

# Law Society of Scotland submission of 26 February 2024

## PE2061/C: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents

Thank you for your letter of 29 January 2024 seeking the Law Society of Scotland's views on the action called for in PE2061: Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents. The petition calls on the Scottish Parliament to urge the Scottish Government to help prevent coercion of vulnerable, frail, and debilitated individuals by requiring solicitors to have a medical professional co-sign legal documents confirming the capacity of the individual.

Whilst we have the upmost sympathy for the petitioner, and for any family dealing with the legal complexities around the death of a loved one, we do not support the action called for in the petition.

It is not uncommon for elderly, vulnerable or frail clients – including those nearing the end of their lives – to wish to take urgent action to put their affairs in order and to instruct a solicitor for this purpose. In these situations, it is essential that the solicitor is able to take and give effect to the client's proper instructions quickly.

We note that the Committee has also agreed to write to the British Medical Association and the General Medical Council. Whilst these organisations will be better placed to comment on the practical and resource implications of placing additional requirements on medical practitioners, our members already report significant practical difficulties in finding medical practitioners who are able and willing to provide certificates for applications under the Adults with Incapacity (Scotland) Act – often causing significant delay. We would be concerned that these challenges would be replicated if the proposed additional responsibilities were placed on medical practitioners. We also note that medical professionals can charge for certain reports, and that there may be cost implications for individuals and families in requiring additional medical input.

Even if it were practicable for medical professionals to assume this considerable additional responsibility, they would not necessarily be able to cover all the relevant considerations. Capacity is just one of a number of factors which might render a document voidable. Others include undue influence, fraud or error. If a medical co-signature were taken to certify validity, that could exclude the possibility of demonstrating that a document was otherwise voidable.

Whilst medical professionals may routinely assess capacity for medical treatment, they may be unwilling or unable to undertake capacity assessments for other purposes including a person's ability to execute a legal document. They may not have an understanding of the relevant laws and the various legal tests which are applied for differing purposes.

We believe that the current system strikes the right balance in enabling clients to make decisions on their estate and protecting vulnerable people.

[Rule B1.5](#) of our Practice Rules provides that solicitors must have the authority of their client for their actings. Our [Guidance B1.5 Capacity Generally](#) states that:

*“A solicitor must (a) have instructions from their client and (b) be satisfied when taking instructions that the client has the capacity to give instructions in relation to that matter.”*

The same guidance goes on to state that

*“If there is any doubt as to a client's capacity to instruct in a particular case (for example a client may have a profound learning disability), input should be sought from an appropriate professional. Whilst the decision on whether or not a client has capacity remains one for the solicitor to satisfy themselves of the answer to, that solicitor must assess the client by appropriate means which should include their own knowledge of the adult and/or the solicitor may take input from a GP, a clinical psychologist or other relevant persons.”*

Our Guidance [B1.5 Vulnerable Clients Guidance](#) sets out further guidance which applies wherever a solicitor is, or reasonably ought to be, aware that a client or prospective client is or may be vulnerable. It notes that *“Solicitors will often require to combine implementing the positive obligation to facilitate valid and competent juridical acts with the obligation to identify where proposed juridical acts may be incompetent,*

*void or voidable.*” Paragraph 9 of the guidance sets out the circumstances in which a solicitor should seek advice from a medical practitioner or other relevant person where there are doubts as to capacity, and the process for doing so.

Scottish solicitors are robustly regulated, and clients are protected by the Client Protection Fund and professional indemnity insurance. Where a solicitor fails to comply with our Rules and Guidance, we will take action as a regulator.

We regularly review our Guidance and advice to our members to ensure that solicitors follow best practice and that appropriate safeguards are in place. The Guidance referred to above was most recently reviewed and updated in 2022.

Whilst we are aware of the so-called “golden rule” which applies in England in cases of testamentary capacity, we do not consider that this is necessary or desirable to replicate this approach in Scotland in light of the other safeguards which exist. We understand that the status of the “golden rule” is a matter of ongoing debate in England and Wales. We further understand that it has been observed in caselaw that failure to follow the “golden rule” would not necessarily invalidate a will, and that the purpose of the “rule” is to assist in the avoidance of disputes (see *Key v Key* [2010] EWHC 408 (Ch) at [6] and [8]).

In our view, attempting to legislate along the lines suggested by the petitioner in a way which could be easily and quickly applied in emergency situations would be extremely challenging, and would supplant the checks and balances which currently exist to balance enabling clients to make decisions on their estate and protecting vulnerable people. We are concerned that any requirement for medical professionals to co-sign legal documents could add significant complexity to the process, and increase both the cost and time required to prepare legal documents. In some cases, this could lead to people dying without their wishes being legally fulfilled.

I hope that the above is helpful. We would be happy to assist the Committee with any other information that is relevant.