



The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Powers of Attorney Bill



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 18 April 2023, the Committee considered the delegated powers that are exercisable within the Scottish Parliament's legislative competence in the [Powers of Attorney Bill](#) ("the Bill").
2. The LCM is being considered in terms of the Committee's wider remit contained in Rule 6.11.1(b) of Standing Orders which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.
3. The Powers of Attorney Bill is a Private Members Bill introduced in the House of Commons by Stephen Metcalfe MP on 15 June 2022. The Bill is presently still progressing through the UK Parliament and is at second reading stage in the House of Lords.
4. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") for the Bill on 16 March 2023. The Scottish Government states in the LCM that legislative consent is required for the provisions of the Bill that apply to Scotland as they are within the legislative competence of the Scottish Parliament. The UK Government does not consider that any of the Bill's provisions require the consent of the Scottish Parliament. The LCM has been lodged in the Parliament on the basis that the Bill contains provisions that make it a "relevant Bill" under Standing Orders, and accordingly the legislative consent process in the Parliament applies (Standing Order rule 9B).
5. The Scottish Government is recommending consent be given to the Bill and states in the LCM that the Bill is aligned with the Scottish Government's emphasis on increasing accessibility to obtaining a power of attorney.

Overview of the Bill

6. The Bill consists of three clauses and one schedule. The stated purpose of the Bill is to enable modernisation of the process for making and registering a lasting power of attorney (“LPA”) made under the Mental Capacity Act 2005 (“MCA”). The Bill is to facilitate modernisation with the aim of increasing safeguards for the donor of an LPA, improving the process of making and registering an LPA, and to increase the sustainability of the Office of the Public Guardian (“OPG”). The Bill principally extends to England and Wales only, however, a few of the Bill's provisions also extend to Scotland.
7. Clause 2, clause 3 and paragraph 8 (a) and (b) of the schedule to the Bill extend to Scotland. Clause 2 amends the Powers of Attorney Act 1971 regarding how the contents of an instrument creating a power of attorney may be proved by means of a certified copy, by adding Chartered Legal Executives to the list of persons able to certify a copy. Clause 3 deals with commencement of the provisions of the Bill. Paragraph 8(a) and (b) of the schedule to the Bill amend the Mental Capacity Act 2005, which generally does not apply to Scotland, to allow LPAs registered electronically to be evidenced by the record in the register of LPAs maintained by the Public Guardian in England and Wales as sufficient proof of the contents of the instrument in any part of the United Kingdom, and for other methods to be prescribed by the Lord Chancellor. These specific provisions extend to Scotland.
8. The lead committee for the Bill is the Health, Social Care and Sports Committee.
9. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (the “UK DPM”). As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government's view on the relevant clauses is set out in the LCM.
10. There are only two delegated powers conferred on the Lord Chancellor in the Bill that apply to Scotland, which are minor and consequential to allow the provisions of the Bill to operate effectively.

Delegated Powers

Clause 3 - Commencement and Transitional

Power conferred on: Lord Chancellor

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: None

Provision

11. Clause 3(5) confers a power on the Lord Chancellor to bring the provisions of the Bill into force, on such day or days as may be appointed by regulations made by statutory instrument. Commencement regulations can also make transitional, transitory or saving provision, and may make different provision for different purposes under clause 3(6).
12. Regulations made under this clause are not subject to any parliamentary procedure.

Committee consideration

13. Clause 3 of the Bill will come into force the day on which the Act is passed with clause 2 subsequently coming into force 2 months after the day on which the Act is passed. Clause 3(2) allows the Lord Chancellor to bring the remaining provisions of the Bill into force on such days as may be appointed by regulations.
14. The DPM states at paragraph 14 that the delegated power to make commencement regulations in this way is to enable provisions to be brought into force at a time considered the most appropriate or convenient. It further states that it is also to afford flexibility having regard to the need to make any necessary secondary legislation, issue guidance and put the necessary systems and procedures in place.
15. The power to commence provisions by regulations is standard practice in modern primary legislation. This clause extends to Scotland as a few of the Bill's provisions extend to Scotland. The power is very narrow and is limited in how it may be exercised. It is subject to being laid only and not subject to any parliamentary procedure, which is standard for commencement regulations.

16. **The Committee is content with the power conferred on the Lord Chancellor and that the regulations under this clause are not subject to any parliamentary procedure.**

Paragraph 8(b) of the Schedule to the Bill - Evidence of Registration

Power conferred on: Lord Chancellor

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Provision

17. Paragraph 8(b) of the schedule to the Bill confers a power on the Lord Chancellor to prescribe a method for the Public Guardian to provide a form of document which will be, in any part of the United Kingdom, evidence of the content of an instrument and that it has been registered as an LPA.
18. Regulations made under this clause are subject to the negative parliamentary procedure.

Committee consideration

19. The DPM outlines the reasons for seeking this power in paragraphs 43-47 which states that currently LPAs are made on paper and sent to the Public Guardian for registration. The changes being made by paragraph 8 of the schedule to the Bill will allow this to be done electronically and allow that electronic record to be evidence of the content of an instrument and that it has been registered as an LPA in any part of the United Kingdom.
20. Paragraph 8(b) of the schedule to the Bill allows the Lord Chancellor to set out in regulations the form of any other document, provided by the Public Guardian, which will be acceptable as proof of the content and fact of registration of an LPA. This, the DPM states, is to ensure that if the electronic LPA is unable to be accessed a paper alternative (as prescribed) could be used.
21. The DPM further states that the exact mechanism by which the Public Guardian can provide documentary evidence of the content of the registered LPA will consist of administrative and technical detail which it is not considered appropriate or proportionate to set out in primary legislation. Additionally, how the digital process for registering LPAs will work will be finalised when the digital service has been built, tested and is ready to be used. It may also require to be subject to changes over time to take account of technological advances or to maintain best practice which require legislative changes to be made promptly and flexibly through regulations.
22. The LCM at paragraph 14 states that “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 cross-border 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.”
23. Matters of technical detail in the operation of a Bill would generally not appear on the face of the Bill and would be dealt with appropriately via regulations. The power is very narrow and is limited in how it may be exercised which is very clear from the text of the Bill and cannot be exercised more widely. It is also subject to the negative Parliamentary procedure, which the DPM states is aligned with the level of scrutiny applied to the other regulation-making powers under Schedule 1 to the MCA.

24. **The Committee is content with the power conferred on the Lord Chancellor**

and that the regulations under this clause are subject to the negative parliamentary procedure.

