

# **ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000**

---

## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 2: Continuing Powers of Attorney and Welfare Powers of Attorney**

##### ***Section 15: Creation of continuing power of attorney***

58. This section defines a continuing power of attorney, and describes how a valid power is created. A power of attorney is a power conferred on another person to manage specified affairs of the person granting the power (“the granter”).
59. Subsections (1) and (2) define a “continuing power of attorney” as a power to manage specified aspects of the granter’s property or financial affairs that continues to have effect when the granter loses the capacity to deal with the matters concerned. The person to whom such powers are given is defined as a “continuing attorney”. This creates a distinction between powers of attorney that have effect only when the granter still has capacity, but cannot or does not want to act for some other reason, and those that are intended to continue on incapacity. The Act is only concerned with the latter.
60. Subsection (1) states that a continuing power of attorney will continue to be legally binding after the incapacity of the person granting it.
61. Subsections (3) and (4) stipulate conditions for a continuing power of attorney to be valid. A written document conferring the power and signed by the granter is required, an oral request would not be sufficient. There is no requirement for this to be witnessed, although in practice documents will be attested so that they can be used as evidence in court proceedings if necessary.
62. Subsection (3)(b) requires the power of attorney to state that it is the intention of the person granting the power that it should have effect on their losing capacity. This new process requires a granter to opt-in to continuing powers. The Act repeals section 71 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which required granters to opt-out if they did not want their power of attorney to be effective on their incapacity. This provides a safeguard against unintentional granting of inappropriate powers.
63. Subsection (3)(c) requires the power of attorney to include a certificate in a prescribed format from the solicitor acting for the granter, or someone in a category of people to be defined in Regulations. This will certify that the solicitor, or other person, interviewed the granter just prior to the granter signing the document. It will also certify that the granter understood what they were signing. In many cases it will be obvious in the solicitor’s opinion that the granter is capable of understanding, and no further evidence would be required; however, if the granter appears to be failing in capacity, recent medical evidence might be required. The solicitor or other person acting must also certify they have no reason to believe that pressure or undue influence has been put upon

*These notes relate to the Adults with Incapacity (Scotland)  
Act 2000 (asp 4) which received Royal Assent on 9 May 2000*

the granter, who, because of failing physical or mental faculties, may be particularly vulnerable to suggestion.

64. Subsection (4) prevents a potential conflict of interests where the solicitor or other person providing the certificate under subsection (3) is also the person to whom the power is being granted.