

Terms and Conditions for Curators *ad litem* in the Mental Health Tribunal for Scotland (Revised June 2024)

1. Definitions and Interpretation

a. In this, unless the context otherwise requires:

“Application” means the application to become a curator *ad litem* on the List

“Appointee” means someone who has been approved to be included in the List of Curators *ad litem* held by the Mental Health Tribunal for Scotland

“Date of application” means the date of receipt by the Mental Health Tribunal for Scotland of the application sent in accordance with Clause 3 below

“Date of appointment” means, in relation to existing curators and in accordance with Clause 5, 1 March 2021 and, otherwise, the date of issue of the Enhanced Disclosure certificate referred to below

“Fees and expenses” means the fee and expenses as set out by the Mental Health Tribunal for Scotland

2. Qualifications and Experience

The appointee confirms and verifies that they have the necessary qualifications and experience, which include:

- a. Has understanding and working knowledge of the Mental Health Tribunal for Scotland, the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) and relevant subordinate legislation;
- b. Has the capacity to perform the duties of a curator *ad litem*;
- c. Maintains an up-to-date knowledge of mental health law;
- d. Has one of the following professional qualifications:
 - i) Solicitor or Solicitor Advocate, holding a practising certificate from the Law Society of Scotland current at the date of application with a minimum of one years post-qualifying experience; or
 - ii) Is on the current Roll of Solicitors and has a minimum of three years demonstrable experience in the field of mental health concluding not more than two years before the date of application; or
 - iii) Is a member of the Faculty of Advocates and has a minimum of three years demonstrable experience in the field of mental health concluding not more than two years before the date of application.

The Tribunal retains a discretion to consider applications from solicitors or advocates who may not meet the foregoing conditions if special cause exists.

3. Process for Appointment to the List

The appointee acknowledges and agrees to the following process of appointment to the List:

- a. An application in writing must be submitted to the President's Office, The Mental Health Tribunal for Scotland, Hamilton House, Hamilton, ML3 0QA or by email to mhtspresidentsoffice@scotcourttribunals.gov.uk for consideration. In the written application, details should be provided of the applicant's professional qualifications and experience, including any particular experience, whether professional or personal, which is of relevance in relation to potential appointment as a curator.
- b. Formal checks will be carried out which include Enhanced Disclosure, the cost of which will be borne by the appointee. The process for Enhanced Disclosure is set out in Appendix II.
- c. The period of appointment is five years from the date of appointment. Prior to the end of the period of appointment, the appointee will be notified that they can seek reappointment for a further period of appointment subject to complying with the Enhanced Disclosure requirement set out at 3.b and any other conditions set by MHTS.

4. Conditions of Service

Remuneration

- a. The Tribunal's prior approval in writing should be obtained before the curator incurs expenditure of an unusual nature or significant amount. In particular, in the event the curator *ad litem* considers that the patient would benefit from an independent medical report or other independent report, the curator *ad litem* will require to seek prior approval in writing from the Tribunal before incurring such expenditure. In considering any such requests the Tribunal will have regard as to whether or not it will be in the interests of justice and of benefit to the patient for such a report to be obtained.
- b. Curators *ad litem* are remunerated in accordance with the Tribunal's Scale of Fees for Curators *ad litem* applicable at the date of appointment. The curator should submit a professional account for payment of fees and outlays to the Tribunal within three months from the conclusion of the tribunal proceedings to which the curator has been appointed. Failure to submit an account within this period may result in the account not being paid by the Tribunal.
- c. In the event of any dispute in relation to a professional account submitted, the curator or the Tribunal may refer the account to the Auditor of Court for taxation.

Conduct

- d. An individual must be, and remain throughout the period of listing as a curator *ad litem* for MHTS, a fit and proper person to perform the role of a curator. In the event

that a professional complaint is made to the Scottish Legal Complaints Commission against a person on the list of MHTS curators *ad litem*, that person will advise MHTS within 14 days of becoming aware of the making of the complaint. They will provide MHTS with such information as MHTS may reasonably require about the complaint.

Guidance

e. The appointee acknowledges, and agrees to have regard to the Tribunal Guidance to Curators *ad litem* set out in Appendix I in carrying out their duties. The appointee also agrees to keep the Tribunal informed of their current employment position and contact details. The Tribunal will hold and make use of this data solely for the purposes of appointment and service of individuals as curators *ad litem* to patients in proceedings before the Tribunal.

Signed:

Date:

GUIDANCE TO CURATORS *AD LITEM*

1. This Guidance applies where a curator *ad litem* is appointed by the Mental Health Tribunal for Scotland (“the Tribunal”) or a Convener in terms of rule 55 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No.2) Rules 2005 (“the Rules”).
2. The curator *ad litem* is appointed to safeguard the interests of a patient in proceedings before the Tribunal. The curator is appointed in a personal capacity and should appear personally before the Tribunal unless there are exceptional circumstances which prevent this. This means attending proceedings in the same manner as the members – in other words, attending in person at an in-person hearing if this is the mode of hearing set down. In the event that a curator *ad litem* becomes unable to attend a hearing to conduct proceedings on a patient’s behalf, prompt notification requires to be made to the Tribunal. It is likely to be necessary for the curator to be discharged to enable the appointment of a curator who is available to conduct the hearing on the patient’s behalf.
3. Curators *ad litem* should not be engaged on any other business when personally conducting a tribunal hearing before a tribunal on behalf of a patient.
4. The appointment of a curator *ad litem* will be made on a case by case basis from the List of Curators *ad litem* maintained by the Tribunal. Inclusion in the List of Curators *ad litem* maintained by the Tribunal does not guarantee that a curator *ad litem* will be appointed with any particular frequency. Curators *ad litem* on the List of Curators should ensure that an efficient response system is in place when they are contacted by the Tribunal seeking their appointment to minimise delays in the process.

Section 1 principles and the overriding objective

5. While a curator *ad litem* is not subject to a statutory duty to have regard to the principles specified in section 1 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) when discharging any function under the 2003 Act, good practice suggests that the principles should be taken into account by a curator *ad litem* when representing the interests of a patient in proceedings before the Tribunal. Likewise good practice suggests that a curator *ad litem* should have regard to the overriding objective of the Rules (under which a curator *ad litem* is appointed) as stated in Rule 4, namely to “secure that proceedings before the Tribunal are handled as fairly, expeditiously and efficiently as possible”.
6. It is recognised that there can be a tension between the role of a curator *ad litem* and the principle of patient participation in Tribunal proceedings. On occasion the patient may attend and wish to make representations at a hearing when a curator *ad litem* has been appointed. Good practice would suggest that such a situation is handled sensitively to ensure that the patient is allowed to participate as fully as possible.

Commitment and Timescales

7. The expectation of the Tribunal is that a curator *ad litem* will only accept an appointment where they are available to act expeditiously in discharging the duties of the curator *ad litem* and are available to attend the hearing.

8. It is a matter for each curator to consider whether or not a meeting with the patient will be appropriate. The tribunal recognises that there will be some cases where a meeting with a patient will not be of benefit to the patient or assist the curator in the course of their enquiries or the conduct of the case. There is a well-established practice in such cases of a curator reserving their position on the application until they have heard the evidence at the hearing, and this continues to be reasonable where it is apparent that a meeting with the patient would not be of benefit to the patient or assistance to the curator. Where a curator *ad litem* considers a meeting with the patient a necessary step, the curator should visit the patient within at most four working days of the appointment. It is expected that in accepting the appointment the curator can meet this timescale in the interests of both the patient and the efficiency of Tribunal proceedings.

9. If the curator *ad litem* forms the view that the patient is capable of instructing a solicitor to represent their interests in proceedings before the Tribunal, the curator *ad litem* should contact the Tribunal by email immediately and inform the Tribunal that the appointment of a curator *ad litem* is not necessary and state their reasons for reaching this conclusion to enable the appointment to be revoked timeously by the Tribunal.

10. If, at any time during the proceedings before the Tribunal, the curator *ad litem* reaches the view that the patient is capable of instructing a solicitor, they should inform the Tribunal that the appointment is no longer necessary in order that the Tribunal can discharge the curator *ad litem* from their appointment.

11. Where a date has been set for a Tribunal hearing and the curator *ad litem* is of the view that it will not be possible to complete the necessary investigation by the date of the hearing, they should contact the Tribunal at the earliest opportunity by email, stating the reasons that they have been unable to complete these investigations, to enable the Tribunal to determine whether the hearing should proceed.

12. The curator *ad litem* is not required to produce a written report, save in exceptional circumstances. The curator *ad litem* should report on their investigations orally at the outset of the tribunal hearing. Any written report deemed necessary by the curator *ad litem* should be submitted to the Tribunal at least three days in advance of the hearing.

Curator Appointments in pre –existing applications and appeals instigated by the patient

13. A curator *ad litem* may be appointed in an application or appeal lodged by a patient when the patient's solicitor has withdrawn from acting (eg an application lodged in terms of section 50 of the Act). Upon notice of this event the Tribunal may appoint a curator *ad litem ex proprio motu* solely for the purpose of determining whether the application or appeal should be maintained. Any curator *ad litem* appointed in such

proceedings shall provide the tribunal with a written report within a period set down by the Tribunal stating whether or not the application or appeal should be maintained on the patient's behalf. They should provide in that report information as to the patient's level of understanding of the application, including whether the patient is expecting a hearing to take place. In the event that the curator *ad litem* concludes that the application or appeal should be maintained by the patient, the curator will normally be appointed by the Tribunal to undertake the conduct of the application or appeal and should conduct the tribunal proceedings on the patient's behalf as they consider appropriate.

Practical arrangements

14. The conduct and mode of enquiry for contacting a patient in any proceedings is a matter for each curator and will depend on the circumstances of the patient and the nature of each case. Curators should ensure that they have appropriate arrangements in place to assess and minimise any risk to either themselves or the patient when they are conducting their enquiries. In particular, when a home visit to a patient is considered necessary by the curator, it is prudent and good practice for curators to make enquiries with the patient's care team prior to any such meeting. The patient's care team will be best placed to provide information about the most appropriate way to meet with a patient.