

Legislative Consent Memorandum

Powers of Attorney Bill

Background

1. This memorandum has been lodged by Humza Yousaf MSP, Cabinet Secretary for Health and Social Care, under Rule 9B.3.1(b) of the Parliament's standing orders, and is supported by Kevin Stewart MSP, Minister for Mental Well-being and Social Care. The Powers of Attorney Bill was introduced in the House of Commons on 15 June 2022. The Bill can be found at [Powers of Attorney Bill - Parliamentary Bills - UK Parliament](#).

Content of the Powers of Attorney Bill

2. The Bill is a Private Members' Bill introduced by Stephen Metcalfe MP. 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. 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.

Provisions which relate to Scotland

3. The Bill largely extends to England and Wales only. However some of the provisions extend to Scotland. The clauses which extend to Scotland and, in the Scottish Government's view, require a Legislative Consent Motion are as follows (clause numbers relate to the print of the Bill on introduction).

4. Clause 2 extends to Scotland. 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 of the Mental Capacity Act 2005 ("the 2005 Act") as regards 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, paragraph 16 of schedule 1 of the 2005 Act does extend to Scotland. 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.

6. 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. This would include, in the Scottish Government’s view, proving the contents of an instrument made in Scotland as well as an instrument made in another part of the United Kingdom.

7. Paragraph 8(a) and (b) of the schedule would modify Scot law as regards the means of evidencing, in Scotland and for the purposes of Scots law, the content of an instrument creating LPA and the fact that it has been registered. As such, this provision concerns Scots law on the evidencing of the contents of an instrument creating a power of attorney from another jurisdiction.

8. In both cases, these are matters that are within the legislative competence of the Scottish Parliament and, in the Scottish Government’s view, both provisions falls within the meaning of “relevant provision” for the purposes of Rule 9B.1 of the Parliament’s standing orders.

9. However, the UK Government does not consider that either of these provisions require the consent of the Scottish Parliament. This view is on the basis that the provisions are consequential on the main changes of the Bill relating to the English and Welsh law on powers of attorney (such as the change to facilitate electronic registration of LPA and to enable chartered legal executives to certify copies of instruments creating powers of attorney).

10. Notwithstanding the UK Government’s position, it remains the Scottish Government’s view that the Bill is a relevant Bill for the purposes of Standing Orders.

Reasons for seeking a Legislative Consent Motion

11. The Bill is a relevant Bill within Rule 9B.1.1 of the Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament and alters the executive competence of the Scottish Ministers.

Legislative consent is required for Clause 2 and paragraph 8 of the schedule of the Bill.

12. Consent is recommended, 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.

13. The provisions of this Bill relate to matters within the legislative competence of the Scottish Parliament. These changes stem from the UK Government's Lasting Powers of Attorney modernisation project which aims to transform the way that individuals make and register their LPAs by introducing a digital channel and enabling different processes and evidence to be accepted depending on whether an LPA is made digitally, by paper or a mix of two. The Office of the Public Guardian (OPG) in England are developing and implementing a modernised digital service to enable the changes to be made. The digital system operated by OPG Scotland is distinct and separate from OPG England. The Scottish Courts and Tribunals Service is working closely with OPG Scotland to start work on replacing the current OPG IT system (SIGMA). Any changes to the Scottish power of attorney regime will have to wait until SIGMA is replaced.

14. 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.

15. The Bill adds Chartered Legal Executives to the list of individuals who can certify a copy of power of attorney. There isn't an equivalent of a Chartered Legal Executive in Scotland. The Law Society of Scotland does operate an accredited paralegal status. There is no specific accreditation relating to powers of attorney and accredited paralegals are not a prescribed class under the Adult with Incapacity (Scotland) Act 2000 for the purposes of the creation of continuing powers of attorney or welfare powers of attorney under that Act. They therefore cannot facilitate the granting of those types of Scottish power of attorney. Having consulted with the Law Society of Scotland on this issue in the past, they are not aware of any demand for accredited paralegals to be able to certify copies of power of attorney. Notwithstanding, there is increased access to justice in a Chartered Legal Executive being able to certify a copy of an instrument creating a power of attorney that can be used and recognised in Scotland for the purposes of the 1971 Act. This aligns with the Scottish Government's policy of increasing access to justice and is supported by OPG (Scotland), the Law Society of Scotland and the Faculty of Advocates.

16. The changes proposed are relatively minor technical issues. The provisions of existing law that are being amended currently apply throughout the UK and so there are advantages to the UK Parliament enacting the amendments for the whole of the

UK, rather than there being separate Scottish provision enacted by the Scottish Parliament and provision enacted for the rest of the UK by the UK Parliament. There is no available Scottish legislative vehicle to make these changes and apply them in Scotland. OPG (Scotland), the Law Society of Scotland and the Faculty of Advocates are all supportive of the changes.

Consultation

17. The UK Government conducted a consultation on Modernising Lasting Powers of Attorney on 20 July 2021 which closed on the 13 October 2021. The Summary of Responses was published in May 2022. The Summary of Responses provided an in depth breakdown of the respondents' views on each of the seven proposals and the government's intended way forward. A link to the UK consultation can be found here: [Modernising Lasting Powers of Attorney – GOV.UK \(wwwi.gov.uk\)](https://www.gov.uk/government/consultations/modernising-lasting-powers-of-attorney). The Scottish Government has undertaken limited consultation with the Law Society of Scotland, OPG Scotland and Faculty of Advocates.

Financial implications

18. The provisions of the Bill which extend to Scotland will have no significant financial implications.

Conclusion

19. This Bill confirms Scotland and the wider UK's commitment to ensuring that vulnerable people are protected and their rights are properly facilitated. It will allow more individuals to retain control of their lives by planning for their future. The Bill affirms the Scottish Government's commitment to increasing accessibility of taking out a power of attorney. This encourages the uptake of power of attorney and ensures that people can think through how they might want their health, welfare and financial affairs to be managed in the future, if they are unable to make decisions themselves on these matters.

Draft Legislative Consent Motion

20. The draft motion, which will be lodged by the Cabinet Secretary for Health and Social Care, 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.”

Scottish Government
March 2023

This Legislative Consent Memorandum relates to the Powers of Attorney Bill (UK legislation) and was lodged with the Scottish Parliament on 16 March 2023

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