

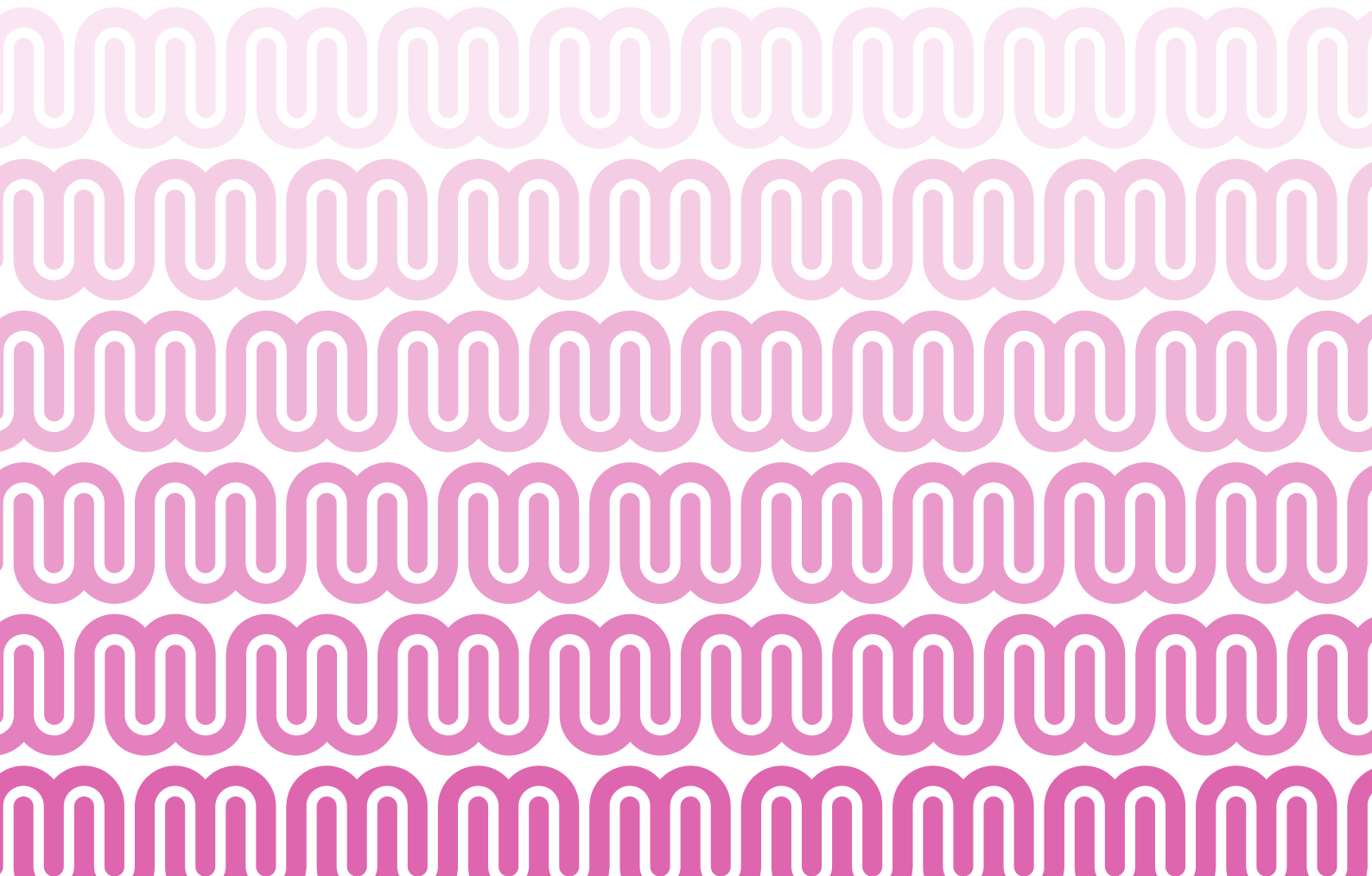


mental welfare
commission for scotland

QUICK GUIDE

Power of Attorney under Adults with Incapacity (Scotland) Act 2000 for general practitioners

April 2021



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

What is a Power of Attorney?

A power of attorney document is drawn up by an adult (the granter), giving specific powers to someone they trust to make decisions or take actions on their behalf. This person is called their attorney.

The powers granted can be financial and property matters (called a continuing power of attorney) or welfare matters (welfare power of attorney). The document must be registered with the Office of the Public Guardian before it can be used.

Someone can only make a power of attorney (POA) when they have capacity to understand what it means to grant these powers.

Someone granted a continuing POA can use it as soon as it is registered, unless the POA says otherwise. A welfare POA can only be used for decisions the person has lost capacity to take him or herself. Some POAs say that the attorney can only use their powers after a specific event, such as an assessment by a doctor to say the person has lost capacity.

What is a Guardian?

A guardian is someone appointed by the court after an adult has lost capacity to take their own decisions, because welfare or financial decisions or both need to be taken on their behalf.

A welfare guardian can be an individual, such as a relative or close friend, or the Chief Social Work Officer. The guardianship order will say which decisions and/or actions the welfare guardian can take on behalf of the person with incapacity. The guardian is appointed by the sheriff court.

The application includes reports from two doctors (one a psychiatrist) and a mental health officer (a specially-trained social worker). The reports say why the person needs a guardian and whether the person asking to be guardian is suitable.

Similarly a financial guardian may be appointed on application to the sheriff court. The guardian may be a relative or a lawyer or accountant.

Issues for GPs to consider in certifying capacity to grant a Power of Attorney

A power of attorney must incorporate a certificate in the prescribed form by a practising solicitor, a practising member of the Faculty of Advocates or a registered and licensed medical practitioner.

You must interview the granter (ideally on their own) immediately before the granter signs the document, to establish their capacity to understand what they are doing.

- ✓ Your assessment may be based on your knowledge of the granter or on consultation with another person who has knowledge of the granter at the time of granting the power. It should not rest solely on information coming from the proposed attorney/s.
- ✓ You must ensure the granter understands the nature and extent of the powers they are granting. For instance, has the granter read the document, or had assistance to read it? Do they understand what powers they are granting and the implications of this? Have they discussed when they would want the powers to be used? Would they want their capacity to be assessed by a medical practitioner before any of the welfare or financial powers can be used?
- ✓ Where you are uncertain about the capacity of the granter, you may wish to involve another medical practitioner or refer for a specialist medical assessment before considering certification of capacity.
- ✓ You must be sure the granter is not acting under undue influence or pressure from another person. This is particularly vital where the process is not being initiated by the granter of the POA; for example, where a friend or family member is encouraging the granter to make the POA. Psychological and social factors in situations of undue influence include isolation, dependency, acquiescence, loss, emotional manipulation and exploitation of vulnerability.
- ✓ Where the granter appears vulnerable or susceptible to undue influence, or if there are other professionals involved in their care and support, it may be useful to consult with them to gain a wider view of the situation.
- ✓ Where you have concerns about undue influence being exerted on the granter, you should not provide a certificate of capacity and should refer to the local authority under adult support and protection legislation or alert the Office of the Public Guardian (OPG). Where a solicitor has been involved in framing the application you should make your concerns known to them.
- ✓ Be aware that once a POA is registered with the OPG, welfare powers can only be exercised once the granter has lost capacity but continuing (financial) powers may be used immediately unless specified otherwise in the POA document.
- ✓ The granter may include a clause in the POA document requiring that a medical practitioner certifies their incapacity before the attorney can act on their behalf. The issues above around assessment of capacity and undue influence should similarly be taken into account.

You may also find [Common Concerns with Power of Attorney](#) useful.

The principles of the Adults with Incapacity (Scotland) Act 2000

Any action taken on behalf of an adult should reflect these principles:

- be of benefit to the adult;
- be the least restrictive thing to do in the circumstances;
- take the past and present wishes and feelings of the adult into account;
- take the views of the nearest relative and the primary carer (as well as other relevant people) into account; and
- encourage the adult to use his/her existing skills.



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Mental Welfare Commission 2021