivener Notaries said:

> Ultimately, the main barrier is the lack of a universally recognised signing/notarisation electronic protocol that is globally accepted which currently results in a default back to the more traditional methods involving paper, ink and embossed notarial seals.

2.54 The Notaries Society said:

> The ultimate aim must be to encourage as many countries as possible to adopt internationally recognised norms such as those promoted through UNCITRAL and by e-IDAS.

2.55 CMS LLP said:

> We welcome consistency of approach on execution formalities across the UK and other jurisdictions … Any cross-border initiatives aimed at streamlining these processes would be welcome.

2.56 However, the City of London Law Society ("CLLS") cautioned that this should not necessarily be the main driver for the development of electronic signatures in this jurisdiction. They suggested that the formality requirements for UK companies should not be "overly influenced by the requirements of other jurisdictions".

2.57 Some consultees considered that technological solutions may ultimately be the answer. The Society of Licensed Conveyancers observed that:

> if an electronic signature system incorporates sufficient proof of identity verification checks universally recognised as best practice and that the executing party has received and acknowledges that they have received and understood sufficient advice in order to enable them to make an informed decision as to whether to execute the document, this should be sufficient evidence to satisfy the requirements of any jurisdiction.

Discussion

2.58 Consultees' comments highlighted that the issue of cross-border registration and enforcement can add another layer of complexity to the electronic execution of documents. It is notable that consultees' responses did not point to many "success stories" in other jurisdictions, even where such jurisdictions may have their own domestic legislation dealing with electronic execution.

2.59 Notwithstanding the eIDAS framework, there does not appear to be a clear, consistent international approach. Consultees told us that this can cause problems for both individuals and businesses.

2.60 Consultees also commented more generally about the benefits of harmonisation of legislation across jurisdictions, the mutual recognition of certain electronic signatures and the role of technology in cross-border transactions.

2.61 We have considered what the Law Commission may be able to recommend which may help to resolve these issues whilst maintaining the current flexibility of the common law. As we discuss in Chapter 4, some consultees suggested that an industry working group could usefully look at cross-border issues. We agree. It may be especially useful for the industry working group to identify those jurisdictions which cause particular difficulties for parties.[92]

2.62 In the meantime, parties and bodies issuing official documents must be aware of the different approaches between jurisdictions where their documents need to be relied upon or recognised abroad and, in some cases, may be well advised to use paper documents. We agree that as technology improves and more documents start to be issued and signed electronically, confidence and acceptance of electronic execution is likely to grow on a global level.

REGISTRATION OF DOCUMENTS

2.63 Sometimes, transactional documents must be registered with a particular body after execution in order to give effect to the transaction. For example, it may be a term of a

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[92] We discuss this at para 4.107 and from 4.119.

mortgage agreement over a ship that the mortgage must be registered on the UK Ship Register.[93] If the owner is a UK Company, it must also be registered at Companies House.[94]

2.64 If a registry only accepts wet ink signatures, then the parties will not be able to execute documents electronically, regardless of the legal position. Therefore, we have contacted some of the relevant registries[95] to ascertain the position in relation to registration of documents.

2.65 Companies House has told us that they operate an online filing service which allows most forms, notices and statements to be both signed and delivered to Companies House electronically. Where a copy of a document needs to be filed at Companies House, for example a document creating a charge over a company's assets, Companies House require a certified copy of the relevant document to be provided. If the document creating the charge has been executed using only electronic signatures, a PDF copy of that document or deed can be uploaded and the person making the filing can certify that it is a correct copy of the original without the need for a wet ink signature. A copy of the charge certificate is then emailed to the person who registered the charge.[96]

2.66 The Intellectual Property Office ("IPO") has told us that most patent, trademark and design applications are filed electronically. The IPO's electronic forms are "signed" by the user clicking a tick box or button. Where a document requiring a signature is delivered online or on digital media in relation to a patent application, the IPO's statutory guidance provides that it shall "only be treated as signed where the signature takes the form of a facsimile signature, a text string signature or an enhanced electronic signature", each as defined in the guidance.[97] Where other forms or documents are filed electronically outside the boundaries of the IPO's online services, the IPO has discretion to accept electronic copies such as PDFs.

2.67 The Aircraft Registration section of the Civil Aviation Authority ("CAA") told us that it accepts electronic signatures for applications to the UK Register of Civil Aircraft and UK Register of Aircraft Mortgages. Electronic signatures in this context are an image that is the same impression as the individual's own signature within a digitised or embedded format in a document. A signature which is clearly taken from a "font" available through Microsoft or any other IT software manufacturer would not be accepted. In this way the Aircraft Registration section is able to accept e-mail applications rather than applications by post or fax. They also use electronic

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93 Merchant Shipping Act 1995, sch 1, para 7; Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993 No 3138, reg 59.

94 Companies Act 2006, s 895A.

95 In particular, Companies House, the Intellectual Property Office, the Civil Aviation Authority and the UK Ship Register.

96 For further information about registering a charge at Companies House, https://www.gov.uk/guidance/registering-a-charge-mortgage-for-a-company#certified-copy-of-the-charge-instrument.

97 Intellectual Property Office, Statutory guidance: Directions: filing patent applications by electronic means, paras 26 and 27, https://www.gov.uk/government/publications/filing-patent-applications-by-electronic-means--2/directions-filing-patent-applications-by-electronic-means.

signatures (as described above) for outbound documents and letters. This includes documents required by international law such as the Certificate of Registration which is subject to Annex 7 to the Convention on International Aviation.

2.68 We were advised on behalf of the Ship Register that the Ship Register currently receives documents by email (including those signed by electronic signature). The Ship Register is currently working towards a fully electronic system for registering ships. Certificates of registry are issued in paper format and a PDF copy is also provided.

2.69 The acceptance of documents executed electronically by registries in other jurisdictions was raised by consultees in response to our consultation question about cross-border issues, discussed above.[98] The Society of Scrivener Notaries said that many company and land registries "are not set up to receive electronic documents coming from overseas" and "will insist on wet-ink originals being couriered to them."

2.70 HM Land Registry highlighted the fact that a registry may have particular reasons for setting its own standards of signature. It said:

> For jurisdictions with a register of title, HM Land Registry would argue that the registration authority need to have control of the means of execution used for documents that must be registered, particularly where title guarantee is offered.

2.71 Below, we discuss lasting powers of attorney, and explain that the Office of the Public Guardian ("OPG") requires wet ink signatures.

UK EXIT FROM THE EU

2.72 At the time of writing, the UK remains part of the EU. In the consultation paper we noted that eIDAS is already part of the law of the UK.[99] On the date of the UK's withdrawal from the EU, eIDAS will be incorporated into UK domestic law.[100] It confirms the principle that electronic signatures are generally capable of having legal effect and also seeks to provide a common standard of electronic signature (a qualified electronic signature) which can be recognised in all EU Member States. Insofar as eIDAS is relied on and accepted as a common standard, this can continue after the UK's exit. It may be beneficial for UK parties to consider qualified electronic signatures when dealing with parties in Member States. CLLS noted that the continuation of the eIDAS regime would be important:

> While the UK remains subject to EU law… or if the UK were to enter into a Treaty with the EU… then the possibility of use of qualified electronic signatures where a document has EU resident parties, will remain an important consideration to assist recognition in those jurisdictions.

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98 We discuss this from para 2.38.

99 CP 237, para 2.24.

100 European Union (Withdrawal) Act 2018, s 3(1). Additionally, the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019, SI 2019 No 89 comes into force at the point that the UK leaves the EU. They make consequential amendments to eIDAS to remove deficiencies caused by the UK no longer being part of the EU.

2.73 The FCO's response noted that leaving the EU may exacerbate some of the cross-border issues:

> After the UK leaves the European Union, the authorities in EU Member States may impose additional documentary requirements upon resident British Citizens. This could affect as many as 1 million British Nationals resident in the EU, if e-documents, particularly those documenting life events and/or identity, are more widely rolled out in the U.K. placing additional burdens on the FCO's legalisation service in addition to the challenges mentioned above.

2.74 At this point, it is not easy to predict whether there will be additional uncertainties or difficulties relating to the enforceability of electronic signatures as a result of the UK leaving the EU.

CONSUMERS AND VULNERABLE PARTIES

2.75 This project covers the execution of a wide range of documents, from consumer credit agreements to contracts for the sale of land between individuals to multi-million-pound transactions between commercial parties.

2.76 This project also covers the execution of documents by consumers and documents called lasting powers of attorney. A lasting power of attorney is used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs. It is therefore a very important document, which can have devastating consequences for an individual if it is executed under duress or fraudulently. Because of this, some stakeholders have raised concerns about including documents signed by consumers, and lasting powers of attorney in particular, within the scope of our project.

Consultation paper

2.77 We noted that we had been told that consumers are more likely to enter into agreements in haste or error, or as a result of fraud, if they use electronic signatures. Some stakeholders had also raised concerns about "digital poverty", particularly in relation to older or vulnerable individuals.[101]

2.78 Stakeholders expressed concern about the possibility that if documents were required to be executed electronically, this might have a harmful effect on older or vulnerable individuals. For example, in 2018 8.4% of adults in the UK had never used the internet, more than half of whom were adults aged 75 years or older. 20% of disabled

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[101] Digital poverty or "digital exclusion" refers to exclusion from the opportunities afforded by digital technologies, for example due to a lack of access to the internet: HM Government, *Delivering Digital Inclusion: An Action Plan for Consultation* (2008), http://webarchive.nationalarchives.gov.uk/20120919213425/http://www.communities.gov.uk/documents/communities/pdf/1001077.pdf. Also, Age UK, *Digital Inclusion Evidence Review* (2013), https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/active-communities/rb_sept13_age_uk_digital_inclusion_evidence_review.pdf.

adults had never used the internet in 2018.[102] Mandating electronic execution could disproportionately and adversely affect a significant percentage of the population.

2.79 We acknowledged that these are significant concerns which must be given careful consideration. However, this is beyond the remit of the general law of execution of documents, and therefore beyond the scope of our project. We emphasised that our project considers whether electronic signatures are legally valid in general terms. We do not propose that any form of electronic execution should be made mandatory in any circumstances.

2.80 Where consumers or particularly vulnerable people require particular protection, specific legislation is and can be used. In the consultation paper we asked whether consultees agreed that this was the better approach:[103]

> 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?

Consultees' views

2.81 The vast majority of those who responded to this question agreed with our provisional conclusion that any specific protections should be in specific legislation or regulation rather than the general law.[104] Consultees who agreed included the Chancery Bar Association, the General Council of the Bar of England and Wales, the Law Society, CLLS, Westminster and Holborn Law Society, the Society of Scrivener Notaries, RBS and the GC100.

2.82 Some consultees said that, as well as being the best way of ensuring appropriate protections were in place at all, specific legislation or regulation was the best way of ensuring that those protections could be easily identified and located. For example, RBS said:

> Special provision in both the general law of execution of documents and in the more specific legislation directed towards certain types of documents or customers has the potential for causing confusion. Provision within specific legislation or regulation is better able to target the specific risks or concerns presented.

2.83 DocuSign said that this approach would avoid "omnibus legislation for the execution of documents" and was "likely to minimize confusion, promote efficiency, and best address the nuanced needs of the specific use case under consideration".

2.84 There were 109 consultees who responded to this question who not only agreed that specific legislation or regulation was appropriate but also went further and stated that

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102 Office for National Statistics, "Statistical bulletin: Internet users in the UK: 2018", https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2018.

103 CP 237, para 6.14.

104 146 out of 161 consultees who responded to this question (approximately 91% of responses).

such legislation or regulation was required to protect vulnerable people.[105] For example, Judge Elizabeth Cooke said that the "argument for specific provision in contexts where people are more likely to be vulnerable is obvious".

2.85 Solicitors for the Elderly said that "additional safeguards" are required where documents are being executed by "elderly and vulnerable people". They argued that both lasting powers of attorney and trust deeds executed by private individuals should be subject to additional safeguards to ensure that they do indeed represent a voluntary act.

2.86 Selwood Research were concerned that there is not enough protection for consumers:

> Lenders are today concluding [consumer] credit agreements with a mere click of the debtor's mouse - with very little cautionary effect, and no evidence that the signatory was actually present.

2.87 The Chancery Bar Association noted the importance of timing, suggesting that any legislation dealing expressly with the use of electronic signatures should be accompanied by relevant protections or exclusions where required.

2.88 Several consultees suggested that rules for execution by vulnerable parties should be more detailed than the general position. For example, Selwood Research said:

> Where there is a heightened need for protection the detail of the signing ceremony (and therefore the need for evidence of it having been followed) may need to be more carefully codified - provided that this is capable of implementation in a technology-agnostic manner.

2.89 Of the 161 responses to this question, 104 were about lasting powers of attorney specifically. Agreeing that protections should be in specific legislation or regulation, they also said that the existing formalities needed to remain in place to protect people granting lasting powers of attorney. We discuss these below.

2.90 Two consultees suggested that there were drawbacks to having special protections in legislation. For example, Adobe, Inc said:

> The greater the recourse to specific legislation outside a general law on execution of documents, the greater the prospect of regulatory divergence between the UK and other jurisdictions, and the greater the legal uncertainty in the execution of cross-border legal transactions.

Discussion

2.91 The vast majority of consultees who responded to this question agreed with our provisional conclusion that any specific protections should be in specific legislation or regulation rather than general law.[106]

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[105] 109 out of 161 consultees who responded to this question (approximately 68% of responses). This number includes 104 consultees who explicitly mentioned lasting powers of attorney.

[106] 146 out of 161 consultees who responded to this question (approximately 91% of responses).

2.92 This approach ensures that the general law on execution of documents does not become over-complicated or unnecessarily prescriptive. While it does not put all the legislation about execution in one piece of legislation, it does mean that protections in a certain area can be quickly identified in the legislation relevant to that topic (for example, the Mental Capacity Act 2005 and related regulations in relation to lasting powers of attorney). Keeping protections in specific legislation or regulation may also be the best way to ensure that protections are appropriate to address the particular risk associated with a particular document or transaction, and are kept up to date.

2.93 A number of consultees stated that specific legislation or regulation should be in place to protect vulnerable people. Some consultees made suggestions for protections which should be put in place. It is outside our remit to consider the detail of specific legislation or regulation in place to protect vulnerable people.

2.94 We do not propose that any form of electronic execution should be made mandatory. Nor are we suggesting that an individual authority cannot set its own specific additional requirements for documents to be registered with it. Below, we discuss the requirements of OPG in relation to lasting powers of attorney.

2.95 In Chapter 4, we set out an option for Government to consider whether a general legislative statement codifying the existing law on electronic signatures should be introduced. This could make the law more accessible but would require further consultation. In our suggested drafting, we include a power to exclude the use of electronic signatures for certain purposes, ensuring that there is a clear way of doing this in necessary cases. The drafting also makes clear that a public body would not be required by the legislation to start accepting electronic signatures.[107]

2.96 In Chapter 4 we also recommend that an industry working group should produce best-practice guidance for the use of electronic signatures where individuals, in particular vulnerable individuals, execute documents electronically.[108]

Lasting powers of attorney

2.97 As we have discussed, our focus is on the general law relevant to electronic execution and it is not within the scope of our project to comment extensively on lasting powers of attorney. Rather, the relevant policy responsibility sits with the Ministry of Justice ("MoJ") and the OPG. However, given the level of concern raised by stakeholders, both before our consultation exercise and in responses to the consultation paper, we consider lasting powers of attorney in more detail below.

2.98 A lasting power of attorney is used by an individual ("the donor") to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs, in circumstances where the donor has lost the capacity to do so. It is therefore a very important document, which can have a significant impact on the life and finances of an individual.

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107 This is discussed at para 4.53.

108 In Chapter 4 we recommend that an industry working group should be established to consider practical and technical issues associated with the electronic execution of documents: Recommendations 1, 2 and 3 from para 4.127.

2.99 This is reflected in the statutory formalities for a valid lasting power of attorney, which go beyond what is needed for a standard deed.[109] A lasting power of attorney must be executed as a deed under section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 (that is, signed, witnessed, delivered). A lasting power of attorney must also meet stringent requirements in the Mental Capacity Act 2005 and regulations made under that Act. It must be executed in a prescribed form. It must include a statement by the donor that they have read the prescribed information. It must also be accompanied by a certificate by a third party confirming that the donor understands the purpose of the document and that the donor is not being induced to execute the document by undue pressure or fraud.[110] These documents must be executed and then registered with the OPG.

2.100 In 2014 the OPG consulted on implementing a fully digital process for making and registering a lasting power of attorney, removing the need for paper forms.[111] The majority of consultees were not in favour of these proposals, arguing that the use of electronic documents for granting lasting powers of attorney increased the opportunity for fraud, duress and abuse.[112]

2.101 The current system for the execution of lasting powers of attorney is partly digital. The donor of a lasting power of attorney may fill the details out online but is then required to print the document and sign it in wet ink, before it can be registered and take effect. Our interpretation of the law is that a lasting power of attorney could in theory be executed with an electronic signature, but we have been told by the OPG that this is not currently possible in practice. The OPG has also confirmed that it has no plans to move quickly to a system of simple electronic signatures, without additional safeguards.

Consultation responses on lasting powers of attorney

2.102 In the consultation paper we asked whether our provisional conclusion that an electronic signature is capable of satisfying a statutory requirement for a signature, would result in increased confidence in the legality of electronic execution in England and Wales. Eighty consultees told us that our provisional proposal would result in confidence in the use of electronic signatures in a commercial context, but not in relation to lasting powers of attorney.

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109 This is discussed in more detail in CP 237, paras 4.14 to 4.25. Also, G Shindler and S E Sherry, *Aldridge: Powers of Attorney* (11th ed 2016) para 6-07.

110 Mental Capacity Act 2005, sch 1 and Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253.

111 Office of the Public Guardian, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default* (2013), https://consult.justice.gov.uk/digital-communications/opg-enabling-digital-default/supporting_documents/Transforming%20the%20Services%20of%20the%20Office%20of%20the%20Public%20Guardian.pdf.

112 Office of the Public Guardian, *Transforming the Services of the Office of the Public Guardian: Enabling Digital by Default – Response to Consultation CP(R) 26/11/2013* (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/346357/digital-by-default-response.pdf_-_Adobe_Acrobat_Pro.pdf. Also, S Brodbeck, "Fears over power of attorney safeguards as fraud claims rocket" *The Daily Telegraph* (16 June 2018).

2.103 Nine responses explicitly said that lasting powers of attorney should not be permitted to be signed electronically. For example, the Law Society said:

> 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.

2.104 We also received 58 identical responses relating to powers of attorney which highlighted the role that existing protections play in the granting of lasting powers of attorney:

> The majority of Lasting Powers are made by older people, and with age comes situations which place the older person at risk, such as cognitive and/or physical impairment. In a professional capacity, it is extremely common for family of the donor to seek to 'get' a power of attorney over their older relative's financial affairs.
>
> The bargaining position is very much weighted against the donor.
>
> There is a separate requirement by an independent person to confirm at the time the donor executed the power he understood what he was signing and there was no fraud, undue pressure or anything else which would prevent the donor from making the power. Although the assessment is based in the time of execution, it is possible that it is signed sometime after the donor actually signed - potentially months afterwards. As such the role of the witness can be vital in ensuring the donor intends to make the power and it is his signature, at the point of execution.

2.105 We acknowledge the role of these additional requirements and do not suggest that they should be changed or removed.

2.106 Benjamin Eliott, the CEO of an online electronic signature and contract management software company, supported "controls (albeit regulated, if necessary) operated by the OPG at the point of document registration". He argued that this would be preferable to prescriptive legislation or regulation on method because:

> Such controls enable protections on the one hand, while also retaining the flexibility to move with quickly change in technology (important, especially if it is compromised) and places a responsibility and accountability with a discrete body to seek and improve methods to protect the vulnerable, which may otherwise be lost if it went into a regulation.

Conclusion

2.107 In the case of lasting powers of attorney, it is clear that the OPG and MoJ should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures. We have drawn these issues to the attention of the OPG and MoJ officials.

Chapter 3: Electronic signatures – the current law

3.1 In Chapter 2 we explained that, where an agreement is required to be "in writing" or recorded in a "document", it is well-established that these requirements can be met electronically and do not require paper documentation.

3.2 In this chapter we discuss the legal reasoning which underpins the propositions in our statement of the law in the executive summary of this report ("Statement of the Law"). We also set out consultees' views on the subject.

3.3 Our conclusions on the current law on electronic signatures in this chapter have broad application and, unlike our terms of reference, are not restricted to commercial and consumer documents. This is because the enactments and case law relevant to electronic signatures do not generally distinguish between different types of situation in which electronic signatures may be used, or different types of signatory, and this has been reflected in the scope of our conclusions.

3.4 While we conclude that the current law generally accommodates the use of electronic signatures, we acknowledge that there are situations in which the law is more prescriptive as to the form or type of signature required; for example, where there is something explicit in an enactment, or case law on the relevant document, that requires a particular kind of signature.[113]

3.5 A more detailed exposition of the law in this area, and its development, can be found in Chapter 3 of the consultation paper.[114]

LEGAL VALIDITY OF ELECTRONIC SIGNATURES

3.6 An electronic signature is capable in law of being used to validly execute a document (including a deed).[115] This conclusion is based on the provisions of the eIDAS Regulation ("eIDAS"),[116] the Electronic Communications Act 2000 ("ECA 2000") and case law relating to electronic signatures and signatures more generally.

eIDAS

3.7 The current EU legislation addressing electronic signatures is eIDAS, which came into force in 2016. EU Regulations apply directly in all member states without the need for

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113 The Law Commission has concluded that this is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15. Also, for example, National Health Service (Pharmaceutical and Local Services) Regulations 2013/349, reg 2.

114 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

115 This is provided that (i) the person signing the document intends to authenticate the document and (ii) any formalities relating to execution of that document are satisfied. Statement of the Law, para (1).

116 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS").

member state implementation.[117] On the date of the UK's withdrawal from the EU, eIDAS will remain part of UK domestic law.[118]

3.8 Article 25(1) of eIDAS provides that electronic signatures cannot be denied legal effect (either in terms of legal validity or admissibility as evidence) solely because of their electronic nature.

3.9 "Electronic signature" is defined broadly as meaning:

> data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.[119]

3.10 In addition to confirming the principle that electronic signatures are generally capable of having legal effect, eIDAS seeks to provide a common standard of electronic signature (a qualified electronic signature) which can be recognised in all member states.[120]

3.11 Article 25(2) of eIDAS provides that a qualified electronic signature "shall have the equivalent legal effect of a handwritten signature". The reference to qualified electronic signatures being regarded in the same way as handwritten signatures is a reflection of the assumption that handwritten signatures provide an accepted level of protection.

3.12 A qualified electronic signature is an electronic signature which:

(1) meets all the following requirements of an advanced electronic signature:[121]

(a) it is uniquely linked to the signatory;

(b) it is capable of identifying the signatory;

(c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under their sole control; and

(d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable; and

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117 eIDAS, arts 50 and 52. Direct application of EU regulations is discussed in P Craig and G De Búrca, *EU Law, Text, Cases, Materials* (5th ed 2011) ch 7.

118 European Union (Withdrawal) Act 2018, s 3(1) and European Union (Withdrawal) Act 2018, section 3(1) and Electronic Identification and Trust Services for Electronic Transactions (Amendment etc) (EU Exit) Regulations 2019. We discuss the UK exit from the EU from para 2.72.

119 eIDAS, art 3(10). "Signatory" is defined in eIDAS, para 3(9) as "a natural person who creates an electronic signature". eIDAS uses the term "electronic seal" where a legal person, such as a company, signs a document: eIDAS, art 3(24).

120 A qualified electronic signature based on a qualified certificate issued in one member state must be recognised as a qualified electronic signature in all other member states: eIDAS, art 25(3).

121 eIDAS, art 26.

(2) is created by a qualified electronic signature creation device and based on a qualified certificate for electronic signatures.[122]

3.13 The introduction of a common standard of electronic signature (a qualified electronic signature) by eIDAS was considered necessary as the law on electronic signatures in different member states had developed differently. There was a risk that it would diverge too much, hampering cross-border interactions.

3.14 Recital 49 to eIDAS provides that:

> It is for national law to define the legal effect of electronic signatures, except for the requirements provided for in this Regulation according to which a qualified electronic signature should have the equivalent legal effect of a handwritten signature.

3.15 eIDAS therefore allows member states to make provision for the legal effect of electronic signatures which are not qualified electronic signatures. This would allow member states to lay down, for example, security standards to be complied with by e-signing systems should they want to.

3.16 As we discuss below, the English courts have treated electronic signatures as capable of binding parties in the same way as a handwritten signature, provided that there is an intention to authenticate. Further, case law in England and Wales has not sought to make legal validity conditional upon fulfilment of particular security standards.

ECA 2000

3.17 The Electronic Communications Act 2000 ("ECA 2000") extends to the whole of the UK. It implemented (at least in part) the provisions of the E-signatures Directive[123] which was superseded by eIDAS. The ECA 2000 has since been amended to supplement provisions of eIDAS.[124]

3.18 The ECA 2000 confirms the admissibility of electronic signatures, broadly defined, as evidence in legal proceedings.[125]

3.19 However, this provision only relates to the admissibility of electronic signatures, rather than their inherent validity. It is generally thought that it does not "assist in determining

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122 eIDAS, art 3(12). These requirements, particularly the requirement that any subsequent change in the data is detectable, indicate that, at least at present, an advanced electronic signature will be a digital signature. Developments in technology may mean that signatures other than digital signatures may fulfil these requirements in the future. We have been told that there is already capability for the use of advanced electronic signatures in the market. For example, a card reader and credit/debit card issued by a bank would meet the requirements for an advanced electronic signature under eIDAS for transactions with that bank.

123 Directive on a Community framework for electronic signatures 1999/93/EC, Official Journal L 013 of 19/01/2000 p 12.

124 Explanatory notes to the Electronic Identification and Trust Services for Electronic Transaction Regulations 2016, SI 2016 No 696.

125 Electronic Communications Act 2000, s 7. We discuss admissibility in evidence of electronic signatures from para 3.35.

to what extent existing statutory signature requirements are capable of being satisfied electronically"[126] – although there are opposing views.[127]

3.20 Like eIDAS, the E-signatures Directive provided that signatures based on a "qualified certificate" should satisfy legal requirements in the same way as handwritten signatures, with other electronic signatures not to be denied legal effectiveness solely because they were electronic. The ECA 2000 did not transpose these statements into domestic legislation.

3.21 It is possible that the drafters of the ECA 2000 considered that the flexibility of the common law made such transposition unnecessary. The explanatory notes to section 7 state that:

> It will be for the court to decide in a particular case whether an electronic signature has been correctly used and what weight it should be given (e.g. in relation to the authentication or integrity of a message) against other evidence.[128]

3.22 In the second reading of the Bill in the House of Lords, the Minister for Science and Innovation indicated that section 7 was intended to put an end to:

> Lawyers argu[ing] about whether or not electronic signatures would be recognised as valid by the courts. We cannot afford to wait while lawyers argue and courts decide. Instead, Clause 7 will allow business and consumers to have confidence in electronic signatures. It puts beyond doubt that a court can admit evidence of an electronic signature and a certificate in support of a signature, not only for the purpose of establishing who the communication came from, but also in establishing the date and time it was sent and in some cases whether it was intended to have legal effect.[129]

3.23 It is clear from the explanatory notes and the Minister's comments that electronic signatures were taken to be legally valid in at least some circumstances – or, at the very least, that it will be for the courts to decide that issue on a case-by-case basis.

3.24 It is worth mentioning that section 8 of the ECA 2000 created a power to modify primary or secondary legislation to authorise or facilitate the use of electronic communications for certain purposes. This could therefore be used to provide that certain documents which require a signature could be signed electronically. However, while over 50 statutory instruments have been made under section 8, most address

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126 2001 Advice, para 3.27. Also 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) and Hodge Malek QC (ed), *Phipson on Evidence* (19th ed 2017) para 40-13.

127 For example, Mr Justice Popplewell said that s 7 "recognises the validity of such an electronic signature by providing that an electronic signature is admissible as evidence of authenticity": *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117 at [42].

128 Explanatory notes to the ECA 2000, paras 42 to 43.

129 *Hansard* (HL), 22 February 2000, vol 610, col 187 per the Minister for Science, Department of Trade and Industry (Lord Sainsbury of Turville).

the provision of notices or information electronically, rather than the use of electronic signatures.[130]

Case law

3.25 The underlying principle that an electronic signature is capable in law of being used to execute a document, including where there is a statutory requirement for a signature, is established in the relevant case law.[131]

3.26 When the use of a particular electronic signature has been considered by the courts, it has been noted that electronic signatures are generally acceptable, including where there is a statutory requirement for a signature.[132] The relevant court has then moved on to consider the particular facts of the case, applying an objective test as to whether the conduct of the signatory indicates an authenticating intention. Even in particular cases where the electronic signature in question was not found to be a legally valid signature, the principle of validity of electronic signatures was accepted, and the judgment was made on the particular facts of the case.

3.27 Later in this chapter we note the different forms of electronic signatures that the courts have been asked to consider.[133]

INTENTION TO AUTHENTICATE

3.28 In general, the principal function of a signature, whether electronic or otherwise, is to demonstrate an intention of the party to authenticate the document.[134]

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130 Exceptions to this include, but are not limited to, the Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004 No 3236, the Registration of Marriages etc (Electronic Communications and Electronic Storage) Order 2006, SI 2006 No 2809 and the Social Security (Electronic Communications) Order 2011, SI 2011 No 1498.

131 We acknowledge that there are situations in which the law is more prescriptive as to the form or type of signature required. This occurs, for example, where there is something explicit in an enactment, or case law on the relevant document, that requires a particular kind of signature. The Law Commission has concluded that this is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15. Also, for example, National Health Service (Pharmaceutical and Local Services) Regulations 2013/349, reg 2.

132 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [28]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21], *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95]; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1205 (Ch) at [44]; *WS Tankship II BV v Kwangju Bank Ltd and another; WS Tankship III BV v Seoul Guarantee Insurance Co; WS Tankship IV BV v Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) at [153] and [155]; and *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [42] and [43]. From para 3.50 we discuss *FirstPost Homes Ltd v Johnson* [155] 1 WLR 1567, a case which contained comments about the need for a handwritten signature but which pre-dates these later authorities.

133 These are discussed from para 3.42.

134 Statement of the Law, para (1); 2001 Advice para 3.28; and *Goodman v J Eban Ltd* [1954] 1 QB 550, 557 where the Master of the Rolls said that "[T]he essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or 'signature' so as personally to authenticate the document". In the context of cases dealing with electronic signatures: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [29]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21]; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [32]; *Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [45].

3.29 As we discuss below, some consultees questioned our use of this language in the consultation paper because the concept of "authentication" appears in eIDAS in a different context. We use this language because this is what is used in case law. What it means, effectively, is that the party intended to be bound by the document.

3.30 A signature may perform different functions including, for example, the making manifest of an intention to be legally bound or confirming the signatory has notice of the contents of a document. It is such a function which "distinguishes a "signature" from the mere writing of a name".[135]

3.31 In our 2001 Advice we suggested that the courts should apply the following purely objective test: would the conduct of the signatory indicate an authenticating intention to a reasonable person?[136] We continue to support this approach. Below we consider different non-electronic and electronic forms which the courts have found to be legally valid signatures.[137]

OTHER FORMALITIES WILL NEED TO BE COMPLIED WITH

3.32 Our view is that an electronic signature is capable in law of being used to execute a document (including a deed). However, any formalities relating to execution of that document as required by law also have to be satisfied.[138] If a document was signed with an electronic signature but the formalities were not complied with, it would not be validly executed.[139] Such formalities may be required under a statute or statutory instrument, or may be laid down in a contract or other private law instrument under which a document is executed.[140]

3.33 This is specifically contemplated in article 2(3) of eIDAS which provides that the regulation "does not affect national or Union law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form".[141]

3.34 The following are examples of formalities:

(1) that a signature be witnessed;[142] or

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135 L Brazell, *Electronic Signatures and Identities: Law and Regulation* (3rd ed 2018) para 2-002; per Slade LJ in *Central Motors (Birmingham) Ltd v PA Wadsworth (trading as Pensagain)* (1982) 133 N.L.J. 555 and *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [26].

136 2001 Advice, para 3.29.

137 We discuss these from para 3.42.

138 Statement of the Law para (1). We discuss formalities from para 2.5.

139 We discuss this in relation to deeds through *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 in CP 237, paras 4.41 to 4.47.

140 Statement of the Law para (2).

141 There is an argument that article 2(3) of eIDAS would have allowed the common law in England and Wales to develop to the effect that an electronic signature was not a valid way of signing a contract. From para 3.25, we explain that the common law has accepted that electronic signatures can be legally valid.

142 For example, Law of Property (Miscellaneous Provisions) Act 1989, s 1(3). We explain that a deed is required to be signed in the presence of a witness from para 5.14.

(2) that the signature be in a specified form (such as being handwritten).[143]

ADMISSIBILITY IN EVIDENCE

3.35 An electronic signature is admissible in evidence in legal proceedings. It is admissible, for example, to prove or disprove the identity of a signatory and/or the signatory's intention to authenticate the document.[144]

3.36 Evidence in legal proceedings is admissible where it is relevant to an issue being considered by the court.[145] Should a dispute arise, for example, as to whether there is a valid agreement between the parties, a signed document may be produced as evidence of the alleged agreement.

3.37 The signature on such a document could perform a number of functions, including to identify the author or sender of a document and/or make manifest a declaration of an intention to be legally bound and/or authenticate a document.[146] One or more of the parties may therefore submit a signature on a document in evidence to seek to prove or disprove who signed a document or whether they intended to be bound by it.

3.38 In addition to these principles, which apply to signatures generally, the ECA 2000 provides specifically that an electronic signature is admissible in evidence in legal proceedings. Section 7 provides that:

> In any legal proceedings—
>
> (a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data, and
>
> (b) the certification by any person of such a signature,
>
> shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data.

3.39 The explanatory notes to the Act provide further explanation as to what is meant by "authenticity" and "integrity" in section 7. They state:

> An *electronic signature* is something associated with an electronic document that performs similar functions to a manual signature. It can be used to give the recipient confirmation that the communication comes from whom it purports to come from

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143 For example, under the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, s.2, an electronic prescription form must be signed with a prescriber's advanced electronic signature, as defined in eIDAS, and transmitted as an electronic communication to a nominated dispensing contractor by the Electronic Prescription Service. Under regulation 15 of the Misuse of Drugs Regulations 2001, a paper prescription must be "written so as to be indelible, be dated and be signed by the person issuing it with his usual signature"

144 Statement of the Law para (3).

145 *Phipson on Evidence* (19th ed) para 2-01.

146 L Brazell, *Electronic Signatures and Identities: Law and Regulation* (3rd ed 2018) para 2-002 and 2001 Advice, para 3.28.

("authenticity"). Another important use of electronic signatures is establishing that the communication has not been tampered with ("integrity").[147]

and

It will be for the court to decide in a particular case whether an electronic signature has been correctly used and what weight it should be given (e.g. in relation to the authentication or integrity of a message) against other evidence. Some businesses have contracted with each other about how they are to treat each other's electronic communications. Section 7 does not cast any doubt on such arrangements.[148]

3.40 In addition, in the second reading of the Bill in the House of Lords, the Minister for Science and Innovation noted that evidence of an electronic signature could be admitted by a court for the purpose of establishing who a communication came from as well as the date and time it was sent and, in some cases, whether it was intended to have legal effect.[149]

3.41 It is important to distinguish between the admissibility of a signature in evidence and the weight that may be given to that signature by the court. We discuss the question of evidential weight of electronic signatures further at paras 2.27 to 2.32. We conclude that users of electronic signatures should satisfy themselves that the system or technology they adopt will have sufficient evidential weight to answer questions as to the identity of a signatory, authority of a signatory to sign and integrity of the document being signed. We return to this issue in Chapter 4 when we discuss the role of the proposed industry working group.

FORM OF ELECTRONIC SIGNATURE

3.42 The law does not generally prescribe a particular type of signature, save where this is set out in legislation or contractual arrangements, or where case law specific to the document in question leads to a contrary conclusion.[150] There is no statutory definition of "signed" or "signature" which applies generally.[151]

3.43 The common law adopts a pragmatic approach to what will satisfy a signature requirement.[152] In determining whether the method of signature adopted demonstrates an authenticating intention the courts adopt an objective approach, considering all of

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147 Explanatory notes to the ECA 2000, para 5.

148 Explanatory notes to the ECA 2000, para 43.

149 *Hansard* (HL), 22 February 2000, vol 610, col 187 per the Minister for Science, Department of Trade and Industry (Lord Sainsbury of Turville).

150 The Law Commission has concluded that this is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15. Also, for example, National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, reg 2.

151 In the context of deeds, the Law of Property (Miscellaneous Provisions) Act 1989, s 1(4) provides that "sign" includes "making one's mark on the instrument" ("LPMPA 1989").

152 2001 Advice, para 3.25.

the surrounding circumstances.[153] Indeed, provided that the "signatory" intends to authenticate the document, it need not be the "signatory" who actually signs.[154]

3.44 The courts have, for example, held that the following non-electronic forms amount to valid signatures where there is a statutory requirement for a signature:

(1) signing with an 'X';[155]

(2) signing with initials only;[156]

(3) using a stamp of a handwritten signature;[157]

(4) printing of a name;[158]

(5) signing with a mark, even where the party executing the mark can write;[159] and

(6) a description of the signatory if sufficiently unambiguous, such as "Your loving mother"[160] or "Servant to Mr Sperling".[161]

3.45 Electronic equivalents of these non-electronic forms of signature are likely to be recognised by a court as legally valid. There is no reason in principle to think otherwise.

3.46 Also by way of illustration, the courts have held that the following electronic forms amount to valid signatures in the case of statutory obligations to provide a signature where the statute which requires a signature is silent as to whether an electronic signature is acceptable:

(1) a name typed at the bottom of an email;[162]

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153 Statement of the Law para (4). We discuss "intention to authenticate" from para 3.28.

154 *In re Whitley Partners Limited* (1886) 32 Ch D 337 (the signature by an agent to a memorandum of association of a company was sufficient to render the agent's principal an original member of the company under the Companies Act 1862).

155 *Jenkins v Gaisford & Thring* (1863) 3 Sw & Tr 93; S Mason, *Electronic signatures in law* (4th ed 2016) para 1.38.

156 *Phillimore v Barry* (1818) 1 Camp 513, *Chichester v Cobb* (1866) 14 LT 433. Also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [26].

157 *Goodman v J Eban LD* [1954] 1 QB 550 page 557.

158 *Brydges (Town Clerk of Cheltenham) v Dix* (1891) 7 TLR 215; *Tourret v Cripps* (1879) 48 L J Ch 567.

159 *Baker v Dening* (1838) 8 Ad & E 93.

160 *In re Cook* [1960] 1 All ER 689.

161 *In re Sperling* (1863) 3 Sw & Tr 272.

162 *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [32] (a signature was required under s 4 Statute of Frauds 1677). In the following cases the court has said that, in principle, an email chain containing an electronic signature would be sufficient: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [30]; *Orton v Collins and others* [2007] 1 WLR 2953 at [21] and *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) at [95]. It has also been noted that the emails must suggest binding obligations on the parties and include the relevant contractual terms: *Green*

(2) clicking an "I accept" tick box on a website;[163] and

(3) the header of a SWIFT message.[164]

3.47 The 2001 Advice concluded[165] that the following types of electronic signature would, in general, satisfy that objective test (subject to the interpretation of the signature requirement in its statutory context):[166]

(1) a digital signature (that is, a public key encryption system involving a certification authority);

(2) a scanned manuscript signature;

(3) the typing of a name, for example, at the end of an email; and

(4) clicking on a website button.

3.48 Importantly, the Law Commission acknowledged that, although clicking on a website button may be less secure than a signature in wet ink, "reliability is not essential to validity".[167]

3.49 There have been relevant cases where a disputed electronic or non-handwritten signature has not satisfied a statutory requirement for a signature. We consider these below.

3.50 The 1995 case *FirstPost Homes Ltd v Johnson*[168] concerned a contract for the sale of land which must, among other things, be in writing and signed under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The buyer prepared a typed letter, addressed to the buyer, for the seller to sign. The seller signed the letter, but the buyer signed only the attached plan. The Court of Appeal held that it was the letter which had to be signed, and that the buyer's name as addressee of the letter did not constitute a signature. There was therefore no valid contract.

(Liquidator of Stealth Construction Ltd) v Ireland [2011] EWHC 1205 (Ch) at [44] and B McFarlane, N Hopkins and S Nield, *Land Law* (2017) paras 4.13 and 4.16.

163 *Kathryn Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd* [2014] EWHC 37 (QB) at [43] and [44] (a signature was required under the Consumer Credit Act 1974 and the Consumer Credit (Agreement) Regulations 2010).

164 *WS Tankship II BV v Kwangju Bank Ltd and another; WS Tankship III BV v Seoul Guarantee Insurance Co; WS Tankship IV BV v Seoul Guarantee Insurance Co* [2011] EWHC 3103 (Comm) at [155] (a signature was required under s 4 Statute of Frauds 1677).

165 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) ("2001 Advice"), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/, paras 3.31 to 3.39.

166 2001 Advice, para 3.30.

167 2001 Advice, paras 3.35, 3.38. We discuss security and reliability and the evidential weight of electronic signatures from para 2.24.

168 [1995] 1 WLR 1567.

3.51 While the Court of Appeal in this case was asked to consider a signature which was typed, the decision should be confined to its facts.[169] The decision focused on the fact that the alleged signature of the buyer was of the buyer as addressee of the letter, rather than on the fact that it was not handwritten.[170] Indeed, the court expressly limited the application of its decision, saying:

> This decision is of course limited to a case where the party whose signature is said to appear on a contract is only named as the addressee of a letter prepared by him. No doubt other considerations will apply in other circumstances.

3.52 Lord Justice Peter Gibson referred to in his judgment in *FirstPost*[171] the decision in *Goodman v J Eban Ltd* from 1954, quoting Lord Denning's dissenting judgment:[172]

> In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it.

3.53 However, it is of note that the case reiterated the principle that a signature must demonstrate an intention of the party to authenticate the document and the High Court has subsequently said that, in principle, a string of emails, containing the typed signatures of the parties, could create a contract satisfying the requirements of section 2.[173] We can infer from this that case law has developed to accommodate increasingly frequent use of technology.

3.54 *In J Pereira Fernandes*,[174] a party's name in an email address automatically inserted by an internet provider did not constitute a signature on an email because there was no evidence that the party intended to authenticate the document.[175] While the purported signature in this case was not found to be sufficient for the purposes of section 4 of the Statute of Frauds 1677, the court did accept the principle that an electronic signature can satisfy a statutory requirement for a signature. The court also reiterated the principle that a signature must demonstrate an intention of the party to authenticate the document. It is therefore reasonable to infer that this case is about a

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169 This view is supported by academic criticism of this judgment. In particular, Professor Julian Farrand QC and Professor Alison Clarke argue that it "should be confined to its own peculiar facts and not followed" and criticise the Court of Appeal's reliance on *Goodman v J Eban Ltd* [1954] 1 QB 550: *Emmet & Farrand on Title* (2018, loose-leaf) vol 1 para 2.041, with Professor Julian Farrand QC and Professor Alison Clarke.

170 G Smith, *Internet Law and Regulation* (4th ed 2007) para 10-113, n 79.

171 *FirstPost Homes Ltd v Johnson* [1995] 1 WLR 1567, 1575

172 *Goodman v J Eban Ltd* [1954] 1 QB 550, 561. Lord Justice Peter Gibson also referred to comments made by the Master of the Rolls in the same decision

173 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [44] to [45]. Also, B McFarlane, N Hopkins and S Nield, *Land Law* (2017), paras 4.13 and 4.16

174 *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 at [29].

175 Some writers have pointed out that clicking "send" on an email can be seen as an act of authentication (S Mason, *Electronic signatures in law* (4th ed 2016) paras 11.4 to 11.41), and that, viewed in its entirety, the process of sending an email includes steps which evidence the sender's intention to authenticate the document: C Freedman and J Hardy, "J Pereira Fernandes SA v. Mehta: A 21st century email meets a 17th century statute" (2007) 23(1) *Computer Law and Security Review* 77.

lack of evidence of an intention to authenticate rather than questioning the principle of the legal validity of electronic signatures.

3.55 The High Court in *Lindsay v O'Loughnane*[176] considered whether an email containing a typed signature of the party was sufficient for the purpose of section 6 of the Statute of Frauds (Amendment) Act 1828. Mr Justice Flaux (as he then was) said that such an email would not be enough without a "written representation" of who is sending the email, "either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the email". The court did accept the principle that an email containing a typed signature of the party could satisfy the requirements of section 6.[177] This case does not emphasise the intention of the parties as the key factor as to whether a person's mark constitutes a signature. However, it relies on *J Pereira Fernandes*, which does support this principle. It is therefore reasonable to infer that *Lindsay* could be interpreted as another example of a case about a lack of evidence of an intention to authenticate a document.

3.56 In *Green v Ireland*[178] the High Court considered whether a chain of emails containing an agreement to grant a charge over property met the requirements of section 2 of the LPMPA 1989.[179] On the facts, the court held that the emails did not amount to a contract[180] because they did not evidence binding obligations on the parties nor did they state any contractual terms; rather the emails suggested that a further contractual document would be prepared. However, the court accepted the principle that a string of emails containing the typed signatures of the parties could create a contract satisfying section 2.[181]

CONSULTEES' COMMENTS ON THE CURRENT LAW

3.57 In the consultation paper, we set out our analysis of the law and asked whether consultees agreed 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.[182]

3.58 A strong majority of consultees agreed that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law.[183] As well as

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176 [2010] EWHC 529 (QB), [2012] BCC 153.

177 *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), [2012] BCC 153 at [95].

178 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297.

179 That a contract for the sale of land must be in writing and signed, incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each document.

180 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [46] to [50].

181 *Re Stealth Construction Ltd; Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297 at [44] to [45]. Also, B McFarlane, N Hopkins and S Nield, *Land Law* (2017), paras 4.13 and 4.16.

182 CP 237, para 3.87.

183 166 consultees responded to this question. 142 consultees (approximately 86% of responses) agreed that an electronic signature is capable of satisfying a statutory requirement for a signature under current law, 23

personal responses, those who agreed included several law firms, the City of London Law Society ("CLLS"), HM Land Registry and the Chancery Bar Association. Those who disagreed included some regional law firms, CILEx[184] and the Notaries Society.

Consultees who agreed

3.59 142 consultees of 166 who answered this question agreed with our conclusion on the current law. For example, HM Land Registry said:

> HM Land Registry agrees that this is provided for by the eIDAS Regulation, EU 910 of 2014, which will be incorporated into UK law by the European Union Withdrawal Act 2018.

3.60 OneSpan agreed and said:

> There is no reason to believe that the intent of a person's signature differs between a well-designed e-signature system and a well-designed paper contract or form signed with a pen.

3.61 Weightmans LLP agreed with the conclusion but acknowledged that an electronic signature would not always be appropriate:

> However, we also acknowledge there will be people who do not wish to adopt electronic signatures due to the perceived security risk, or those who are not technically savvy or unable to use a computer due to age or health. However, for those that wish to use one, we consider it should satisfy the statutory requirement for a "signature" under the current law.

3.62 However, many consultees who agreed with our conclusion on the current law also suggested other points for consideration. We have grouped these into themes below. A fuller summary of responses is published separately.[185]

Intention to authenticate

3.63 Some consultees agreed but queried the process of authentication.

3.64 The CLLS questioned the choice of the words "an intention to authenticate the document":

> The eIDAS Regulation defines "authentication" as an electronic process that enables the electronic identification of a natural or legal person, or the origin and integrity of data in electronic form to be confirmed … Current law therefore has appropriated "authentication" to secondary verification of a primary signature.

consultees (approximately 14% of responses) disagreed and 1 consultee (approximately 1% of responses) answered "other".

184 The Chartered Institute of Legal Executives.

185 https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

> We think in the light of those changes either the phrase "where there is an intention to authenticate the document" should be omitted completely or the word "authenticate" should be replaced by the word "sign".

3.65 By “intention to authenticate”, we mean an intention on the part of the signatory to be bound by the document. The language is taken from case law, but we appreciate the need to make this clear.[186]

3.66 Lloyds Banking Group noted that some uncertainty still surrounds automatically generated text as to whether it can indicate a signatory’s intention to authenticate:

> … query whether an automatically inserted signature at the foot of an email would also fail to demonstrate the signatory’s intention to authenticate? We note that it may also be difficult for the recipient to identify the difference between a name that is typed at the foot of an email and a name that has been added automatically to the same document.

Interpretation by the courts

3.67 Four consultees were concerned about the courts’ interpretation of the law on electronic signatures in particular circumstances. Bryan Cave Leighton Paisner LLP accepted that the courts’ general approach is to accept electronic signatures as satisfying statutory requirements, but thought there was still a risk that some courts might take a narrow view. They referred to a specific case to demonstrate this:

> In *Cowthorpe Road 1-1A Freehold Limited v Wahedally* CLCC (Ch), 16 February 2016 (unreported), the judge inferred that a notice had to be a hard copy document because the relevant statutory provision stated that it may be served by post (as only a hard copy document is capable of being sent by post); he was also of the opinion that it was not possible to sign an electronic document with an original signature ('in the ordinary sense of the word'). Decisions like this mean that caution is currently required when considering whether an electronic signature will satisfy a particular statutory requirement or be acceptable to all parties in a commercial setting.

3.68 We accept that some statutes exclude the possibility of electronic execution, such as when they provide expressly that something has to be sent by post. However, the decision in *Cowthorpe Road* is unfortunate because the provision about service by post was permissive rather than mandatory. We think the court took a conservative stance which we hope, even just a few years after the decision, would be regarded as such.

3.69 A small number of consultees suggested that a test case[187] could help to clear up any outstanding uncertainty. Because a test case is likely to be brought by private parties rather than Government, it is not something we have recommended. In any case, it is difficult to imagine a sufficiently comprehensive “scenario” which would cover multiple

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186 *Goodman v J Eban Ltd* [1954] 1 QB 550 and *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953 at [21]. Also, 2001 Advice paras 3.26.

187 A test case procedure is provided for under the Financial List, which is set out in Practice Direction 51M of the Civil Procedure Rules 1998, SI 1998 No 3132.

different types of documents signed by different types of parties, in order to address doubts in different contexts.

Further clarification

3.70 One of the main concerns was that despite the position of the law on the validity of electronic signatures, uncertainty still lingered amongst groups of stakeholders. Consultees suggested that the Law Commission should either clarify the current law further, recommend a legislative statement, or undertake a test case.

Safeguards

3.71 The ICAEW[188] stressed the need for "appropriate safeguards" and were concerned that a "desire for ease, speed and convenience should not override security and protection:"

> In particular we consider that as with wet signatures, there should be safeguards to ensure documents are signed by those who have the authority to sign and/or are not signing under duress. Key to this will be the need to prove identity. Practical guidance on how to prove identify and on the various technological options to facilitate this would be useful.

3.72 The Agricultural Law Association said:

> Any proposed reform in this area must provide for sufficient and robust protection against fraudulent actions to protect those who hold the title of the property asset where the impact of fraudulent activity could have very significant implications.
>
> This concern is particularly acute where land is held by Trustee or Trustee companies and there is an increased risk of land being fraudulently transferred without notice to the beneficial owners.

3.73 Solicitors for the Elderly said:

> We agree that an electronic signature is capable of satisfying a statutory requirement for a signature where there is an intention to authenticate the document. However, we do not agree that it should operate by default, and believe that there are certain categories of document where it might not be desirable for an electronic signature to automatically suffice, and where additional safeguards are required, e.g. on the transfer of property into trust and Lasting Powers of Attorney.

Consultees who disagreed

3.74 Out of 166 responses, 23 consultees disagreed with our conclusion on the existing law.

3.75 CILEx suggested that the common law position was not enough to satisfy some lawyers:

> That common law precedent has somewhat clarified the position of the law on electronic signatures and their validity. However, in the absence of an express

[188] The Institute of Chartered Accountants in England and Wales.

provision entrenching the general approach within legislation, practitioners within multiple practice areas (commercial law, conveyancing, private client work) are hesitant to rely on electronic signatures to execute documents.

3.76 Jennifer Harris thought that the detail of what was legally valid was not sufficiently clear:

> Whilst it may be possible to sign a document electronically, I am not sure that the law is sufficiently clear around different parties signing different documents. If one party has signed electronically and the other party prints it off and signs the physical copy and then scans that back in is that OK or must all parties sign electronically if it is to be signed electronically? Can a company seal be embossed electronically and then signed electronically also? The lack of an authoritative statement around the requirements creates confusion.

3.77 A small number of consultees focused on a concern that electronic signatures would increase the scope for fraud, rather than the analysis of the legal position.

Discussion

3.78 As set out above, the clear majority of consultees agreed with our conclusion on the current law. However, both consultees who agreed and did not agree also raised concerns around the meaning of and need for an intention to authenticate, the possibility of a court taking a different interpretation in particular cases, and the need for adequate safeguards.

3.79 We hope that our consideration of these issues in this document will assist. In the following chapter, we consider whether codifying the law would be beneficial.

Chapter 4: Electronic signatures – recommendations and options for reform

4.1 In the preceding chapters we have discussed the current law relating to electronic signatures and electronic execution, and the background against which the legal issues operate. In Chapter 3, we set out our conclusion that the current law – through a combination of existing legislation and the common law – already provides for the legal validity of electronic signatures. However, we acknowledged that doubt about this nevertheless appears to remain among some stakeholders. We also explained, in Chapter 2, that the decision as to whether an electronic signature could or should be used is not just a legal one, and may depend on the security of the available technologies, the identity of the parties signing the document, and the use to which the document is to be put.

4.2 In this chapter, we consider what more could be done to assist parties in their deliberations. We do not make a formal recommendation for legislative reform confined within our terms of reference, but we set out an option for the Government to consider whether a more general legislative statement should be introduced. We do recommend the formation of an industry working group to consider non-legal issues.

LEGISLATIVE REFORM

4.3 In the consultation paper[189] we provisionally concluded that further legislation was not necessary in England and Wales because the existing law around electronic signatures was sufficient. We noted that the obvious advantages of legislative reform would be clarity, certainty and accessibility in terms of law. An individual or business would be able to point with confidence to a statutory statement that an electronic signature is as valid as a handwritten signature. If this were to increase confidence in electronic execution and therefore increase the number of electronic transactions, it would have the potential to reap significant benefits for business and individuals.

4.4 However, we were reluctant to propose legislative reform simply "for the avoidance of doubt", where it did not appear to be necessary. We were also concerned about disrupting existing confidence in electronic signatures, or disrupting established practices if legislation were to be prescriptive in terms of process or technology. A legislative statement about the validity of electronic signatures of itself would not address concerns with security, trust and reliability of different types of electronic signatures.[190] Nor would it include protections for vulnerable people, which are a matter for specific regulation or legislation.[191]

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189 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237") https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

190 From para 4.88, we discuss and recommend that these issues should be covered by an industry working group.

191 We discuss consumers and vulnerable parties from para 2.75.

4.5 Although we considered the question to be finely balanced, we decided at that stage that we should not propose a new legislative statement. We asked stakeholders if they agreed with our provisional conclusion that further legislation is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signatory.

Responses from consultees

Law reform is unnecessary

4.6 The majority of consultees,[192] including the General Council of the Bar of England and Wales, the City of London Law Society ("CLLS"), the Society of Licensed Conveyancers, the Society of Scrivener Notaries and some professional membership organisations agreed with our provisional conclusion that legislative reform is not necessary.

4.7 Some consultees commented favourably about the flexibility of the current law. For example, the Society of Scrivener Notaries said that the eIDAS Regulation ("eIDAS")[193] "has the effect of being clear, not unduly prescriptive and allows the law to be flexible in a cross-border context". The BVCA[194] thought there was a risk that any further legislation "would be overly prescriptive or restrictive when compared to the current requirements".

4.8 Other consultees emphasised that electronic signatures were already being used with confidence, including by consumers for such things as consumer credit agreements. Benjamin Eliott, the CEO of an online electronic signature and contract management software company, said:

> In my experience with the electronic signing platform for which I work, society and the legal profession now widely accepts the validity of electronic signature, except in the context of a Deed or witnessed contract.

4.9 Some consultees raised concerns that legislative reform could cause uncertainty for those using or considering using electronic signatures. For example, RBS[195] suggested that there might be a lower take up of electronic execution in the period before any legislation was implemented, and Charles Russell Speechlys were concerned that reform "may call into question agreements already executed".

Legislative reform is necessary to permit the use of electronic signatures

4.10 A minority of consultees took the view that legislative reform is necessary to permit the use of electronic signatures.[196] These responses were predominantly from law firms and individuals, although the Notaries Society said:

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192 117 out of 166 consultees who responded to this question (approximately 70% of the responses).

193 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS").

194 British Private Equity & Venture Capital Association.

195 The Royal Bank of Scotland plc.

196 29 out of 166 consultees who responded to this question (approximately 18% of the responses).

> An electronic signature (in its many variants) may be a valid means of signature and admissible in evidence as an intention to be bound. However, so long as the relevant legislation omits to state that such a signature is legally binding or that an electronic signature is equivalent to a handwritten one, we submit that an electronic signature cannot fulfil the statutory requirements for a signature. Confirmatory legislation may therefore help to increase confidence in the use of electronic signatures.

4.11 Some consultees, including Liverpool Law Society and some law firms, took the view that reform is required but only in relation to certain documents. For example, Hogan Lovells International LLP thought that legislative reform would be required in order to provide for electronic execution of deeds.

4.12 Some consultees who told us that legislative reform would be necessary to permit the use of electronic signatures were opposed to the use of electronic signatures and therefore were not in favour of such legislative reform. Many of these consultees raised concerns about the use of electronic signatures in lasting powers of attorney and the potential for abuse and fraud.

Legislative reform to provide clarity

4.13 A number of consultees who agreed that the current law permits the use of electronic signatures would nevertheless welcome legislative reform to provide clarity. Only 17 stakeholders took this view, but they included professional membership organisations including the Law Society, the Chancery Bar Association, GC100,[197] STEP,[198] ILAG,[199] the Agricultural Law Society and UK Finance.

4.14 The Law Society commented that:

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

4.15 ILAG commented that differing internal processes and risk appetite mean that there is no consistent attitude to electronic signatures amongst insurers, concluding that clarification of the law in terms of its application to the corporate environment is "essential".

4.16 ILAG also noted the impact beyond the corporate and insurance world:

> It should not be for the Courts to prove that the use of an electronic signature is satisfactory. Legal proceedings can be expensive and prohibitive for consumers as well as small and medium-sized businesses.

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197 A membership organisation for general counsel and company secretaries working in FTSE 100 companies.

198 The Society of Trust and Estate Practitioners.

199 The Investment & Life Assurance Group.

Additional assurance would particularly assist small and medium-sized business, reducing the need to seek outside legal counsel and potential risk of legal action.

4.17 Shoosmiths LLP (and some other consultees) raised the issue of legal opinions:

> One particular concern that we have is that in the absence of a legislative statement of validity, lawyers may not be prepared to issue an unqualified legal opinion that a document has been validly executed when an electronic signature has been used. This may not be acceptable to overseas parties (in particular) and could adversely impact the competitiveness of England and Wales as a jurisdiction in which to do business.[200]

4.18 GC100 argued that a clearer legislative statement is necessary to maintain and enhance the desirability of English law:

> In our opinion, absent legislative reform, parties – especially international parties who may be less familiar with English law – will continue to receive equivocal (or at least qualified) legal advice as to the validity of electronic signatures and, in light of that advice, will naturally default to what they perceive to be the 'safe' option of relying on traditional forms of execution. In maintaining the desirability of English law as a choice of law for international contracts, enhanced clarity over the validity of, and formalities for, electronic signatures should be communicated in a definitive, legislative form within an English statute.

Discussion

4.19 Although only a minority of consultees suggested that legislative reform is necessary or desirable to permit the use of electronic signatures, the concerns raised were sufficiently compelling that we have revisited the question of legislative reform.

4.20 There was no consensus amongst the responses from consultees as to the form that legislative reform should take. We consider below different approaches to legislative reform in this area and the tensions and benefits highlighted by stakeholders of the various approaches.

Should legislation be more or less prescriptive?

4.21 Some consultees wanted to see new legislative provisions which clearly set out the criteria which need to be fulfilled for an electronic signature to be valid. Kennedys noted that existing legislation and case law does not "address the practical or technical issues around the creation and evidence of an e-signature".

4.22 Catherine Phillips referred to the intention to authenticate, which we discuss in Chapter 3:[201]

> If the law requires there to be an electronic signature plus evidence of the intention to authenticate in order to establish validity, it would be useful to be given clear

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200 The comment from Shoosmiths LLP about providing an unqualified legal opinion is consistent with what we have been told by other stakeholders (including CMS LLP and Clifford Chance LLP) in pre-consultation meetings.

201 From para 3.28.

criteria on what procedural steps satisfy the 'intention to authenticate'. Otherwise this creates an additional level of difficulty in the giving of a clean opinion.

4.23 In the consultation paper we considered legislation in other jurisdictions and noted that some jurisdictions provide that an electronic signature will satisfy a rule of law which requires signing, so long as various conditions are met.[202] The benefit of this approach is that there will be certainty as to when an electronic signature has been validly used.

4.24 There are, however, drawbacks to this more prescriptive approach. In Chapter 6 of the consultation paper we discussed the risks of overly prescriptive or detailed legislation dealing with technology. We also noted that some businesses are already using electronic signatures extensively and we would not wish to disrupt their practices by, for example, requiring a particular type of technology to be used for electronic signatures. The same concerns apply to setting out a prescriptive execution process.

4.25 Some consultees voiced similar concerns about the need for any new legislative statement to be technology-agnostic and future proofed. For example, the Law Society cautioned that:

> 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.

4.26 Charles Russell Speechlys did not consider that legislative reform is desirable and noted the drawbacks of legislation dealing with technology:

> We endorse the view that legislation dealing with technology runs the risk of being overly prescriptive and detailed and we note that given the speed at which advances in technology are made it may be impossible to anticipate every eventuality leading to the need in the future to regularly amend the legislation.

4.27 In the consultation paper we said that any legislation relating to the validity of electronic signatures would need to be drafted in general terms. We continue to support this approach.

4.28 We recognise that some stakeholders have concerns about technology and practical issues associated with the electronic execution of documents and have concluded that these can be best dealt with by the industry working group, as discussed below.[203] This group could provide best practice guidance which has the benefit of being less prescriptive than legislation.

A new legislative statement about electronic signatures

4.29 Some consultees suggested that a new legislative statement about electronic signatures could provide clarity and certainty. For example, the Notaries Society said:

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202 CP 237, paras 5.6 and 5.7.

203 We discuss the industry working group from para 4.88.

A short sentence in a future statute confirming that an electronic signature has the same effect as a handwritten one would increase confidence in their use and reliability.

4.30 CMS LLP said:

It would be helpful to have a new, clear, legislative statement confirming that an electronic signature is as valid as a handwritten signature.

4.31 Catherine Phillips noted that:

Concerns are routinely raised that the ECA does not address the validity of electronic signatures.

4.32 Icon UK Limited suggested that clarity about the validity of electronic signatures could be provided by either a series of public statements or legislative reform. If legislative reform were to be considered they would like to see:

a 'light-touch' legislative reform which was:

- "for the avoidance of doubt"

- was consistent with the position in other jurisdictions, especially eIDAS ensured that the concepts of 'higher standards required for higher value/risk transactions' should apply.

Options for legislative reform

4.33 In our view, any legislative provision addressing the validity of electronic signatures should have wide application. It should not be limited to documents used by commercial parties and consumers as our terms of reference are. Electronic signatures are used, and may increasingly be used, in circumstances which would fall outside of these contexts, such as in the family and criminal law spheres. The enactments and case law relevant to electronic signatures do not generally distinguish between different types of situation in which electronic signatures may be used, or different types of signatory. Our conclusions on the current law on electronic signatures in this report also have broad application and, unlike our terms of reference, are not restricted to commercial and consumer documents. A legislative provision restricted to the use of electronic signatures in particular areas would, by implication, cast doubt on the validity of electronic signatures in other contexts. This would be highly undesirable given their widespread use.

4.34 Our discussion of possible legislative approaches below is therefore based on the assumption that any new legislative provision would apply to all situations where a signature is required, save where the current law specific to the document in question leads to a contrary conclusion.[204]

[204] The Law Commission has concluded that this is most likely the case in respect of wills: Making a Will (2017) Law Commission Consultation Paper No 231, para 6.15.

Amendment to the Interpretation Act 1978

4.35 Certain transactions are required by the law of England and Wales to be in writing and "signed" or executed as a deed. However, there is no statutory definition of "signed" or "signature" in the Interpretation Act 1978.[205] Therefore we have considered whether that Act could be amended to include a definition of "signed" which encompasses electronic signatures.

4.36 While this would clarify the position in situations where a signature is required by statute, it would not do the same for documents which are not required by statute to be signed (but, for example, the parties have agreed that signatures are required).[206] We do not therefore think this would be a useful or appropriate amendment.

4.37 Some stakeholders have talked to us about the use of electronic signatures in such cases, usually commercial contracts. It is not clear that an amendment to the Interpretation Act would provide the clarity and reassurance sought by stakeholders concerned with commercial transactions.

4.38 Further, as we discuss below, there is an argument that some documents should be excluded from the ambit of electronic signatures. A change to the Interpretation Act 1978 would be necessarily of general application. Of course, the same argument could be made about most legislative options, but we think that the Interpretation Act in particular is intended to be applied generally.

4.39 We do not therefore consider that an amendment to the Interpretation Act 1978 would be desirable or particularly helpful.

Codification of existing law

4.40 If a new legislative statement were to be introduced, it could be used to fill the perceived gaps in the existing provisions in eIDAS[207] and the Electronic Communications Act 2000 ("ECA 2000"). From what stakeholders have told us, uncertainty as to the effect of the current law arises partly for the following reasons relating to the scope of these provisions:

(1) the ECA 2000 provides that in any legal proceedings, an electronic signature shall be admissible in evidence. However, it does not provide that an electronic signature is legally valid;

(2) article 25(2) of eIDAS provides that qualified electronic signatures, rather than all electronic signatures, have the equivalent legal effect of a handwritten signature. In effect this provision distinguishes between qualified electronic signatures (which are subject to more onerous requirements under eIDAS) and other types of electronic signatures. This appears to have created some

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205 CP 237, para 3.18.

206 We discuss formalities and requirements for a signature from para 2.5.

207 eIDAS is the current EU legislation addressing electronic signatures, which came into force in 2016. EU Regulations apply directly in all member states without the need for member state implementation. eIDAS is therefore part of domestic law and remains so under the terms of the European Union (Withdrawal) Act 2018, s 3 and the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019/89.

uncertainty as to the legal effect of electronic signatures which are not qualified electronic signatures;[208] and

(3) some stakeholders feel more confident pointing to a statute than case law for confirmation of the validity of electronic signatures. This is especially the case in cross-border transactions where parties may be more familiar with the law in other jurisdictions which do include legislative statements about the validity of electronic signatures.

4.41 As we have outlined in the previous chapter, our view, and the view of the majority of consultees, is that the case law fills the perceived gaps in eIDAS and the ECA 2000. The purpose of any new legislative statement would be to provide clarity, and would effectively codify the existing law so that it appeared in statute in a single statement.

4.42 The Chancery Bar Association told us that legislative reform may be desirable to provide clarity about electronic signatures but that any such reform "would require more than just restating any existing legislative provisions". STEP also suggested that "legislative reform could effectively be a consolidation of the relevant case law and legislation".

CONCLUSION ON A FURTHER LEGISLATIVE STATEMENT

4.43 We provisionally concluded in the consultation paper that the law already provides that electronic signatures can satisfy a requirement for a signature, and that further legislation was not necessary or desirable. The majority of consultees agreed with us on both counts. In Chapter 3, we set out our renewed conclusion that the law already caters for electronic signatures.

4.44 However, even where consultees agreed with our conclusion on the current law, some, including professional membership organisations representing many members, said that a definitive legislative statement would nevertheless be beneficial, particularly to businesses, and would make the law of England and Wales in this area more accessible.

4.45 The Law Commission was asked to look at the legal validity of electronic signatures in 2001 and concluded, as we have done, that the law was satisfactory. Yet 18 years later, uncertainty remains. While we, and others who have read the existing legislation and case law closely, may be confident in our conclusions, it is clear that there is still genuine concern amongst some in the market. Leaving non-lawyers and small businesses to search through case law is arguably undesirable given the importance and pervasiveness of the issue.

4.46 Our conclusions on the current law on electronic signatures have broad application and, unlike our terms of reference, are not restricted to commercial and consumer documents. Our strong view is that any new legislative statement would have to be similarly broad. A legislative provision restricted to the uses of signatures in particular

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[208] This uncertainty appears to exist even though article 25(1) of eIDAS provides that an electronic signature shall not be denied legal effect in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.

areas would, by implication, cast doubt on the validity of electronic signatures in other contexts. This would be highly undesirable given their widespread use.

4.47 As our terms of reference are limited to documents used by commercial parties and consumers, we have not actively consulted stakeholders operating in other areas where electronic signatures may be used, either now or in the future. It would not therefore be appropriate for us to recommend the introduction of a broad legislative provision confirming the status of electronic signatures beyond our terms of reference. Instead, we set out below options for reform relating to codifying the law which the Government, or we, could take forward with a wider remit.

Draft provision

4.48 We have worked with parliamentary drafters to produce a possible formulation which could be considered as part of such a future exercise. It could be inserted into the ECA 2000, or could be a freestanding provision.

1 Legal effect of electronic signature

(1) An electronic signature (whether or not it is a qualified electronic signature) —

(a) has the same legal effect as a handwritten signature, and

(b) is capable of being witnessed and attested.

(2) Subsection (1) —

(a) has effect in relation to an agreement subject to any contrary agreement between the parties,

(b) does not require a person to accept an electronic signature —

(i) for a purpose for which the person has indicated that a signature that is not an electronic signature is required, or

(ii) for a purpose for which the person has indicated that an electronic signature of a particular description is required, if the electronic signature is not of that description, and

(c) does not apply where the manner in which a document is to be signed, or the form of a signature, is expressly provided for by or under an enactment.

(3) The Secretary of State may by regulations made by statutory instrument make provision setting out other cases or circumstances in relation to which subsection (1) does not apply.

(4) The power to make regulations under subsection (3) includes power to make consequential, supplementary, incidental, transitional or saving provision.

(5) A statutory instrument containing the regulations is subject to annulment in pursuance of a resolution of either House of Parliament.

(6) In this section—

"the eIDAS Regulation" means Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC;

"electronic signature" and "qualified electronic signature" have the same meanings as in the eIDAS Regulation (see Article 3(10) and (12) of that Regulation).

What the drafting does

4.49 This drafting seeks to provide a simple statement of validity of electronic signatures in situations where a signature is required by statute (including where an instrument is being executed as a deed) and also where a document is not required by statute to be signed but the parties have agreed that a signature is required.[209] The drafting also confirms that an electronic signature can be witnessed and attested.

4.50 The drafting seeks to remove any confusion caused by the different treatment in eIDAS of qualified electronic signatures and other electronic signatures, by providing, at subsection (1)(a), that an "electronic signature" has the equivalent legal effect of a handwritten signature. The drafting is based on that in article 25(2) of eIDAS but, unlike article 25(2) (which applies only to qualified electronic signatures) subsection (1) applies to all electronic signatures. The drafting uses the definition of "electronic signatures" in eIDAS which, is very broad.[210] eIDAS is part of domestic law, and remains so under the terms of the European Union (Withdrawal) Act 2018.[211]

4.51 The drafting refers explicitly to electronic signatures having the status of a "handwritten signature". Some stakeholders told us that handwritten signatures should not be regarded as the "gold standard". Although we are sympathetic to this argument, we consider that the benefits of complementing and supplementing the existing eIDAS regime (which also refers to handwritten signatures) outweigh the perceived benefits of an alternative, perhaps more modern, formulation. In addition, handwritten signatures are sufficiently well understood in this and other jurisdictions that the drafting should give a clear signal that electronic signatures can similarly be relied upon.

4.52 The drafting provides the flexibility for the use of electronic signatures but in no way seeks to mandate their use. Under subsection (2)(a), parties to agreements would still be entitled to agree their own additional requirements for signatures for particular transactions. For example, they could agree that parties must use a specific type of electronic signature or may not use an electronic signature at all.

4.53 Under subsection (2)(b), a person is not required to accept an electronic signature if they have indicated that only a handwritten signature, or only a particular type of electronic signature, will be accepted for a particular purpose. This means that a public register would not be required to start accepting electronic signatures where, for policy or practical reasons, it chooses not to. The relevant person could set out their position expressly, or otherwise make it evident that electronic signatures will not be accepted. Therefore, if a document is required to be registered in order to take effect, and the register requires wet ink signatures, the executing party or parties could not use electronic signatures. For example, the Office of the Public Guardian's system currently does not allow a lasting power of attorney to be signed electronically; after the details have been filled in, it must be printed out and signed in manuscript. Similarly, if a register requires a particular kind of electronic signature, for example, a

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209 We discuss formalities and requirements for a signature from para 2.5.

210 We discuss the definition of an "electronic signature" in eIDAS in Appendix 2, from para 2.17.

211 European Union (Withdrawal) Act 2018, s 3 and the Electronic Identification and Trust Services for Electronic Transactions (Amendment etc.) (EU Exit) Regulations 2019/89.

qualified electronic signature as provided for under eIDAS, the executing party or parties will not be able to use a different kind of electronic signature.

4.54 Subsection (2)(c) provides that, where an enactment expressly requires that a document is to be signed with a particular form of signature, this requirement will be unaffected. For example, under regulation 15 of the Misuse of Drugs Regulations 2001/3998, a prescription must be "written so as to be indelible, be dated and be signed by the person issuing it with his usual signature" or be prescribed on an electronic prescription form. An electronic prescription form must be signed with a prescriber's advanced electronic signature, as defined in eIDAS, and transmitted as an electronic communication to a nominated dispensing contractor by the Electronic Prescription Service.[212] In these circumstances, a simple electronic signature would not have the equivalent effect of a handwritten signature.

4.55 Finally, under subsection (3), secondary legislation could exclude the use of electronic signatures for particular purposes. If the Government decides to take forward this or similar draft legislation, we think it should consider whether any types of documents should be excluded, for example to protect vulnerable people. Although ideally protections and exclusions would be included in specific legislation (as discussed in Chapter 2), we have included this power to ensure that there is an immediate way of excluding some documents from the general provision if the Government considers that this is desirable.

4.56 It was suggested to us that wills should be excluded from the ambit of any general legislation. While electronic execution of wills is outside the scope of the present project, it is being considered as part of the Law Commission's project on wills. In the consultation paper on wills, we provisionally proposed that electronic signatures should not be able to fulfil the requirements for signing a will, until such time as an enabling power is used to provide specifically for electronic execution of wills.[213]

What the drafting does not do

4.57 We are conscious that the above drafting does not deal with some of the issues on which consultees have asked for more detailed guidance and, in some cases, have suggested that this could be set out in legislation. We have considered consultees' responses carefully but our view is that it would not be desirable for such a legislative provision to prescribe more detail about how and when electronic signatures should or could be used.

Specific technology

4.58 Our research and the views of stakeholders have emphasised the challenges of proposing legislation to cater for specific technological solutions to existing practices. In many cases, the existing law is already sufficiently flexible to allow for such

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212 National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013/349, reg 2, definition of "electronic prescription form".

213 Making a Will (2017) Law Commission Consultation Paper No 231, ch 6. If Government considers implementing some form of general statement about electronic signatures, the position of electronic wills will need to be considered carefully.

technological developments, so further legislation is not necessary.[214] And legislation referring to particular technologies may quickly become outdated, excluding better solutions or potentially becoming entirely obsolete.

4.59 Professor Chris Reed, a member of the project's advisory panel, has previously pointed out that there is a trend for legislation, particularly in relation to technology, to become increasingly detailed.[215] Graham Smith, also a member of the project's advisory panel, has warned against legislation being so prescriptive that particular technologies or types of electronic information are implicitly favoured or unnecessarily excluded.[216]

4.60 We think that any legislation should be technology neutral so as to avoid these pitfalls. The drafting therefore uses the broad definition of "electronic signatures" already in existence in eIDAS and does not suggest that any particular type of electronic signature has a preferred status in law.

4.61 Similarly, the drafting does not deal with requirements for security or reliability of electronic signatures. These considerations are separate from the question of legal validity. To set out minimum standards would again risk making special provision for particular types of electronic signature and we do not think that is desirable in legislation. It will be for the parties to consider what is appropriate in their own cases but, as discussed below, we consider that an industry working group could usefully provide guidance on such matters.

A process for execution

4.62 Some consultees asked that we set out a process for electronic execution (or electronic witnessing). However, there are risks associated with such an approach.[217] We agree that it might give certainty where an exact process has been followed. However, we consider that it would be disproportionately prescriptive. Such an approach may lead to disputes where the process had not been followed precisely, but the outcome is substantively the same as it would have been if the process had been followed. It might also make the legislation outdated in the event that new technologies were to disrupt established practices, and could prevent better ways of working being developed. Moreover, we do not wish to set overly stringent standards for electronic execution without justification, where the same standards are not applied to traditional execution of paper documents.

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214 In general, legislation should be made when it is necessary, and not merely "for the avoidance of doubt";D Greenberg (ed), *Craies on Legislation* (9th ed 2008) para 1.8.2.

215 C Reed, "How to make bad law: lessons from the computing and communications sector" (2010) *Queen Mary University of London, School of Law Legal Studies Research Paper No 40/2010*, 2, http://ssrn.com/abstract=1538527.

216 G Smith, "Legislating for electronic transactions" [2002] *Computer and Telecommunications Law Review* 58, 59.

217 G Smith "Legislating for electronic transactions" [2002] *Computer and Telecommunications Law Review* 58 and C Reed "How to make bad law: lessons from the computing and communications sector" (2010) *Queen Mary University of London, School of Law Legal Studies Research Paper No 40/2010*.

4.63 Below, we recommend that an industry working group should be established to consider practical issues associated with the electronic execution of documents.[218] We think the industry working group could set out best practice guides for dealing with, for example, commercial parties, consumer or vulnerable parties, or parties in other jurisdictions.

Deeds

4.64 The drafting does not explicitly refer to the electronic execution of deeds. However, it applies to the execution of deeds as it applies to all situations where a signature is required.[219]

4.65 The drafting also reflects our view that:

(1) an electronic signature can be witnessed in the same way as a handwritten signature; and

(2) in addition to the signatory, a witness can also sign electronically.

4.66 We discuss the execution of deeds in more detail in Chapter 5.

OPTIONS FOR REFORM

Options for reform.

4.67 Although the current law already provides for electronic signatures, Government may wish to consider codifying the law on electronic signatures in order to improve the accessibility of the law. Any legislative provision should have broad application, and further consultation would be required.

4.68 Government should consider whether the power to exclude certain types of documents from being signed electronically should be used to exclude anything for which electronic execution is not considered appropriate.

THE BENEFITS OF CLARIFYING THE LAW

4.69 In the consultation paper we said that stakeholders had told us that a lack of clarity in the law is discouraging some parties from using electronic signatures.[220] We suggested that a move to increase confidence in electronic signatures, and therefore the number of electronic transactions, has the potential to reap significant benefits for business and individuals.[221] Any effort to clarify the law, whether through the conclusions in this report or through codification, would aim to increase confidence.

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218 Recommendations 1, 2 and 3 from para 4.127.

219 We discuss the execution requirements for deeds from para 5.6.

220 CP 237, para 6.3.

221 CP 237, para 8.89.

4.70 We asked consultees to estimate the financial value of increased confidence in the legality of electronic execution in England and Wales. We asked if consultees thought there could be a reduction in transaction costs between 10 and 30%.[222]

Consultees' views

4.71 The responses we received provided little support for our view that there would be a substantial reduction in transactional costs due to increased confidence. This was not because consultees disagreed with our figures, but because they thought that it would be difficult or impossible to calculate the financial value.

4.72 Consultees did, however, provide further insight into the various potential costs and benefits associated with an increase in the use of electronic execution which could result from our work. These broadly support our initial assessment of the impact of reforms as set out in the consultation paper.[223]

Financial benefits

4.73 Almost half of the consultees who commented on the financial value of increased confidence in electronic execution agreed that there would be some costs savings and pointed to the potential for a reduction in transaction costs.[224] These included costs associated with printing, scanning and couriering documents as well as the collation of executed documents after a transaction had been completed. Bryan Cave Leighton Paisner LLP and Eversheds Sutherland LLP also suggested that legal fees associated with discussions between lawyers and with clients about the use of different electronic signatures would also be reduced.

4.74 In terms of actual values, although it was difficult to predict, consultees who engaged with the figures tended to think it would be at the lower end of our estimate – perhaps between 5 and 10%. CLLS and BVCA observed that the larger the transaction, the smaller the transaction costs will be relative to the overall cost of the transaction.

4.75 Other consultees[225] were more cautious and suggested that any reduction in transaction costs would be minimal or that there may be costs as well as savings associated with increased use of electronic signatures. Peter Hughes, the Conveyancing Association and Beth Rudolph considered that there would be no saving per transaction. Carpenter & Cop Solicitors cautioned that, while there may be a reduction in transaction costs, litigation costs may increase and Kennedys suggested that there may be new transaction costs associated with the need to prevent fraud.

4.76 Given the scope of our terms of reference, we did not receive representations from many public bodies as to the savings already realised, or which could be realised, through the use of electronic signatures.

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222 CP 237, para 8.92.

223 CP 237, paras 8.89 to 8.91.

224 17 out of 36 consultees who responded to this question (approximately 47% of responses).

225 9 out of 36 consultees who responded to this question (approximately 25% of responses).

Efficiency and non-financial benefits

4.77 A number of consultees considered that electronic execution would increase the efficiency of transactions.[226] While some of these efficiencies would result in cost savings, other non-financial benefits would also result. For example, Bryan Cave Leighton Paisner LLP highlighted that there would be a reduction in delays caused by the need for signatories to be physically present. Similarly, CLLS pointed out that transactions could be executed out of hours.

4.78 The Sussex Partnership NHS Foundation Trust said:

> We would like electronic signatures to be accepted as capable of satisfying a statutory requiring for "signature". Our consultants and clinical staff will often ask to be able to complete statutory documents and attach an electronic signature. This could either be attached on a pre-set electronic form saved within a clinical IT system via their computer password login, or via a pre-saved electronic signature.

4.79 Four consultees pointed to the environmental benefits of electronic execution of documents.[227]

4.80 In the consultation paper we mentioned the potential for businesses to better meet customer demand for digital products and services and the potential for impacting upon the competitiveness of England and Wales as a place in which to do business or adjudicate disputes. Hogan Lovells International LLP's and CMS LLP's comments in their consultation responses supported this observation.

Costs

4.81 In the consultation paper we acknowledged that there may be some initial set-up costs associated with using electronic signatures, for those who wished to use specific software, for instance (although these would be voluntarily incurred by parties wishing to upgrade their software). Some consultees provided us with examples of such short-term costs,[228] including purchasing software or obtaining access to third party platforms, remedying errors or fraud if systems lack security and the costs associated with training lawyers and clients in the use of signing platforms and electronic signature software.

4.82 Over half of consultees responded to this question to tell us that they were concerned about the increased risk of fraud that use of electronic signatures would have in relation to lasting powers of attorney. The vast majority did not comment on the financial value of increased confidence in electronic execution. In addition to comments specifically about lasting powers of attorney, four consultees raised concerns about the downsides of use of electronic signatures, including an increased risk of disputes, litigation and fraud.[229]

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226 22 out of 146 consultees who responded to this question (approximately 15% of responses).

227 The Law Society, BVCA, Jennifer Harris and Matthew Wardle (on behalf of third year law students at the University of Cumbria).

228 10 out of 36 consultees who responded to this question (approximately 28% of responses).

229 Michael O'Brien, David Satchell, Tom Sorby and Arnison Heelis.

4.83 We acknowledge, as noted by consultees, that there may be drawbacks as well as benefits to using electronic signatures in certain circumstances. As we discuss in Chapter 2, we do not suggest that electronic execution should be made mandatory in any context. It is for the parties to decide what is appropriate in their own transactions.

Discussion

4.84 We believe that increased confidence in electronic execution would lead to increasingly efficient transactions, which could deliver savings in costs and time and allow resources to be directed to other activities.

4.85 The benefits of execution processes which are quick and convenient go beyond reduced transaction costs. We were told that an uptake in the use of electronic execution in complex legal transactions may enable businesses to grow, as businesses can better meet customer demand for digital products and services. The facilitation of electronic commerce also has advantages internationally. Additional procedural layers caused by legal uncertainty in cross-border transactions leads to delays, as discussed in Chapter 2. It might even adversely impact the competitiveness of England and Wales as a place in which to do business or adjudicate disputes.

4.86 The transitional costs of our recommendations for reform are likely to be slender. For example, while it is possible that, if electronic execution of complex legal documents becomes more widespread, firms will have to implement revised procedures or IT systems, this would not be mandated by our reforms.

4.87 Similarly, the cost of professional indemnity insurance might increase if insurers form the view that electronic execution of these types of documents is vulnerable to fraud, but nothing in our report suggests that electronic execution should be used in situations where it is not appropriate or desirable. In any case, our discussions with stakeholders have suggested that the benefits outlined above are likely to outweigh these costs. There are unlikely to be on-going costs associated with our recommendations.

INDUSTRY WORKING GROUP

4.88 In this report we have noted that we have been told by stakeholders that confidence in electronic signatures is often limited, both because of questions of legal validity and other issues such as security and reliability.

4.89 As discussed above and in the consultation paper, we do not think it is for legislation to attempt to deal with the more practical aspects of electronic execution. In the consultation paper we provisionally proposed that an inter-disciplinary industry working group, potentially convened by Government, would be better placed to consider these issues and develop guidance. Below we look at consultee responses to our provisional proposal to have an industry working group.

Considering non-legal concerns

4.90 Factors other than questions of legal validity also influence a party's decision whether to execute a document electronically.[230] In Chapter 2 we considered other issues to consider when using electronic signatures, in particular:

(1) questions of evidence, security and reliability of particular types of electronic signatures in particular circumstances;

(2) particular concerns in cross-border transactions; and

(3) the involvement of consumers or vulnerable people.

4.91 Other factors may include questions of trust and identity, the interoperability of electronic signature systems, and the archiving of information.[231]

4.92 The joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees have published two notes on the electronic execution of documents dealing with legal questions.[232] Both of these have alleviated some uncertainty around execution.[233] Consequently, we considered that similar guidance, from a technological and practical perspective, would be extremely valuable.[234]

4.93 We explained in the consultation paper that we do not consider it would be appropriate for the Law Commission, as a law reform body, to provide guidance on these non-legal, technical issues. We therefore provisionally proposed that an industry working group should be established, potentially convened by Government, to consider practical, technical issues.[235]

Consultees' views

4.94 The vast majority of consultees agreed that an industry working group should be established.[236] These included professional membership organisations, technology companies, law firms and individuals. Those who disagreed did so either because they had concerns about the use of electronic signatures in the first place, or because they were sceptical about what a working group would realistically be able to achieve.

4.95 A few consultees approved of a working group but had some reservations about its efficacy. GC100 and Eversheds Sutherland LLP were concerned that it may delay legislative reform. Icon UK Limited was concerned that it may not issue guidance quickly, becoming another "loop … which [would] delay certainty … further". euNetworks agreed "in theory" but was concerned it could lead to further debate and increasing delays.

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230 CP 237, paras 2.37 to 2.51 and para 7.24.

231 CP 237, para 7.24.

232 CP 237, para 1.16.

233 CP 237, para 1.18.

234 CP 237, para 7.26.

235 CP 237, paras 7.28 and 9.6.

236 165 consultees responded to this question. 155 consultees (approximately 94% of responses) agreed that a working group should be established, whilst 8 consultees (approximately 5% of responses) disagreed and 2 consultees (approximately 1% of responses) provided other comments.

Membership of an industry working group

4.96 Several consultees explicitly affirmed that a working group should be Government led. CMS LLP thought that this would "give weight to the processes and outcomes". UK Finance thought this would ensure "widespread engagement from all stakeholders, including public bodies".

4.97 The majority of consultees who commented on the membership of the proposed industry working group wanted to ensure that the working group was made up of representatives who could consider the interests of individuals as well as commercial parties, particularly when concerning the needs of vulnerable people and the execution of lasting powers of attorney.

4.98 Other consultees who commented on the membership of the proposed industry working group emphasised that it should include those with legal expertise, technology experts, business representatives / users and insurers. In addition, UK Finance suggested that public bodies should be represented while the Society of Scrivener Notaries suggested that they and institutions such as the Land Registry and the Law Society should be represented.

4.99 A number of consultees volunteered to be part of the industry working group.[237]

Areas for an industry working group to consider

4.100 Some consultees suggested that the working group should consider the capabilities of existing signing platforms and the potential for technology to assist with the signing process and evidence and security of electronic signatures. Shoosmiths LLP said:

> It is likely that we will see an increasing number of providers of this technology, and industry standards will be necessary to ensure that they are all adhering to the same levels of security, privacy, reliability, integrity and so on.

4.101 CMS LLP suggested that the industry working group could be involved in producing best practice guidance for using e-signing platforms in complex, lawyer-led transactions and even kite marks to show the level of security protections in place on different platforms. They also suggested that the functionality of platforms could be considered to ensure that they allow legal requirements to be satisfied in a user-friendly and efficient manner.

4.102 RBS noted that there were different signing solutions available and suggested that the industry working group could "work towards settling on a list of key (technology agnostic) features that e-signing solutions could address". UK Finance suggested that technology experts could clarify the "capabilities … [of] electronic audit trails, digital identification and digital certification". ICAEW said "practical guidance on how to prove identify and on the various technological options to facilitate this would be useful".

4.103 Some consultees wanted clarity about the procedural steps which need to be satisfied for electronic execution (or electronic witnessing), including an intention to authenticate.[238]

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[237] Alzheimer's Society, Smart Pension, TheCityUK, The Society of Licensed Conveyancers, ILAG, BVCA, the Society of Scrivener Notaries, Bryan Cave Leighton Paisner, Icon UK Limited, AliasLab UK Limited, Selwood Reseach, Docusign, Adobe, Inc. and Ian Macara.

[238] Some consultees suggested that this detail should be included in any legislative reform: from para 4.21.

4.104 Other consultees thought that the working group should address some of the risks of electronic execution. For example, Kennedys saw a working group as an opportunity to consider "issues such as data breaches and fraudulent activities". Lloyds Banking Group suggested that the working group consider third party recognition of electronic signatures and potential issues around obsolescence/accessibility of technology over the effective life of electronically executed documents.

4.105 Some consultees suggested that technological standards or associated guidance should be developed to "encourage the reliability of electronic signatures".[239] Peter Howes said:

> … it is important that associated guidance should make users aware of the greater risks associated with the less secure electronic signature options so that decisions to use are based on considered appraisal rather than ignorance.

4.106 A large number of consultees suggested that the working group should consider the needs of individuals (as opposed to corporate bodies) and the protections which should be in place for vulnerable people when using electronic signatures. The Alzheimer's Society suggested that the working group "should consider issues such as supported digital services, and how to ensure that there are effective safeguards". ICAEW suggested a wider consultation should be carried out, including with representative bodies of those with disabilities or other special needs, to ensure that any guidance produced can meet the needs of as many potential users of electronic signatures as possible.

4.107 RBS suggested that the industry working group could look at cross-border issues, in particular "both in recognition of how the UK's common law approach (or proposed legislative changes) would be treated in foreign jurisdictions, and how the UK courts would treat foreign e-signatures". In response to question 3 of the consultation paper, other consultees also commented on the use of electronic signatures in other jurisdictions and in cross-border transactions.[240] BVCA told us that the time and cost involved in obtaining local legal advice deters the use of electronic execution for cross-border transactions.

4.108 Some consultees commented on the type of technology used in cross-border transactions or in other jurisdictions. For example, Peter Howes suggested that use of electronic signatures in cross-border transactions "will typically lead to a reliance on the stronger, more robust forms of electronic signature rather than those that are simple but weak".

Benefits of an industry working group

4.109 In the consultation paper we asked whether consultees agreed that our proposal to establish an industry working group would provide benefits such as reduced transaction costs (and if so, how much) and non-monetary benefits (and if so, what benefits).[241]

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239 Lloyds Banking Group.

240 CP 237, paras 6.19 and 9.3.

241 CP 237 paras 8.95 and 9.17. In response to this question, consultees also commented on the benefits of increased use of e-signatures generally. These responses have been considered where we consider the potential benefits of an increase in electronic execution.

4.110 Only 16 consultees suggested that an industry working group would result in reduced costs. CLLS noted that "greater acceptance would be likely to increase competition" across "several document platforms" which should "reduce costs". Catherine Phillips suggested that an:

> industry working group has the potential to save a considerable amount of time otherwise spent by individual law firms in researching all of the practical and technical issues. It should also reduce time spent in resolving disagreements between firms about accepted methods of use and this should reduce transaction costs.

4.111 Some consultees noted that users would benefit from the practical and technical guidance of a working group. For example, RBS said the working group could "driv[e] better customer experiences through standardisation" and produce "better customer outcomes through the potential for better record keeping of documents".

4.112 A number of consultees thought a working group would promote greater confidence and certainty in the use of electronic signatures. Some thought creating industry standards would also facilitate confidence and certainty. For example, ILAG said that an:

> Industry consensus on such practical and technical issues would increase efficiencies and certainty between businesses and consumers. It would also allow for new technologies and innovative approaches to be discussed in a non-competitive environment.

4.113 Charles Russell Speechlys added that "in terms of non-monetary benefits … increasing lawyer confidence in the use of electronic execution is key to the successful adoption of this technology". Iain Macfarlane noted that "no one wants to move first on this topic". He said that "the principal benefit will be to create enough … momentum that … lawyers can adopt electronic signatures with confidence".

4.114 A few consultees considered how a working group could educate industry groups. Richard Oliphant said that a working group should "educate lawyers who in turn can offer better advice to their clients on how to go digital and authenticate more transactions electronically." Adobe, Inc. added that the:

> Government has a key role not just to help set and interpret rules, but to educate the market in how to take advantage of technologies. The industry working group could provide invaluable education material and case studies to help encourage adoption and usage of signatures.

Discussion

Setting up an industry working group

4.115 As set out above, the vast majority of consultees agreed that an industry working group should be established to consider practical issues associated with the electronic execution of documents. Consultees also supported our provisional proposal that the industry working group should be convened by Government.

4.116 Consultees suggested that the benefits of an industry working group included reduction in transaction costs, increased confidence in the use of electronic signatures and an opportunity to educate potential users of electronic signatures.

4.117 We address the legal validity of electronic signatures in Chapter 3 above. However, we acknowledge there and elsewhere that there are non-legal uncertainties over which stakeholders have expressed concern. Given the support of consultees, we believe that an industry working group could assist with some of these issues, providing more confidence for users and potential users of electronic signatures.

What would an industry working group do?

4.118 In response to our consultation, consultees suggested that the industry working group should consider the potential for technology to assist with the signing process and evidence and security of electronic signatures. It could also highlight the risks and benefits of different types of signatures in order that users could make an informed choice. We agree that this is something that an industry working group is well placed to do. A review of existing technology would assist current users of electronic signatures and may also lead to the development of best practice guidelines which can be used by developers and users in future.

4.119 A number of consultees shared their experiences of using electronic signatures in cross-border transactions.[242] Although the general position is that parties to a document are free to execute it in accordance with the formal requirements of the law of the place of execution,[243] the formal requirements of the place of enforcement remain relevant.[244] We think that the industry working group is an appropriate forum to consider how to address some of the challenges of using electronic signatures in cross-border transactions.

4.120 We do not think that it is likely to be appropriate for the working group to consider and advise on which types of signatures satisfy the requirements in different jurisdictions or of particular bodies or registries in different jurisdictions. However, best practice guidance about the security and reliability of different electronic execution technologies will assist parties to a cross-border transaction to decide what kind of technology could be used in a particular transaction. It may also be useful for the industry working group to identify those jurisdictions which cause particular difficulties for parties.

4.121 Some consultees suggested that it would be helpful for those wishing to use electronic signatures to have clarity about the procedural steps which need to be satisfied for electronic execution (or electronic witnessing), including an intention to authenticate. We see a benefit in the industry working group considering this. Best practice guidance could set out an agreed set out steps for electronic execution of documents which would assist those who wish to use electronic signatures.

4.122 A large number of consultees suggested that the working group should consider the needs of individuals (as opposed to parties in commercial transactions) and the protections which should be in place for vulnerable people where documents are executed electronically. In Chapter 2 we discussed the concerns expressed by

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242 Discussed from para 2.38.

243 N P Ready, *Brooke's Notary* (14th ed 2013) paras 8-51, 11-04, 11-31.

244 N P Ready, *Brooke's Notary* (14th ed 2013) para 11-04 and Request for a preliminary ruling from the Oberster Gerichtshof (Austria), Case C342/15 *Leopoldine Gertraud Piringer* [2017] 3 CMLR 587. Also comments from the FCO discussed from para 2.51.

stakeholders about electronic execution of documents by consumers and vulnerable individuals and electronic execution of lasting powers of attorney.[245]

4.123 While the risk of fraud and error exist for commercial transactions, we think that they are potentially more acute in situations where an individual is executing a document, sometimes without the support of professional advisers. We therefore suggest that the industry working group considers best practice for commercial transactions separately from best practice for situations where individuals are executing documents electronically, given the different considerations.

4.124 In the consultation paper we looked at the current law on deeds and provisionally proposed that it should be possible to witness an electronic signature via video link and then attest the document. We sought consultees' views on this provisional proposal as well as witnessing, attestation and delivery in the context of electronic execution if deeds. These provisional proposals and consultees' views are discussed in detail in Chapter 6. There were some points raised by consultees in relation to video witnessing, attestation and vulnerable individuals which we think are suitable for the industry working group to consider. Our recommendations for the industry working group in relation to deeds are discussed in more detail in Chapter 6.[246]

4.125 We agree that all of these issues could usefully be covered by the working group.

Membership of an industry working group

4.126 In light of the topics to be considered by the working group, we also consider that it should have an interdisciplinary membership. This proposal was supported by consultees. It is important that any best practice guidance it produces is developed collaboratively by users of electronic signatures as well as technology experts, lawyers and insurers, to ensure that it covers relevant topics as comprehensively as possible.

RECOMMENDATIONS

Recommendation 1.

4.127 An industry working group should be established and convened by Government to consider practical and tec hnical issues associated with the electronic execution of documents.

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245 Financial Conduct Authority, *Review of retained provisions of the Consumer Credit Act: Final report* (March 2019), https://www.fca.org.uk/publication/corporate/review-of-retained-provisions-of-the-consumer-credit-act-final-report.pdf, Annex 6, paras 158 to 162.

246 Recommendations 4 and 5, from para 6.45 and preceding discussion.

Recommendation 2.

4.128 The terms of reference for the industry working group should include:

(1) considering how different technologies can help provide evidence of identity and intention to authenticate when documents are executed electronically;

(2) considering the security and reliability of different technologies used to execute documents electronically;

(3) producing best practice guidance for the use of electronic signatures in different commercial transactions, focusing on procedural steps to be followed, evidence, security and reliability where documents are executed electronically; and

(4) producing best practice guidance for the use of electronic signatures where individuals, in particular vulnerable individuals, execute documents electronically.

Recommendation 3.

4.129 The industry working group should have an interdisciplinary membership, including:

(1) members who represent the interests of individuals, including vulnerable individuals;

(2) members who have an insight into cross-border transactions;

(3) lawyers;

(4) technology experts;

(5) insurers; and

(6) businesses.

Chapter 5: Deeds – the current law

5.1 Having considered electronic signatures, we now turn our attention to deeds. A deed is a document executed with a high degree of formality, and by which an interest, a right or property passes or is confirmed, or a binding obligation is created or confirmed. The formality requirements for a deed are more onerous than for a document that is required simply to be in writing or signed.

5.2 We discuss the current law of deeds in detail in Chapter 4 of the consultation paper.[247] In this chapter we summarise the current law, discussing the formal elements of a deed including the requirements that deeds must be witnessed and delivered. We also look at the decision in *Mercury*, which stakeholders have told us raises concerns about the use of "virtual" signings to execute deeds.[248]

5.3 In Chapter 6, we consider the provisional proposals that we made in the consultation paper, and consultees' responses to those proposals.

WHEN ARE DEEDS REQUIRED?

5.4 Deeds may be required by statute or the common law.[249] Some of the documents which must be executed as deeds include:

(1) arrangements relating to property, including conveyances of land or interests in land and mortgages;[250]

(2) powers of attorney (including powers of attorney used in a commercial context such as some inter-creditor deeds, and those used in a personal capacity such as lasting powers of attorney);[251]

(3) the exercise of powers of appointment;[252]

(4) certain actions under the Trustee Act 1925 such as the appointment or discharge of a trustee;[253] and

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247 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237") https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

248 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

249 CP 237, paras 4.9 to 4.13. They are also required for instruments registered under the Land Registration Act 2002, which are not within the scope of this project: Land Registration Act 2002, s 27, sch 2; Land Registration Rules 2003, SI 2003 No 1417, sch 9.

250 CP 237, para 4.10; Law of Property Act 1925, ss 52, 101(1), 104(1) and 155.

251 Powers of Attorney Act 1971, s 1(1); Companies Act 2006, s 47; Mental Capacity Act 2005, s 9 and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, SI 2007 No 1253, reg 5.

252 Law of Property Act 1925, s 159.

253 Trustee Act 1925, ss 39 and 40.

(5) agreements without consideration.[254]

5.5 Even when parties are not required by law to execute their document as a deed, they may nevertheless choose to do so, usually to secure longer limitation periods in the event of litigation.[255]

WHAT ARE THE REQUIREMENTS OF A VALIDLY EXECUTED DEED?

5.6 To be executed validly, a deed must fulfil the requirements prescribed by statute and, in the limited circumstances where statute does not apply, by the common law.[256]

5.7 Section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") provides that an instrument shall not be a deed unless:

(1) it makes clear on its face that it is intended to be a deed (the "face value" requirement);[257] and

(2) it is "validly executed as a deed".

5.8 Whether an instrument has been "validly executed as a deed" will depend on the circumstances and who is executing the deed.

Deeds executed by an individual

5.9 Section 1 of the LPMPA 1989 provides that for an individual to execute a deed validly, the instrument must be signed "in the presence of a witness who attests the signature and delivered as a deed".[258] We have explained in Chapter 3 our view that an electronic signature can satisfy a statutory requirement for a signature.

5.10 Section 1 was enacted following the Law Commission's 1987 report on deeds and escrows.[259] In that report, the Law Commission recommended the introduction of a requirement that deeds must be witnessed and attested in order to be valid.[260] The

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254 *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 259; J Cartwright, *Formation and Variation of Contract* (2014) para 4-17 and The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253 ("1998 Report"), https://www.lawcom.gov.uk/project/the-execution-of-deeds-and-documents-by-or-on-behalf-of-bodies-corporate/, para 2.5.

255 Limitation Act 1980, ss 5 and 8 and J Cartwright, *Formation and Variation of Contract* (2014) para 4-10.

256 CP 237, para 4.14 to 4.28. Under the common law, a deed must be signed, sealed and delivered: *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* paras 228 to 229. The common law requirements apply in limited circumstances: *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 227.

257 The face value requirement is discussed in *Katara Hospitality v Guez* [2018] EWHC 3063 (Comm) at [44] to [52].

258 Law of Property (Miscellaneous Provisions) Act 1989, s 1(3).

259 Deeds and Escrows (1987) Law Com No 163 ("1987 Report"), https://www.lawcom.gov.uk/project/deeds-and-escrows/.

260 1987 Report at para 5.1.

Law Commission pointed out that this recommendation simply formalised in law the practice at the time.[261] This was reiterated in Parliament.[262]

Deeds executed by a company formed under the Companies Act 2006

5.11 Deeds executed by companies under the Companies Act 2006 are dealt with by sections 44 and 46 of that Act. Section 46 provides that a deed is validly executed for the purposes of section 1 of the LPMPA 1989 if it is duly executed and delivered as a deed.[263]

5.12 Under section 44, a document may be executed in two ways by a company:

(1) by affixing the common seal; or

(2) by the signatures of:

(a) two authorised signatories (such as a director or the secretary of the company);[264] or

(b) a director of the company attested by a witness.

5.13 These provisions are modified by statutory instrument to apply to other types of corporations.[265] In addition to these statutory requirements, a deed made by a company must in general be executed in accordance with any formality requirements in its constitution.[266]

WITNESSING AND ATTESTATION

5.14 Witnessing involves observing the execution of a document. Attestation involves the additional step of recording, on the document itself, that the witness has observed the execution.[267]

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261 1987 Report at para 2.12.

262 *Hansard* (HC), 26 July 1989, vol 157, col 1141.

263 A document is presumed to be delivered upon execution unless a contrary intention is proved: Companies Act 2006, s 46(2).

264 Companies Act 2006, s 44(2) and (3).

265 For example, limited liability partnerships (Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009 No 1804, reg 4), unregistered companies (Unregistered Companies Regulations 2009, SI 2009 No 2436, reg 3, sch 1, para 3), overseas companies (Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009 No 1917, reg 4). Similar provisions apply with modifications to registered societies, which are membership organisations carrying on a social or community purpose. For example, Co-operative and Community Benefit Societies Act 2014, s 53, in comparison to s 44(2) of the Companies Act 2006.

266 *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 241. For example, the articles of association made under the Companies Act 1985 and the Companies Act 2006 allow for a further use of a company seal. This is discussed in M Anderson and V Warner, *Execution of documents* (3rd ed 2015) para 18.8.

267 *Burdett v Spilsbury* 10 Cl & Fin 416, 417; *Wright v Wakeford* [1803-13] All ER Rep 589, 591; and *Re Selby-Bigge* [1950] 1 All ER 1009, 1011. The definition of "attesting witness" in J Cartwright, *Formation and variation of contract* (2014) para 4-07, n 63 is also relevant. Typically attestation is achieved by the witness

What are the purposes of witnessing?

5.15 As we explain in Chapter 2, formalities may fulfil evidential, cautionary/protective or labelling purposes.[268] Although witnessing with attestation may further the evidential aim of formalities,[269] they evidence the fact of execution by a particular person and not the contents of the document.[270] There is no general requirement that a witness must read the document or do anything other than watch the signatory sign and attest to that fact. Nor is there any requirement for the witness to vouch for the identity of the signatory.[271]

5.16 Witnessing and attestation do, however, further the cautionary function of formalities by including another step in the execution process, which underlines the significance of the transaction and prevents the signatory from too readily incurring obligations.[272] It may also help guard against forgery or duress. A witness is "another pair of eyes" whose presence may ensure, for example, that the grantor's signature was not added by a beneficiary, and that the signatory executed the agreement voluntarily. At the very least, a witness may provide evidence as to the absence of vitiating factors if there is a subsequent dispute.[273]

5.17 In response to the consultation paper, the majority of consultees felt that the requirement that a deed must be witnessed provides protection to vulnerable people, particularly in the context of lasting powers of attorney. We discuss this in more detail in Chapter 2.[274]

5.18 We agree that a witness who is physically present may further the protective function in some circumstances. Equally, it is important to be realistic and practical about the level of this protection. Undue influence and duress are more likely to take the form of a sustained campaign against the signatory, which the witnessing requirement cannot protect against, rather than a "gun to the head"-type scenario.[275] Depending on the transaction, it is possible that the person applying the pressure may act as the witness

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signing an "attestation clause", which confirms that the document was duly executed in the presence of the witness.

268 We discuss formalities from para 2.5.

269 An attestation clause indicates that the document was indeed signed by the signatory: *Emmet & Farrand on Title* vol 2 *Execution of deeds* para 20-015. In 1985, the Law Commission said that attestation "would give rise to an evidential presumption of due execution". Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93 ("1985 Working Paper"), https://www.lawcom.gov.uk/project/transfer-of-land-formalities-for-deeds-and-escrows/, para 8.3(i). Also *Re Sandilands* (1871) LR 6 CP 411, 413 per Montague Smith J; and *First National Securities Ltd v Jones* [1978] Ch 109, 118 per Buckley LJ.

270 In the context of wills, Lord Eldon LC explained in *Wright v Wakeford* [1803-13] All ER Rep 589, 591 that "it is not the will that is attested but the act of the testator".

271 This is evident from the fact that a witness does not need to know the signatory, and is not obliged to identify the signatory prior to attestation (for example, by requesting sight of a passport or driving licence). We discuss this in CP 237, para 4.37.

272 1985 Working Paper at para 8.3(i).

273 1985 Working Paper at para 8.3(i); *Log Book Loans Ltd v Office of Fair Trading* [2011] UKUT 280 (AAC) at [73] and *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [29].

274 We discuss consumers and vulnerable parties from para 2.75.

275 CP 237, paras 8.21 to 8.23.

themselves.[276] Similarly, witnessing will not provide complete protection against fraud and forgery because there is no legal requirement that a witness must be independent.[277] Nor is there a requirement that the witness must know or be able to identify the signatory.

Can an electronic signature be "witnessed"?

5.19 It has been suggested that even a witness who is physically present may not be able to witness an electronic signature because what is being signed is hidden inside the computer and cannot be seen.[278] We do not agree. In the consultation paper, we referred to the 2001 Advice which noted that electronic communications have a "dual form"; that is, a display on a screen and their form as digital information.[279]

5.20 Although a witness may not be able to see the digital information, what they can see is the signatory purporting to add their signature to a document on the screen.[280] If a subsequent dispute arises, then the issues of evidence, security and reliability, which we address in Chapter 2 will need to be considered. However, we do not consider that this means that an electronic signature cannot be witnessed.

Does "the presence of a witness" mean physical presence?

The consultation paper

5.21 In the consultation paper, we discussed the requirement that a deed must be signed "in the presence of a witness who attests the signature".[281] Our provisional conclusion was that this provision requires that a witness must be physically present when the document is signed.[282] We cited *Brooke's Notary* in which the authors say, in relation to section 1 of the LPMPA 1989, that "[t]hese stringent requirements make it clear, among other things, that the witness or witnesses must be present in person at the signing of the deed".[283] We also considered older case law.[284] Moreover, the fact that

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276 Extra protections are in place for the execution of lasting powers of attorney. We discuss lasting powers of attorney from para 2.97.

277 Cf the position for lasting powers of attorney which is discussed in CP 237, para 4.48.

278 HM Land Registry, "Executing a document using an electronic signature" (8 February 2017), https://hmlandregistry.blog.gov.uk/2017/02/08/executing-document-electronic-signature/.

279 Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) ("2001 Advice"), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/, para 3.8; and CP 237, paras 3.9, 3.10 and 8.12.

280 At paras 3.9 and 3.10, we discuss the "dual form" of electronic communications, which was considered by the Law Commission in the 2001 Advice.

281 CP 237, paras 4.52 to 4.57. Also, Companies Act 2006, s 44 and Law of Property Miscellaneous Provisions Act 1989, s 1.

282 CP 237, paras 4.52 to 4.57.

283 N P Ready, *Brooke's Notary* (14th ed 2013), para 11-09; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 236. Attestation is considered in M Dray, "Deeds speak louder than words. Attesting time for deeds?" [2013] *The Conveyancer and Property Lawyer* 298.

284 *Freshfield v Reed* (1842) 9 M&W 404, 405; *Ford v Kettle* (1882) 9 QBD 139, 144 to 145; *Halsbury's Laws of England* (2012) vol 32 *Deeds and other Instruments* para 236.

the signature of the witness must be affixed at the time of execution supports the conclusion that a witness must be physically present when the document is signed.

5.22 However, we noted the comments of Lord Justice Pill in *Shah v Shah* that he could "detect no social policy which requires the person attesting the signature to be present when the document is signed".[285] We also acknowledged that much of the relevant case law was decided in the nineteenth century, when presence other than physical presence would not have been in the contemplation of the court or the parties.

5.23 Therefore, we asked whether consultees agreed with our provisional conclusion that the requirement under the current law that a deed must be signed "in the presence of a witness" required the physical presence of that witness.[286]

Responses from consultees

5.24 A significant majority of consultees strongly agreed with our provisional conclusion.[287] For example, the GC100[288] said:

> We agree that the natural meaning of this requirement is that the witness must be physically present when the deed is signed (although we have encountered arguments to the contrary).

5.25 CMS LLP said:

> We agree with the Law Commission's provisional conclusion that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical contemporaneous presence of that witness. In the absence of authoritative case law or legislation that specifically addresses and approves "virtual" witnessing, there will be concerns about its effectiveness in the electronic execution of deeds.

5.26 The General Council of the Bar of England and Wales also agreed with our provisional conclusion, pointing out that it is "more definitive" than the view taken in the 2016 note 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. The joint working party concluded that physical presence was "best practice".

5.27 Some consultees, including the City of London Law Society ("CLLS") and the BVCA,[289] agreed with our provisional conclusion, but said that they expected that the courts of England and Wales would take a practical, flexible approach in relation to witnessing without physical presence. Lloyds Banking Group also suggested it would be possible to argue that a witness would be present if the witness viewed the signing of the deed remotely. Others, including Eversheds Sutherland LLP, GC100 and Bryan

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285 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 at [30]; footnote 72 in CP 237, para 4.55.

286 CP 237, paras 4.57 and 9.2.

287 162 consultees responded to this question. 147 consultees (approximately 90% of responses) agreed with our provisional conclusion, with 9 consultees disagreeing (approximately 6% of responses) and 6 consultees (approximately 4% of responses) answering "other".

288 A membership organisation for general counsel and company secretaries working in FTSE 100 companies.

289 British Private Equity & Venture Capital Association.

Cave Leighton Paisner, did not think that parties could be confident that a court would accept witnessing without physical presence.

5.28 A small number of consultees[290] did not agree with our provisional conclusion that a witness must be physically present when the document is signed. Clifford Chance LLP also said that the law is unclear. The Law Society of England and Wales agreed that the law is "not free from doubt", saying:

> 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. 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.

5.29 Matthew Wardle (on behalf of third year law students at the University of Cumbria) pointed out that there is no explicit reference to what "presence of a witness" means and suggested that the legislation is open to broad interpretation.

Discussion

5.30 The provisions of the LPMPA 1989 and the Companies Act 2006 require the "presence of a witness". Although they do not specify "physical" presence, it is not clear that the requirement may be satisfied by remote forms of witnessing, such as by video link or other types of technology.

5.31 As a matter of statutory interpretation, there is a presumption that Parliament intends a court to interpret legislation in a way that allows for changes that have occurred since the Act was initially drafted. Such changes may include technological developments.[291]

5.32 How this principle of interpretation is applied will depend on the nature of the enactment and the way in which the provision has been expressed.[292] Therefore, in *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security*,[293] Lord Wilberforce said:

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290 9 out of 162 consultees who responded to this question (approximately 6% of responses). 6 out of 162 consultees who responded to this question (approximately 4% of responses) answered "other".

291 D Bailey and L Norbury, *Bennion on Statutory Interpretation* (7th ed 2017) paras 14.1 and 14.2; A Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (2018), p 21 onwards.

292 *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] AC 800 at 822.

293 *Royal College of Nursing of the United Kingdom v Dept of Health and Social Security* [1981] AC 800 at 822. This case was described in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] UKHL 13 at [10] as "authoritative". It has been cited in subsequent cases including *R (on the application of William Hill Organization Ltd) v The Horserace Betting Levy Board* [2012] EWHC 2039 (Admin), *R (on the application of Harrison) v Secretary of State for Health* [2009] EWHC Admin 574 (Admin), [2009] 3 WLUK 592 and *Revenue and Customs Commissioners v Rank Group Plc* [2013] EWCA Civ 1289, [2014] STC 470.

the courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive.

5.33 It could be argued, therefore, that "presence" should be interpreted broadly to include "virtual" or "remote" presence to account for changes in technology. However, section 1(3) of the LPMPA 1989 and section 44 of the Companies Act 2006 are restrictive, rather than permissive, provisions. The wording of these provisions limits the validity of deeds to documents which meet certain requirements.

5.34 There are also significant policy questions which should be considered before extending the provision to include remote or virtual witnessing, particularly in relation to section 1 of the LPMPA 1989 which applies to individuals. Deeds may be executed by individuals to confer authority on another person to make decisions about the donor's personal welfare, and/or property and affairs.[294]

5.35 Some consultees argued that it would be open for a court to decide that remote or virtual witnessing would satisfy the statutory requirements. Although we agree that may be the case, we are not persuaded that parties can be confident that the current law would allow for a witness viewing the signing on a screen or through an electronic signature platform, without being physically present. This conclusion is based on the combination of the restrictive wording of the statutory provisions and the serious policy questions underlying any extension to accommodate technological developments.

5.36 We make a further observation. Under the Companies Act 2006, a document may be executed in various ways:[295]

(1) by affixing the common seal of the company;

(2) by the signature of two authorised signatories; or

(3) by the signature of a director of the company in the presence of a witness who attests the signature.

5.37 As pointed out by the GC100, where a deed is executed by a corporation, a witness is not necessary in all cases: instead, it may be executed by the signature of two "authorised signatories".[296] There is no requirement for these signatures to be witnessed, or for the signatures to be applied at the same time. Therefore, a company may already execute a deed validly with electronic signatures (and without needing to satisfy a requirement for witnessing and attestation) under the Companies Act 2006.

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294 We discuss lasting powers of attorney from para 2.97.

295 Companies Act 2006, s 44.

296 An authorised signatory may be any director of the company and the secretary (or any joint secretary) of the company (where it is a private company with a secretary or a public company): Companies Act 2006, s 44(3).

DELIVERY

5.38 Another requirement for the valid execution of a deed is that it must be "delivered".[297] The purpose of delivery is to signify that the maker of the deed intends it to become effective and to be bound by it. A deed may be delivered even though it is still in the possession of its maker: physical delivery is not required by the law.[298] A deed takes effect from the date of delivery, not from the date of execution.[299]

5.39 Although the delivery of deeds is required by both the LPMPA 1989 and the Companies Act 2006, "delivery" is not defined in either statute.

Delivery in escrow and delayed delivery

5.40 Delivery may be effected in different ways.[300] First, a deed may be executed and delivered concurrently as an "unconditional deed". This means that the deed takes immediate effect and is irrevocable.[301]

5.41 The maker of a deed may not want the deed to take effect immediately on execution Therefore, one way of delaying delivery is to deliver a deed into "escrow". This means that the deed is irrevocable, but it will not take effect until one or more conditions of escrow are fulfilled, such as that transaction monies are received. Once those conditions are fulfilled, the deed becomes effective from the date that the deed was delivered into escrow.[302]

5.42 Another way of delaying delivery of a deed is to deliver it to an agent to "hold to order". This means that the deed is deposited with an agent "with instructions to deal with it in a certain way in a certain event".[303] Unlike unconditional delivery and delivery into escrow, this form of delayed delivery is revocable. The party can change their mind until delivery occurs.

Presumptions of delivery

5.43 In some cases, there is a rebuttable presumption of delivery of an instrument as a deed. For example, under the Companies Act 2006 an instrument is presumed to be delivered in accordance with the LPMPA 1989 when it is executed (that is, signed or sealed in accordance with section 44 of the Companies Act 2006), "unless a contrary intention is proved".[304] Additionally, where a lawyer or their agent or employee purports to deliver

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297 CP 237, para 4.58 to 4.76.

298 CP 237, para 8.61.

299 *Universal Permanent Building Society v Cooke* [1952] Ch 95, 101; 1998 Report at para 6.6.

300 *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 195, cited in *Silver Queen Maritime Ltd v Persia Petroleum Services plc* [2010] EWHC 2867 (QB) at [107].

301 1998 Report at para 6.5.

302 *Silver Queen Maritime Ltd v Persia Petroleum Service Plc* [2010] EWHC 2867 (QB) at [116]. In their response to the consultation paper, Bryan Cave Leighton Paisner LLP told us that in practice, to avoid an earlier date of execution, deeds are normally regarded as delivered conditionally rather than in escrow.

303 *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 195.

304 Companies Act 2006, s 46(2). Also, Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, SI 2009 No 1804, reg 4 (in relation to limited liability partnerships), the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009 No 1917, reg

an instrument as a deed on behalf of a party, "it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument".[305]

5.44 There are no such statutory presumptions for individuals, though the question of when or whether a deed is delivered has been considered in case law. Although there does not need to be a physical handing over of the deed to the other party,[306] there must be an act or words showing an intention to be bound.[307]

MERCURY

5.45 In the consultation paper in Chapters 4 and 8, we discussed the decision in *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs*.[308] Mr Justice Underhill (as he then was) referred to a document as needing to be "a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing". He also said that section 1 of the LPMPA 1989 had the effect that (in the case of a deed) "the signature and attestation must form part of the same physical document".[309]

5.46 These comments were obiter – that is, incidental and not part of the main decision.[310] However, they raised concerns among lawyers about the use of pre-signed signature pages and signings or closings where signature pages are sent by email or by fax. In 2009, the joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees published a note, which was intended to facilitate virtual signings and closings in the light of *Mercury*.[311] A "virtual signing", in the context of the 2009 note, is a signing or completion meeting at which not all, or none, of the signatories are present.

5.47 The 2009 note emphasised the importance of ensuring that all parties' lawyers have agreed to the proposed arrangements for the virtual signing. It suggested three options for a virtual signing, with various levels of formality, depending on the type of document being executed.

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4 (in relation to overseas companies), the Unregistered Companies Regulations 2009, SI 2009 No 2436, reg 3, sch 1, para 3 (unregistered companies), Charities Act 2011, s 260(4) (in relation to charities) and the LPA 1925, s 74A (corporations aggregate).

305 Law of Property (Miscellaneous Provisions) Act 1989, s 1(5).

306 1998 Report at paras 6.1 to 6.2.

307 *Chitty on Contracts* (32nd ed 2015) vol 1 para 1-121. *Xenos v Wickham* (1866) LR 2 HL 296 is cited by textbooks as authority for this proposition and was cited by the Court of Appeal in *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66 at [35].

308 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

309 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743 at [39] to [40].

310 This is discussed in CP 237, para 4.86.

311 The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf .

(1) Option 1. Final execution copies of documents are emailed to all parties. Each party prints and signs the signature page only and then sends a single email, to which is attached the final version of the document and a PDF copy of the signed signature page.

The 2009 note's view is that the PDF (or Word)[312] final version of the document and the PDF of the signed signature page (both attached to the same email) will constitute an original signed document and will equate to the "same physical document" referred to in *Mercury*.

(2) Option 2. Final execution copies of documents are emailed to all parties. Each party prints and signs the signature page only and then sends an email, to which is attached a PDF copy of the signed signature page.

The 2009 note's view is that a print-out of the execution version of the document with the printed and signed signature pages attached will constitute an original signed document.

(3) Option 3. The signature pages relating to the documents still being negotiated are circulated to parties. The signature page is executed by each signatory and returned to be held to the order of the signatory (or the signatory's lawyers) until authority is given for it to be attached to the document to be signed. Once each document has been finalised, the law firm co-ordinating the signing of the documents emails the final version of the document to each absent party (or their lawyers, or both). They will also obtain confirmation that the final version of the document is agreed, and authority to attach the pre-signed signature page to the final version and to date and release the document.

The 2009 note's view is that the final approved version of the document with the pre-signed signature pages that have been attached with the prior approval of the parties (or their lawyers) will constitute an original signed document.

5.48 As to which option should be used for each type of document, the 2009 note included a table which summarised its conclusions, which we reproduce with permission:

Type of document	**Option 1 – Return PDF/Word document plus signature page**	**Option 2 – Return signature page only**	**Option 3 – Advance pre-signed signature pages**
Deeds	Yes	No	No
Real estate contracts	Yes	No	No

[312] A PDF file, while ostensibly "locked", can be edited. Conversely, a Word document can be locked for editing in the same way as a PDF. We do not consider that the type of file used in these examples is determinative of the validity of a given virtual signing procedure. However, as set out in Chapter 2 of CP 237, parties may wish to consider the evidential value of the system used.

Guarantees (stand-alone or contained in simple contracts)	Yes	Yes	Yes
Simple contracts (not incorporating any of the above)	Yes	Yes	Yes

5.49 As in the consultation paper, we agree with, and endorse, the conclusions of the 2009 note, which provides a practical way of dealing with the concerns raised by *Mercury*.

5.50 We understand the 2009 note is being followed by the market. In those circumstances, in the consultation paper we did not consider that legislative reform was necessary and we did not propose options for reform to address the concerns raised by *Mercury*.

5.51 However, as we have said above, the 2009 note deals with handwritten signatures which are then scanned. Some stakeholders asked for guidance on how electronic signatures may satisfy a requirement that the document is a "discrete physical entity at the moment of signing". While there are a variety of signing situations, we commented on two examples of approaches to using electronic signatures. Regardless of the approach used, parties should not lose sight of the principle that there must be an agreement between the parties to all the terms of the alleged agreement.

5.52 The first example we referred to was where an electronic signature is applied to an electronic document, such as a Word or PDF document. In that case, the question of whether the document is a "discrete physical entity at the moment of signing" should not arise. This is because the signature can be applied to the document without removal of the signature pages. However, if the signature page is removed, the options outlined by the 2009 note should be followed.

5.53 The second example was where a document is executed over an online signing platform. Such platforms allow a signatory to open a link delivered electronically (for example, by email) by the coordinator to access a common controlled version of a document in which they can add their electronic signature. The link may be protected by various authentication processes, including a password. The signatory does not have to print, sign by hand, scan, email or fax the signed page. The system records which signatories have executed the document (including the time, date of signing and IP address of the computer, plus any additional authentication). The coordinator may be authorised to insert a date or counter sign after all the parties have executed the document. Once the document is executed, the system delivers electronically a link or a PDF of the signed document.

5.54 Our view remains that this process is analogous to Option 1, described above. When the party signs the document on an online system, they have the entire document before them. If the document is a deed, and the application of an electronic signature is witnessed and attested in the physical presence of the witness who then applies their

own electronic signature, the signature and attestation will “form part of the same physical document”.

5.55 Accordingly, the electronic document sent by the system, comprising the final version of the document signed by an electronic signature, will constitute an original signed document and will equate to the “same physical document” referred to in *Mercury*.

Chapter 6: Deeds – recommendations

6.1 In this chapter we continue our discussion of deeds, paying particular attention to the provisional proposals for reform suggested in the consultation paper.[313]

6.2 Our provisional proposals focused primarily on the requirement of witnessing and attestation. In the consultation paper we explored several different options for reform. We set these out below, along with consultees' responses. We explain that, in most cases, consultees did not consider that the options we set out were necessary or desirable. We make one recommendation for reform, relating to witnessing by video link.

6.3 In Chapter 4 we recommended that an industry working group should be established to consider practical issues associated with the electronic execution of documents.[314] In this Chapter we recommend some areas around deeds for the industry working group to consider. We also recommend that Government should ask the Law Commission to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose.

6.4 We then return to the requirement that deeds must be "delivered". In the consultation paper, we asked consultees whether this requirement was blocking the electronic execution of deeds in practice. We discuss consultees' responses below and conclude that legislative reform is not necessary or appropriate.

6.5 We also explain why we do not think legislation is necessary to deal with comments from Mr Justice Underhill in *Mercury*,[315] which we discuss in Chapter 5. However, we agree that it may be desirable, and recommend that it be considered as part of any wider review of the law of deeds.

6.6 Finally, we consider consultee views on our provisional proposal that a review of the law of deeds should be a future Law Commission project. We recommend that Government should ask the Law Commission to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose.

WITNESSING AND ATTESTATION

6.7 Legislation requires that a deed must be signed in the presence of a witness who attests the signature.[316] In Chapter 5, we conclude that parties could not be confident

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313 Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

314 Recommendations 1, 2 and 3 from para 4.127.

315 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

316 We discuss the formality requirements for deeds in Chapter 5.

that the current law would allow for "remote" witnessing where the witness is not physically present when the signatory signs the deed.[317]

6.8 At the pre-consultation stage, some stakeholders told us that this aspect of the law is preventing the widespread use of electronic signatures to execute deeds. Therefore, in the consultation paper we explored various potential options for the execution of deeds electronically. Rather than set out only one preferred option for reform, we set out a range of options for potential reform, divided into two categories. First, those which maintained the traditional requirements for witnessing and attestation, based on deeds being in paper form, namely:

(1) witnessing by video link; and

(2) witnessing through a signature platform.

6.9 Although both of these potential options would require legislative reform, they would retain the traditional characteristics of a deed, transposed into an electronic format.

6.10 Secondly, we set out tentative options for reform which would require a significant departure from the current requirement for witnessing and attestation:

(1) the use of digital signatures, or another type of technology, to replace witnessing and attestation; and

(2) a new concept of acknowledgment for electronic signatures.

Witnessing using a video link

The consultation paper

6.11 We provisionally proposed that it should be possible to witness an electronic signature via video link and then attest the document.[318] We considered that the use of a video link was the most obvious move away from physical presence while still retaining the key elements of witnessing. The witness could observe the signing ceremony via the video link and attest to execution by affixing their own electronic signature to the same document. The witness could then attest to the fact of having seen the document being signed, though not in the physical presence of the signatory.

6.12 Our provisional view was that witnessing via video link was sufficiently similar to witnessing in the physical presence of the signatory that it should be permitted. Such a solution would be technology neutral in terms of the type of electronic signature which could be used.

Responses from consultees

6.13 Consultees responded positively to this proposal but also raised a number of practical challenges. A clear majority of consultees, including the City of London Law Society ("CLLS"), the Law Society and law firms agreed that it should be possible to witness

317 We discuss witnessing from para 5.14.

318 CP 237, para 8.32.

an electronic signature via video link and then attest the document.[319] For example, Eversheds Sutherland LLP agreed because video link could satisfy the "key elements of witnessing" which require "both visual and audible confirmation that something is being done." They noted that:

> Quality and speed of video technology will only improve over time which makes the argument for permitting attendance by video stronger…

6.14 However, most consultees who supported the proposal did not do so unconditionally. There were a range of issues raised by consultees, including:

(1) whether an electronic signature can be witnessed at all;

(2) whether the proposal for video witnessing is a viable and practical option;

(3) whether it would give rise to an unacceptable risk of fraud; and

(4) the need for careful legislation.

Can an electronic signature be witnessed?

6.15 We have previously noted that there is an argument that even a witness who is physically present may not be able to witness an electronic signature.[320] This point was reiterated by two consultees, HM Land Registry and the GC100. For example, HM Land Registry said:

> It is the view of HM Land Registry that it is not possible for an electronic signature to be physically witnessed in the way that a pen and ink signature can. An electronic document is a collection of data in a computer system, and the electronic signature is another data string that is attached to it. The e-signature is applied to the data within a software system, or in a hardware security module, or some other computing device. A person cannot witness that process. Any witness could not be sure that the signatory had electronically signed the data that the screen purports to represent, or that the screen represents the data that is intended to be signed. This will apply equally if a witness tries to view the signing by video link. Also, the screen is unlikely to show the whole document, perhaps just a small section where the signature is to be shown. If there were a subsequent challenge it may not be possible for the witness to confirm that they witnessed the signing of the whole of an electronic document.

6.16 We have previously explained that the common characteristic of case law on electronic signatures was that the courts looked to whether the method of signature used fulfilled the function of a signature: that is, demonstrated an intention on the part

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[319] 165 consultees responded to question 7. 114 consultees (approximately 69% of responses) agreed with our provisional proposal, with 37 consultees disagreeing (approximately 22% of responses) and 14 consultees (approximately 9% of responses) answering "other". It is noted that a large number of these responses (approximately 60) were identical responses and simply said "yes", adding no detail.

[320] CP 237, para 8.12.

of the signatory to authenticate the document.[321] The law of England and Wales has taken a flexible approach and courts have held that a requirement for a signature has been satisfied by various forms.[322]

6.17 The requirements for a witness are also generally flexible and permissive.[323] There is no express restriction as to who can be a witness under the Law of Property (Miscellaneous Provisions) Act 1989 ("LPMPA 1989") or the Companies Act 2006 and no general requirement that an attesting witness to a deed must be independent from the signatory.

6.18 In the consultation paper, we said that "Although a witness may not be able to see the digital information, what they can see is the signatory purporting to add their signature to a document on the screen".[324] We consider that this is the salient point. The witness is required to attest to the fact that he or she saw the signatory add his or her mark (in whatever form that takes) to a document.

6.19 As to whether the witness could be sure that the signatory had electronically signed a certain document, or whether the screen is unlikely to show a whole document, we are not persuaded that this is relevant to the question of whether witnessing of an electronic signature is possible. There is no general requirement at law that an attesting witness must read a document, understand its effect, or do anything other than watch the signatory sign and then attest to that fact.[325]

Is the proposal for video witnessing a viable and practical option?

6.20 Some consultees queried whether the requirement for witnessing and attestation is causing a genuine problem which could be solved by video witnessing. Instead, consultees indicated that the primary blockers to electronic execution of deeds are technical, practical issues. For example, the CLLS and the Law Society, while agreeing with our provisional proposal, both said that the issue is less the problem of finding a witness to be physically present and more about the operation of signing platforms. The CLLS noted that issues of "commercial confidentiality … mean that the parties do not want a witness unrelated to the deal to have the full document sent to them".

6.21 CMS LLP also noted the confidentiality concerns, and pointed out that, when the witness received the document for attestation, "they would need to satisfy themselves that this was the same document that they had observed being signed earlier" by video link.

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321 CP 237, para 3.20; Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) ("2001 Advice"), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/, para 3.26.

322 CP 237, para 3.18.

323 One exception to this approach is in relation to lasting powers of attorney, which we consider in CP 237, para 4.48.

324 CP 237, para 8.12.

325 CP 237, para 4.34 onwards.

6.22 Some consultees, although agreeing with witnessing by video link, suggested that the focus of a review of witnessing should be on removing the requirement for a witness for certain documents, rather than on enabling witnessing of deeds through electronic means.

Risk of fraud

6.23 Many consultees raised concerns about whether the use of remote witnessing would increase the risk of fraud, particularly where documents were executed by vulnerable individuals. However, a clear majority of consultees nonetheless agreed with our provisional proposal that it should be possible to witness an electronic signature via video link and then attest the document. Several consultees expressed concern about the risks of fraud, but accepted that video witnessing could be used as long as appropriate safeguards were in place. Weightmans LLP said that the option should be available to those who wished to use it, as long as the correct safeguards were in place. However, they emphasised that "it should by no means be compulsory".

6.24 Other consultees, including the STEP[326] and the Chancery Bar Association, considered that the risk of fraud would be too great.[327]

6.25 Consultees involved in the conveyancing process advocated a new regime. Documents should not require traditional witnessing and instead should be subject to a system where parties are required to prove their identity prior to signing the document digitally.[328] The Conveyancing Association and Beth Rudolph said:

> Additional protection for vulnerable people or around vulnerable documents (eg lasting powers of attorney) should have enhanced levels of diligence which are already endemic through regulation of legal entities.

Careful legislation

6.26 Some consultees agreed with our provisional proposal, but suggested that any move to video witnessing would require careful, considered legislation. The General Council of the Bar of England and Wales, Solicitors for the Elderly, the Agricultural Law Association and Peter Hughes each thought that legislation should set out the precise requirements for satisfying witnessing and attestation. It should also deal with issues of identity, the consequences of a technology failure and the extent to which the witness should have sight of the signatory. Icon UK, acknowledging that video witnessing was "technically possible" and should be permitted, said that there would need to be "controls in technical, process and legal matters according to the quantum of gain or risk".

6.27 Consultees including the Chancery Bar Association, Yoti, DocuSign, and RBS[329] cautioned against recommending any solution which is not technology neutral and may become outdated. As we discuss in Chapter 4, there are risks with legislating too prescriptively for technology. Such an approach may stifle innovation, inadvertently

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326 Society of Trust and Estate Practitioners.

327 One consultee, Michael O'Brien, suggested that video witnessing could be used for commercial parties only.

328 This approach would be similar to that taken by HM Land Registry, as discussed from para 6.57.

329 The Royal Bank of Scotland plc.

exclude new types of technology and create the potential for unnecessary disputes over compliance with technical requirements.[330]

Discussion

6.28 The majority of consultees supported our provisional proposal that it should be possible to witness an electronic signature via video link and then attest the document. However, having considered these responses, we are not convinced that a current need for legislation allowing video witnessing has been demonstrated.

6.29 Some consultees, including those who supported our provisional proposal, queried whether witnessing of deeds causes a genuine problem and, if so, whether the option for video witnessing would solve that problem. Consultees have instead pointed to other obstacles to the electronic execution of deeds, including:

(1) for electronic signature platforms, having to pre-identify a witness before starting the signing process;

(2) the need to sequence the signing to ensure that the witness signs after the signatory;

(3) maintaining the confidentiality of the document;

(4) whether a witness should attest a document using the same device as the signatory or a separate device (which may lead to confidentiality concerns).

6.30 These technical, practical issues do not require legislative reform. In the consultation paper we said that it would not be appropriate for the Law Commission to provide guidance on these types of issues.[331] The practical and technical issues identified above in relation to electronic execution of deeds could be considered by the industry working group.[332] This was also suggested by the CLLS and the Law Society.

6.31 Consultees were particularly concerned about whether the use of remote witnessing would increase the risk of fraud, particularly where documents were executed by older or vulnerable individuals. In Chapter 2 we acknowledge that the potential for fraud, and of harm to vulnerable parties, are serious issues which require careful consideration.

6.32 We agree with the majority of stakeholders, which include a significant number of private client lawyers, that the possibility of remote witnessing should not be rejected due to the risk of fraud. However, it is clearly something which would need to be considered carefully before introduction. In Chapter 4 we recommended that the terms of reference for the industry working group should include producing best practice guidance for the use of electronic signatures where individuals, in particular vulnerable individuals, execute documents electronically.[333] The technical aspects of remote

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330 This is discussed from para 4.58 and in CP 237, paras 6.12 to 6.15.

331 CP 237, paras 7.24 and 7.25.

332 We recommend that an industry working group should be established to consider practical issues associated with the electronic execution of documents: Recommendations 1, 2 and 3 from para 4.127.

333 Recommendation 2(4) at para 4.128.

witnessing, including protections which could be available to protect individuals executing deeds, are also questions which may be suitable for the industry working group to consider.

6.33 Following the work of the industry working group, it may be that video witnessing is still considered to be an attractive option for stakeholders. In that case, we recommend that Government should consider whether to legislate to allow for video witnessing.

6.34 If legislation was required, then section 8 of the Electronic Communications Act 2000 ("ECA 2000") would be relevant. This section provides a power to modify primary or secondary legislation to authorise or facilitate the use of electronic communications for certain purposes, including:[334]

> the doing of anything which under any such provisions is required to be or may be authorised by a person's signature or seal, or is required to be delivered as a deed or witnessed.

6.35 Given the drafting of section 8 (as a power to modify statutory provisions), any move to facilitate video witnessing may have to be targeted at specific provisions (for example, an amendment of section 1 of the LPMPA 1989) rather than being general in nature.

The mechanics of video witnessing

6.36 We asked consultees how, if video witnessing was to be permitted, the witness should complete the attestation.[335] We provided two potential options:

(1) via a signing platform which the signatory and witness both log into; and/or

(2) with the document being emailed to the witness by the signatory immediately after signing.

Responses from consultees

6.37 The majority of consultees[336] said that the attestation should be completed via a signing platform. A minority agreed that attestation could be completed by the signatory emailing the document directly to the witness immediately after signing.

6.38 Most consultees who said that attestation should be completed by a signing platform, rather than by email, considered that email was not sufficiently secure. For example, Solicitors for the Elderly thought that emails might be more subject to "technical glitches (e.g. failed delivery of an email, problems in accessing attachments)". They

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334 Electronic Communications Act 2000, s 8(2)(c). We note that the use of this power would need to be to amend existing provision, such as section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 44 of the Companies Act 2006.

335 CP 237, paras 8.33 and 9.8.

336 118 of the 165 consultees who answered this question (approximately 72% of responses) said attestation should be completed via signing platform. 19 said attestation could be completed emailing the document. 28 responses answered "other". 52 consultees submitted an identical response, saying that a signing platform was to be preferred (but only if video witnessing was used – a signing platform alone was not sufficient).

also suggested that use of a signing platform would encourage a prompter completion of the formalities.

6.39 In contrast, Nicholas Bohm, a member of the project's advisory panel, raised concerns about signing platforms, particularly around the assessment of their reliability. He suggested that most prospective users would not be in a position to determine whether the claims of the signing platform were justified or could be relied upon.

6.40 19 consultees said that either option would be viable for attestation. 11 consultees, including Clifford Chance LLP, the CLLS and the Law Society, warned against prescribing a technological solution and suggested that any method of attestation should be technology neutral.

6.41 A minority of consultees said that neither method was a viable option for attestation. Most of these responses focused on security concerns.

6.42 Judge Elizabeth Cooke suggested that there was a fundamental problem which could undermine the premise of remote witnessing, saying that there is no way for the witness to "know that the document he or she is attesting is the one whose execution he or she has witnessed." Because the witness does not see the text of the document, they would not know if a different document was sent to them (for example, by email) after they have witnessed by video link.

6.43 Although we acknowledge that this appears to be a significant problem, it is one that could arguably be resolved through the use of technology. It is therefore the type of issue which could be considered by the industry working group recommended above.

Discussion

6.44 We recommend that Government should consider using section 8 of the ECA 2000 to allow for video witnessing, after consideration of the practical, technical issues by the industry working group. Given that recommendation, we do not make any further recommendation as to how attestation should be achieved. That could be a matter for the industry working group, taking into account responses which we have received from consultees.[337]

[337] We summarise the results of the consultation exercise in this report; a fuller summary of responses in published separately: https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

RECOMMENDATIONS

Recommendation 4.

6.45 The terms of reference for the industry working group should include:

(1) Considering potential solutions to the practical and technical obstacles to video witnessing of electronic signatures on deeds and attestation; and

(2) Considering how these potential solutions can protect signatories to deeds from potential fraud.

Recommendation 5.

6.46 Following the work of the industry working group, Government should consider using section 8 of the Electronic Communications Act 2000 to allow for video witnessing.

WITNESSING AND ATTESTATION OF DEEDS – OTHER PROVISIONAL PROPOSALS

6.47 In the consultation paper, we set out several other provisional proposals in relation to the witnessing and attestation of deeds. None of these provisional proposals were strongly supported by consultees and we do not recommend taking any of them forward. However, for completeness, we provide below a description of each provisional proposal, along with a short summary of consultees' responses.

6.48 In some cases, we suggest that the options could be revisited as part of a wider review of deeds.[338]

Signing platform with no video link

6.49 One provisional option we explored in the consultation paper was the ability to witness an electronic signature through a signing platform without a video link or direct communication between the signatory and the witness.[339]

6.50 We explained that a signatory and a witness could be logged onto the same signing platform from different locations, having authenticated themselves through the use of a password or, for example, a PIN sent to their respective mobile phones. The signatory could then apply their electronic signature to the document and the witness could see the signatory's signature on the document. The witness could attest the signatory's signature by applying their own signature to the same document on the signing platform.

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338 We discuss our recommendations for a future review of the law of deeds below from para 6.111.

339 CP 237, paras 8.37 to 8.42; Also question 9 of the consultation paper: CP 237, paras 8.42 and 9.9.

6.51 The witness would not actually see the physical act of the signatory applying the signature so they could not attest to this. However, the witness would need to be sufficiently satisfied that the signature was applied by the signatory. We explained that the functions of formalities for deeds would be satisfied but to a lesser extent than with the use of a video link.

Responses from consultees

6.52 The majority of consultees said that it should not be possible to "witness" an electronic signature through an online signing platform without a video link or any direct communication between the signatory and the witness.[340] Specifically, most consultees pointed out that the use of a signing platform in this way could undermine the evidential and protective functions of formalities for deeds. For example, Buckles Solicitors LLP said:

> This leaves open the risk of the "signing" being made by someone who is either not the individual (i.e. fraud) or is the individual but they are subject to undue influence or lack the mental capacity to agree to the document in question.

6.53 Some consultees highlighted the risk of fraud and others suggested that the option of using a signing platform offered limited additional benefits and complicated the requirement to "witness" an electronic signature.

6.54 The Law Society and Clifford Chance LLP noted that there may be some practical issues with this option and including that it is not (at least currently) possible to log onto a platform simultaneously.[341]

6.55 Consultees also raised concerns such as the platform's security, the value of the witness, the importance of capturing sufficient data and evidence and the need to ensure that the person logged onto the platform is indeed the person named in the document.

6.56 There was little support for this option and we do not make any recommendation concerning witnessing an electronic signature using a signing platform without a video link or direct communication between the witness and the signatory.

A technology-specific approach

6.57 Another option we considered was whether the witnessing and attestation requirement should be replaced with an approach based on a specific type of technology, such as Public Key Infrastructure.[342]

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340 162 consultees responded to question 9. 18 consultees (approximately 11% of responses) agreed that it should be possible, with 126 consultees disagreeing (approximately 78% of responses) and 18 consultees (approximately 11% of responses) answering "other". Of the 126 consultees who disagreed, 58 consultees submitted an identical response saying that such an approach would undermine the protective function of a witness, which is particularly important in the execution of lasting powers of attorney.

341 Nicholas Bohm, a member of the project's advisory panel, also raised this point.

342 CP 237, paras 5.30, 5.31 and 8.43 to 8.50. We discuss Public Key Infrastructure at paras 2.13 and 2.14 of Appendix B.

6.58 This would be similar to the policy of HM Land Registry,[343] and we recognise the attractiveness of having a single system for all deeds executed electronically. Under the proposed system, HM Land Registry will be a "trust service provider", providing advanced electronic signatures, and it will adopt a process under which an additional authentication process will be carried out through the GOV.UK Verify system.[344] Section 91 of the Land Registration Act 2002 underpins this system. Section 91 provides that a document in electronic format is "to be regarded for the purposes of any enactment as a deed" if it meets certain requirements, including that the document is signed with an electronic signature, which is certified.[345]

6.59 Ultimately, in the consultation paper we decided not to offer this as a provisional proposal for reform, highlighting the important differences between our project and the work of HM Land Registry. HM Land Registry deals with registrable instruments[346] which must be entered onto the register of title. As a register of title, HM Land Registry provides an indemnity for mistakes in the register.[347] Rules may be made about how the register is to be kept and how electronic documents may be registered.[348] This provides HM Land Registry with control over a self-contained system of documents, which is not present in other contexts. Replacing the requirement for witnessing and attestation with a mandatory type of technology would involve a significant departure from the current requirements of a deed, and we did not consider that there was a justification for it in the wider context.

6.60 We asked consultees whether they agreed with our view 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.[349]

Responses from consultees

6.61 A significant majority of consultees strongly agreed with our view that there should be no requirement for a particular type of technology.[350] Some consultees, including the Conveyancing Association, the GC100, DocuSign and RBS, were concerned that

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343 HM Land Registry, Consultation on Proposals to amend the Land Registration Rules 2003 (2017), paras 21 to 37; and HM Land Registry, Proposals to amend the Land Registration Rules 2003 Government Response (2018), ch 4. Also, CP 237, para 1.11 and the accompanying footnotes; and Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, paras 13.11 to 13.33.

344 HM Land Registry, *Proposals to amend the Land Registration Rules 2003 Government Response* (2018), paras 4.16 to 4.25.

345 Land Registration Act 2002, s 91(4), (5).

346 Land Registration Act 2002, ss 27, 91.

347 This is discussed in Updating the Land Registration Act 2002 (2018) Law Com No 380, https://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/, paras 14.1 and 14.5.

348 Land Registration Act 2002, ss 1, 91.

349 CP 237, paras 8.50 and 9.10.

350 159 consultees responded to question 10. 138 consultees (approximately 86% of responses) agreed with our view, with 11 consultees disagreeing (approximately 7% of responses) and 10 consultees (approximately 6% of responses) answering "other".

mandating a particular type of technology may stifle innovation or undermine the flexibility of the common law, or that the legislation would become obsolete.

6.62 Similarly, consultees including CLLS, Taylor Wessing LLP, OneSpan and the Society of Scrivener Notaries said that technology such as Public Key Infrastructure may be costly and cumbersome to use, especially in a private context.

6.63 Other consultees, including the Chancery Bar Association and STEP, said that a one-size-fits-all approach may not be appropriate because different types of signature could be appropriate for different documents.

6.64 Eleven consultees did not agree with our view. HM Land Registry and the Notaries Society referred to the eIDAS Regulation ("eIDAS")[351] to indicate that the law already includes provisions on certain types of signatures such as digital signatures. Replacing the witnessing and attestation requirement for electronic signatures with a requirement for a digital signature, with a certificate, would be consistent with the current law.

6.65 In relation to our general approach to deeds in the consultation paper, HM Land Registry sounded a note of caution, saying:

> HMLR is of the view that it is not appropriate to try to replicate the paper process in the digital world. The existing law on e-signatures recognises this, and introduces provisions for trust services. A trust certificate is provided with an electronic signature, which links the signature to a person, and also protects the integrity of the data once signed. Certification takes the place of witnessing, transposing a notarial model into the digital environment … HM Land Registry is concerned about the confusion that will be caused by the Law Commission's proposals. The proposal will result in two different regimes for digital deeds.

Discussion

6.66 We agree with HM Land Registry that a single comprehensive and consistent system dealing with the electronic execution of deeds would be the preferable approach. However, the majority of stakeholders have told us that they would oppose a course of action which mandated a specific type of technology. They stressed the importance of the general law remaining flexible and technology neutral, as well as a desire not to stifle innovation.

6.67 The responses from the majority of consultees have convinced us that we should not mandate a particular type of technology, and we do not make any recommendation for reform. However, this issue could be revisited as part of a general review of the law of deeds, particularly if such a review considered the role of deeds and/or witnessing, for at least some types of transactions.[352]

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351 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS").

352 We discuss our recommendations for a future review of the law of deeds below from para 6.111.

Electronic acknowledgement

6.68 The final option which we explored in the consultation paper was that of electronic acknowledgement. We provided the following example:

> Alice signs a deed with her electronic signature. Alice phones or emails Bob to tell him that she has signed the document, then sends the document to Bob. Bob sees the document with Alice's signature. Bob signs the document with his electronic signature and includes a statement on the document that Alice has acknowledged her signature to him.

6.69 We recognised that this option would involve a significant legislative amendment as it envisages a fundamental change to the elements of a deed for deeds executed electronically. We said, therefore, that we would not recommend it lightly. However, it also has benefits over technology-specific options such as the above. We asked whether consultees thought 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.[353]

Responses from consultees

6.70 A significant majority of consultees disagreed with this provisional proposal.[354] Of the consultees who disagreed, most were concerned about protections for individuals executing deeds.[355] 24 respondents provided responses which highlighted the protective nature of deeds, particularly for those documents executed by individuals.

6.71 Other consultees rejected the notion entirely. For example, the Society of Scrivener Notaries said there was "no material advantage to a system of electronic acknowledgments over one of electronic witnessing". They submitted that

> any legal concept of electronic acknowledgment would fail to find suitable traction in the public domain and, as a result, it would prove to be an inadequate alternative to witnessing.

6.72 The Chancery Bar Association, the CLLS and the General Council of the Bar of England and Wales did not consider that this proposal would have real, practical benefits.

6.73 However, 27 consultees supported a move away from traditional witnessing, or indeed witnessing altogether, to a different type of system. For example, Stephen Bowman said:

> Absolutely (other than specific exceptions for vulnerable persons / special contracts). … [A] witness adds very little value to the contracting process but does

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353 CP 237, paras 8.51 to 8.60, and 9.11.

354 164 consultees responded to question 11. 27 consultees (approximately 17% of responses) agreed with our view, with 124 consultees disagreeing (approximately 76% of responses) and 13 consultees (approximately 7% of responses) answering "other".

355 64 consultees provided identical responses. These acknowledged that there may be a case for moving away from traditional concepts in limited circumstances involving commercial transactions.

introduce inconvenience, complexity (as demonstrated by the need for this consultation) and cost.

6.74 euNetworks thought that the purpose of witnessing "is really evidential" and that "technology with ID verification … would ultimately be far better evidence and easier to find and prove than trying to track down a secretary, neighbour or acquaintance who may have been handy to witness a signature at the time".

6.75 Eversheds Sutherland LLP noted the practical benefits of the concept of acknowledgement and argued that it should be allowed for both paper and electronic documents, saying "This would be a relaxation of the current rules around executing deeds without losing all the benefits of the witnessing process".

6.76 Other consultees, regardless of their ultimate answer, suggested that a further review of the law of deeds could consider the purpose of witnessing and the circumstances in which it is necessary.

Discussion

6.77 We have not received a strong response in favour of this option from consultees and, in those circumstances, we do not recommend that this option should be taken forward.

6.78 Consultees were particularly concerned about the use of electronic acknowledgement in the context of deeds executed by vulnerable individuals but were open to the idea of it being used for commercial transactions. There was also support for the concept of acknowledgement being considered as part of a wider review of the law of deeds.[356] Such a review could include consideration of the issues raised by consultees, including whether it should apply at all, or in a limited way to commercial transactions only.

6.79 Therefore, we recommend that the concept of acknowledgement, for both paper and electronic deeds, should be considered as part of a wider review of the law of deeds.[357]

DELIVERY

6.80 In Chapter 5 we explained that the traditional legal requirement that a deed must be "delivered" no longer requires a physical transfer of possession of the document.[358] Instead, delivery may now be affected in various ways, such as delivering a deed into escrow or to an agent "to hold to order", or including a clause which states the date of delivery. For certain transactions there are also statutory presumptions of delivery, although these do not apply to deeds executed by individuals.

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356 We discuss our recommendations for a future review of the law of deeds below from para 6.111.

357 Recommendation 7 at para 6.135.

358 We discuss this from para 5.38.

6.81 Although it did not appear that the requirement for delivery was preventing the electronic execution of deeds, we asked for consultees' views in the consultation paper.[359]

Responses from consultees

6.82 A strong majority of consultees agreed that the requirement that deeds must be delivered does not impede the electronic execution of deeds.[360] Some consultees pointed out that in practice they include provisions on delivery in their transactional documents which circumvent any problem. Such provisions may state, for example, that delivery is not effective until the document is dated.

6.83 Other consultees, whilst agreeing that delivery does not prevent electronic execution, suggested that it could be usefully reviewed in the future. For example, the Law Society agreed that "the law of delivery is antiquated and has little effective use in the modern world", suggesting that the concept could be abolished or at least modernised.

6.84 The Notaries Society suggested that further thought should be given as to the statutory presumptions of delivery and the distinction in the application thereof to companies and individuals. Benjamin Elliott urged consideration of the function of delivery, which serves to provide a signatory with an opportunity to change his or her mind.

6.85 A small number of consultees[361] disagreed with our view and thought that the requirement that deeds must be delivered does impede the electronic execution of deeds. Yoti, a technology company, agreed with the Law Commission's 1985 Working Paper[362] that there are evidential difficulties with the concept of delivery and suggested that we should recommend either a presumption of delivery or the abolition of delivery entirely.

Discussion

6.86 As set out above, the majority of consultees agreed with our view that delivery does not impede the electronic execution of deeds.[363] However, some consultees, including those who said there were no problems with delivery in practice, suggested that the concept of delivery should be reviewed. They argued that it is unclear and does not

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359 CP 237, paras 8.70 and 9.12.

360 162 consultees responded to question 12. 138 consultees (approximately 85% of responses) agreed with our view, with 13 consultees disagreeing (approximately 8% of responses) and 11 consultees (approximately 7% of responses) answering "other".

361 13 consultees (approximately 8% of responses) of 162 who responded to this question.

362 Transfer of Land: Formalities for Deeds and Escrows (1985) Law Commission Working Paper No 93, https://www.lawcom.gov.uk/project/transfer-of-land-formalities-for-deeds-and-escrows/, para 8.2(iv).

363 CP 237, para 8.68. In response to our consultation, CILEx told us that a majority of its members considered that physical delivery of a deed was necessary to satisfy the requirement for delivery. Although historically, delivery was indeed the physical act of handing the deed to the other party, our review of the authorities demonstrates that the transfer of physical possession has become less important over the years and is no longer necessary: CP 237, paras 4.58 to 4.61.

reflect current practices, which do not involve the transfer of physical possession of the document.

6.87 In the consultation paper, although we did not make any provisional proposals for reform of the concept of delivery, we acknowledged that there could be a case for at least changing the name of delivery so that it reflects current practice. Ultimately, we considered that this was not a sufficient reason by itself to justify legislative reform.

6.88 Furthermore, we noted that any proposal for reform we recommend in this project could only affect deeds executed electronically. This could result in different requirements for deeds in electronic form and deeds in paper form, each performing the same function of setting out when a deed takes effect, but under different names.[364] This would not promote certainty and clarity in the law.

6.89 Nonetheless, we agree with consultees that the concept of delivery should be reconsidered. We think that the best way to do this would be to include it in a broader review of the law of deeds, which we discuss below.[365] Such a review should include an analysis of the purpose of delivery and whether the requirement for delivery should be amended or removed entirely.[366]

Security concerns

6.90 A small number of consultees raised concerns about security and potential fraud in relation to the delivery of deeds. As discussed in Chapter 4, questions about the security and reliability of documents executed electronically are an issue which could be considered by an industry working group.[367] We discuss fraud and the potential of risks to vulnerable users in Chapter 2.

MERCURY

6.91 In Chapter 5 we discuss *Mercury*,[368] in which Mr Justice Underhill, referred to a document as "a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing". His Lordship also said that section 1 of the LPMPA 1989 had the effect that (in the case of deeds) "the signature and attestation must form part of the same physical document".[369]

6.92 Although these comments were not binding authority, they caused concern among lawyers about the use of pre-signed signature pages and signings where signature pages are sent by email or fax.

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364 CP 237, para 8.67.

365 We discuss our recommendations for a future review of the law of deeds below from para 6.111.

366 Recommendation 7 at para 6.135.

367 Recommendation 2(3) at para 4.128.

368 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743.

369 *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743 at [39] to [40].

6.93 Subsequently, the joint working party of the Law Society Company Law Committee and the CLLS Company Law and Financial Law Committees published the 2009 note, which suggested options for a *Mercury*-compliant signing, depending on the document to be executed.[370]

6.94 In pre-consultation discussions, stakeholders told us that the market has been following the 2009 note. Therefore, we did not propose options for reform in the consultation paper. We considered that legislative reform was unnecessary and inappropriate to address the implications of *Mercury*. We asked consultees whether they agreed.[371]

Responses from consultees

6.95 This question was met with a mixed response from consultees.[372]

Concerns about lasting powers of attorney

6.96 The majority of consultees replied with reference to lasting powers of attorney. We received 71 identical responses, which said:

> In relation to lasting powers of attorney, if an attorney failed to have their part of the prescribed form witnessed properly, such as the witness failed to include their full name, the power will be rejected by the Office of the Public Guardian at registration as not complying with the underpinning regulations. However, it is common for the attorneys only to have to resign a separate part of the LPA and do not see the whole form when they sign. Whilst the comments in Mercury may be Obiter, they represent good practice. No one should sign a deed without seeing what the final deed looks like.

6.97 Solicitors for the Elderly were similarly concerned:

> We note that where there are deficiencies with LPAs (e.g. the failure of a witness to provide their full name), the Office of the Public Guardian will reject the LPA when registration is attempted and part of the document will be returned for the party to re-execute. We are uncomfortable with this, and as a matter of principle believe that no one should sign a deed without seeing what the final deed looks like.

6.98 Some consultees simply repeated the last line from the identical responses we received that "no one should sign a deed without seeing what the final deed looks like". Other consultees agreed with that sentiment.

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370 The Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees, "Note on execution of documents at a virtual signing or closing" (May 2009, with amendments February 2010), http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf.

371 CP 237, paras 8.83 and 9.13.

372 We received 149 responses to this question. 31 consultees (21% of responses) agreed that legislative reform is unnecessary and inappropriate to address the implications of *Mercury*. 14 consultees (9% of responses) disagreed. 104 consultees (70% of responses) answered "other".

Other responses

6.99 Outside of the context of lasting powers of attorney, some consultees agreed that it would be unnecessary and inappropriate to introduce legislative reform to address the issues raised by *Mercury*. These consultees agreed generally that the 2009 note had provided assurance to lawyers and businesses. For example, CMS LLP noted that virtual signings are now "widely used and accepted by the legal profession" and did not think further legislation was required.

6.100 GC100 said that, although law firms have slightly different approaches to how clients to should sign remotely which "is hardly good advertising for the use of English law", this does not have "an impact on parties' choice of governing law in international contracts".

6.101 In contrast, Taylor Wessing LLP also raised the issue of an inconsistency in approach, suggesting legislative reform could be useful to enhance "transactional efficiency and standardisation".

6.102 Similarly, a few consultees said that legislation was necessary or would be useful. For example, Shoosmiths LLP said that legislation could clarify certain "loose ends", such as "whether it is legally possible to make manuscript amendments to a deed that has been executed but not yet delivered".

6.103 Stephen Bowman agreed and made a strong case for legislation:

> My fear is that without legislative reform, developing the existing law to incorporate electronic signatures and witnessing, alongside the principles set out in Mercury, will become a technical minefield and this is not helpful to ordinary parties wishing to efficiently enter into contracts. No matter how clearly Mercury compliant instructions are given to parties wishing to remotely execute documents, we regularly receive documents that have not been executed properly and waste a lot of time in rectifying this. It would be a missed opportunity to not tackle and update this whole area of law, using legislation to set out the results in a clear and concise manner.

6.104 Several consultees who answered "other" said that although legislation is not necessary, it may be desirable to maintain certainty of the law. For example, STEP pointed out that, although the 2009 note is widely accepted, it is still at least possible that it could be "tested in court and found to be wanting", which would undermine the many transactions which rely on it.

6.105 The Law Society thought Government should consider codifying the post-Mercury arrangements but cautioned that:

> 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.

Discussion

6.106 Consultees' responses to our question about *Mercury* were generally consistent with what stakeholders had told us in pre-consultation discussions. It appears that lawyers

and businesses have adapted to a post-*Mercury* world, particularly following the publication of the 2009 note.

6.107 However, several consultees suggested that legislation may be desirable. In the context of lasting powers of attorney, consultees told us that they consider that the comments in *Mercury* "represent good practice".

6.108 We remain of the view that legislative reform is not necessary to address the implications of *Mercury*. However, we see that legislation may be useful. The comments were not binding authority and we are not aware of any subsequent binding authority on this point.[373] Likewise, although we are told that the 2009 note is followed by the market, it is not legally binding.

6.109 In these circumstances, we consider that legislation could provide clarity by codifying the current position. It could also help alleviate any inconsistencies in approaches, which have been referred to by consultees.

6.110 Any legislation which codifies *Mercury* should do so for both deeds executed in paper form and deeds executed electronically. Therefore, we recommend that a future review of the general law of deeds should include further consideration of the consequences of *Mercury* and the possibility of codification.[374]

A REVIEW OF THE LAW OF DEEDS

6.111 We explained in Chapter 5 that there are certain types of document which must be executed as deeds to be valid. For example, deeds are typically required for land transactions, agreements made without consideration and for powers of attorney.[375] In some situations, parties may choose to execute a document as a deed. This is typically to secure longer limitation periods in the event of litigation.[376]

6.112 Deeds have more onerous formality requirements than other documents. To be validly executed a deed must be signed in the presence of a witness and delivered. In pre-consultation discussions, some stakeholders queried whether such formalities, and even the concept of deeds in general, are fit for purpose in the twenty-first century.

6.113 Therefore, we asked consultees whether they agreed that a review of the law of deeds should be a future Law Commission project.[377]

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373 We are aware of a decision of a HM Land Registry adjudicator: *(1) Andrew Francis Garguilo (2) Jennifer Margaret Garguilo v (1) Jon Howard Gershinson (2) Louisa Brooks* [2012] EWLandRA 2011 0377. In this case, the signatory pages of the lease were executed separately from the remainder of the lease. Although there was only one version of the lease, Ms Ann McAllister, sitting as Deputy Adjudicator, applied *Mercury* and held that the lease was not validly executed as it did not comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.

374 Recommendation 7(4) at para 6.135.

375 CP 237, paras 4.9 to 4.13.

376 Limitation Act 1980, ss 5 and 8 and J Cartwright, *Formation and Variation of Contract* (2014) paras 4 to 10.

377 CP 237, paras 8.88 and 9.14.

Responses from consultees

6.114 The majority of consultees did not think there was a need for a general review of the law of deeds.[378] Most consultees who opposed such a review did not provide any reasons.[379] In contrast, several professional membership organisations, including the General Council of the Bar of England and Wales, the Notaries Society, the CLLS, the Chancery Bar Association and the GC100, agreed that the law of deeds should be reviewed.

6.115 Some consultees considered the current law of deeds to be adequate and not in need of reform. For example, the Society of Scrivener Notaries said that there is not "sufficient uncertainty" around the formalities of deeds to warrant a review of the law. They said that in necessitating a document to be executed as a deed, the current formalities safeguard the parties involved.

6.116 Other consultees were cautious, and felt that a change in the law of deeds would aid fraud. MLP Law was concerned that the current legal protections would be weakened, saying that they provide "effective … although not fool proof" safeguards, particularly in relation to deeds executed by individuals. The Westminster and Holborn Law Society said that a review should only take place "if the present study should show significant defects in the way they operate at present".

6.117 Bryan Cave Leighton Paisner LLP anticipated that "clarification" of the position of electronic signatures in relation to deeds would be resolved by this report. It identified this issue as the "root cause for most calls for reform" and expected "certainty" in this regard to negate the need for a further review. Yoti said that there would be no need for a review of the law of deeds: the Law Commission should instead make a recommendation that deeds can be executed validly using an electronic signature.

6.118 44 consultees agreed that the law of deeds should be reviewed. Most of these responses suggested that deeds, and their current formalities, may no longer be appropriate. The Society of Licensed Conveyancers queried whether deeds are "fit for purpose in today's day and age". Other consultees, including the CLLS, Weightmans LLP, the Chancery Bar Association and the Conveyancing Association, reflected this sentiment.

6.119 For example, Clifford Chance LLP explained:

> Technology developments and changes in practice suggest that a re-assessment of the law of deeds would be welcomed, for reasons of certainty, flexibility and competitiveness.

6.120 Some consultees raised the possibility of abolishing deeds altogether, whilst Matthew Wardle (on behalf of third year law students at the University of Cumbria) suggested that there should be a "broad" review of their use. Iain Macfarlane agreed with a

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[378] 157 consultees responded to question 14. 100 consultees (approximately 64% of responses) disagreed with the need to review the law of deeds, with 44 consultees (approximately 28% of responses) agreeing and 13 consultees (approximately 8% of responses) answering "other".

[379] 93 consultees who did not think that there should be a review of the law of deeds did not provide a reason for their answer.

review of the law of deeds "reluctantly" because of a perceived anomaly as to the documents which are required to be deeds:

> We require some documents to be executed as deeds because they are important and require a further level of formality. However, things are not quite in balance. The fact that a simple, low value and relatively short-term lease requires a higher level of formality than a multimillion pound contract for the permanent sale of property is peculiar.

6.121 Several consultees were particularly concerned with whether the formalities of a deed were either necessary or replaceable through technological methods. Richard Oliphant said that the current formalities of deeds seem "anachronistic". The Chancery Bar Association said:

> 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.

6.122 Several consultees pointed especially to the concept of witnessing as requiring review. The CLLS suggested that if "deeds [were] needed", whether they "should be the subject of witnessing" should be explored too.

6.123 Both the Notaries Society and Catherine Phillips highlighted the important protective function of witnessing. The Notaries Society warned that any new regime must not "undermine the free will of the signatory". Catherine Phillips pointed out that if a "secure key or biometric identification device" was used to execute a document, "then it may be that the requirement to witness becomes redundant".

Potential issues to consider in a review of the law of deeds

6.124 Apart from the question of witnessing, some consultees made suggestions as to what should be considered in a future review of the law of deeds. These suggestions included the role that deeds play in relation to limitation periods and agreements for which there is no consideration. Hogan Lovells International LLP pointed out that "many large corporate and structured finance transactions turn to deeds" where there are agreements which are not for consideration.[380]

6.125 The General Council of the Bar of England and Wales and the CLLS each raised the issue of electronic company seals. The General Council of the Bar of England and Wales noted that the requirement in section 45(2) of the Companies Act 2006 for the company name to be "engraved" on the seal "appear[s] to preclude" electronic seals.

6.126 HM Land Registry suggested that a review of the law of deeds should include identity assurance and fraud within its scope.

6.127 The Liverpool Law Society said that "if electronic execution is to take place, there needs to be a review of the law". DocuSign thought that both witnessing and

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[380] CP 237, para 4.12.

attestation were “no longer fit for purpose”, but questioned whether a “substantial legal overhaul” would be more beneficial than “an evolutionary approach”.

6.128 In his response to our provisional proposal that an industry working group should be established, Stephen Bowman suggested that the working group should consider the removal of the requirement of witnessing for deeds, but only in a commercial context. He also suggested that it should undertake a “costs/benefits analysis on the requirement for a witness when executing deeds”. Referencing how overseas companies can execute a UK deed without a witness, he thought that witnessing “did not reconcile neatly with… electronic signatures”.

Discussion

6.129 As set out above, the majority of consultees did not agree that there should be a review of the law of deeds. The few consultees who provided an explanation for their answer said that the current law of deeds is adequate and not in need of reform. Others said that such a review would not be necessary because the Law Commission’s report on electronic execution would clarify the issues around the electronic execution of deeds.

6.130 However, several professional membership organisations and law firms made a strong argument for a review of the law of deeds, both in their responses to this consultation question and in responses to other consultation questions discussed above. Their responses made the following points:

(1) the current law of deeds is arguably outdated and there should be a broad review which should take account of technological developments;[381]

(2) there is an argument that deeds should be abolished, either entirely or for particular types of transactions;

(3) there is an argument that certain requirements of deeds, including witnessing and attestation and delivery should be amended, replaced or removed; and

(4) the implications of *Mercury* should be codified.

6.131 Additionally, in the consultation paper, we considered how other jurisdictions (specifically Australia, New York, Hong Kong, Singapore, Scotland and Estonia) deal with deeds. We found that only some of the jurisdictions we considered use deeds and that, often, deeds are used for fewer types of transactions.[382]

6.132 Having considered consultees’ responses carefully, we have decided to recommend that there should be a review of the law of deeds, dealing with both deeds executed on paper and electronically. Such a review could consider broad issues about the efficacy of deeds and whether the concept is fit for purpose.

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381 This review could include (but not be limited to) consideration of the different types of witnessing, fraud, questions of identity and the use of electronic seals.

382 CP 237, para 5.26 and Appendix 2. For example, although the distinction between deeds and simple contracts is retained under New York law, only interests in land must be conveyed by deed or similar instrument: General Obligations Law, §§5-703(1), 5-705.

6.133 A review could also consider the specific requirements of deeds.[383] As set out above, this project has raised several issues which should only be considered in the context of a wider analysis of the law of deeds. For example, stakeholders have told us that delivery, while not preventing electronic execution, is outdated and should be replaced. Any attempt to address this issue as part of our current project could affect only delivery of electronic documents, leading to separate systems for deeds executed electronically and those executed on paper. If deeds are to be considered in a future project, any change could be made for deeds in general, regardless of the way in which they are executed.

RECOMMENDATIONS

Recommendation 6.

6.134 Government should ask the Law Commission to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose.

Recommendation 7.

6.135 A future review of the law of deeds should include:

(1) consideration of whether the witnessing and attestation requirement of deeds executed electronically should be replaced with an approach based on a specific type of technology, such as Public Key Infrastructure;

(2) consideration of the potential for the introduction of a concept of acknowledgement, for both paper and electronic deeds;

(3) an examination of the statutory requirement for delivery, including a consideration of whether it should be amended or removed, for both paper and electronic deeds;

(4) further consideration of whether the implications of *Mercury* should be codified, for both paper and electronic deeds;

(5) consideration of whether there should be different requirements for deeds executed in a commercial context and those executed by individuals; and

(6) consideration of whether deeds should be abolished or limited to certain types of documents.

[383] Being witnessing, attestation and delivery, as discussed in Chapter 5.

Chapter 7: Recommendations and options for reform

Options for reform.

7.1 Although the current law already provides for electronic signatures, Government may wish to consider codifying the law on electronic signatures in order to improve the accessibility of the law. Any legislative provision should have broad application, and further consultation would be required.

7.2 Government should consider whether the power to exclude certain types of documents from being signed electronically should be used to exclude anything for which electronic execution is not considered appropriate.

Paragraphs 4.67 and 4.68

Recommendation 1.

7.3 An industry working group should be established and convened by Government to consider practical and tec hnical issues associated with the electronic execution of documents.

Paragraph 4.127

Recommendation 2.

7.4 The terms of reference for the industry working group should include:

(1) considering how different technologies can help provide evidence of identity and intention to authenticate when documents are executed electronically;

(2) considering the security and reliability of different technologies used to execute documents electronically;

(3) producing best practice guidance for the use of electronic signatures in different commercial transactions, focusing on procedural steps to be followed, evidence, security and reliability where documents are executed electronically; and

(4) producing best practice guidance for the use of electronic signatures where individuals, in particular vulnerable individuals, execute documents electronically.

Paragraph 4.128

Recommendation 3.

7.5 The industry working group should have an interdisciplinary membership, including:

(1) members who represent the interests of individuals, including vulnerable individuals;

(2) members who have an insight into cross-border transactions;

(3) lawyers;

(4) technology experts;

(5) insurers; and

(6) businesses.

Paragraph 4.129

Recommendation 4.

7.6 The terms of reference for the industry working group should include:

(1) Considering potential solutions to the practical and technical obstacles to video witnessing of electronic signatures on deeds and attestation; and

(2) (2Considering how these potential solutions can protect signatories to deeds from potential fraud.

Paragraph 6.45

Recommendation 5.

7.7 Following the work of the industry working group, Government should consider using section 8 of the Electronic Communications Act 2000 to allow for video witnessing.

Paragraph 6.46

Recommendation 6.

7.8 Government should ask the Law Commission to carry out a review of the law of deeds, to consider whether the concept remains fit for purpose.

Paragraph 6.134

Recommendation 7.

7.9 A future review of the law of deeds should include:

(1) consideration of whether the witnessing and attestation requirement of deeds executed electronically should be replaced with an approach based on a specific type of technology, such as Public Key Infrastructure;

(2) consideration of the potential for the introduction of a concept of acknowledgement, for both paper and electronic deeds;

(3) an examination of the statutory requirement for delivery, including a consideration of whether it should be amended or removed, for both paper and electronic deeds;

(4) further consideration of whether the implications of Mercury should be codified, for both paper and electronic deeds;

(5) consideration of whether there should be different requirements for deeds executed in a commercial context and those executed by individuals; and

(6) consideration of whether deeds should be abolished or limited to certain types of documents.

Paragraph 6.135

Appendix 1: Acknowledgements

CONSULTATION

1.1 The following bodies and individuals responded to our consultation, which ran from 23 August 2018 to 23 November 2018.

Professional membership organisations

Agricultural Law Association	British Private Equity and Venture Capital Association (BVCA)
GC100	Institute of Chartered Accountants in England and Wales (ICAEW)
Investment and Life Assurance Group (ILAG)	Kent Law Society
Liverpool Law Society	Solicitors for the Elderly
The Chancery Bar Association	The Chartered Institute of Legal Executives (CILEx)
The City of London Law Society (CLLS)	The Conveyancing Association
The General Council of the Bar of England and Wales	The Law Society
The Notaries Society of England and Wales	The Society of Licensed Conveyancers (SLC)
The Society of Scrivener Notaries	The Society of Trust and Estate Practitioners (STEP)
TheCityUK	UK Finance
Westminster and Holborn Law Society	

Government and public bodies

Cumbria County Council

HM Land Registry

Sussex Partnership NHS Foundation Trust

Law firms

Arnison Heelis Solicitors	Bana Vaid & Associates
Bird Wilford and Sale Solicitors	Blocks Solicitors
Bryan Cave Leighton Paisner LLP	Buckles Solicitors LLP
Carpenter & Co Solicitors	Charles Russell Speechlys
Clifford Chance LLP	CMS Cameron McKenna Nabarro Olswang LLP (CMS LLP)
Cognitive Law Ltd	Darwin Bowie Ltd
Dixon Ward Solicitors	Eversheds Sutherland LLP
Glanvilles LLP	Hogan Lovells International LLP
J A Hughes	Jones & Co Solicitors
Jordans Solicitors	Kennedys Law LLP
Leeper Prosser Solicitors	Melkerts Solicitors
MLP Law Ltd	Mullis & Peake LLP
PCB Solicitors LLP	Shoosmiths LLP
Smith Partnership	Steene Law Ltd
Taylor Wessing LLP	TLT LLP
Wedlake Bell LLP	Weightmans LLP

Businesses

Adobe, Inc.	AliasLab UK Limited
CapDesk ApS	DocuSign
euNetworks	Funding Circle Ltd
Icon UK Limited	Lloyds Banking Group
OneSpan	Pension Bee
The Royal Bank of Scotland plc (RBS)	Selwood Research
Smart Pension	Yoti

Members of the judiciary

Judge Elizabeth Cooke

Individuals

Joanna Addison	Catherine Anderson	Paddy Appleton
Carolyn Bagley	Kerry Bates	Richard Bates
Caroline Bielanska	James Bird	Nicholas Bohm, a member of the project's advisory panel
Naomi Bowie	Stephen Bowman	Jenny Brading
John Breeze	Kayleigh Brown	Sarah Bushell
Chris Carr	Caroline Carter	Hannah Clark
Caroline Coats	Laura Colville	Karin Cox-Putker
Marjorie Creek	Gabriella Cuoghi	Gareth Day
Charles Daysh	Catherine Diamond	Samantha Downs
Elizabeth Dunn	Benjamin Eliott	Peter Facey
Susan Fairless	Graham Farries	Elizabeth Foggin
Joanna Elizabeth Fong	Emma Fretwell	Bekka Fuszard
Melissa Gilman	Andrea Godfrey	Maria Goodacre
Alison Greatbanks	Catrin Griffiths	Samantha Hamilton
Jennifer Harris	Rachel Hawkins	Rebecca Haywood
Angela Hickey	Mark Hopper	Afonwy Howell-Pryce
Peter Howes	Peter Hughes	Megan Jones
Lesley Kemp	Tanya Kirman	Richard Lane
Ella Lewis	J Lewis	Deniece Lines
Ian Macara	Iain Macfarlane	Julie Man
Karen Markall	Ken McRae	Katherine Melkerts
Hugo Moore	Naomi Neville	Michael O'Brien
Richard Oliphant	Mike Paley	Sophia Parkes
Michael Parr	Catherine Phillips	Philippa Pipe
Edward Popham	Lorna Pound	Jennie Pratt

Nigel Pugh	Jacqueline Randall	Mary Rimmer
Catherine Robson	Beth Rudolf	Sally Runnacles
Lucy Samy	David Satchell	Kenneth Seakens
Tom Sorby	Margaret Taylor	Kathryn Toomey (on behalf of second year law students at the University of Cumbria)
Robert Tozzi	Francesca Tubb	Edward Vidnes
Lesley Walker	Laura Walkley	Heather Wannell
Craig Ward, Baron of Lundie	Kelly Wardell	Matthew Wardle (on behalf of third year law students at the University of Cumbria)
Jenny Watson	Robert Watson	David Wells
Sarah White	Caroline Williams	Rosemary Alison Wyeth

Other

Council for licensed Conveyancers

UK Foreign and Commonwealth Office Consular Document Policy Team

Alzheimer's Society

MEETINGS

1.2 The Law Commission met or otherwise corresponded with members of the project's advisory panel as well as the following people and organisations in relation to this project.

Lawyers and Law firms

3 Verulam Buildings	Allen & Overy LLP
Clifford Chance LLP	CMS Cameron McKenna Nabarro Olswang LLP (CMS LLP)
Herbert Smith Freehills LLP	Linklaters LLP
Shoosmiths LLP	

Members of the judiciary

Sir Geoffrey Vos, Chancellor of the High Court

Government and public bodies

Department for Business, Energy & Industrial Strategy	Department for Digital, Culture, Media & Sport
Department for Transport	Financial Conduct Authority
HM Land Registry	Ministry of Housing, Communities & Local Government
Ministry of Justice	Office of the Public Guardian
UK Foreign and Commonwealth Office Consular Document Policy Team	

Registries

Civil Aviation Authority	Companies House
Intellectual Property Office	

Individuals

B. Collier	George Danezis
Peter Howes	Steve Marsh
Richard Oliphant	

Professional membership organisations

Company Law Committee of the Law Society	Conveyancing and Land Law Committee of the Law Society
Financial Markets Law Committee	GC100
The City of London Law Society	The Law Society
The Notaries Society	TheCityUK
UK Finance	

Businesses

Adobe Sign	Barclays
Countrywide Tax & Trust Corporation Ltd	euNetworks
Lloyds Banking Group	Mattereum
OneSpan (formerly eSignLive)	Prudential
The Royal Bank of Scotland (RBS)	Workshare Transact

Academics

Professor Ross Anderson, University of Cambridge

Professor George Danezis, University College London

Dr Steven Murdoch, University College London

Professor Christian Twigg-Flesner, University of Warwick

Appendix 2: A note on technology

2.1 Below we provide a brief summary of the main types of electronic signatures which we refer to in this report.[384] For further information on each of the technologies below, please see the references in the footnotes. Please note that we do not intend this to be a comprehensive list of all the technologies that are, or may become, available.

Scanned manuscript signatures

2.2 A signatory may use a pen to sign a piece of paper that is then scanned to create an electronic representation of the wet ink signature. This image may then be saved and incorporated into legal documents, including contracts and emails.[385]

Manuscript signing on screen

2.3 A signatory may use a stylus or fingernail to inscribe an image approximating to their usual manuscript signature. This is commonly used in courier deliveries. It may also produce a signature that can be saved and used in the same way as a scanned wet ink signature for signing documents, including on signing platforms. This kind of signature may be with or without capture of biodynamic characteristics (see below).

Clicking on "I accept"

2.4 A signatory may click on an "I accept" or "I agree" button on a website as a way of signing an agreement.[386] The Law Commission's 2001 Advice suggested that the click could reasonably be regarded as the technological equivalent of a manuscript "X" signature.[387]

Passwords/PINs

2.5 A signatory may sign a document by using a password and/or PIN. For example, a signatory may use a PIN to authorise a credit card transaction rather than signing a paper receipt.[388] Of course, although this may be a way of signing a document, not every use of a password or PIN constitutes a signature. As we discuss in Chapter 3,

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384 We also considered different types of electronic signatures, including typed names, scanned manuscript signatures, passwords, PINs, biometrics and digital signatures in our recent consultation: Making a Will (2017) Law Commission Consultation Paper No 231 paras 6.46 to 6.87.

385 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-005; S Mason, *Electronic signatures in law* (4th ed 2016) ch 12. Also Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission (2001) ("2001 Advice"), https://www.lawcom.gov.uk/project/electronic-commerce-formal-requirements-in-commercial-transactions/, para 3.32.

386 *Bassano v Toft* [2014] EWHC 377 (QB), [2014] CTLC 117; we discuss this in Electronic Execution of Documents (2018) Law Commission Consultation Paper No 237 ("CP 237"), https://www.lawcom.gov.uk/project/electronic-execution-of-documents/ paras 3.71 to 3.73.

387 2001 Advice, para 3.37.

388 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-004; S Mason, *Electronic signatures in law* (4th ed 2016) ch 9.

this question depends on whether there was an intention for the password or PIN to function as a signature and authenticate a document.

Typing a name

2.6 A signatory may type their name, initials or other identifier at the bottom of an electronic document (such as an email)[389] as a way of signing a document.[390] The Law Commission's 2001 Advice also considered that a system which is set up to add the name (or initials) automatically could provide an electronic signature.[391]

Email address

2.7 An email address which appears in the header of an email may be an electronic signature depending on whether the evidence demonstrates an intention that it constitutes a signature of the document.[392] We discuss this question in Chapter 3.

Associating a biometric with a signature

2.8 Biometrics may be used to verify the signatory's identity through reference to a physical characteristic, such as fingerprints.[393] Where that information is "attached to or logically associated with" [394] an electronic document, that process could amount to signing. We have not heard that these types of signatures are being used by stakeholders to sign complex or high-value legal documents as a matter of course. It appears though that a biodynamic version of a handwritten signature is increasingly being used. Here, a signatory draws their manuscript signature on a screen or special pad (see "manuscript signing on a screen", above). The unique way that the person signs is recorded as a series of measurements, together with a digital reproduction of the signature.[395]

Digital signatures

The term "digital signature"

2.9 "Digital signature" is a term that can be used in different ways.[396] For the purposes of this project, a digital signature is a type of electronic signature produced by using asymmetric or public key cryptography.

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389 For example, *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953, discussed in CP 237 para 3.79.

390 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-003; S Mason, *Electronic signatures in law* (4th ed 2016) ch 10.

391 2001 Advice, para 3.33.

392 We discuss *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543 and *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm), [2012] CILL 3154 from para 3.59.

393 A detailed discussion of biometrics can be found in L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-009 to 4-032.

394 Definition of "electronic signature" in Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, art 3(10) ("eIDAS").

395 S Mason, *Electronic signatures in law* (4th ed 2016) ch 13.

396 For example, we use it to refer to an electronic signature using public key cryptography. The term "digital signature" may also be used to mean a digital signature which includes the use of a certificate (discussed below under Public Key Infrastructure).

2.10 Under this system, a person has two keys. Each key is a very large number.[397] It is usually represented by a long string of characters.[398] The first key is available to everyone ("the public key"). The owner of the public key may provide it to others or publish it. The second key must be kept secret ("the private key").[399]

2.11 Information can be associated with the private key to create a mathematical representation that is unique to that information ("the information digest"). This may be used to produce a digital signature.

> **Example**
>
> Alice creates data which is a unique fingerprint of the information or document ("the information digest"). This fingerprint, encrypted with Alice's private key, constitutes the digital signature.[400] Using the same function Alice used to create the information digest, Bob can recalculate it and compare the two versions. If these two versions of the data match (one created by Alice, the other created by Bob), then Bob can be confident that the information was signed using Alice's private key, and that the information has not been altered since it was signed.[401]

2.12 Our references to Alice and Bob perhaps give the impression that it is the users who always take the above actions. In practice, Alice and Bob are likely to have software which carries out these functions (although they will initiate them).

Digital signatures using Public Key Infrastructure

2.13 Public Key Infrastructure ("PKI")[402] may become relevant when Alice and Bob do not have a pre-existing relationship and Bob wishes to verify that the public key used by Alice does in fact belong to her. In those cases, a person's public key may be the subject of a digitally-signed certificate provided by a trusted third party ("a certification authority"). The purpose of such a certificate is to provide a link between the public key,

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397 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-036.

398 This system of letters (A to F) and numbers is known as the "hexadecimal" system. For a person to use a public or private key, it is not necessary for them manually to input the number. Rather, the number which comprises the key may be stored on an electronic device.

399 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-033 onwards; S Mason, *Electronic signatures in law* (4th ed 2016) ch 14.

400 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) paras 4-038 to 4-039.

401 The digital signature technology may be used for purposes other than signing a document. It may be used for purely evidential purposes, to show that the content of the document has not changed, without an intention to authenticate the document. It may also be used by entities other than natural or legal persons, such as, for example, a smart phone.

402 PKI is a system in which a person's public key is the subject of a digitally-signed certificate provided by a certification authority.

the person or entity to whom the key was issued and the identity of the person or entity to whom it belongs.[403]

2.14 Certification authorities may hold directories of the certificates they have issued, to enable third parties to confirm that a certificate was in fact issued. They may also hold a list of certificates which have been revoked or suspended.[404] The trustworthiness of a certificate depends on the identification assurance level undertaken, that is, how rigorously did the certification authority check that the person presenting themselves as Alice was not an impostor?

Signatures under eIDAS

2.15 We turn now to consider electronic signatures under the eIDAS Regulation ("eIDAS").[405] This is an EU regulation which applies directly in all member states without the need for national implementation.[406] Therefore, eIDAS is currently part of the law of the UK. On the date of the UK's withdrawal from the EU, eIDAS will be incorporated into UK domestic law.[407]

2.16 We discuss eIDAS in detail in Chapter 3. For current purposes, we consider only the three categories of electronic signature which are set out in eIDAS.

Electronic signatures

2.17 The first is an "electronic signature", which is defined broadly, as meaning:[408]

> data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.

2.18 Stephen Mason, a member of the project's advisory panel, says that this broad definition is "in keeping with the wide nature of what is capable of constituting a signature in digital terms".[409]

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403 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 5-006; S Mason, *Electronic signatures in law* (4th ed 2016) para 14.16. The person to whom a key pair (public and private keys) is issued will not always be the key's owner. For example, Alice may be issued with a key pair to sign documents on behalf of a company. The keys are issued to Alice, but belong to the company. Another example is where the person/entity to whom the keys are issued is someone claiming the identity of the person/entity to which the keys are believed to have been issued. For example, a key is issued to Alice in Bob's name.

404 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 5-013.

405 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

406 We discuss eIDAS in more detail from para 3.7.

407 European Union (Withdrawal) Act 2018, s 3(1).

408 eIDAS, art 3(10).

409 S Mason, *Electronic signatures in law* (4th ed 2016) para 4.12.

2.19 Article 3(9) of eIDAS defines "signatory" as "a natural person who creates an electronic signature".[410]

Advanced electronic signatures

2.20 The second category of electronic signature in eIDAS is an "advanced electronic signature". This is an electronic signature which meets certain requirements:[411]

(a) it is uniquely linked to the signatory;

(b) it is capable of identifying the signatory;

(c) it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under his sole control; and

(d) it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

2.21 These requirements, particularly the requirement that any subsequent change in the data is detectable, indicate that, at least at present, an advanced electronic signature will be a digital signature, as described above.[412]

2.22 Commentators such as Lorna Brazell and Stephen Mason, both members of the project's advisory panel, have pointed out[413] that a digital signature can only be "uniquely" linked to a signatory's private key, not to the signatory. That is, somebody else could potentially have access to, and use, another's private key.[414] There are also questions as to what "sole control" means and whether it can be satisfied by an electronic signature in the context of the reliability and security issues raised below.[415]

Qualified electronic signature

2.23 The third type of electronic signature under eIDAS, and the most complex, is a qualified electronic signature. A qualified electronic signature is an advanced electronic signature that is:

(1) created by a qualified electronic signature creation device; and

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410 eIDAS uses the term "electronic seal" where a legal person, such as a company, signs a document: eIDAS, art 3(24).

411 eIDAS, art 26.

412 Developments in technology may mean that signatures other than digital signatures may fulfil these requirements in the future. We have been told that there is already capability for the use of advanced electronic signatures in the market. For example, a card reader and credit/debit card issued by a bank would meet the requirements for an advanced electronic signature under eIDAS for transactions with that bank.

413 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 4-042.

414 L Brazell, *Electronic Signatures and Identities Law and Regulation* (3rd ed 2018) para 6-057. S Mason, *Electronic signatures in law* (4th ed 2016) para 4.17.

415 S Mason, *Electronic signatures in law* (4th ed 2016) paras 4.22 to 4.32. We refer to security and reliability issues from para 2.47 below.

(2) based on a qualified certificate for electronic signatures.[416]

2.24 In summary, it is an advanced electronic signature with additional requirements and criteria. For example, a "qualified electronic signature creation device" must meet the requirements of Annex II to eIDAS.[417] Annex II includes requirements as to confidentiality, security and reliability.

2.25 A "qualified certificate for electronic signature" means a certificate which links the signature to a person (as discussed in the context of PKI, above), which is issued by a "qualified trust service provider". It is likely that it will usually be a commercial body providing this service. It must also meet the requirements set out in Annex I to eIDAS.[418]

[416] eIDAS, art 3(12).

[417] eIDAS, art 29.

[418] eIDAS, art 3(15).

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