



Law Society
of Scotland

Powers of Attorney Bill

Briefing for the Second Reading in the House of
Lords

June 2023



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.

We welcome the opportunity to provide a briefing on the Powers of Attorney Bill¹ ahead of the Second Reading in the House of Lords scheduled for 16 June 2023.

General Remarks

The Powers of Attorney Bill is a Private Members' Bill introduced in the House of Commons. The Bill is divided into three clauses and a Schedule. The purpose of the Bill is to make provision about lasting powers of attorney, proof of instruments creating power of attorney, and for connected purposes.

Much of the Bill does not apply to Scotland. We comment only on the provisions which apply to Scotland. These are clauses 2, 3 and paragraphs 8(a) and (b) of the Schedule.

We note that a Legislative Consent Memorandum (LCM) has been lodged with the Scottish Parliament by Scottish Ministers.² We submitted comments to the lead committee of the Scottish Parliament as part of a targeted call for views in April 2023.³ On 24th May, the Scottish Parliament agreed that the relevant provisions of the Bill, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Our primary concern in relation to the Bill is that it does not include clear provision regarding the automatic operation of Scottish Powers of Attorney in England, or when presented in Scotland to branches of banks and other institutions headquartered in England. In our view this is a matter of significant importance.

1 <https://bills.parliament.uk/bills/3210>

2 <https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/powers-of-attorney-bill>

3 <https://www.parliament.scot/-/media/files/committees/health-social-care-and-sport-committee/correspondence/2023/law-society-powers-of-attorney-submission.pdf>

Comments on the Bill

Clause 2

This clause amends Section 3 of the Powers of Attorney Act 1971 to include Chartered Legal Executives (CLEs) amongst those who can certify copies of powers of attorneys.

The requirements for certifying that a copy of a power of attorney document is a true copy under section 3 of the 1971 Act are distinct from both the process of signing a power of attorney, and from the certification requirements for granting a valid power of attorney. Section 3 of the 1971 Act applies to proof of instruments creating power of attorney in Scotland.

We understand that CLEs currently facilitate the creation of Lasting Power of Attorneys in England and Wales. On this basis, it would appear sensible for them to be able to also certify copies of Powers of Attorney and therefore we have no general concerns regarding this clause.

Clause 3

Clause 3 sets out the general provisions for extent, commencement and short title.

We have no comments on this clause.

Schedule, paragraphs 8(a) and 8(b)

Part 1 of the Schedule amends Schedule 1 of the Mental Capacity Act 2005 (“the 2005 Act”). Paragraph 8 amends paragraph 16 of Schedule 1 to the 2005 Act in respect of evidence of registration.

Paragraph 8(b) amends the 2005 Act to provide that, where an instrument has been registered under Schedule 1 of the 2005 Act in electronic form, the record in the register of that instrument is to be, in any part of the United Kingdom, sufficient proof of the instrument.

Schedule 1 of the 2005 Act sets out the formalities for Lasting Powers of Attorney made under that Act. It does not apply to Scottish Powers of Attorney made under the Adults with Incapacity (Scotland) Act 2000. The effect of Paragraph 8(b) is therefore that the record in the register of a Lasting Powers of Attorney which has been registered in electronic form is proof of the instrument in any part of the UK including in Scotland, but there is no equivalent provision for automatic operation of Scottish powers of attorney in the rest of the UK. We consider this a significant omission.

During the third reading of the Bill in the House of Commons on 21 March 2023 Mike Freer MP, the Parliamentary Under-Secretary of State for Justice, suggested that legislation is already in place “that allows for the recognition of Scottish powers of attorney in England & Wales”. Similarly, when giving evidence to the Health, Social Care and Sport Committee of the Scottish Parliament, the Minister for Social Care, Mental Wellbeing and Sport, Maree Todd MSP indicated that “The legislation currently allows for the recognition of Scottish powers of attorney in England and Wales...Given that there is already legislation in place that provides recognition of Scottish powers of attorney in England and Wales, I am not persuaded that further legislation is the answer. However, this is about ensuring that institutions and organisations have awareness and are educated on the legal status of Scottish powers of attorney.”⁴ Schedule 3 of the 2005 Act does provide for recognition of powers of attorney granted in other jurisdictions in England and Wales however this route is convoluted and in practice can require proceedings in the Court of Protection in England & Wales to achieve recognition. Whilst agreeing with the Minister that education and awareness are important we believe that the best solution to resolving the issue of a lack of recognition of Scottish Powers of Attorney is by clear and readily understood legislation.

We are aware that the current position results in significant practical difficulties for those appointed under Scottish powers of attorney seeking to exercise their powers in England and Wales or with banks and financial institutions based in England and Wales, including at branches in Scotland. We are aware that some practitioners have adopted a practice of recommending to clients that they grant power of attorney in both jurisdictions, which is expensive and not sustainable.

We consider that the current legislative position is inadequate, and that the Bill is a fitting opportunity to ensure automatic recognition and enforcement throughout the UK of powers of attorney 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.

⁴ Health, Social Care and Sport Committee of the Scottish Parliament Report, Legislative Consent Memorandum(LCM) on the Powers of Attorney Bill, available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/HSCS/2023/5/16/8483bc42-e981-4ab5-b3b1-b1c8ef8516ca-1/HSCS062023R5.pdf> , at para 19.

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