Experiences of Children in Family Law Proceedings in an
Australian context

Pilot study

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Introduction

Over the past decade there has been increased attention focused on the Family Court in Australia particularly in relation to outcomes for separating parents and their children. Whilst divorce rates in most western countries appear to have reached a plateau the number of dependent children experiencing divorce in Australia remains approximately 50,000 each year. Since an increasing number of children are expected to experience family breakdown more than once the number of young people involved in divorce proceedings is likely to trend upwards. The plethora of research that has emerged over the past twenty five years in response to such statistics has focused primarily on the impact of divorce on children and the factors that may account for the variable effects. Most of that research data has been gathered through measures constructed by adults which allow children little choice about how they express views, and which constrain them within a pre-defined framework. There has however been a recent transformation in childhood research which has sought to consider family life from an entirely new, ethnographically rich and radically different perspective; that is, from the perspective of the child.

It is this perspective that informed the pilot research project that is the subject of this paper. The research, conducted in late 2002, focused on a number of children’s experience of family law processes following their parent’s separation. Taking the Family Law Reform Act 1995 as the backdrop, we focus on the stories and voices of children and, in doing so, challenge traditional legal constructions of childhood and legal understandings of issues that surround children’s participation in family law processes.

The initial aim of the pilot study was to develop a framework from which to explore and develop theories about children’s experiences of contested law proceedings and to assess the efficacy of the methodology as a foundation for a major study to begin in late 2003. In the early stages of the project, the study was

1 Murphy P and Pike L, “The Columbus pilot in the Family Court of Western Australia: Some early findings from the evaluation” Paper presented to the Eighth Australian Institute of Family Studies Conference, Steps forward for families: Research, practice and policy, Melbourne, 12-14 February 2003
6 Pryor & Seymour n 2 above at 229
widened to include children’s experiences of both contested and uncontested proceedings as it became apparent that we wanted to focus on the voices of the children and not the mechanisms that allow for them to be heard.

In particular, we took as a point of departure for the research three specific issues:

1. That children can and do hold coherent views of families and of social life in general and that their opinions should therefore be heard.
2. Children’s perspectives are important and the views that children hold can usefully inform the views of adults who make decisions concerning their well-being.
3. Whether and to what extent children want to participate in major decisions relating to their well-being.

The study adopts a critical-hermeneutic theoretical stance in exploring children’s involvement in the decisions and processes that potentially influence their lives in significant ways. Critical theory is useful for this research because of its dialectical concern with the social construction of experience and, in particular, because the ‘discourse of possibility’ that emerges from such an approach opens up new spaces which take account of children’s experiences of family law processes. One of the most important aspects of a critical theory-informed qualitative research endeavour involves the often neglected domain of the interpretation of information. This interpretive or hermeneutical aspect is pivotal to this project because such an approach gives priority to the meanings children themselves attach to their experience. As Oakley points out, the voices of children have largely been excluded in research that instead privileges the voices of others (adults) and, in so doing, produces authoritative knowledge on their behalf.

**Locating the Voice of the Child**

Embedded in the theoretical approach taken in this research is the implicit understanding that to listen to children is to listen to their voices. Approaching the research from the perspective of children’s voices raises issues as to how we might hear what is being said and then what to do with such a diversity of accounts. Such an approach challenges us to listen to what children say and to reflect on how their experiences shape the way they see the world and

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10 Kincheloe & McLaren, n 9 above
12 Smart C, “From Children’s Shoes to Children’s Voices” (2002) 40(3) *Family Court Review* 307
themselves as participants in it. We suggest that these experiences affect children’s definitions of themselves including the way they interact with others, their public and private personae and their sense of control over life events.13

By allowing us, the researchers, to listen to their voices (including their silences) it is possible to begin to gain a perspective on children’s understanding of themselves in relation to the legal processes taking place around them. In doing so, a critical hermeneutics approach arouses a critical consciousness that renders the personal political. As researchers we are implicated in this process in that it requires us to become aware of the ideological imperatives and epistemological assumptions that inform our research as well as our own claims to knowledge. Our own voices as researchers constitute an additional narrative concerned with emancipatory outcomes for children.

The metaphor of voice enables us to explore how children are represented and defined within the Family Law Reform Act and to consider whether children are allowed to be heard in a way that reflects their own interests and specificities. Sampson’s appropriation of notions of voice is particularly useful because his framework allows for voice to be understood in a variety of contexts which can be applied to many aspects of experience and development.14

- To be without a voice means to live without impact in the shaping of one’s life and is relevant to the child’s sense of mind, self-worth and feelings of isolation and connection to others.15

- To merely speak when permitted means to speak as one has been constructed by that discourse or to speak through its gaze, perspective or standpoint. By speaking only when one has permission to speak, that is, within the dominant discourse, leaves existing arrangements of power unchallenged. Although voice in this accommodative sense may be appear to have a real advantage over having no representation at all, it fails to satisfy in that it offers a representation of the self in terms defined by the dominant groups and so only advances their interests. To speak in an accommodative voice has the potential to leave the child feeling disturbed and unsatisfied.16

- A transformative voice17 refers to a transformation in power whereby children are able to speak in their own voices and in their own cultures.

13 Belenky et al, Women’s Ways of Knowing, Basic Books, 1986 at 3
15 Belenky et al, n 14 above at 18
16 Sampson, n 14 above at 1220
17 Sampson, n 14 above at 1220
By telling us about their voice and silences, children tell us about the world and their place in it. The point of finding a transformative voice is not to find a niche within someone else’s version of reality, but to challenge and go beyond its idea of truth.  

Whilst the research uses the metaphor of voice and applies it to the narratives of the children, it does not claim, in doing so, to reveal any final truth or interpretation of their experience. Instead the approach seeks to understand how discursive practices associated with family court legal processes maintain the status quo in relation to ideologies concerning children and their experience. Foucault’s approach speaks to our own in this regard:

> Whenever I have tried to carry out a piece of theoretical work, it has been on the basis of my own experience, always in relation to processes I saw taking place around me. It is because I thought I could recognise in the things I saw, in the institutions with which I dealt, in my relations with others, cracks, silent shocks, malfunctionings . . . that I undertook a particular piece of work, a few fragments of an autobiography.  

Our perception that there may have been ‘cracks, silent shocks, malfunctionings’ in the ways in which children’s participation is understood prompted us to attempt to make some of these visible by listening to the voices of the children themselves.

A consistent theme in research seeking children’s perspectives about their parent’s separation and divorce, is the acknowledgment by researchers that they are not advocating that children’s wishes are determinative of decisions relating to residence and contact, nor for children’s perspectives of their parent’s separation and divorce to become privileged above their parent’s experiences. They do however argue for children’s voices, rather than being excluded from family and legal decision making, to be included and weighed equally with other voices in the process. Our research attempts to take up this challenge.

19 Foucault, M. cited in L. Kritzman Michel Foucault: Politics, Philosophy, Culture. Routledge, New York, 1988  at 156
21 Gollop et al n 18 above
Constructing the child from a sociological perspective

The history of the study of childhood in the social sciences has been marked not by an absence of interest in children but by their silence. Until recently, contemporary western orthodoxies about children have been dominated by developmental accounts which have constructed children as “immature, irrational, incompetent, asocial and acultural,” awaiting transformation into “mature, rational, competent, social and autonomous adults.” Developmental accounts of childhood have explained and constructed the nature of the child around the twin assumptions of naturalness and universality. In these models, the ‘child’ is the bodily manifestation of cognitive development that represents all children from infancy to adulthood, while ‘childhood’ is seen as a series of predetermined stages leading towards adulthood. In this context a child’s competence has been defined as the capacity to solve empirical-analytic or moral practical problems.

The most powerful and persistent influence on this model of childhood has been the work of Jean Piaget. In Piaget’s account, children’s problem solving is measured objectively either in terms of the truth claims of descriptive statements, or in the terms of the rightness of normative statements, including justifications of actions and the norms governing them. Piaget’s conceptualisation of childhood has encouraged the idea that children are marginalised beings awaiting passage and emphasises incompetence and ignorance at the expense of grounding cognitive development in the child’s social experiences. Smart et al describe one dimension of this marginalization to be that adults see children to be not only different but also inferior. From this presumption, adults have been able to create hierarchical boundaries between themselves and children on the basis of ontological differences between the two, and therefore are able to maintain children in structurally powerless positions in society.

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25 Habermas J Moral Consciousness and Communicative Action, MIT Press, Cambridge, 1991, p 33. Habermas states that there is a parallel between Piaget’s work and Lawrence Kohlberg’s theory of moral development. Both have the goal of explaining competences, which are defined as capacities to solve particular types of empirical-analytic or moral practical problems. The problem solving is measured objectively either in terms of the truth claims of descriptive statements, including explanations and predictions, or in the terms of the rightness of normative statements, including justifications of actions and the norms governing them.
26 Piaget’s work continues to inform contemporary western orthodoxies about child rearing practices and lies at the heart of current educational thinking and practice. See Walkerdine n 22 above.
27 Prout n 20 above at 11
28 smarter n 20 at 11
29 Smart et al n 8 above at 9
An example of such marginalization is evident in research literature that has focused primarily on the impact of divorce on children, but often has not sought out the perspectives of the children themselves. The last few decades have witnessed a great deal of research on the effects of separation, divorce and remarriage on children. Whilst such research has provided a range of insights into children’s experiences it has also been the subject of debate in relation to various ideological, methodological and conceptual limitations, most notably in relation to children’s experiences being mediated and reported by someone else, usually a parent. In considering children’s experiences the debate is both ‘polarised and intense’ with competing discourses about children’s rights and children’s welfare vying for legitimacy. Both liberal and conservative perspectives on the effects of divorce further marginalise the voice of the child. This being the case, research focusing on children’s experience should take into careful consideration “what we know, not just what we believe.” Children’s own interpretations of their experience needs to be located somewhere in this process of knowledge production.

Although Piaget’s work has been, at times, uncritically absorbed into educational thinking and practice, there have been recent challenges to constructions of ‘childhood’ in the same way feminists have challenged constructions of ‘women’. This has seen a growth in awareness that constructions of childhood might differ across time or in space. Researchers from a variety of disciplines have sought to establish a new model of childhood based on a view of children as persons with the capacity to act, interact and influence their social worlds. The emergence of a new paradigm referred to as the sociology of childhood emphasizes the idea that childhood is to be understood as a social construction which is culturally variable, that is, while the immaturity of the child is to be understood as a biological fact, the ways in which immaturity are made meaningful is a fact of culture. Children are not conceptualized as one homogenous group, as
childhood cannot be entirely separated from variables such as class, gender, history, culture or ethnicity and researchers are challenged to explore the plurality of childhoods across these boundaries. Finally, childhood and children’s social relationships and cultures are considered worthy of study in their own right, and not just in respect to their social construction by adults. Implicit in this understanding is that children be seen as actively involved in the construction of their own lives, the lives of those around them and of the societies in which they live.

Within this sociological landscape, child-adult relationships have begun to be scrutinized and the marginalization of children in a variety of contexts challenged.39 By seeing children as active participants in family life, a theory of childhood deficiency is transformed into a theory of childhood competency, prompting a fundamental shift in thinking about children’s intellectual and emotional status.40 While children may be dependent on adults for substantial periods of time, this does not preclude the development of their sense of individual identity and their social and moral capabilities, particularly in matters pertaining to their well-being.41

Smith and Taylor suggest that alternative conceptualizations of child development can be drawn from sociocultural perspectives which view children’s development as profoundly affected by interactions with other people, the specific culture inhabited by the child and through social institutions and history.42 Constructions of children have a major influence on the degree to which children are listened to, and how much their views are taken into account. As Smith and Taylor assert:

> The greater the richness of interactions in which children participate, the greater the child’s understanding and knowledge. Thus adult and child are seen to jointly construct understanding and knowledge.43

Their research, conducted over the last six years concerning children’s perspectives on separation and divorce and on their involvement with the Family Court in New Zealand, suggests that all children are able to express what is important to them. This issue of children expressing their views is not one of the child’s competence to provide information as it is of adults competence to elicit or observe it in the context of a trusting, supportive and reciprocal

39 Prout & James n 20 above at 14
41 Smart et al n 8 above at 13
42 Smith A &Taylor N. “Rethinking children’s involvement in decision-making after parental separation” Paper presented to the *Eighth Australian Institute of Family Studies Conference, Steps forward for families: Research, practice and policy*, Melbourne, 12-14 February 2003 at 3
43 Smith &Taylor n 40 above at 3
relationship.\textsuperscript{44} They report that although very few children reported being consulted about their initial access arrangements, most children, when asked to give advice to parents provided a strong message that they wanted to be asked, given choices and have parents check that arrangements were convenient for them.

The New Zealand findings are supported by research in the UK where Butler et al\textsuperscript{45} found that most children were not consulted over the decision about residence despite the children’s expressed belief that their opinion was important and that they had something to add to the decisions that were being taken around them. The researchers observed that by wanting to be told what was going on and consulted on important decisions, children expressed the desire to regain cognitive control of events, reporting that being left out of discussions tended to increase their anxiety and upset. In a similar vein, Smart and Neale, found that children distinguished between participation and choice, with most children stating that they it was important for them to participate in their families decisions about residence and contact, but that they did not aspire to making autonomous choices.\textsuperscript{46}

The theoretical basis for this study draws on such findings and our own belief as researchers that a child is a potentially active participant in his or her family’s life. We acknowledge that engaging with children as competent and active social actors necessarily requires that child-adult relationships are reconstructed as adults and parents ‘see’ themselves in new ways in relation to children.\textsuperscript{47} As children begin to be understood to have different competencies to adults, they are no longer understood to have inferior knowledge and competence but rather like adults, as having authoritative knowledge that develops according to life experiences.\textsuperscript{48}

While conceptual changes have also taken place in the Australian legal landscape with the introduction of the Family Law Reform Act in respect to children, the changing sociological perspectives outlined above are not reflected in our family law system. In the next section, we consider the issues that surround effective ways of enhancing children’s participation in light of the Family Law Reform Act.

\textsuperscript{44} Smith & Taylor n 40 above at 13
\textsuperscript{45} Butler I, Scanlon L, Robinson M, Douglas G & Murch M, “Children’s Involvement in their Parents Divorce: Implications for Practice” (2000) 16 Children & Society 89
\textsuperscript{46} Smart C. & Neale B., “It’s my life too’ – Children’s Perspectives on post divorce parenting” 2000 (3) Family Law 163 at 166
\textsuperscript{47} Smart et al., n 8 above at 14
\textsuperscript{48} Smart et al. n 8 above at 14
Constructing the child from a legal perspective

Family law reflects and influences society’s values and views of childhood, children’s relationships with their families and with society. Over the last century, there have been several authoritative constructions and reconstructions of childhood⁴⁹ which once incorporated into legislation, have institutionalized understandings of children and their relationships with their families prevalent at that time. In this way, the law represents a highly specialized system of thinking about social realities and their regulation.⁵⁰ Freeman suggests legislation has the ability to set new standards of what is right and wrong and essentially aims to create a new culture.⁵¹ If a new culture of elevating and facilitating children’s participation in family law processes is to find expression and legitimacy in law, the child as represented in law must have the capacity and identity to assume involvement and participation. In other words, the construction of the child within the Family Law Reform Act is determinative of how a child will be heard and will be allowed to participate within the meaning of the Act.

In this section we examine how the Family Law Reform Act and its implementation construct the child and make assumptions that allow for the regulation of children’s voices. We explore how liberal discourses have shaped, informed and interpreted a legal narrative defining how the child is to be heard. We take that legal narrative and examine how it has excluded the children’s voices to the such an extent that we suggest that the child is not envisaged by and is unable to adopt or understand the legal narrative.⁵²

Smart has observed that the process of starting to treat children seriously poses many challenges to legal systems and adults. She states that there are problems of how to hear what is being said and then what to so with the diversity of accounts likely to be expressed? We seek to make visible some of the problems that surround how to hear what is being said by critically examining provisions that allow for children to be heard in the Family Law Reform Act in light of Shier’s “Pathways to Participation” model.⁵³

⁴⁹ Hendrick H, “Constructions and Reconstructions of British Childhood: An Interpretive Survey, 1800 to the Present” in James & Prout n 20 above at 59
⁵⁰ James A L & James A, “ Pump up the Volume – Listening to children in separation and divorce” (1999) 6(2) Childhood 189 at 190
⁵¹ Freeman M, “The Next Children’s Act” 28 Family Law at 345 in James et al n 48 above at 191
⁵² Davies M “Legal Separatism and the Concept of the Person” in Cambell T & Goldsworthy J (eds), Judicial Power, Democracy and Legal Positivism, Ashgate Dartmouth, Sydney, 2000 at 117
⁵³ Shier H “Pathways to Participation: Openings, Opportunities and Obligations” (2001) 15 Children & Society at 107
In Australia, the child’s wishes are the first in the list of things the court must take into account in determining the “best interests” of the child. There are a number of ways in which the wishes of the child are heard by the court:

- through a psychiatrist or psychologist via the Family Report (Family Law Act 1975, section 62G(2))
- through affidavits and evidence of parties to the proceedings, and their witnesses, both expert and lay
- through a solicitor via the appointment of a child representative (section 68 L)

Although provision is made for children’s wishes to be heard, no ‘right’ to be heard in any proceedings that affect the child exists, nor does the child have the opportunity to express his or her views freely. When a matter is resolved privately and the adults are in agreement, there is no obligation to consider the wishes of the child. Parents are exhorted by the Act to agree about matters concerning the child, but not encouraged to consider to what extent children should participate in the process or what explanation should be provided.

In practice, many children only have indirect involvement with the Family Court as most matters are settled before a final hearing. Involvement in this way is diffuse as there is no need to make a decision about how to weigh the ‘rights’ and ‘welfare’ of the child, or how to hear the wishes of the child in a way that is open to public scrutiny. However, the authority of both statutory provisions and judicial pronouncements and their attendant assumptions permeate family court processes and decision making. For example, the mechanisms of private negotiation involve translation of legal principles by professional counsellors that reflect not only the theoretical orientation of the mediator, but also aspects of the legal process that confer bargaining endowments (such as court delays). Saposnek has reported mediators and decision-makers hold views about the role of the mediator as ranging from a neutral facilitator of negotiations between two parents, to that as a strong advocate for the child.

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54 Chisholm R, “Children’s Participation in Family Court Litigation” (1999) 13 Australian Family Law Journal 201 referring to Section 68F(2)(a)
55 Section 60B(2)(d)
57 Dewar n 54 above
58 Dewar n 54. above. For example, Altobelli, T., in his report ‘It’s time for a change: Resolving Parenting Disputes in the Family Court of Australia’ presented at International Society of Family Law – 10th World Conference, states that the time from filing to hearing can range from 10.8 months to 42.5 months.
John Dewar has found that while the new Part VII provisions have made it easier to achieve distributive justice between parents, that is, how parents give time and make decisions with respect to children in ways that are acceptable to parents, they have tended to occlude the introduction of the child’s perspective on the arrangements being made.\(^6\) He reports that counsellors, often faced with the fact that the ‘least lousy option’ is the best that can be aimed for, tend to define a good agreement as one ‘that the parties can live with’ as being consistent with the child’s best interests. Even when children are directly involved their voice is edited by psychologists, solicitors, counsellors, health professionals or parents or unheard subject to his or her best interests.

We see that in contested proceedings, the legislation is structured in a way that only allows the voice of the child to come to court as a narrative that has been edited and shaped by parents, counsellors and legal representative, while in privately ordered proceedings it is silent as to how children should participate, despite including a range of provisions encouraging parents to favour mediation and counselling over litigation. Such a dynamic suggests then that the child subject as a construct of the law can be said to speak with a voice that is edited or unheard subject to his or her best interests.

Although beyond the scope of this paper, the major study (Fitzgerald in progress) will explore the notion that underpinning the best interests test is the idea that a child’s identity is synonymous with the child’s best interests. Thery has observed that

> The discourse of judges and lawyers who claim to take account of only the interest of the child, should be countered by showing that, when they speak of the child, they are always and inevitably speaking of something else: the father, mother, the family itself.\(^6\)

In this way, the child’s best interests become conflated with the options, choices and wishes of the parents and the State.\(^6\) Consequently, the legal identity of the child is universalised and constructed by recourse to adult versions of order, competence and rationality.\(^6\) An example can be found in the recent shift in emphasis in the making of interim orders, whereby the existing arrangements principle, whereby the child’s best interests are considered to be met by interim orders that ensure stability pending a full hearing, has been displaced by judicial concern about parental ‘equality’.\(^6\) In other words, interim orders have been

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\(^6\) Thery n 49 above at 352.
\(^6\) Rhoades H, Graycar R & Harrison M, The Family Law Reform Act: The First Three Years University of Sydney & The Family Court of Australia, 2000
made on the basis of ensuring that one parent does not obtain a tactical advantage over the other before the final hearing, rather than an assessment being made of the child’s best interests or by application of the existing arrangements principle from Cowlings case.

In private proceedings, judicial scrutiny of parental arrangements is exercised sparingly as parents are considered to be, in general terms, best able to determine and promote the child’s best interests.\textsuperscript{65} In relation to private proceedings, Piper states that the most influential assumptions underpinning the best interests test can be grouped into two clusters: the first set coalescing around the idea that children need, above all, two parents who cooperate with each other and who keep contact with their children. The second set concerns the vulnerability of children in the context of decision-making within the legal system.\textsuperscript{66} Perhaps the most powerful narrative operating in family law is the belief that family breakdown is inevitably harmful and renders children vulnerable. Although it is beyond the scope of this report to explore the rhetoric of harm, suffering and innocence have been utilized to pursue political objectives,\textsuperscript{67} it is relevant that assumptions of harm have acted to promote the idea that children are harmed by the ‘burden’ of saying what they want and particularly if they participate in court proceedings has seen professionals and parents reluctant to question children directly or indirectly about what their wishes are, despite growing evidence that children are not helped by their lack of involvement and that they in fact want more information about what is happening. This issue is relevant to the formulation of the best interests test and will be explored in depth in the major study.

The relevance of exploring these assumptions lies in the acknowledgment of the dominant influences in the construction of the best interests test and thus a better understanding of the difficulties that might attach to adding the voice of the child to the decision making processes.

\textit{The Family Law Reform Act – constructions of childhood?}

The conceptualisation of ‘capacity’ within liberal legal theory lies at the heart of the child’s struggle for recognition to be heard within the \textit{Family Law Act} and plays a central role in shaping and informing how a child will potentially participate in legal proceedings. Capacity and consequently legal recognition are predicated upon liberal ideals which are central to a conception of legal relations

\textsuperscript{67} Smart n 8 above at 22
between the individual and the state and define the ‘prerequisite’ qualities an individual must possess to participate in legal proceedings. We briefly discuss several of these ideals and the role they play in constraining children’s participation in family law.

Liberal law is realised in the rule of law, which acts as a condition of freedom, ensuring distinctness of law from the individual so that the individual may live free of the arbitrary rule of personalities and power. 68 Central to this freedom lies the distinction between the public and private spheres of society. The public sphere is the realm of law, of regulation, of the state and of political participation, while the private sphere is the realm of the individual and her or his particular social, familial, religious and cultural affiliations, excluding the actions of the state. 69 By distinguishing between contested and private proceedings, the legislation reflects conventional research and policy contexts in which talking to children about family life has been seen as an intrusion into what is essentially a private sphere of life. 70

The law assumes those who participate in legal processes to be essentially rational, autonomous and free beings who calculate the consequences of various lines of action, make their choices and are responsible for their own actions but not those of others.71 Hegel has defined this relationship as follows:

[I]n the state…*man* is recognised and treated as a rational being, as free, as a person; and the individual, on his side, makes himself worthy of this recognition by overcoming the natural state of his self-consciousness and obeying a universal, the will that is in essence and actuality will, the *law*; he behaves, therefore, toward others in a manner that is universally valid, recognising them—as he wishes others to recognise him—as free, as persons. 72

A willingness to adhere to legal norms can only be expected of partners to interaction if they have in principle been able to agree to the norms as free and equal beings. As children are not envisaged as having capacity to assume a legal identity, they don’t readily enter into the reciprocal relationship of legal recognition based on ‘rights’. 73 In other words, if the legitimacy of the legal order is dependent on a rational agreement between individuals with equal rights then one must be able to suppose that the legal subjects have the capacity to make reasonable, autonomous decisions. Children are then distinguished from adults in terms of their legal capacity to make well informed and rational decisions, on

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69 Davies n 50 above at 119.
70 Smart n 8 above at 10.
73 Honneth n92 above at 109.
the basis that the identity of a child is unformed, immature and incomplete. Traditional legal understandings of what constitutes childhood are shaped by developmental models of childhood and absorbed into judicial pronouncements concerning how children are to be heard in legal proceedings. For example, Piaget’s model of childhood continues to inform contemporary western orthodoxies about child psychology and has been uncritically absorbed into judicial pronouncements concerning how children are to be heard in legal proceedings. In H v W the court summarised Piaget’s five stages of cognitive development to support the idea that children by the age of seven are capable of deductive reasoning.74 This decision formed the basis for stating the existence of the rebuttable presumption that children are capable of making a considered decision and provides an example of how ‘scientific’ knowledge, once transferred to the discursive text of the law, becomes largely immune to critical scrutiny.75 The formulation of rational action as ‘one which avoids all mistakes deriving from inadequate reflection’ and ‘an adequate judgment of probable outcomes’ serves to illustrate that many adults would be found wanting if their actions were evaluated against these criteria.76

Notions of capacity are further premised on the liberal ideals of selfhood that dichotomise mind and body and privilege the mind as central to personhood at the expense of any account of the body.77 Traditionally the status of the body as a focus for inquiry within philosophical discourse has been that of an impediment, a distraction, something to be controlled and increasingly absent.78 The embodied child is barely contemplated within these structures of law.

We suggest that until legal constructions of childhood and attendant assumptions about childhood evident in the Family Law Reform Act are acknowledged, the law will continue privileging a narrative of the child that is embedded in liberalist ideology and influenced by developmental theories of childhood to the exclusion of other narratives of childhood. While the adoption of the UN Convention on the Rights of the Child obligation to ensure children’s views are given due weight in decision-making in the Family Law Reform Act, the law operates from a perspective which locates and conceptualizes children in relation to their parents and families and thus struggles to deal with the agency and difference of children.79

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74 [1995] FLC 92-598,
75 Piper n 64 above at 266
76 Smith, n 58 above at 106.
78 Mykitiul n 76 above
79 James & James n 48 above at 200
Shier’s *Pathways to Participation* model, as shown in the following diagram, contributes to an understanding of why the issue of listening to children is reported as being problematic.⁸⁰

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⁸⁰ Shier, note 51 above
In terms of participation, that children’s views are to be taken into account is considered to be the minimum level required to endorse the UN Convention on the Rights of the Child. At this level, Shier states that there are three levels associated with implementing this level of participation. The opening occurs once the worker/organisation is ready to take children’s views into account. The opportunities exist when the organization has a decision-making process that enables children’s views to be taken into account, while the obligation exists when the organization makes it its policy to implement Article 12 of the UN Convention on the Rights of the Child; that is, to ensure that children’s views are given due weight in its decision-making.

If the Family Law Reform Act is considered in light of Shier’s model of participation and our discussion above, it is clear that while adopting the language of UN Convention on the Rights of the Child in practice, there is nothing in place to support the opportunity for children to participate at any level in family law processes. For example, while the legislation represents the language of Level 3 in Pathways to Participation, there is nothing in the legislation to implement the requirements of Level 1 that is, that children are listened to. This theme will be explored further in the major study. However, for the purposes of this paper it is evident that while children are involved in their parents’ separation and divorce in that they experience the events on much the same emotional terms as adults, there are many levels and types of participation which are influenced by roles, expectations and relationships within a society at a particular time and are reflected in family law legislation.

Methodology

This pilot project is located within a qualitative research framework, which provides a vehicle for elevating the voices of the children whilst also attempting to advance the understanding of particular critical perspectives in relation to their experience of the legal processes associated with their parent’s divorce.

'Methodology' in this research, refers to the approach we drew upon in studying children’s experience of family law processes; it relates to the chosen process of this inquiry, but it does not raise any expectations of what we expected to find. The method of data collection used in this project, in-depth semi-structured interviews, as well as the inductive approach to analysing the data, enabled us to focus on the margins, highlight uniqueness, concentrate on the enigmatic and attempt to elevate the repressed or unheard. Such an approach is not employed in an attempt to create new 'knowledge' or ‘truth’ in regard to the experiences of the children involved in the study. Rather it advocates for the creation of a ‘more

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81 Smith, note 8 above at 74, Shier, note 51, Scanlon at al note 43 above
hesitant and partial scholarship”, capable of helping us, the researchers, ‘tell a better story’ about the experience of these children.

As critical researchers we have drawn from the hermeneutic tradition and postmodern critique to (re)examine claims to authority concerning children and their experience. Such an approach implies that, as researchers, we must speak/write about their experience merely as interpreters working within the context of certain “boundaries and blinders.”

Nevertheless, we would argue that the interpretations emerging from the hermeneutic process can enlighten and heighten new understandings about the experience of children described to us. As hermeneutical researchers we wish to move beyond the limits of thin description and decontextualised facts to produce thick descriptions of the narratives of children “characterised by the context of their production, the intentions of their producers and the meanings mobilised in the processes of their construction.”

Pursuing this research interest is complex and invites some interrogation of the potential 'taken-for-grantedness' of the methodology. The work of Packwood and Sikes is helpful in explaining and negotiating this dilemma:

The choice of a research discourse is never simply the expression of an intellectual preference; it is not independent of historically concrete cultures and practices. Research methodologies are historical artefacts. Research studies create economies of knowledge. Certain kinds of knowledge serve certain kinds of interests and ignore others. Research methodology and ideology are mutually constitutive.

Such an approach enables us to focus on the participants and their voices mindful of the strengths and limitations such an approach poses.

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83 Grossberg n 80 above at 332
84 Kincheloe & McLaren n 9 above at 286
85 Kincheloe & McLaren, n 9 above at 286
86 Packwood, A. & Sykes, P. “Adopting a postmodern approach to research.” (1996) 9 (3) Qualitative Studies in Education at 337
The Participants

The participants for the study were located in a local district on the north coast of NSW. Eight young people\(^\text{87}\) between the ages of 6 and 19 were interviewed in November 2002. The sample comprised 5 boys and 3 girls and included a diverse range of experiences from privately ordered divorce to a matter currently listed before the Family Court.

Approval for the research was originally based on a sample of young adults aged between 18 and 24 years engaged in retrospectively reflecting and reporting on family law proceedings experienced as children. Several recruitment methods were employed, including advertising through local papers, radio, University intranet and flyers. However, these methods proved largely unsuccessful in attracting the intended sample. The difficulties experienced getting access to participants, in effect, influenced the design of the research in much the same way as that identified by other researchers.\(^\text{88}\) Since the advertising attracted the interest of several parents and their children ethics approval and consent was subsequently sought to conduct the research on the basis of the interview sample including children under 18 years of age.

Ethical principles as outlined in National Health and Medical Research Council National Statement were complied with.\(^\text{89}\) A letter of consent was mailed to the parent accompanied by information for the child to read before interviews took place. (Appendix A) The letter of consent also explained the purpose of the research. The ethical principles of informed consent, confidentiality, privacy and right to discontinue and withdraw from the research were integrated into the research methodology and the circumstances of the interviews. As researchers we were concerned to ensure the children had adequate information about the research and what it would require of them so they could make a comfortable judgement about whether or not they wished to participate.\(^\text{90}\) Both researchers have completed Prohibited Persons Declarations as part of their obligations under NSW Child Protection legislation.

Whilst there is very little literature outlining methodologies for interviewing children, the researchers both have extensive experience working with children in professional settings. The principle of ensuring that the interview interactions

\(^{87}\) The term ‘young people’ has been used here in referring to the participants so as to take into account the range of ages up to 19 years. For the most part however, the paper refers to ‘children’ because the older participants were reflecting back on events and issues which occurred when they were younger than 15 years of age.


\(^{89}\) National Health and Medical Research Council: The National Statement on Ethical Conduct in Research involving Humans, June 1999

\(^{90}\) Smith A. Incorporating children’s perspectives into research: Challenge and opportunity. Children’s Voices Article Collection, Children’s Issues Centre, Dunedin, New Zealand 2002 at 2
remained focused and safe was integrated throughout the interview process by utilising opportunities to build rapport with each child, keeping a relaxed and informal atmosphere relatively free from distractions, using conversational prompts, ensuring language was appropriate for the age of the child and asking ‘open’ questions. Preparations were made to ensure participants were able to be referred to a specialist counsellor in children’s matters if the need arose.

The Interviews

The use of interviews in this research acknowledges that children are actors in their own right who actively construct and interpret their social world. It also acknowledges that ‘the standpoint of the child in any research about children, which attempts to interpret their experience, should also be central’. Semi-structured in-depth interviews with the eight participants took place in the homes of the children, usually at the suggestion of the parent, and in space that provided reasonable privacy whilst maintaining full visibility for participants and researchers. The interviews ranged between were 20 and 60 minutes duration. Each interview was audio tape recorded and subsequently transcribed in full. Although the interview questions were formulated with the aims and objectives of the project in mind, the semi-structured nature of the interviews allowed for children to share their stories in a variety of ways. For some this involved sharing stories about their family by showing photographs, drawings and artwork. For others, hypothetical scenarios and descriptions of a friend’s experiences were introduced to pursue further discussion. Some interviews moved beyond the semi-structured format and were more akin to ‘natural’ conversations. In three of the interviews the participants shared important information after the tape recorder was switched off. Notes of these discussions were made immediately after the interview and added to the end of the transcription.

The researchers explained to each participant that the project was a pilot, that is, it was a ‘test run’ to make sure the relevant issues were being investigated and appropriate questions were being asked to give voice to the main concerns of in the subsequent larger study. Several participants were keen to discuss issues that they felt would help us as researchers to understand their experiences because they perceived it may benefit other children. Such a dynamic is consistent with

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91 These techniques for interviewing children are consistent with guidelines provided by Polson, R., ‘Talking with children in research’, Children’s Voices Article Collection, Children’s Issues Centre, Dunedin, New Zealand. 2002.

views that suggest children who participate in research that does not promise any direct benefits to them might still benefit indirectly.\footnote{Macklin, n 90 above at 7}

**Analysing the Data**

In this study it was intended that data collection and analysis be a simultaneous process. In analysing each interview, we would be able to identify issues to be explored and questions to be asked in future interviews. Such a recursive approach was only partly realisable due to interviews conducted in close succession and one of the researchers being unable to attend some interviews.

Nevertheless, reflecting on the earliest interviews, working to organise the data into (loosely shaped) themes, and trying to discover what these themes had to tell about children’s experiences enabled us to focus and shape the remaining interviews. To do this effectively, it was necessary to listen repeatedly to some tapes and re-read transcripts, as each listening and reading provided new insights or developed pre-existing ones.

It is important to note that the management, analysis and interpretation of qualitative empirical materials is a complex process, particularly when the research is located within a critical framework. Despite the enormous appeal and widespread use of a grounded theory approach\footnote{See for example Glaser B, *Basics of Grounded Theory Analysis: Emergence versus forcing* Sociology Press, California, 1992; Miles M & Huberman A, *Qualitative Data Analysis: An Expanded Sourcebook* 2\textsuperscript{nd} ed. Thousand Oaks, California, 1994} to analysis of qualitative data, it raised problems for us because our research argues against a transcendental realism, focusing instead on the local and particular, that is, the voices of the individual children.

The first task, therefore, was to go through the transcripts, effectively drafting stories of the experience of the children in relation to family court legal processes. Through this process, we were shaping a focus that was somehow definable and at least partly manageable, while being mindful that every categorisation of an ‘experience’ rendered some data visible while making the other invisible. Foucault refers to this process as trying to “tame the wild profusion.”\footnote{Foucault, M. *The Order of Things: An Archaeology of Human Sciences*. Vintage Books. New York, 1973 at 15} This was an integral ongoing process, because the later critical analysis, was very much reliant on this earlier attention to some organisation of the data, tentative though the following diagram suggests this to be:
- How does the legal system respond to a child's changing need over time if notions of participation are so constrained by the system and other notions of construction of the child?
- What are the legal consequences of this paradigms in sight of
  - increased trend to equal contact
  - relocation cases
  - law and reliance of Family Reports
Although this initial approach to analysis did begin to reveal a picture of some of the complexity of children’s experience of legal processes, these first attempts at sorting and organising the data still represented a rather conventional structure. The issues emerging from the stories of the children presented as almost too unitary and cohesive in this conceptualisation and did not adequately acknowledge that each was traversed by complex and contradictory representations of participation, and of subjectivities that ‘refused to stand still.’ As researchers we were mindful therefore that the notion of ‘themes’ emerging from the children’s stories was somewhat problematic. Rather the analysis revealed that the same theme (participation) occurred in different discursive formations. We became aware that in fixing subject positions there was a lack of recognition that the children were continually moving within and outside the very discourse/s in which they had been positioned by the Family Law Reform Act and its interpretation in the Family Court. Kincheloe and McLaren refer to this process as “hermeneutical bridge building” where the researchers engage in the ‘back and forth of studying parts in relation to the whole and the whole in relation to the parts.’

Such an approach is consistent with the notion that within legal discourse, it is not the individual child who imparts meanings to discourse, but rather the discourse that provides an array of ‘subject positions’ which these individuals may occupy. The goal, therefore, was to reposition any further analysis away from the individual participants to their narratives. In doing so we attempted to make visible the multiple voices of the children by utilising, in part, Sampson’s framework as described in an earlier section of the paper.

In taking this approach it is therefore important to keep in mind that no child’s account of his or her experience is a definitive story. Critical hermeneutics acknowledges that every telling is constrained, partial, and determined by the discourses and histories that prefigure, even as they might promise representation. In other words, the meanings of the children can never be fully disclosed because the interpretations given can never be direct representations. To this end, we provide direct quotes from the interviews to allow the voices of the children to be made visible.

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96 Britzman, D. The Question of Belief: Writing Poststructural Ethnography. (1995) 8(3) Qualitative Studies in Education 229-238 at 234
97 Kincheloe & McLaren n 9 above at 286
The Children’s Voices

Children are not only relevant and competent witnesses to the process of their parents divorce, they are also the most reliable witnesses of their own experience. From the outset the children provided thoughtful, articulate views on their understanding of the legal processes and of their role in those processes. Listening to their descriptions, it became apparent that the notion of a voice for children had many different meanings in different contexts. For example, children’s narratives sometimes related to the physical voice and the procedural and structural processes that regulate how they might be heard. In many of the narratives of the children interviewed the experience of having no voice and of being unheard by both lawyers and parents was described:

“I was not really asked……….I think you should understand that children don’t get much choice about it. They don’t get much choice” Christy

Divorce is a parent thing, something they do. Anna

“If you had no involvement and you wanted something and you were forced to take something you didn’t want, then you are going to grow up, you feel like cheated, and every time you see someone or you don’t see someone, its just wearing you down.” Anna

“At the time I wanted to stay at the school I was at. Living with (parent)… we were going to go to a different school which we weren’t kind of told about. Kind of pushed into it. ……… I was kinda pushed aside a bit” Vin

Q: Could the plan have been changed easily if you didn’t like it? A: “Not really” Johnny

“If parents are really fighting, really bitter about it, it’s a lot harder for them to be heard cause the parents already know what they want a lot. Like they want them on weekends, and the other parent can have them on weekdays and it is hard for them to be heard, they feel it is not really their choice” Anna

“Um, not sure about the Court. I’m not sure that they were told all about it… (wish not to see Dad)” Michael

Butler et al, n 43 above at 99
Other children described their voice as muted or self-edited when expressing their wishes to parents in light of their desire to not upset parents.

It’s really hard to do that. You just can’t tell something like that to your parents…it is easier to tell a friend or someone like that. The parents are always fussy about stuff like that. Christy

……..cause the child is going to compromise or try and keep…………cause they love their Mum and their Dad and they want to try and keep them happy………….. if my Dad had have said to me, do you want to come and stay with me on the weekends I couldn’t have said no then. You just cant do that. And if my Mum had said Dad you want to stay with me and not see your Dad so often and I wanted to, it would have been hard to say no to her, no, I want to see my Dad, especially when they are in a situation of conflict and you would be aware of that and it would be hard.. Anna

The experience described by the children is similar to the experience reported by children overseas. In New Zealand research, very few children reported being consulted about initial custody arrangements, while over half had no input into arrangements about access. 99 In the UK, most children reported that they were not consulted over the crucial decision of residence, and when they were asked it was usually for a view on a decision that had already been made. 100 By describing a voice that is edited or silenced, the children in these research studies describe a relationship between discourse and power that exists and is constructed by others who dictate “realities” which the children live. The children describe a voice that is limited and obstructed by discursive parameters and rules which confined them to a conventionally acceptable position, that is as developing but yet still incompetent. 101 Such a repression of identity and autonomy is evident in the judgment of one of the families of the children interviewed for the current project. In that matter, the judge magistrate stated:

“As regarding (child), despite his obvious maturity, intelligence and age and despite his telling both his mother and father that he wishes to reside with his mother, I feel it is more important that the Father is seen to ‘win’ something as well... Since I have granted the Mother her wishes for less frequent hand-overs of the children, permission to travel with the children overseas, and making orders so that ongoing, painful negotiations with the Father is unnecessary (child) will not be given individual treatment but will be considered in the orders as other, younger children. It is most important that both parents are seen to ‘win’ something.” 102

Children consistently reported they had little or no understanding of separation and divorce, further limiting their ability to shape an understanding of what was happening and to restore balance in their lives. McCredie and Horroz suggest

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99 Gollop et al, n 18 above at 387-388  
100 Butler et al, n 43 above at 96  
101 Sampson, n 14 above at 1220.  
102 Transcript from Lismore Family Court, 21st September 2001
that lack of information and consultation may be factors which inhibit children’s adjustment to changes in family structure. Sandler and Yum found that children’s perceived lack of control over events mediated some of the impact of divorce related stress on adjustment. Several children stated that they wished they had known more about the court processes, so that they could have anticipated what lay ahead of them:

I didn’t understand divorce at all……….and I didn’t understand what the implications were, or what the Courts were about or anything. And even now I don’t know much about it. It would be good to have some sort of information package or something, just something that you could read about, like directed at kids, not just adults, and explain what it is and what your rights are………….I think if more was made known to people going through it (children) they would think about it then rather than later…..it is too hard to change.” Anna

The children often described how they sought out information from their friends, although they expressed dissatisfaction with the information that they had received. Several children suggested that a “neutral” person be involved who could provide information and answer questions. Most children expressed the wish to understand what was happening, several suggesting that they be given an information package or that a “neutral” person visit them and allow them to ask questions without feeling that they were upsetting one or the other parent:

“but to have someone come out that they don’t know who is not going to take sides and say what it is that you really want, how often do you see them, and just make sure that they say what they want, not what they think they should say……….I think someone who is not involved with the Court so much because Court people are a bit intimidating, so like someone who deals with little kids a lot and who knows how to talk to them, to approach them in a non-threatening way, and he can just talk to them not even about legal things but more about the emotional thinks and that, and that way they can sort out what is going on and what they want and just sort of how they are thinking as well. That’s really important. Then they can formulate a sort of independent opinion and then give the Court that as well as the parents perhaps. I think that the parents need to hear sometimes from the children” Anna

Others suggested that the children should be able to speak with the judge in order to obtain information and to access what they perceived to be the facts of the matter:

“It would be good if maybe, I just felt most of the time that I wanted to, like if there were recordings of the court hearings and stuff…….that I could actually listen to them, cause I was being told various things by both parents, and I am like what the?………….Its really difficult and confusing” Johnny

“If the kids could listen to what was happening like actually happening, straight facts, just not curvy ones that are not really true…….” Johnny

Q: Who would be the best person to give you information?

“The judge” Johnny

“It would have been helpful if there was just a sheet of paper saying they want this to happen, and this is going to happen, stuff like that” Johnny

The children’s accounts of having little understanding of the processes that surrounded their parents divorce and separation are similar to the accounts from children overseas. In the UK, the majority of children reported that no one had explained to them what the breakdown of their parents’ marriage might mean for them in the immediate and longer term and a similar proportion reported that they had not been asked for their views on what was happening. 105

Children consistently and clearly called on their parents and lawyers to listen to them and expressed well formed views about wanting to have a voice in the family processes surrounding the separation of their parents. In expressing the wish to be heard, the children are assuming a transformative voice, that is, one that allows for the possibility of the child to be heard in their own way:

Just know that children aren’t just children. That they have opinions, that they are not stupid they know what goes on and they are capable of being able to recognize what they want, and if they get stuck every second week with a parent that they don’t necessarily like then it is going to foster horrible feelings and its just going to get worse. They need to realize that children should be heard. Anna

Just listen a lot more and if they do something wrong don’t get mad at them. Avril

Just listen, that is the main thing. Vin

I would say that they would have to actually talk about it with the children, and all that sort of stuff…. try and find out the best, find out what the child wants or something like that ………….ask them (children) about it. How would you feel if we moved away or something like that. Christy

This strongly expressed desire by the children to be listened to and consulted is consistent with qualitative research findings overseas. The Children’s Issues Centre in New Zealand has focused its research on the factors that might help children to be resilient to the risks of divorce and separation and to determine ways of supporting their well being following family change. 106 In the light of

105 Butler et al, n 43 above at 92
106 Gollop et al, n 18 above at 2
extensive research projects speaking with children they state that children are highly capable of expressing their views, and that any processes that deal with parental separation, whether they be legal or social, should include consultation with children.\textsuperscript{107} In addition, they suggest an important factor in helping children cope with the stress of separation is that they feel listened to, their views respected and they have an influence on arrangements.\textsuperscript{108}

Being told what was happening was also a vital consideration for children interviewed by researchers at Cardiff University,\textsuperscript{109} where almost all of 104 children reported that being left out of explanations could feel very much like being left out altogether. Instead, they sought a degree of cognitive control over events, especially in the absence of any simple or immediate resolution of the emotional upset, anger, feelings of injustice and feelings of loss.

In addition to being listened to and consulted, children described the need to be able to participate in the on-going arrangements and to have the ability to change situations they did not like:

...it’s a weird situation. Like it happened six years ago, so much changes in that time. Cause your parents are able to remarry in that time and you (parents) are allowed to change your mind........It doesn’t seem fair that we have to be locked into six years of custody arrangements or longer, up to eighteen years.....................when in eighteen years time they could have eighteen more divorces. Anna

“Yeh, cause they aren’t sure what they want. And its good to have test runs...cause they might not like staying at one place for two weeks. It might be too much, and they just might miss the other parent and they just make mistakes.” Johnny

It is important if later on they decide that they should change their mind, that they want more contact,.............they should be able to have a review of the situation Anna

The children’s narratives describing the need for arrangements to be able to be modified as children’s wishes, needs and relationships change over time highlights the need to recognize separation as a process not an event. Often children’s accounts are dismissed because they are “likely to change” while parents understandings and changing feelings are given legitimacy as they experience new transformations in their lives.\textsuperscript{110}

\textsuperscript{108} Gollop et al, n104 above at 149
\textsuperscript{109} Butler at al, n 43 above
\textsuperscript{110} Smart, n 12 above at 308
Several children also referred to the need to have time to make decisions, including the difficulties associated with formulating their wishes during the early stages of separation:

*It is only as it gets less painful, less raw that you start thinking about the long term*

Anna

Vin described how it took several months to formulate his expressed wishes about where he would attend school. During that time he felt:

“.. pretty bad. My grades showed it too- I was starting to fail subjects, stuff like that “

However, once he was able to formulate and express what he wanted he stated:

..if you are listened to, because then you can decide who your friends are, what school you go to, and it just makes you happier, makes your life easier

The interviews also shed light on how children understand the idea of expressing their wishes and by implication their understanding of notions of voice and participation. While children did not understand the expression of their wishes and the need to be listened to as a self-determining decision, but they nevertheless sought to contribute to the decision making processes that surrounded them.

For example, Vin described how once he had expressed his wishes about the school he wanted to attend and where he wanted to live, he still did not want to involved with the finalization of the decision:

*I’m quite happy with just being in the background*

While Anna knew that her wish to reside with her mother was not in question, she did not want any involvement with the court processes:

*I was kept out of it, not because they didn’t want me to have a say but because it was too much. I didn’t want to be a part of it.*

An understanding of voice as interactive with parents’ decisions is supported by recent research in the UK, where researchers at the University of Leeds have recently completed a longitudinal qualitative study in which children were clear in stating that they did not want to be forced to make choices, but they did want to have a voice in what was happening.\(^{111}\) In NZ, Smith states that respecting children’s wish for consultation does not imply that children should be left alone

\(^{111}\) Smart, n12 above at 318
to make decisions without adult input, but rather emphasise a social context where children and adults are engaged and involved in reciprocal interactions with others and where children are guided by skilled and sensitive adults.112

The experience of being listened to and involved in decisions about residence and contact was described by Avril as being a positive and enabling her to continue in what she described as a loving relationship with both parents. She seemed bemused at some of my questions and proceeded to describe how it was easy for her in her family to express clearly what she wanted in respect of where she would live:

..when I am listened to, I don’t have to say it ten thousand times and I have just to say it once and they will talk to me ..... Avril

In addition to feeling reassured that her views would be sought and listened and when asked what has made the last three years (since parents separated) easier, Avril responded:

I guess I know what is going on and stuff

By speaking with the children themselves, the research project represents a movement away from the narratives of harm which inform contemporary debates about divorce. The phenomenon of ‘harmism’ has seen the inevitability of harm associated with family breakdown as a conventional wisdom.113 The message that divorce is damaging to children is so dominant that parents commonly regard their children as rendered vulnerable by the divorce. Smart observes that parents, rarely offered methods or strategies to avoid, reduce, or address this perceived harm may tend to avoid speaking to the children. Parents’ worry then gives rise to a silencing where it is thought that it is better for the children not to know what is happening so that they will be unaffected.114 However, it is also clear from listening to children that they are involved in their parents’ divorce in that they experience the events probably on much the same terms as adults.115 This is clear from the language expressed in the interviews that reveals that for most children, separation and divorce is a process involving painful periods of changes and many losses, requiring adaption by the whole family in many areas of their lives. The initial experience is expressed in the language of grief and loss:

113 Smart, n 8 above at 41
114 Smart, n 12 above at 308
115 Butler et al, n 43 above at 98
It’s harder on the kids than it is on the adults because if the kids are attached to one parent it is much harder Johnny

The hardest part about it is the last thing you think is shock…..a lot of it is denial as well……It is only as it gets less painful, less raw that you start thinking about the long term” Anna

when things are bad its really bad on the kids like yelling and I kinda just………… Vin

The only thing I wished was that it would…..get properly Christy

Stay together……yep stay together Harry

To keep them (children) with their parents” Maxy

Do something with the kids and make it better for them……..like making them actually enjoy the life they are having right now” Harry

However, it is also clear that the children have expressed the wish to be listened to and involved in making decisions that affect them. The researchers submit that the narratives of the children interviewed suggest children’s resilience to the risks of separation and divorce can be promoted by consulting with and seeking of children’s perspectives and views in both private and public proceedings which concern them.

In contrast, a concluding comment from one young person observed:

“...its funny just by saying children you make them sound so young and they’re not. Even the young ones……..They know, they just know these things. They realise what is going on and its very emotional but underneath there is reason. They know what is happening and so it would be very hard…………….you would have to realize in the interviews that there is emotion there as well as talking and reason………….” Anna

**Limitations & Reflections**

The process of undertaking this pilot study which explores the experiences of children in family court legal processes and the use of a particular critical theoretical stance has raised a number of issues which we perceive to be significant enough for comment. As researchers we were faced with the sometimes uncomfortable dilemma of how to elevate the voices of the children whilst not producing yet another grand narrative that positions them in particular ways or within particular discursive boundaries.
In this way we make no self-conscious claim or conceit of being ‘right’ in our approach to this project. We hope not to have assimilated too easily or by foreclosure the object of the Family Court, the experiences of the children or the tireless endeavours of their parents and others to support and protect them and act in their ‘best interests’. We have reflected at length on the assumptions which seep into our work that in any way suggest our own interests concerning children’s experiences of family court processes and those of the participants or their parents are somehow aligned. As researchers continuing to work in this area we remain open to the perspective that we are unable to see all there is to see and all there is to know in regard to any of the issues reported in this paper. Hopefully what follows in the large scale study (Fitzgerald, in progress) might, amongst other things, generate further theoretical and practical discussions about children and their experiences of Family Court legal processes in Australia. We have little doubt that continuing to engage with such children as they make sense of their experience will further affirm the sense of privilege we have known in being invited to share in their stories in this pilot project endeavour.

As researchers we were cognisant of the ethical issues concerning interviews with children particularly the ‘biggest’ as defined by Morrow and Richards, being ‘the disparities in power and status between adults and children’. Whilst we took the self-evident steps to ensure children participated in the research on their own terms, and attempted to underpin the interviews with informality, acceptance and warmth, we were nevertheless mindful of the power imbalance. This has prompted us to think reflexively about our approach to the large scale study, specifically in relation to pursuing a more participatory approach where the children play a more active role in the research process over a longer period of time.

By adopting features of the new sociological paradigm, we acknowledge the observation of Smart, Neale and Wade that the new paradigm is no less a social construct than the old, but rather a product of our particular historical and cultural conditions.117

**Future considerations**

It is apparent that the sociology of childhood, the *United Nations Convention on the Child* and the *Family Law Reform Act* have opened a ‘space’ for children’s voices and stimulated interest in questions of how children understand and interpret their parents separation, how these stories are to be understood and interpreted

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117 Smart et al, n 8 above at 15
and for what purposes they are then used by legal decision makers. The narratives of the children in this pilot study suggest that children know and are capable of articulating their own experiences of their parents divorce and challenge us as researchers to look critically at how children understand and interpret their own voices and anticipate effective on-going participation of their parents’ separation and divorce. The narratives also provide a stimulus from which to challenge the formulation of the\textit{best interests} test. If a relationship exists between voice and the experience of loss, a relevant factor in the formulation of the best interests test will involve the elevation of children’s voices in family law proceedings. Our theoretical discussion contributes to understanding why some of the resistances that exist in the law to elevating children’s voices in family law. In the major study we will continue to seek the involvement of children in a research project committed to further exploring appropriate, meaningful and effective means for children to participate in family law processes.

Appendix A
Letter to children

Dear ……………………..

Thank you for agreeing to talk with Dr Graham and Mrs Fitzgerald. We are interested to speak to children like you to help us to learn about how children’s experience of the legal processes that take place when their parents separate.

We would like to ask you questions about whether you wanted to be involved in the decisions that were being made at that time about where you would live and how often you would see both your parents. We are interested to ask you about whether you were able to tell people what your wishes were. We will also ask you if there is anything you think people who make the law could do to make it better for children.

Over the next year Dr Graham and Mrs Fitzgerald will be interviewing more than one hundred children. We will need to tape each interview to help us remember everything we have spoken about with each child. However, no one except Dr Graham or Mrs Fitzgerald will listen to those tapes and they will be stored carefully so no-one else may listen to them. Your name will not be used when the interview is written up because you will be given a ‘pretend’ name so no one else can tell that you are the person who was interviewed. You can help choose this ‘pretend’ name if you wish. The recording will be erased once all the information from the interviews is written up.

During the interview you do not have to answer any questions that you do not want to answer. If you do not want to continue talking with Dr Graham or Mrs Fitzgerald, you can stop at any time. It is important for you to know that if you tell Dr Graham or Mrs Fitzgerald during the interview that someone is hurting you we must, by law, tell someone who can help you.

Once you have decided that you would like to meet with us for the interview, we would like you to sign this letter and bring it to the interview. If you have any questions about this letter or the interview please feel free to contact Robyn Fitzgerald on 0411 800 447 or speak with us before our meeting begins.

We are looking very forward to meeting you on 12th December 2002

Yours sincerely,

Dr Anne Graham                                      Ms Robyn Fitzgerald
Letter to Parents

8th December 2002

Dear (Parent),

Thank you for agreeing for your child/children …………………………………..to participate in the research project we are conducting through Southern Cross University. The purpose of the study is to explore and develop theories about children’s experiences of contested family law proceedings in Australia since the implementation of the Family Law Reform Act in 1995.

The theories about children’s experiences will be developed from interviews which will need to be audio-taped so that they may be carefully analysed. In order to discuss and explore your child’s particular experience of family law proceedings the interview will be semi-structured. This means that the questions asked will be partly determined by your child’s responses.

Our role will be to write about the experiences that your child describes and try to link this with other participants’ experiences and then to current legal and sociological literature on how children are positioned or ‘heard’ in family law proceedings.

Only Dr Graham and Robyn Fitzgerald will have access to the taped interviews. Any of your child’s personal details gathered in the course of the project are strictly confidential. Our written work will not contain your child’s actual name. We will choose a pseudonym (another name) for your child so that if our work contains quotes from our interviews, your child’s anonymity will be ensured. If a report of this study is submitted for publication your child will not be identifiable in such a report. The recording tapes will be erased once the paper is completed. It is important for you to know that if your child discloses a situation of abuse or neglect the researchers are obliged, under NSW Child Protection legislation, to report the matter.

The interviews have been carefully designed to ensure that participation in the research causes no distress to your child. However, in the unlikely event that any distress should occur we will refer him/her to professional counselling with Ms Bronwyn Sergeant at no cost to yourself. We anticipate the interview will take between 25 and 30 minutes. The interview will be held at Southern Cross University in Room B3.06 or at your home if your child would prefer. If your child decides he/she wants to discontinue participation at any time he/she may do so without giving a reason and his/her right to do so will be respected.
Please sign the attached consent forms and return them to us prior to the commencement of our interview. If you have any questions we expect you to ask us. Please do not hesitate to contact either Robyn Fitzgerald or Dr Anne Graham.

If you have any queries or complaints regarding this project that cannot be answered by the person responsible for this research project please contact:

Mr John Russell
Graduate Research College, Southern Cross University
Ph: (02) 6620 3705 Fax: (02) 6626 9145 Email: jrussell@scu.edu.au

We look forward to our meeting on Wednesday 11th December 2002 at 4.00 at your home.

Yours sincerely,

Dr Anne Graham
(Phone: 02 66 203613)

Ms Robyn Fitzgerald
(Phone: 0411 800 447)
Parent consent form

CONSENT FORM

Experiences of children in contested family law proceedings in an Australian context.

I, _________________________________ have read and understood the attached information and any questions I have asked have been answered to my satisfaction. I agree for my child/children ……………………………………………………..to participate in this research and have been given a copy of this form to keep.

I understand that this research will involve an interview for approximately 25-30 minutes, and that this interview will be audio-taped. I am also aware that ……………………………………… can withdraw from the study at any time.

I understand that in all written work associated with this research that my child (and anyone else named in the interview) will be identified by a pseudonym to ensure confidentiality and anonymity. I give permission to Robyn Fitzgerald and Dr Anne Graham to listen to and transcribe the audio-tapes.

I know that the aim of the research project is to explore and develop theories about children’s experiences of contested family law proceedings in Australia since the implementation of the Family Law Reform Act in 1995. I know that I can contact Robyn Fitzgerald on 0411 800 447 or Dr Anne Graham on 02 66 203 613 during working hours with any queries that I have. I understand that the project is funded by a grant from a Southern Cross University Legal Scholarship Support Fund.

Signed:

Date:


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