

# Citizen Participation and Public Petitions Committee

2nd Meeting, 2021 (Session 6)

Wednesday, 1 September 2021

PE1857: Regulate the role of curator ad litem

## Note by the Clerk

<b>Petitioners</b>	Stephen Leighton
<b>Petition summary</b>	Calling on the Scottish Parliament to urge the Scottish Government to regulate the curator ad litem and ensure historical claims of malpractice of curators ad litem in Scotland are investigated.
<b>Webpage</b>	<a href="https://petitions.parliament.scot/petitions/PE1857">https://petitions.parliament.scot/petitions/PE1857</a>

## Introduction

1. This is a new petition that was lodged on 18 February 2021.
2. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe A**.
3. While not a formal requirement, petitioners have the option to collect signatures and comments on their petition. On this occasion, the petitioner elected not to collect this information.
4. The Session 5 Public Petitions Committee agreed to seek advanced views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe B** of this paper.
5. A submission has also been received from the petitioner and this is included at **Annexe C**.

## Scottish Government submission

6. The Scottish Government submission highlights that under the Adults with Incapacity (Scotland) 2000 Act (AWI), the Sheriff has wide and flexible powers to deal with matters that come before the court in relation to the affairs of an adult with incapacity. This includes the power to appoint a curator ad litem in court proceedings where the adults with incapacity may not wish, or be able to appear in court themselves.
7. It is in these circumstances that the Curator ad litem is appointed by the court, for example where it is suspected that the adult does not have capacity.
8. The submission notes the appointment of a curator ad litem in cases under the AWI Act is due to a common law power the court has, as curators are not specifically mentioned in the 2000 Act (although safeguarder's are). The principles of the AWI Act are applicable to any intervention under the Act and therefore would apply to curators performing actions under AWI.
9. The Scottish Government notes the curator ad litem's first responsibility is to ascertain whether in fact the person has capacity to give legal instruction similar to when a client has to have capacity to instruct a solicitor otherwise the solicitor cannot legally act. This decision is evidence based and in order to properly fulfil the role, the curator must be able to undertake full and relevant enquiries and to commission or prepare reports where necessary. These are independent medical reports.
10. The submission highlights that an [independent review of the mental health legislation](#) is underway. It notes this will consider how 'capacity' and 'significantly impaired decision-making ability' is assessed by clinicians and practitioners, across both mental health and incapacity legislation.
11. The Scottish Government notes it does not regulate curators ad litem. Instead, there is general regulation of the legal profession and of social workers. In addition, there is specific provision in place in respect of curators ad litem in some types of court actions.
12. Given that curators ad litem are very small in number and most of them are either solicitors or social workers, the submission states they will be regulated under their own professional regulatory body if there are any concerns or complaints raised about their conduct.
13. If someone is not acting appropriately in relation to an adult lacking capacity, the submission advises the Office of the Public Guardian can investigate property or financial matters and the local authority or Mental Welfare Commission can investigate welfare matters. These investigatory bodies can make applications to court for directions in respect of the curator ad litem under section 3 of AWI.

## Petitioner submission

14. The petitioner submission highlights the AWI Act does not specifically mention the role of curator ad litem. He notes a sheriff can still appoint a curator out with the AWI Act, for example under the Ordinary Cause Rules (33.16). He also notes curators ad litem perform actions out with the scope of AWI legislation.
15. The petitioner submission advises they have spoken with the Scottish Government review team and they have advised the regulation of the curator ad litem role will not be part of the mental health legislation review.
16. The Scottish Government submission states "*Rules of court were changed in 2017 on the appointment of curators ad litem ... These changes followed a policy paper by the Scottish Government and the Mental Welfare Commission to the Scottish Civil Justice Council.*" The petitioner highlights this law change was based on a complaint to the MWC by a person who alleges they had their rights removed by the appointment and continued appointment of a curator ad litem.
17. The petitioner notes everyone is assumed to have full legal capacity, and just because someone may wish not to instruct a solicitor, should not result in a sheriff substituting decision making on to a curator ad litem.
18. The petitioner advises the changes made in 2017 were a result of someone complaining about a curator ad litem, but he believes the law change has increased the risk of potential malpractice of the curator ad litem role, as now the regulation of the role is to be overseen by the curator ad litem themselves. There is no oversight or regulation of the curator ad litem role, yet there are claims of malpractice by curators.
19. The petitioner highlights he sent a Freedom of Information request (FOIR) to the Office of Public Guardian who responded advising they do not regulate the curator role and thought the role was obsolete.
20. The petitioner further highlights that he sent FOIRs to both the Scottish Legal Complaints Commission and the Scottish Social Services Council who both advised they would not investigate any complaints put forward about a registered worker performing actions as curator ad litem.

## Action

21. The Committee is invited to consider what action it wishes to take on this petition.

**Clerk to the Committee**



## Briefing for the Citizen Participation and Public Petitions Committee

**Petition Number:** [PE01857](#)

**Main Petitioner:** Stephen Leighton

**Subject:** Regulate the role of curator ad litem

Calling on the Scottish Parliament to urge the Scottish Government to regulate the curator ad litem and ensure historical claims of malpractice of curators ad litem in Scotland are investigated.

### Background

A curator ad litem ('a curator') is an individual who can be appointed by a court or tribunal to represent the interests of someone in court or tribunal proceedings who does not have 'capacity' to do that for themselves.

*What is capacity and who has it?*

Broadly speaking, capacity is the ability to understand information relevant to a proposed decision or action and to appreciate the reasonably foreseeable consequences of taking or not taking that decision or action.<sup>1</sup>

With some exceptions, the law says a person under 16 doesn't have capacity to make decisions with legal consequences. The law also presumes that a person 16 or over does have that capacity, subject to some additional protections for younger adults.<sup>2</sup>

However, the [Adults with Incapacity \(Scotland\) Act 2000](#) also recognises a person aged 16 or over might lack capacity in an individual case, due to, for example, a mental illness or a learning disability. That legislation gives the courts various powers to help manage the affairs of adults with incapacity.

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<sup>1</sup> Scottish Government (2008). *Communication and Assessing Capacity – a guide for social work and care staff*, para 3. Available at: [file:///C:/Users/s801059/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/0055759%20\(1\).pdf](file:///C:/Users/s801059/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/0055759%20(1).pdf)

<sup>2</sup> [Age of Legal Capacity \(Scotland\) Act 1991](#), sections 1-3.

### *The law relating to curators*

Under the common law (i.e. the law made by judges, not by legislation), there is a power to appoint a curator in civil court proceedings when someone, either a child or adult, lacks capacity.

This power means that curators can be appointed in a wide range of different types of court proceedings. For example, this power enables the use of curators in court proceedings associated with the [Adults with Incapacity \(Scotland\) Act 2000](#), even though curators are not specifically mentioned in that legislation.

In addition to the common law power, individual statutes do make specific provision for the appointment of a curator in certain circumstances.

### *Varying degrees of regulation*

There are varying degrees of regulation of the role of curator across the different types of court proceedings where curators are used. Differing approaches are taken on topics such as:

- the circumstances in which a curator can be appointed to a case
- curators' fees, including the levels charged and who is responsible for paying the fees in a court case
- the qualifications required to be a curator and what training they must have once appointed
- how often their appointment is reviewed once appointed to a case
- the complaints mechanism if something goes wrong.

### *Recent reforms*

There are several examples of recent reforms in specific policy areas where curators are used.

[New court rules were introduced in 2017 relating to the use of curators for adults in court proceedings for divorce and dissolution of civil partnerships.](#)<sup>3</sup>

In November 2020, the [Mental Health Tribunal for Scotland](#), which has a key role in relation to compulsory measures of treatment and care for adults,<sup>4</sup> introduced [a new process for the appointment of, and service of, curators in relation to the Tribunal's work.](#)

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<sup>3</sup> For the background to this, see the associated [policy paper](#) produced by the Scottish Government and the [Mental Welfare Commission for Scotland](#). It was considered by the [Scottish Civil Justice Council](#), which makes recommendation for new court rules.

<sup>4</sup> Under the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#).

[Section 17 of the Children \(Scotland\) Act 2020](#) (not yet in force) covers the situation when parents (or parents and other relatives) are involved in court proceedings because of a dispute over a child's care<sup>5</sup> and a curator is appointed on behalf of a child.

Provision is made in section 17 for a new regulatory regime for curators, which the Scottish Government aims to have operational by 2023. It is largely to be developed by secondary legislation, [on which the Government launched its consultation in March 2021](#).

### *Calls for reform*

Over the years, it has been suggested at various points that more general reforms to the law which applies to curators is required. Examples include:

- the [Report by the Research Working Group on the Legal Services Market in Scotland](#) (2006) which raised issues around the transparency of appointments and a possible consumer protection issue in relation to the fees charged by curators. The lack of a common procedure for appointments of curators across Scotland was also criticised.
- The [final report of the Scottish Civil Courts Review](#) (2009), an important judge-led review of the civil justice system in Scotland, called for greater regulation of curators, including in cases relating to the adults with incapacity legislation.
- In 2014, the [Faculty of Advocates](#), one of the key bodies representing the legal profession in Scotland, [asked the Scottish Law Commission](#) (a statutory body that makes recommendations to Scottish Ministers on law reform) to consider a review of the law on curators. The Faculty was particularly concerned about the lack of regulation of the role of curators appointed under common law powers. No relevant project resulted from the suggestion.

## **UN Convention on the Rights of Persons with Disabilities**

The [UN Convention on the Rights of Persons with Disabilities](#) (UNCRPD) is referred to by the petitioner. This is a human rights treaty that promotes and protects the rights of people with a disability.

People with a 'mental disorder' (a term which is increasingly regarded as outdated, but which is still included in some Scottish legislation) have a disability in terms of the UNCRPD.<sup>6</sup> The term includes a mental illness, a personality disorder and a learning disability.<sup>7</sup>

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<sup>5</sup> Under Part 1 of the [Children \(Scotland\) Act 1995](#).

<sup>6</sup> Scottish Mental Health Law Review, [Terms of Reference](#), p 3.

<sup>7</sup> [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#), section 328.

The UK ratified the Convention in 2009.<sup>8</sup> The Scottish Government has a [Delivery Plan associated with the UNCRPD](#) covering the period from the end of 2016 to 2021.

The Scottish Government [announced on Friday 12 March](#) that, subject to the outcome of the 2021 Scottish Parliament election, a new Human Rights Bill will be introduced in the next session of the parliament. The Bill would incorporate rights of four United Nations treaties into Scots Law, including the UNCRPD.

The [Equality and Human Rights Commission](#) has produced [a helpful guide to the UNCRPD](#).

## **Scottish Government Action**

### *Adults with Incapacity (Scotland) Act 2000*

As noted earlier, curators are sometimes appointed in cases associated with the [Adults with Incapacity \(Scotland\) Act 2000](#) ('the 2000 Act'). This is the legislation which gives the court various powers to help manage the welfare, property and finances of adults with incapacity.

The Scottish Government has said to SPICe that it believes curators, although not explicitly mentioned in the legislation, are subject to [the general principles of the legislation](#) contained in section 1. Furthermore, the Government thinks that the investigatory bodies associated with the legislation could investigate concerns about curators.<sup>9</sup> These are the local authority and the [Mental Welfare Commission](#) in relation to an adult's welfare and [the Office of the Public Guardian](#) in relation to property and finances.<sup>10</sup>

### *Adults with incapacity consultation*

In 2018, [the Scottish Government consulted on reform to the adults with incapacity legislation](#), i.e. the 2000 Act as amended by the [Adult Support and Protection \(Scotland\) Act 2007](#) ('the 2007 Act'). Curators did not feature in the proposals for reform.

One of the main themes emerging from the consultation was that there was strong support for change to the legislation and practice. There was consensus on the need to make changes to meet the requirements of the UNCRPD. [Following the consultation, some changes which do not require primary legislation have been completed or are ongoing, but the aim is further reforms through primary legislation.](#)

### *Scottish Mental Health Review*

In March 2019, [the Scottish Government announced](#) the [Scottish Mental Health Law Review](#), an independent review chaired by John Scott QC. The

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<sup>8</sup> Ratification is when a country agrees to be bound by the terms of an international treaty.

<sup>9</sup> Emails from the Scottish Government to SPICe, dated 18 and 22 March 2021.

<sup>10</sup> By virtue of sections 6-10 of the 2000 Act.

review is looking at the 2000 Act and the 2007 Act, along with the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#), which relates to compulsory measures of detention, care and treatment.

The Scottish Government has made it clear that any future primary legislation will need to incorporate the findings of this review and so any timescales for legislation will reflect that.

The [call for evidence](#) on the Scottish Mental Health Law Review ran from February to May 2020 and [consultation responses are available online](#). [An analysis and interim report of that review were published in December 2020](#). The next phase of work is ongoing.

**The team supporting the review has confirmed that the role of curators will be included in the scope of the review.** This will be confined to the use of curators in cases under the legislation the review is considering.<sup>11</sup>

### Key Organisations

- [Mental Welfare Commission for Scotland](#)
- [Office of the Public Guardian \(Scotland\)](#)
- [ENABLE Scotland](#)
- the Mental Health and Disability Subcommittee of the [Law Society of Scotland](#)
- [Faculty of Advocates](#)
- [Scottish Human Rights Commission](#)

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**13 May 2021**

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@scottish.parliament.uk](mailto:spice@scottish.parliament.uk)

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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<sup>11</sup> Email from the Secretary to the Scottish Mental Health Review to SPICe, dated 22 March 2021.

**PE1857/A**

Scottish Government submission of 23 March 2021

Under the Adults with Incapacity (Scotland) 2000 Act (AWI), the Sheriff has wide and flexible powers to deal with matters that come before the court in relation to the affairs of an adult with incapacity. This includes the power to appoint a curator ad litem in court proceedings where the adults with incapacity may not wish, or be able to appear in court themselves. Even if they do appear, they may not be able to fully protect their own interests. It is in these circumstances that the Curator ad litem is appointed by the court, for example where it is suspected that the adult does not have capacity. The role of curator has developed through common law and practice in Sheriff court cases and the role is there to protect the adult's will and preferences. The appointment of a curator ad litem in cases under the Adults with Incapacity (Scotland) 2000 Act is due to a common law power the court has, as curators are not specifically mentioned in the 2000 Act (although safeguarder's are). The principles of the AWI Act are applicable to any intervention under the Act and therefore would apply to curators performing actions under AWI.

If someone is not acting appropriately in relation to an adult lacking capacity, then the Office of the Public Guardian can investigate property or financial matters and the local authority or Mental Welfare Commission can investigate welfare matters. These investigatory bodies can make applications to court for directions in respect of the curator ad litem under section 3 of AWI.

The curator ad litem's first responsibility is to ascertain whether in fact the person has capacity to give legal instruction similar to when a client has to have capacity to instruct a solicitor otherwise the solicitor cannot legally act. This decision is evidence based. In order to properly fulfil the role, the curator must be able to undertake full and relevant enquiries and to commission or prepare reports where necessary. These are independent medical reports. These investigations enable the curator to give proper consideration to the application and to the appropriate course of action. Having established to the curator's own satisfaction that the adults incapacitated, the curator could then choose to represent the adult at a hearing or decide to instruct a legal representative for the adult.

The starting point for assessing someone's capacity to make a particular decision is always the assumption that the individual has capacity. In legal proceedings the burden of proof will fall on the person who asserts that capacity is lacking. A court must be satisfied that on the balance of probabilities, capacity has been shown to be lacking. The 2000 Act was designed to promote personal autonomy, as well as protect adults who lack capacity to make some or all decisions for themselves. These values are fundamental to our society and therefore for all citizens unless they need protection.

An independent review of the mental health legislation is underway. This will consider how 'capacity' and 'significantly impaired decision-making ability' is assessed by clinicians and practitioners, across both mental health and incapacity legislation. Information can be found here: <https://mentalhealthlawreview.scot/>

The Scottish Government does not regulate curators ad litem. Instead, there is general regulation of the legal profession and of social workers. In addition, there is specific provision in place in respect of curators ad litem in some types of court actions. Given that curators ad litem are very small in number and most of them are either solicitors or social workers then they will be regulated under their own professional regulatory body if there are any concerns or complaints raised about their conduct.

If there is any complaint then contact can be made with the [Scottish Legal Complaints Commission](#) (SLCC) at who may be able to help. The SLCC are the first point of contact for all complaints about lawyers in Scotland. If the curator ad litem is a social worker and there is any concerns then contact can be made with the [Scottish Social Services Council](#) (SSSC). The SSSC deals with concerns about social services workers.

Information on the regulation of the legal profession in Scotland can be found in this report:

[https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/SLS\\_report\\_final\\_version\\_PDF\\_---.pdf](https://assets.publishing.service.gov.uk/media/5e78cc9b86650c296f6eda63/SLS_report_final_version_PDF_---.pdf).

Information on the regulation of social workers can be found on the [Scottish Social Services Council's website](#).

The Mental Health Tribunal for Scotland has [published guidance for members](#) on the place of patients at hearings where a curator ad litem is appointed.

Rules of court were changed in 2017 on the [appointment of curators ad litem in family actions](#). These changes followed a [policy paper](#) by the Scottish Government and the Mental Welfare Commission to the Scottish Civil Justice Council.

**PE1857/B**

Petitioner submission of 11 April 2021

This submission acknowledges the Scottish Government's (SG) response.

The SG explains there is a review into Mental Health legislation. I have spoken with the review team and they have disclosed they will not be reviewing the regulation of the curator ad litem role.

The SG response highlighted the powers a sheriff has within the Adults with Incapacity Act (AWI), however, as already disclosed, the AWI does not specifically mention curator ad litem. A sheriff can still appoint a curator out with the AWI Act, for example Ordinary Cause Rules (33.16). Also, curator ad litem's perform actions out with the scope of AWI legislation.

The SG submission states "*Rules of court were changed in 2017 on the appointment of curators ad litem ... These changes followed a policy paper by the Scottish Government and the Mental Welfare Commission to the Scottish Civil Justice Council.*" This law change was based on a complaint to the MWC by a person who alleges they had their rights removed by the appointment and continued appointment of a curator ad litem.

Historically, before May 2017, when appointing a curator ad litem, the sheriff would "*make an order for intimation of the ground of the action to the Mental Welfare Commission for Scotland; and include in such an order that the Commission sends to the sheriff clerk a report indicating whether in its opinion the defender [person] is capable of deciding to give consent to the granting of the decree*". The MWC have stated they have only ever had two sheriffs' write to them about Ordinary Cause Rules 33.16 before May 2017, yet we know curators have been extensively used within the Scottish Courts for years.

The Ordinary Cause Rules (33.16 prior to May 2017) did not state what should happen if the MWC said the person has legal capacity, this is probably because the person could instruct a solicitor should they wish, or be a party litigant themselves, Everyone is assumed to have full legal capacity, and just because someone may wish not to instruct a solicitor, should not result in a sheriff substituting decision making on to a curator ad litem.

There are claims that some sheriffs' have substituted decision making away from people who are assumed to have a mental health issue onto a curator ad litem. This can happen out with the scope of the AWI Act. Also, the judgement to assume someone has a mental health problem should not translate to the person lacking legal capacity.

Due to the changes proposed by the MWC (May 2017), there is now a definition of incapable. Also, the requirement for the MWC to provide a report for the court indicating whether or not they believed the person was capable of legal capacity has been removed. Instead, it will be the responsibility of the curator ad litem themselves to submit a report, based on medical evidence, "*stating whether or not, in the opinion of a suitably qualified medical practitioner, the defender is incapable of*

*instructing a solicitor to represent the defender's interests".* The Rules also obliges the curator to periodically review the need for their appointment to continue.

This change in law does not regulate the role, it actually removes the only safeguard that was in place, especially if a Sheriff can appoint a curator ad litem without medical opinion to begin with. The changes made in 2017 were a result of someone complaining about a curator ad litem, but the law change now increases the risk of potential malpractice of the curator ad litem role, as now the regulation of the role is to be overseen by the curator ad litem themselves. There is no oversight or regulation of the curator ad litem role, yet there are claims of malpractice by curators.

I have sent a Freedom of Information request (FOIR) to the Office of Public Guardian, they said they don't regulate the curator role and even said they thought the role was obsolete. I could forward the FOIR should the committee wish to see it.

The SG submission states "*Given that curators ad litem are very small in number and most of them are either solicitors or social workers then they will be regulated under their own professional regulatory body if there are any concerns or complaints raised about their conduct*". I also sent FOIR to both the SLCC & SSSC who both said they would not investigate any complaints put forward about a registered worker performing actions as a curator ad litem, again I would be more than happy to send these FOIR to the committee should they wish.

As already explained in the petition, I have contacted all public offices, nobody regulates the role.