

Citizen Participation and Public Petitions Committee
Wednesday 30 October 2024
16th Meeting, 2024 (Session 6)

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

Introduction

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>

1. [The Committee last considered this petition at its meeting on 24 January 2024.](#) At that meeting, the Committee agreed to write to the Law Society of Scotland, the Mental Welfare Commission for Scotland, the British Medical Association, and the General Medical Council.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new written submissions from the Law Society of Scotland, the General Medical Council, the British Medical Association (BMA) Scotland, the Mental Welfare Commission for Scotland, and the Petitioner, which are set out in **Annexe C**.
4. [Written submissions received prior to the Committee's last consideration can be found on the petition's webpage.](#)
5. [Further background information about this petition can be found in the SPICe briefing](#) for this petition.
6. [The Scottish Government gave its initial position on this petition on 30 November 2023.](#)
7. Every petition collects signatures while it remains under consideration. At the time of writing, 399 signatures have been received on this petition.

Action

8. The Committee is invited to consider what action it wishes to take.

Clerks to the Committee
October 2024

Annexe A: Summary of petition

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: Extract from Official Report of last consideration of PE2061 on 24 January 2024

The Convener: PE2061 is the final new petition that we are considering this morning. This is the petition that you focused your attention on, Mr Choudhury. The petition, which was lodged by Laura Johnston-Brand, calls on the Scottish Parliament to urge the Scottish Government to help to 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.

I have been aware that a couple has been with us in the gallery all morning. They have stuck it to the end, so I will conclude that they are here for this petition. Thank you for joining us.

The petitioner has explained that, while terminally ill in hospital, her father was asked to sign legal documents affecting the value of his estate. The family raised their concerns with the Law Society of Scotland, and a solicitor was thereafter found guilty of misconduct and fined.

The SPICe briefing notes that, although there is no general requirement under common law to have someone assessed before they enter into a legal agreement, the Law Society's guidance on meeting the needs of vulnerable clients makes it clear that solicitors cannot simply rely on the presumption of capacity.

In its response to the petition, the Scottish Government stated that it is already best practice for a solicitor to obtain a medical opinion if there are doubts about a client's capacity. The response went on to note that the question of a "golden rule", similar to that which operates in England and Wales, has been considered by the Scottish courts, which ruled that such a strict requirement is not necessary.

We have also received a submission from the petitioner that responds to the Scottish Government's view. The petitioner remains concerned that the Law Society's rules are insufficient in deterring solicitors from taking actions that they should not take, and notes that the complaints procedure can be a long and distressing one and that it is challenging for members of the public to navigate, with solicitors facing minimal consequences even when complaints are upheld.

We have had notes of interest in the petition from Alex Rowley and Liam McArthur, and representations have also been made to me by Claire Baker and Finlay Carson. Therefore, there is quite a wide range of interest among colleagues on the issues that the petition has raised.

Colleagues exchanged views during our period of consideration ahead of looking at these matters today. Some important issues have been raised, and I believe that we want to keep the petition open at this point.

Are there any suggestions on how we might proceed? Maybe Mr Choudhury would like to offer a suggestion to us now.

Foyso Choudhury: Sure. I will repeat what I said earlier. I suggest that we write to the Law Society of Scotland, the Mental Welfare Commission for Scotland, the

British Medical Association and the General Medical Council to seek their views on the action called for in the petition, including the potential resource implications for medical professionals.

The Convener: Thank you. Following on from the submissions and notes that we have received in relation to the Scottish Government's view that the "golden rule" that obtains elsewhere in the UK is not necessary in Scotland, it would be good to ask the Law Society when we write to it why it feels satisfied that the current arrangements are sufficient. It is clear that, across the rest of the UK, that is not the judgment that has been reached. Individual circumstances can be very detrimental, and the current outcomes can be quite tragic.

Important issues have been raised in the petition, and I am not terribly satisfied with the brush-off response that we have received so far. I think that we need to drill down and interrogate a bit further in respect of all this. Do colleagues share that view? Mr Torrance, are you waving your glasses to say something, or are you just waving your glasses?

David Torrance: I am waving them in agreement with you, convener.

The Convener: Thank you. We will keep the petition open and drill down a little bit further. We will write to the various organisations that Mr Choudhury suggested writing to, and specifically the Law Society. I would like to ask the Law Society whether it can give any indication to us of the outcomes of its operational practice as it currently stands. What can it point to that it believes means that the current arrangement is satisfactory, given that there is a much more stringent application of practice elsewhere in the UK?

It has been a long morning for our petitioners in the gallery. I hope that they are content that we are keeping the petition open and will be pursuing its aims. Of course, as petitioners, they will be kept abreast of any information in relation to the progress of the petition.

Annexe C: Written submissions

Law Society of Scotland written submission, 26 February 2024

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

Thank you for your letter of 29 January 2024 seeking the Law Society of Scotland's views on the action called for in PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents. The petition calls 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.

Whilst we have the upmost sympathy for the petitioner, and for any family dealing with the legal complexities around the death of a loved one, we do not support the action called for in the petition.

It is not uncommon for elderly, vulnerable or frail clients – including those nearing the end of their lives – to wish to take urgent action to put their affairs in order and to instruct a solicitor for this purpose. In these situations, it is essential that the solicitor is able to take and give effect to the client's proper instructions quickly.

We note that the Committee has also agreed to write to the British Medical Association and the General Medical Council. Whilst these organisations will be better placed to comment on the practical and resource implications of placing additional requirements on medical practitioners, our members already report significant practical difficulties in finding medical practitioners who are able and willing to provide certificates for applications under the Adults with Incapacity (Scotland) Act – often causing significant delay. We would be concerned that these challenges would be replicated if the proposed additional responsibilities were placed on medical practitioners. We also note that medical professionals can charge for certain reports, and that there may be cost implications for individuals and families in requiring additional medical input.

Even if it were practicable for medical professionals to assume this considerable additional responsibility, they would not necessarily be able to cover all the relevant considerations. Capacity is just one of a number of factors which might render a document voidable. Others include undue influence, fraud or error. If a medical co-signature were taken to certify validity, that could exclude the possibility of demonstrating that a document was otherwise voidable.

Whilst medical professionals may routinely assess capacity for medical treatment, they may be unwilling or unable to undertake capacity assessments for other purposes including a person's ability to execute a legal document. They may not have an understanding of the relevant laws and the various legal tests which are applied for differing purposes.

We believe that the current system strikes the right balance in enabling clients to make decisions on their estate and protecting vulnerable people.

[Rule B1.5 of our Practice Rules](#) provides that solicitors must have the authority of their client for their actings. [Our Guidance B1.5 Capacity Generally](#) states that:

“A solicitor must (a) have instructions from their client and (b) be satisfied when taking instructions that the client has the capacity to give instructions in relation to that matter.”

The same guidance goes on to state that

“If there is any doubt as to a client's capacity to instruct in a particular case (for example a client may have a profound learning disability), 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.”

Our [Guidance B1.5 Vulnerable Clients Guidance](#) sets out further guidance which applies wherever a solicitor is, or reasonably ought to be, aware that a client or prospective client is or may be vulnerable. It notes that “*Solicitors will often require to combine implementing the positive obligation to facilitate valid and competent juridical acts with the obligation to identify where proposed juridical acts may be incompetent, void or voidable.*” Paragraph 9 of the guidance sets out the circumstances in which a solicitor should seek advice from a medical practitioner or other relevant person where there are doubts as to capacity, and the process for doing so.

Scottish solicitors are robustly regulated, and clients are protected by the Client Protection Fund and professional indemnity insurance. Where a solicitor fails to comply with our Rules and Guidance, we will take action as a regulator.

We regularly review our Guidance and advice to our members to ensure that solicitors follow best practice and that appropriate safeguards are in place. The Guidance referred to above was most recently reviewed and updated in 2022.

Whilst we are aware of the so-called “golden rule” which applies in England in cases of testamentary capacity, we do not consider that this is necessary or desirable to replicate this approach in Scotland in light of the other safeguards which exist. We understand that the status of the “golden rule” is a matter of ongoing debate in England and Wales. We further understand that it has been observed in caselaw that failure to follow the “golden rule” would not necessarily invalidate a will, and that the purpose of the “rule” is to assist in the avoidance of disputes (see *Key v Key* [2010] EWHC 408 (Ch) at [6] and [8]).

In our view, attempting to legislate along the lines suggested by the petitioner in a way which could be easily and quickly applied in emergency situations would be extremely challenging, and would supplant the checks and balances which currently exist to balance enabling clients to make decisions on their estate and protecting vulnerable people. We are concerned that any requirement for medical professionals to co-sign legal documents could add significant complexity to the process, and

increase both the cost and time required to prepare legal documents. In some cases, this could lead to people dying without their wishes being legally fulfilled.

I hope that the above is helpful. We would be happy to assist the Committee with any other information that is relevant.

General Medical Council written submission, 27 February 2024

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

We thank the Citizen Participation and Public Petitions Committee for the opportunity to comment on PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents.

The General Medical Council (GMC) is the independent regulator of doctors in the UK. We work with doctors, patients, and other stakeholders to support good, safe patient care. We set the standards doctors and those who train them need to meet and help them achieve them.

The GMC would not take a position on whether or not such a change should take place. However, doctors may already be asked to conduct a formal capacity assessment to ascertain whether a patient may lack capacity to make certain decisions (particularly if the decision could be life-changing or have far-reaching consequences, which might be the case for complex financial decisions). As per [paragraph 2 of 'Good medical practice'](#), doctors must work within the limits of their competence, and so we would not expect them to make assessments about the capacity of their patients to make financial decisions if they felt unable to do so.

British Medical Association (BMA) Scotland written submission, 5 March 2024

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

BMA Scotland is a leading voice advocating for outstanding healthcare and a healthy population, providing members with individual services and support throughout their lives. As a trade union, the BMA is formally recognised for collective bargaining purposes at a UK, devolved nation and local level. It represents, supports and negotiates on behalf of all doctors and medical students in the UK and currently has a membership of more than 191,000 (approximately half of practising doctors) in the UK and more than 17,000 in Scotland. Members of the BMA come from all branches of medical practice and specialities, for example GPs, consultants, public health, occupational medicine, medical academics, students and doctors in training.

BMA Scotland is sympathetic to the issues highlighted in petition PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents. General practitioners tend to be the doctors who will know the patients independently and therefore most likely to be able to give a view regarding a person's capacity, if it is called into question. Capacity is however

not the same as a person's ability to resist coercion. Many people with full capacity can be and have been victims of coercive behaviour.

There is already provision for GPs and other doctors to comment on capacity where this is appropriate. Coercive behaviour in legal issues falls to lawyers to look out for and to protect their clients.

The proposal would not be part of the General Medical Services contract and therefore not be part of NHS activity for doctors, it would be undertaken as additional work and would require a reasonable fee for the time taken, we would envision something similar to what currently happens with Firearms licenses. There is however a risk, that in the currently suggested form, the proposal would create an impossible increase in workload. The NHS is currently not able to meet the demand being placed on it. Doctors and other health care professionals are struggling with increasing workloads and decreasing capacity. The likelihood is that if such a requirement was brought forward, it would fall majoritively on the shoulders of GPs.

The BMA understand the 'Golden Rule' mentioned in the background information to refer exclusively to testamentary capacity where there may be doubts about a testator's ability to make a will because of age or impediment.

Petitioner written submission, 29 March 2024

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

I write in response to the [Law Society submission of 26 February 2024](#).

Accessing solicitors at end of life or within a crisis situation can be positive if rights and wishes are upheld but not for those with vulnerabilities that can cause confusion, anxiety and limited mental health capacity. Individuals may appear fine to non-medical professionals like solicitors in the limited window they see them. Medical experts see the subtle changes and can spot capacity issues. Those making changes at the end of life are in the constant care of medical staff, making access easier.

Certificates for individuals under the Adults with Incapacity (Scotland) Act is important for nursing facilities and treatments. Without these documents families wouldn't be able to get loved ones in nursing homes or the treatment they need. Delays occur but it's just as likely it could be caused by solicitors and the court. My petition would ensure medical and legal sides work together so that people are not shoved from one side to another but looked after by both parties. Keeping the rights and care of that individual at the heart of the situation.

The Law Society have investigated cases where current safeguards and processes have failed to protect vulnerable clients. Families require clarity and reassurance that processes are in place to protect clients when they are most vulnerable. This petition will ensure added protections are in place and processes are more effective.

Documents could be voided due to error or fraud just as a document with multiple partner signatures or business can be voided if there is an issue. The medical

professional is not signing the documents as a partner to that document, but would be ensuring that the vulnerable person has had a capacity assessment and can make decisions and understand the consequences of what is being asked of them. My petition would give the individual a chance to pause and reflect while creating a safeguard against controlling behaviour, alerting those around them to a potential situation.

The client protection fund is not a solution to stop vulnerable people being taken advantage of, in fact it could be used as an excuse for bad behaviour. It only protects clients which use solicitors that use legal firms regulated by the Law Society. The Scottish Government moved away from the idea of a single body regulator, and although the majority of solicitors are covered by the Law Society, I don't think all are and not all firms are solicitor-owned. It is not available for most people due to strict guidelines and is a last resort according to the Law Society.

Barriers in the [Client Protection Fund guidelines](#) include:

- 1(B) is elitest, uses professional language that alienates those traumatised by the legal process. It puts the responsibility on the victims to justify why they should be considered which is not a fair system that respects those who are most in need of understanding and support.
- 1(C) Sounds reasonable, however it may not be possible for someone to use other means especially if it is costly or they don't feel equipped to deal with it.
- 1(F) Given the cost of a solicitor this is likely the majority of claims. This may not sound like a difficult thing but if you have any health issues including mental health this could be a large hurdle.
- 2(c) Not only is this sort of evidence expensive to achieve if you have lost a significant amount of money, it is also very difficult for some people to do. Going through another process to prove dishonest behaviour can retraumatise victims leading to many people unable to do so or just give up due to constant victimization.
- 2(d) This is not realistic or achievable for some victims.
- Section 3 lists losses not covered by the fund which are extensive and would exclude many applicants.

Section 4 lists losses that don't normally result in a grant.

- 4(c) This could technically apply to someone who signed documents even if they didn't understand the consequences or if there was coercion involved.
- 4(d) This is not always possible due to grief, lack of knowledge about the fund, mental or physical health issues. It also makes no sense if there is to be civil action etc to gather evidence needed for this, civil action or other process can take years.

- 4(e) Even if a solicitor has been found guilty of misconduct this fund will not cover them.

Complying with Section 6 could be very difficult for some victims, making them relive the trauma that led to their situation.

Section 10 states that a solicitor is not normally needed for the application. However, someone who didn't understand the circumstances that led to their situation may disagree but any legal fees over £500 must be cleared by the Law Society first. This adds a barrier to people seeking legal advice who are already financially vulnerable.

How many people access this fund or indeed start the process but don't complete it? The fund is a barrier which has been set up by the sector themselves.

Guidelines and rules are routinely broken, there is no real impact on dishonest solicitors and current safeguards are skewed in favour of their members. The maximum financial penalty for solicitors is £5000. After a tribunal the maximum compensation after going through another process is £5000. If you felt the need for legal advice during this process, given the accused's knowledge of the law, then you would be out of pocket. Victims could lose money by complaining with no way of recouping it. That's not a fair system for clients. How many people submitted a complaint, how many were upheld or investigated?

Guidance was updated in 2022 but there is no mention what was updated or the process they went through to determine that they were operating in the best way for people, other than the members they protect.

There are failings of the "golden rule", yet it is a more robust system than ours with tighter guidelines. The change proposed by this petition would go further than the "golden rule", making people in Scotland the most protected in the UK.

Having a medical professional co-sign vulnerable individuals' legal documents is not an unnecessary cost and would protect from future costs when a dispute arises. Financial abuse is an under reported issue and this proposed change would help to stop this. Capacity assessments are under-used by solicitors currently as they deem them not to be necessary.

How do their safeguards protect people who may have temporary or fluctuating capacity issues due to medication, mental health, injuries, dementia, or ageing? This would allow people who know of family disputes or of their fluid capacity to make changes and to have them respected.

Mental Welfare Commission for Scotland written submission, 15 April 2024

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

I am writing further to your letter dated 29 January 2024 in which the CPPP Committee requests a view from the Mental Welfare Commission of Scotland in relation to public petition PE2061, which relates to the following matter:

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.

The Commission has considered the issue and referred to the Committee's Official Report dated 24 January 2024, which provides that two key points are considered which are outlined below with our response.

1. The Commission's view in relation to the requirement for solicitors to have a medical professional co-sign legal documents which confirms a person's capacity.

The Commission views that solicitors are bound by their professional standards of conduct practice rules and expect that solicitors are acting in accordance with their legal and professional standards, which includes safeguarding the interests of a person who may present as vulnerable in relation to capacity to make some or all decisions. The instance described in the Committee's report appears to be a departure from a solicitor's professional standards. We suggest that this does not necessarily indicate that there is a need for a medical co-signatory in all cases, rather we would advocate a proportionate response and expect that solicitors should exercise their professional judgement.

We would further suggest that an individual has a power of attorney document in place, which includes an explicit clause requiring a medical review in circumstances where a person's decision-making capacity, in relation to welfare, finance and/or property matters, is unclear.

It may also be beneficial for the Committee to seek a view from the Office of the Public Guardian given the petition relates to a person's financial and property matters.

2. The potential resource implications for medical professionals.

The Commission, through exercising its functions across Scotland in the field of mental health, is aware of the current workforce challenges, which includes a deficit in medical resources. However, as the medical workforce sits outside of our remit, we would suggest that the Committee may find it helpful to seek a view from the Academy of Medical Royal Colleges and Faculties in Scotland in relation to medical workforce implications.

We hope that the Committee finds this response helpful.

Petitioner written submission, 24 April 2024

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

I am responding to the submissions provided by the British Medical Association (BMA), General Medical Council (GMC), and Mental Welfare Commission for Scotland.

The GMC don't give figures for formal assessments and there is no way of knowing how many times this should have been carried out but wasn't asked for.

Doctors, as with all medical professionals, should work within their knowledge. The petition is asking that vulnerable people have the right to be assessed, which is well within the limits of a doctor's competence.

The responses highlight that GPs and other doctors already deliver this support, and when asked many practices have a person responsible for safeguarding. It is very likely local GPs are the ones to be able to assess capacity, however with an increase in GP practices being taken over by NHS boards, it may be others who, through their role as a consultants or district nurses, are the most relevant person to carry out the assessment.

The petition aims to build on the good practice that already exists and ensure the most vulnerable people, who don't have capacity at that time, are further protected from exploitation. The Mental Welfare Commission failed to highlight the practices in place into which this could be added, such as an Advanced Statement allowing individuals to lay out their wishes while they have capacity. We want to give vulnerable individuals the ability to advocate for themselves and to be advocated for.

Power of Attorney documents are also great if put in place before capacity issues arise, if the individual has the right one and it contains all the necessary information. It's not routinely done before illness arises and there are many issues that can occur with Power of Attorney documents as outlined in the Mental Welfare Commission of Scotland's documents. It is not a blanket solution for individuals who are vulnerable and lacking capacity. It can be a tool for unscrupulous people and is often not set up for the occurring situation.

There are lots of documents that can be put in place if someone knows what's coming, but most don't, and these documents are useless. There is no consistent protection for people whether they have a long-term or variable capacity issue, especially if it's not predicted which is usually the case.

The petition aims to allow for legal documents to be set aside until such time when an individual is equipped to understand and deal with them.

The ask of this petition will not stop vulnerable people with capacity being victims of coercive behaviour, however, it is an added safeguard for those who may be exposed to controlling behaviour, and for those around them to be aware of these situations.

People already are accustomed to paying a fee for letters of support, medical assessments for work etc.

There is a duty of care for medical staff and solicitors, the proposed change requires both to take responsibility and hold the other accountable, while having the vulnerable person at the centre. It is currently not under the General Medical Services Contract, however these contracts are reviewed to meet the needs of their patients so it could be added in the future.

We are looking for a fair system for all where individuals can be supported to reduce the risk of further harm through exploitation which would have life-changing consequences.

Presently, it is up to the individual solicitor to decide if the assessment is required, something which is beyond their remit and not always done although it's best practice. It is also putting pressure on doctors, consultants, and medical staff to be aware of potential exploitation and a need for an assessment. At the moment, it is also up to the individual or their family to know that an assessment can be carried out. All these factors result in an inconsistent approach which is not a fair system for all.

Without additional checks put in place the impact on individuals and their families can result in increased stress, and anxiety which may cause long-term health issues, further impacting the limited resources of the NHS at this time.

Lack of resources should not be a reason not to put in additional protection for those most vulnerable in our society.