

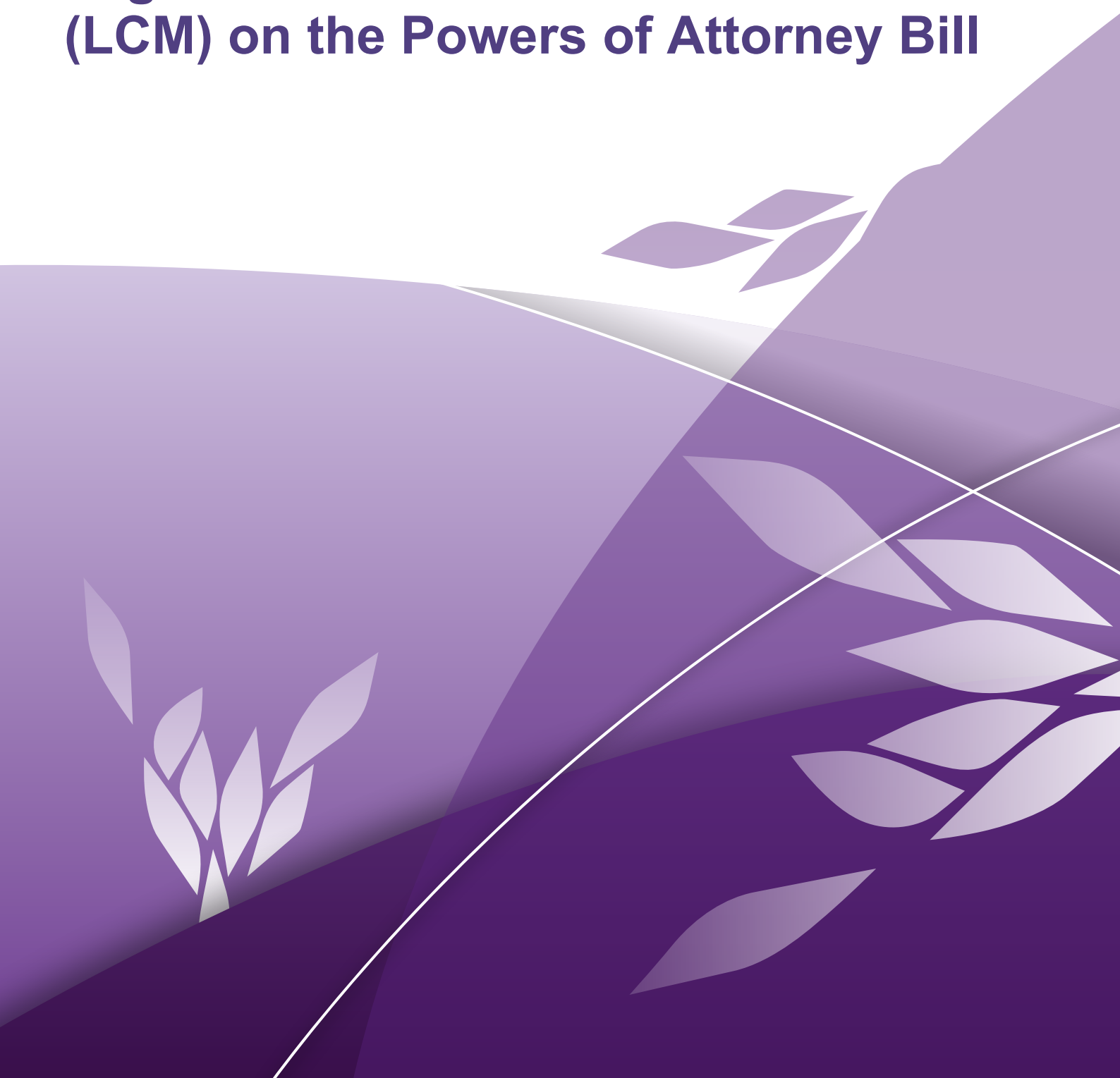


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Health, Social Care and Sport Committee

Legislative Consent Memorandum (LCM) on the Powers of Attorney Bill



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Health, Social Care and Sport Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Health and Social Care and matters relating to drugs policy.



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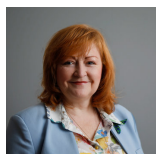
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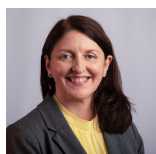
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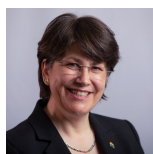
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Introduction

1. The [Powers of Attorney Bill LCM](#) was lodged by the Scottish Government on 16 March 2023 and referred to the Health, Social Care and Sport Committee. The Powers of Attorney Bill is a Private Member's Bill introduced by Stephen Metcalfe MP in the House of Commons on 15 June 2022.
2. The Bill consists of three clauses and one schedule:
 - Clause 1, and the schedule, provides for amendments to the Mental Capacity Act 2005 in relation to the process for making and registering Lasting Powers of Attorney (LPA);
 - Clause 2 amends section 3 of the Powers of Attorney Act 1971 to include Chartered Legal Executives amongst those who can certify copies of power of attorney in accordance with that section; and
 - Clause 3 outlines that the Bill largely extends to England and Wales only, except for some clauses which also extend to Scotland and Northern Ireland. Clause 3 also provides for commencement of the resulting Act if Bill were to be passed.

Interaction with devolved competence

3. The LCM notes that whilst the Bill largely applies to England and Wales only, some of the provisions extend to Scotland. It is the Scottish Government's view that a Legislative Consent Motion is therefore required for the following (clause numbers relate to the print of the Bill on introduction):
 - Clause 2; and
 - Paragraph 8 (a) and (b) of the schedule.
4. Clause 2 amends section 3 of the Powers of Attorney Act 1971 ("the 1971 Act"). Section 3 of the 1971 Act extends to Scotland and currently provides that the contents of an instrument creating a power of attorney may be proved by means of a copy which is certified in accordance with that section. The persons that are listed as being able to certify a copy for the purposes of section 3 are: the donor of the power, a solicitor, a person who is authorised for the purposes of the Legal Services Act 2007 in relation to notarial activity and a stockbroker. Clause 2 would amend section 3 to add Chartered Legal Executives to this list of persons, along with a definition.
5. Paragraph 8 (a) and (b) of the schedule extends to Scotland. The schedule makes various amendments to the Mental Capacity Act 2005 ("the 2005 Act") as regards lasting power of attorneys (LPAs), including making provision for the electronic registration of LPAs. LPAs are a form of power of attorney in English and Welsh law. Most of the provisions of the 2005 Act do not extend to Scotland. However, the LCM notes paragraph 16 of schedule 1 of the 2005 Act does extend to Scotland.
6. Paragraph 16 concerns evidence of registration of LPAs and the contents of an instrument creating an LPA. It provides that a document purporting to be an "office copy" of an instrument registered under schedule 1 is, in any part of the United Kingdom, evidence of the contents of the instrument and the fact that it has been registered. Paragraph 8 of the schedule of the Bill amends paragraph 16 to the effect that where an instrument creating an LPA is registered in electronic form, the record in the register of LPAs maintained by the Public Guardian in England and Wales is sufficient proof of the contents of the instrument in any part of the United Kingdom. Paragraph 16 will also be amended to enable the Secretary of State to make regulations to the effect that a document provided by the Public Guardian in a prescribed manner is to be, in any part of the United Kingdom, evidence of the contents of the instrument and of the fact that it has been registered. The Explanatory Notes accompanying the Bill indicate, at paragraph 60, that this would, for example, enable a paper alternative to be used if the electronic record cannot be accessed.
7. The LCM advises that Clause 2 would modify Scots law in respect of the proof, in Scotland and for the purposes of Scots law, of the contents of an instrument creating a power of attorney. The Scottish Government believes this would include proving the contents of an instrument made in Scotland as well as an instrument made in another part of the United Kingdom.
8. Paragraph 8 (a) and (b) of the schedule would modify Scots law as regards the means of evidencing, in Scotland and for the purposes of Scots law, the content of

an instrument creating an LPA and the fact that it has been registered. As such, the LCM advises this provision concerns Scots law on the evidencing of the contents of an instrument creating a power of attorney from another jurisdiction.

9. The Scottish Government is recommending consent because:

” ...the Bill is aligned with the Scottish Government's emphasis on increasing accessibility to obtaining a power of attorney. As noted above, the changes that apply to Scotland will allow the record in the register of LPAs maintained by the Public Guardian in England and Wales to be used as sufficient proof of the contents of an instrument in any part of the United Kingdom including Scotland.

10. The Scottish Government has indicated that the draft motion which will be lodged is:


"That the Parliament agrees that the relevant provisions of the Powers of Attorney Bill, introduced in the House of Commons on 15 June 2022, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament"

Committee consideration

Delegated Powers and Law Reform Committee consideration

11. The Delegated powers and law reform (DPLR) committee considered the LCM at its meeting on 18 April 2023 and published its [report](#) on the LCM on 19 April 2023.
12. The report notes "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".
13. The DPLR Committee advises it is content with the powers conferred on the Lord Chancellor by this LCM.

Health, Social Care and Sport Committee consideration

14. Ahead of oral evidence, the Committee sought written submissions on the LCM from the Law Society of Scotland, the Faculty of Advocates and the Office of the Public Guardian Scotland and Scottish Courts and Tribunal Service (OPGS and SCTS). The submissions can be viewed at Annexe A.
15. The submission from the OPGS and SCTS advises "the proposals of the Bill would have minimal impact on my functions under statute...I would have no concerns if the Committee were to recommend the approval of the LCM to the Scottish Parliament."
16. The Law Society of Scotland submission highlights an issue relating to the recognition of Scottish powers of attorney in England and Wales which is causing practical difficulties and is the source of frequent complaints – and which the Law Society of Scotland advises the UK Bill will not resolve.
17. The Law Society advises there is a need for a similar clear provision regarding the operation of Scottish powers of attorney in England, or when presented in Scotland to branches of banks and other institutions headquartered in England.
18. The Committee took oral evidence from the Minister for Social Care, Mental Wellbeing and Sport on 9 May 2023.
19. In relation to the issue raised by the Law Society of Scotland the Minister advised:
 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.

20. The Minister advised she would be keen to commit to working with third-party organisations to raise awareness through publicity about the validity of Scottish powers of attorney in England and Wales.

Conclusion

21. The Committee recommends that the Parliament agree to a legislative consent motion in the terms outlined in the LCM.

Annexe A: Written submissions

The Faculty of Advocates submission, dated 11 April 2023

The Faculty of Advocates is the independent referral Bar in Scotland. The Faculty is pleased to have the opportunity to respond to consultations, although should make it clear at the outset that the Faculty does not seek to comment upon issues of policy. Whilst the Faculty cannot comment upon whether the Committee ought to recommend approval of the Legislative Consent Memorandum ('LCM') to the Scottish Parliament, the Faculty is pleased to offer its comments on those aspects of the underlying Power of Attorney Bill ('the Bill') which would affect Scotland.

As the LCM notes, the Bill is primarily concerned to make changes to the law in England and Wales. However, there are two changes made by the Bill which would have a cross-border effect, namely:

- i. The Bill would expand the categories of persons who can certify a copy of an instrument creating a Power of Attorney under section 3 of the Powers of Attorney Act 1971 ('the 1971 Act'), by adding one further group to that list. A copy certified in accordance with section 3 of the 1971 Act is proof of the contents of the instrument which creates a Power of Attorney. The 1971 Act is primarily concerned with England and Wales, but section 3 applies throughout the UK, and therefore any amendment of section 3 has the potential to impact Scotland in terms of what is accepted as evidence here.
- ii. The Bill would make provision in the Mental Capacity Act 2005 ('the 2005 Act') in respect of registration of Lasting Powers of Attorney in electronic form with the Public Guardian in England and Wales. This could have an impact in Scotland because in terms of paragraph 16 of Schedule 1 of the 2005 Act, an office copy of an instrument registered under that schedule is evidence of the contents of that instrument and the fact of its registration in any part of the UK. The Bill proposes that this paragraph be amended such that where registration has been in electronic form, the record in the register maintained by the Public Guardian in England and Wales will be proof of the instrument's contents in any part of the UK (and the Bill would also allow for secondary legislation to be made regarding paper copies).

These two amendments proposed by the Bill would seem likely to be of relatively minor practical impact in Scotland. Further, for the reasons set out in paragraphs 14 and 15 of the LCM, it may be thought that such impact is not a negative one, from the standpoint of accessibility considerations. The LCM itself records support which has been expressed by the Faculty, and by the Law Society of Scotland (see paragraphs 15 - 17).

Law Society of Scotland submission, dated 11 April 2023

Thank you for your letter of 24 March regarding the Powers of Attorney Bill introduced in the House of Commons on 15 June 2022, and the Committee's consideration of the legislative consent memorandum (LCM) lodged by the Scottish Government on 16 March 2023.

We understand that the Scottish Government and the UK Government have differing views on whether a legislative consent motion is required in respect of this Bill as it stands. We offer a comment about that in our last paragraph below.

However, from a Scottish point of view the main issue is not what is in the Bill, but what is not. The Bill proposes to create a provision under which English powers of attorney, or official copies of them, will be automatically operable in Scotland. The need, however, is for a similar clear provision regarding the operation of Scottish powers of attorney in England, or when presented in Scotland to branches of banks and other institutions headquartered in England. Those practical difficulties are a cause of frequent complaints, including complaints to the Law Society of Scotland and – we understand – to MSPs.

Your Committee may be aware of the proceedings at third reading of the Bill in the House of Commons on 21 March 2023. Mike Freer, the Parliamentary UnderSecretary of State for Justice, suggested that legislation is already in place "that allows for the recognition of Scottish powers of attorney in England & Wales". The route however is convoluted and in practice can require proceedings in England & Wales to achieve recognition.

Mr Freer did however offer to address the problem as part of UK Government's engagement "particularly with banks and the insurance sector" regarding the English changes. What is required is that the Bill should be adjusted slightly to apply in both directions, and that there should then be adequate education and engagement to ensure that its provisions are applied in practice. There is no evidence of problems in the England-to-Scotland direction. Scottish case law makes it clear that English powers of attorney are as effective here as Scottish powers of attorney, and so far as we are aware that is followed in practice. Thus, the Bill as it stands seeks to address a problem in one direction that does not exist, and fails to address the problem in the other direction that most certainly exists.

Our Mental Health and Disability Sub-Committee recently re-affirmed its support for the objective of achieving early legislation throughout the UK to ensure automatic recognition and enforcement throughout the UK of any measure under adults with incapacity, mental capacity, or equivalent legislation 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.

We suggest that the Committee could approach the issue by indicating that there is an issue concerning the recognition of Scottish Powers of Attorney and other measures in the English jurisdiction which could be resolved by an amendment to the Bill. Any change to the Bill would need to be followed up with adequate publicity, education and engagement to make it clear that within the UK all powers of attorney are equally effective and operable, without difficulty, wherever issued and wherever submitted.

The above is a matter of significant importance. Many people in Scotland taking on the voluntary role of attorney for a loved one run into the unexpected and unnecessary, yet frustrating and time-consuming, difficulties described above. If further comments from me and/or appropriate colleagues would assist your Committee further, we would be happy to provide that, including by meeting your Committee.

On the divergence of opinion about the need for an LCM, we are not in a position to comment on whether an LCM is necessary, but we can point you to Devolution Guidance Note 10 which provides that "Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament." Category III Bills are those which contain "provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers". It is a matter for the Committee and its advisers to assess whether

there is a requirement for legislative consent in connection with this Bill.

I hope in the meantime this is of some assistance to you and your Committee.

Office of the Public Guardian Scotland and Scottish Courts and Tribunal Service submission, dated 5 April 2023

Dear Convener,

Thank you for your recent letter seeking the views of the Public Guardian on the LCM for the above Bill and in particular, whether or not the Committee should recommend its approval by the Scottish Parliament.

I respond in my role as Public Guardian and on behalf of the SCTS acting in its role to provide efficient and effective administration to the courts, tribunals and the Office of the Public Guardian (Scotland) and does not include the views of the Judiciary. I have previously indicated, to Scottish Government policy officials, that the proposals of the Bill would have minimal impact on my functions under statute.

On the basis of the above, I would have no concerns if the Committee were to recommend the approval of the LCM to the Scottish Parliament.

I hope this is of assistance

