

## **Cross Border Recognition of AWI Measures**

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### **Introduction**

I am asked, with regularity: -

- a) if a Scottish order (power of attorney or guardianship) can be used in another country and, reciprocally,
- b) if a non-Scottish order can be used in Scotland?
- c) what is the mechanism for getting a non-Scottish order authorised for use in Scotland?
- d) what are the supervisory arrangements?

These questions are addressed below in respect of the two main Scottish orders, guardianship and Power of Attorney.

### **Can a Scottish order be used elsewhere in the world?**

The acceptance of Scottish orders in other countries is a matter for that other country to determine. You should check with an agent versed in the law of that country what the country's requirements are.

If required, formal UK Apostillation of the order can be offered. This is via an on line application, by the holder of the Order, to the Legalisation Office, a UK Government department. The Public Guardian for Scotland is a recognised signatory.

The book on [International Protection of Adults](#) covers cross border requirements in a wide range of countries, so may offer a useful start point.

### **Can a Scottish order be used in England?**

The question ‘can a Scottish order be used elsewhere’ is asked most frequently in respect of England and especially in respect of Scottish powers of attorney. The English equivalent of the AWI, the Mental Capacity Act 2005, (MCA) governs this. The wording would suggest that it is permissible to use a Scottish PoA in England, but experience shows that attorneys find this difficult in practice. We (Scotland) had hoped that the Ministry of Justice (MoJ) would take the opportunity, via the Bill which modernised powers of attorney in England and Wales (progressing in 2023), to ease the recognition of Scottish PoAs but they have seen this as unnecessary, believing that the MCA as drafted is sufficient. There is a process which allows an attorney to have their Scottish PoA endorsed for use in England and Wales. Application is via the Court of Protection.

### **Can a non-Scottish order be used in Scotland?**

The position varies depending on whether this is an order analogous to guardianship, or the equivalent of a Power of Attorney.

#### ***Orders Analogous to Guardianship***

Schedule 3, paragraph 7 (1) of the [Adults with Incapacity \(Scotland\) Act 2000](#) is the relevant section. It states that

*“Any measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland.*

This wording reflects the Hague Convention on the International Protection of Adults.

#### ***Measure of protection***

According to this wording, a ‘measure of protection’ is one that is “taken” [under the law of another country]. The definition of such measures are in paragraph 14 and include guardianship and analogous institutions 14(c).

As for PoAs, there is a view that a ‘measure of protection’ should, or may, include a PoA competently drafted and recognised in its country of origin – but, from this, you can see that there is dubiety about the position of a PoA. To err on the side of caution it is best to look at ‘foreign’ PoAs and guardianships distinctly.

#### ***Mechanism for Enforcement***

1. A measure [of protection] that falls within the ambit of paragraph 7 ie one that is recognised by the law of Scotland may be registered, paragraph 8.
2. [SSI 2003/556](#) covers the process of registration – which is via the relevant Sherriff Court.
3. If the measure is not written in English, translation to English is required, which must be certified as a correct translation.
4. Notification of the intention to register an international measure must be given to certain Scottish Authorities, as listed.
5. If/once ‘the foreign order’ is approved by the sheriff for registration the Public Guardian is notified and a Certificate issued, in the same way as for a Scottish guardianship appointment.
6. The person so appointed would then be permitted to exercise their order in Scotland.

### *Supervision*

7. What is not clear is the process for ongoing supervision, following registration of the order.
8. It would be preferable for the relevant Scottish Authority to take over supervisory responsibility but nothing compels this. There can be a tendency for the appointee to be supervised by both Scotland and the country of origin.
9. Reciprocally, where a person under a Scottish order moves out with the Scottish jurisdiction it would be preferable for the receiving country to take over supervision, as per their own jurisdictional requirements; but nothing ‘triggers’ this.
10. We have had cases where either Scotland continues to supervise someone now abroad – with no jurisdictional authority; or ceases supervision but without formally transferring this to the receiving country, leaving the guardian unsupervised and potentially the incapable person exposed.
11. Once a non-Scottish guardianship order is registered, and even if the Public Guardian has assumed supervision, it is unclear what happens if/when there are any issues with the Order - are these reported back to the court of origin and if so by whom, or are these dealt with in Scotland by the court authorising the use of the foreign order?

12. This is a matter on which we need a policy / more clarity.

### ***Power of Attorney, or equivalent***

13. Schedule 3 paragraph 4 is the relevant part of the Adults with Incapacity (Scotland) Act 2000, the relevant wording being, in paragraph (1)

*“the law governing the existence, extent, modification, and extinction of continuing or welfare powers of attorney (including like powers, however described) shall be that of the State in which the granter habitually resided at the time of the grant of these powers”.*

14. And in paragraph (3) *“The manner of exercise of such a power shall be governed by the law of the State in which its exercise takes place”.*

15. This wording reflects the Hague Convention on the International Protection of Adults.

16. Interpreting this, an international equivalent of a Power of Attorney (including an English LPA) may be exercised / used in Scotland, but it cannot be changed or revoked other than as may be permitted by the law of the country of origin.

17. When being exercised in Scotland, its use is subject to the Adults with Incapacity (Scotland) Act 2000.

### ***Mechanism for Enforcement***

18. There is no provision for such a Power of Attorney to be registered in Scotland. SSI2003/556 relates only to a process for orders equivalent to guardianship.

19. The reason there is no such provision, it is suggested, is because the wording of Schedule 3, paragraph 4 permits the use of a Power of Attorney in any event, without the need for formal registration.

20. This is endorsed by the terminology in several places throughout the Act, eg at Section 1(7) whereby a guardianship is accepted *“if it is recognised by the law of Scotland”* S1(7)(a), but there is no such corresponding caveat in respect of a power of attorney S1(7)(b) and (c).

21. Despite the fact that use of a non-Scottish Power of Attorney should simply be accepted, Users of non-Scottish Powers of Attorney can struggle to have their deed officially recognised because of the lack of registration.

22. A Scottish Power of Attorney has a certain appearance; although a prescribed format is not required many do follow a similar general design, once registered with the Office of the Public Guardian the deed has a Certificate of Authority attached. Organisation relying on the authority of an Attorney look for the Scottish Certificate of Authority as an indication that it is a bona fide document. When they see what to them is a strange foreign order they are unwilling to accept the authority of the attorney.
23. The Office of the Public Guardian has [a form of Certificate](#) on their website, which mirrors in appearance that of a registered Scottish deed, and which explains the position with non-Scottish deeds. Attorneys can download this to append to their deed; this has assisted in some cases.
24. A formal recognition process for non-Scottish powers of attorney would reduce the difficulties faced by those seeking to rely on these in Scotland but this a) goes beyond what the Hague Convention requires and b) places an additional hurdle, and cost, for those that are managing with a non-Scottish deed without finding they need formal validity.
25. What is clear is that we require greater awareness in respect of the legislation that applies in cross border cases in order that, for example, Agencies appreciate that they can rely on a non-Scottish power of attorney, as presented but there is no-one charged with increasing awareness. Regrettably, therefore this issue rumbles on, without any satisfactory easy solution.