

# **Power of Attorney (PoA) and the Adults with Incapacity (Scotland) Act 2000**

## **Frequently Asked Questions FAQs**

**There is separate Guidance on Managing Self-Directed Support for Adults with Incapacity. You may wish to read it in conjunction with these FAQs.**

### ***What is a PoA?***

- A PoA is granted by a person, while capable, nominating whom they would wish to manage their affairs (property and finance or welfare affairs) if they are no longer able to do so personally.

### ***What is the role of the Office of the Public Guardian (OPG) in PoAs?***

- The Office of the Public Guardian (OPG) registers both financial and welfare PoAs, (these can be combined in a single PoA). A Certificate of Registration on the front, signed by the Public Guardian, will evidence registration.
- The OPG can offer information and advice to people exercising financial or property functions in respect of that function.
- The OPG may receive and investigate complaints about the way in which a financial attorney is exercising their function.
- The OPG can investigate any circumstances in which the property or financial affairs of a person with incapacity seem to be at risk.

### ***What is the role of the Local Authority (LA) in PoAs?***

- The LA can offer information and advice to people exercising welfare functions.

- The LA may receive and investigate complaints about the way in which a welfare attorney is exercising their function.
- The LA can investigate any circumstances in which the welfare of a person with incapacity seems to be at risk.
- Where the person is incapable, the LA can refer concerns about finances to the OPG.
- The LA have duties under the Adult Support and Protection (Scotland) Act 2007, which is not the subject of this paper, but which in brief places a duty on a LA to inquire into matters where a vulnerable (but potentially capable) person appears to be at risk of harm.

***Do the OPG or LA supervise the actions of an attorney?***

- No. This is because a PoA is granted by a person while capable, so it is seen as inappropriate to suggest, by supervision, that they did not pick an appropriate person.
- Solicitors execute the majority of PoAs and this acts as an additional safeguard in the system.

***Is there a PVG check before an attorney is appointed?***

- No. A person grants a PoA while they are capable. Their capacity has to be assessed by a lawyer or doctor. A capable person is free to nominate whomever they wish to act as their attorney.

***How do we know if a PoA has been registered?***

- Ask the attorney for sight of the document, looking for the Certificate of Registration, which is an A4 sheet, and forms the first page of the document. To read more about it click here: <https://www.publicguardian-scotland.gov.uk/power-of-attorney/registration/after-registration>.
- If you still have concerns you can telephone the Office of the Public Guardian (OPG) on 01324 678300 and ask for a public register search. Anyone is entitled to ask for this, you do not need to explain why you want this.
- The OPG are in the process of making this an on line application, once this is available you will be able to search the Register directly.

***Who decides when the welfare powers start?***

This will depend on what the POA requires. There will be a sentence, usually half way down the first page, which say, *“I have considered how my capacity will be determined”* after this it will offer one of three things:

- It may say *“And this is when my attorney reasonably believes this to be the case”*. In which case, as the wording suggests, the attorney is the person who decides if the person is incapable and if the welfare powers can/should come into effect.
- It may say *“and this is when my attorneys are advised by medical opinion that I am incapable”* (or similar words). In which case the attorneys need to have obtained that medical opinion before they can commence acting on their powers. For one to rely on the instructions of an attorney, who is required to get medical opinion, and who has not done is to rely on someone not authorised to offer such instruction.
- It may say nothing, i.e. there may be a full stop after *“I have considered how my capacity will be determined.”* If this is the case, it defaults to the attorney making the decision, because there is no instruction from the granter to say otherwise.

### **Capacity Assessing**

- Capacity is not all or nothing.
- A person may be able to make some decisions but not others.
- A person’s capacity to make a decision should be assessed against that specific decision.
- Even if the welfare powers have started this does not mean that the attorney then makes every decision.
- The attorney must support the person to make their own decision as far as is possible.
- If it is not possible for the person to make their own decision, even with support, then the decision made on their behalf by the attorney should be a best interpretation of what the person’s decision would have been.
- These requirements do not only apply to attorneys, they extend to anyone exercising any function in respect a person with incapacity.

### **What do we do if we suspect misuse of a PoA?**

Report this as soon as possible, hard evidence is not required.

- Welfare and financial concerns may be reported to the relevant Local Authority, under either Adult Support and Protection or Adults With Incapacity, as the case may be.

- Financial concerns may be reported to the Office of the Public Guardian regarding a person who is now incapable. More detail is available here: <https://www.publicguardian-scotland.gov.uk/power-of-attorney/registration/concern-about-continuing-attorneys>.

***Can a person be blocked as an attorney?***

- No. A PoA is granted by a person assessed [by a lawyer or doctor] as capable. That person is free to choose whomever they wish, even if their choice to all others may seem unwise.
- There is a statutory bar on people who are bankrupt acting as financial attorney. More detail is available here <https://www.publicguardian-scotland.gov.uk/power-of-attorney/faqs#declared> .

***Can a PoA be revoked?***

- Yes. It can be revoked but only by the person who granted it and only after an assessment, by a lawyer or a doctor, that they remain capable of making such a decision.

***Can an Attorney be removed?***

- Yes. Court action, under section 20 of the AWI, can be raised by ‘a person with an interest’ to remove an attorney, or some of the powers – but good cause would need to be shown as this overrides the wishes of the person so is not something the Sheriff agrees to lightly.

***Is there a national list of people with PoA?***

- Yes. There is a national list contained within the Public Register. The Public Guardian currently holds the Public Register but there are plans to have this available on line.

***What is a substitute attorney?***

- A substitute is a person who is named as a replacement attorney, if the principal attorney can no longer fulfil the role.

***Can a substitute PoA be a paid caregiver?***

- Yes. A substitute is not an attorney, holds no official position of authority, unless or until they need to take up the attorney appointment.
- If the substitute is a family member then the Regulations apply to them as to any other family member.
- The Attorney can be 'employer' and the substitute the caregiver, subject to the Regulations, even if the two are closely aligned in discussions about the care of the supported person.
- If the substitute has to take up post as attorney, they can no longer be the paid caregiver.

***Can lost monies be recouped?***

- Not readily. The OPG has no powers to recovery lost money. They can however place a stop on the bank account to prevent further loss.
- The person disadvantaged by the loss e.g. a Care Home can take a civil action for recovery.
- If there is a second attorney, with relevant powers, they could raise the necessary recovery action but this would have to be funded out of the adult's remaining funds.
- A prosecution of the defaulting attorney, if this proceeds, can order monies be replaced into the adult's estate.

***Can an Attorney with relevant powers be employed as a personal assistant paid for using a publicly funded social care budget?***

- Technically yes, if they are a non-family member
- No, if they are a family member. Self-directed Support Regulation 2014 part 3 section 9(1) (b) currently prohibits this.
- Additionally, this Regulation allows the Local Authority to prevent a family member being employed as a personal assistant if they believe that either the family member, or the cared for person, is being forced to agree to the care being provided in that way.