



The Scottish Parliament
Pàrlamaid na h-Alba

PUBLIC PETITION NO.

PE01857

Name of petitioner

Stephen Leighton

Petition title

Regulate the role of curator ad litem

Petition summary

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.

Action taken to resolve issues of concern before submitting the petition

I have contacted George Adams MSP, Michael Mathieson MSP, Humza Yousaf, Cabinet Secretary for Justice and Clare Haughey, Minister for Mental Health. I have also contacted the Mental Welfare Commission, the Law Society (Scotland), the Scottish Legal Complaints Commission, the Scottish Courts Tribunals Service, the Crown Office and Procurator Fiscal Service, the Lord Advocate and the Police.

Petition background information

A curator ad litem is a legal representative in Scots law, appointed to present the wishes and preferences of a person who lacks the legal capacity to make decisions.

Courts have a power at common law to appoint a curator ad litem in any case where a person does not have legal capacity. The decision to determine if someone lacks legal capacity should be based on medical evidence, however, a Sheriff can decide a curator ad litem is required, which removes decision making from the person and onto said curator ad litem. This is often done without any medical assessment. Also, the judgement to assume someone has a mental health problem should not translate to the person lacking in legal capacity.

In Scotland, a curator ad litem does not need to be a solicitor, but most are. The amount of curators ad litem is unknown, by some estimations there are around twelve in Scotland.

The Convention on the Rights of Persons with Disabilities (the Convention) is intended as a human rights instrument, that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms.

The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) General Comment No. 1 on Article 12 (Equal recognition before the law) of the Convention includes the following statements:

- Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making. (para. 17)
- States parties must review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences. (para. 26)
- The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker... constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. (para. 40)

The CRPD Committee's position is that Article 12 of the Convention entails that all persons, regardless of their decision-making capabilities, must enjoy "legal capacity" on an "equal basis with others". Legal capacity involves the right to be recognised as a person before the law, as well as the right to legal agency, that is, to have one's decisions – for example, concerning health or social care, where and how to live, finances – legally recognised. "Legal capacity" is considered fundamental to personhood, equal human dignity, and full citizenship.

The CRPD Committee's interpretation states that "legal capacity" and "mental capacity" are distinct: the former is a legal concept, the latter a psychological one. Contrary to the virtually universal provisions in mental health law and capacity-based law, they maintain that the existence of a disability (based on a physical, mental, sensory or psychosocial impairment) must never be grounds for denying legal capacity and the imposition of "substitute decision-making" – that is, a decision made by another person in the place of the person with a disability (not appointed by the person, done against his or her will, and not based on his or her own "will and preferences") for example, appointing a curator ad litem.

The CRPD Committee insists that the preservation of "legal capacity" means that we "must respect the rights, will and preferences of persons with disabilities". With the appropriate support (strictly speaking for the exercise of "legal capacity", and that the State is obligated to provide), people with disabilities will be able to express their "will and preferences". Where a person has difficulty in communicating this directly, they state that one should achieve a "best interpretation" of the person's "will and preferences", involving those who know the person.

An important background factor in the emphasis on legal capacity in the Convention is the widespread abuse of the rights of persons with disabilities. In many places this has amounted to a loss of nearly all civil rights, sometimes termed a "civil death".

Although there are clearly some excellent practices from curators ad litem in Scotland, there are claims that some are not representing the wills and preferences of the person which breaches, and removes the fundamental human rights the Convention tries to uphold of legal capacity.

There are some claims that curators ad litem are ignoring the fact that people already have legal capacity. With some claims they are removing legal capacity by taking on the role of substituted decision maker on the behalf of a person when they do not have the consent of the person or have an established legal contract agreed with the person. These alleged actions of some curators ad litem is undermining the virtue of the Scottish Courts and Tribunals Service and wider judiciary within Scotland.

There is a culture of some curators ad litem referring to themselves as "officers of the court". This practice is deliberately misleading. If the role of the curator ad litem is to put forward the will and preferences of the ward (person). how can they be an officer of the

court – there would be a conflict of interest.

There is a culture of some curators ad litem referring themselves as an officer of the court to third parties such as social work, health services and financial institutes. It is also claimed there are some that access personal information while assuming substituted decision making under the pretence of being an officer of the court.

Both the Law Society of Scotland and the Judicial Office have explained that a curator ad litem is not an officer of the court. Part of their explanation was due to the conflict of interest (hence the need for regulation), and secondly, they are not employed (on the payroll) through any judicial office.

There is no regulation of the curator ad litem role – no organisation oversees the profession. As there have been claims that some curators ad litem are adopting substituted decision making without regard for legal capacity, then it is quite concerning that there is no regulatory oversight. This why we need action from the Scottish Government.

The Scottish Courts and Tribunals Service, the Mental Welfare Commission, the Law Society Scotland, the Scottish Legal complaints Commission, the Lord Advocate and the Police have all stated they do not have any resource/responsibility to investigate claims of malpractice of the curator ad litem role.

Even the Justice Minister has stated he doesn't know who regulates the role of curator ad litem.

As it involves vulnerable people how can such a position not be regulated?

It is also essential that any new regulatory body must investigate historical claims of malpractice of curators ad litem.

Unique web address

<https://www.parliament.scot/GettingInvolved/Petitions/curatorregulation>

Related information for petition

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NO

How many signatures have you collected so far?

0

Closing date for collecting signatures online

N/A

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