



**Law
Commission**
Reforming the law

Electronic execution of documents

Summary

Consultation Paper 237

21 August 2018

THE PURPOSE OF THIS PROJECT

- 1.1 The law relating to signatures and other formal documentary requirements has a history spanning centuries. As far back as 1677, the Statute of Frauds required certain documents to be in writing and signed. It is still in force today. But the documents executed in today's world are no longer the same as those used over 400 years ago. Individuals, consumers and businesses demand modern, convenient methods for making binding transactions. Technological developments have changed the ways in which these transactions are made and will continue to change at an ever-more-rapid pace.
- 1.2 Can the law of England and Wales keep up? Our common law system is inherently flexible and contracts can be created in many ways. Most transactions are not required to be executed in a particular manner or even to be made in writing. However, the law subjects some documents to certain procedures, such as signing or witnessing. These procedures are called "formalities". Formalities have several purposes: evidential (providing evidence of the transaction); cautionary (trying to ensure the maker realises what they are doing); protective (protecting weaker parties); and labelling (making the kind of document and its effect apparent to third parties).¹
- 1.3 The formalities imposed vary according to the transaction. For example, a guarantee must be in writing, or evidenced in writing, and signed.² 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.³ A power of attorney must be executed as a deed, which means that it must be signed, witnessed and attested and delivered.⁴
- 1.4 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 commercial documents.⁵ We understand that these notes have alleviated some of the uncertainty around the execution of documents and we discuss them in our consultation paper.⁶ In short, we agree with and endorse

¹ See paras 2.4 to 2.7 of the consultation paper.

² Statute of Frauds 1677, s 4.

³ Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁴ See paras 4.14 to 4.28 of the consultation paper. As we explain in paras 1.48 to 1.50 below, the term "delivered" is something of a misnomer. Although historically it referred to the transfer of physical possession of the document, the emphasis is now on the intention of the maker of the deed.

⁵ See 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> (last visited 8 August 2018) (2009 note); and 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/category/114/LSEW%20%20CLLS%20Joint%20Working%20Party%20-%20Note%20on%20the%20Execution%20of%20a%20Document%20Using%20an%20Electronic%20Signature.pdf> (last visited 8 August 2018) (2016 note).

⁶ See Chapters 3, 7 and 8 of the consultation paper.

the conclusions outlined in the notes. However, we consider that there is a need for further clarification.

1.5 We have been told that legal issues around the electronic execution of documents are hindering the use of new technology, particularly where legislation requires a document to be “signed”. The purpose of this project is to ensure that the law governing the electronic execution of documents, including electronic signatures, is sufficiently certain and flexible to remain fit for purpose in a global, digital, environment.

1.6 The terms of reference of this project, as agreed between the Law Commission and the Ministry of Justice, are as follows:

(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).⁷

(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:

(a) Registered dispositions under the Land Registration Act 2002, which are 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”.

1.7 This project extends to England and Wales only.

1.8 This document summarises our consultation paper, which sets out in detail the current law and our proposals for reform. The consultation paper is available online at <https://www.lawcom.gov.uk/project/electronic-execution-of-documents/>. We invite responses to our consultation questions, set out in full at the end of this document. The deadline for responses is **23 November 2018**.

⁷ In the *Mercury* decision, Mr Justice Underhill (as he then was) referred to a document as having to be “a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing”: see para 1.52 below and paras 4.77 to 4.87 of the consultation paper. These comments were not part of the binding decision.

Comments may be sent:

Using an online form at <https://consult.justice.gov.uk/law-commission/electronic-execution> (where possible, it would be helpful if this form was used).

Alternatively, comments may be sent:

By email to electronic-execution@lawcommission.gov.uk. An optional response form is available at: <http://www.lawcom.gov.uk/electronic-execution>

By post to Commercial and Common Law Team, Law Commission, 1st Floor, Tower, 52 Queen's Anne Gate, London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

- 1.9 It is important to make clear that the proposals contained in this consultation paper are only provisional. At this stage, we are not making recommendations for law reform. It is during this open public consultation that we are inviting views on our provisional proposals. These views will be taken into account when forming our final recommendations, which will be published in a subsequent report.

A NOTE ON TECHNOLOGY

- 1.10 Our consultation paper is technology neutral, by which we mean that we do not focus on or favour a particular type of technology. Accordingly, we use the term “electronic signatures” broadly, to cover everything from a scanned manuscript signature that is added to documents to digital signatures and Public Key Infrastructure. In Chapter 2 of the full consultation paper, we provide a summary of the main types of electronic signature.
- 1.11 Stakeholders have told us that it is not only the question of legal validity which is impeding the electronic execution of certain transactions. Practical issues, such as the security and reliability of electronic signatures, are also important. In Chapter 2, we outline some of these practical issues which parties wishing to use electronic signatures may want to consider.
- 1.12 Users of electronic signatures should satisfy themselves that the procedures they have adopted will provide sufficient trust between the parties and have sufficient evidential weight for the purposes of their transaction. Although the notion of an entirely electronic transaction is attractive, parties should also consider whether there may be slightly less convenient ways of establishing trust and evidence which provide more certainty. However, it can be tempting for parties to over-emphasise the security of “wet ink” or handwritten signatures over electronic signatures. These traditional forms of signature are not themselves risk-free.

WHAT IS THE PROBLEM?

- 1.13 Some stakeholders have told us that they and their clients use electronic signatures confidently for all transactions, including those which are required by law to be “signed” or executed as a deed. However, others refuse to use electronic signatures at all and instead execute all their documents with handwritten signatures because, at least in part, of concerns about their validity.
- 1.14 There is particular uncertainty where transactions are executed by deed because, as set out below, deeds are required to be signed “in the presence of a witness and attested”. The result is that, even when electronic signatures are used, stakeholders generally ensure that the signatory and the attesting witness are physically in the same room.
- 1.15 We believe that there is a case for considering whether reform of the law relating to the electronic execution of documents is required or would be beneficial. Stakeholders have told us that a lack of clarity in the law is discouraging some parties from executing documents electronically in circumstances when it would be more efficient and expedient to do so. This may disproportionately affect small businesses and start-ups, which do not have access to legal expertise in the same way as larger commercial businesses.

THE CURRENT LAW AND PROPOSALS FOR REFORM

Electronic signatures

- 1.16 The eIDAS regulation (eIDAS)⁸ is an EU regulation which applies directly in all member states without the need for national implementation.⁹ It provides that an electronic signature cannot be denied legal effectiveness solely because of its electronic nature, and that qualified electronic signatures¹⁰ satisfy any legal requirements in the same way as handwritten signatures.¹¹
- 1.17 eIDAS also provides that electronic signatures are admissible in evidence in legal proceedings.¹² The Electronic Communications Act 2000, a UK statute, mirrors the admissibility provision in eIDAS,¹³ but does not expressly provide for the validity of electronic signatures.

⁸ 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.

⁹ 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: European Union (Withdrawal) Act 2018, s 3(1). See para 3.32 of the consultation paper.

¹⁰ For an explanation of the different types of electronic signatures, including qualified electronic signatures, see paras 2.9 to 2.36 of the consultation paper.

¹¹ eIDAS, art 25.

¹² eIDAS, art 25(1).

¹³ Electronic Communications Act 2000, s 7.

- 1.18 However, there are recent judgments from the Court of Appeal and the High Court which have decided that electronic methods of signing, such as a typed name in an email and clicking on an “I Accept” button, do satisfy a statutory requirement for a signature. This is the case provided that there is an intention to authenticate the document.¹⁴
- 1.19 Our provisional view is that the combination of eIDAS, domestic legislation and case law means that an electronic signature is capable of meeting a statutory requirement for a signature if an authenticating intention can be demonstrated.¹⁵ This view is not limited to a particular type of electronic signature: the law is flexible.
- 1.20 This view is consistent with the conclusions of the Law Commission in the 2001 Advice to Government on the formalities which apply in relation to commercial agreements in England and Wales.¹⁶

Is legislation required?

- 1.21 Although we provisionally conclude that the current law caters adequately for electronic signatures, we are aware that some stakeholders would like a clear legislative statement to avoid any doubt.
- 1.22 Therefore, we have considered whether there should be legislative reform to include a statement in statute that an electronic signature is as valid as a handwritten signature. There are clearly benefits to such an approach, which would provide clarity and certainty. Other jurisdictions we have examined, including Australia, Estonia, Hong Kong, New York, Scotland, and Singapore, each provide such a statement of validity in legislation.¹⁷ However, we are not persuaded at present that this is necessary in England and Wales because of our provisional conclusion that the current law already accommodates electronic signatures.
- 1.23 However, this is a finely balanced question and we welcome the views of consultees.

¹⁴ In Chapter 3 we discuss *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 1 WLR 1543; *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm); *Golden Ocean Group Ltd v Sagaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674; *Bassano v Toft* [2014] EWHC 377 (QB); *Re Stealth Construction Ltd*; *Green (Liquidator of Stealth Construction Ltd) v Ireland* [2011] EWHC 1305 (Ch); *Lindsay v O’Loughnane* [2010] EWHC 529 (QB); and *Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953.

¹⁵ See paras 3.83 to 3.87 of the consultation paper. An electronic signature may also be used instead of a handwritten signature even where there is no statutory requirement for a signature.

¹⁶ 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/> (last visited 8 August 2018).

¹⁷ We discuss the legal position of electronic signatures in these jurisdictions in Chapter 5 of the consultation paper, with further detail in Appendix 2. For example, in Scotland, the Requirements of Writing (Scotland) Act 1995 lists those documents which are required to be in writing to be valid. It also prescribes the way in which such requirements may be satisfied electronically, which involves using a particular type of electronic signature: see para 5.22 of the consultation paper.

A test case?

- 1.24 A different option which consultees may wish to consider is whether a claim could be brought using the test case procedure under the Financial List.¹⁸ This procedure could be used to obtain an authoritative ruling on the effectiveness of an electronic signature, provided that certain requirements are met.¹⁹

A working group on practical and technical issues

- 1.25 We provisionally propose the creation of an industry working group, potentially convened by Government, to consider practical, technical issues which may be influencing a party's decision to execute a document electronically. These issues may include the security and reliability of electronic signatures. We have been told by stakeholders that there are also questions of trust and identity, the interoperability of electronic signature systems, and the archiving of information. We believe that guidance from an industry working group may give more confidence to stakeholders who wish to use electronic signatures but are hesitant because of practical or technical concerns.²⁰

Deeds

- 1.26 Deeds are a type of document with more stringent formality requirements than a document which simply requires writing or a signature.²¹ The Law Commission has previously defined a deed as a written document which is executed with the necessary formality, and by which an interest, right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.²²
- 1.27 There are relatively few transactions which must be made by deed rather than by simple contract. They are usually required for land transactions, for agreements made without consideration (that is, without a reciprocal obligation such as payment) and for granting powers of attorney.²³
- 1.28 In order to be validly executed, deeds must, in general, be signed in the presence of a witness who attests the signature, and delivered as a deed.²⁴ Unlike for electronic signatures, there are no legislative provisions currently in effect which deal with the electronic execution of deeds.

¹⁸ Practice Direction 51M, Civil Procedure Rules 1998, SI 1998 No 3132.

¹⁹ See paras 7.21 to 7.23 of the consultation paper; Practice Direction 51M, para 2.1 and CPR, r 63A.

²⁰ See paras 7.24 to 7.28 of the consultation paper.

²¹ For a discussion of deeds, see Chapter 4 of the consultation paper.

²² The Execution of Deeds and Documents by or on behalf of Bodies Corporate (1998) Law Com No 253 (1998 Report), paras 2.4 to 2.5.

²³ See paras 4.9 to 4.13 of the consultation paper.

²⁴ Law of Property (Miscellaneous Provisions) Act 1989, s 1. Deeds executed by companies under the Companies Act 2006 are dealt with by sections 44 and 46 of that Act.

Witnessing and attestation

- 1.29 Witnessing involves observing the execution of a document. Attestation is the additional step of recording, on the document itself, that the witness has observed the execution.²⁵
- 1.30 Some stakeholders have suggested that witnessing and attestation should not be required for deeds executed with an electronic signature. We have been told that it causes delay and inconvenience in the execution of deeds.
- 1.31 We believe that the witnessing and attestation requirement fulfils an important evidential function whether a deed is signed electronically or not, and we do not think there is any justification for such a significant inconsistency between electronic and hard copy documents. Therefore, we consider that the witnessing and attestation requirement should be retained for deeds executed electronically.²⁶

Does the witness need to be physically present?

- 1.32 If the witnessing and attestation requirement is to be retained, how may it be satisfied where an electronic signature is used? The simplest way is by the witness being physically present when the electronic signature is applied to the document. However, we have also considered whether another form of “presence”, such as by video link, is sufficient.
- 1.33 Our provisional view is that the current provision that a deed must be signed “in the presence of a witness” means that the physical presence of a witness when the document is signed is required. Based on statutory construction and case law, we are not convinced that parties could be confident that the current law would allow for the witness viewing the signing on a screen, without being physically present. This means that, currently, witnessing by video link is unlikely to satisfy the witnessing and attestation requirement.²⁷
- 1.34 We have therefore considered potential options for reform to allow more flexible arrangements for deeds executed electronically.

Provisional proposal: witnessing by video link

- 1.35 We provisionally propose that it should be possible for a witness to observe an electronic signature by video link and then attest the document by affixing their own electronic signature to it.²⁸ The witnessing and attestation could be more or less simultaneous, if both parties are logged into the same signing platform. If the signed electronic document is emailed to the witness, then the witness could attest the document immediately after observing the signatory sign the document.
- 1.36 The basic requirements for valid execution of a deed (that is, signing, witnessing and attestation and delivery) would remain the same. We believe that this option could fulfil

²⁵ See for example *Wright v Wakeford* [1803-13] All ER Rep 589 at 591.

²⁶ See para 8.7 of the consultation paper.

²⁷ See paras 8.8 to 8.15 of the consultation paper.

²⁸ See paras 8.24 to 8.33 of the consultation paper.

the evidential, protective and cautionary functions of formalities to the same or a similar extent as traditional witnessing and attestation in person.²⁹

1.37 We ask for consultees' views. We also ask how attestation should be carried out.

Other options for reform: moving away from witnessing and attestation

1.38 We have also considered various scenarios in which the witness would not actually see the signatory applying the electronic signature, but would have other evidence to suggest that it was in fact the signatory who signed.

1.39 First, we consider the use of a signing platform.³⁰ A signatory and a witness may be logged onto the same signing platform but from different locations, having authenticated themselves through the use of a password, a PIN sent to their mobile phone, or even a scanned identification such as a driving licence.

1.40 If a witness can see the electronic signature appear on their screen in real time, should it be necessary for the witness also to observe the signatory's application of the signature by video link? We think that using a signing platform alone may fulfil the functions of witnessing, but to a lesser extent than if the witness could actually see the signatory applying their electronic signature. We ask consultees whether they think it should be possible to execute a deed in this way, noting that the witness would not be able to attest to having seen the physical act of signing.

1.41 Secondly, we discuss whether the witnessing and attestation requirements could be replaced with a requirement that a document must be signed using a digital signature, which is a more complex type of electronic signature produced by using asymmetric or public key cryptography.³¹

1.42 This would be similar to the proposed approach of HM Land Registry in relation to dispositions that must be registered.³² However, there are factors which render this approach unsuitable for our more general purposes. HM Land Registry has a degree of control over a self-contained system of registration of documents. The range of documents dealt with in our project is not limited to one type of transaction, nor to a particular system of registration. The same level of standardisation would be difficult to achieve across all types of documents, and may also be undesirable. Therefore, our view is that the witnessing and attestation requirement should not be replaced with a requirement that a document must be signed using a particular type of technology. We ask whether consultees agree.

²⁹ In the consultation paper at para 4.40 we say that it is not clear whether the "labelling" function of formalities is met by witnessing and attestation. Instead, it is adequately met by other formalities.

³⁰ See paras 8.38 to 8.42 of the consultation paper.

³¹ See paras 8.43 to 8.50 of the consultation paper. For a description of this technology, see paras 2.18 to 2.23 of the consultation paper.

³² HM Land Registry, *Consultation on Proposals to amend the Land Registration Rules 2003* (2017), paras 21 to 37; HM Land Registry, *Proposals to amend the Land Registration Rules 2003 Government Response* (2018), ch 4.

- 1.43 Thirdly, we explore the possibility of a new concept of “electronic acknowledgement”.³³ We envisage that the signatory would sign the document electronically, and then acknowledge to the witness that they had signed it, showing or sending the document to the witness. The witness would then sign the document with their own electronic signature and include a statement that the signatory had “acknowledged” the signature.
- 1.44 We consider that introducing a new concept of electronic acknowledgement could increase transaction efficiency, whilst fulfilling the functions of witnessing to a similar degree as traditional witnessing and attestation.
- 1.45 In principle, a signatory could acknowledge their signature in writing, in person, by video link or by telephone. In order to establish the necessary evidential connection between the signatory, the document and the witness, the witness must see the signatory’s signature on the document before applying their own signature.
- 1.46 We think that the acknowledgement and witnessing would have to take place reasonably soon after the signing. We do not think it should be possible to complete the witnessing procedure weeks or months after the signing. Similarly, we consider that the acts of acknowledgement and witnessing should take place within a reasonably short time period of each other.
- 1.47 This option would require a significant legislative amendment as it envisages a fundamental change to the formal elements of a deed, for deeds executed electronically. It is not something which we would recommend lightly and we seek consultees’ views.

Delivery

- 1.48 Once a deed is signed, witnessed and attested, it must be “delivered as a deed”. Historically, delivery consisted of the physical act of handing the deed to the other party. Over time, the transfer of physical possession has become less important and the emphasis is now on the intention of the maker of the deed.
- 1.49 In practice, parties satisfy the requirement that a deed must be “delivered” in various ways. The document may state the date of delivery³⁴ or there may be “delayed” delivery, through escrow or provision of the deed to a third party to “hold to order”.³⁵ For corporate bodies, there are also statutory presumptions which deem a deed to have been delivered upon signature.³⁶
- 1.50 Although we would ideally like to see the name of “delivery” changed to reflect modern practices, this is not a sufficient reason by itself to justify a legislative amendment. We

³³ See paras 8.51 to 8.60 of the consultation paper.

³⁴ For example, “In witness whereof this [document name] has been executed by the parties as a deed, and is delivered on the date first above written.”

³⁵ *Longman v Viscount Chelsea* (1989) 58 P & CR 189 at 195, cited in *Silver Queen Maritime Ltd v Persia Petroleum Services plc* [2010] EWHC 2867 (QB) at [107].

³⁶ Companies Act 2006, s 46(2).

have not heard from stakeholders that the requirement of delivery hinders lawyers and businesses from executing deeds electronically.³⁷

- 1.51 However, if deeds are to be considered in a future project, as discussed below, the change could be made for deeds in general, regardless of how they are executed.

The *Mercury* decision

- 1.52 In the High Court decision in *Mercury*³⁸ Mr Justice Underhill, as he then was, referred to a document as having to be “a discrete physical entity (whether in a single version or in a series of counterparts) at the moment of signing”.³⁹ This raised concerns among lawyers about the use of pre-signed signature pages and situations where signature pages are sent by email or by fax.
- 1.53 These comments were obiter – that is, incidental and not part of the main decision. They are not binding authority. However, the comments in *Mercury* caused sufficient concern to warrant the publication of a 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 2009 note).⁴⁰ The purpose of this note was to facilitate virtual⁴¹ signings and closings for documents governed by English law in the light of *Mercury*.
- 1.54 The 2009 note contained an analysis of *Mercury* and guidance to practitioners as how to conduct virtual signings of different types of documents, including deeds, contracts under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, guarantees or simple contracts.
- 1.55 We agree with, and endorse, the conclusions of the 2009 note, which provides a practical way of dealing with the concerns raised by *Mercury* and which, we understand, is being followed by the market.⁴² We do not propose legislative reform because we do not believe it is necessary. We ask whether consultees agree.
- 1.56 The 2009 note deals with wet ink signatures which are then scanned. However, some stakeholders have asked for guidance on how electronic signatures may satisfy the

³⁷ See paras 8.61 to 8.70 of the consultation paper.

³⁸ *R (Mercury Tax Group Ltd) v Her Majesty's Commissioners of Revenue and Customs* [2008] EWHC 2721 (Admin), [2009] STC 743. See more detailed discussion at paras 8.71 to 8.83 of the consultation paper.

³⁹ *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]. See paras 4.82 to 4.86 of the consultation paper, where we also refer to the Court of Appeal decision in *Koenigsblatt v Sweet* [1923] 2 Ch 314. This case, which was referred to by counsel in *Mercury*, involved the ratification of a signature.

⁴⁰ 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> (last visited 8 August 2018).

⁴¹ A “virtual signing”, in the context of the note, is a signing or completion meeting at which not all, or none, of the signatories were present.

⁴² We set these out from para 8.74 of the consultation paper.

requirement that the document is a “discrete physical entity at the moment of signing”. We envisage two possible situations.

- 1.57 First, where an electronic signature is applied to an electronic document, we believe that the question of whether this document is a “discrete physical entity at the moment of signing” will generally not arise. This is because the signature can be applied to the document without removal of the signature pages. If the signature page is removed, then the procedure in the 2009 note should be followed.
- 1.58 Secondly, where a document is executed over an online platform, the party has the entire document before them. If the document is a deed, and the application of an electronic signature takes place in the physical presence of the witness, who then applies their own electronic signature, then the signature and attestation will “form part of the same physical document”.

A WIDER REVIEW OF DEEDS?

- 1.59 In the consultation paper we discuss the issues which arise when formalities which have been developed for documents executed in hard copy are applied to electronic documents. There is a separate question, however, as to whether these formalities, and the concept of deeds in general, are still fit for purpose in the twenty-first century. Some stakeholders have told us that deeds should be abolished, either for certain types of transactions, or altogether.
- 1.60 In order to address these questions, we are seeking consultees’ views on whether there should be a wider review of the law of deeds, as a separate Law Commission project. This project could consider both deeds executed electronically and those in traditional, paper form.⁴³

DOCUMENTS EXECUTED BY CONSUMERS AND VULNERABLE INDIVIDUALS

- 1.61 As well as transactions between commercial parties, this project covers documents executed by consumers, such as consumer credit agreements and trust deeds. It also covers the execution of 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.
- 1.62 Some stakeholders have expressed concern about including these types of documents within the scope of the project. It has been suggested that consumers are more likely to enter into agreements in haste or error if they use electronic signatures.⁴⁴ In relation to lasting powers of attorney, the potential impact of these documents raises very serious concerns about the financial abuse of older or vulnerable people. It has been

⁴³ See paras 8.86 to 8.88 of the consultation paper.

⁴⁴ See Financial Conduct Authority, *Review of retained provisions of the Consumer Credit Act: Interim report* (August 2018) Discussion Paper DP18/7, Annex 6, para 156.

suggested that enabling these documents to be created electronically may increase the opportunity for fraud, duress and abuse.⁴⁵

- 1.63 We have considered these concerns carefully. The principal reason for excluding these types of documents is that consumers and vulnerable individuals need more protection than commercial bodies. This argument must be given significant weight.
- 1.64 We note that where individuals may be particularly vulnerable, specific legislation already provides additional layers of formality. For example, the Consumer Credit Act 1974 and regulations made under that Act prescribe formality requirements for regulated credit agreements.⁴⁶ Nothing in this project should be taken to remove or lessen these protections.
- 1.65 Lasting powers of attorney raise particular issues because of their potential impact on vulnerable and older people. We have considered these issues seriously and discussed them with the Office of the Public Guardian (OPG). The current system for the execution of lasting powers of attorney is partly digital. The donor may create the document online but is required to sign it in wet ink before it can be registered and take effect. Given our provisional conclusion on the validity of electronic signatures, 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.
- 1.66 Nothing in our consultation paper should be taken to suggest that an individual authority, such as the OPG, cannot set its own requirements for documents to be registered with it. Security and reliability concerns in relation to electronic signatures in specific circumstances are questions to be determined by the parties.⁴⁷ However, we note that a simple typed electronic signature is extremely easy to forge.⁴⁸ In the case of lasting powers of attorney, the OPG should consider what is sufficiently secure and reliable for donors before introducing any system using electronic signatures.
- 1.67 Ultimately, this project deals with general formalities of documents executed electronically, namely signing, witnessing and attestation and delivery. As set out above, a deed may be executed in a commercial context or by a consumer or individual, and the same general rules apply. Our provisional view is that it would not be desirable to carve out exceptions in the general legislative provision for documents executed by consumers or individuals. We consider that this is a matter for specific legislation or regulation. We ask for consultees' views.

IMPACT OF REFORM

- 1.68 We consider that our provisional conclusions and proposals in respect of electronic signatures and deeds will increase confidence in the legal validity of electronic execution. A corresponding rise in the number of electronic transactions has the

⁴⁵ See paras 6.32 to 6.34 of the consultation paper.

⁴⁶ Consumer Credit (Agreements) Regulations 1983, SI 1983 No 1553 and Consumer Credit (Agreements) Regulations 2010, SI 2010 No 1014.

⁴⁷ In the case of lasting powers of attorney, by "parties" we refer to the OPG.

⁴⁸ See paras 2.48 and 6.39 of the consultation paper.

potential to reap significant benefits for business and individuals, in both increased efficiency and allowing resources to be directed to other activities.

- 1.69 The transitional costs of our proposals for reform are relatively small and that there are unlikely to be on-going costs. However, it is difficult to put a number on the benefits or costs associated with our proposals. Therefore, we ask consultees for quantitative and qualitative evidence as to what they believe to be the consequences of our proposals. The information which we receive from consultees in response to the questions below will form the basis of an impact assessment to be published with our final report.

LIST OF CONSULTATION QUESTIONS

- 1.70 Throughout the consultation paper, we ask consultees for their views on our provisional conclusions and proposals. For convenience, we have listed all the consultation questions, and the corresponding paragraph reference to the consultation paper, below.

Consultation Question 1.

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

Paragraph 3.87

Consultation Question 2.

- 1.72 Our provisional conclusion is that the requirement under the current law that a deed must be signed “in the presence of a witness” requires the physical presence of that witness. Do consultees agree?

Paragraph 4.57

Consultation Question 3.

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

Paragraph 6.19

Consultation Question 4.

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

Paragraph 6.41

Consultation Question 5.

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

Paragraph 7.20

Consultation Question 6.

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

Paragraph 7.28

Consultation Question 7.

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

Paragraph 8.32

Consultation Question 8.

1.78 If witnessing by video link is to be permitted, how do consultees consider the witness should complete the attestation:

- (1) Via a signing platform which the signatory and witness both log into?
- (2) With the document being emailed to the witness by the signatory immediately after signing?

Paragraph 8.33

Consultation Question 9.

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

Paragraph 8.42

Consultation Question 10.

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

Paragraph 8.50

Consultation Question 11.

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

- (1) How should electronic acknowledgement be effected (for example, by email, telephone, text message, in person)?
- (2) Do consultees consider that there should be a prescribed period of time (for example, 24 hours) within which:
 - (a) acknowledgement must occur after signing; and
 - (b) acknowledgement and witnessing must take place?
- (3) How should the witness record the signatory's acknowledgement?

Paragraph 8.60

Consultation Question 12.

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

Paragraph 8.70

Consultation Question 13.

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

Paragraph 8.83

Consultation Question 14.

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

Paragraph 8.88

Consultation Question 15.

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

Paragraph 8.93

Consultation Question 16.

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

Paragraph 8.94

Consultation Question 17.

1.87 Do consultees agree that the Law Commission's proposal to establish an industry working group, to consider practical, technical issues, would:

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

Paragraph 8.95

Consultation Question 18.

1.88 We have canvassed several options for electronically executing deeds without the physical presence of a witness. We welcome evidence from consultees on the benefits (for example, reduced delays in completing transactions) or costs which might result from:

- (1) the capacity to execute deeds electronically without the physical presence of a witness; or
- (2) any or all of the specific options for electronically executing deeds described above, namely via video link, signing platform, or acknowledgement.

Paragraph 8.96