

## **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.