



## **Law Commission Consultation – Electronic Execution of Documents**

**A Response by**

**The Chartered Institute of Legal Executives (CILEX)**

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## **1. Introduction**

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform.
- 1.3. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.

## 2. General Points

- 2.1. CILEx believes that technologically enabled legal services and processes have potential to improve the experience for the public and professionals. However, CILEx members are concerned that promoting the use of technology to allow for the electronic execution of documents (both contracts and deeds), could leave the system open to fraud and abuse.
- 2.2. CILEx surveyed its members to understand their views on the Law Commission's proposals. It showed a clear need for the review, with only 9% of survey respondents saying they felt that the current position of the law on electronic signatures is clear enough as it stands. Some members commented that existing case law on the matter has been insufficient to provide the clarity and predictability for practitioners to rely on, preventing wide spread use of the practice.
- 2.3. Members were nonetheless vocal about the impact that this could have on vulnerable persons, particularly with regard to deeds, and suggested that the costs of potential liability over fraudulent electronic signatures would greatly outweigh the benefits that technology could bring.
  - 2.3.1. One member commented: "*The whole electronic signature issue leaves itself open to abuse from all levels. We are trying to get away from the situations where fraud is on the rise and introducing electronic signatures is not going to achieve this. It leaves the whole system open for abuse and it is the legal advisors who end up having to pick up the pieces in instances of fraudulent activity.*"
  - 2.3.2. Members have strongly suggested that the principle would benefit from being reassessed and that proposals should carefully take into account opinions from all corners of the legal profession before any reforms are made.

## 3. Validity of Electronic Signatures

- 3.1. CILEx recognises 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 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.
  - 3.1.1. 83% of surveyed CILEx members admitted that they always rely on wet-ink signatures to execute documents. Even in situations where the document was emailed over to them for signing, the majority (72%) opted to print out the document, sign it in wet ink and then post it back to the relevant party.<sup>1</sup>
- 3.2. CILEx cautions that these signatures are nonetheless vulnerable to fraud and misuse, with members going as far as to point out the ease at which a signature can be transposed onto a document by a third party.

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<sup>1</sup> It is noted that majority of survey respondents did rely on technology for the creation and dissemination of contracts/deeds. 94% of respondents used technology in all/most cases for drafting contracts/deeds. In turn, 50% relied on technology in all/most cases for sending draft documents to their client and 62% for sending the completed document to their client. However, in stark contrast, only 29% relied on technology in all/most cases to physically sign the document for completion, and only 37% for certifying copies of documents

- 3.2.1. On the basis of these concerns the current legal approach was favoured by some respondents; whereby the evidential burden around the validity of electronic signatures lies on the party seeking to enforce them (i.e.: electronic signatures are not taken as prima facie valid).<sup>2</sup> However, member opinion on this matter reflected an almost 50/50 split, with others arguing that unless reforms are implemented for electronic signatures to carry evidential weight, they would be of very little use in practice.<sup>3</sup>
  - 3.2.2. CILEx appreciates that this discord in consensus reflects those within the consultation paper. Whilst the Law Commission suggests that future legal reform is unnecessary (and thereby that electronic signatures should continue to enjoy legal admissibility but not evidential weight),<sup>4</sup> the advisory notes referenced and endorsed throughout the consultation advocate the opposite.<sup>5</sup>
  - 3.2.3. CILEx advises that greater consideration is needed on this matter (which may in turn act as a further indication of whether future legal reform is indeed warranted).
- 3.3. It is recognised that the widespread use of electronic signatures and the aforementioned question of evidential weight, are in part, questions of technology. CILEx thereby emphasises that whilst further reform is still needed to clarify whether an electronic signature is capable of satisfying the statutory requirement for a signature, it is paramount that due regard is also paid towards safeguarding against fraud and abuse. Greater consideration of the suitability, reliability and authenticity of these signatures is necessary, and to this end CILEx supports the proposals put forth for a special working group, led by Government, to try and resolve these issues and assess any limitations within current technology.
- 3.3.1. CILEx would advise that this working group comprise of both experts within technology and, crucially, experts within legal practice. Appraisal of the risks, concerns and challenges of electronic signatures must be conducted through a suitable lens which safeguards the primacy of the law and integral legal concepts, as well as the impact that this might have on legal practitioners and consumer interests.
  - 3.3.2. In the absence of relevant industry standards, (focusing predominantly on the reliability of electronic signatures), even where reforms are made to clarify the legal position, it is highly dubious that this would result in major uptake of electronic signatures by legal practitioners in the field.<sup>6</sup>

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<sup>2</sup> 53% of members favoured this approach, whereas 47% of surveyed members felt that electronic signatures should be prima facie valid.

<sup>3</sup> Members advocating that electronic signatures should be prima facie valid, had commented: *"If not prima facie valid then there is no point in electronic signature. Any signature would need to be an 'authorised signatory'."*; *"If a framework for e-signatures is in place, and followed, then prima facie this should be valid and therefore the person challenging it should have the burden of proof. I think it will create a system of uncertainty and doubt if prima facie e-signatures are no valid, which will pose difficulties in practice."*

<sup>4</sup> Consultation Paper, p.18, para 2.41-2.43.

<sup>5</sup> 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), p.5, para 5.

<sup>6</sup> Trends in member opinion support this finding. Some even suggested that where electronic execution was adopted it would still likely be supplemented with a wet-ink signature of some kind: *"It would be more expensive as you would still get a signed copy as well."* Also note: only 18% of surveyed members agreed or strongly agreed that signing contracts electronically is common in practice, with majority of these respondents operating in commercial law, as opposed to conveyancing or private client.

- 3.4. Surveyed members whose work involves cross-border transactions, shared the following anecdotal information:
  - 3.4.1. Electronic execution of contracts sent from overseas companies will be expected to require a legal opinion confirming the good legal status of the company (albeit members still retained reservations against accepting such documents).
  - 3.4.2. Some jurisdictions require that a company seal is affixed to the document confirming the signature's authenticity.
  - 3.4.3. Transactions with certain jurisdictions (Spain, USA, Germany, Switzerland) have revealed that the UK's stance towards electronic signatures is more reserved.

#### **4. Electronic Execution of Deeds**

- 4.1. CILEx members have expressed deep concerns against the electronic execution of deeds. An overwhelming majority of members do not feel that electronic execution of any formality requirements for deeds (witnessing, attestation and even delivery) should be conducted virtually or electronically.
  - 4.1.1. 93% of members agreed or strongly agreed with the Law Commission's finding that the requirement for a deed to be 'signed in the presence of a witness' requires physical presence.
  - 4.1.2. However, contrary to the Law Commission's finding, 69% of members agreed or strongly agreed that the requirement for a deed to be delivered also requires this to be physical delivery.<sup>7</sup>
- 4.2. Member opinion was largely in disagreement with all the options provided in the consultation paper for enabling electronic execution of deeds by law. The vast majority of members referenced the inability to protect against undue influence and the inability to sufficiently protect the interests of vulnerable persons as reasons for their disagreement.<sup>8</sup>
  - 4.2.1. Amongst concerns raised were also: the risks of hacking or security breaches; the risk that electronic execution may give rise to future causes for challenge; the accessibility to, or suitability of, technology (particularly for clients executing lasting/enduring power of attorneys owing to their demographic); initial start-up costs for installing reliable technology; maintenance and running costs of the technology; whether this would be user-friendly; unstable wifi connections/power cuts; verification systems, and potential interception.
  - 4.2.2. Members further pointed out the potential inconvenience of video links and signing platforms, should these require clients to download specialist software for the purposes of a single signature. In such instances, electronic execution may provide little benefits over physical execution.<sup>9</sup>

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<sup>7</sup> One member stated: "*Delivery, since Denning's judgments on fax, requires immediacy which is not guaranteed [in the context of non-physical delivery].*"

<sup>8</sup> Member comments to this effect included: "*Checking capacity at the time of signing is critical & can't be done electronically*"; "*I do not think the electronic execution of deeds should be introduced. the fraudsters are always one step ahead.*"; "*Undue influence can't be checked as you have no idea if anyone else is present. Also, majority of those preparing LPAs will not have the technology.*"; "*Elderly clients won't have access to the technology*"; "*I think the proposals should be very carefully considered with a view to the primary concern being to prevent fraud. The proposals may save time or money, but there is a very significant fraud risk.*"

<sup>9</sup> Some respondents noted that the options provided were rather "*long winded*", so much so that it may be easier for the client to simply visit the law firm in person instead.

- 4.3. Whilst the Law Commission's preliminary research suggests that "protection against vitiating factors such duress, undue influence and fraud is not the only or the principal aim of witnessing,"<sup>10</sup> CILEx members are strongly concerned about the impact that a lack of physical presence will have on this particular function.
- 4.3.1. 84% of respondents selected the protective function of witnessing and attestation as the most important function; more so than the cautionary or evidentiary functions which were identified within the consultation paper.
- 4.3.2. CILEx strongly cautions against diminishing the protections in place within the law of deeds which safeguard the interests of signatories. Deeds are unique in nature owing to the very significance of the transactions that they govern. In appreciation of this, a requisite level of protection is imperative in protecting the wider public interest.
- 4.3.3. CILEx would like to draw attention to the fact that the evidentiary function is shared within the formalities for both deeds and contracts; it is the protective and cautionary functions which truly set apart the formality requirements of deeds. Both of these latter functions are compromised in all of the options put forward.<sup>11</sup>
- 4.4. Concerns for the electronic execution of deeds were not limited to more sensitive deeds but were noted in the context of all deeds given the significance of transactions involved.<sup>12</sup>
- 4.4.1. Nonetheless, acute problems were identified in relation to lasting power of attorneys and enduring power of attorneys. Herein, CILEx would like to draw the Law Commission's attention to the unique risks of allowing certificate providers to witness documents electronically. As the primary function of the certificate provider is to safeguard that there has been no undue influence, fraud or duress by the donor, the protective function of witnessing becomes ever more important when donors are generally more vulnerable. As all the options put forward for the electronic execution of deeds would impede this function, they would in turn be in complete discord with the very purpose that certificate providers are intended to fulfil.<sup>13</sup>
- 4.5. With specific regard to the Law Commission's suggestion of 'electronic acknowledgement'; the new concept was recognised as an innovative approach. However, member opinion remained highly sceptical that this would work in practice, at least not in a manner that would provide benefit to the current system of witnessing/attestation.
- 4.5.1. If this approach were to be implemented, all members agreed or strongly agreed that there should be limitations on: a). the period between signing a deed and acknowledging that you have done so to the witness, and b). the

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<sup>10</sup> Consultation paper, p.83, para 8.21.

<sup>11</sup> As acknowledged within the consultation paper, the protective function would be most compromised, however the cautionary function would also be lessened owing to the administrative convenience that technology provides. Member comments expressed concern that the cautionary function may also be diluted: "*I would be concerned also with capacity of clients and that they understand what is being signed*"; "*I think it dilutes the importance of the document being signed...*"; "*Depersonalises the transaction.*"

<sup>12</sup> Note that some members also held reservations about electronic signatures used for particularly sensitive contracts, such as contracts for the sale of land.

<sup>13</sup> On average 10% of survey respondents thought that electronic execution of documents using existing technology would be suitable for certificate providers. A marginally greater percentage (14%) thought that electronic acknowledgement would be suitable for certificate providers.

period between acknowledging you have signed a deed to the witness, and the witness signing the document in turn.

4.5.2. Member suggestions on what these periods should be, varied from the idea that these should take place successively (with no time interval), to a maximum period of 1 week.

4.6. Member opinion, by and large, considered that there would be little benefit from any of the options put forward to enable electronic execution of deeds.

4.6.1. 74% of respondents disagreed or strongly disagreed that proposals for virtual witnessing and attention would reduce transaction costs.<sup>14</sup> Of the benefits noted however, was the potential that this could improve convenience (especially for overseas clients) and reduce time and costs.

4.6.2. Nevertheless, it was argued that time and cost reductions should not be a primary aim when it comes to the most important stage of a transaction, i.e. execution.<sup>15</sup>

#### For further details

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<sup>14</sup> Amongst conveyancers, there were none who believed that the proposals for virtual witnessing and attestation would reduce transaction costs.

<sup>15</sup> Relevant member comments included: that *“it is a folly to try and reduce costs in relation to what is probably the most important element of a transaction.”*; *“There needs to be a high level of accountability for parties executing these types of documents. It’s not good enough to risk losing the security of a deed for the inconvenience of an executing party.”*; *“The requirement for the presence of a witness is a safeguard not a hindrance.”*