Law Society of Scotland

Consultation Response

Caution for PoA? Invitation to Comment

August 2021

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Mental Health and Disability sub-committee welcomes the opportunity to consider and respond to the Scottish Government invitation to comment on caution for Powers of Attorney (PoA). The sub-committee has the following comments to put forward for consideration.

Consultation Questions

1. What are your views on the concept in principle?

1.1 The issue of caution for powers of attorney is an important one and it is appropriate that it is considered carefully at this time.

1.2 It is our view that a requirement for caution for attorneys should never be obligatory. To impose such a requirement involuntarily would unacceptably contravene the principles of autonomy and self-determination, which over the years have been enhanced rather than diminished at the international human rights level. This point is fundamental, and is developed further in response to question 3 below.

1.3 The availability of a relatively inexpensive caution may be a useful option for granters who choose to select it. However, careful examination of the proposal nevertheless identifies significant issues in relation also to voluntary availability of caution. In particular, it would present issues which are significant, and which do not appear to have been addressed, identified in our answer to question 2.

1.4 The full costs of introducing such a scheme do not appear to have been quantified. They should be identified, quantified, and the consequences assessed. Whilst we recognise that many granters may be content with the relatively small premium proposed, for others this will present a real barrier. Additionally, wider costs to individuals including additional legal fees arising from solicitors either advising them about the scheme, or alternatively drawing it to their attention and explaining it, do not appear to have been quantified. Potential costs against public funds and public resources, including the resource implications for the OPG, do not appear to have been quantified at all.

1.5 It would appear that such a scheme could not be made workable without amendments to primary legislation. Some relevant points regarding the OPG's powers are noted below in our answer to question 2. It is understood that it is the policy of Scottish Government that there should be no amendments to the Adults with Incapacity (Scotland) Act 2000 (which contains in Part 2 the existing scheme for continuing and welfare powers of attorney) prior to any legislation following upon the Final Report of the Scottish Mental Health Law Review ("SMHLR"). Consideration of all aspects of the 2000 Act is within the remit of SMHLR. Any changes to the existing statutory scheme for continuing and welfare powers of attorney should be considered by SMHLR in a manner integrated, so far as relevant, with their proposals as a whole.

1.6 Before any particular proposal is formulated and taken further, there should be a data-based assessment of the nature and extent of average annual losses attributable to malfeasance by continuing attorneys which would be made good under whatever scheme is proposed. See our paragraph 3.3 below.

2. What are your views on the Product Specification as set out in Appendix A?

2.1 Paragraph 16 of the Product Specification raises major issues. It appears to envisage that OPG should act as adjudicator as to whether a claim on the bond should be made and should be met by the cautioner. Whilst we recognise that the process outlined replicates that already in place for guardianship bonds, it is arguable that it would require the conferring on OPG of judicial powers which OPG does not yet have. Any such procedure would require to meet all human rights standards for such a judicial role. Who would be entitled to make a claim? What remedy would the claimant have if OPG rejected the claim? What remedy would the cautioner have if the cautioner disputed the claim? Has the potential impact of such a role upon impartial performance of OPG's other statutory functions been assessed?

2.3 Paragraph 18 suggests that the provider could decide whether to claim against the attorney, or against a joint attorney. If such claims were permitted, particularly in the case of joint attorneys, granters would have to be advised of such arrangement and many would regard it as a counter-incentive to granting a power of attorney. Moreover, questions would have to be resolved in relation to attorneys acting as appointed supporters under the power of attorney document, or as co-decision-makers (on which see also our answer to question 11).

3. Against the specification set out in Appendix A, what are your views on this being a mandatory requirement?

See our answer to question 1, above.

3.1 Caution should not be mandatory. That would defeat the purposes of the existing scheme of continuing powers of attorney, to an extent that would call in question the human rights compliance of the arrangement. Paragraph 3.3 of Scottish Law Commission Report No 151 on Incapable Adults (September 1995), which remains the principal source of the purpose and reasoning behind the scheme now contained

in the 2000 Act, commences: “The main advantage of contractually conferred powers of attorney is that they are relatively cheap and flexible compared with court appointed guardians”. The removal of choice in the matter, and the imposition of the bureaucracy and rigidity of such a scheme, would unacceptably and unnecessarily diminish the distinction between powers of attorney and guardianship. If the granter prefers the protections of guardianship, the granter can be advised either (a) to let a guardianship application proceed in the event that it becomes necessary, or (b) where the granter already has some impairment of relevant capacity, to make use of the option himself (or herself) to apply for a guardianship order. The committee has experience of applications in category (b) being advised, and being made successfully. Moreover, an adult opting not to grant a power of attorney, on the basis that if necessary a guardianship order would be granted, can under existing common law grant an advance directive as to the choice of guardian, should one be appointed (as explicitly provided for in Principle 14 of Council of Europe Recommendation CM/Rec. (2009)11), or to make other stipulations about the terms of any guardianship order to be granted. Under Scots law as it stands, such an advance directive would not be binding, but taking account of the section 1 principles of the 2000 Act and the terms of the UN Convention on the Rights of Persons with Disabilities (“UN CRPD”), any court appointing a guardian could reasonably be expected, in practice, to afford due respect to the adult’s will and preferences (and recorded wishes and feelings) except for overriding good reason.

3.2 The fundamental human rights point is that for caution to be mandatory, under whatever scheme is proposed, would make no difference to granters who would in any event have opted for the scheme. Rather, a mandatory requirement would impose a cautionary scheme upon a granter who did not want that to be done. The practical consequence is that people who would otherwise grant powers of attorney might well for that reason opt not to do so after all. Such an imposition would in any event be contrary to relevant human rights principles, particularly the pervasive principles supporting autonomy and self-determination. These are expressly articulated in Article 1 of Rec. (2009)11 as follows:

> **Principle 1 − Promotion of self-determination**
>
> 1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.
>
> 2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.

Such overriding of the potential granter’s will in that manner would also expressly contravene the requirement for respect for the person’s rights, will and preferences in accordance with Article 12.4 of UN CRPD.

3.3 If a cautionary scheme were to be imposed by the state against the will of granters who did not wish to have it, granters would require to be relieved of all additional costs of doing so. As has been demonstrated in conjunction with the “mypowerofattorney” campaign, the potential savings to the public purse (for example in substantial shortening of periods of delayed discharge from hospital) by the encouragement of the public to grant powers of attorney are substantial. Existing registration costs, as a deterrent to granting powers of attorney, are already contrary to the public interest, as it would appear from relevant research that there would be an overall saving to public funds if costs of granting were absorbed

by the state.[1] It is not clear that the additional costs of any such scheme have been fully assessed and quantified. They would include additional professional time advising; abortive professional costs if the granter decided after all to opt for guardianship; and possible costs of additional separate advice (see our answer to question 12 below).

4. Against the specification set out in Appendix A, what are your views on this being a voluntary requirement?

See our answer to question 1, above.

The meaning of “voluntary requirement” is unclear. How can something that is voluntary be a requirement? If it is to be a voluntary arrangement, it surely should be an option rather than a requirement? If it is to be available optionally, there would appear to be no reason why providers should not provide caution, and granters either obtain caution or require the attorney to obtain it, under existing provision. It is however understood that a well-structured “official” scheme might have administrative advantages and might encourage providers to enter the market.

5. What are your views on the costs, as currently indicated

See our answer to question 1, above. If a mandatory or comprehensive scheme of caution for powers of attorney were to be introduced, that should only occur with all costs met from the public purse.

It would be impossible to assess the future state of the adult’s property and finances. The capital of some might increase. The capital of others might diminish substantially through care costs, or otherwise. On the other hand, a fixed premium would inevitably be unfair, and in any event act as a deterrent. It would be a particular and substantial deterrent for people with very small estates, or those whose principal motivation is to grant welfare powers but who are advised to include at least basic financial powers to cover the eventuality of there being finances to be administered or other need for financial powers. That could include, for example, administering self-directed support, or other actions such as renouncing a lease, where powers were required for contractual and other purposes without significant funds (or indeed any funds) coming under the control of the attorney.

1 See for example: https://academic.oup.com/ageing/article/46/4/659/2926035 ; https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)32992-6/fulltext; and https://journals.sagepub.com/doi/full/10.1177/1355819618814055

6. What are you views on cover being restricted to £25,000-£50,000?

This would be too low for some, too high for others.

7. What are your views on the impact, if any, on PoA uptake, assuming this were a mandatory requirement?

See our answer to question 1, above.

7.1 Initially there may be a substantial surge in granting of powers of attorney, often with inappropriate haste, to have them registered prior to the new provisions coming into force, and thus to avoid the additional costs.

7.2 With the new provisions in force there would be likely to be a reduction in powers of attorney granted compared with levels of grant that would otherwise have occurred, and a corresponding increase in applications for guardianship, with the resulting resource implications.

7.3 See also our answer to question 1 above.

8. What are your views on a principal provider scheme (akin to that operated by the OPG for guardianship bonds)?

As with caution for guardianships, having a principal provider would offer some reassurance and comfort, and would relieve granters from having to “shop around”. Granters would in particular be reassured that appropriate due diligence would have been done by OPG in the selection of the provider and that the product had been assessed as appropriate for its purpose.

9. What impact do you envisage for Local Authority or OPG Investigations?

We have no comments.

10. Would this differ dependent on whether the scheme was mandatory, or voluntary?

We have no comments.

11. What are your views on claims, if necessary, covering loss from capable persons estates, or should these be limited to incapable persons?

A limitation to incapable persons would be unworkable, particularly under powers of attorney where financial powers become operable upon grant of the document, or some trigger other than an assessment of incapacity. It would become necessary to carry out complex – and in most cases disputed – retrospective investigations, broadly similar to those that occur when capacity to grant a Will is an issue. It is notable that Scots law, unlike some systems, does not require any registration when the granter is deemed to have lost relevant capacity and the attorney begins to act. In such circumstances it would be most difficult to establish whether and to what extent a loss had been caused prior to impairment of relevant capacity, and after. Moreover, in typical cases incapacity gradually becomes impaired, and it would be necessary to attempt to establish which capabilities were engaged and the extent to which impairment of capacity should be taken into account in apportioning a loss before and after the impairment of capacity.

12. What are your views on caution for professional attorneys?

12.1 It should not be assumed that practising solicitors “have their own cover”. The committee has taken advice from the Professional Practice Department of the Law Society: the inter-relationship between any cautionary arrangement and the Society’s Master Professional Indemnity Policy and the Society’s Guarantee Fund would require to be assessed by reference to the precise terms of whatever cautionary scheme is proposed.

12.2 There would be potential for conflict of interest issues, where a solicitor who is nominated to act as attorney might be conflicted when advising in relation to a voluntary scheme, or indeed as to the consequences of a mandatory scheme.

13. What are your views on extending caution to cases already registered?

This would be fundamentally inappropriate. It would change the basis on which the granter had decided to grant a power of attorney.

14. There are number of disparities mentioned in the Invitation to Comment Paper – eg between guardians and attorneys, between capable and incapable persons, between lay and professional guardians, between sole and joint attorneys. What are your views on any of these disparities?

We have no further comments beyond those made in answer to other questions.

15. What are your views on the risk and benefits mentioned?

All of the risks listed in paragraphs 26 – 32 are valid and potent. Particularly unfortunate would be the risk identified in paragraph 30 that granters would feel constrained by the need to meet acceptance criteria, and thus to select someone for appointment as attorney whom they would not otherwise have chosen.

16. Are there any risks or benefits, in your view, in addition to those mentioned?

We have no comments beyond those expressed elsewhere.

17. Do you have thoughts on other measures that may offer added safeguards / protection from abuse and so reassurance on the efficacy of PoA use?

Provisions to be found in other jurisdictions should be evaluated. These include, for example, provisions (in some cases mandatory) for appointment of a supervising attorney. Joint appointments are already available and should be encouraged. As has already been proposed by the Law Society of Scotland, the 2000 Act should allow remedies to be pursued by persons with an interest as beneficiaries or potential beneficiaries where attorneys are also executors and opt not to pursue claims against themselves. Also, malfeasance often comes to light only after the death of the granter, and (as also already proposed by the Law Society of Scotland) power should be conferred on the Public Guardian, in the Public Guardian's option, to continue an investigation, or initiate an investigation, within the Public Guardian's statutory functions after the death of the granter. Development (as in some other jurisdictions) of specialist capability to prosecute financial abuse of elderly and/or vulnerable people could reasonably be expected to have significant deterrent value.

18. Please feel free to offer any other comments of note.

We have no further comments.

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