

# Briefing for the Citizen Participation and Public Petitions Committee on [PE2061](#): Require solicitors to ensure capacity of vulnerable individuals by having a medical professional co-sign legal documents, lodged by Laura Johnston-Brand

## An overview of issues raised by the petition

In terms of current law and practice, there are three main areas relevant in the context of this petition:

- the general position on a person's capacity, which applies for most types of legal documents
- the statutory position on capacity when someone is making a 'power of attorney'
- the Law Society of Scotland's practice rules which apply to Scottish solicitors when they are advising clients.

In terms of possible future reforms, the [final report of the Scottish Mental Health Law Review](#) is a relevant document.

All these topics are discussed in more detail in this briefing.

### The general position: capacity

The age of legal capacity in Scotland is 16 under the [Age of Legal Capacity \(Scotland\) Act 1991](#). However, the 1991 Act makes no provision on incapacity for reasons other than age.

There is a [definition of incapable](#) which applies to an adult (that is, someone 16 years and over) in the context of the specific statutory interventions in the [Adults with Incapacity \(Scotland\) 2000](#). This definition is [often regarded as a helpful source of guidance on incapacity in other legal contexts](#). Broadly, the definition focuses on whether someone can act and make, communicate, understand, and retain the memory of a decision.

There are also various important common law principles affecting this area, that is, principles developed by the decisions of judges in previously decided cases.

Under the common law, adults who are 16 or older are **presumed** to have the capacity to manage their affairs, including the capacity to enter into a legal agreement. The presumption can be 'rebutted' (overturned by the court) by medical evidence in an individual case, which will be led by the person in the case who objects to the presumption operating.

While evidence might be led in court about someone's capacity in the context of an individual dispute, there is no general requirement under the common law to have someone assessed before they enter into a legal agreement.

### **The general position: facility and circumvention and undue influence**

Someone may suffer a degree of mental deterioration which, without amounting to incapacity, may leave them easily imposed on by others. The common law also has two (often overlapping) legal principles which apply in this situation.

First, **facility and circumvention** will exist if it can be proven that someone has taken advantage of a person's weakened mental state and a loss has resulted. Second, **undue influence** can occur if someone acting in a position of trust takes advantage of their position to secure a benefit under a legal document.

A legal step (such as entering into a legal agreement) affected by **facility and circumvention** and/or **undue influence** is voidable. If it is **voidable** this means it is valid until its legal effect is successfully challenged in court.

### **Adults with incapacity (Scotland) Act 2000**

What is described above on capacity is the general position applying for most legal documents or agreements.

However, the position for someone wishing to make a **power of attorney** under Part 2 of the [Adults with Incapacity \(Scotland\) Act 2000](#) is different.

A [power of attorney](#) is a written document that give legal authority to someone to make decisions on someone else's behalf. Under the 2000 Act, the power of attorney needs to be made while the adult in question still has capacity to make this decision.

Prior to granting a power of attorney, either 1) a solicitor who is registered to practice law in Scotland, 2) a practising member of the [Faculty of Advocates](#), or 3) a UK medical doctor, must interview the person proposing to make the power of attorney. The purpose of the interview is to ensure that the person understands what they are doing by granting a power of attorney.

If the solicitor, advocate, or medical doctor is satisfied that the person does understand, they will sign a **certificate of capacity**. This certificate of capacity then forms part of the power of attorney document. Without the certificate of capacity, there is no valid power of attorney.

### **The Law Society's practice rules**

Scottish solicitors advising clients (for example, on whether to enter into a legal agreement) are bound by the [Law Society of Scotland Practice Rules 2011](#) ('the Law Society practice rules').

Under the Law Society practice rules, solicitors must have authority to act on behalf of their clients and must not accept improper instructions (Rule B1.5.1). This involves being satisfied when taking instructions that the client has sufficient capacity to give those instructions (see [Guidance: Rule B1.5: Capacity Generally](#)).

Although under general law capacity is presumed, the Law Society's [Vulnerable Clients guidance](#) (para 9) makes it clear that solicitors cannot simply rely on this:

“In cases of doubt as to the extent to which, and circumstances in which, capacity can be exercised, or conversely as to the extent to which incapacity, undue influence, undue pressure, or any other vitiating factor may adversely affect the validity of a contemplated juridical act, the solicitor should seek the consent of the client to obtain advice in accordance with this paragraph. Subject to such consent, the advice of a medical practitioner, psychologist or other relevant person should be sought. It may be necessary to approach someone with particular specialist expertise.”

If, after carrying out a capacity assessment (informed by medical input if necessary) a solicitor determines that their client does not have capacity in relation to a particular matter, they may have to refuse to accept instructions (Rule B1.5.2).

In addition to the rules and guidance described above, other Law Society practice rules and guidance may apply to specific situations associated with vulnerable clients.

## Scottish Mental Health Law Review

Between 2019 and 2022, there was an independent review of mental health law in Scotland, with the [final report](#) published in September 2022. The Scottish Government published [its response to this report](#) earlier this year.

A key theme of the final report is how to promote **supported decision-making**, that is, supporting a person's decision-making ability to ensure that their will and preferences are respected. In law, this is a person exercising their legal capacity.

Another key theme of the report is stronger rights, protections, and safeguards for [adults with incapacity](#), including updating the law relating to [powers of attorney](#).

In [its response to the final report](#), the Scottish Government set out [its high-level priorities for reform](#), and an [initial timescale for delivery](#).

**Sarah Harvie-Clark**  
16/11/23

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@parliament.scot](mailto:spice@parliament.scot)

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Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP