

Citizen Participation and Public Petitions Committee

1st Meeting, 2024 (Session 6), Wednesday 24
January 2024

PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents

Petitioner	Laura Johnston-Brand
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to help prevent coercion of vulnerable, frail, and debilitated individuals by requiring solicitors to have a medical professional co-sign legal documents confirming the capacity of the individual.
Webpage	https://petitions.parliament.scot/petitions/PE2061

Introduction

1. This is a new petition that was lodged on 2 November 2023.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition can collect signatures while it remains under consideration. At the time of writing, 293 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.
6. A submission has been provided by the petitioner. This is included at **Annexe D**.

Action

The Committee is invited to consider what action it wishes to take on this petition.

Clerk to the Committee

Annexe A

PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents

Petitioner

Laura Johnston-Brand

Date lodged

2 November 2023

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to help prevent coercion of vulnerable, frail, and debilitated individuals by requiring solicitors to have a medical professional co-sign legal documents confirming the capacity of the individual.

Previous action

I have contacted MSPs Keith Brown and Jim Fairlie. Keith Brown responded to say he has written to the Cabinet Secretary for Justice and Home Affairs to highlight our campaign and seek the Scottish Government's view on this proposed change.

Background information

Our dad was terminally ill in the high dependency unit of Perth Royal Infirmary, when during his final days his solicitor along with his business partner presented him with legal documents to sign. These documents affected the value of our dad's estate, consuming his final moments and the little time we had with him.

We took the matter to the Law Society of Scotland, and the solicitor was found guilty of 5 counts of misconduct and received a £5000 fine. During the tribunal, part of the defence was that the solicitor didn't have to ensure dad's capacity in the same way as he would have to in England, where they have a "golden rule" to ensure any frail or extremely sick person has to get a medical professional to co-sign legal documents to guarantee capacity and confirm there has been no coercion.

Annexe B

The logo for SPICe, featuring the text 'SPICe' in white on a purple-to-blue gradient background.

The Information Centre
An t-Ionad Fiosrachaidh

Briefing for the Citizen Participation and Public Petitions Committee on [PE2061](#): Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents, lodged by Laura Johnston-Brand

An overview of issues raised by the petition

In terms of current law and practice, there are three main areas relevant in the context of this petition:

- the general position on a person's capacity, which applies for most types of legal documents
- the statutory position on capacity when someone is making a 'power of attorney'
- the Law Society of Scotland's practice rules which apply to Scottish solicitors when they are advising clients.

In terms of possible future reforms, the [final report of the Scottish Mental Health Law Review](#) is a relevant document.

All these topics are discussed in more detail in this briefing.

The general position: capacity

The age of legal capacity in Scotland is 16 under the [Age of Legal Capacity \(Scotland\) Act 1991](#). However, the 1991 Act makes no provision on incapacity for reasons other than age.

There is a [definition of incapable](#) which applies to an adult (that is, someone 16 years and over) in the context of the specific statutory interventions in the [Adults with Incapacity \(Scotland\) 2000](#). This definition is [often regarded as a helpful source of guidance on incapacity in other legal contexts](#). Broadly, the definition focuses on whether someone can act and make, communicate, understand, and retain the memory of a decision.

There are also various important common law principles affecting this area, that is, principles developed by the decisions of judges in previously decided cases.

Under the common law, adults who are 16 or older are **presumed** to have the capacity to manage their affairs, including the capacity to enter into a legal agreement. The presumption can be 'rebutted' (overturned by the court) by medical evidence in an individual case, which will be led by the person in the case who objects to the presumption operating.

While evidence might be led in court about someone's capacity in the context of an individual dispute, there is no general requirement under the common law to have someone assessed before they enter into a legal agreement.

The general position: facility and circumvention and undue influence

Someone may suffer a degree of mental deterioration which, without amounting to incapacity, may leave them easily imposed on by others. The common law also has two (often overlapping) legal principles which apply in this situation.

First, **facility and circumvention** will exist if it can be proven that someone has taken advantage of a person's weakened mental state and a loss has resulted. Second, **undue influence** can occur if someone acting in a position of trust takes advantage of their position to secure a benefit under a legal document.

A legal step (such as entering into a legal agreement) affected by **facility and circumvention** and/or **undue influence** is voidable. If it is **voidable** this means it is valid until its legal effect is successfully challenged in court.

Adults with incapacity (Scotland) Act 2000

What is described above on capacity is the general position applying for most legal documents or agreements.

However, the position for someone wishing to make a **power of attorney** under Part 2 of the [Adults with Incapacity \(Scotland\) Act 2000](#) is different.

A [power of attorney](#) is a written document that gives legal authority to someone to make decisions on someone else's behalf. Under the 2000 Act, the power of attorney needs to be made while the adult in question still has capacity to make this decision.

Prior to granting a power of attorney, either 1) a solicitor who is registered to practice law in Scotland, 2) a practising member of the [Faculty of Advocates](#), or 3) a UK medical doctor, must interview the person proposing to make the power of attorney. The purpose of the interview is to ensure that the person understands what they are doing by granting a power of attorney.

If the solicitor, advocate, or medical doctor is satisfied that the person does understand, they will sign a **certificate of capacity**. This certificate of capacity then forms part of the power of attorney document. Without the certificate of capacity, there is no valid power of attorney.

The Law Society's practice rules

Scottish solicitors advising clients (for example, on whether to enter into a legal agreement) are bound by the [Law Society of Scotland Practice Rules 2011](#) ('the Law Society practice rules').

Under the Law Society practice rules, solicitors must have authority to act on behalf of their clients and must not accept improper instructions (Rule B1.5.1). This involves being satisfied when taking instructions that the client has sufficient capacity to give those instructions (see [Guidance: Rule B1.5: Capacity Generally](#)).

Although under general law capacity is presumed, the Law Society's [Vulnerable Clients guidance](#) (para 9) makes it clear that solicitors cannot simply rely on this:

"In cases of doubt as to the extent to which, and circumstances in which, capacity can be exercised, or conversely as to the extent to which incapacity, undue influence, undue pressure, or any other

vitiating factor may adversely affect the validity of a contemplated juridical act, the solicitor should seek the consent of the client to obtain advice in accordance with this paragraph. Subject to such consent, the advice of a medical practitioner, psychologist or other relevant person should be sought. It may be necessary to approach someone with particular specialist expertise.”

If, after carrying out a capacity assessment (informed by medical input if necessary) a solicitor determines that their client does not have capacity in relation to a particular matter, they may have to refuse to accept instructions (Rule B1.5.2).

In addition to the rules and guidance described above, other Law Society practice rules and guidance may apply to specific situations associated with vulnerable clients.

Scottish Mental Health Law Review

Between 2019 and 2022, there was an independent review of mental health law in Scotland, with the [final report](#) published in September 2022. The Scottish Government published [its response to this report](#) earlier this year.

A key theme of the final report is how to promote **supported decision-making**, that is, supporting a person’s decision-making ability to ensure that their will and preferences are respected. In law, this is a person exercising their legal capacity.

Another key theme of the report is stronger rights, protections, and safeguards for [adults with incapacity](#), including updating the law relating to [powers of attorney](#).

In [its response to the final report](#), the Scottish Government set out [its high-level priorities for reform](#), and an [initial timescale for delivery](#).

Sarah Harvie-Clark

16/11/23

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at spice@parliament.scot

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

Annexe C

Scottish Government submission of 30 November 2023

PE2061/A: Require solicitors to ensure the capacity of vulnerable individuals by having a medical professional co-sign legal documents

The Scottish Government has considered the information provided in the petition and the Scottish Government wish to share their condolences with Mr Johnston's family. While the Scottish Government is sympathetic in this instance, we do not view that the legislative changes sought are necessary or appropriate. The Scottish Government concluded that the rules detailed by the Law Society of Scotland alongside the additional safeguards currently in place are sufficient in protecting the capacity of vulnerable individuals when signing legal documents.

Responsibilities of Solicitors

Assessing a person's testamentary capacity is a legal question, to be considered and assessed by legal professionals and the courts. It is already best practice for solicitors to obtain a medical opinion if there are doubts as to a testator's capacity. This is in line with a solicitor's legal responsibilities, which include a duty to act with integrity. Solicitors are also subject to the Law Society of Scotland's rules on trust and personal integrity, acting in a client's interests, and conflict of interest, among others.

Law Society of Scotland Rules

The Law Society of Scotland rules require a solicitor to have instructions from their client and be satisfied when taking instructions that the client has the capacity to give instructions in relation to that matter.

If there is any doubt as to a client's capacity to instruct in a particular case, input should be sought from an appropriate professional. Whilst the decision on whether or not a client has capacity remains one for the solicitor to satisfy themselves of the answer to, that solicitor must assess the client by appropriate means which should include their own knowledge of the adult and/or the solicitor may take input from a GP, a clinical psychologist or other relevant persons. Solicitors cannot simply rely upon

the legal presumption of capacity but must take reasonable steps to facilitate the exercise of capacity, including in the matter of instructing a solicitor.

Additional Safeguards

In addition to the rules set out by the Law Society of Scotland covering the capacity of an individual client, there are also additional safeguards in respect of the Client Protection Fund and professional indemnity insurance. The Client Protection Fund exists to protect clients who have lost money because of the dishonesty of a solicitor (or a member of their staff). Additionally, Scottish solicitors working in private practice have professional indemnity insurance to cover claims of negligence against them.

‘Golden Rule’

The ‘golden rule’ referred to in the petition applies in England whereby the testamentary capacity of someone who is elderly or suffering from, or has recently suffered from, a serious illness should be assessed by a medical practitioner where that person is seeking to make or change their will. It is not a ‘rule’ as such, and failure to observe it does not of itself invalidate the will or the change, but it is considered to be best practice in England. The question of the ‘golden rule’ has been considered by the Scottish courts which ruled that such a strict requirement is not necessary. Assessing whether a person has testamentary capacity is a legal question, to be considered and assessed by legal professionals and the courts. While medical evidence may often be available, and useful, to the courts, the assessment of capacity does not depend solely on medical evidence.

Yours sincerely

Access to Justice Unit

Annexe D

Petitioner submission of 11 December 2023

PE2061/B: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents

Although grateful for the condolences for our situation expressed by the Scottish Government in their response, I wish to point out that we are not an isolated case and each day we hear in different ways how our changes outlined in petition number PE2061, also known publicly as "Willie's law", could have helped someone. I have no doubt that the changes are necessary and appropriate.

The Law Society of Scotland rules are not sufficient to deter less-discerning solicitors from taking actions they shouldn't or from stopping lazy ones from doing proper checks. The Law Society complaints procedure is an isolating and distressing process lasting years for victims to go through. The solicitors are still in a more privileged position given their knowledge of the law which many can't afford to access and rarely given more than a fine if found guilty. Many people don't feel equipped for such an undertaking and the maximum fine is less than a week's work for most solicitors, hardly reflective of the years of trauma any victim must go through to succeed.

Seeing capacity as solely a legal issue as stated in the Scottish Government submission is where the problems occur. Capacity is also used medically, there is a definition of capacity on the NHS website. Given a solicitor will only meet their client a handful of times during their lifetime and medical professionals will meet with their patients on a regular basis, it stands to reason that the medical staff are likely to see issues in a vulnerable person's capacity long before a solicitor would, as they have a baseline to judge. Many people in mental health crisis, or in a diminished capacity state such as early dementia, or medications can appear to a stranger as having capacity whereas to a relative or medical professional they would understand they are not presenting as normal for them.

It is best practice for a solicitor to obtain a medical opinion if there are doubts but "best practice" is not a legal requirement even if there are

doubts about someone's capacity. There is no actual consequence for a solicitor if they don't. The solicitor's legal responsibilities can all be circumvented especially if they state they felt they were acting in their client's interest and even if they weren't, where are the consequences? In our case there were 5 separate counts of misconduct agreed upon between the Law Society solicitor and the solicitor we brought the complaint against, and he still only got a token fine as that is the maximum they can impose.

The additional safeguard of the Client Protection Fund or insurance assumes that the lay person would know of its existence and then have the means to claim. Neither are a safeguard for most victims, but a means through which solicitors can avoid any severe consequences.

The golden rule is indeed best practice in England and although it doesn't necessarily go far enough to ensure all vulnerable people are protected as it should and can be flouted. It does, however, take into account frail, elderly and people who have recently suffered from illness which our best practice rules don't specifically deal with. This is a wide section of people who are truly the most vulnerable and who should be protected. The golden rule was brought up as a defence in our Law Society case specifically stating that since we don't have it in Scotland the solicitor could not be held to its standards. This was an acceptable defence and clearly shows the golden rule is a more robust and inclusive system even if it is not legally binding in all cases it is strong enough to be used as a defence.

These changes are not just to protect the vulnerable, they have far-reaching effects. It would help solicitors to have their clients' wishes respected and for them to be challenged less. It allows a vulnerable person's decisions to be supported and for their voice to be heard. It also lets medical professionals advocate for their patients, avoiding harmful effects to a person's mental health which can have dire consequences.

The Government have acknowledged that there are potentially long-standing gaps in the law, and that there needs to be changes to ensure stronger rights, protections, and safeguards are put in place. There are mental health reforms underway with the aim of addressing gaps in advocacy, along with how to support decision-making of vulnerable people. The changes this petition proposes will do this, along with supporting carers who make legal decisions for the person they care for.

Society is judged on how we treat the most vulnerable not how we protect the most privileged. Changing the law to reflect this is, in my view, necessary and appropriate.