DISCUSSION PAPER – MENTAL CAPACITY IN RELATION TO CIVIL PROCEEDINGS

Purpose

1. This paper is to draw members' attention to reform programmes in relation to mental capacity in Scotland.

Current framework

2. In Scotland, everyone aged 16 and over is presumed to have mental capacity to make decisions for themselves. If during civil proceedings it becomes apparent that there may be some doubt in relation to a person's capacity the court may appoint a curator *ad litem*.

3. A curator *ad litem* is an officer of the court, appointed in order that the court may be satisfied that the case is properly conducted, and is under a duty to exercise independent judgment and protect or safeguard the interests of the person so far as they are affected by the particular action.

4. The appointment of a curator *ad litem* is only mandatory where the party is a defender to a family action.[1] In other civil proceedings, the matter will be discretionary for the court, applying the test of whether justice in the particular circumstances of the case demands it.[2]

5. The Adults with Incapacity Act 2000 (AWI Act) sets out the definition of incapacity and provides a framework for safeguarding the welfare and managing the finances of adults (people aged 16 or over) who lack capacity.[3]

Proposed Reforms

6. The Scottish Government (SG) carried out a consultation on the AWI Act between July and October 2024. The purpose of the consultation was to seek views on proposals to reform the legislation following recommendations made by the Independent Review of Mental Health and Incapacity Law in Scotland.

7. The Scottish Mental Health Review (SMHLR) recommended a new approach to mental health and capacity law with a new purpose of ensuring that the human

[1] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Rule 33.16
[2] See Macphail, ibid, paragraphs 4.29-4.34.
[3] Adults with Incapacity (Scotland) Act 2000

rights of people with mental or intellectual disability are respected, protected and fulfilled.

8. The SG's consultation on AWI reform closed in October 2024. Strong support for modernisation was noted, but significant concerns were raised around:

   - ECHR compliance (particularly deprivation of liberty).
   - Resource pressures and advocacy availability.
   - Need for more detailed proposals before legislation.

9. An expert working group for AWI reform was established in September 2025 and is responsible for progressing workstreams on deprivation of liberty, guardianship, supported decision-making and medical treatment. The group regularly reports to the ministerial oversight group and will contribute to the development of legislative proposals by June 2027.[4]

10. In addition to AWI legislation reform SG has committed to incorporating a series of human rights instruments into domestic law including the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[5], as far as possible within the limits of devolved competence.

11. A report by the European Disability Forum (EDF) has highlighted that many persons with disabilities continue to face significant barriers in exercising their legal capacity.[6]

12. This report also highlighted that there are inconsistencies with implementation of the UNCRPD across EU member states with full deprivation of legal capacity allowed in 12 member states, while 9 member states allow for partial guardianship or similar systems. Additionally, 6 member states have nearly abolished guardianship but maintain exceptions in specific cases. Spain and Ireland are among the states who have almost abolished all guardianship in favour of supported decision-making systems.

13. The SMHLR was initiated by the Scottish Government in 2019 and chaired by Lord John Scott KC. Its primary goal was to assess and recommend improvements to Scotland's mental health, capacity, and adult support legislation, ensuring alignment with contemporary human rights standards.

14. The review involved extensive consultation with stakeholders, including individuals with lived experience of mental health issues, practitioners, and academics. It resulted in over 200 recommendations aimed at:

[4] Adults with incapacity reform: Expert Working Group - gov.scot
[5] Convention on the Rights of Persons with Disabilities | OHCHR
[6] Final-print-version-HR-Summary-of-the-report.pdf

- Strengthening the voice of service users and their caregivers in decision-making processes.

- Reducing coercion within the mental health system and promoting supported decision-making.

- Securing rights to necessary support and services for individuals with mental health conditions.

15. The review's recommendations are expected to influence significant changes in mental health legislation in Scotland, promoting a more inclusive and supportive environment for individuals with mental health conditions. The review also recommends a comprehensive scheme of supported decision making, including better access to individual advocacy in line with other countries such as Spain and Ireland.

16. In June 2024, the SG published an initial delivery plan for the Mental Health and Capacity Reform Programme, setting out a range of actions that are either underway or planned in the period up to April 2025.[7]

17. The programme is intended to ensure rights are protected, respected and fulfilled; including people's rights to live independently, participate in and make decisions about their care and treatment and access rights-based models of support, particularly for people experiencing mental illness and adults who lack capacity.

18. This programme and the reform of AWI legislation is part of the SG's plans to modernise mental health and capacity law with the direction of travel being legislation which is more compatible with the UNCRPD.

19. The recent SCJC consultation on Simplified Divorce confirmed support for removing the term 'mental disorder' and replacing with 'mental capacity' to assess if a person has capacity to understand and make decisions in relation to their legal rights rather than exclude them simply on the basis of having a mental disorder.[8] This demonstrates support for being more compatible with the UNCRPD.

Civil Justice Committee report

20. At the SCJC meeting in October 2025, members were directed to the work of the Civil Justice Committee in England and Wales on mental capacity.[9]

[7] Introduction - Mental Health and Capacity Reform: delivery plan October 2023 to April 2025 - gov.scot
[8] consultation-analysis---simplified-divorce.pdf
[9] paper-3-2---mental-capacity-in-civil-proceedings.pdf

21. The CJC published a report[10] on determining mental capacity in civil proceedings in November 2024. The report follows a review commissioned in 2022 over concern about the lack of clear rules for how courts decide whether a party in civil litigation lacks capacity to conduct proceedings.

22. The SCJC discussed the scale of the issue in Scotland recognising the procedural differences between the jurisdictions and that the recommendations in the CJC report are not directly applicable in Scotland.

Discussion point

23. Do members consider that this is an area which would benefit from further scrutiny by the Committee?

SCJC Secretariat

February 2026

[10] CJC Procedure for Determining Mental Capacity in Civil Proceedings - Nov 2024