



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Execution of Deeds
and Documents) Order
2004**

**Fourteenth Report of Session
2003–04**



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*Report, together with formal minutes and
written evidence*

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The Regulatory Reform Committee

The Regulatory Reform Committee is appointed to consider and report to the House of Commons on proposals for regulatory reform orders under the Regulatory Reform Act 2001 and, subsequently, any ensuing draft regulatory reform order. It will also consider any "subordinate provisions order" made under the same Act.

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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 141, available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom

A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mick Hillyard (Clerk), Stuart Deacon (Committee Specialist), Brian Dye (Committee Assistant) and Liz Booth (Secretary).

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Summary

The purpose of the proposal is to implement reforms to legislation governing the execution of deeds and other documents by and on behalf of corporations. The proposed reforms were identified by the Law Commission of England and Wales and were the subject of its report “The Execution of Deeds and Documents by and on behalf of Bodies Corporate”. The effect of these proposed changes would be to make it clear what is required in various circumstances in order for corporations to execute a deed or other documents. The measure would increase certainty among businesses, legal practitioners and others that legal procedures leading to the execution of such documents have been correctly carried out and that the document can be accepted as having been validly executed.

The Committee considers that the proposals meet the tests laid down in the Regulatory Reform Act and would be beneficial and recommends that a draft Order in the same form as the proposal should be laid before the House.

1 Report under Standing Order No. 141

1. The Regulatory Reform Committee has examined the proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004 in accordance with Standing Order No. 141. We have concluded unanimously that a draft Order in the form of the proposal should be laid before the House.

2 Introduction

2. The proposal for the draft Regulatory Reform (Execution of Deeds and Documents) Order 2004 was laid before the House by the Department for Constitutional Affairs (“the Department”) on 21 July 2004.

3. The proposed Order would introduce a number of reforms to legislation governing the execution of deeds and documents by and on behalf of corporations. It would make amendments to section 74 of the Law of Property Act 1925, section 36A of the Companies Act 1985 and Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 to remove certain restrictions on the powers of companies and corporations more generally and would remove inconsistencies between these Acts so that the law would be clarified. Consequential amendments would also be required to the Powers of Attorney Act 1971. These changes are intended to allow a greater common understanding of the requirements of the law: they will increase certainty amongst businesses, legal practitioners and others that legal procedures related to the execution of deeds have been correctly carried out.

4. The proposed Order is intended to give effect to recommendations made in the Law Commission Report “The Execution of Deeds and Documents by and on behalf of Bodies Corporate”.¹ The Government’s acceptance of recommendations made in that Report was given in answer to a Parliamentary Question on 27 July 1999.² The proposed Order draws on the provisions of a draft bill appended to the Law Commission’s Report and the Order would give effect only to changes proposed by the Law Commission (although some changes recommended in the Report are not part of the current proposal (e.g. recommended changes to the powers of liquidators of companies)).

5. The House has instructed us to examine the proposal against the criteria specified in Standing Order No. 141 (6) and then, in the light of that examination, to report whether the Government should proceed, whether amendments should be made, or whether the Order should not be made.³

6. Our discussion of matters arising from our examination is set out below. Where a criterion specified in Standing Order No. 141(6) is not discussed in the report, this indicates that we have no concerns to raise about that criterion. In the course of our examination, we requested further information from the Department about a number of

1 Report number 253, published in August 1998. Available at www.lawcom.gov.uk/files/lc253.pdf

2 HC Written Answer 27 July 1999, col. 222

3 Standing Order No. 141(2)

issues relating to the proposal.⁴ The Department's response is reproduced as Appendix B to this report.

3 Background to the proposal

7. The background to the proposal lies in changes to the law governing the form of deeds and the method of their execution made by the Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 1989, although problems with these enactments take place in the context of much longer-standing difficulties with the law.⁵

8. The Companies Act 1989 introduced a new Section 36A into the Companies Act 1985 ("the 1985 Act") which ended the requirement that every company must have a common seal, and allowed companies to execute deeds by the signature of their officers alone. It also sought to reflect changes in the law relating to deeds generally made by the Law of Property (Miscellaneous Provisions) Act 1989, in particular the requirement that to be a deed, an instrument must make it clear on its face that the parties to it intend that it be a deed (known as the "face-value" requirement).

9. The ability of companies to execute deeds without the use of a common seal was found to be useful. Notwithstanding the useful freedom that it provided, section 36A of the 1985 Act was nevertheless found to be complex and confusing, and there seemed to be conflicts between its detailed provisions and other statutes, especially section 74 of the Law of Property Act 1925 and Section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. The reforms in section 36A, while being helpful in themselves, also left the legal framework for the execution of deeds different as between companies and other types of corporations.⁶ Additionally, the reforms in the two Acts of 1989 had concerned the execution of deeds and other documents *by* a company; they had not addressed circumstances in which deeds and documents were executed *on behalf of* a company by another person (who might be either a natural person or a corporation).

10. In light of the views expressed concerning the possible need for further reforms of the law, the Lord Chancellor and the President of the Board of Trade acting jointly referred the issue to the Law Commission, formally requesting that the Commission "...review the law on the execution of deeds and documents by and on behalf of all bodies corporate and to make recommendations".⁷ Following consultations which had shown there was very clear support for further legislative reform in this area, the Commission published its report in August 1998. The Government's intention to accept the recommendations in that report was announced in the answer to a Parliamentary Question on 27 July 1999.

4 Letter dated 17 September 2004 from the Committee Specialist to the Department of Constitutional Affairs.

5 The Law Commission give the following definition of a deed: "A deed may be defined as a written instrument 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". An instrument may be defined as a formal legal document in writing.

6 The section provided that companies did not need to keep a common seal and that they could execute deeds by the signature of their officers alone, while corporations must execute deeds by affixing their seal and the attestation thereof by a director and company secretary, or similar officer. There are also inconsistencies as to what is necessary for a deed or document to be properly executed (see paragraph 14 below).

7 *The Execution of Deeds and Documents by or on behalf of Bodies Corporate*, paragraph 1.1.

4 Extent of the proposal's application

11. The proposal applies to England and Wales. Recommendations contained in the Law Commission report which would affect the United Kingdom as a whole were omitted from the proposed Order on the basis that the Order was largely concerned with reforms affecting only England and Wales and the Government wished to preserve its specific focus on these matters.⁸ The laws determining the execution regimes for deeds and other documents in Scotland and Northern Ireland are specific to those jurisdictions and are largely within the devolved competence of the Scottish Parliament and Northern Ireland Assembly. In response to a question we put to it, the Department indicated that it did not believe its proposals would have the effect of bringing about a convergence in law and practice between the respective United Kingdom jurisdictions.⁹

5 Assessment of the proposal against the Standing Order No. 141(6) criteria

Inappropriate use of delegated legislation

12. **The proposal appears to be appropriate for delegated legislation.**

Removal of burdens

13. The Department presents an analysis of the recommendations for changes in the law made by the Law Commission in terms of burdens for the purposes of the Regulatory Reform Act at paragraphs 12 to 20 of the explanatory statement. Most of the burdens take the form of restrictions of various kinds affecting the process of executing deeds and documents. The burdens take the forms described in the following paragraphs.

Execution of deeds by corporations

14. The Law of Property Act 1925 provides in favour of a purchaser that a deed shall be deemed to have been duly executed by a corporation where its sealing has taken place in the presence of one of its directors and the company secretary or his deputy, and where those persons attest that they witnessed the document being sealed.¹⁰ The equivalent provision in the Companies Act 1985 allows for a document (which may be a deed or another form of document) to be validly executed where it receives the signature of two of a company's directors or one of its directors and the company secretary.¹¹ The two

8 In addition to those recommendations adopted as part of the current RRO proposal, the Law Commission had recommended an amendment to the powers of liquidators under the Insolvency Act 1986 (which applies across the UK) to establish that the power of a liquidator to execute a deed or document in the name of or on behalf of a company is quite separate from the power to use the company's seal. The Department states that this reform has been omitted in order to preserve the territorial application of the proposed order to England and Wales alone. Scotland and Northern Ireland have their own legislative provisions to govern the execution of deeds and documents, including specific provisions within the Companies Act 1985.

9 Appendix B, Question 4

10 Law of Property Act 1925, s. 74(1). "Attestation" may be defined as a formally recorded statement by a person that he or she witnessed the signature of a document by a specified other person.

11 Companies Act 1985, s. 36A

provisions are therefore not fully consonant with each other. The Department also considers that the specific requirement in the 1925 Act that the company secretary must attest the sealing of a deed amounts to an unnecessary burden.

15. The Department views the relevant section of the Companies Act 1985 as imposing an unnecessary restriction on the powers of companies validly to execute documents, where the directors or secretary of such companies are themselves other corporations (i.e. where a company has one or more 'corporate officers'). This is because there is no doubt what needs to be done in order for an officer who is a natural person to sign a document but it is unclear how a corporate officer may validly sign a document as director or secretary, and thereby execute that document. Most of those consulted on the question by both the Department and before them the Law Commission felt it would be beneficial if the law could be made clearer as to how corporate officers execute documents.

16. The explanatory statement¹² records that the Government will, in due course, introduce a bill to effect wide-ranging amendments of company law, implementing the work of the Company Law Review.¹³ One aspect of these planned reforms will be the removal of the requirement that companies must be constituted with a company secretary. If this is enacted, provision will need to be made for companies without a secretary to execute deeds and documents through a single signatory. The Department records that there are no plans to extend this proposed power more widely to all corporations¹⁴.

17. The Department considers that the requirement under section 74(1) of the 1925 Act that a deed executed by a corporation must be sealed and attested by a director and the company secretary (or his deputy) imposes an unnecessary burden. It proposes to remove this restriction and to permit that two directors may attest the seal, in addition to the present facility for a director and the secretary to do so. It also proposes to amend section 74(1) so that it would apply to all instruments made by corporations and not merely to deeds. Both these changes will make the relevant provisions of the 1925 Act much closer parallels with the equivalent provisions of the Companies Act 1985.¹⁵

18. The Department also proposes to amend those provisions of the 1925 Act and the Companies Act 1985 relating to the attestation of seals and the signature of deeds to permit a corporate officer of a company or corporation to designate an individual officer so to sign and attest on its behalf.

19. We consider that the Department has correctly described these burdens, and that its proposal would remove them.

12 Explanatory statement, paragraph 13

13 The Government's intentions are described in the White Paper *Modernising Company Law, July 2002, Cm 5553-1*

14 Explanatory statement, paragraph 13

15 In paragraph 13 of its explanatory statement, the Department notes that, as part of its planned further reforms to company law, there is an intention to allow companies to be constituted without a company secretary. This would mean that some companies might have only a single director who would need to be the sole signatory in the execution of deeds and documents. The Department states that the establishment of appropriate regime to govern execution by sole signatories will be an integral part of that further reform process.

Irrebuttable presumption of delivery

20. Section 36A (6) of the Companies Act 1985 provides a purchaser with an irrebuttable presumption that any document which has been duly executed by a company has also been delivered upon execution.¹⁶ This provision therefore creates a burden on companies in that it has the effect of preventing them from executing a document and holding over delivery until some later time. There is no comparable presumption relating to delivery of documents made by other corporations in the Law of Property Act 1925. The Companies Act 1985 is also at variance with provisions of the Law of Property (Miscellaneous Provisions) Act 1989, which specifically provides that the signing and delivery of deeds are distinct actions, so allowing a deed to be signed by the appropriate persons at a convenient time prior to being delivered, and thus taking effect.

21. Article 5 of the proposed Order would amend section 36A(6) of the 1985 Act to remove the irrebuttable presumption of delivery.

22. We consider that this burden has been correctly identified by the Department and would be removed by the proposal.

Execution on behalf of another person

23. Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that, for an instrument to be a deed, it must be validly executed by the person making it, or the parties to it. There is no reference to situations where a deed is executed on behalf of those persons by someone else acting on their behalf. The section therefore gives rise to a burden in that it restricts the powers of persons making or who are party to a deed, preventing them from delegating the execution of that deed to another person.¹⁷ This restriction is implicit in the way in which the relevant part of the 1989 Act has been worded but, as the Department indicate in their statement, there are circumstances where it does not have the effect of creating this limitation by reason of powers to delegate execution provided by alternative statutes. The particular example they have given is where section 74(3) the Law of Property Act 1925 provides that, in the case of a conveyance of property owned by a corporation, an attorney may execute the deed of conveyance as a deed by signing the name of the corporation in the presence of a witness, giving the conveyance effect just as if the corporation had itself executed it.¹⁸

24. In their report, the Law Commission noted that where a corporation gives another person authority to execute a deed on its behalf, the authority given is a power of attorney. While the common law recognized the capacity of corporations to do this, the position was first statutorily established in the Powers of Attorney Act 1971. Section 7(1) of that Act refers to the execution of deeds by signature of an attorney being as effective as if done “with the signature of the donor” (the donor being the legal person who has given power to

16 Execution of a deed or document is the completion of the process, whether by signing, sealing or otherwise, and sometimes including delivery, by which that deed or document becomes legally binding and enforceable. Delivery is the final formality in the execution process by which the maker of the deed demonstrates that they intend that the deed shall take effect. It may, but does not necessarily, involve the physical transfer of the document to another person.

17 Although the Department suggests that solutions to this problem are however found in practice, explanatory statement, paragraph 16.

18 An attorney may be defined as a person duly appointed by another to transact legal business on his behalf.

the attorney to perform this function). The issue of concern to the Commission, and subsequently to the Department, is that corporations do not of course execute deeds by means of their own signature, but either by execution under their common seal or by the signature of their officers. The effect may therefore be that the terms of this section of the 1971 Act restrict the ability of corporations to grant full powers of attorney (i.e. including the capacity to execute deeds on their behalf). Parallel wording in Section 7(3) of the 1971 Act may also give rise to a similar restriction in the case of the execution of conveyances.

25. To remedy these difficulties with the current law, the Department has proposed:-

- i. to amend 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 to provide that an instrument may be a deed if validly executed in the name or on behalf of the person making it or the parties to it. (Article 7 of the proposed Order).
- ii. to amend section 7 of the Powers of Attorney Act 1971 to provide that the donee of a power of attorney may validly execute a deed on behalf of the donor of that power. The form of the inserted wording would mean that section would be equally applicable to situations where the donor of the power of attorney was an individual or a corporation, as it does not refer to the process of signature but to execution “in any manner which would constitute due execution of that instrument by the donor”. (Article 6 of the proposed Order).

26. We consider that the Department has correctly described a number of related burdens and that its proposal would remove them.

Execution under seal not evidence of an intention to create a deed

27. The Department has agreed with the Law Commission that the effect of section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 is not always clear. This provision of the 1989 Act creates the so-called “face-value” requirement: that, in order to be a deed, an instrument must make clear on its face that the person making it or the parties to it intend it to be a deed. This is to be demonstrated by the fact of the instrument bearing a description of itself in those terms, expressing itself to be signed or executed as a deed, or otherwise.

28. The purpose of the face value requirement is to make clear a distinction between deeds and other instruments in circumstances, subsequent to the 1989 Act, when deeds may be executed without the use of a seal. The way in which the requirement is formulated gives a degree of latitude which may be helpful, in that the intention to create a deed is less likely to be undone through an accidental omission or defect in a closely specified form of words. The corresponding disadvantage is that it may not always be clear whether a document is to be a deed, even if it has been sealed; it may be one of another kind of sealed legal document. Neither would it be helpful to regard any document which is executed under seal as being a deed.

29. The Department therefore includes in Article 8 of its proposed Order an amendment to section 1(2) of the 1989 Act, so that an instrument shall not be taken to have made clear on its face that it is intended to be a deed simply by virtue of its having been executed under seal.

30. The Department treats this element of its proposal as removing or reducing a burden. We consider it may be better regarded as using the power in section 1(6)(c) of the Regulatory Reform Act to make incidental or supplemental provision.

Extension of presumption of authority to deliver

31. Section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a purchaser benefits from an irrebuttable presumption that a solicitor, licensed conveyancer or notary public has authority to deliver an instrument as a deed on behalf of the party for whom they act. The effect of this is that there is therefore no requirement to obtain any additional confirmation of their authority so to deliver. The provision only has effect on “a transaction involving the disposition or creation of an interest in land”.

32. The Department identifies the burden in this case as being the effective restriction on the presumption of authority to deliver only to those transactions which involve interests in land. The proposed Order would therefore remedy this at Article 9 by removing the reference in section 1(5) of the 1989 Act to transactions “involving the disposition or creation of an interest in land”.

33. We are satisfied that the Department has correctly described a burden and its proposal would remove it.

New burdens

34. The Department has identified a problematic ambiguity with Section 36A(4) of the Companies Act 1985.¹⁹ This provision gives any document, expressed howsoever to be executed by the company and signed by the director and secretary of a company or two of its directors, the same effect as if it were executed under the common seal of the company. The provision is helpful and, with other provisions, allows for formal documents to be brought into effect more easily and expeditiously. The difficulty with it is that it fails to take account of situations where the same persons serve as directors and secretary of two of more companies which are parties to the same deed. In such situations it has become common practice for individuals who are officers of a number of companies by a single signature to execute deeds on behalf of some or all of those companies, notwithstanding the clear legal principle that a deed must be the act of all and each of the parties to it (so that, for example, an individual who is a director of companies x, y and z executes a deed relating to all three companies with a single signature). The Department notes that this practice, in conjunction with errors in the drafting of documents, has led to disputes as to the enforceability of agreements created by deeds in instances where it has not been possible to demonstrate that particular companies were in fact party to the deeds at issue.²⁰

35. The Department has therefore proposed a new burden in requiring that directors and secretaries who serve more than one company which is party to a deed should be required to sign separately for each of those companies. This would make clear for whom they signed on each occasion.

¹⁹ Explanatory statement, paragraph 34

²⁰ Explanatory statement, paragraph 34

36. **We agree that effect of this element of the proposal would be to impose a new burden in the way in which the Department has described.**

Proportionality, desirability and fair balance of the new burden

37. The Department comments that the imposition of the new burden described in paragraph 35 above will give the officers who act for more than one company in the making of a deed more onerous duties to perform, in the sense of requiring that they must sign a deed separately for each company which is a party to it and for which they are authorised to act. On the basis that the imposition of this requirement will have the benefit of making the requirements of the law clearer, and will establish that deeds must be properly completed and fully explicit as to the parties by whom they are made, the Department argue the new burden is proportionate to the benefits expected to result from its creation. **We agree.**

38. In view of the extent to which the proposed Order would remove and reduce other burdens imposed by the current law, the Department believe that it would be desirable for the Order to be made. It also argues that the creation of the new burden affecting directors and secretaries of more than a single company described above strikes a fair balance between the interests of those persons and the public interest. This is not a correct application of the test in Section 3(2)(a) of the Regulatory Reform Act, which is to be applied to the provisions of proposed Orders in their entirety. **We nonetheless consider that the proposal meets the fair balance criterion by virtue of the general improvement in the clarity and coherence in the relevant law it would bring about, together with the minimal and justified burden imposed upon directors and secretaries of companies. We also consider that the proposed new burden satisfies the test of desirability for the same reasons.**

Removal of inconsistencies and anomalies

39. There are inconsistencies in the current legislation with respect to what it means for a deed or document to have been executed and, in particular, whether the act of execution properly includes or supposes that the document has or will also be ‘delivered’ as a deed. The three relevant Acts provide definitions of execution in these ways:

- Section 36A(5) of the Companies Act 1985 states that “A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed...”. The Law Commission and the Department consider that this definition supposes that execution and delivery may be separate actions and that a deed may therefore be executed but not delivered until some later point in time.
- Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 refers to an instrument being validly executed as a deed where it is signed by the person making it, attested by witness(es) and delivered either by that person or by someone authorised to do so on his behalf. All of these actions must be performed for a deed to be made and have effect.

- Section 74(1) of the Law of Property Act 1925 refers to a deed having been duly executed if it is sealed and attested by appropriately qualified persons. In these circumstances, “the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly”. There is no reference to delivery at all.

40. The Department considers that there was no intent to establish different regimes for the full execution of documents in the passage of the three Acts but that their meanings are inconsistent and have caused legal uncertainties in practice.²¹ It proposes to resolve these ambiguities in amendments to the Law of Property Act 1925 (Article 4 of the proposed order) and the Companies Act 1985 (Article 6). The effect of these amendments will be to ensure that all three Acts will contain parallel provisions which define the valid execution of deeds as involving both execution and delivery.

41. A further area of inconsistency identified by the Department concerns provisions relating to attestation by witnesses of the signature of deeds by appropriate persons.²² Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 requires that the signatory of a deed must sign in the presence of a witness and that the witness attests the signature. Provisions in Section 74 (3) of the Law of Property Act 1925 require that a witness be present at the signing of a deed, but no formal attestation is required.

42. The Department proposes in paragraphs 3 and 4 of Schedule 1 to the Order to amend the Law of Property Act 1925 to require that witnesses to the signature of deeds and other instruments shall also attest the signature.

43. We consider that the Department has correctly described anomalies existing in the current legislation and that its proposal will have the effect of removing them.

Maintenance of necessary protection

44. The Department indicated in their statement that the great majority of those who responded to its consultation agreed that the proposals would not remove any necessary protection.²³ In most instances, it argues that levels of protection would be enhanced over those provided by the current law.

45. We describe the effects of the proposals on protections in the following paragraphs.

- a) **Clarification of the ‘face-value’ requirement.** It is not certain at present whether the Law of Property (Miscellaneous Provisions) Act 1989, which requires that, for an instrument to be a deed, it must make clear that it is to be so on its face, can be satisfied merely by virtue of an instrument bearing a duly applied and authenticated seal. The Department considers that protection for those who enter into legal relationships with people or corporations would be enhanced by establishing that the presence of an appropriate seal, shall not, by itself, be sufficient to satisfy the face-value requirement.

21 Explanatory statement, paragraph 23

22 Explanatory statement, paragraph 25

23 Explanatory statement, paragraph 32

- b) **Execution of deeds by corporations.** The Department proposes amending the Law of Property Act 1925 to permit a deed to be signed by two directors, in addition to a director and the company secretary. This permits a greater degree of flexibility while continuing to require that two officers of a company will need formally to attest the execution of deeds for them to have effect. The Department therefore concludes that necessary protection would be maintained.
- c) **Execution of deeds by corporate officers.** Paragraph 28 of the explanatory statement describes the present difficulty with the Companies Act 1985 and its failure to make explicit provision for the execution of deeds by corporate officers of corporations. The Department considers that its proposed amendments of the Act to establish clear rules for the execution of deeds by corporate officers will increase the levels of protection in two ways: firstly, the powers of corporate officers with respect to the execution of deeds will be more clearly defined and therefore able to be known and understood by those who may have dealings with them. Secondly, corporate officers will themselves be protected through the more explicit definition of their powers. The Department also argues that its proposed amendment to the Companies Act 1985 to require that a deed must be signed separately by directors and secretaries for each company they serve which is a party to it maintains a necessary protection in that it ensures that deeds can be clearly attributed to those parties who make them. **We consider that this proposed requirement, which constitutes a new burden for the purposes of the Regulatory Reform Act, introduces a new protection in the form of the clarified and more transparent method by which deeds would be executed by directors and secretaries of multiple parties to those deeds, rather than continuing a protection as the Department asserts.**
- d) **Extension of presumption of authority to deliver.** The Department considers that this element of its proposal would increase the level of protection for those who deal with persons who act through a legal representative (either a solicitor, a licensed conveyancer or a notary public) for the reason that the effect would be to apply an irrebuttable presumption of authority to deliver instruments in connection with all kinds of transaction, not merely those involving the creation or disposal of interests in land. It is also asserted that necessary protection in respect of ability to control the delivery of a deed would not be affected. The Department does not explain how this would be achieved in its explanatory statement; the consultation document on the proposal comments that control of delivery will be retained by the person making the deed for the reason that it cannot be delivered until that person has given it to his legal representative for the purpose of delivery.
- e) **Execution on behalf of another person.** The Department considers that its proposal to amend to the Powers of Attorney Act 1971, to specify that attorneys who act on behalf of donors of powers of attorney may execute deeds with the same effect as if the donor had himself performed the act of execution, will mean that protection is increased for those who deal with parties acting through such attorneys, as the actions of the attorney in executing a deed will be more clearly binding on the donor.
- f) **The delivery of deeds.** The Department's proposal in this respect amounts to the effective fusion of delivery and execution. The Department considers that its proposed reforms to the Law of Property Act 1925 and the Companies Act 1985 would increase

levels of protection for those dealing with persons acting through legal representatives by clarifying the circumstances in which documents/instruments become effective. Unless a contrary intention can be proved, the proposed Order would establish that delivery shall be presumed on execution, making execution and delivery simultaneous acts.

46. **We consider that the proposal would maintain all necessary protections.**

The exercise of reasonable rights and freedoms

47. The Department considers that no person would be prevented from continuing to exercise any reasonable rights or freedoms as a result of its proposal. It also believes that that element of the proposal which would have the effect of permitting corporations to delay delivery of deeds which have already been executed will amount to an extension of their current rights and freedoms. **We agree.**

Estimates of costs, savings and other benefits

48. The Department state that it is hard to provide any specific estimates of the costs or savings to which this proposal might give rise. No quantifiable information was available from respondents to the consultation exercise.

49. Benefits the Department expects from its proposal take the form of a simpler, clearer statutory regime for the execution of deeds and documents and the consequences of this in more efficient legal procedures and reduced administrative costs. Savings may also be possible as corporations and others have a reduced need for legal advice to determine correct procedures in areas identified by the Department where the present law is ambiguous and unclear. Such savings are likely to be long term. While marginal in terms of business costs, the savings are likely to benefit very large numbers of firms: the Department notes that, at the time its Regulatory Impact Assessment was prepared, there were 963,000 companies registered under the 1985 Act in England and Wales. Those who need to rely on the validity of deeds and other documents will benefit directly from the proposed wider applications of the statutory presumptions as to their procedural validity.

50. The Department notes that the proposal imposes increases in cost, at least in principle, in the form of the requirement that where two or more parties to a single document are companies who have directors in common, those directors sign the document separately for each of their companies.

51. The Department's assessment of the proposal at the conclusion of the Regulatory Impact Assessment is "The Law Commission's proposals are to all intents and purposes wholly beneficial to those affected by this area of law". **We agree with this assessment.**

Consultation

52. A consultation document on the implementation of the Law Commission's report by means of Regulatory Reform Order was published by the then Lord Chancellor's Department on 6 September 2002. The consultation period ran for 12 weeks until 29 November 2002 and the document was sent to a wide and varied range of consultees,

including representative bodies, individual lawyers (solicitors, barristers and academic lawyers) and law firms.²⁴ It was also made available on the relevant Departmental and central Government websites.²⁵ Representations continued to be received until 6 December 2002 and the Department treated these in the same way as those received within the formal consultation period.

53. 23 responses were received from solicitors, academic lawyers, Government offices, professional bodies and trade associations.²⁶ Three respondents asked that their submissions be treated as confidential.

54. Most of the respondents were in agreement with the purpose and form of the proposal and considered it could appropriately be given legislative effect by means of a Regulatory Reform Order. Annex C to the explanatory statement briefly records the Department's reasoned response to suggestions for changes to the proposal; no changes were made in the light of the consultation.

55. Both the National Assembly for Wales (as required under section 5(1) of the Regulatory Reform Act) and the Scottish Executive and Scottish Office were consulted. None wished to make any comment on the proposal.

56. We consider that the proposal has been the subject of, and taken appropriate account of, adequate consultation.

Compatibility with obligations arising from membership of the European Union

57. The Department notes that both the European E-Commerce and Electronic Signatures Directives impose on Member States requirements not to create any legal impediments to electronic contracting.²⁷ In its consultation document on the proposal, the Department stated that, subject to the views of consultees (including the Law Commission itself), it was its intention to take forward the Law Commission's proposals as a coherent whole. Should the views of consultees favour, or technical developments appear to make necessary, legislative changes which had not been envisaged in the draft proposal, the Department proposed to make use of order-making powers under section 8 of the Electronic Communications Act 2000 (or other appropriate means) to give them effect. The Department subsequently found that "there was widespread agreement with, and no dissent from, this approach".²⁸

58. In its commentary on the matter in the explanatory statement, the Department notes in particular that its proposed amendment to section 36A of the Companies Act 1985 would introduce the requirement that directors of more than one company must sign a deed or document separately for each company which is a party to the agreement created in that

24 A list of those sent a copy of the consultation document is reproduced at Annex A to the explanatory statement.

25 www.dca.gov.uk/consult/rro/deeds.htm & www.direct.gov.uk

26 A list of respondents is given at Annex B to the explanatory statement. Annex C gives a summary of the points made by respondents.

27 Explanatory statement, paragraph 51

28 Explanatory statement, paragraph 52

document. It considers that this requirement may apply to electronic contracts, in addition to contracts established and recorded through the medium of conventional documents (although it agreed in correspondence that this is a question that only the courts can settle, and no such determination of the issue has ever been made).²⁹ Insofar as section 36A of the 1985 Act may apply to the execution of electronic documents, no barrier to electronic contracting would arise from the requirement to provide separate signatures. We asked the Department whether the fact that multiple electronic signatures would be required under paragraph 10 to Schedule 1 of its proposed Order would create any impediment to the making of electronic contracts. In their answer, the Department argued that no such impediment would be created by virtue of a requirement to sign a document electronically several times.³⁰ **We agree.**

59. Another point we asked the Department to consider was whether its proposed amendment to the Law of Property Act 1925 requiring that witnesses to the signature of deeds and other instruments shall also formally attest the signature would establish any obstacle to electronic contracting in circumstances where attestation of the signature might be from some remote location by means of electronic conferencing, and whether any such difficulty might contravene the E-Commerce Directive.

60. In its response, the Department reasoned that the requirement to attest a signature could not be an obstacle to the creation of electronic contracts, as such contracts could be signed by means of a digital, scanned or typed signature. It went on to acknowledge that the courts have never determined whether it is possible for the remote witnessing of the signature of a document by means of electronic conferencing equipment to make it possible for a person witnessing the signature in that way lawfully to attest the signature. It takes the view that section 74(3) of the Law of Property Act 1925 requires the witness of a signature to be physically present with the signatory. The Department states “In so far as this may be an obstacle to the electronic creation of deeds, it is not one introduced by the proposed Order”. This is clearly correct.

61. We are satisfied that the proposal does not itself give rise to any incompatibility with obligations arising from membership of the European Union.

6 Conclusion

62. We consider that a draft Order in the form of the proposal should be laid before the House.

29 Appendix B, answer given to Question 1

30 Appendix B, answer given to Question 3

Formal minutes

Tuesday 16 November 2004

Members present:

Mr Peter Pike, in the Chair

Mr Russell Brown

Dr Doug Naysmith

Brian Cotter

Brian White

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 62 read and agreed to.

Resolved, That the Report be the Fourteenth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till Tuesday 30 November at 9.30 am.]

List of written evidence

- A** Letter from the Committee Specialist to the Department for Constitutional Affairs dated 17 September 2004
- B** Letter from the Department for Constitutional Affairs to the Committee Specialist dated 1 October 2004

Appendix A

Letter from the Committee Specialist to the Department for Constitutional Affairs

Proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004: request for information

Thank you for the helpful presentation made by officials from your Department on 14 September on the subject of this RRO proposal.

The Committee considered the proposal at its subsequent meeting and resolved to seek your further comments on a number of points. The issues which concern the Committee are set out below, under the relevant categories for consideration in the Regulatory Reform Act and the Committee's Standing Order.

Whether the proposal has the effect of continuing any necessary protection as required in Section 3(1)(a) of the Regulatory Reform Act 2001 (S.O. No 141(6)(c))

Whether the proposal appears to be incompatible with any obligation resulting from membership of the European Union (S.O. No 141 (6)(i))

- Q 1 Please indicate whether the Department considers that the Companies Act 1985 permits the execution of a document by the application of an electronic signature.
- Q 2 Please indicate whether the proposed amendments to the Law of Property Act 1925 in paragraphs 3 and 4 of Schedule 1 to the proposed Order requiring that witnesses to the signature of deeds and other instruments shall also formally attest the signature would have the effect of creating any obstacle to the witnessing of such deeds remotely by persons using electronic conferencing equipment, and whether any such obstacle would contravene the EU directive on E-Commerce.
- Q 3 Please indicate whether the proposed requirement in paragraph 10 of Schedule 1 to the proposed Order that directors and secretaries of more than one company which is party to a given document must sign that document separately for each company on whose behalf they act creates any impediment to the execution of documents by means of electronic signature.

Other matters arising from the Committee's consideration of the proposal (S.O. 141(5))

The Committee notes that the proposal applies to England and Wales for the reason that the legislative provisions to be reformed only apply to this jurisdiction, and that the Department decided to exclude from the proposed Order those elements of the Law Commission's recommendations which would affect the law of the United Kingdom as a whole.

- Q 4 Please indicate i) whether the Department considers there are any material differences in the relevant legal requirements and practices in respect of the execution of deeds and documents between the various United Kingdom jurisdictions; and ii) whether, and in what respects, the effect of the proposed Regulatory Reform Order would be to bring about a convergence in the legal regimes for the execution of deeds and documents by corporations in England and Wales, Scotland and Northern Ireland.
- Q 5 Please indicate whether the Government has any plans for additional legal reforms to these areas of the law in Scotland and Northern Ireland and, if it does, what mechanism it is intended to use to give effect to such reforms.

Q 6 Please indicate what plans if any the Department has for the implementation of those elements of the Law Commission's recommendations which address the powers of liquidators throughout the United Kingdom under the Insolvency Act 1986.

The Committee understands that the proposed Regulatory Reform Order would have the effect of making reforms to the legislation governing the execution of deeds and document by corporations and by companies registered under the Companies Act 1985. Where separate and specific statutory provisions establish execution regimes for particular forms of corporation, it appears that these arrangements will remain unaffected.

Q 7 Please indicate whether the Department's proposal will have the effect of revising execution requirements which pertain to corporations which are co-operatives or are other types of mutual corporation.

I would be grateful to receive your response to these questions, together with any additional information which the Department believes would be helpful to the Committee not later than Friday, 1 October.

17 September 2004

Appendix B

Letter from the Department for Constitutional Affairs to the Committee Specialist

Proposal for the Regulatory Reform (Execution of Deeds and Documents) Order 2004: response to request for information

Thank you for your letter of 17 September 2004 setting out questions posed by the Committee in relation to the proposed RRO mentioned above. The Department is grateful to the Committee for this opportunity to explain its proposals further.

Q 1 Please indicate whether the Department considers that the Companies Act 1985 permits the execution of a document by the application of an electronic signature.

The Department considers that neither the Companies Act 1985 nor the amendments proposed to it in the draft order create any obstacles to the ability of a company to execute an electronic document by the application of an electronic signature. The purpose of the order is to specify how documents may be executed. It does not introduce any new concepts or requirements that discriminate against electronic contracting.

Although, ultimately, only the courts can decide whether the Companies Act 1985 permits the execution of a document by the application of an electronic signature, the Committee may be interested to know that the Law Commission has published advice on the use of electronic documents in an e-commerce context. It advised that electronic documents and signatures in visible form, such as e-mail and website trading, would satisfy statutory requirements for documents to be written and signed unless the statutory context otherwise required. An example of such a statutory context that required paper would be one that obliged documents to be sent by post. The Commission did not specifically consider the requirements of the Companies Act 1985 but the Department does not consider that the terms of the Act are such as to rebut the Commission's general presumption in favour of permitting electronic documents.

The Law Commission's advice 'Electronic Commerce: Formal requirements in commercial transactions' was published in December 2001. It is available on the Law Commission's website at <http://www.lawcom.gov.uk>.

Finally, as stated in the memorandum to the Committee of July 2004, I would reiterate that the Government is not persuaded that section 36A of the 1985 Act cannot be interpreted as applying to electronic contracts and that should further legislative changes be necessary in England and Wales in relation to the execution or signature of electronic documents, they should be addressed by an order made under section 8 of the Electronic Communications Act 2000 or other appropriate means rather than the proposed regulatory reform order.

Q 2 Please indicate whether the proposed amendments to the Law of Property Act 1925 in paragraphs 3 and 4 of Schedule 1 to the proposed Order requiring that witnesses to the signature of deeds and other instruments shall also formally attest the signature would have the effect of creating any obstacle to the witnessing of such deeds remotely by persons using electronic conferencing equipment, and whether any such obstacle would contravene the EU directive on E-Commerce.

Section 74(3) of the Law of Property Act 1925 provides that a person may, as attorney, execute a conveyance for a corporation by signing in the name of the corporation in the presence of at least one witness. A conveyance for these purposes is very widely defined. The amendment at paragraph 3 of schedule 1 specifies that the witness must attest the signature. To do this the witness will sign the document.

As mentioned, the effect of the amendment is to require the witness to attest the signature of the attorney. In theory, section 74 does not actually require this, but, in practice, as noted by the Law Commission in its report 'The Execution of Deeds and Documents by or on behalf of Bodies Corporate' (Law Com no 253), 'it is unlikely that there would be any difference between the two provisions' (para 7.36). This is because under the present law the person taking delivery of the deed would want evidence that a witness had been present and would usually insist that the witness signed the document.

The amendment at paragraph 4 effects a similar change where the person signing on behalf of another person is itself a corporation.

Article 9 of the E-Commerce Directive prohibits the creation of obstacles to the use of electronic contracts. It is not entirely clear whether, and if so to what extent, deeds and other instruments are contracts for the purpose of the Directive. For the purpose of this reply, we have assumed that at least some of them will be contracts within the Directive.

The Department acknowledges that the amendments might, in theory, be considered to add a new requirement or burden to the process of executing a deed. However, in practice, the new requirement or burden is negligible and embeds current best practice. As the Law Commission's advice mentioned in reply to question 1 implies, if the conveyance in question is electronic, the witness's signature could be a digital, scanned or typed electronic signature. The requirement of attestation is therefore not an obstacle to the creation of electronic contracts.

Whether it is possible to satisfy the requirement that the deed be signed in the presence of a person by using electronic conferencing equipment has not been determined by the courts. The point does not seem to have been considered by the Law Commission in the advice mentioned. The Commission did briefly discuss the possibility of witnessing an electronic will but in doing so only envisaged that the witness would be present in the same room as the testator. The Department's initial view is that section 74 requires the witness to be physically present with the signatory. In so far as this may be an obstacle to the electronic creation of deeds, it is not one introduced by the proposed order.

Q 3 Please indicate whether the proposed requirement in paragraph 10 of Schedule 1 to the proposed Order that directors and secretaries of more than one company which is party to a given document must sign that document separately for each company on whose behalf they act creates any impediment to the execution of documents by means of electronic signature.

Paragraph 10 also implements a recommendation of the Law Commission. The Commission took the view that the administrative convenience of a director or secretary for several companies signing only once rather than several times in 'the relatively small number of cases where the practice might be regarded as useful' was outweighed by need for a clear rule (Law Com No 253 para 3.33). The reform is intended to provide certainty

that each and every company is bound by the deed being executed. The fact that several electronic signatures would have to be applied to the document rather than a smaller number may be an additional burden or requirement but it is not an additional impediment to the execution of an electronic document as it is satisfied by the repetition of an action rather than a different action.

Q 4 Please indicate i) whether the Department considers there are any material differences in the relevant legal requirements and practices in respect of the execution of deeds and documents between the various United Kingdom jurisdictions; and ii) whether, and in what respects, the effect of the proposed Regulatory Reform Order would be to bring about a convergence in the legal regimes for the execution of deeds and documents by corporations in England and Wales, Scotland and Northern Ireland.

The Department considers that there are material differences between the legal requirements and practices as to the execution of deeds and documents as between England and Wales on the one hand and Scotland on the other. The legal requirements and practices as between England and Wales on the one hand and Northern Ireland on the other are, however, similar. The Department does not consider that the proposed order would bring about a convergence between the different jurisdictions.

Q 5 Please indicate whether the Government has any plans for additional legal reforms to these areas of the law in Scotland and Northern Ireland and, if it does, what mechanism it is intended to use to give effect to such reforms.

The Government has no such plans. The law relating to the execution of deeds and documents is largely devolved. The proposed reforms in the draft order are intended to apply to England and Wales only. Reform of the equivalent areas of the law in Scotland and Northern Ireland would be for the Scottish Executive and, currently, the Northern Ireland Office.

Q 6 Please indicate what plans if any the Department has for the implementation of those elements of the Law Commission's recommendations which address the powers of liquidators throughout the United Kingdom under the Insolvency Act 1986.

The Law Commission recommended the amendment of liquidator's powers for England and Wales only and the Government has accepted that recommendation. The aspect of corporate insolvency law affected by the recommendation is a reserved matter in relation to Scotland. However, it is a devolved matter in Northern Ireland. The Department omitted these recommendations from the draft order to preserve its territorial extent. The Department will liaise with the departments responsible for insolvency law to try to identify a suitable legislative vehicle to implement the Commission's recommendation.

Q 7 Please indicate whether the Department's proposal will have the effect of revising execution requirements which pertain to corporations which are co-operatives or are other types of mutual corporation.

Corporations which are co-operatives or mutual societies are included in the category of corporation called 'corporations aggregate'. The consultations carried out by the Law Commission and the Department were extended to these types of corporations and feedback was received. As these types of corporations can include the smallest mutual society and the largest local authority it was decided not to introduce a uniform way of executing documents as this could impose burdens in a disproportionate way. However, Section 74 of the Law of Property Act 1925 does apply to corporations aggregate and this is amended by the proposed reforms to introduce a presumption about execution of documents when carried out in a certain way under seal. This will enable people dealing with corporations of any kind to be more certain about when documents are executed when done in accordance with the amended provisions of Section 74. Therefore whilst co-operative and mutual corporations will be affected by this new presumption of execution under seal (Section 74) there is no proposal to dictate to them when they should use a seal.

I hope these answers are helpful.

1 October 2004

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All reports are available from The Stationery Office.