

Health, Social Care and Sport Committee

**16th Meeting, 2023 (Session 6), Tuesday, 9
May 2023**

Legislative Consent Memorandum – Powers of Attorney Bill

Note by the clerk

Introduction

1. The [Powers of Attorney Bill](#) is a Private Member's Bill introduced by Stephen Metcalfe MP in the House of Commons on 15 June 2022.
2. The UK Parliament will not normally legislate on matters devolved to the Scottish Parliament without its consent; this is often referred to as the Sewel Convention. [Chapter 9B of the Parliament's Standing Orders](#) sets out the rules and procedures for seeking legislative consent under the convention.
3. The Scottish Government believes the Powers of Attorney Bill falls under Rule 9B.1.1 of the Standing Orders, as it will impact on areas devolved to the Scottish Parliament and on the executive competence of the Scottish Ministers.
4. For any views of the Parliament to be considered at Westminster, it must conclude its considerations before the last amending stage (report stage in the second house).
5. Ahead of today's evidence session the Committee requested written submissions from the Faculty of Advocates, the Law Society of Scotland and the Office of the Public Guardian Scotland. The submissions are available at annexe A.
6. Maree Todd, Minister for Social Care, Mental Wellbeing and Sport and Scottish Government officials will give evidence on the LCM at today's meeting.

Powers of Attorney Bill

7. The [Explanatory Notes](#) on the Bill state the Bill will “enable modernisation of the process for making and registering lasting powers of attorney (LPA) and make it easier for individuals to obtain certified copies of powers of attorney”.
8. The Explanatory Notes go on to state “The Bill facilitates this wider modernisation by enabling changes to the process to make and register an LPA, introducing the requirement to verify identity as part of applying to register an LPA and streamlining how people can object to the registration. It also enables different

processes and evidence to be accepted depending on whether an LPA is made digitally, on paper or a mix of the two”.

Legislative Consent Process

9. When a Bill that will impact on areas devolved to the Scottish Parliament goes through the UK Parliament, the Scottish Government will normally prepare a Legislative Consent Memorandum (LCM). This explains how the Bill will affect Scotland and why, for example the Bill may:
 - change the law on a “devolved matter” (an area of policy which the UK Parliament has devolved to the Scottish Parliament); or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
10. If the Scottish Government recommends in its LCM that consent be given, it will normally be decided by a motion taken in the Chamber known as a Legislative Consent Motion. This motion is usually drafted by the Scottish Government. If, however, the Scottish Government does not recommend consent be given, a debate on the LCM may be scheduled in the Chamber.
11. In this case, the Scottish Government has noted it intends to lodge the following Legislative Consent Motion:

“That the Parliament agrees that the relevant provisions of the Powers of Attorney Bill, introduced in the House of Commons on 15 June 2022, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Scottish Government Legislative Consent Memorandum

12. A [legislative consent memorandum](#) was lodged by Humza Yousaf MSP, then Cabinet Secretary for Health and Social Care, on 16 March 2023.
13. The LCM notes the Bill largely extends to England and Wales only, but the following provisions extend to Scotland, and therefore require a Legislative Consent Motion:
 - Clause 2 amends section 3 of the Powers of Attorney Act 1971 (“the 1971 Act”). Section 3 of the 1971 Act extends to Scotland and currently provides that the contents of an instrument creating a power of attorney may be proved by means of a copy which is certified in accordance with that section. Clause 2 would modify Scots law in respect of the proof, in Scotland and for the purposes of Scots law, of the contents of an

instrument creating a power of attorney. This would include, in the Scottish Government's view, proving the contents of an instrument made in Scotland as well as an instrument made in another part of the United Kingdom.

- Paragraph 8(a) and (b) of the schedule extends to Scotland making various amendments of the Mental Capacity Act 2005 ("the 2005 Act") as regards LPAs, including making provision for the electronic registration of LPAs. It provides that a document purporting to be an "office copy" of an instrument registered under schedule 1 is, in any part of the United Kingdom, evidence of the contents of the instrument and the fact that it has been registered. The Explanatory Notes accompanying the Bill indicate, at paragraph 60, that this would, for example, enable a paper alternative to be used if the electronic record cannot be accessed. Paragraph 8(a) and (b) of the schedule would modify Scot law as regards the means of evidencing, in Scotland and for the purposes of Scots law, the content of an instrument creating LPA and the fact that it has been registered. As such, this provision concerns Scots law on the evidencing of the contents of an instrument creating a power of attorney from another jurisdiction.

14. In relation to whether consent should be given, the LCM states—

"Consent is recommended, because the Bill is aligned with the Scottish Government's emphasis on increasing accessibility to obtaining a power of attorney. As noted above, the changes that apply to Scotland will allow the record in the register of LPAs maintained by the Public Guardian in England and Wales to be used as sufficient proof of the contents of an instrument in any part of the United Kingdom including Scotland."

15. It goes on to explain:

"The Scottish Government is supportive of the expansion of the methods of evidencing an English and Welsh LPA to take into account digital advancements as well as retaining paper copies. The recognition of the English and Welsh LPAs in Scotland ensures that there is clarity and simplification of how the law applies crossborder and provides for mutual recognition. There is increased accessibility for those who wish to take out LPA in widening the accepted ways of evidencing an LPA that can be used in Scotland."

Scrutiny by other Scottish Parliament Committees

16. The Delegated powers and law reform (DPLR) committee considered the LCM at its meeting on 18 April 2023 and published its [report](#) on the LCM on 19 April 2023. The report advises the DPLR Committee is content with the powers conferred on the Lord Chancellor by this LCM.

Decisions

- 17. After considering today's evidence from the Minister, Members are invited to consider what views to include in the Committee report.**
- 18. Members are invited to agree to consider a draft report on the LCM by correspondence.**

Clerks to the Committee

4 May 2023

The Faculty of Advocates submission, dated 11 April 2023

The Faculty of Advocates is the independent referral Bar in Scotland. The Faculty is pleased to have the opportunity to respond to consultations, although should make it clear at the outset that the Faculty does not seek to comment upon issues of policy. Whilst the Faculty cannot comment upon whether the Committee ought to recommend approval of the Legislative Consent Memorandum ('LCM') to the Scottish Parliament, the Faculty is pleased to offer its comments on those aspects of the underlying Power of Attorney Bill ('the Bill') which would affect Scotland.

As the LCM notes, the Bill is primarily concerned to make changes to the law in England and Wales. However, there are two changes made by the Bill which would have a cross-border effect, namely:

- i. The Bill would expand the categories of persons who can certify a copy of an instrument creating a Power of Attorney under section 3 of the Powers of Attorney Act 1971 ('the 1971 Act'), by adding one further group to that list. A copy certified in accordance with section 3 of the 1971 Act is proof of the contents of the instrument which creates a Power of Attorney. The 1971 Act is primarily concerned with England and Wales, but section 3 applies throughout the UK, and therefore any amendment of section 3 has the potential to impact Scotland in terms of what is accepted as evidence here.
- ii. The Bill would make provision in the Mental Capacity Act 2005 ('the 2005 Act') in respect of registration of Lasting Powers of Attorney in electronic form with the Public Guardian in England and Wales. This could have an impact in Scotland because in terms of paragraph 16 of Schedule 1 of the 2005 Act, an office copy of an instrument registered under that schedule is evidence of the contents of that instrument and the fact of its registration in any part of the UK. The Bill proposes that this paragraph be amended such that where registration has been in electronic form, the record in the register maintained by the Public Guardian in England and Wales will be proof of the instrument's contents in any part of the UK (and the Bill would also allow for secondary legislation to be made regarding paper copies).

These two amendments proposed by the Bill would seem likely to be of relatively minor practical impact in Scotland. Further, for the reasons set out in paragraphs 14 and 15 of the LCM, it may be thought that such impact is not a negative one, from the standpoint of accessibility considerations. The LCM itself records support which has been expressed by the Faculty, and by the Law Society of Scotland (see paragraphs 15 - 17).

Law Society of Scotland submission, dated 11 April 2023

Thank you for your letter of 24 March regarding the Powers of Attorney Bill introduced in the House of Commons on 15 June 2022, and the Committee's consideration of the legislative consent memorandum (LCM) lodged by the Scottish Government on 16 March 2023.

We understand that the Scottish Government and the UK Government have differing views on whether a legislative consent motion is required in respect of this Bill as it stands. We offer a comment about that in our last paragraph below.

However, from a Scottish point of view the main issue is not what is in the Bill, but what is not. The Bill proposes to create a provision under which English powers of attorney, or official copies of them, will be automatically operable in Scotland. The need, however, is for a similar clear provision regarding the operation of Scottish powers of attorney in England, or when presented in Scotland to branches of banks and other institutions headquartered in England. Those practical difficulties are a cause of frequent complaints, including complaints to the Law Society of Scotland and – we understand – to MSPs.

Your Committee may be aware of the proceedings at third reading of the Bill in the House of Commons on 21 March 2023. Mike Freer, the Parliamentary UnderSecretary of State for Justice, suggested that legislation is already in place "that allows for the recognition of Scottish powers of attorney in England & Wales". The route however is convoluted and in practice can require proceedings in England & Wales to achieve recognition.

Mr Freer did however offer to address the problem as part of UK Government's engagement "particularly with banks and the insurance sector" regarding the English changes. What is required is that the Bill should be adjusted slightly to apply in both directions, and that there should then be adequate education and engagement to ensure that its provisions are applied in practice. There is no evidence of problems in the England-to-Scotland direction. Scottish case law makes it clear that English powers of attorney are as effective here as Scottish powers of attorney, and so far as we are aware that is followed in practice. Thus, the Bill as it stands seeks to address a problem in one direction that does not exist, and fails to address the problem in the other direction that most certainly exists.

Our Mental Health and Disability Sub-Committee recently re-affirmed its support for the objective of achieving early legislation throughout the UK to ensure automatic recognition and enforcement throughout the UK of any measure under adults with incapacity, mental capacity, or equivalent legislation made and authenticated in any part of the United Kingdom in accordance with the laws applicable to that part; with such information and guidance as might be necessary to ensure operability of that provision in all parts of the UK without difficulty.

We suggest that the Committee could approach the issue by indicating that there is an issue concerning the recognition of Scottish Powers of Attorney and other measures in the English jurisdiction which could be resolved by an amendment to the Bill. Any change to the Bill would need to be followed up with adequate publicity, education and engagement to make it clear that within the UK all powers of attorney are equally effective and operable, without difficulty, wherever issued and wherever submitted.

The above is a matter of significant importance. Many people in Scotland taking on the voluntary role of attorney for a loved one run into the unexpected and unnecessary, yet frustrating and time-consuming, difficulties described above. If

further comments from me and/or appropriate colleagues would assist your Committee further, we would be happy to provide that, including by meeting your Committee.

On the divergence of opinion about the need for an LCM, we are not in a position to comment on whether an LCM is necessary, but we can point you to Devolution Guidance Note 10 which provides that "Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament." Category III Bills are those which contain "provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers". It is a matter for the Committee and its advisers to assess whether there is a requirement for legislative consent in connection with this Bill.

I hope in the meantime this is of some assistance to you and your Committee.

Office of the Public Guardian Scotland and Scottish Courts and Tribunal Service submission, dated 5 April 2023

Dear Convener,

Thank you for your recent letter seeking the views of the Public Guardian on the LCM for the above Bill and in particular, whether or not the Committee should recommend its approval by the Scottish Parliament.

I respond in my role as Public Guardian and on behalf of the SCTS acting in its role to provide efficient and effective administration to the courts, tribunals and the Office of the Public Guardian (Scotland) and does not include the views of the Judiciary. I have previously indicated, to Scottish Government policy officials, that the proposals of the Bill would have minimal impact on my functions under statute.

On the basis of the above, I would have no concerns if the Committee were to recommend the approval of the LCM to the Scottish Parliament.

I hope this is of assistance.