



Briefing for the Public Petitions Committee

Petition Number: [PE01857](#)

Main Petitioner: Stephen Leighton

Subject: Regulate the role of curator ad litem

Calls 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.¹

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.²

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.

¹ 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)

² [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.](#)³

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,⁴ introduced [a new process for the appointment of, and service of, curators in relation to the Tribunal's work.](#)

³ 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.

⁴ 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 care⁵ 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.⁶ The term includes a mental illness, a personality disorder and a learning disability.⁷

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

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

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

The UK ratified the Convention in 2009.⁸ 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 UNCPD.

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.⁹ 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.¹⁰

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

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

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

¹⁰ 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.¹¹

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