The Child Law Clinic
School of Law
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THE CHILD LAW CLINIC

Ascertaining the Views of Children in Guardianship, Custody and Access Proceedings in Ireland

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EXECUTIVE SUMMARY

This report examines the effectiveness of the implementation of the obligation in Article 42A.4.2° of the Irish Constitution to ascertain the views of children in court proceedings concerning guardianship, custody and access. It presents the results of phases 2 and 3 of a three-phase research project. Phase 1 consisted of a comparative review (published in 2023) that provided an insight into the processes and structures for the ascertaining the views of children in private family law proceedings in six jurisdictions (Ireland, England and Wales, Australia, New Zealand, Ontario, and Germany), with a view to identifying common challenges, the strengths and weaknesses of different approaches, and variations in law and practice. Phases 2 and 3 aimed to produce empirical data on the practical reality of child participation in proceedings in Ireland specifically concerning guardianship, custody and access. Phase 2 consisted of a national survey of the views and experiences of professionals who have worked in these proceedings. Phase 3 consisted of observation of family law proceedings in a sample of seven District Court venues across Ireland. The data collected in the course of this project is triangulated against other data sources, and recent reform proposals are assessed in light of the empirical evidence.

The data indicates that notwithstanding the enactment of Article 42A.4.2° of the Constitution and section 32 of the Guardianship of Infants Act 1964, considerable barriers remain to the vindication of the right of children to be heard in guardianship, custody and access proceedings. The views of children are ascertained in a minority of cases at present, with considerable variation in practices from District to District. Costs associated with commissioning expert reports are extremely high, and there is a shortage of experts available to prepare reports. Concerns exist regarding the regulation of professionals charged with preparing reports; the level of training provided to all professionals involved in private family law proceedings; and the level of support and information provided to children to assist them to express their views. Recent recommendations made by the Department of Justice *Review of the Role of Expert Reports in the Family Law Process* are necessary, but not sufficient. Legislative reform, additional support and training for judges and child-friendly court environments are also necessary if the constitutional obligation to ascertain the views of all children capable of forming their own views is to be fully discharged.

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ABOUT THE CHILD LAW CLINIC

The Child Law Clinic was established in 2010 to provide pro bono research assistance to practicing lawyers or civil society groups to assist in their litigation and advocacy work. It also authors its own submissions and amicus briefs to various courts and committees on matters of interest. The Clinic is based at the School of Law at University College Cork School. It engages postgraduate students from the LLM in Children's Rights and Family Law, who provide research assistance under the guidance of Faculty members specialising in child law and children's rights. The Clinic Director is currently Professor Conor O'Mahony.

Past litigation work has included supporting successful cases in the European Court of Human Rights (O'Keeffe v Ireland, 2014), the Irish Supreme Court (O'Meara v Minister for Social Welfare, 2024), and various other cases in the Circuit Court and District Court. Research assistance for civil society groups has addressed a wide range of issues, ranging from discrete queries to in-depth research briefs on issues including family reunification for children in care, parental consent following family breakdown, child homelessness, homophobic and racist bullying, and the right of children to be heard.

For regulatory reasons, the Clinic is not in a position to provide direct legal advice or representation to clients; its work on individual cases must proceed via the medium of a practicing solicitor or barrister.

Lawyers and others wishing to use the Clinic's services should contact the Clinic by email at conor.omahony@ucc.ie, or in writing c/o School of Law, University College Cork, to outline their request for information or support.

See further details, including examples of past work, at
https://www.ucc.ie/en/childlawclinic/

1. INTRODUCTION

Pursuant to international human rights law and the Irish Constitution, the Irish State is legally obliged to make provision for the views of children to be ascertained and given due weight in private family court proceedings concerning guardianship, custody and access. Legislation enacted in 2015 provides a framework for discharging this obligation. Concerns have been expressed over the past decade around the effectiveness of this framework; but to date, no robust empirical evidence has been available against which the legitimacy of these concerns could be measured.

No official statistics are collected to track the frequency with which children's views are ascertained or the mechanisms used to this end. The absence of published written judgments in the vast majority of private family law proceedings combines with the *in camera rule* to further obscure what is happening on the ground. The few empirical studies that have been undertaken in this space are either based on narrow subcategories of cases,[1] or were conducted before the key legal reforms took effect in 2015.[2] In particular, no detailed study has been undertaken analysing the full extent of the impact of Article 42A.4.2° of the Constitution (approved by referendum in 2012 and implemented by legislation in 2015), which makes it an obligation to ascertain the views of all children capable of forming their own views in proceedings concerning guardianship, custody and access[3].

The Child Participation in Private Family Law Proceedings project aims to contribute to our understanding of how the obligation to ascertain the views of children in proceedings concerning guardianship, custody and access is being implemented in practice. The study has been undertaken by researchers in the Child Law Clinic at the School of Law at University College Cork, consisting of a team of postgraduate students in the LLM in Children's Rights and Family Law, under the leadership of Clinic Director Professor Conor O'Mahony and mentored by Liam O'Driscoll. The Clinic was commissioned to undertake this research by the Children's Rights Alliance and One Family. Funding for phase 3 of the project was generously provided by Taighde Éireann – Research Ireland under the New Foundations scheme.

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[1] See, eg, S McCaughren, S Holt, A Parks and S Gregory, *Research report on guidance on contact time for infants and young children in separated families* (One Family/TCD/UCC, 2022, available at https://onefamily.ie/contact-time-for-infants-and-young-children-in-separated-families-research-report/. This report gathered data through a survey of parents, two focus groups with professionals working in the area of family law, and six interviews with members of the Irish judiciary. However, its focus was restricted to cases involving contact arrangements for children aged 0-6 years.

[2] See, eg, R O'Shea, Judicial Separation and Divorce Proceedings in the Circuit Court (PhD Thesis, Waterford Institute of Technology, 2014, available at https://arcmedlaw.com/wp/docs/Headline_Findings_phd_ROS.pdf).

[3] Department of Justice, Review of the Role of Expert Reports in the Family Law Process (June 2024,) available at https://assets.gov.ie/295856/f52bb897-bb6f-4fbc-b4de-5aa7fab484f5.pdf) notes at p 12: "There is an absence of systemic research on the use of expert reports in family law. There is also an absence of data on any aspect of the process including the number of reports ordered and the reasons they are ordered."

The project proceeded in three phases:

Phase 1: Comparative Review of Current Practice (2023)[4]
Phase 2: National Survey of Professionals (2024)
Phase 3: Courtroom Observation (2024)

This research report will present the results of phases 2 and 3 – namely, a survey of practitioners with experience of court proceedings concerning guardianship, custody and access, and observation of such proceedings in a sample of seven District Court venues (both of which were conducted during 2024). It will begin by providing the legal background; Part 2 will examine international law obligations, while Part 3 will assess the steps taken in Irish law to implement these obligations. In Part 4, the study design and methodology will be briefly laid out, following which the results of the study will be discussed in detail in Part 5. Key themes emerging from the research include difficulties in securing expert reports due to costs and a shortage of experts available to prepare reports; concerns around the regulation of professionals charged with preparing reports, and the level of training provided to all professionals involved in private family law proceedings; and the level of support and information provided to children in order to assist them to express their views. The report will conclude in Part 6 with a discussion section that will examine recent reform recommendations made by the Department of Justice *Review of the Role of Expert Reports in the Family Law Process,*[5] *("Review of Expert Reports")* and assess whether they are sufficient to ensure that the constitutional obligation to ascertain the views of all children capable of forming their own views is fully discharged.

2. INTERNATIONAL LAW OBLIGATIONS

Since ratification of the Convention on the Rights of the Child (CRC) in 1992, Ireland has been legally bound by the obligation imposed by Article 12 CRC, which provides as follows:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child,

[4]Conor O'Mahony and Liam O'Driscoll, The Voice of the Child in Private Family Law Proceedings: A Comparative Review (Child Law Clinic, August 2023), available at https://www.ucc.ie/en/media/academic/law/2023x2f2024/VoiceoftheChildinPrivateFamilyLawProceedingsAComparativeReview.pdf.
[5]Department of Justice (n 3 above).

> either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Having ratified the CRC, Ireland is obliged by Article 4 to "undertake all appropriate legislative, administrative, and other measures for the implementation" of Article 12.

Although less explicit, it is increasingly the case that Ireland's obligations under the European Convention on Human Rights (ECHR) also require that children's views are ascertained and given due weight during private family law proceedings. The case law of the European Court of Human Rights does not interpret Article 8 as always requiring a child to be heard in court; this matter should be assessed according to the specific circumstances of each case, while considering the child's age and maturity[6]. A number of older decisions found that no violation occurred in circumstances where it was decided that child participation in proceedings was not necessary or was potentially harmful to the child.[7] Nevertheless, in recent years, the Court has issued a number of decisions finding States in violation of Article 8 for failing to afford children the opportunity to express their views in private family law proceedings. For example, in *M and M v Croatia,* the Court found a violation of Article 8 regarding court proceedings concerning custody in which, inter alia, provision was not made to ascertain the views of a child as to which parent should take care of her[8]. The Court held that children have the same procedural rights as parents to be adequately involved in the decision-making process in custody proceedings[9]. As such, the failure to seek the views of a nine and a half year-old child of above-average intellectual capacities infringed Article 8 by failing to ascertain and ascribe due weight to her wishes as regards the issue of which parent to live with[10]. The judgment in this case made extensive reference to Article 12 of the CRC and General Comment No 12 of the Committee of the Rights of the Child to support its conclusions[11].

Similarly, in *C v Croatia,* a violation of Article 8 was found on the basis that custody proceedings had not afforded a child the opportunity to be heard by the court either directly or through a representative such as a guardian *ad litem*[12]. The Court noted that "the applicant's situation, as a child of divorced parents in a custody battle, would appear to be an example of cases in which children may need special guardians ad *litem* in order to protect their interests, explain to them court proceedings and decisions and their consequences, as well as generally to liaise

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[6]European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child (2022)* at p 44, available at https://fra.europa.eu/en/publication/2022/handbook-european-law-child-rights

[7]See, eg, Sahin v Germany (30943/96, 8 July 2003).

[8]10161/13, 3 September 2015. See further C Mol, "Maturity and the Child's Right to be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared" in K Boele-Woelki (ed), Plurality and Diversity of Family Relations in Europe (Intersentia, 2019) at pp 237-254.

[9]10161/13, 3 September 2015 at [180] to [181].

[10]Ibid at [186].

[11]Ibid at [94], [97], [171] and [181], citing Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard (CRC/C/GC/12, 20 July 2009), available at https://www.refworld.org/legal/general/crc/2009/en/70207

[12]80117/17, 8 October 2020.

between the competent judge and the child."[13] As such, the Court found that "the combination of flawed representation and the failure to duly present and hear the applicant's views in the proceedings irremediably undermined the decision-making process in the instant case."[14]

Like the CRC, the ECHR is binding on the Irish State as a matter of international law. Moreover, section 3 of the European Convention on Human Rights Act 2003 requires Irish courts, when interpreting and applying any statutory provision or rule of law, to do so in so far as is possible in a manner compatible with the State's obligations under the ECHR. Accordingly, the provisions of family law legislation that will be discussed in Part 3 below must, in so far as is possible, be interpreted and applied in a manner that is compatible with the judgments in *M and M v Croatia* and *C v Croatia.*

3. DEVELOPMENT OF IRISH LAW

3.1 1992-2015

The implementation in Irish law, policy and practice of the international law obligation to ascertain and give due weight to the views of children in private family law proceedings has been slow and uneven. Section 47 of the Family Law Act 1995 empowers courts to make orders "procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate". Although this makes no reference to the views or wishes of the person to whom the report relates, the courts have held that the provision is broad enough to encompass a report ascertaining the views of the child.[15] However, section 47 suffered from a number of significant shortcomings as a vehicle for ascertaining the views of children. It fixed the parties to the case with the cost of procuring a report and placed no restrictions on what could be charged for the preparation of a report (or on who might prepare one). The Denham Report highlighted difficulties faced by non-legally aided persons in meeting costs for the appointment of experts under section 47.[16] Hogan and Kelly have outlined that cases involving limited resources are denied the benefit of these reports, as the parties are already involved in legal action that by nature is very costly.[17]

Shortly afterwards, section 11 of the Children Act 1997 inserted a new section 25 into the Guardianship of Infants Act 1964 requiring that in cases concerning the

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[13] *Ibid* at [77].
[14] *Ibid* at [81].
[15] *DK v PIK* [2022] IECA 54 at [15].
[16] The Sixth Report of the Working Group on a Courts Commission (The Denham Report) (Dublin: Government Publications, 1999), available at https://www.courts.ie/ga/acc/alfresco/d871dde4-c70f-419d-80b3-2a27289e8fad/6th%20Report%20WGCC%20summary.pdf/pdf (last accessed February 17, 2015), p.68.
[17] C Hogan and S Kelly, "Section 47 reports in family law proceedings: Purpose, evidential weight and proposal for reform" (2011) 2 Irish Journal of Family 27. See further Department of Justice (n 3 above) at p 30: "One stakeholder noted that they had been quoted €12,000 for a s.47 report."

guardianship, custody or upbringing of a child, "the court shall, as it thinks appropriate and practicable having regard to the age and understanding of the child, take into account the child's wishes in the matter." In *FN v CO*, the High Court found that the principles of constitutional justice "include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court"[18]. Accordingly, section 25 "should be construed as enacted for the purpose of *inter alia* giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child."[19]

However, the effectiveness of these reforms was limited by the failure to commence sections 26 and 28 of the Guardianship of Infants Act 1964[20] which were designed to provide practical mechanisms through which the views of children could be ascertained and communicated to the Court in private family law proceedings. Section 28 would have allowed for the appointment of a guardian *ad litem* or separate legal representation for the child, in a manner similar to the model operated in public law proceedings under the Child Care Act 1991. Meanwhile, Section 26 specified that for the purposes of social reports procured under section 47 of the Family Law Act 1995, the District Court was a "Court" for the purposes of section 47 and thus empowered to order section 47 social reports.

The enactment of section 26 to allow District Courts to avail of section 47 social reports appears to have been based on a misinterpretation of section 47 of the Family Law Act 1995, which is more properly construed as applying in all proceedings (in any court) under the Guardianship of Infants Act 1964[20]. However, the non-commencement of section 26 nevertheless created a (mis)impression that District Courts did not have jurisdiction to procure section 47 social reports, and this (mis)impression prevails in a number of publications by authoritative sources[21]. The net

[18][2004] 4 IR 311 at 322.
[19]Ibid. This passage was later cited with approval by Baker J in A O'D v Judge Constantine G O'Leary [2016] IEHC 555 at [89].
[20]Section 47 itself states in subsection (6) that it is available in proceedings under the Guardianship of Infants Act 1964, and section 5 of the 1964 Act gives jurisdiction in guardianship, custody and access cases to the District Court. Confusion appears to arise due to section 2 of the Family Law Act 1995, which provides that for the purposes of the 1995 Act, "the court" shall be construed in accordance with section 38. Section 38(1) provides that "the Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings under this Act" (emphasis added). However, guardianship, custody and access proceedings are not proceedings held under the Family Law Act 1995; they are proceedings held under the Guardianship of Infants Act 1964. As such, while section 38 of the 1995 Act confines the availability of section 47 reports to the Circuit Court and High Court in proceedings held pursuant to the 1995 Act itself, it does not do likewise for proceedings held pursuant to the 1964 Act. Section 47 separately lists proceedings under the 1964 Act and proceedings under the 1995 Act as proceedings in which section 47 may be invoked. Thus, the better view is that section 47 may be invoked in District Court proceedings under the 1964 Act – notwithstanding the non-commencement of section 26 of the Guardianship of Infants Act 1964 (which is redundant due to the wording of section 47 itself).
[21]See G Shannon, Tenth Report of the Special Rapporteur on Child Protection (2016) at p 227 and Department of Justice (n 3 above) at p 17.

result is that the failure to commence sections 26 and 28 of the Guardianship of Infants Act 1964 left District Courts (where the vast majority of guardianship, custody and access cases are heard)[22] with no clear statutory mechanism for discharging their obligations under section 25 of the same Act to ascertain the views of children.

3.2 Constitutional and legislative developments in 2015

It is against this backdrop that Article 42A of the Constitution (which was approved in a referendum in 2012) was enacted into law in 2015. Sub-section 4 of the Article provides as follows:

> 1° Provision shall be made by law that in the resolution of all proceedings -
> i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
>
> ii concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration.
>
> 2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

In short, Article 42A.4.2° mirrors the terms of Article 12 CRC (at least insofar as it applies to the specified legal proceedings),[23] and requires that the views of children be ascertained and given due weight in all guardianship, custody and access proceedings in which the children are capable of forming their own views. It is now a requirement of both international human rights law (that is binding on Ireland) and of the Irish Constitution that Irish law make provision for this to occur, albeit that Article 12 CRC, the ECHR case law and Article 42A.4.2° of the Constitution all leave open the question of what mechanism(s) might be used for the discharge of this obligation. Article 12(2) CRC refers to a menu of options, whereby a child shall have the opportunity to be heard in judicial proceedings "either directly, or through a representative or an appropriate body".

The enactment of legislation aimed at implementing Article 42A.4.2° came in the form of the Children and Family Relationships Act 2015, which imposes an obligation on courts to ascertain the views of children in private family law proceedings, and makes provision for a mechanism designed to facilitate this. The obligation arises as a general one due to the link between views and best interests.

[22] According to Courts Service statistics, 87% of orders made in guardianship, custody and access cases in 2023 were made in the District Court. See Courts Service Annual Report 2023 at p 74, available at https://www.courts.ie/acc/alfresco/2b552955-e0f9-41a2-80e7-c526d24651e2/Courts%20Service%20Annual%20Report%202023.pdf/pdf/1

[23] Article 42A.4.2° is narrower than Article 12 CRC in that it applies only in the specified court proceedings, whereas Article 12 CRC applies in all matters affecting children. However, within the category of cases covered by Article 42A.4.2°, the level of obligation to ascertain the views of children is essentially identical to the terms of Article 12 CRC.

Under section 3 of the Guardianship of Infants Act 1964 (as substituted by section 41 of the Children and Family Relationships Act 2015), the best interests of the child is the paramount consideration for the court in all guardianship, custody and access cases. Section 31(2)(b) of the 1964 Act (as inserted by section 63 of the 2015 Act) obliges the court to take the child's ascertainable views into account when assessing the child's best interests. Therefore, this obligation cuts across all decisions made under the Act. In addition to this general obligation, the obligation to ascertain and take account of the child's views is specifically re-stated in a number of new provisions governing declarations of parentage,[24] applications for guardianship,[25] applications for access,[26] and enforcement orders.[27]

Section 31(6) of the 1964 Act (as inserted by section 63 of the 2015 Act) stipulates that in obtaining the ascertainable views of a child, the court shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence. While the Act does not rule out any particular approach to achieving this end, it only spells out a single mechanism in detail. Under section 32(1)(b), the court is empowered (on its own motion or on application of one of the parties) to make an order appointing an expert to determine and convey the child's views. It is important to note that this is a discretion rather than an obligation. In deciding whether to make such an order, the court is obliged in particular to have regard to the following:

(a) the age and maturity of the child;
(b) the nature of the issues in dispute in the proceedings;
(c) any previous report on a question affecting the welfare of the child;
(d) the best interests of the child;
(e) whether the making of the order will assist the expression by the child of his or her views in the proceedings;
(f) the views expressed by the parties.

On the question of who may act as an expert, sections 32(10) and (11) give the Minister for Justice, in consultation with the Minister for Children, the power to make regulations establishing the qualifications and experience that an expert appointed under section 32 must have, and setting out minimum standards for the performance of the role. The Guardianship of Infants Act 1964 (Child's Views Experts) Regulations 2018 designate five categories of professionals who (provided they have experience of working with children or adolescents for five of the previous ten years and are registered with their professional body) may act as experts for the purposes of section

[24]Section 21(8) of the 2015 Act.
[25]Section 6C(8), 6E(13) of the 1964 Act (as inserted by section 49 of the 2015 Act).
[26]Section 11B(3) of the 1964 Act (as inserted by section 9 of the 1997 Act and amended by section 55 of the 2015 Act).
[27]Section 18A(5) of the 1964 Act (as inserted by section 60 of the 2015 Act).

32(1)(b): psychiatrists, psychologists, social care workers, social workers, and teachers. However, these Regulations are only applicable to reports relating to the child's views prepared under section 32(1)(b). They are not applicable to welfare reports which the court may order under section 32(1)(a). In at least some District Court venues, judges have developed a local practice of using a section 32(1)(a) welfare report as a dual-purpose report addressing both the child's welfare and the child's views.[28] In such circumstances, the views of the child may be reported to the court without any legal stipulation regarding the qualifications of the expert preparing the report. It will be seen below that this broadens the pool of potential experts available to produce reports, but raises questions around the effectiveness of the law aimed at regulating the qualifications of experts.

3.3 Assessment of Section 32

There are a number of weaknesses in section 32(1)(b) as currently drafted. The first weakness is that the Act does not clarify how a court is to determine whether a child is capable of forming views, which is the issue on which the existence or otherwise of an obligation to ascertain those views hinges. In the absence of any guidelines, it would seem that this is a matter for each individual judge to determine; no guidance is given as to what judges should take into account (or indeed what practical steps they should follow) when making this determination. The obvious route would be to appoint an expert to make this assessment on their behalf, and indeed, one of the items stipulated in the prescribed form of the order directing a report from an expert is to ascertain whether the child is capable of forming their own views on the proceedings.[29] However, as already noted, the appointment of an expert is not mandatory in every case; moreover, as will be seen below, issues relating to the cost and availability of experts will dictate that there will be many cases where they are not appointed. Whether judges are suitably qualified to make this determination themselves is open to question, and the absence of any guidance on how they should do so is a recipe for inconsistency.

Second, as previously noted, section 32(1) makes it clear that the appointment of an expert to determine and convey the views of the child is entirely at the discretion of the court. This is not necessarily a problem; Article 42A.4.2° does not require the appointment of a person to ascertain and convey the views of the child, as long as the child is given the opportunity to express those views in some form. However, the Act is silent as to what exactly should happen in cases where the court decides not to appoint an expert. This lack of clarity has potential to pose difficulties. The obligation to facilitate the free expression of the child's views remains, but the absence of clear provisions stipulating how this should happen leaves the door open to nothing happening at all. Direct testimony from the witness box will often be inappropriate given the nature of the proceedings. This leaves a meeting with the judge as the only

[28]See Practice Direction for District No 20 (Mallow, Fermoy and Midleton District Courts), 26 October 2023.
[29]SI No 17/2016 – District Court (Children and Family Relationships Act 2015) Rules 2016, O 58, r 14.

other option; but it will be seen below that many judges do not feel qualified to engage in such meetings, and do so rarely in practice.

The final weakness relates to the treatment of the issue of costs where an expert is appointed to ascertain the child's views. Section 32(9) provides that the fees and expenses of an expert appointed under this section shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party as the court may determine, while section 32(10)(b) provides that the fees for an expert may be fixed by regulations made by the Minister. Experience from the use of section 47 of the Family Law Act 1995 as a means of procuring an expert report on children demonstrates the potential for an uneven and potentially discriminatory operation of these provisions, whereby experts are not appointed to ascertain the views of children in cases where the parties are of modest financial means and cannot afford to pay for the fees of the expert.[30] Therefore, the fact that Section 32(9) makes it mandatory for the fees of the expert to be paid by the parties to the proceedings risks a situation where not all children are afforded a similar opportunity to be heard, which arguably falls short of the intended effect of Article 42A.4.2°.

The Guardianship of Infants Act 1964 (Child's Views Experts) Regulations 2018 attempted to mitigate this risk by prescribing the rates of professional fees for preparing reports in relation to children. For ascertaining the age and maturity of the child, determining the child's capacity to understand the report, and ascertaining whether the child is capable of forming his or her views on the matters of the proceedings or reporting them to the court, the expert may charge up to €240. For functions combining ascertaining the age and maturity of the child and furnishing a report to the court, the expert may charge up to €325. In addition, an expert may charge expenses for appearing as a witness in the proceedings, up to a maximum amount of €250.[31] Testimony provided to the Joint Oireachtas Committee on Justice and Equality in 2019 suggested that the intended effect of these Regulations is frustrated by the fact that the rates are set at relatively low levels. This limits the number of experts willing to perform the amount of work involved for the fee that would be payable, making it difficult for parents to identify experts to perform the task.[32] At the same time, stakeholders consulted for the Department of Justice *Review of Expert Reports* indicated that the Regulations are not always complied with, and that some experts are charging between €800 to €1,000 for section 32(1)(b) reports.[33]

The flaws in the drafting of section 32 were such that there is clearly a risk that it is insufficient to fully implement the obligations imposed by Article 12 CRC and Article 42A.4 of the Constitution in the context of private family law proceedings. However, to date, no robust empirical data has been available to assess whether this risk had become a reality in practice. Evidence presented to the Joint Oireachtas Committee

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[30]See note 22 above and accompanying text.
[31]Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018), Article 10.
[32]See Joint Oireachtas Committee on Justice and Equality, Report on Reform of the Family Law System (October 2019) at p 36, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf
[33]Department of Justice (n 3 above) at p 30.

on Justice and Equality in 2018 suggested that the child's right to be heard was not being fully vindicated in these proceedings.[34] However, this evidence was mostly anecdotal in nature; it drew on the personal experiences of a small number of practitioners, and could not be relied upon as an accurate representation of the system as a whole. A more robust appraisal is required that seeks to document (within constraints imposed by the *in camera* rule) the frequency, mode and effectiveness of child participation in private family law proceedings.

4. STUDY DESIGN AND METHODOLOGY

The *Child Participation in Private Family Law Proceedings* project aims to contribute to our understanding of how the obligation to ascertain the views of children in guardianship, custody and access proceedings is being implemented in practice, and how the current arrangements might be improved. Phase 1 of the project produced a comparative review that provided an insight into the processes and structures for ascertaining the views of children in private family law proceedings in six jurisdictions (Ireland, England and Wales, Australia, New Zealand, Ontario, and Germany), with a view to identifying common challenges, the strengths and weaknesses of different approaches, and variations in law and practice.[35] Phases 2 and 3 (which are the focus of this report) produced original empirical evidence regarding the practical reality of child participation in private family law proceedings in Ireland using multiple methodologies. The study is framed around the following research questions:

1. How frequently do children participate in private family law court proceedings in Ireland, and what mechanisms are used to facilitate their participation?

2. How effective are the existing arrangements, and what barriers (if any) exist?

3. What measures could be implemented to enhance the effectiveness of child participation in family law court proceedings?

In answering these questions, the study adopted a mixed-methods approach consisting of a national survey of practitioners (phase 2), followed by courtroom observation of a sample of District Court proceedings across a selection of District Court venues (phase 3). Ethical approval for both phases was granted by the Social Research Ethics Committee at University College Cork. In addition, permission to attend and report on District Court proceedings was granted by the Minister for Justice pursuant to Regulation 2(b) of the Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005.

The survey was distributed in Spring 2023 using social media channels and professional networks, supplemented by a snowball sampling technique. It asked a series of qualitative and quantitative questions aimed at capturing professionals' experiences of and views on the implementation of the obligation to ascertain the views of

[34] Joint Oireachtas Committee on Justice and Equality (n 32 above).
[35] O'Mahony and O'Driscoll (n 4 above).

children in private family law proceedings. 58 responses were received (31 solicitors, 9 barristers, 3 child psychologists and 15 other) with a good range of geographical experience (15 urban, 7 rural and 36 both). The survey data was analysed by researchers at the Child Law Clinic using thematic analysis for the qualitative element.

The courtroom observation phase involved researchers attending court in pairs for a total of 16 days of private family law hearings across seven of the 23 District Court venues (three urban, four rural). Within those days, a total of 62 cases concerning guardianship, custody and access were observed and analysed with respect to the issue of the ascertainment of the views of children. Since Article 42A.4 only refers to proceedings involving guardianship, custody and access, the research focused on these cases to the exclusion of (eg) cases involving domestic violence or maintenance. The courtroom observation data was used to supplement and triangulate the survey data. Further triangulation against relevant published sources occurred wherever possible. In respect of both phases 2 and 3, individual researchers conducted their own analysis of the data, before presenting this to the research team for interrogation; the process of reaching consensus among the research team on the key research findings served to control against the risk of individual bias.

There are a number of limitations of this study. Resource and logistical constraints restricted the number of days of family law proceedings that could be observed. For this reason, phase 3 focused exclusively on District Court hearings, since the vast majority of guardianship, custody and access cases are heard at District Court level.[36] Circuit Court and High Court proceedings were not included. The sample size of cases observed was not small, but neither was it especially large. It was not possible to follow individual cases through multiple days of hearings, and so the observations represent a snapshot of the state of play in a hearing on a given day rather than a comprehensive case history.

Parents and children were not included in the survey due to the constraints of the *in camera* rule. A decision was made to restrict the practitioner survey to lawyers and parties acting as experts for the purposes of section 32 or section 47 reports; judges were not included in its scope due to ethical complexities arising from the interaction between university research ethics procedures and the 2023 Courts Service protocol on judicial participation in research projects.[37] (Note, however, that members of the judiciary, as well as other stakeholders not covered by this project's practitioner survey, participated in the consultation process as part of the Department of Justice *Review of Expert Reports* – the findings of which are integrated into the analysis below).

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[36]See note 22 above.
[37]Courts Service Legal Research and Library Services Committee protocol on "Judicial Participation in Research Projects – Guidance for Researchers" (8 February 2023, available at https://www.courts.ie/acc/alfresco/d7db0f3d-a8c2-4e7e-9f4e-2541bc9ae13f/LRLS%20Subcommittee%20-%20Judicial%20Participation%20in%20Research%20Projects%20Protocol%2020230222.docx/docx/1

5. RESULTS

5.1 Frequency of ascertaining views

Children will never have their views ascertained in 100% of private family law proceedings. The obligation under Article 12 CRC and Article 42A.4.2° of the Constitution applies only to children who are capable of forming their own views, meaning that there will always be some cases involving very young children in which the obligation does not apply. It is not possible to state what proportion of proceedings fit into this category; inevitably, it will vary over time in line with the age profiles of the children involved in the proceedings. As such, there is no "correct" figure for the proportion of proceedings in which the views of children will be ascertained. Nevertheless, on the law of averages, cases that exclusively involve very young children would normally form a small minority of the total. The converse of this is that in a system in which it is legally mandatory to ascertain the views of all children capable of forming their own views in guardianship, custody and access proceedings, it would be reasonable to expect that this would occur in a substantial majority of proceedings.

The Department of Justice *Review of Expert Reports* noted that participants in its stakeholder consultation identified "divergence on how often Voice of the Child reports are ordered with some District Court Judges ordering a report in virtually every case and others only ordering them in 5-10% of cases. It was reported that Voice of the Child reports are ordered in approximately 20% of cases in the Circuit Court and 50% of cases in the High Court."[38]

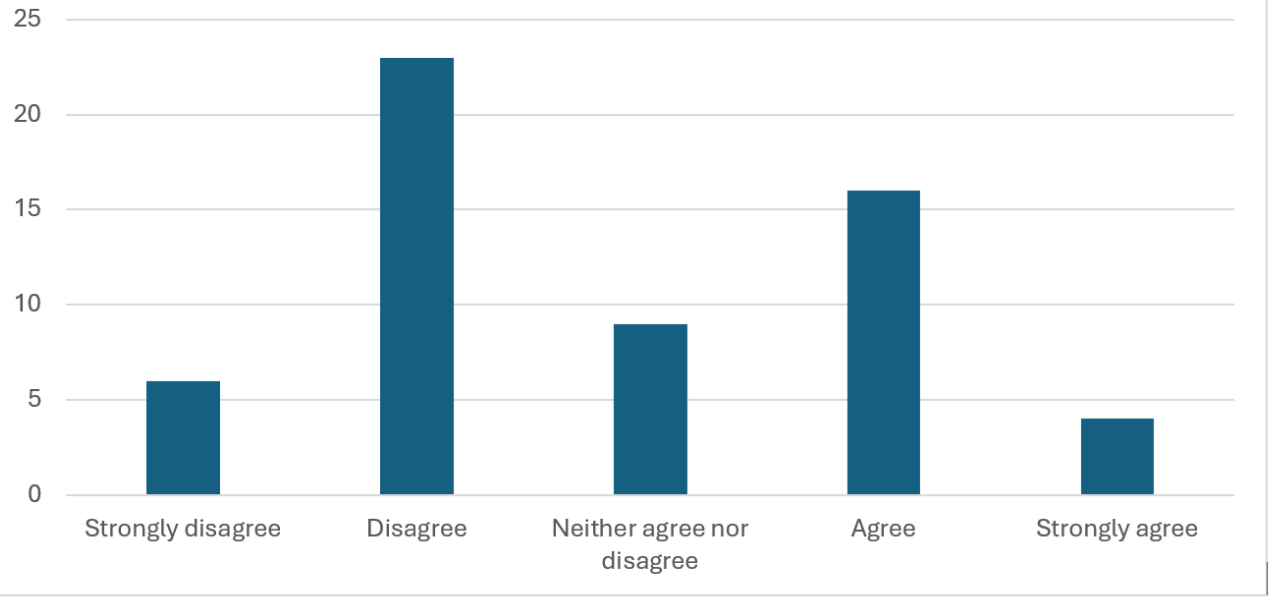
The practitioners surveyed for this study were asked to rate how frequently children participate in private family law proceedings, with 1 being the least frequent and 10 being the most frequent. The average rating was 4.24/10. This correlates very closely with the courtroom observation data: children's views were reported to have been ascertained in 29 out of 62 cases observed (47%). The variation between venues in appointment rates identified in the *Review of Expert Reports* was very much in evidence in the data, ranging from 0% of cases observed in one venue to 91% of cases observed in another. Some judges repeatedly informed parties that no order could be made without a section 32(1)(b) report being commissioned; but this approach was far from commonplace. The highest appointment rate of 91% arose in an urban venue, while the lowest appointment rate of 0% arose in a rural venue. However, other urban venues had appointment rates of 23% and 25% of cases observed; while some rural venues had appointment rates of 45% and 33% of cases observed. As such, the variation is venue-specific rather than evidence of a sharp urban/rural divide.

The data suggests that nationally, children's views are ascertained in less than half of all cases concerning guardianship, custody and access. It would be reasonable to surmise that a substantial number of cases pass through the courts in which the obligation to ascertain the view of the children is applicable, but is not discharged. Further corroboration is provided by the survey results, which provide further evidence

[38]Department of Justice (n 3 above) at p 29.

that the proportion of children whose views are ascertained is too low at present. When asked whether they agreed or disagreed with the statement that "[t]he obligation under Article 42A.4 of the Constitution to ascertain the views of all children capable of forming views in the course of proceedings concerning guardianship, custody and access is being discharged at present," 50% of respondents disagreed, whereas only 34% of respondents agreed (Figure 1):

Figure 1: "The obligation under Article 42A.4 of the Constitution to ascertain the views of all children capable of forming views in the course of proceedings concerning guardianship, custody and access is being discharged at present."



The survey of professionals asked participants to rank which factors were the most important in determining whether the views of children are ascertained. The approach of the judge was ranked as the most important factor, but there was a very mixed picture here, with little to choose between the importance ascribed to this factor and to the approach of the lawyers, financial resources, and the skills/training of professionals (see Figure 2). The only clear consensus in response to this question was that the courtroom environment and facilities was the least important factor (notwithstanding the fact that there was strong consensus among 81% of participants in response to another question that private family law court proceedings are not a child-friendly environment). This can be accounted for by the fact that most children participate indirectly through expert reports, and do not need to attend court during this process; as such, while the courtroom environment and facilities might act as a barrier to direct child participation, it is not an important factor in determining whether children's views are ascertained indirectly.

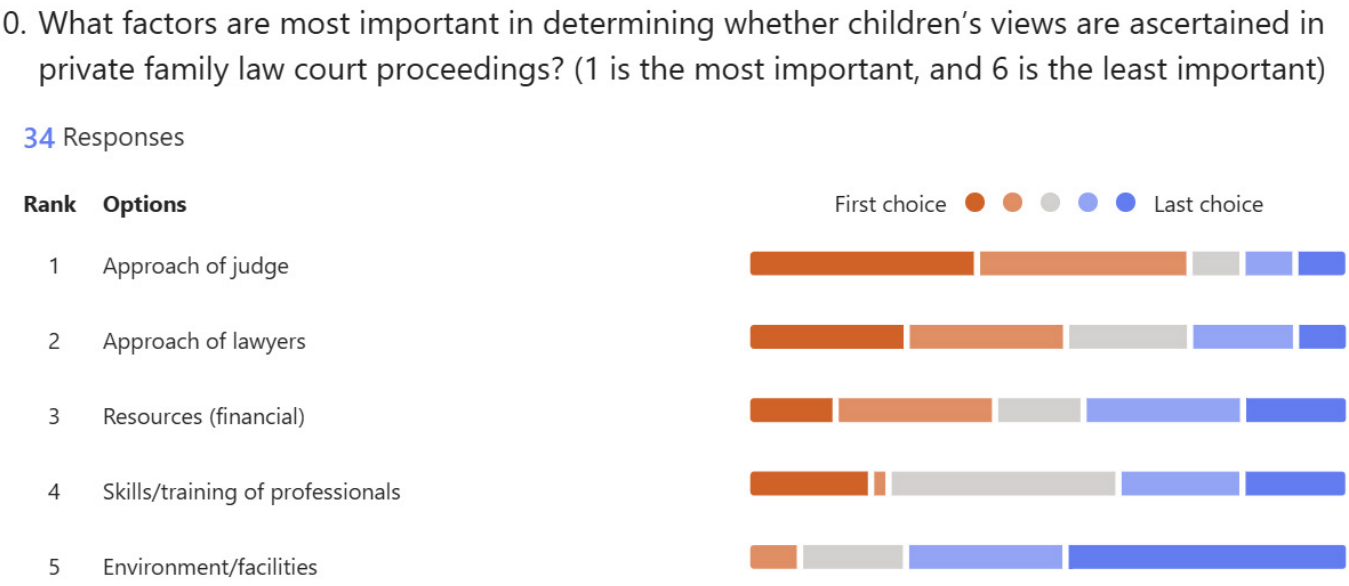


Figure 2: Factors determining whether children's views are ascertained.

5.2 Mechanism used

Where children's views are ascertained in guardianship, custody and access proceedings, the data indicates that the most common mechanism used for this purpose is the expert report pursuant to section 32(1)(b) of the Guardianship of Infants Act 1964. In the survey, 71% of participants indicated that this was the most frequently used mechanism, while 25% indicated that it was the second-most used mechanism. Section 32(1)(b) reports were even more dominant in the courtroom observation phase, accounting for 24 of the 29 cases in which the views of the children were ascertained.

The survey data listed social reports under section 47 of the Family Law Act 1995 as the second-most common mechanism for ascertaining the views of children in proceedings concerning guardianship, custody or access. This was not borne out in the courtroom observation phase; section 47 reports were not identified as having been used in any of the cases in which the views of the child were ascertained. The discrepancy between the two phases in this respect may be in part explained by the confusion surrounding the availability of section 47 reports in District Court proceedings (whereas no such confusion arises in the small proportion of these proceedings that are heard in the Circuit Court). While the courtroom observation phase was limited to District Court proceedings, the survey did not restrict its focus in the same way.

A meeting between the judge and the child was listed as the third-most common mechanism of ascertaining the views of children in guardianship, custody and access proceedings. However, this was not to suggest that it is a commonplace occurrence. It was documented in just two of the cases observed in phase 3. The qualitative data from the survey demonstrated a commonplace sentiment among judges that they are not suitably trained or qualified to conduct such meetings, leading to a lack of willingness on the part of many judges to utilise them as a means of ascertaining the view of the child:

> Judges don't like meeting with children to hear their wishes. They don't see themselves as qualified to do this. *(Solicitor, Urban & Rural)*

> Many judges feel inadequately prepared to meet and converse with children of different ages. They also worry about allegations against them relating to the interviewing of children. *(Family Therapist, Urban & Rural)*

This data echoes findings from empirical research on public law proceedings under the Child Care Act 1991 (which in most Districts would be conducted by the same judges as proceedings on guardianship, custody and access).[39]

Finally, in the cases observed during phase 3, the views of children were ascertained via the medium of reports prepared by the Child and Family Agency pursuant to section 20 of the Child Care Act 1991 in three cases. Like section 47 of the Family Law Act 1995, this section was not drafted as a mechanism for ascertaining the views of children specifically – it refers to "an investigation into the child's circumstances" – but this is broad enough to include details regarding the child's views. However, its scope is relatively narrow, since it can only be ordered by the court in cases in which there are concerns for the welfare of the child such that it may potentially be appropriate to make a supervision order or care order.

5.3 Barriers to ascertaining views

Survey participants identified multiple barriers to section 32(1)(b) reports being commissioned, with the result that the views of children are not ascertained. Cost was a major theme in the data:

> The cost of involving reporters to relay the voice of the child is a huge barrier [that] [o]ften means reports cannot be commissioned, and if the judge is not willing to meet the child themselves it leaves a gap. *(Solicitor, Urban & Rural)*

> Cost of the section 32 and section 47 reports and professionals available to complete them at affordable rates. These reports are not obtained in all cases as cost is certainly a barrier for people. *(Solicitor, Rural)*

> … section 32 reports are cost prohibitive for a lot of litigants and the waiting time is astronomical. Even for people on legal aid, the cert does not always cover the cost of the report. *(Solicitor, Urban & Rural)*

> Reports costs thousands, funding is very inadequate, reliance on small cohort of private practitioners who are willing to do the report. Reports take months and any follow up (ie therapies, parenting plans) are very expensive. The cost is prohibitive. *(Solicitor, Urban & Rural)*

The cost of reports may act as a barrier not only to the realisation of the right of the child to be heard, but to the ability of parents to pursue legitimate claims regarding custody or access. In a case observed in phase 3, a father who did not have legal

[39] A Parkes, C Shore, C O'Mahony and K Burns, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27 *Child and Family Law Quarterly* 423 at pp 432-433.

representation was seeking sole custody on the basis that the current access arrangement was not being honoured. The judge informed the father that proceeding with the case would require a section 32(1)(b) report in order to adhere to the constitutional requirement to hear the voice of the child. When informed that such a report may cost more than €1,000, the father accepted the judge's suggestion of entering into mediation rather than pursuing his claim in court. Irrespective of whether this was a good outcome in this particular case, it is clear that there is significant structural difficulty arising from the fact that the parents are fixed with the costs of commissioning expert reports. A parent's decision as to whether or not to pursue a claim for guardianship, custody or access should not hinge on whether or not they can afford the costs associated with ascertaining their child's views.

Other issues regarding payment for section 32(1)(b) reports featured in numerous cases observed in phase 3. The most common approach appears to be for the cost of the reports to be equally split between the parents. In two cases, a report had been completed, but the parent(s) had not yet paid for it; as result, it had not been submitted to the court (which the judge in one of the cases described as a "pity"). In another case, it had been agreed that the parents would split the cost, but the father failed to pay his half. In a third case, one of the parties only agreed to pay half of the costs if the order commissioning the report was amended to include a welfare report under section 32(1)(a). A fourth case involved a commitment by the child's grandparents to cover any costs associated with updating a report that had been commissioned in previous proceedings.

A second issue that commonly featured in the survey responses was a lack of availability of experts to produce section 32(1)(b) reports, either in general or at the prescribed rates. It was noted earlier that in some Districts, judges have attempted to broaden the pool of potential experts by using welfare reports under section 32(1)(a) (in respect of which there is not a prescribed list of qualified experts) as a means of ascertaining the views of children;[40] but this is not a widespread practice. Associated with the shortage of experts, practitioners also complained of lengthy delays in obtaining reports:

> … the availability of psychologists to carry out the assessments and reports is very problematic … there is nobody available in the whole county doing s 32 court reports on the voice of the child; hence we are relying on practitioners in neighbouring counties at great cost and with long delays. (Barrister, Urban & Rural)

> There is also a shortage of child psychologists who will work for Legal Aid Board fees and some that do have fixed views. (Solicitor, Urban)

> There is a lack of suitably qualified experts available to conduct reports. And the costs of such reports are very high. (Barrister, Rural)

> … the funding needs to be subsidised at a minimum, more experts are required [and] there is significant delay in obtaining appointments. (Solicitor, Urban)

[40]See note 28 above and accompanying text.

In one case observed in a rural venue during phase 3 of the project, the judge noted that an order commissioning a section 32(1)(b) report had been made four years previously, but no report had yet been produced.

Other issues that were identified as barriers to ascertaining the views of children were the approach taken by judges and legal practitioners, and a related lack of awareness and training:

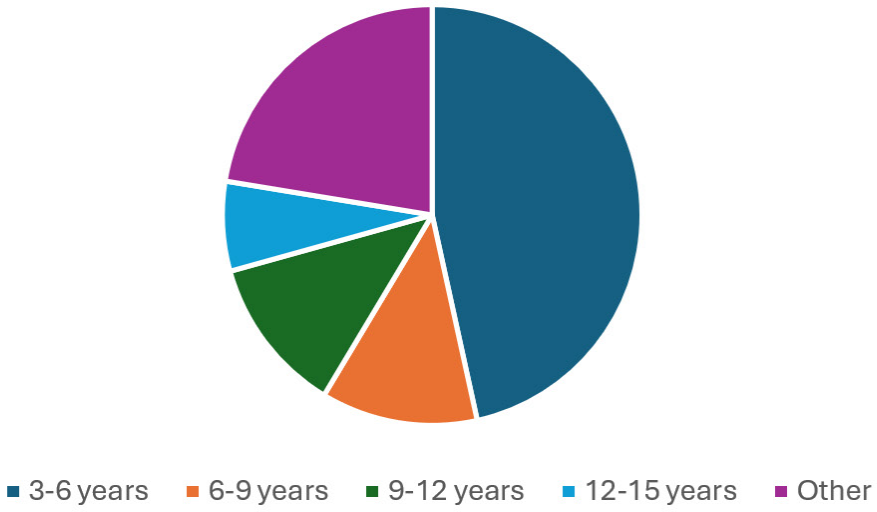
> It is generally up to one or both of the parties as to whether the views of the child will be sought. The judge will very rarely look for such a report on their own motion … (Solicitor, Urban)

> Yes, there are barriers. These range from resources (eg, the cost of involving experts to undertake s 32 or s 47 assessments and prepare reports) to expertise (eg, most judges have not had the requisite training to facilitate a discussion with children) to time (eg, the additional time involved in involving children). (Barrister, Urban)

The approach of parents is also a factor; several cases were observed during phase 3 in which a judge ordered the preparation of a section 32(1)(b) report, but the parents questioned its necessity or argued that it would delay the proceedings. While these arguments did not necessarily sway the judges (with the need to adhere to the requirements of Article 42A.4.2° cited in a number of cases observed), it is reasonable to suggest that there may be other cases in which the parents hold a similar view, and a judge does not commission a report because neither party requests one.

The age of the child would appear to be a barrier to the participation of at least some children that should be old enough the form their own views, albeit perhaps a minority. Participants in the survey were asked what tends to be the minimum age below which the judge(s) in their area are not willing to ascertain the views of children, and the results varied considerably. The most common answer (47%) was age 3-6 years, but 12% of respondents said it was 9-12 years, while 7% of respondents set the figure as high as 12-15 years (see Figure 3). Even where children are older, this does not guarantee that their views will be heard by the court. In phase 3, a case was observed in which the father was seeking sole custody on the basis of an allegation that the mother was unfit to have custody. Although the children involved were aged 17 and 15, the court proceeded on the basis of the evidence of the father and a social worker, and made no reference to the views of the children.

Figure 3: In your experience, is there a minimum age below which the views of children are not sought in private family law proceedings?



The local variations evident in this data are in line with the findings of extensive research on public law proceedings under the Child Care Act 1991 that have documented the extent to which different District Court judges take different approaches to similar issues, including (but not limited to) ascertaining the views of children.[41]

5.4 Influence on proceedings

Participants in the practitioner survey were asked whether they agreed or disagreed with the statement that "the views of children, once ascertained, are influential on the outcome of cases." 66% of respondents agreed or strongly agreed with this statement, while only 10% disagreed or strongly disagreed. Some practitioners expressed discomfort with the pressure that children may come under if their views are seen as being so influential:

> I think that the issue is that there is a difference between child participation and the notion that the child gets to decide. The latter represents an abdication of parental responsibility and is open to abuse and manipulation of the children. It is the voice of the child not the choice of the child. Parents and judges need to know that but they don't. There is a District court judge who asks when parents have agreed access terms whether six and seven year old kids agree with what the parents have agreed. That is unfair on the children to put them in that position. That does not empower them. It endangers them. *(Solicitor, Urban & Rural)*

Meanwhile, a minority of practitioners were critical of the failure of courts to give due weight to the views of children when making decisions:

[41]See C Coulter, Second Interim Report: Child Care Law Reporting Project (October 2014, available at www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf), pp 7, 10 and 61, and Parkes et al (n 39 above) at p 438

> Courts can sometimes receive reports which contain the views of the child, but not give sufficient weight to the views of that child. The Court tends to pay more attention to the views of the expert. So, the views of the child are ascertained and then a paternalistic approach is adopted and the Court decides what is in the best interests of the child. What then, is the point of obtaining the views of the child, if the adults are going to ignore them and decide what is best? *(Barrister, Rural)*

5.5 Effectiveness of existing arrangements

Participants in the survey were asked to rank the various mechanisms for ascertaining the views of children in order of effectiveness. The section 32(1)(b) report was considered the most effective by 64% of respondents, while the meeting with the judge was ranked first by 23%. Having said that, the qualitative data suggested that participants in the survey still had considerable concerns about the effectiveness of each of these mechanisms. It was seen earlier that the availability of both mechanisms can be limited by a shortage of section 32(1)(b) experts, or difficulties in securing experts at the prescribed fee rates, or by the unwillingness of judges to meet with children. Even where these issues are overcome, participants were of the view that the mechanisms still do not always effectively incorporate the views of children into the proceedings.

In General Comment No 12 in 2009, the Committee on the Rights of the Child stated that where the child's views are conveyed through a representative, that representative "must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children"; additionally, "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative."[42] It is therefore notable that notwithstanding the 2015 reforms, there is evidence that the level of qualifications and experience of people acting as experts can vary considerably. The Department of Justice *Review of Expert Reports* noted the following from its stakeholder consultation:

> Stakeholders stressed that there is only a small pool of people doing this work which places limitations on choice. Stakeholders noted that because of the pressure on parties to find experts, less qualified people are moving in and parties may suggest someone less qualified than they would have liked in order to get the report quicker.[43]

It should be recalled in this context that some courts use section 32(1)(a) welfare reports rather than section 32(1)(b) voice of the child reports as a dual-purpose welfare and views report, which circumvents the regulations that are applicable to section 32(1)(b) reports.[44] This has the advantage of broadening the pool of experts that may be commissioned to prepare a report, but the potential disadvantage of

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[42]Committee on the Rights of the Child (n11 above) at [36].
available at https://www.refworld.org/docid/4ae562c52.html

[43]Department of Justice (n 3 above) at p 30.

[44]See note 28 above and accompanying text.

contributing to the concern that not all experts who prepare reports are suitably qualified to do so.

A recurring theme in the data in the practitioner survey conducted for this project was that the framework regulating who may act as an expert for the purposes of ascertaining the views of children remains inadequate. This concern particularly related to section 47 reports, but also to a lesser extent to section 32(1)(b) reports:

> Regulation of all professionals carrying out court reports is needed. Section 47 reports [are] unregulated and can be carried out by anyone. Section 32 reports are better regulated in legislation, but who checks qualifications and experience of practitioners?[45] *(Family Support Worker, Urban & Rural)*

> Section 43(2)(b) Regulations limit the qualifications and exclude family therapists, while including teachers who do not generally have expertise in family dynamics. *(Clinical Psychologist, Urban & Rural)*

> As matters stand, persons who are not qualified to write reports, are offering services, attending court and offering views which affect children. *(Barrister, Rural)*

The concerns around the regulation of the qualifications of expert report writers led to a related concern around the level of skill exercised by some of the experts:

> There is a wide spectrum regarding the professionals who engage with the children. Depending on the professionals involved, there could be huge differences as to the effective participation of the children. *(Solicitor, Urban)*

> Some professionals charged with seeking the views of the child do not have the relevant training and experience to complete this work and ensure their views are sought. *(Guardian ad litem, Urban & Rural)*

A number of participants identified pressure of time as a factor that undermines the effectiveness of expert reports. This related both to pressure on time in court, and pressure of time during the assessment process leading to the production of the report:

> I think that the amount of cases which are listed on a daily basis may impose a barrier to effective child participation on judiciary. *(Barrister, Urban)*

> I meet children twice but I believe it's not enough time. It's such a complex area, so many factors age etc. *(Social Care Practitioner, Urban & Rural)*

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[45]On this point, see Department of Justice (n 3 above) at p 31: "Stakeholders reported that the process of checking an expert's qualifications is informal. Parties usually exchange assessors CVs when trying to agree on one and then one of the parties, usually the party that didn't propose the expert, would also check out the qualifications. The CV is then brought to the judge to consider … The CV would list the assessor's academic qualifications and experience. Stakeholders reported that the CV is usually taken at face value. It was reported that sometimes a judge may insist that the professional is CORU registered. It was reported that the assessors [sic] qualifications are normally listed at the beginning of the report and that an expert can be challenged on their qualifications post report if called as a witness."

> The current system seems to expect a short assessment with limited meetings with the child with the need for parents to be heard. Often it is the parents that take up most of the time for an assessment. *(Guardian ad litem, Urban & Rural)*

If an expert report is not commissioned by the court, then direct participation through a meeting with the judge is the most commonly-used mechanism for ascertaining the views of the child. While Article 12 CRC allows for children to be heard either directly or through a representative, the Committee on the Rights of the Child stated in General Comment No 12 that "wherever possible, the child must be given the opportunity to be directly heard in any proceedings"[46] (although "[p]referably, a child should not be heard in open court").[47] To this end, States Parties are obliged to provide training on Article 12 to all professionals working with and for children (including judges and lawyers), ensure appropriate conditions for supporting and encouraging children to express their views, and combat negative attitudes, which impede the full realization of the child's right to be heard.[48] The Committee also stressed that:

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.[49]

The data gathered in this study clearly indicates that current arrangements in the Irish family law system are not well suited to the direct participation of children. It was already noted that 81% of respondents to the practitioner survey were of the view that private family law court proceedings are not a child-friendly environment. Respondents were also concerned about whether judges are properly qualified and trained to communicate with children in direct meetings, as well as with the appropriateness of such meetings from an evidential standpoint:

> Some judges have little to no experience with children and child development which is also of increasing concern … *(Solicitor, Urban & Rural)*

> … there are issues with "evidence" being given in judges' chambers in the absence of the parties who would wish to put context to the views given or correct a mistake/ misunderstanding but can't … At the end of the day, the parties are the parents and the submissions made will focus on what suits either party. The views of the child can are ardently and passionately argued by the legal team – if they favour that party's position. *(Solicitor, Urban)*

A further point that raises concerns around the effectiveness of child participation in guardianship, custody and access proceedings relates to the level of information provided to children. In General Comment No 12, the Committee on the Rights of the Child emphasised that a precondition of children being able to express an informed view is that they have a right be informed about the matters under consideration, and

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[46]Committee on the Rights of the Child (n 11 above) at [35].
[47]*Ibid* at [43].
[48]*Ibid* at [49].
[49]*Ibid* at [34].

of the options and possible decisions to be taken (and their consequences). Children must also be informed about the conditions under which they will be asked to express their views.[50] Particular attention needs to be paid to the provision and delivery of child-friendly information and adequate support for self-advocacy.[51] Additionally, since Article 12 requires that children's views are given due weight, children have a right to receive feedback informing the child of the outcome of the process and how her or his views were considered. This acts as "a guarantee that the views of the child are not only heard as a formality, but are taken seriously", and "may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint."[52]

The Department of Justice *Review of Expert Reports* described access to information as a "dominant message" emerging from a consultation with young people conducted as part of the review, with young people calling for more communication; clear age-appropriate information to prepare children and young people for court proceedings; to be kept informed; and for better feedback loops.[53]

In the practitioner survey, participants were asked whether they agreed or disagreed with the statement: "Children are provided with accessible information before, during and after private family law court proceedings." 33% of respondents strongly disagreed, while a further 47% disagreed. With a total of 80% of respondents either disagreeing or strongly disagreeing, this was one of the points displaying the highest level of consensus within the survey data – rivalled only by the similar figures regarding the absence of a child-friendly environment. Clearly, the provision of information and feedback to children is a significant weak point in current arrangements for ascertaining the views of children. Meanwhile, the court environment is such that direct participation is likely to continue to be significantly less common than indirect participation through expert reports until such time as significant work is undertaken on the physical facilities in which private family law proceedings are heard, and on mitigating the more adversarial aspects of the current model. One practitioner noted that at present, "[t]he court environment is totally wrong for any child and they should not be dragged into these proceedings." *(Solicitor, Urban & Rural)*

5.6 Potential Reforms

In light of the issues identified in the data presented above, it is not surprising that participants in the practitioner survey identified a wide range of potential reforms that they would like to see implemented with a view to enhancing child participation in private family law proceedings.

> Measures to address the cost of procuring expert reports were a primary concern: … provide for reports which are affordable yet the quality of same is not affected. *(Solicitor, Rural)*

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[50] *Ibid* at [25].
[51] *Ibid* at [34].
[52] *Ibid* at [45].
[53] Department of Justice (n 3 above) at pp 9-10.

> More resources and experts to get views required. *(Solicitor, Urban)*
>
> … the funding needs to be subsidised at a minimum, more experts are required [as] there is significant delay in obtaining appointments. *(Solicitor, Urban)*
>
> … perhaps the funding of court reports could be centralised and when a report is ordered by the court, the payment of the professional would be on the basis of central funding and a means test applied to the parties. Where applicable the parties pay a contribution towards/portion of the assessor's fee commensurate with their means. *(Solicitor, Urban)*

Multiple respondents expressed the view that experts should be provided by a State service rather than though market-based reliance on private operators. This was often combined with the recommendation that guardians *ad litem* should be responsible for communicating the views of children to courts in private family law proceedings on a similar basis to how they currently operate in public law proceedings:

> Parents do not have thousands for reports to spend. The burden is once more on parents in crisis. Should be a state service – much quicker and involved once court provides an order to ensure implementation. *(Solicitor, Rural)*
>
> A CAFCASS-type facility would be welcome – a government body that ascertains views and wishes to inform court/parents. Provide qualified persons to carry out assessments in child-friendly way. *(Barrister, Urban)*
>
> The proposed GAL agency established under the Child Care (Amendment) Act 2022 should be extended to include private family law cases. *(Solicitor, Urban & Rural)*
>
> We need a statutory guardian *ad litem* service for public and private child cases. *(Solicitor, Urban & Rural)*
>
> … the current [guardian *ad litem*] system for children in care ensures the voice if the child is heard in public proceedings. A similar system should be in place for the private system. GALs meet with children on a regular basis to build up trust and get an understanding of the child's situation before forming a view … Children engage better when they are comfortable, have a level of trust with the adult/professional, understand the purpose of meetings and clearly understands where their views will go. The above will allow the child to engage full in the process and ensure their views are heard. *(Guardian ad litem, Urban & Rural)*

Some of the comments made above echo points raised in the consultation carried out as part of the *Review of Expert Reports*, which noted that young people "raised the importance of having relationships and interaction with adults that feel 'real', where the care and interest given is genuine."[54]

The establishment of a State service, whether based on the guardian *ad litem* model or utilising experts in a manner similar to current arrangements, would potentially

[54]Department of Justice (n 3 above) at p 10.

answer the calls made by other respondents for increased regulation of experts and more uniform availability of experts within a reasonable timeframe:

> … more accessible section 32 reporting; better and more uniform reporting; better monitoring of the quality of reports and qualifications of psychologists preparing reports; more funding; quicker reporting: the waiting time is not reflected in the quality of the reports! *(Solicitor, Urban & Rural)*

> … reforms needed would be 1) the cost of getting a suitably qualified person to find out children's views – and who pays for it; 2) ensure that no matter where in the country the parties reside, that there is availability of experts/suitably qualified people; 3) that getting the views of the children should not take so long … *(Solicitor, Urban & Rural)*

The need for more specialist training for judges also featured prominently in the qualitative data, with some respondents also pointing out that judges need more time as well as more training in order to be able to engage effectively with children. Related to this was the need for a more child friendly environment in which judges could meet children:

> … we need more family law judges. More importantly we need specialist family law judges. *(Solicitor, Urban & Rural)*

> We need specialised judges and a more child friendly environment for the child's voice to be heard effectively. *(Solicitor, Urban & Rural)*

> … I do think there is some scope for having children speak with judges a bit more but in a setting other than court-based so it's less intimidating. *(Solicitor, Urban)*

> … if judges are to interview children that they have time, and training to do so. *(Solicitor, Urban & Rural)*

One respondent pointed out that this it is important not only to focus on training judges, but on increasing understanding and awareness among all legal professionals involved in proceedings:

> … the legislative basis is there. However, a programme of training of judges primarily (but also lawyers), to address their fears of potential harm for children, might help to slowly change the culture. The prevailing attitude I think is that it would be better for the children not to be brought into a decision-making process that most professionals assume should properly be a matter for the adults to manage. Judges (and lawyers) would benefit from hearing from psychologists who can train them on how to manage the process, and how to gauge when child participation would benefit the child, and when it would not. *(Solicitor, Urban)*

Other respondents focused on different issues, such as the provision of information to children:

> Information – it is incumbent on us to furnish children with information regarding the family law process (insofar as it affects them) in language that they can

> understand. Child-friendly brochures etc, may assist. More often than not, children are brought to interviews with psychologists or the like and not told why they are there. Reports are then prepared, placed on the court file and furnished to the lawyers. Whatever about such reports not being furnished to the mother and father, they are never furnished to the child, nor any summary/synopsis. So, information which affects the child (such as with whom they will live, what access they may have or not have with the other parent) is never made available to that child. Decisions are then made about issues relating to guardianship, custody and access, without any notification to the child. The child simply finds out about the decision when the court proceedings have been determined. *(Barrister, Rural)*

6. DISCUSSION AND CONCLUSION

It is now 10 years since Article 42A of the Irish Constitution came into effect and was implemented by way of the insertion of section 32(1)(b) of the Guardianship of Infants Act 1964. While Article 42A.4.2° was narrower than Article 12 CRC in one respect (namely, being confined to specified court proceedings rather than encompassing all matters affecting the child), its wording was aligned with the CRC within the context of court proceedings concerning guardianship, custody and access. The key to realising its potential lay in the manner of its implementation through legislation, policy and practice.

Over the past decade, it gradually became evident that many stakeholders had concerns that the arrangements put in place in 2015 were not adequate for the purpose of implementing the constitutional obligation set down in Article 42A.4.2°. The alarm bell was first rung in the report of the Joint Oireachtas Committee on Justice and Equality in 2019.[55] The need to improve the arrangements for ascertaining the views of children in private family law proceedings was a prominent theme in the work of the Family Justice Oversight Group,[56] and Goal 1 of the *Family Justice Strategy 2022-2025* is "[t]o ensure that the needs of children are at the centre of the family justice system, their voices are heard and considered and that they are supported in their own individual journey through the system."[57]

The findings of the *Child Participation in Private Family Law Proceedings* project provide one of the most robust accounts yet of the shortcomings of the existing arrangements. These are neatly summarised by one participant in the practitioner survey:

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[55]Joint Oireachtas Committee on Justice and Equality (n 32 above).

[56]Department of Justice, Family Justice Strategy 2022-2025 (available at https://assets.gov.ie/239772/7a41d453-19b8-403d-8022-296322e796f8.pdf) states at p 20 that ensuring that the voice of the child is heard "was regarded as the single most important focus for the family justice system by the majority of consultees in the public consultation".

[57]*Ibid.*

> The current system is ad hoc with no uniformity, oversight etc. It does not ensure children's voices are heard or shared in the best way possibly. *(Guardian ad litem, Urban & Rural)*

The specific issues of concern that were identified during this research are not a surprise, in that they echo the issues raised in reports previously published in this area. Many of the practitioners who completed our survey would likely have also participated in the stakeholder consultation conducted by the Department of Justice in the preparation of the *Review of Expert Reports*, which took place less than a year earlier. As such, the same key concerns emerge:

- Failure to ascertain the views of many children who have a right to be heard;
- Failure to provide children with child-friendly information about the court proceedings and any decision reached;
- Costs as a barrier to child participation;
- Shortages of experts available to provide reports (and consequent delays);
- Variable levels of training for lawyers and judges;
- Loose regulation of who may provide voice of the child reports; and
- Lack of child-friendly courtroom environments.

It is pleasing to see that the Review of Expert Reports has made recommendations that would address some (albeit not all) of these difficulties. Its recommendations include measures that would address barriers to the commissioning of expert reports such as costs and availability of experts, as well as broader measures that would enhance the supports provided to children to facilitate their participation in proceedings.

On the issue of costs and availability, the Review made three main recommendations. First, and key to the full implementation of Article 12 CRC and Article 42A.4.2° of the Constitution, is the recommendation that all expert reports be funded by the State:

> Under Article 42A of the Constitution every child has a right to have their views heard in private family law proceedings concerning adoption, guardianship, custody, or access. Stakeholders stressed that this right not currently being fully realised, with children only having a report provided where the parents can pay for same. It is recommended that all voice of the child reports be funded by the State.[58]

It was further recommended that in the interim, Legal Aid Board fees for expert reports in family law proceedings should be reviewed and increased where necessary.[59] Related to this, it was recommended that the fees in Guardianship of Infants Act 1964 (Child's Views Experts) Regulations 2018 should be reviewed and the regulations amended if necessary.[60]

A much broader recommendation made in the *Review of Expert Reports* was that consideration should be given to establishing the role of Children's Court Advocate, whose responsibilities would include:

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[58]Department of Justice (n 3 above) at p 57.

[59] *Ibid.*

[60]*Ibid.*

- Provision of information to children involved in family law proceedings (including assisting understanding of the child's circumstances, the legal process, and how to cope with changes in their life that may result);
- Assisting children to have their voice heard in proceedings through the medium of their choice (including through meeting with children, accompanying children during meetings with judges and providing guidance to the judge, and making children aware of their right to request to be present during the hearing or a particular part of the hearing of the proceedings and advising the court on whether this would be in the child's best interests); and
- Promoting the right of the child to be heard and should educating children on the role of the Advocate by visiting local schools.[61]

The Review recommended that a Children's Court Advocate should be a CORU-registered Social Worker, CORU-registered Social Care Worker, Speech and Language Therapist or teacher registered with the Teaching Council, with at least three years of relevant experience of working directly with children in the previous five years. The Review further recommended the development of a professional qualification for Children's Court Advocates that would provide a route into the profession and ensure consistency of training and standards.[62] All Advocates should undergo an intensive training relevant to their role before taking up their position as an Advocate, and should also be required to undergo continuing professional development and supervision.[63] As an interim measure, pending the development and piloting of the Children's Court Advocate project, the Review recommended that voice of the child reports should be commissioned from experts on a panel which should be established for the production of welfare reports under section 32(1)(a) of the Guardianship of Infants Act 1964.[64]

If a larger number of experts are available, at a more uniform level of qualification, and free of cost to the parties, this will undoubtedly improve the position considerably by comparison to current arrangements. More children will be likely to have their views ascertained in proceedings on guardianship, custody and access, and the arrangements for ascertaining their views will be more effective. To this extent, the recommendations of the *Review of Expert Reports* are well-considered and welcome. Nevertheless, these reforms will not, of themselves, ensure that all children are heard and that the obligations imposed by Article 12 CRC and Article 42A.4.2° of the Constitution are adequately discharged. Even if all of the Review's recommendations are fully implemented, ordering a section 32(1)(b) report will remain at the discretion of the judge. Section 32 will not impose an obligation to do so (or even a presumption in favour of doing so). It will also remain the case that the legislation will be silent on the arrangements for ascertaining the views of children in cases where children are capable of forming their own views, but section 32(1)(b) reports are not ordered.

In this regard, section 32 can be contrasted with the provision made in the Child Care (Amendment) Act 2022 for the appointment of guardians *ad litem* to report to the

[61] *Ibid* at p 54.
[62] *Ibid* at p 57.
[63] *Ibid* at p 55.
[64] *Ibid* at p 56.

court on the views and best interests of children involved in child protection proceedings under the Child Care Act 1991. The 2022 Act inserts a new Part VA into the 1991 Act, which establishes a presumption in favour of the appointment of a guardian *ad litem,* and additionally obliges the court to explicitly address the question of how the views of children will be ascertained in cases in which the court chooses to depart from this presumption. Section 35B(3) provides:

> (3) In proceedings under Part IV, IVB or VI, the District Court shall by order direct that a guardian *ad litem* be appointed for a child, unless the court—
>
> > (a) is satisfied, having regard to all of the circumstances that the court considers relevant to the child … that the best interests of the child can be determined without such appointment being made, and
> >
> > (b) in respect of a child who is capable of forming his or her own views, it has determined other means by which to facilitate the expression by the child of those views.

Section 35B(4) further provides that "[w]here the District Court decides not to make an order under subsection (3), it shall give reasons for its decision in writing."

There is no question that these provisions are far stronger than section 32 of the Guardianship of Infants Act 1964 in respect of the level of obligation imposed on the court to ascertain the views of the child and to appoint a representative through which this can occur. While the provisions have not yet been commenced, it can be projected that their commencement will make it much harder for cases under the Child Care Act 1991 to be heard without ascertaining the views of children than is currently the case under the Guardianship of Infants Act 1964. Since the right of children to have their views ascertained in court proceedings affecting them applies equally in public and private law cases, basic principles of equality suggest that the terms of the Guardianship of Infants Act 1964 should be amended to align them with the stronger and more effective model that has been enacted for the purposes of proceedings under the Child Care Act 1991.

Finally, even if the Guardianship of Infants Act 1964 establishes a presumption in favour of commissioning a section 32(1)(b) report, it will remain open to judges to decide not to commission one in some cases and to utilise another mechanism for ascertaining the views of the child. Indeed, it may be desirable that this be done more often in cases involving older children, so as to facilitate their direct participation (as called for in General Comment No 12). It seems likely that the alternative used in many of these cases will be a meeting between the judge and the child. The *Review of Expert Reports* does not address the issue of judicial training, or the issue of the courtroom environment. The data gathered in this study makes it clear that if meetings between judges and children are to be an effective mechanism for ascertaining the views of children in private family law cases, both of these issues will need to be addressed – so that judges can exercise the appropriate skills and sensitivity during the course of the meeting, and that the meeting takes place in a child-friendly environment that minimises stress for the child and facilitates free and open communication.