

CURATORS AD LITEM

Policy Proposal

1. To ask the Family Law Committee (the Committee) to consider a joint paper submitted by the Scottish Government (SG) and Mental Welfare Commission for Scotland (MWC) (**Paper 4.1A**). It proposes amendments to the rules of court in relation to: the appointment of curators *ad litem* to defenders in family actions; the terminology of the existing rules; and the simplified divorce and dissolution forms.

Timing

2. While there is no specific timeframe for implementation of the proposals, we consider that, if the Committee agrees that there is a need for rules, it would be helpful to have them in place at the earliest opportunity in order to address the concerns raised. We therefore propose that rules be developed for consideration at the 12 December 2016 Committee meeting with a view to them being submitted to the Scottish Civil Justice Council for consideration and approval in early 2017.

Rationale

3. The SG/MWC suggest that amendments are required to Ordinary Cause Rules 33.16, 33A.16 and to Rule 49.17 of the Rules of the Court of Session to address difficulties that have been raised with the MWC by practitioners and litigants in relation to:
 - (i) the lack of a mechanism in the rules for the curator to check that the appointment is still appropriate;
 - (ii) the potential inappropriateness of an appointment continuing simply because a defender has a mental disorder rather than when he/she does not have capacity to instruct representation; and
 - (iii) where divorce is sought on the basis of one year's non-co-habitation with consent and the defender has a mental disorder, the requirement for the MWC to send a report to the sheriff clerk indicating whether the defender is capable of giving consent.
4. In relation to terminology. the SG /MWC suggest that amendments are also required to remove the term "suffering from a mental disorder" replacing it with "has a mental disorder". It has also been suggested that amendments are

required to the simplified divorce and dissolution forms, to achieve consistency in the questions that they ask about mental disorder.

5. **Paper 4.1A** contains extracts of the relevant court rules and forms.

Implementation

6. Implementation of the proposed amendments to rules of court will require discussion with SCTS as to operational issues, training requirements for operational staff and with the Judicial Institute for Scotland as to judicial training requirements.

Consultation

7. There has been no public consultation in relation to this proposal.

Legal advice

8. LPPO's consideration of the proposals discussed in **Paper 4.1A** supports the view that changes to the sheriff court Ordinary Cause Rules and to the Rules of the Court of Session would be appropriate. If rules are instructed, detailed legal advice will be provided along with the draft rules at the next Committee meeting.

Recommendation

9. **The Committee is asked to consider the proposal for amendment to the rules at Paper 4.1A and to indicate whether it is content to instruct LPPO to prepare draft rules for consideration at the next Committee meeting.**

Scottish Civil Justice Council Secretariat

September 2016