HEARING THE VOICE OF THE CHILD IN FAMILY ACTIONS – FORM F9

Purpose

1. To provide the Family Law Committee (the Committee) with an overview of responses to the letter issued by Secretariat on 03 August 2016, which updated stakeholders on progress in relation to the review of Form F9 and invited comments on the draft replacement forms F9.1 and F9.2.

Background

2. At its meeting on 20 June 2016, the Committee considered two new replacement forms developed by the sub-group to replace Form F9. Fiona Jones advised that the sub-group had met twice and had taken on board responses from stakeholders in relation to improving Form F9 along with the views expressed at the 22 February 2016 Committee meeting.

3. The Committee agreed that the sub-group should develop the proposed new forms in line with discussion and suggestions provided at the 20 June 2016 meeting; that those who had previously submitted comments on improving the existing form F9 should be invited to offer views on the proposed new forms; and that arrangements should be made for groups of children to be consulted on the draft new forms.

4. The Committee also agreed that the members should consider at which stage in the proceedings the proposed new forms might be issued to children and bring proposals on this to the 10 October meeting.

Sub-group consideration of responses received

5. In total 11 responses were received to the request for views on the two new draft forms. In addition to the written responses, LPPO and Secretariat have met with policy officials from Scottish Women's Aid and the office of the Children and Young People's Commissioner Scotland (CYPCS has followed up the meeting with written comments summarising their key points, and a summary from Scottish Women's Aid is expected shortly). A list of those who responded is at **Annex A** and copies have been provided, along with the meeting papers, on the Committee private website area.

6. Generally, those who responded felt that the proposed forms were an improvement on the existing Form F9 and most of the consultees also offered suggestions for further improving the forms. However, some stakeholders held opposing views on certain points, and we consider that it will not be possible to develop forms that will satisfy all stakeholders completely.

7. The sub-group met on 15 September 2016 to consider the responses received. A summary of the main points raised by consultees is set out below, along with

the sub-group's views. Forms F9.1 and F9.2 have been amended in line with the views of the sub-group on the comments received and are at **Paper 5.1A**.

A. Forms are not an ideal method

Many responses repeated comments that were made previously, about forms not being an ideal method for seeking the views of children (in large part due to the risk of the resident parent exerting an influence on the child). As the Committee has discussed previously, the sub-group noted that it is difficult to see a way around this. Since the Committee has already indicated that reviewing the form will be one of the first steps in improving how the voice of the child is heard, the sub-group simply noted this point.

While it will not remove the risk of influence, the new forms suggest that the child might want to ask an adult who he/she trusts for help with the form, and it will always be open to the sheriff to decide to seek views using an alternative or additional method. The response from the Children and Young People's Commissioner Scotland (CYPCS) suggests that the form could say something like: '*As the decision being made by the Sheriff is about you, your Mum and your Dad, then it is best if the person helping you to have a say is not your Mum or your Dad. This is to make sure that any views you share with the Sheriff are your own.'* The sub-group would welcome views from the wider Committee on this – in particular, if the Committee agrees with the idea in principle, a form of wording that does not refer to specific family members would be needed so that it is broad enough to cover all scenarios.

B. The child should have the choice of method

Linked to the point discussed at A, above, some consultees (such as AVENUE, CYPCS, the Scottish Child Law Centre (SCLC), and Relationships Scotland) consider that the child should be told what methods are options for expressing views. CYPCS in particular feels that the child should have the right to choose the method to be used. The sub-group noted that while it is possible for the form to ask the child if there are other ways he/she would like to express views, to avoid cutting across the sheriff's discretion, the final decision would likely need to remain with the sheriff. In some cases, the child may feel under too much pressure if he/she is the person responsible for choosing an appropriate method. Furthermore, there is perhaps a lot to be said for the sheriff having the final say with regard to method – if the sheriff suspects any undue influence is being put on the child, he/she can suggest a suitable method to get around this.

AVENUE's response discusses the question in the form which asks "Would you prefer to say what you think in a different way?" AVENUE states:

'Our team felt that it would be extremely difficult for children and young people to understand what their options are in this respect and would therefore be more likely to tick the No box. If this is to be explored, a range of choices could be offered perhaps including:

- *Meeting with the Sheriff directly*
- *Referring to a family mediation service who offer consulting children services*

- *Writing in letter or email form to the sheriff or clerk of the court*
- *An appropriate website with additional signposting information*
- *Contact information about the Scottish Child Law Centre'*

Other consultees made similar points. The sub-group decided against this approach, for two main reasons. First of all, it is not clear how, or whether, some of these options could be facilitated. Secondly, presenting a list of options might imply that all of the specified options are possibilities, and that the sheriff would support whatever the child selected. If the sheriff ultimately decided against the method picked by the child, this could leave the child feeling confused and disillusioned.

Dr Kirsteen Mackay noted that providing a list of options might overwhelm the child with too much information. The sub-group agreed with this. The form has therefore been amended in line with a suggestion by Dr Mackay, so that it indicates to the child that if he/she wants to find out about other ways of giving views, to call the Scottish Child Law Centre or Clan ChildLaw.

Children 1st and CYPCS suggest that the child should be given the option of sending in a video or voice recording. Many consultees consider that the form should be available online, for children to be able to complete and submit it electronically. Like consultees, the sub-group appreciates that children would be more familiar with this than with taking an envelope to a post-box. LPPO has informally raised the idea that the new Form F9.2 might be fast-tracked for online submission on the new electronic system. However, it is understood that at present there are data security issues that will need to be addressed before this will be possible. The sub-group acknowledges that similar data security concerns would likely arise in relation to children sending in video or voice messages.

C. <u>One Form or Two?</u>

AVENUE considers that one form would simplify the process. Most consultees, including the Faculty of Advocates, appeared to support the use of two forms to separate the intimation stage from the seeking of views. However, many commented that it could be confusing for the child to be asked for views twice. The Faculty of Advocates suggests sending the first letter (F9.1) when an action is raised, but that the child should not be asked for views at that stage.

The Faculty's suggestion is for the second letter (F9.2) to then be sent one week later. The sub-group discussed this, but noted that the Faculty's response implied that both letters would be sent by the court rather than by the pursuer's solicitor. The sub-group recognised that it was unlikely that SCTS resources would be able to accommodate this – there would be implications for postage costs and staff would require training in relation to completing the letters (notably, the part that summarises the dispute that the court is being asked to deal with). In addition, the sub-group thought that the Faculty's suggestion of sending the second letter one week after the first would not be a long enough period. It would mean the letter would be sent before it is known whether or not the action is defended.

The sub-group agreed that it might be preferable for the child to be asked for views only once. It is proposed that the first letter could simply notify the child that the action has been raised, say what it is about in very short simple terms, and let the child know that he/she will soon receive another letter asking for views. This proposed first letter, F9.1, would replace the 'classic' Form F9 currently referred to in the rule on intimation to a child (rule 33.7(1)(h)).

D. When should Form F9.2 seeking views be sent?

To address concerns about the child being asked for views twice in quick succession, the sub-group suggests that the child should only be asked for views at the stage when the court is being asked to make a decision. The sub-group understands that there might therefore be five possible triggers for the child being asked for views in Form 9.2:

(i) when a notice of intention to defend (NID) is lodged, or (in order to seek views in an undefended action) when the deadline for lodging the NID has passed;
(ii) if/when a third party notice is lodged;
(iii) if/when an early motion is enrolled;
(iv) if/when a minute for decree is lodged;
(v) when a minute for variation of decree is lodged (the form would need to be adapted for use in these circumstances, and it is likely that a fresh intimation form (F9.1) would need to be sent first).

In addition to the triggers above, it may also be desirable to insert a 'catch-all' provision into the rules stating that the sheriff may require a Form F9.2 to be sent to a child at such time as the sheriff directs.

E. Font, Typeface and Language

Several consultees have suggested revised wording to make the forms more child-friendly, with many suggesting that the letters should refer to "sheriff" rather than "judge". This is because "sheriff" is the term that will be used by everyone else – particularly as the action progresses – and it might therefore cause confusion for the child. The sub-group agreed with this, and has amended the proposed forms accordingly.

Comments received from AVENUE, CELCIS, CYPCS and SCLC suggested that the phrase "keep your views secret" should not be used. The concept of secrecy was considered to be unhelpful and may carry negative connotations for some children.

Comments were also made in relation to colour, accessibility and the consistency of the faces used in the forms. Some comments suggested that the use of smiley, neutral and frowning faces might be seen as patronising or condescending by children (particularly older children), and might not be sufficiently nuanced. The SCLC's view was that the scope of the three emotion faces could be too narrow, and even leading. SCLC suggested a 'thoughts cloud' for this reason, to give children more options to express their feelings and views. The sub-group recalled that the Children's Parliament had previously

suggested using 'Cantril's Ladder' – a graphic of a ladder with ten rungs – for similar reasons.

The sub-group noted all of these comments and agreed with some of them, but drew two main conclusions. Firstly, it would be best to wait and see how children react to the use of smiley faces during the consultation exercises. As the Faculty response indicates, '*happy and sad faces will make the form easier for younger children, and opportunities are given for lengthy explanations for those children who wish to give their views very fully.'* Secondly, the sub-group thought that the particular graphics to be used in the forms was not a decision for the sub-group to make – it was hoped that a graphic designer / illustrator might in time be appointed to deal with this. The drafts created by the sub-group were put together with images/emojis taken from Clip Art, and it is therefore recognised that the drafts do not quite yet have a professional look and feel.

F. Yes or No tick-box

Some organisations (including AVENUE, CYPCS, Relationships Scotland) queried the relevance of the question which asked the child if he/she understood what the judge would be making a decision about, with the child being asked to tick 'Yes' or 'No'. They felt it was unclear what would happen if the child ticked 'No'. CYPCS expressed a concern there would be a risk that the child's views would be completely disregarded (i.e. that a 'no' response could be used to assess the child's capacity and undermine anything the child wrote elsewhere in the form). The sub-group agreed this question did not serve a clear purpose and has therefore deleted it from the revised drafts.

G. Guidance documents and Adult Helper

The SCLC offered extensive amendments to the forms and also submitted suggested documents to accompany them – a covering letter to be sent with each form, as well as "Guidance for the Adult Helper" and "Declaration of Child's Independent Views". The CYPCS referred to SCLC's 'Helping Hands' pack and thought that guidance for the child should be included in a separate document rather than in the form itself. CYPCS also supported the idea of a guidance leaflet for adult helpers.

The sub-group considered that if the form was sufficiently clear and easy for a child to understand, it was difficult to see the need for a separate guidance document for adults. The sub-group thought that sending a "Declaration of Child's Independent Views" might be one form too many, and did not feel that this would provide any additional reassurance that the views expressed were in fact the child's own.

Some responses expressed concern at the idea of teachers being singled out as a suggested person to help the child. CYPCS noted that *'not all children would necessarily feel comfortable discussing their family circumstances in a school environment.'* Its response suggested that a number of examples of who the child might talk to should be provided. AVENUE's response states: *'It is helpful to signpost a young person to an adult they can trust but we are unsure about highlighting teachers as an example. Whilst we understand their experience of working with young people is extensive, they may also have a professional*

relationship with one parent more than the other (usually the resident) which is not always helpful in offering impartial and independent support. We would recommend "an adult you can trust" is sufficient.' The sub-group decided that AVENUE's suggested approach might be the best option. However, as discussed under A above, the sub-group would welcome the Committee's views on whether the form should suggest that the child seek help from someone other than a family member.

Relationships Scotland proposed that the form should contain a space for the child, if he/she had help from an adult, to indicate who helped them. The sub-group agreed this might be helpful to know, and an additional short question has therefore been added to the end of Form F9.2.

H. Confidentiality

Linked to the point discussed at E above in relation to the sheriff keeping the child's views "secret", some organisations felt it was not clear what exactly would be shared. For example, the Family Law Association's response said: *'the third paragraph of the letter advises the child that the judge might not share what the child has written but will have to explain what the child would like to happen. It is felt that it should be made clear who this might be explained to.'*

The sub-group thought it would be difficult to come up with a form of wording that would fit every case. In the revised form, the sub-group therefore proposes the following wording: *'The sheriff might not share exactly what you have written or said, but the sheriff has to think about this and explain in court what you would like to happen.'*

While consultees considered that signposting children to the SCLC and Childline was helpful, concerns were raised regarding the inclusion of the additional information provided on the Childline confidentiality website. It was felt this might be too much information for a child to take in. The sub-group agreed and has deleted this wording from the revised drafts. On the basis that Clan ChildLaw now has funding for a free legal helpline that covers the whole of Scotland, the sub-group agreed that it would be helpful to provide children with its telephone number too.

I. The forms should be sent to younger children

Several consultees (including the SCLC, Scottish Women's Aid and CYPCS) consider that there is a need to ensure that the form is sent to younger children, as well as to those aged over 12. The response from SCLC states: '*We would support the sending of the revised F9 forms and accompanying letters to all children as an automatic measure in cases which the decision directly affects a child where the child is of primary school age*.' The response goes on to say *'The current position within the Ordinary Cause Rules (Chapter 33.15(2)(b) for example) does not preclude children under a certain age being sent the form F9 and we would suggest this position remains the same with additional guidance to encourage the process of gathering views from younger children.'*

This ties in with the response received from Faculty to the Committee's initial consultation. Referring to the Children (Scotland) Act 1995, that response stated: *'There is a statutory presumption in section 11(10) that a child of twelve years of age or more will be of sufficient age and maturity to form a view. This does not, of course, mean that children who are younger than twelve will not* have views and be able to express them.'

The sub-group would be interested to hear the Committee's views on whether the rules should be amended to include a statement making it clear that the forms have been designed to be sent to children as young as age 5.

J. What will happen next, feedback to the child, and timescales

CELCIS states that *'At the end of the form, it could be reassuring to add a contact number for enquiries, or a suggestion of timescale of when a decision will be made in order to avoid the child worrying unnecessarily.'*

It is difficult to come up with a uniform description of what will happen next, as the stages and the timescales will vary from case to case. It could be misleading to provide a generic explanation which ends up being deviated from in a particular case.

Some consultees (for example, Scottish Women's Aid and CYPCS) suggest that feedback should be given to the child *after* a decision has been made in a case. The sub-group recognises that this would be helpful for children – particularly when the sheriff reaches a decision that is not in line with the child's views – but is conscious that this is not straightforward and would have a significant impact on court staff and resources. Traditionally, it has not been the role of operational court staff to explain the outcome of cases or the reasons for the sheriff's decision – even to parties. In cases where the child has engaged with an independent advocate or intermediary (such as AVENUE, Relationships Scotland etc.), the sub-group understands that that person will generally explain things to the child. For there to be a suitably qualified person within the courts tasked with providing such feedback, significant funding and resources would need to be identified and committed.

Dr Kirsteen Mackay is one of several consultees who considers that the child should receive an acknowledgment when his/her completed form is received by the court. She states: '*it appears that no process is to be put in place to acknowledge receipt of the child's views by the court. If so, this is disappointing as children consistently express a wish to hear back from the court so they know their response has been received.'* This would have operational (training and staff time) and budgetary (postage) impacts on SCTS, but if members favour the suggestion, Secretariat and LPPO could look into this.

K. What if the child's views change?

The Faculty of Advocates suggests that the form should let the child know what to do if his/her views change. Its response states: *'there should be an indication to the child in this form that they may contact the judge during the court action if their views change, and an indication of how they can do this.'* While the sub-group recognised that in the present system, it could be difficult to make

arrangements for the child to contact the sheriff, it agreed this was an important point. The revised form now therefore contains the following sentence, to assist the child if his/her views change: *'If what you think changes, you can contact a lawyer or call the phone numbers for the Scottish Child Law Centre or Clan* Childlaw.'

L. <u>The process of seeking children's views should be handled by the courts</u>

Similar to the points made under C and J above, Scottish Women's Aid and CYPCS felt strongly that ideally, the whole process for seeking a child's view, keeping him/her informed and providing feedback post-decree should be handled by the courts. For example, the response from CYPCS states:

'A change in the Court Rules should be considered to allow the Courts to take charge of the process of gathering children's views either via Form F9 (or by other suitable methods). The current process does not work for children and young people, and a large proportion of children's views remain unheard. Whilst this may have cost implications, it will allow for greater flexibility in how the views of children are collected. It will also reduce and/or remove any suggestion of parental manipulation. Having courts taking responsibility for this process should reinforce the position of children as central, not peripheral, to the proceedings.'

While the sub-group could see the appeal in this idea, it would be a significant shift. Current resources and the reality that family actions are part of an adversarial court system tend to suggest that this proposal could only be achieved as part of a wider reform.

M. <u>Accessibility – disabilities and languages</u>

Consultees such as CYPCS and SCLC raise concerns about accessibility of court forms. SCLC suggests that *'disability accessible documents'* (for example Braille, audio format, adapted forms for children with dyslexia) should be made available on request. It proposes that the forms should include a note indicating that these will be provided on request. It is also suggested that the forms be made available in foreign languages, to encourage and ensure *'effective* participation of children from different ethnic and cultural backgrounds.'

LPPO's view is that the accessibility of court forms is not an issue that is exclusive to children, or to family actions. Many of the points that have been raised apply equally to adults with disabilities or whose first language is not English, who may be involved in any type of action –. The sub-group recognised this. Forms tend to be issued by parties or their solicitors, so there may be a question about whether it is the role of SCTS to consider the availability of court forms in alternative formats and languages. Given the wide-reaching scope of the points made, the sub-group did not consider the issue further. If members are of the view that these points should be given consideration, it may be that the matter should be referred to the SCJC's Access to Justice Committee.

N. DVD / online video explaining the process

CYPCS suggests that *'There should be a DVD created to be included with the form, or a link to an online resource. This should outline to children and young people why it's important for them to share their views. This could be similar to children and young people's resources recently developed by the Scottish Children's Reporter Administration.'*

This may be more of an operational matter for SCTS, rather than for the FLC. However, if it is a suggestion that members would like to pursue, LPPO and Secretariat could consider how best to look into it.

O. Statutory 'risk assessment'

While not a comment on the form itself, Scottish Women's Aid requested that the rules should be amended to include a reference to the 'risk assessment' provided for in section 11(7A) to (7E) of the Children (Scotland) Act 1995. The text of these provisions is set out in **Annex B**.

At the meeting with Scottish Women's Aid, it was suggested to LPPO and Secretariat that a 'prompt' to the sheriff might be included in the rules, so that it is clear that in addition to the child's views, the risk should be taken into account. The subgroup considered that this was a matter for the wider Committee to consider. If members are minded to agree to the request, it may be that rule 33.19 (and equivalent in Chapter 33A and Chapter 49 of the Rules of the Court of Session) would be the logical place to position this.

Consultation with children

8. A number of offers have been received to 'pilot' or seek feedback from children on the revised forms. These have come from: (i) the Children's Parliament; (ii) the Scottish Child Law Centre; (iii) Clan ChildLaw; (iv) the Scottish Children's Reporter Administration; and (v) Scottish Women's Aid.

9. Scottish Women's Aid is working on a joint project with CYPCS, which will look at how children's voices are heard generally. This will involve a number of workshops being run with children – one of which will consider court actions – and Scottish Women's Aid and CYPCS would like to use the revised forms as part of it. The Chair and the sub-group have approved this suggestion and consider that, in addition to the consultations facilitated by other organisations, this will provide a valuable opportunity to hear feedback on the drafts from children. Secretariat will soon be following up the other offers of help with consultations.

Recommendation

10. Members are invited to consider the various issues outlined at paragraphs 7A to O above. If minded to agree with the points discussed, members may wish to instruct LPPO to (i) produce a first draft of any changes to the rules that may be necessary, for consideration at a future meeting; and (ii) make changes to the draft forms to reflect the Committee's discussions.

Lord President's Private Office/Scottish Civil Justice Council Secretariat

September 2016

ANNEX A

HEARING THE VOICE OF THE CHILD IN FAMILY ACTIONS – FORM F9

Responses received

1. CELCIS
2. Faculty of Advocates
3. Dr Kirsteen Mackay
4. Children in Scotland
5. Scottish Child Law Centre
6. Relationships Scotland
7. Family Law association
8. AVENUE
9. Children 1st
10. Children and Young People's Commissioner for Scotland (CYPCS)
11. Scottish Women's Aid (comments in this paper are based on points discussed at a meeting with Scottish Women's Aid – a written summary will be provided as soon as this is received from Scottish Women's Aid.)

ANNEX B

Extract from section 11 of Children (Scotland) Act 1995

(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity, shall so far as practicable—

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express.

(7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are—

(a) the need to protect the child from—

(i) any abuse; or

(ii) the risk of any abuse,

which affects, or might affect, the child;

(b) the effect such abuse, or the risk of such abuse, might have on the child;

(c) the ability of a person—

(i) who has carried out abuse which affects or might affect the child; or

(ii) who might carry out such abuse,

to care for, or otherwise meet the needs of, the child; and

(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

(7C) In subsection (7B) above—

"abuse" includes—

(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;

(b) abuse of a person other than the child; and

(c) domestic abuse;

"conduct" includes—

(a) speech; and

(b) presence in a specified place or area.

(7D) Where—

(a) the court is considering making an order under subsection (1) above; and

(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,

the court shall consider whether it would be appropriate to make the order.

(7E) In subsection (7D) above, *"relevant person"*, in relation to a child, means—

(a) a person having parental responsibilities or parental rights in respect of the child; or

(b) where a parent of the child does not have parental responsibilities or parental rights in respect of the child, a parent of the child.