

GUIDANCE to TRIBUNAL MEMBERS No. 1/2010

PLACE OF PATIENTS AT HEARINGS WHERE CURATOR *AD LITEM* APPOINTED

Purpose of this Guidance

This guidance note applies where a curator *ad litem* has been appointed to a patient under rule 55(2) of the Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Rules 2005 (“the Rules”).

Appointment of curator ad litem

The Tribunal has power under rule 55 of the Rules to appoint a curator *ad litem* to a patient. There are three circumstances in which a curator *ad litem* may be appointed. These are set out in rule 55(2) and are as follows:

- “(a) *that the patient does not have the capacity to instruct a solicitor to represent the patient’s interests in proceedings before the Tribunal;*
- (b) that where the Tribunal or a Convener has made a decision not to disclose a document or report or part of it to the patient under rule 47, and the patient does not have a representative to represent their interests; or*
- (c) that the patient has been excluded from any hearing or part of it under rule 68 or 69 and the patient does not have a representative to represent their interests.”*

For a curator *ad litem* to be appointed under rule 55(2)(a) the patient must not have capacity to instruct a solicitor. For a curator *ad litem* to be appointed under rule 55(2)(b) and (c) the patient will have capacity to instruct a solicitor but will not have instructed any representative to represent their interests.

Compliance with the Principles of the 2003 Act

In general where a curator *ad litem* is appointed to represent an individual's interests before a court, that individual is no longer a party and should take no part in the proceedings. Members should be aware that despite this general position the principles of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) still apply. The principles in section 1 (and as applied to children by section 2) of the 2003 Act, which apply in respect of a patient, require the Tribunal in discharging its function to have regard to ***inter alia***:

- (i) the present and past wishes and feelings of the patient which are relevant to the discharge of the Tribunal’s function;
- (ii) the importance of the patient participating as fully as possible in the discharge of the Tribunal’s function;

- (iii) the importance of providing such information and support to the patient as is necessary to enable the patient to participate in accordance with (ii) above;
- (iv) the need to ensure that, unless it can be shown that it is justified in the circumstances, the patient is not treated in a way that is less favourable than the way in which a person who is not a patient might be treated in a comparable situation;

The principles are framed in absolute terms and are not qualified. They are much more than an expression of good professional practice. They impose legally binding duties on those discharging functions under the 2003 Act, and this includes the Tribunal. Failure by the Tribunal to have due regard to the principles when making a decision may give grounds for that decision to be appealed. Whilst a patient may not have capacity to instruct a solicitor to represent his interests, he may still have capacity to participate in the proceedings. Thus, where a patient is ousted from the proceedings as a party to the proceedings, the principles still apply, and the patient therefore should be involved in the proceedings in so far as is possible.

Guidance

Where a curator *ad litem* is appointed to a patient, therefore, the Tribunal must have regard to the principles of the 2003 Act. The Tribunal must have regard to the importance of the patient participating as fully as possible in the discharge of the Tribunal's function. The patient must not be regarded as a passive recipient of care or treatment. It is important that panels do not exclude patients from hearings simply because a curator *ad litem* has been appointed.

It is appreciated that individual panels will require to deal with patients according to circumstances as they arise. To assist panels, I provide the following guidance:

- (i) tribunals must at all times have regard to the principles contained in the 2003 Act;
- (ii) patients who have a curator *ad litem* appointed should not be excluded from a hearing unless there are good reasons for doing so, and the exclusion and the reasons therefore, are subsequently detailed in the written determination;
- (iii) wherever possible, the patient's present and past wishes and feelings, which are relevant to the discharge of the Tribunal's function, should be ascertained from the patient;
- (iv) patients should be encouraged to contribute as fully as possible at the hearing. It will be a matter for individual panels to decide how, and to what extent the patient is able to contribute, and how and to what extent they provide information and support to the patient;



Dr Joe Morrow
President

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