**Registers of Scotland: Consultation on Electronic Documents**

**Response from the Scottish Law Commission – October 2013**

## This is a response by the Scottish Law Commission to the recent [consultation](http://www.ros.gov.uk/public/publications/edocs_scotland_regulations_consultation_2013.html) by Registers of Scotland (“RoS”) on the draft Electronic Documents (Scotland) Regulations 2013. We have found it simpler to frame our response as a whole rather than as a set of answers to the consultation’s three questions.

## *Introduction*

## The Scottish Law Commission supports the early implementation of Part 10 of the Land Registration etc. (Scotland) Act 2012 (“the 2012 Act”). We are also grateful for the chance to have participated in the preparatory discussions hosted by RoS which informed some of the background to the draft Electronic Documents (Scotland) Regulations.

## *Background – signatures and probativity for traditional documents*

## Although the consultation is confined to electronic documents and electronic signatures we begin with a brief review of the current law on signing so-called traditional – essentially, paper – documents and on conferring probativity on them. We think that this discussion reveals some important policy issues which need to be considered in the development of a parallel regime of electronic signatures.

## First, traditional signatures. Signing a legal document, and in particular one that is known to be contractual, is generally well understood as committing the signatory to whatever the legal effects of the document may be, even where there is no legal requirement of signature or, indeed, writing for the effect in question to be achieved. Thus, signing a document in an approved manner makes the document legally effective.

## In relation to traditional documents, Scots law seems to recognise three modes of signature: in descending order of onerousness:

## (i) probative signatures;

## (ii) signatures conferring formal validity where the law requires the use of writing; and

## (iii) other signatures.

From the outset, it is important to note that for categories (i) and (ii) the signatures must be subscriptions, that is, be placed at the end of the substantive text of the document.[[1]](#footnote-1) For category (iii), a signature may be in some other position on the document, e.g. on a margin, or at the top.

There are, though, some differences between what qualifies as a valid signature as between categories (i) and (ii). For a document to be probative under the Requirements of Writing (Scotland) Act 1995 (“RoW(S)A”),[[2]](#footnote-2) i.e. for it to fall within category (i), its subscription will normally include the signatory's forename and/or initial followed by surname (for example, Hector L MacQueen), although an abbreviated or familiar form of a forename may be used as part of this (such as, Eck MacQueen).[[3]](#footnote-3)

## By contrast, the following can be a valid signature where only formal validity (i.e. category (ii)) is required:

## a name which is not the signatory's full name (e.g. the forename Hector standing without a surname);

## a description (e.g. Dad);

## an initial (e.g. HLM or, perhaps, H); or

## a mark (e.g. X),

## if (1) these are the person's usual method of signing, whether generally or only for documents of the kind in question; or (2) if the person intended it to be a signature of the document.[[4]](#footnote-4)

There are no requirements for what may be a signature under category (iii). Presumably a *sine qua non* is intention, although perhaps more by way of intention that the document being signed be given legal effect against the signatory as necessary.

We now consider probativity, which is the essential difference between category (i), on the one hand, and categories (ii) and (iii) on the other. But what is it? It has been said that the probativity of a document is all about its appearance:

"Whether a document is probative is determined by visual inspection. Either it looks valid or does not. For probativity, looks are everything. Recourse to extrinsic evidence is not permitted. The judgment must be made by looking at the deed alone. And the judgment must be made. No sitting on the fence is permissible. There is no such thing as (as is often suggested in exam answers) a document which is presumed to be probative. Either it is probative or it is not. …

This means that if a fault in executing or witnessing cannot be determined by visual inspection, the document is still probative. A forged deed will be probative, unless the forgery is apparent, which is unlikely … If the subscription and witnessing are not one continuous process, the document will still be probative, unless the gap in time is revealed on the face of the deed. *…* [T]he document is probative if it *bears* to have been validly subscribed and witnessed."[[5]](#footnote-5)

A probative document is sometimes said to be *self-proving*. In other words, it is presumed to have been signed by the granter.[[6]](#footnote-6) It is also presumed that any alterations which are duly executed formed part of the document at the point of subscription. These presumptions can be challenged, but the onus is on the challenger to show that, on balance, the document is not what it bears to be.[[7]](#footnote-7) By contrast, documents falling within categories (ii) and (iii) have to be proved to be what they purport to be if there is any challenge to their authenticity. There are no presumptions that this is so.

## The main benefit of a probative document is that, if it contains an appropriate consent clause, it may be registered for preservation and/or execution (in the sense of enforcement) in the Books of Council and Session.[[8]](#footnote-8) Wills are an example of documents made probative so that they can be preserved in this way against the risk of loss or destruction of the initial document.[[9]](#footnote-9) Again, should a debt due under a contract not be paid in time, registration (which can be carried out at any time after the execution of the document) enables the creditor to move to enforcement by way of summary diligence without any prior need to raise a court action and obtain decree against the debtor.[[10]](#footnote-10)

How is probativity achieved? Essentially, the document requires to be attested, or witnessed. Thus, the signature of a witness to the granter’s subscription is required, the granter having either signed in the presence of the witness or acknowledged his/her/its signature to the witness in what is overall a continuous process.[[11]](#footnote-11) A testing clause, or equivalent, is then added;[[12]](#footnote-12) its main purpose is to record particulars of execution such as date, place, and the name and address of the witness; but a secondary purpose is to mention any alterations which have been made prior to signature. Provided that the document takes this form, it will be probative.

*Electronic signatures*

Once the 2012 Act has amended RoW(S)A, traditional documents will be subject to Part 2 and electronic ones to Part 3. There will, though, be structural similarities between the two Parts. Importantly for our purposes, both will distinguish between the formalities required to make a document *valid* and those required to make it *probative*.

We take the view that the very limited requirements for a subscription to give formal validity to a document are capable of being met by at least many types of relatively informal electronic signatures on electronic documents. In other words, some category (iii) signatures should be acceptable, as well as those in categories (i) and (ii). In our opinion this applies to all documents, including those which require to be in writing under section 1 of RoW(S)A.[[13]](#footnote-13)

Thus we see no policy reason why an offer to buy heritage and its acceptance cannot be made by email or other electronic communication if signed electronically by each sender writing their forename at the end of their respective communication – this would simply be a parallel to the current law under which holograph missives similarly subscribed would create a binding contract of sale. If necessary, the documents have to be proved to be what they purport to be. Clearly it would be contrary to public policy to create conditions in which binding land contracts (or wills, etc.) could be created accidentally, but this has long been a concern of the law and there are a number of protections in place which would apply equally to electronic documents. For example, such documents would have to reveal objectively that they are offers and acceptances meeting the requirements of a contract – consensus on the essentials of the contract such as parties, subject-matter and price, intention to effect legal relations, certainty etc. Secondly, they would need not to be vitiated by threats, fraud, undue influence, facility and circumvention, error and misrepresentation. Thirdly, parties can agree expressly or impliedly that no binding contract will be formed until certain agreed formalities are met.[[14]](#footnote-14) So there are plenty of protections in place without adding another that says that such relatively informal means of electronic communication cannot give rise to a contract for the sale of heritage. They can after all give rise to other contracts (i.e. ones which do not require to be in writing) of significant commercial and financial value.[[15]](#footnote-15)

For probativity, the electronic signature incorporated into, or logically associated with, the document must be of a nature that justifies the presumptions which accompany probativity. As we have seen above, these presumptions are about (a) the person who signs with the signature, (b) the place and date of signature (while remembering that these latter two things are optional in the world of paper documents), and (c) the inclusion of alterations within the document at the point of signature.

What type of electronic signature would justify such presumptions flowing from its use? Of the three kinds mentioned in the consultation paper, it would seem that both the advanced electronic signature and the qualified electronic signature would be satisfactory, but not the basic electronic signature.

The key is the certification built into both the advanced and the qualified electronic signature, namely a certification that the person applying the electronic signature in question is indeed the person whose signature it purports to be. The certification is the analogue of the witness to the traditional document. The electronic signature will also provide information about date (and indeed time) of signature. Unless it has a GPS dimension the signature will not provide information about place; but it will be enough that the document itself bears that information. The advanced electronic signature can also provide information about alterations and that further such signatures have been applied after alterations have been made to the electronic document.

The comparison between certification (in the context of electronic documents) and witnessing (for traditional documents) may be pursued in a little more detail. The witness must be designed, i.e. by name (usually full name) and address (which may be a business address), in the document or its testing clause or equivalent.[[16]](#footnote-16) But the witness’ occupation is not now required and its use may be dying out in practice. So we may well know much less about the traditional witness than we do about the certifier of an advanced or qualified e-signature. In addition, not only must the witness either see the subscription or have the subscriber acknowledge it, the witness to the traditional document must know the granter.[[17]](#footnote-17) The certification process prior to the issue of an advanced or qualified e-signature will be more demanding than this.

What are the sanctions against a witness who is in breach of the duty to know the person whose subscription he or she purports to witness? The subscription loses its probative status, but this does not affect the witness directly.[[18]](#footnote-18) It would seem that the precautions which precede the issue of an advanced or qualified electronic signature typically exceed those which are typical before a witness to the subscription of a document can be said to know the subscriber, and also that the liabilities of the certifier for either the advanced or the qualified electronic signature are much greater and more specific than those of the negligent witness to the traditional subscription.

It can therefore be suggested that the advanced e-signature more than meets all the requirements which the law has required of traditional subscriptions to make them probative, and that it is not clearly appropriate to exclude them as a means to this end.

*Draft regulations*

After these introductory remarks we turn to the consultation questions. Looking at the questions from the stance of a person seeking to promote the use of electronic documents – or, in colloquial terms, with the goal of e-enablement – we recognise that there is a balance to be struck between facilitating the use of technology and protecting against fraud or other abuse. In addition, given that much of the technology is new and in the process of further development, it is important to incorporate sufficient flexibility to allow for those developments – or, in other words, to have something which works now and is likely to continue to work next month and next year.

Our view is that the proposed regulations are more successful on the second count than the first. We say this because we understand that there will be a review of the regulations after a period of about 2 years following commencement. This strikes us as a useful and practical way of building in flexibility.

But, for the reasons sketched earlier in this response, we have reservations about the balance struck in the proposed Regulations between promotion of technology and protection against abuse. We doubt that the goal of “e-enablement” will be achieved if the use of electronic documents for legal purposes is (as we suggest it will be) significantly more onerous than the use of traditional documents for the same purposes; and the onerousness is not really justified by concerns about fraud or mis-use of the technology, since the present law on traditional documents is equally open to that criticism.

As a matter of policy, at present the privilege of probativity is available to anyone who can create and subscribe in the required form a document in the presence of a witness who also signs the same document. The proposed Regulations will not create a “level playing field” for electronic documents since, as the Consultation and its BRIA acknowledge, qualified electronic signatures are not available in Scotland apart from that which the Law Society of Scotland proposes to issue to its members.[[19]](#footnote-19) Indeed, it is the Law Society’s plan to issue qualified electronic signatures which seems to drive the Consultation’s recommendations more than a consideration of the law’s general policies in these areas.

While therefore we support the early implementation of the proposed Regulations in order that a start be made on the use of electronic missives by conveyancers, we would urge that the position be kept under close review, particularly with regard to facilitating the formal completion of electronic documents in general, especially in the commercial arena.

Finally, we have considered whether the power under section 9C(2)(b)(i) of RoW(S)A needs to be exercised. This issue is not raised in the consultation document. Although we think that it is arguable that the power must be exercised as part of the implementation process,[[20]](#footnote-20) the fact that paragraph (b) of section 9C(2) begins with “(either or both)” can be read as indicating that the drafter may have intended that it is permissible that only one of the two options which follow is, in fact, capable of being used. On that reading, it is acceptable not to exercise the power in section 9C(2)(b)(i).

1. There are some specific and limited exceptions, such as the monarch’s power to “superscribe”, i.e. sign at the top of a document: see s 13 RoW(S)A. [↑](#footnote-ref-1)
2. All references to the Act are to it as prospectively amended by the 2012 Act. [↑](#footnote-ref-2)
3. RoW(S)A, s 7(2). See further, George L Gretton and Kenneth G C Reid, *Conveyancing* (4th edn, 2011), para 17.04. [↑](#footnote-ref-3)
4. RoW(S)A, s 7(2)(c). [↑](#footnote-ref-4)
5. George L Gretton & Andrew J M Steven, *Property, Trusts and Succession* (2nd ed, 2013), paras 30.32-30.33 (emphasis in the original). [↑](#footnote-ref-5)
6. If the date or place of signature are included then these details are also presumed to be true: s 3(8) RoW(S)A. [↑](#footnote-ref-6)
7. RoW(S)A, s 3(4). [↑](#footnote-ref-7)
8. RoW(S)A, s 6. Dispositions must be probative to be recorded in the Land Register. [↑](#footnote-ref-8)
9. However, at present, registration of a will is usually done by the executor when winding up the estate. During a testator’s lifetime, wills tend to be stored by the testator or, if prepared by a solicitor, in a solicitor’s office. [↑](#footnote-ref-9)
10. On summary diligence see Gloag & Henderson, para 49.01. [↑](#footnote-ref-10)
11. RoW(S)A, s 3(1) and (8). Note that s 3(6) envisages the possibility of a person being witness to the subscription of more than one granter and allows such witnessing to be regarded as a continuous process even if the witness does not sign until each of the granters has subscribed or acknowledged its subscription. Section 7(5) of RoW(S)A states that it is unnecessary for a witness witnessing the signature of more than one granter to sign the document more than once. [↑](#footnote-ref-11)
12. See paras 7.17-7.18 of our Discussion Paper on Formation of Contract (DP No 154) for an illustration. [↑](#footnote-ref-12)
13. If there is a requirement for *sub*scription for electronic documents that may raise issues which do not arise with traditional documents: e.g. clicking on “Agree” or “I accept” on an online application may not clearly put a signature at the foot of the agreement; and an electronic document in the form of a voicemail message may commonly *begin* with an identification of the speaker but not have any such “signature” at the end. [↑](#footnote-ref-13)
14. Eg see *WS Karoulias SA v The Drambuie Liqueur Co Ltd* 2005 SLT 813. [↑](#footnote-ref-14)
15. *Baillie Estates Ltd v Du Pont (UK) Ltd* [2009] CSIH 95; *Nicolas Prestige Homes v Neal* [2010] EWCA Civ 1552; *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89. For a high value contract which was not even reduced to writing see *Sharab v HRH Al-Saud* [2013] EWHC 2324 (Ch); the agent’s commission for selling an Airbus private jet had to be proved by witness statement because the very wealthy principal refused to put it on paper – the agent was found to be entitled to a commission payment of $10,000,000. [↑](#footnote-ref-15)
16. RoW(S)A, s 3(1)(b). [↑](#footnote-ref-16)
17. RoW(S)A, s 3(4)(c)(i). “But the standard is not exacting, and it is sufficient if the witness has credible information at the time of the witnessing. Prior acquaintance is not required. It is good practice to ask for some form of identification, such as a passport or driving licence.”: Gretton & Reid, *Conveyancing* (4th edn, 2011), para 17.05. [↑](#footnote-ref-17)
18. See Gretton & Reid, *Conveyancing* (4th edn, 2011), para 17.06. The witness who knows that the subscriber is not in fact the person he purports to be may well be committing a criminal offence, or be art and part in the subscriber’s criminal offence. The witness who negligently fails to confirm the identity of the subscriber before signing as witness could conceivably be liable to the person whose identity or signature was being misappropriated if that person suffered loss as a result of the fraud; but there are no cases of that kind on the books. [↑](#footnote-ref-18)
19. That will effectively result in those members having a *de facto* monopoly over the execution of documents which require to be probative, including all those which are to be registered or recorded at the Registers of Scotland. And it is quite likely that making the formal validity of electronic documents depend on the use of advanced electronic signatures will likewise require parties to use the services of solicitors where that is not the case with traditional documents. [↑](#footnote-ref-19)
20. Mainly on the basis that in some of the related powers (in s 9B) the inclusion of the words “(if any)” indicates that there is a discretion as to whether to make a prescription, but those words are not used in s 9C(2)(b)(i). [↑](#footnote-ref-20)