



## ELECTRONIC EXECUTION OF DOCUMENTS

Issued 21 November 2018

ICAEW welcomes the opportunity to comment on the *Electronic Execution of Documents* consultation published by the Law Commission on 21 August 2018, a copy of which is available from this [link](#).

We welcome that the Law Commission has confirmed that electronic signatures are valid but not mandatory. We acknowledge that encouraging the electronic execution of documents is a pragmatic response to a common problem faced by many businesses and accountancy professionals. We would stress, however, that appropriate safeguards need to be in place as with any other form of document execution.

We suggest it would be advantageous for the Law Commission to consult with government departments (such as HMRC, the Land Registry and Companies House) regarding their experience with the signing and submission of documents electronically.

This ICAEW response reflects consultation with the Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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## KEY POINTS

1. ICAEW welcomes the Law Commission's consultation on the *Electronic Execution of Documents* and the confirmation that electronic signatures are valid.
2. We are responding on behalf of our members. As a representative body ICAEW supports small and large organisations in the professional business services sector - both by way of policy work and directly through our members who operate or advise businesses.
3. Our members work within a diverse range of organisations (from sole practitioners to multi-national corporations) and frequently advise businesses on procedure. As such our members are very aware of the administrative burdens placed on business, particularly smaller businesses, by an unnecessarily cumbersome and slow procedure such as the need for wet signatures in all cases. We therefore welcome any initiative that can reduce such a burden and acknowledge that electronic execution and electronic-signatures may be a way to reduce this burden.
4. We caution, however that the 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.
5. Key to this will be the need to prove identity. Practical guidance on how to prove identity and on the various technological options to facilitate this would be useful.
6. Linked to this we question why the Law Commission has not suggested that digital signatures should be used in preference to e signatures. We understand this is the case in Scotland and we are not aware that this has caused any problems or has acted as disincentive to the use of technology to sign and execute documents.
7. We suggest it would be advantageous for the Law Commission to consult with government departments (such as HMRC, the Land Registry, Companies House) over their experience of the signing and submission of documents electronically.

## ANSWERS TO SPECIFIC QUESTIONS

***Q1: Our provisional conclusion is that an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document. Do consultees agree?***

8. We agree 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.
9. As we explain in our answer to Q15 we are concerned, however, as to how the 'intention to authenticate' a document can be proved.

***Q2: Our provisional conclusion is that the requirement under the current law that a deed must be signed "in the presence of a witness" requires the physical presence of that witness. Do consultees agree?***

10. Yes. (but see our answer to Q7).

***Q3: We welcome consultees' views and experiences on how other jurisdictions have dealt with the cross-border dimension of electronic execution.***

11. We are unable to provide any view on how other jurisdictions have dealt with the cross-border dimension of electronic execution.

***Q4: 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?**

12. Yes.
13. We suggest, however, that the legislation specifies the precise documents and situations covered to avoid doubt and help to minimise the risk of the exploitation of vulnerable parties.

**Q5: We consider that legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature. Do consultees agree?**

14. Yes we agree legislative reform is not necessary to confirm that an electronic signature is capable of satisfying a statutory requirement for a signature.
15. We would suggest, however, that as there is anecdotal evidence to suggest that many people are unaware that an electronic signature is capable of satisfying the statutory requirement for a signature it may be useful for there to be some form of public education to increase awareness.

**Q6: We provisionally propose that an industry working group should be established, potentially convened by Government, to consider practical, technical issues. Do consultees agree?**

16. Yes. If electronic signatures are to be widely accepted then it is important that as many situations in which they may be appropriate should be considered. Commercial documents signed business to business are the most common situation in which electronic execution and e-signatures may be considered appropriate but there are numerous other examples. These include statutory audit reports and other assurance reports that require signing to prove their validity but there are many other types of documents that should be included in any review.
17. The working group should not be confined to members of the legal profession but should include business representatives and other users as well as technology experts.
18. This initial consultation exercise will be able to identify specific examples of document types to which consideration needs to be given; however we suggest that a wider consultation with a diverse range of bodies and users (such as representative bodies of those with disabilities or other special needs) should follow, to ensure that any future guidance is based on the fullest evidence and so can meet the needs of as many potential users as possible.

**Q7: We provisionally propose that it should be possible to witness an electronic signature via video link and then attest the document. Do consultees agree?**

19. We agree that one option would be to make it possible to witness an electronic signature by video link but we do not think this is necessarily the best approach.
20. As video is widely available and relatively cheap there are some advantages in its use in this way particularly for smaller organisations and companies where cost and limited technological expertise may be an issues.
21. There are, however, some inherent problems in the use of video links. These include the quality of the video link itself: can the other parties, for example, clearly see who is signing the document, what they are signing, who else is in the room (which may have a bearing on whether the signature is given under duress) and the signature once signed?
22. A video link would not prevent identity fraud and in some instances could actually facilitate it. It will still be necessary to prove the identity of the witness. There are ways to do this (eg, UK Verify or Voice print) but users should not be lulled into a false sense of security by accepting a poor quality video of someone signing a piece of paper as a sufficient guarantee of authenticity.
23. Careful consideration needs to be given as to how the document is attested. If the means of attestation is too cumbersome or slow or technically difficult then the appeal of electronic

execution and e signatures would be reduced rather than increased. As we agree that the increased use technology is beneficial to business and the legal process this would be a retrograde step. It is also noted that industry standards are now moving towards dual source identification which might have an effect upon the overall burden of using such methods.

**Q8: If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation: (1) Via a signing platform which the signatory and witness both log into? (2) With the document being emailed to the witness by the signatory immediately after signing?**

24. Provided there are sufficient safeguards over the signing platform then we would suggest that (1) is the best option. We note, however, that there may be issues with the interoperability of signing platforms (ie, if both the signatory and the witness have to use the same signing platform this may limit their use).
25. The problem with (2) is that it builds delay into the transaction and may create additional risk. Email is not the safest way to send documents, without additional controls (such as encryption, proof that the email address is the correct one) and these controls will need to be in place before the email is sent by the signatory to the witness.

**Q9: Do consultees consider that it should be possible to “witness” an electronic signature through an online signing platform in real time, without a video link or any direct communication between the signatory and the witness?**

26. We are concerned that such a method would increase the potential for identity fraud. We would only recommend such an approach if the identity of both parties could be established beyond doubt before the act of “witness” occurred.

**Q10: Our view is that the witnessing and attestation requirement for electronic signatures on deeds should not be replaced with a requirement for a particular type of technology, such as a digital signature using Public Key Infrastructure. Do consultees agree?**

27. We agree that it may not be helpful to insist on one particular type of technology over another, given that technology is continually evolving.
28. We do question, however, why the Law Commission does not consider the use of digital signatures, rather than e-signatures. Digital signatures are commonly used (even prescribed) in many other jurisdictions (eg, Scotland) and are inherently more secure than e-signatures as they are produced by public key cryptography which has built-in security measures.

**Q11: Do consultees think that there is a case for moving away from the traditional concepts of witnessing and attestation in the context of deeds executed electronically, allowing for electronic acknowledgement? If so:**

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

**(2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which: (a) acknowledgement must occur after signing; and (b) acknowledgement and witnessing must take place?**

**(3) How should the witness record the signatory’s acknowledgement?**

29. However a document or deed is signed it is still important that it is witnessed and attested. The way it is done is not as important as insuring it is done appropriately and not under duress.
30. We suggest that there should be sufficient flexibility to ensure the system does not create new burdens and build other delays into the system.
31. We suggest the Law Commission through its proposed working party (see Q6) should establish guidelines for best practice rather than set rules. These should specify that there should be acknowledgement, an agreement between the parties as to the period within

which acknowledgement should occur, recording of the acknowledgement but not to set down how this should be done. This will allow sufficient flexibility but also protection.

**Q12: Our view is that the requirement that deeds must be delivered does not impede the electronic execution of deeds in practice. Do consultees agree?**

32. Yes

**Q13: We consider that legislative reform is unnecessary and inappropriate to address the implications of the Mercury decision. Do consultees agree?**

33. We are unable to comment on this.

**Q14: Do consultees think that a review of the law of deeds should be a future Law Commission project?**

34. Yes. We are aware that there is some of our members are unsure of what constitutes a deed, and what agreements specifically require a deed, and therefore what is covered by the reservation under the Legal Services Act 2007. This appears to be a common area of misunderstanding and should be addressed.

**Q15: We provisionally conclude that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document. Do consultees believe that this will result in increased confidence in the legality of electronic execution in England and Wales? Is any more needed?**

35. Yes we agree that the Law Commission's conclusion that an electronic signature is capable of satisfying a statutory requirement for a signature, provided there is an intention to authenticate a document, will increase confidence in the legality of electronic execution in England and Wales.

36. As noted in our answer to Q5 above we suggest that there should be a public awareness campaign to increase awareness of the validity of electronic signatures. Any such campaign, should also, explain the safeguards that should be employed to prevent fraud and minimise the risk of detriment.

**Q16: What do consultees believe would be the financial value of increased confidence in the legality of electronic execution in England and Wales? For example, do consultees think there could be a reduction in transaction costs by as much as 10% to 30%?**

37. We would suggest that it is very difficult, if not impossible, to quantify the financial value of increased confidence in the legality of electronic execution of documents.

38. We would further suggest that the costs associated with the signing of a document (however it is done) are trivial compared to the legal fees for drafting a document or negotiating a contract.

39. We do not consider that a reduction in transactions costs is the aim, although in some circumstances it may be the outcome. We would say the aim is to increase confidence in the legality of electronic execution and enable those who wish to take advantage of it to do so with confidence in its legality and security.

40. It is also possible that in some circumstances transaction costs may increase – certainly in the short term – as an organisation may need to buy access to signing platforms, video technology, dual authentication etc to enable electronic signing and attesting. Also, if such systems lack inherent security, the costs of specific errors and fraud could easily swamp any 'efficiency' savings resulting in general.

**Q17: Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would: (1) provide benefits such as**

***reduced transaction costs? If so, how much? (2) provide non-monetary benefits? If so, what benefits?***

41. An industry working group to consider practical technical issues would be of use in helping organisations embrace electronic execution with confidence. See also our comments in paragraph 40 above.
42. We question whether it would provide a reduction in transaction costs and/or provide any other non-monetary benefit beyond clarity and confidence in the use of electronic signatures.

***Q18: We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from: (1) the capacity to execute deeds electronically without the physical presence of a witness; or (2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.***

43. Our members have told us that being able to execute deeds electronically without the physical presence of a witness is frequently quicker, easier and therefore more convenient, particularly with regard to cross border transactions.
44. The electronic means used to execute a deed does not, however, have a bearing on this.