

A guide to Power of Attorney in Scotland



Who we are

Age Scotland is the national charity for older people. We work to improve the lives of everyone over the age of 50 so that they can love later life.

Our vision is a Scotland where everyone can love later life.

Our mission is to inspire, involve and empower older people in Scotland, and influence others, so that people can make the most of later life.

Our three strategic aims are to:



Help older people to be as well as they can be



Promote a positive view of ageing and later life



Tackle loneliness and isolation

How we can help

We know that growing older doesn't come with a manual. Later life can bring changes and opportunities to your life and you may need to know about rights, organisations and services which are unfamiliar to you.

That's why we provide free information and advice to help you on a range of topics including benefits and entitlements, social care, legal issues such as Power of Attorney, housing and much more. All of our guides are available to download for free from our website, or you can contact our helpline team to have copies posted to you for free.

The Age Scotland **helpline** is a free, confidential phone service for older people, their carers and families in Scotland looking for information and advice.

Later life can bring times when you just need someone to talk to. Our **friendship line** is part of our wider helpline and older people can call us for a chat. We're here to listen, provide friendship and offer support.

For information, advice and friendship



Call us free on: 0800 12 44 222
(Monday – Friday, 9am - 5pm)



Visit [agescotland.org.uk](https://www.agescotland.org.uk)
to find out more.

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Power of Attorney

What is a Power of Attorney?

You make decisions every day about your life and your future: small decisions such as what to wear or eat, and bigger decisions about things like money, your family and your home. You make judgements about what is right for you.

The law says that everyone over 16 years old in Scotland has the legal capacity to make decisions, unless a legal decision is made that this is not the case.

A Power of Attorney is a legal document that allows someone to make decisions on your behalf.

The person who gives the powers is the **granter** and the person who is given the powers is the **attorney**.

Why should I have a Power of Attorney?

Having a Power of Attorney can give you peace of mind, as you know you will have the support of someone you trust if you are unable to make decisions for yourself.

Your attorney will have the information they need to make those decisions with confidence.

If you don't set up a Power of Attorney and you lose the ability to make decisions for yourself, the person who makes decisions on your behalf may not be the person you would have chosen.

Your next-of-kin, family or other people close to you do not have the legal right to make decisions for you if you lose the ability to do so yourself.

In a medical emergency hospital staff will try to involve you in decisions about your treatment options. This may not be possible if you are unable to communicate your wishes and you don't have an attorney.

A Power of Attorney document is not a Will; it does not relate to what happens after you die. After your death the executor named in your Will is responsible for sorting out your estate, but the Will doesn't give them any rights or responsibilities whilst you are alive.



Types of Power of Attorney in Scotland

There are different types of Power of Attorney in Scotland.

1. Continuing Power of Attorney enables someone, or more than one person, to look after your property and financial affairs. Continuing powers could include managing your bank accounts, buying or selling property and claiming benefits on your behalf. You can choose whether a Continuing Power of Attorney takes effect straight away so someone can help you to manage your money now, or only comes into effect if you lose the capacity to make your own decisions later on.

2. Welfare Power of Attorney enables someone, or more than one person, to make decisions about your health and welfare **only** if you are unable to do this yourself. Welfare powers could include making decisions about where you will live, how you will dress, what you will eat and what medical treatment and care you will receive.

3. Combined Continuing and Welfare Power of Attorney enables someone, or more than one person, to look after both your financial affairs and health and welfare decisions.

4. You can also set up a **Simple Power of Attorney**. This is usually created for a set period of time or for a specific issue, for example, if you go abroad and would like someone else to be able to make decisions on your behalf while you are away. A Simple Power of Attorney can only be used whilst you have the mental capacity to make your own decisions and it does not need to be registered with the Office of the Public Guardian.

What is mental capacity?

Mental capacity is the ability to make decisions for yourself and act on them. Some people may have had limited capacity all their lives. Others may have a reduced capacity caused by a progressive illness such as dementia, or may suddenly lose capacity after a stroke or an accident.

In Scotland, if somebody is incapable of managing their finances or making decisions about their welfare, the Adults with Incapacity (Scotland) Act 2000 provides protection for them.

The Act states that a person may not have mental capacity if they are unable to:

- make or act on decisions
- communicate decisions
- understand decisions, or
- remember decisions.

Mental capacity can vary throughout the day, from day to day or over a longer period of time. It may not affect every kind of decision.

For example:

- someone may struggle to make decisions in the morning, but can make informed choices more easily in the afternoon
- someone may not have the capacity to make complex decisions about their finances or welfare but they may know exactly what they want to eat and wear, and who they want to spend time with.



What happens if there is no Power of Attorney in place?

If you lose capacity to make decisions for yourself and have not appointed an attorney, someone would usually have to go to court to apply for a **Guardianship Order** to be able to act on your behalf.

The process of applying to the court can take a long time, is expensive and can be a stressful and emotional experience. The person appointed by the court may not be the person you would have chosen, and they may not know what your wishes would have been.

Call the **Age Scotland helpline** on **0800 12 44 222** for more information and advice and see our guide to **Legal options for people who have lost capacity**.

Common problems if there is no attorney in place:

- Mary feels frustrated that she has been excluded from meetings and decisions about her sister's health and care. Her sister has been assessed as no longer having mental capacity, and now lives in a care home.
- Andrew was diagnosed with dementia a year ago. His memory has become worse and he can no longer make decisions about his finances. His children disagree about who should go to court to act on his behalf. Andrew always knew that he would prefer his son to do this for him (and had let him know this), but he didn't know he had to state it officially in a Power of Attorney document.

Granting Power of Attorney

Writing the Power of Attorney document

When writing a Power of Attorney document, it is important to grant enough powers to your attorney so they can carry out your wishes. Think about the things that are important to you, for example:

- how you would like your money to be managed
- which regular payments you want to continue (such as subscriptions or charity donations)
- whether you want to make gifts of specified amounts to anyone
- whether you want to allow your attorney to claim expenses
- how you like to dress
- what you like to eat
- where you would like to live
- what will happen to any pets you may have
- who you see
- what activities you want to participate in.

Let your attorney know if your priorities and wishes change.



Who can be appointed as your attorney?

Your attorney could be a partner, spouse or civil partner, solicitor, friend or relative. They must be over 16 years old, willing to take on the role and cannot be bankrupt.

You need to be confident that they will act in your best interests and that they have the skills to carry out the tasks involved. You should never feel pressured into choosing someone you don't want.

Joint attorneys

You can choose one, two or several people to be your attorney. You could grant continuing (financial) powers to one person, and welfare powers to another.

You could also have more than one attorney for each type of power. If you do this, consider their relationship and whether they would work well together.

Substitute attorneys

It is a good idea to have a substitute attorney, particularly if you are part of a couple who have appointed each other.

A substitute attorney can take on the role if your original attorney dies, resigns or is otherwise unable to carry out their duties.

Appointing an organisation

If you wish, you can grant continuing (financial) powers to an organisation such as a firm of solicitors or accountants. If possible, you should specify a named person within the organisation who will be responsible. The solicitor or accountant will charge a fee for this service.

How do I set up a Power of Attorney?

You can use a solicitor to help set up your Power of Attorney or you can write it yourself.

The Power of Attorney must be registered with the Office of the Public Guardian before it can be used.

You should think about whether you want your attorney to be able to act for you immediately (continuing powers only) or only if you lose capacity.

Using a solicitor

Most people use a solicitor to draw up a Power of Attorney. A solicitor has the training and expertise to ensure the wording of your wishes is clear. They can discuss the types of decision that may need to be taken in future and make sure you haven't left out anything important. They can also check that your chosen attorney understands their responsibilities.

The solicitor has to state that you have the mental capacity to understand what you are doing by granting Power of Attorney. They may ask you to have a GP assessment in order to confirm this. There is likely to be a charge for this service; contact your GP surgery for details of their charges.

Once the solicitor is satisfied that you are able to grant Power of Attorney, they will send the document to the Office of the Public Guardian to be registered. There is a fee for registering the document.



Writing a Power of Attorney yourself

You can write the Power of Attorney document yourself but missing or unclear information can lead to complications when registering or using it.

Some stationery shops sell Power of Attorney packs you could use. Even if you decide to write it yourself, it may be safest to ask a solicitor to check it for you, to ensure it is legally enforceable.

You need to make sure:

- you set out the responsibilities you want your attorney(s) to have; and
- your document gives your attorney(s) the necessary powers they will need to make decisions on your behalf

Some common problems are:

- the wording is not clear enough. For example, a power you wanted to grant is open to interpretation or misunderstanding
- the attorney has not confirmed in writing that they have agreed to take on this role
- a Continuing (financial) Power of Attorney also includes instructions about medical treatment or care
- a Welfare Power of Attorney also includes financial instructions

Registering a Power of Attorney

To be valid, your Power of Attorney needs to be registered with the **Office of the Public Guardian in Scotland**. To do this, you need to send them (electronically or by post):

- a copy of your Power of Attorney document
- a completed certificate of capacity
- a completed registration form

You can find copies of the forms and detailed information about how to register the Power of Attorney on the Public Guardian's website at **www.publicguardian-scotland.gov.uk/power-of-attorney/epoar/submitting-a-power-of-attorney**.

Changing or cancelling a Power of Attorney

If you are the **granter**, you can change or revoke (cancel) a Power of Attorney, or a part of it, if you have capacity to understand the decision you are making.

You may need to provide a **Certificate of Capacity** and a **Revocation Certificate**, signed by a solicitor or member of the Faculty of Advocates, or a medical doctor.

If you are the **attorney**, you should write to the Office of the Public Guardian to inform them of your resignation.

The role of attorney ends automatically if:

- the granter dies
- either the granter or the attorney becomes bankrupt. This only affects a Continuing Power of Attorney; a Welfare Power of Attorney can continue
- in a situation where the granter and attorney are partners, separation, divorce or dissolution of the civil partnership occurs.



Being an attorney

Points to consider if you are thinking of becoming an attorney

Becoming an attorney is a big responsibility. You have a duty to carry out the person's instructions, and make decisions in accordance with their wishes. If you feel that there are instructions you could not follow, due to religious beliefs for example, you should not accept the position of attorney.

Being an attorney can be time consuming and stressful. If you have continuing (financial) powers, you may have to deal with unfamiliar issues, such as shares, pensions, tax and property. If you have welfare powers, you may need to make decisions about medical treatment or care homes. It is a good idea to find out where you could get advice about these issues if you should need it.

Make sure the granter lets you know if their priorities and wishes change.

Your responsibilities as an attorney

An attorney's responsibilities depend on the type of powers that have been granted. In general terms, the law sets out five key principles which attorneys must follow:

1. Any decision taken must benefit the granter. You need to consider what they would want, and what is in their best interests. You must not use your position for your own benefit.
2. The least restrictive option should always be taken. The consequences of a decision must be considered and any option taken should preserve the granter's privacy and independence as far as possible.
3. You must carry out the granter's instructions, act on their wishes and respect their right to confidentiality. You should keep a record of what actions you have taken and why, along with evidence such as receipts for purchases made on their behalf. If you haven't been given specific instructions about a major issue such as selling a house, you should seek legal advice.
4. Other relevant people, such as family members, carers or others close to the granter, should be consulted where appropriate, and their views should be taken into account.
5. The granter must be encouraged to use their own skills and develop new skills. They may be able to make some decisions for themselves and should be consulted as far as possible. If someone cannot make a decision at a particular time, they may be able to decide later that day or at another time.



If I agree to be an attorney, what happens?

When the Power of Attorney has been registered with the Office of the Public Guardian, they will send you a registered copy of the document.

If you need to act as attorney, you will have to show or send the Power of Attorney document to relevant organisations such as banks, medical professionals, solicitors and care professionals, together with proof of your identity.

When can the Power of Attorney start to be used?

A Continuing (financial) Power of Attorney can either be used straight away, or only if the granter loses capacity. The person granting Power of Attorney chooses which option they want.

A Welfare Power of Attorney can only be used if the granter loses capacity.

A Power of Attorney that can only be used once mental capacity is lost must include a statement saying that the granter has considered how their incapacity is to be determined - how this should be assessed, and who should do this, for example by a qualified medical practitioner.

You do not have to let the Office of the Public Guardian know when you start using your powers as attorney.

What if people do not accept my authority as attorney?

If people or agencies do not accept your authority as attorney, ask the Office of the Public Guardian for their advice. You may need to follow the complaints procedure for the agency that is not accepting your authority - this may be the formal complaints procedure for health, social work, banking or other services. Call the Age Scotland helpline for information about how to make complaints about different services.

Who can I speak to regarding a concern about an attorney?

If you are worried that a continuing attorney may be mismanaging someone's finances, you can make a complaint to the **Office of the Public Guardian in Scotland**. You will need to provide evidence of your concern, and if appropriate they can carry out an investigation.

You can contact the Office of the Public Guardian through their website **www.publicguardian-scotland.gov.uk** or by telephone on **01324 678 300**.

If your concern is about a welfare attorney, you should contact the social work department of the council where the granter lives, or the **Mental Welfare Commission**.

The Mental Welfare Commission have a telephone advice line on **0800 389 6809** or see their website **www.mwcscot.org.uk** for more information.



Fees and advice

Registration fees

There is a fee to register a Power of Attorney with the Office of the Public Guardian. Some people, including those receiving Guarantee Pension Credit, are entitled to apply for a fee exemption.

For information about current fees, visit the **Office of the Public Guardian Scotland** website at:

www.publicguardian-scotland.gov.uk/general/fees

or contact them on **01324 678398**.

Help with legal fees

Depending on your income and savings, you may be entitled to **legal aid**, to help with the legal fees for drawing up a Power of Attorney. Legal aid is means tested, based on the income and capital of the granter, not the attorney.

You can find out more about legal aid, and check if you could be eligible, on the **Scottish Legal Aid Board** website **www.slab.org.uk**.

Where to find out more

The Scottish Government provides a **Code of Practice for Continuing and Welfare Attorneys**, detailing the main responsibilities of attorneys. It includes a useful guide to communicating with people who have impaired capacity.

You can download a copy from their website at

www.gov.scot/publications/code-practice-continuing-welfare-attorneys-second-edition-updated-february-2018.

Where can I go for more advice?

Age Scotland helpline 0800 12 44 222

The Age Scotland helpline provides information, friendship and advice to older people, their relatives and carers.

If you need an interpreter call **0800 12 44 222** and simply state the language you need e.g. Polish or Urdu. Stay on the line for a few minutes and the Age Scotland helpline will do the rest.

Call us on **0800 12 44 222** for a copy of our publications list or download copies from our website at **www.agescotland.org.uk**.

The Office of the Public Guardian (Scotland)

The Office of the Public Guardian in Scotland is responsible for the registration and maintenance of Power of Attorney documents.

They can provide information and guidance about Powers of Attorney, but cannot give legal advice.

Telephone: **01324 678 300**
www.publicguardian-scotland.gov.uk

Citizens Advice Bureau

You can call Scotland's Citizens Advice Helpline on **0800 028 1456** for advice, or for details of your local bureau or see their website **www.citizensadvice.org.uk/scotland/about-us/get-advice-s/**.

Law Society of Scotland

The Law Society of Scotland is the professional body for Scottish solicitors. They regulate and represent all solicitors in Scotland and can provide details of local solicitors.

Telephone: **0131 226 7411**
www.lawscot.org.uk

Mental Welfare Commission for Scotland

The Mental Welfare Commission for Scotland can help if you need information or advice about your rights in relation to mental health care and treatment, or you are concerned about someone else's rights and welfare.

Telephone: **0800 389 6809**

www.mwcscot.org.uk

Scottish Legal Aid Board

The Scottish Legal Aid Board is responsible for managing legal aid in Scotland. You can find information about legal aid, and search for a solicitor, on their website.

www.slab.org.uk

Disclaimer

While we aim to ensure that the information in this document is factually correct at the time of production, Age Scotland cannot be held liable for any errors or omissions. Please ensure that you have an up-to-date factsheet and that it clearly applies to your situation.

No factsheet can ever be a complete guide to the law, which changes from time to time. Legal advice should always be taken if you are in doubt. Please note that the inclusion of named agencies, companies, products, services or publications in this factsheet does not constitute a recommendation or endorsement by Age Scotland.

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How you can help

Our vision is a Scotland where everyone can love later life.

All the information and advice we provide is free and completely impartial and in helping people access their rights and entitlements, it can be life changing.

We are an ageing population and more people than ever are coming to us for support. You can help us be there for those that need us most.



Make a donation

No matter how small or large, donations make a massive difference and help us continue our important work.

- ▶ Call **03330 15 14 60**
- ▶ Visit **age.scot/donate**
- ▶ Text **LATERLIFE** to **70085** to donate £5.*



Fundraise

Whether it is having a bake sale, running a marathon or knitting small hats for the Big Knit, there are so many ways to raise vital funds to support our work. To find out more, call **0333 323 2400** or visit **age.scot/fundraise**.



Leave us a gift in your Will

By choosing to leave us a gift in your Will, you can help Age Scotland to continue being there for vulnerable older people in the years to come. To find out more, call **0333 323 2400** or visit **age.scot/legacy**.

* Texts cost £5 plus one standard rate message

Let's keep in touch



Sign up to our newsletter

Our regular newsletters by email contain details of our campaigns, services and how you can support our work.

Sign up today by visiting **age.scot/roundup**



Follow us on social media

Our social media channels are a great way to keep up to date with our work and issues that affect older people.



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[/AgeScotland](https://www.linkedin.com/company/AgeScotland)

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Head office

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Email

info@agescotland.org.uk

Visit our website

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