

Law Society of Scotland submission, dated 11 April 2023

Dear Convener,

Powers of Attorney Bill Legislative Consent Memorandum

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 Under-Secretary 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.