

## **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.