

**The Faculty of Advocates submission, dated 11 April 2023**  
**Power of Attorney Bill Legislative Consent Memorandum**

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).