

What is a power of attorney?

A power of attorney is an authority given by an individual (known as the Granter) to another person(s) (known as the Attorney/s) to deal with aspects of the Granter's affairs. This could relate to financial/property matters and/ or personal welfare.

Powers relating to the Granter's financial and property affairs are known as "continuing powers" and may be given with the intention of taking effect immediately and continuing upon the Granter's incapacity or beginning on the incapacity of the Granter.

Welfare powers cannot be exercised until such time as the Granter has lost the capacity to make these decisions.

Granters have scope to grant whatever powers they choose, however as these powers will be strictly interpreted; the Granter should ensure that the powers granted are specific and cover all the relevant aspects of their affairs. A power of attorney document should contain either continuing powers, welfare powers or a combination of both. Someone with MND does not necessarily fall within the scope of this Act since most people with MND retain their mental faculties and ways of making their intentions known, even if they have to resort to coded nods and blinks.

If the person is unable to communicate their wishes, or to be consistent from day to day then the provisions of the Act could become relevant to the person's situation.

Welfare Power of Attorney

A Welfare Power of Attorney allows you (the "Granter") to legally appoint people (called "Attorneys") to make decisions with regard to your personal welfare should you become incapable of doing so yourself at some point in the future. A Welfare Power of Attorney can only be used once the Granter becomes incapable.

Before a Welfare Power of Attorney can be used by the Attorney(s), it needs to be registered with the Public Guardian. It is recommended that Powers of Attorney are registered as promptly as possible after they are made.

This Welfare Power of Attorney allows you to appoint up to four Attorneys. It relates to your personal welfare only and not your property or financial affairs. It is only suitable where you wish to give the Attorneys a general power to make decisions with regard to your welfare, such as deciding on care arrangements or consenting to medical treatment.

The Welfare Power of Attorney must incorporate a certificate signed by a Prescribed Person (a solicitor, a practising member of the Faculty of Advocates or a medical practitioner). From 5 October 2007, all Welfare Powers of Attorney must also contain a statement that the Granter has considered how they would wish their incapacity to be determined.

A Welfare Power of Attorney may be revoked using a Deed of Revocation at any time, either before or after registration, while the Granter has mental capacity. It is necessary to inform the Attorney(s) of the revocation as the Attorneys' authority does not cease until they receive notice of the revocation. A copy of the Deed of Revocation should be sent to each Attorney. If the Power of Attorney has been registered then a copy should also be sent to the Office of the Public Guardian, stating that the Attorneys have been notified.

MND Scotland is the only charity funding research and providing care and information for those affected by MND in Scotland.

When a continuing power of attorney is to begin only in the event of incapacity or if welfare powers are conferred, the document must include a statement confirming that the Granter has considered how their incapacity is to be determined. It is suggested as good practice for the Granter to also consider stating in the document **how** incapacity is to be determined or highlighting **who** should determine when the Granter has lost capacity.

Who can I appoint as my attorney(s)?

The attorney(s) should be someone you trust. You can appoint who you want, this could be a relative, a friend or a professional person such as a solicitor or accountant or a combination. You can appoint someone to deal with financial matters and someone different to deal with personal welfare.

Who cannot act as an attorney?

Someone who is currently declared as bankrupt cannot be appointed or act as a continuing attorney. Contact the Office of the Public Guardian if you require further information on this.

How do I create a power of attorney?

You will need a written document, a certificate of capacity and a registration form; the up to date forms should be downloaded from the OPG website www.publicguardian-scotland.gov.uk.

The written document

In order to create a power of attorney a written document is needed which sets out the precise powers that the Granter wishes the Attorney to have. The document must be signed by the Granter. It must also state clearly that the powers are continuing, welfare or a combination of both.

As the power of attorney gives authority to another person to act on your behalf it

may be in your best interest to seek professional/legal advice when completing your power of attorney document.

The certificate of capacity

The document must also include a statutory certificate signed by a solicitor registered to practice in Scotland, a member of the Scottish Faculty of Advocates or a registered medical practitioner which confirms that:

- they have interviewed the Granter immediately before he/she signed the power of attorney document;
- they are satisfied either through their own knowledge or by consulting another person that the Granter fully understands what he/she is doing and the nature and extent of the powers he/she is giving;
- they have no reason to believe that the Granter is acting under any undue influence

Powers of attorney signed and certified after 1st April 2008 must incorporate the new prescribed certificate. This is a single certificate and can be used when the following powers are conferred:

- a welfare power of attorney
- a continuing power of attorney
- a welfare and continuing, power of attorney

The registration form

To speed up the application process, it is recommended that the Public Guardian's registration form be completed. This can be obtained directly from the Office of the Public Guardian (OPG) or downloaded from their website.

The registration form, power of attorney document and the certificate should be submitted along with the fee (2011

currently £70.00) to the OPG. Cheques should be made payable to "The Scottish Court Service".

Is there a checklist?

There is a downloadable Registration Checklist available on-line to ensure that all of the documents are included and have been fully completed.

The OPG is a 'paperless office' that means that all correspondence sent to the office is scanned and held electronically. In order to speed up the scanning process it would help if the following points were observed when sending in Powers of Attorney:

- Please do not attach staples to any of the papers you send
- Please do not send double sided registration forms or Power Of Attorney documents
- Please provide covering letters
- Please ensure covering letters are A4 size if possible
- Please do not bind the pages of the Power of Attorney together
- Please do not place registration forms or Powers of Attorney in plastic wallets
- There is no need for corner covers

What are the Public Guardian's responsibilities?

All continuing and welfare powers of attorney must be registered with the OPG who maintains a Public Register. The Public Guardian also has a statutory obligation to notify the appropriate local authority and Mental Welfare Commission of any welfare powers of attorney which have been registered.

Once a power of attorney has been registered, the Public Guardian will issue a Certificate of Registration. The Certificate can then be used by the

Attorney immediately in the case of a continuing power of attorney if this is the Granter's wish, or it can be kept safe until such times as the Granter has lost capacity or wishes the Attorney to act on his/her behalf. A welfare Attorney, however, cannot exercise any of the welfare powers granted until the Granter has lost capacity.

Can the power of attorney be revoked?

The Granter can revoke a continuing or welfare power of attorney or any of the powers granted in it once it has been registered with the Public Guardian. The granter must give notice of the revocation in writing.

From 1st April 2008, if a Granter wishes to revoke either some of the powers or all of the powers in the power of attorney a certificate completed by the prescribed person (registered medical practitioner or a practising solicitor or a legal advocate) must be attached to the letter informing of the revocation. The date when the granter subscribes the revocation notice must be the same day he/she is interviewed by the prescribed person. For further guidance please see the OPG website;

www.publicguardian-scotland.gov.uk

It is highly recommended that the code of practice for continuing and welfare attorneys is read in conjunction with the above. This can be viewed and downloaded from the Scottish Government website

www.scotland.gov.uk/Resource/Doc/216725/0058106.pdf

Examples of the types of powers you should consider including in welfare and continuing powers of attorney are listed in Appendix 2 along with some suggested styles, checklists and samples of the forms and certificates you may need to

MND Factsheet 24 Powers of Attorney

complete. Please do not use these forms but download the current forms from the OPG website.

Contact Address

The Office of the Public Guardian
Hadrian House
Callendar Business Park
Callendar Road
Falkirk
FK1 1XR
Telephone: 01324 678 300
Fax: 01324 678 301
Email: opg@scotcourts.gov.uk
Website: www.publicguardian-scotland.gov.uk

See our document “Sample Powers of Attorney” for sample forms to create a power of attorney.