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Children having a say: a study on children's participation in family law decision making

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Children Having a Say:  
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Family Law Decision Making  

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Doctor of Philosophy  

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BEd, LLB (Hons)
Declaration

I certify that the work presented in this thesis is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

I acknowledge that I have read and understood the University’s rules, requirements, procedures and policy relating to my higher degree research award and to my thesis. I certify that I have complied with the rules, requirements, procedures and policy of the University (as they may be from time to time).

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Acknowledgements

A central theme of this thesis has been conversation, and this has been no different for the process of undertaking the thesis itself. There are few worthwhile insights and reflections which are not the fruit of such conversations. Special thanks firstly go to the children who agreed to be involved in the study. Without their rich insights, curiosity and commitment to change, this study would not have been possible. I am also grateful to the parents of the children, and to the caseworkers and managers of the Children’s Contact Service who agreed that the views and perspectives of children must continue to be heard, despite the very real challenges that confronted them in supporting the children to be involved.

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Finally, to my husband Mike and children, Emily, Caitlin and Paddy for their loving care, encouragement and patience. Our conversations over many years and in countless different places have challenged me in ways I could never have imagined. This thesis is dedicated to them.
Abstract

The idea that children should be heard and their views respected in decision-making has become an important principle of family law in recent years. No longer considered objects of concern, children are now understood as entitled to ‘have a say’ in the decision making that determines post separation residence and contact arrangements. At the same time, though, concerns are being voiced that the rhetoric of children’s participation does not readily translate into practice in the complex reality of family law settings. Significantly, children themselves report that they are unheard in family law decision-making processes and their views are not taken seriously.

This study explores the ambiguous and contested nature of children’s participation. It draws on the narratives of thirteen children interviewed in relation to their views and experiences of having a say in family law decision making, specifically within the context of supervised contact. Utilising a critical hermeneutic approach, the findings suggest a number of important and inextricable links between children’s participation, their recognition, and the ways in which adults engage in and interpret dialogue with children. The children’s narratives further reveal the complex power practices at work which act to facilitate as well as to resist and prevent the dialogue which is integral to the recognition of children.

The study argues that children’s participation demands ongoing scrutiny in terms of its enactment in family law processes. Such scrutiny must extend to the social and political power practices that enable, constrain and/or silence the dialogue that supports and facilitates children’s participation in family law decision-making. The thesis concludes by exploring some of the implications for researchers and practitioners when dialogue and recognition are assigned a central role in the conceptualisation and practice of participation.
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<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<td>AVO</td>
<td>Apprehended Violence Order</td>
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<td>CCS</td>
<td>Children’s Contact Services</td>
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<td>ECHR</td>
<td>European Convention on Human Rights and Fundamental Freedoms</td>
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<td>FCA</td>
<td>Family Court of Australia</td>
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<td>FDR</td>
<td>Family Dispute Resolution</td>
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<td>FRC</td>
<td>Family Relationship Centre</td>
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<td>FRSP</td>
<td>Family Relationships Services Program</td>
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<td>HREC</td>
<td>Human Research Ethics Committee</td>
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<td>NHMRC</td>
<td>National Health and Medical Research Council</td>
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<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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Chapter 1: Introduction

We know of course there’s really no such thing as the ‘voiceless’. There are only the deliberately silenced or the preferably unheard. (Roy, 2004, p. 1)

Arundhati Roy’s words on receiving the 2004 City of Sydney Peace Prize make clear that there can be no voice of the voiceless, only practices that contribute to the social isolation of ‘the powerless and the disenfranchised against the powerful’ (p.1). Roy’s words could also describe the position in which children and young people find themselves in the decision-making processes that take place when their parents’ separate and divorce. Children, at times, have been regarded as ‘voiceless’ in family law and policy, at once the object, but all too rarely the subject of family law decision-making processes that take place in their name and which concern them. In the aftermath of parental separation, the ‘voiceless’ child has been conceived of in largely developmental terms as being in the process of becoming, and hence their incompetence, irrationality and structural powerlessness have been taken for granted (Neale & Smart, 1998; Prout & James, 1997).

More recently, however, the position of children in family law and policy has changed. Amidst calls to ‘hear children’s voices’, children now occupy a more ambiguous position in family law decision-making processes. Although still burdened with traditional interpretations of childhood, family law and its associated policy agendas now entertain the notion of children as individual citizens and bearers of rights within civil society (Hendrick, 1997). This new openness to including children as members of civil society is apparent both in the legislation, with the Family Law Act 1975 declaring that children possess a number of rights, and in family law policy, which is increasingly framed to emphasise the importance of children in family law processes. Indeed, the centrality of ‘child-focused’ and ‘child-inclusive’ principles in family law and policy is now widely remarked. One example is the declaration by the Attorney General’s Department (2005) that recent reforms to the Family Law Act by the Family Law Amendment (Shared Responsibility) Act 2006 ‘are about putting children at centre stage’ (p.2).
Yet, while the rhetoric is persuasive, especially when it gives the impression that a child-inclusive culture prevails in Australian family law, policy and practice, children continue to report feelings of exclusion and isolation when describing the decision-making around their parents’ divorces (Cashmore, 2003; Pryor & Emery, 2004; Taylor, Tapp & Henaghan, 2007). The mounting demands for children ‘to have a say’ have thus, somewhat incongruously, heightened unresolved tensions about the relationship between the moral status of children and wider political and social power relations and practices (particularly the rights of parents) which constitute and govern children’s participation in the decisions that will shape their future lives, and which, without close critical scrutiny, have the power to ensure children continue to be ‘deliberately silenced or unheard’ (Roy, 2004, p.1). James (2007) captures the growing concerns that the very idea of giving children a voice has in fact failed to initiate the full recognition of children as citizens in social and political life:

...despite such representations of the ‘voices of children’ children themselves may, nonetheless, continue to find their voices silenced, suppressed, or ignored in their everyday lives. Children may not be asked their views and opinions, and even if they are consulted, their views may be dismissed. (p. 261)

While the principle of children’s participation in family law policy appears progressive, it is clear that there is a disjuncture between policy claims about children’s participation in family law decision-making and practices that facilitate the serious inclusion of children and young people. In short, behind the rhetoric of inclusion a debate is brewing as to whether, how and to what extent these ideals of children’s participation are in fact respected in practice. There is now, more than ever, an urgent need to focus on the contested and ambiguous territory of children’s participation in family law, both in relation to its emancipatory potential as well as some of the unresolved tensions, questions and power practices at work when we invite children to participate in family law decision making. This study can be seen as making a small contribution to that challenge.

The purpose of this study is to investigate how children, and what they have to say, are currently recognised as participants in family law decision-making. The Family Law
Act 1975 forms the backdrop to this research that draws on the narratives of thirteen children who were invited to share their views and experience of having a say. At the time of the study, all thirteen children attended Children’s Contact Services, or CCSs, to visit a parent for supervised contact. Approaching the study from the perspective of children is an important feature of this research and is intended to privilege the meaning and importance children attach to ‘having a say’ and so to challenge the ways we listen to children, particularly in a family law setting. Indeed in this study, ‘having a say’ is understood as a basic principle of participation, in that children are able to take part in decision making by voicing their own concerns about the contact and residence arrangements that follow their parents’ separation. While the two terms should not, therefore, be distinguished too sharply, it is important to note that this study has been formulated around the idea of children ‘having a say’ in preference to the more abstract term ‘participation’. The latter term risks occluding in technical language the very agency it would bring to light, whereas the phrase ‘having a say’ is continuous with the everyday world of children and the colloquial language they use to conceptualise and interpret it. Ideally, such a choice of terminology closes the gap between children’s experience and the adult or legal representation of it, or rather, it strengthens the claim of children to accurately represent their own experience.

The study adopts a critical hermeneutic approach to interpret and represent the diversity of children’s experiences of decision making in family law. Critical hermeneutics is indispensable to such a theoretical task because it proposes a dialogical approach to interpretation which, on the one hand, maintains a commitment to the meaning and subjectivity of the conversations that invite and sustain the participation of children in family law decision making, but, on the other hand, remains attuned to power imbalances which are at odds with that commitment and which might be said to qualify or even condition it. Critical hermeneutics thus embraces the ‘liberating, problematising, innovative and unpredictable potential’ (Kögler, 1999, p. 1) of conversations with children as capable of leading us to new insights about their experiences of family law decision making while at the same time insisting such accounts cannot be heard outside of the political, legal, social, historical and cultural practices of power. What is meant by power in this context is that which potentially enables, inhibits and resists what children have to say and the ways they are able to
participate in family law processes. To this end, before introducing and analysing the narratives of the children involved in this study, the first three chapters provide an account of the legal, political and social discourses which form the basis for such analysis later in the study.

This chapter begins by introducing the substantive focus of the study, children’s participation. Discussion then turns to examine the ‘problem’ of children’s participation, particularly in a family law setting. In this discussion, I introduce some of the tensions and ambiguities that arise when we seek to translate the principle of children’s participation into practice. As part of this discussion, I outline how this study, too, has arisen in response to the tensions that I have observed in family law practice and in previous research. The relevance of critical hermeneutics to this study is then proposed. The chapter concludes with a summary of the significance of the study and an overview of the thesis.

1.1 Why Children’s Participation?

Children’s participation can be said to have emerged in response to what Christensen and Prout (2005, p. 42) describe as a ‘concatenation of factors’ that have challenged the very nature and meaning of participation itself and which have prompted a fundamental shift in thinking about children’s status and capacity to participate in social and political life. Now, more than ever before, children’s participation has come to occupy a central place in social and political life including in decision making that affects them (Davis & Hill, 2006; Moss, Clark & Kjørholt, 2004). As Kjørholt (2001) has observed:

[D]uring the last fifteen years, the emphasis on children as social and political actors holding special rights in decision-making processes at different levels has been overwhelming. The notion of children as independent individual citizens with democratic rights in many ways represents a qualitatively new perspective on childhood. (p.68)

No longer just an ideal, children’s participation is accepted as strengthening the status of children in social and political life, challenging issues associated with their social
exclusion, emboldening the accountability and responsiveness of institutions, as well as contributing far reaching benefits for children’s wellbeing and that of their families and wider communities (Kirby & Bryson, 2002; Kjørholt, 2002; Smart, Neale & Wade, 2001; Smith, 2007; Stafford, Laybourn, Hill & Walker, 2003).

A number of influences on thinking about childhood are closely bound up with more contemporary understandings of children as having strengths and competencies which have transformed them from invisible objects into subjects with legitimate voices of their own (Neale & Flowerdew, 2007). Key amongst these influences are the new childhood studies, sociocultural theory, and the United Nations Convention on the Rights of the Child (UNCRC). Parallel with these too have been significant economic and political changes which have shaped contemporary views of children as participants in social and political life. Economically, with the increased emphasis on the primacy of the consumer, children today are ‘increasingly being drawn into economic markets as consumers and workers’ (Kjørholt, 2001, p.75). Politically, there has been a shift beyond traditional understandings of representative democracy towards the creation and facilitation of participatory mechanisms of citizen engagement, which have supported these more robust views of children as citizens with rights and responsibilities (Gaventa, 2007). Each of these influences has contributed independently and collectively to shaping contemporary understandings of children as having the voice and status of citizens and thus being capable of participation in various aspects of social and political life. Such developments have been described by Moss et al. (2004, p. 3) as ‘surface manifestations of subterranean and seismic shifts in social, economic and political relations’, and are discussed in depth in Chapter Three.

For the purposes of this introductory discussion, however, it is important to note that as a consequence of these developments children’s participation is now legitimated in a number of ways. One of the most important themes to emerge in the scholarly literature is that children’s participation has important implications for children’s wellbeing (Dahlberg & Moss, 2005; Graham, 2004; Hart, 1992; Lansdown, 1995; Lister, 2008a; Moss et al. 2004; Neale, 2004). According to Kjørholt (2002, p. 63) children’s participation is ‘something that contributes to children’s positive development of individual identity, competence and a sense of responsibility’. Research shows
children attribute a great deal of importance to being acknowledged as individuals with opinions and feelings of their own and as being able to constructively contribute to and shape decisions made in their everyday lives (Bagshaw, Quinn & Schmidt, 2006; Cashmore, 2008; Parkinson & Cashmore, 2008; Smart, 2006a; Smith & Taylor, 2003). Children cite participation across any number of contexts, whether in planning and policy evaluation or in relation to their own lives, as helping them develop a sense of belonging in the community, to gaining new skills and experiences, to meeting new people and friends and to building a sense of their own agency (Cashmore, 2003; NSW Children’s Commission, 2006). Within the process of family decision making, children learn experientially that participation involves negotiation, choice and compromise, that participation does not necessarily mean getting their wish, and that compromise is often required (Mayall, 2006; Morrow, 1998; Smith, Taylor & Tapp, 2003; Thomas & O’Kane, 1998, 1999). Ultimately, these benefits contribute to children’s own sense of wellbeing (Graham, 2004; Neale, 2004).

The relevance of participation for children’s wellbeing is supported in a recent Australian study undertaken by the NSW Commission for Children and Young People (2007). In this study involving 126 children and young people, participants identified having some agency and control in decision making as important in helping them to negotiate and solve problems, and for developing moral orientation and sense of self. While the children wanted appropriate boundaries and guidance from parents, they reported that having a voice enables them to identify their goals and develop their own solutions to their everyday life issues. Children’s participation as practice therefore has the potential to be transformative by providing children with the opportunity to make sense of the world around them. As Roche (1997) notes:

To be committed to a practice with children and young people in which they are provided with proper information, in which they are able to express their thoughts and feelings on matters in question at an appropriate time and place, in which the various possible courses of action are fully explored with them, and in which their views, whatever their social origins or location are listened to and treated seriously, will be to transform the experience of child and professional. (p.57)
There are also benefits of young people’s participation for families. Children who feel respected and heard are more likely to respect others, to be more committed to decisions, to share responsibility for decisions, and to differentiate between that which they can and cannot change, and to accept that there are some things which they cannot change (Cashmore, 2003; Graham, 2004; Neale, 2002; Pryor & Rodgers, 2001; Rayner, 1993; Taylor, 2006; Warshak, 2003). In a recent major Australian study of children’s participation in family law disputes which drew on interviews with 47 children, 90 parents, 43 lawyers, 44 mediators and 20 judicial officers, Parkinson and Cashmore (2008) report that parents are supportive of children’s participation for a number of reasons: having a say acknowledges that it is the children’s lives about which decisions are made, children are experts on their own family situation, there are therapeutic benefits for children when they have a say, such as having some control over their environment and being treated with respect, and taking into account children’s views leads to better decisions and therefore to better outcomes and happier children.

A further compelling argument for children’s participation is that it contributes to the creation and development of a better society as a whole (Chawla, 2001; Hart, 1992). By affording children the rightful and legitimate claim to engage in the decisions and processes that affect their lives, participation is said to strengthen the status of all citizens, including children (Cairns, 2006; Lister, 2007). Children are viewed as critical resources in the development of a better society in that children’s perspectives contribute to a greater awareness of ecological and social justice issues and thus, potentially, to the development of a just and harmonious society (Kjørholt, 2002). A growing body of research suggests that children’s participation contributes to the wellbeing of communities by making policy more sensitive to social needs, and therefore more likely to work (Grover, 2004). For example, Sinclair and Franklin (2000) suggest that children’s participation upholds their rights as citizens and service users, enables politicians to fulfil legal responsibilities, improves and influences services through informed decision making and enhances democratic processes. For governments and organisations, encouraging children to participate allows for them to influence the design and delivery of services, and to introduce new and innovative ideas, which in turn translate into relevant and responsive policy (Kirby & Bryson, 2002). Children having a say is therefore understood as playing a central role in
strengthening the accountability and responsiveness of individuals and institutions (Gaventa, 2002a; Cairns, 2006). In practice, this means ‘regarding children and youngsters as fellow citizens, people whose share in society is appreciated and stimulated because of the constructive contribution they are able to make’ (De Winter, 1997, p. 163).

These findings are also reflected in family law research which shows that there are significant benefits to be gained from involving children in family law decision making (Butler et al., 2002; Cashmore, 2003; Neale, 2002; Parkinson & Cashmore, 2008; Smart, 2002; Smart, et al., 2001; Smith, et al., 2003; Taylor et al., 2007). These benefits include the ‘likelihood of better decisions and outcomes, and of greater acceptance and compliance by children, the basic right of children as people with opinions and feelings of their own to be treated with respect, and the demonstrable fact that adults and even parents do not always act in the best interests of children’ (Cashmore, 2003, p.59). In addition, children say that they cope better if they have appropriate information and involvement and are helped to understand the changes taking place around them (Bagshaw et al., 2006; Davis, 1998; Davis & Hill, 2006; Rayner, 1993; Smith, 2002; Taylor, 2006; Wierenga & Wood, 2003). This includes access to information in order to assist them to regain cognitive control of events (Butler et al., 2002; Smith et al., 2003; Graham & Fitzgerald, 2006). Talking together and listening to each other helps children and adults see which plans, problems and values they share and where they differ or need to work towards agreement (Alderson, 2000; Graham, 2004; Neale, 2002).

While the conceptualisation of children’s participation, as introduced in the discussion above, continues to yield sophisticated definitions and understandings of children’s participation, there are, however, growing concerns being voiced as to the extent to which children are taken seriously as participants in their everyday lives, even in those policy and project initiatives that are intended to promote the participation of children (Davis & Hill, 2006; Mason & Michaux, 2005; Thomas & O’Kane, 2000). As more and more children and young people are involved in participatory initiatives, there is growing evidence such participation does not guarantee benefits for children, and that children and young people still have little impact on public or private decision-making outcomes (Davis, Farrier & Whiting, 2006). Matthews (2003) says of this situation:
It would seem that a new social economy is developing, in which non-state actors and communities are increasingly valorised as agents in the process of social change. However, the ways in which social capital is being harnessed to promote the health and well-being of communities vary, as do the ways in which power and decision-making are distributed among the participants. All too often, children are sidelined in these activities. (p. 265)

Matthews’s concerns serve to highlight the contested nature of children’s participation which holds out to children an ambiguous mix of the promise of inclusion and emancipation on the one hand, and the potential for co-option on the other. In the following section, I outline this ‘problem’ of children’s participation as it emerges in the literature, both in relation to children’s participation generally, as well as in relation to the specific context of family law decision making.

1.2 The Problem of Children’s Participation

In the last five years, there has been increasing evidence that the progress made in promoting the rationale or ‘case’ for children’s participation has not been matched by evidence of change for children in their everyday lives. Increasingly, a number of critiques point to a fundamental gap between the rationale for participation and evidence documenting and evaluating its impact and outcomes, what difference it makes, and for whom (Cairns, 2006; Davis, 2007; Davis & Hill, 2006; ESCR Seminar Series Participants, 2004; Gallagher, 2006a; Graham, Fitzgerald & Whelan, 2006; James, 2007; Kirby & Bryson, 2002; Mathews, 2005; Partridge, 2005; Percy-Smith, 2005). For example, Morgan (2005) points particularly to participatory initiatives where organisations consult with children, but then provide little feedback or action in response to the children’s views, a concern also shared by Davis and Hill (2006, p. 9) who assert that young people’s involvement is often ‘tokenistic, unrepresentative in membership, adult-led in process and ineffective in acting upon what children want’. Zakus and Lysack (1998, p. 7) have observed that participation has ‘proven not only difficult to define, but to practically initiate and sustain’, while Davis et al. (2006, p. 16) further argue ‘there is little evidence to suggest that any organisation has been able to enable children and young people to contribute to policy development at national,
regional and local levels and enable them to contribute in a cross/inter service way to the development of targeted and universal services’.

Paradoxically, then, just at the time we are witnessing increasing numbers of government and non-government organisations (in education, family law, health, community services, research institutes and so on) laying claim to the value of participation, we are simultaneously querying whether ‘listening to children’s voices’ guarantees any benefits for them or for other children, and whether public or private decision-making outcomes are shaped or impacted as a result of their participation (Davis, et al., 2006; James, 2007; Piper, 2001). These concerns are cited across a variety of settings and a number of studies show that despite children having enthusiasm for being involved in innovations such as school councils, youth parliaments, local community governance and planning bodies, their involvement is often undemocratic and fails to fulfil its original aims (Cook-Sather, 2007; Davis & Hill, 2006; Wyness, Harrison & Buchanon, 2004). As one of the most governed groups and highest users of state services in our societies, children have little, if any, input into the policy and practice decisions made about them (Gallagher, 2006a; Hill, Davis, Prout & Tisdall, 2004; Rose, 1999). As well, as Morgan (2005) reports, although numerous organisations consult with children, few provide children with feedback and fewer respond to their views.

In educational settings, while children continue to participate informally by producing active social spaces, as well as through more formal activities such as school councils and youth forums, schools continue to resist the agency of children. Thomas (2000, p. 579) describes schools, as ‘peculiarly paradoxical places’ which are ‘structured to encourage kids to become independent and self-reliant, yet most institutions curb expressions of nonconformity’. Children’s school life is highly regulated in ways that preclude any serious invitation to children to engage in conversation about the important issues to children, including timetabling, classroom layout, rule making and curriculums (Gallagher, 2006a, p. 159). For example, in a study examining children’s rights in English schools, Alderson (1999) showed that just over half of a sample of 2272 pupils said that they had a school council, and only 20 per cent of these students saw the school council as effective. The majority of students thought that teachers and
adults determined the agenda of school councils and perceived the work of school councils as largely peripheral to their lives.

In children’s healthcare, there is growing concern about the place of children’s participation in medicalising discourses (Alderson, 2001; Franklin & Sloper, 2005). This is particularly so, argues Coppick (2003), in relation to responses to ‘oppositional behaviour’ in children which construct such behaviours as ‘illness’ and which enforce their ‘dependency on adults to act in their best interests’ (p.149). The gap between the principle and practice of participation is particularly evident for children with disabilities, whose participation in decision making continues to be framed in terms of their disability, rather than their status as a child or young person (National Disability Services, 2007). This growing awareness of the problems associated with children’s participation is captured by Gilligan (2000) in his observations of the provision of services to children in out-of-home care:

The rhetoric of participation – and its application to children in care – is of course highly seductive, but implementing it in terms of care planning and reviews raises complex issues and depends heavily on the skills and commitment of individual social workers. (p.267)

In family law, the picture is no different. As I have mentioned in the introduction to this chapter, children continue to report feeling marginalised and excluded from family law decision-making processes. Research with children seeking their views and experiences of their parent’s separation and divorce reveals that few children are consulted or report any significant involvement in the formulation of initial or ongoing residence and contact arrangements and children and young people continue to report feeling excluded and disregarded (Bagshaw et al., 2006; Butler et al., 2002; Cashmore, 2003; Neale, 2002; Parkinson & Cashmore, 2008; Smart, 2002; Smith & Taylor, 2003 Smith et al., 2003). Of those children who say they were involved, many report that when they were invited to participate it was usually to express a view on a decision that had already been made (Butler et al., 2002; Smith et al., 2003). Indeed, Chisholm (1999) observes that opportunities for children to participate and to ‘tell their own story’ have almost been non-existent within family law litigation and are rare in family law mediation processes.
Children further tell us that they are not well prepared for their parents’ separation and divorce, nor are they adequately informed about the processes that inevitably follow when their parents separate (Butler et al., 2002; Gollop, Smith & Taylor, 2000; Day Sclater & Piper, 2001.) Keeping children ‘in the dark’ only further contributes to children’s pain and confusion, and children lacking information about the separation are more likely to suffer from anxiety and depression, to exhibit distress and to blame themselves for their parents’ separation (Cashmore & Paxman, 1996; Smith et al., 2003; Taylor, 2006). Further, Marshall (1997) reports that young people say that being told ‘there is information about you that is so awful that you are not allowed access to it is more damaging than knowing the information itself’ (pp. 82–83). McCredie and Horroz (1995) report that when participation does not facilitate information sharing, lack of information and consultation may be factors which inhibit children’s adjustment to changes in family structure. Sandler and Yum (1997, cited in Amato, 2000) found that children’s perceived lack of control over events mediated some of the impact of divorce-related stress on adjustment, thus further limiting their ability to shape an understanding of what was happening and to restore balance in their lives. Hence, as Taylor (2005) observes, it is not necessarily the separation itself that is problematic, but rather the way in which adults negotiate their interactions with children. Reflecting on data collected from interviews with 20 children exploring their experiences of family separation, Bagshaw et al. (2006) describe the experience of family law processes for children as follows:

Children were identified as being voiceless in the separation process, despite their view that they have the right to contribute to decisions that affect them; they were not given enough information or support to enable them to cope with family transition. They wanted more information about the reasons for their parent’s separation and what would happen to them in the process. (p. x)

This emerging gap between the principle and practice of children’s participation is not the only area of uncertainty in the study of children’s involvement in decision-making. There is also the growing realisation that while listening to the voices of children represents an important start in addressing the issues arising from the social inclusion of children, actually doing the listening (and responding) authentically is challenging. When asked about participation, for example, children sometimes tell a story that is not
consistent with being an agentic/participant child, nor do their responses always convey ‘thoughts that can be exchanged, and intentions that match situations defined by adults (Komulainen, 2007, p. 25). Moreover, there is growing unrest in relation to the ways in which children’s voices have been represented. For example, James (2007) has argued that the voices of children have been privileged in a relatively uncritical conceptual and theoretical space which hides from view what Geertz (1988) describes as the pitfalls of ‘ethnographic ventriloquism: the claim to speak not just about another form of life but to speak from within it’ (p. 145). Yet, as James (2007) emphasises, giving voice to children is not simply or only about letting children speak. Rather, it is about exploring the unique contribution children’s perspectives can provide to our understanding of, and theorising about, the social world, thereby enabling new insights from the margins where the children speak without rarefying the ‘otherness’ of children’s voices to such a degree that they are turned into an abstract alterity (Hanssen, 2000). While the ‘otherness’ or alterity of children might constitute them conceptually as different, including their ‘voices’ in research should not be assumed as representing a more accurate or authentic account or as more accurately informing policy, as James (2007) suggests:

That is to say, there is a fine line between presenting children’s accounts of the world and the claim to be able to see the world from children’s perspective as a new kind of “truth”…. We must also challenge the new “text positivism” and “dispersed authorship” that seem to assume, necessarily, that research done with or by children - research including “what children say” - is an authentic (and hence unproblematic) representation of children’s voices. (p.263)

Komulainen’s (2007) caveat captures the tension that currently exists for researchers who seek to elevate the voices of children: ‘Before we can simply “give a voice” to children, we need to acknowledge that there are ambiguities involved in human communication, and that these ambiguities result from the “socialness” of human interaction, discourses and practices’ (p. 31). It is within the context of such tensions that this study takes place. However, before introducing the research question itself, it is relevant to comment briefly on how the study came about, for the study itself arose in response to an earlier small-scale study which explored children’s experiences of family law proceedings (Graham & Fitzgerald, 2004) and which fundamentally shaped my thinking in relation to children’s experiences of having a say.
1.3 Why This Study on Children and Family Law?

The previous small-scale study grew out of observations that the family law system, which purported to be focused on reaching decisions that are in the best interests of the child, often excluded the children themselves. In our view, this was despite an ostensible commitment to children and an increasingly strong rights discourse, both in Australia and overseas (Graham & Fitzgerald, 2004). 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 this study. In the early stages of the project, the study was widened to include children’s experiences of both contested and uncontested proceedings as it became apparent that it was important to focus more broadly on the voices of the children than on the mechanisms that allow for them to be heard.

Several key themes about children’s participation emerged from in-depth, semi-structured interviews with eight children, prompting the need for this further study. First, in contrast to their expressed wish to be heard in family law decision-making processes, few children in the earlier study reported having been consulted in the decision-making processes that took place following their parents’ separation. Second, most children wanted greater access to more information, either from a family friend, an independent person working in family law or the judge. The children wanted this information in relation to both their own residential and contact arrangements and in terms of the family court processes.

In addition, we observed a tension between children wanting to have a say and children simultaneously welcoming limits on their decision-making. Children described their difficulties with expressing a view that might hurt one parent, while also revealing the feelings of hurt and confusion that accompanied their parents’ separation, highlighting the ambivalence about their participatory role.
Further, the children described how their feelings of hurt, vulnerability and sadness sometimes clouded their ability to understand their own emotions and their own perspectives on their parents’ separation. By articulating their experiences of decision-making as taking place at a difficult time of change and loss, it was clear that appeals by the children to be treated by adults with respect and as being capable of engaging with what was happening in their families co-existed alongside statements that revealed their vulnerability and experience of their parents’ separation as a difficult time of change and loss (Graham & Fitzgerald, 2004; 2006). Whilst the children expressed a desire to be heard, their narratives of participation appeared to be located within and across quite different discourses of participation, suggesting a ‘to and fro’ between wanting to be involved, yet at the same time, expressing hurt, confusion and a profound care for their parents, and a desire to protect them from any further hurt in relation to the processes occurring around them.

The children’s narratives prompted a number of observations and further questions. First, what exactly was it that children referred to when they said they wanted a say? Second, to what extent does family law accommodate the tension and contradictions of children’s participation, and indeed, what role does family law play in contributing to such contradictions? Finally, there was a question as to why the gap seemed so large between the children’s expectations of participation and their own experiences.

A further layer of complexity was added to these reflections on the earlier study, as it was very evident that our observations and questions about children’s participation in family law held just as much relevance for the research process as they did for the substantive focus of the research. It became very evident there were issues that any further study needed to take account of, in particular, whether and how further research might invite the meaningful and appropriate participation of children in the study, while remaining cognisant of the problematic nature of terms such as ‘meaningful’, ‘appropriate’ and ‘participation’ in the research context.

In addition to suggesting a number of key themes for further exploration, the preliminary study provided further impetus for the current project in that, during the dissemination of its findings, I was approached by staff from a regional Children’s
Chapter 1: Introduction

Contact Service (CCS) with a proposal that a follow-up study be undertaken with children having supervised contact or changeover with a parent at a CCS. At the time, little research had been undertaken in the context of supervised contact and changeover. In Australia, the Contact Services in Australia: Research and Evaluation Project (Strategic Partners, 1998), which involved 49 children ranging in age from 8 months to 13 years, collected survey feedback from parents and 12 children. This study found that some children had positive feelings about their use of the contact service and some did not. Half of the children reported being happy during their visit and enjoyed seeing their non-resident parent, while half said they were unsure or unhappy about the way the visit took place, and about the tension that the visit created for themselves and for their parents. While three quarters of the children said they felt safe, those children who said they did not feel safe were not considered high-vigilance cases, nor were staff aware that the child was significantly worried by some aspect of their visit. Overall, the report found that ‘regardless of age, length of time in the program, type of visit and reasons for use of the service, all children displayed or discussed feelings of insecurity and apprehension with respect to some aspect of the visit’ (Strategic Partners, 1998, p 76).

Overseas, the findings of two major studies were relevant. In Canada, the Supervised Access Pilot Project (the Ontario Project) involved the establishment and evaluation of supervised access programs in 14 locations across Ontario (Ministry of the Attorney General (Ontario), 1994). The study, which was concerned with the impact of contact services on parents and children, reported the views of 121 key stakeholders, including 29 children, aged from 4½ to 14 years. The study reported that children were positive about their experiences of supervised contact and about staff at the centres. However, the majority of children (58%) could not give an account of why they attended the centre, and a further 68% made minor complaints about the centre in relation to toys, activities and about being ‘watched’.

In Scotland, the Child Contact Centres in Scotland Study (Sproston, Woodfield & Tisdall, 2004) examined user’s and worker’s expectations and experiences of child contact centres. One hundred interviews took place with families, contact centre staff and professionals, including eleven children. In that study, children were highly positive about the contact centres. However, like children in Australia and Canada, Scottish
children were unhappy with some aspects of contact, including limited facilities for older children, shared space for contact and the time and flexibility of contact (Sproston, et al., 2004).

The findings of these studies highlighted further tension in children’s experiences of family law decision-making. That so little research had explored children’s experiences of supervised contact, combined with the rapid expansion of CCSs during the early stage of the formulation of my own research question (discussed in Chapter Two), influenced my decision to locate my research within the context of supervised contact, albeit with a focus on decision making within that context.

Whilst the current research was underway, further research findings reporting children’s views and experiences of supervised contact were published. In Australia, the *Children’s Contact Services: Expectation and Experience (Children’s Contact Services Report)* project explored the role of children’s contact services and the expectations different parties had regarding the use of contact services (Sheehan et al., 2005). This study included interviews with 24 children in relation to the question of whether they experienced the contact services to be safe and their visits enjoyable. Children in this study also expressed a strong desire to spend more time with their contact parent, and reported enjoying their supervised visits to the centre. Most of the children also felt safe and supported by the staff and able to rely on their authority to set behavioural boundaries for the contact parent, including making the contact parent more ‘child focused‘ (Sheehan et al., 2005, p. 151). However, some children reported the need for more flexibility. They wanted to be able to stop particular contact visits if they felt upset or frightened, and wanted some control over whether they continued to have meetings with contact parents. Some children reported feeling restricted by the centre procedures, particularly their compulsory attendance. Some expressed the desire for contact to cease altogether. In New Zealand, research undertaken for the Ministry of Social Development, examined what factors contribute to an effective supervised contact centre, why families discontinue attendance at supervised contact centres and what types of contact arrangements families have once they no longer use the service (Gollop, 2008). Data obtained from 18 children revealed that children were positive about the time they spent at the centre, with only 3 children reporting negative feedback,
although most children wanted some aspect about their contact changed, including in relation to the time, form and frequency of contact (Gollop, 2008).

While these studies are relevant to the current study in that they included the views and perspectives of children in relation to their experiences of supervised contact and access, this research differs in that although the CCS is the context in which children’s participation in family law decision making is investigated, the effectiveness per se of the CCS is not being assessed. Rather, there is a more critical engagement with what it is that we mean when we describe family law as child-focused, child-inclusive and child-responsive and where children themselves fit into this picture.

1.4 The Research Question and Aims

This study focuses on the following research question: How are children, and what they have to say, recognised in Australian family law decision-making? In order to explore this research question, four research aims were developed:

1. To identify how children are positioned within the current legislative context in Australia.
2. To analyse the ways in which having a say in the family law context is shaped by contemporary discourses of childhood and participation.
3. To explore the potential of a dialogic approach in facilitating the active, authentic participation of children.
4. To explore the meaning and importance children attach to having a say when their parents divorce.

1.5 The Research Approach

This study turns to critical hermeneutics as the basis of its theoretical approach. In the introduction, I alluded to the potential of critical hermeneutics in that it acknowledges both the emancipatory potential of dialogue as well as the social and political power practices that enable, resist and shut down its critical dimensions. Although Chapter Four details the project of critical hermeneutics, particularly the work of the German
philosopher Hans Kögler, the following section signals the potential of critical hermeneutics for investigating the research question and aims as identified above.

Two key factors informed the choice of critical hermeneutics as the preferred theoretical framework for this study. First, I considered that the utilisation of a reflexive account should be integral to the theoretical approach. By reflexivity, I mean an approach to research which takes into account the subjectivities of both me as the researcher, and the children invited to participate in the study. I perceived critical hermeneutics to be up to this task of taking ‘researchers as well as those researched as the focus’ (Harding, 1993, p.71), in that it forgoes rigid ideas about objectivity, instead approaching the role of the researcher as a resource rather than a troublesome element to be overcome and managed (Grondin, 1991; Olesen, 2005; Weinsheimer, 1985). Indeed, a fundamental understanding of a critical hermeneutic approach to research is that I do not hide from view either my presence or the implicit relations of power in my conversations with the children and as the interpreter of their stories. Olesen (2005) describes such an approach as ‘going beyond mere reflection on the conduct of the research and [demanding] a steady, uncomfortable assessment of the interpersonal and institutional knowledge-producing dynamics of qualitative research’ (p. 251). For this reason, I maintain some visibility in narrating the study, in order that my own ideological imperatives (subjective, intersubjective and normative reference claims) are uncovered to the extent that I am able to do so. By acknowledging the situated nature of interpretation, critical hermeneutics is valuable in research undertaken with children because it moves some way to reducing the distance between myself and the children, while at the same time paying attention to the social power structures often hidden in research, as well as in the context of this study, that is, within family law decision making. This relationship between the meaning and importance children attach to having a say, the power-laden practices that shape and inform children’s narratives, and my interpretation of such accounts, is examined in depth in Chapter Four.

In addition to taking account of the reflexivity of the researcher, critical hermeneutics assumes reflexivity to be a stance adopted by children who participate in research, and who are assumed to play an active role in shaping the research outcomes, including the ways they accept and engage with researchers and research questions. The approach of
critical hermeneutics is thus consistent with insights from the new childhood studies and socio-cultural research which regard reflexivity as a methodological necessity in undertaking research with children (Christensen & James, 2000). As earlier discussion has briefly shown, seeing children as active participants in family life is a central tenet of the new childhood studies and provides a theoretical framework from which toscrutinise child-adult relationships and to challenge the marginalisation of children in a variety of contexts (Jenks, 1996; Prout & James, 1997; Smart et al., 2001). The ethical and methodological implications of adopting a reflexive approach to the study are examined in Chapter Five.

The second reason for my choice of a critical hermeneutic approach was that I perceived that the study should utilise a theoretical approach which not only grounded a reflexive understanding of myself as the researcher and the children as participants, but could also ground the interpretative encounter of reflexivity itself. While Chapter Four provides a more detailed description of how critical hermeneutics does this and why it is a particularly useful approach in the field of childhood studies, it is relevant at this point to say that critical hermeneutics addressed a key concern as I planned this study. This concern was my perceived need for an interpretative framework that would not only approach children as competent partners in dialogue, but also view dialogue itself as being both possible and trustworthy, albeit, always imbued and constrained by power. As Chapter Four will show, critical hermeneutics allows for this in that it attends to the meaning and importance children place on having a say while acknowledging the influence of power inherent in their accounts.

This question of how to ‘do’ a reflexive approach to children’s accounts is, however, a highly contested one in childhood research. While there is consensus within social research traditions on the relevance and benefits of reflexivity for social praxis, this is less so when it comes to the question of how the potential of reflexivity for contemporary social praxis should be realised. As such, qualitative research remains a highly diversified and contested site (Denzin & Lincoln, 2005a). The challenge for social research is how to foreground a position of situated knowledge, accountability and partial truths so that the study achieves what Haraway (1998, p. 599) describes as ‘a view from somewhere’, that is of connected, situated participants, rather than a ‘view
from nowhere’. This includes directing attention to what Guba and Lincoln (2005) describe as the ‘more irritating construct’ of validity (p. 205).

A good example of the challenge that reflexivity raises can be found in recent debates about how to represent the voices of children in research. In these debates, the insights of social constructionism have been strongly influential in inviting and opening up for questioning the epistemological structures and hierarchies that surround notions of the child, and of childhood. However, while a social constructionist approach shares with critical hermeneutics a broad affinity with the notion of knowledge not as produced in isolation, but reproduced against a backdrop of shared understandings, practices, languages and so forth, critical hermeneutics would say that the ontologically relativist position upon which social constructionism is founded requires intense and ongoing scrutiny. This is particularly true in relation to any claims that we as researchers can or should place experience at the centre of our research endeavours. As Greene and Hill (2005) have observed:

Where there is an attack on the notion of the unitary self, an attack on the notion of individual experience cannot be far behind. If there is no self, who is the experiencer? (p. 2)

While there might well be multiple, meaningful (albeit often conflicting) constructions of childhood, the plurality and difference of childhood must also be considered in light of the critique of social constructionist tradition as being ‘too critical, that in undermining foundations and absolutes it puts everything “up for grabs” and leaves nothing in its place’ (Usher & Edwards, 1994, p. 26). Given the contestation currently characterising family law in Australia it seemed particularly important to ensure that this study attempts to avoid reducing an understanding of the children’s knowledge and experiences of having a say to practices of power. This issue is a central concern for this study, and one taken up further in Chapter Four.

Before concluding this brief outline of why critical hermeneutics has been adopted as the theoretical approach in this study, it is also important to note that this may be somewhat at odds with traditional legal approaches to the analysis of the legal issues which lie at the heart of the statutory and common law foundations of family law. These
more traditional approaches, I would argue, are shaped by critical realist positions concerning the nature of reality, and have tended to be largely positivist or post-positivist views (which rely on multiple methods of capturing as much reality as possible) in their approach (Denzin & Lincoln, 2005a). However, as Diduck and O’Donovan (2006) have shown, such approaches hide the functional role of family law in relation to the resolution of disputes concerning children by constituting individuals in particular ways:

Family law, as a form of regulation, is about the manipulation of social norms as well as legal ones, and the idea of family law must now grow also to encompass all the ways our family practices are captured by formal and informal regulation. (p. 7)

The critical hermeneutic approach of this study should be distinguished from more traditional approaches in that it is concerned with an analysis of how the legislative framework works, that is, how it enables, supports, resists and shuts down opportunities for children to participate in family law decision making. So, while this study is based primarily in family law, its primary objective is not to explain the legislation and policy governing how children and what they have to say are recognised, so much as to analyse how it works to recognise children and what they have to say. This does not mean that the analysis of legislation, case law and policy documents is not important, as Chapter Two will show. Rather, it suggests that an examination of what it is possible for children to say, and what it is possible for us to hear, is also important (Alldred & Burman, 2005).

1.6 Overview of the Thesis

This thesis is structured around eight chapters. In this chapter, Chapter One, I have introduced the research question: How are children, and what they have to say, recognised in Australian family law decision making? I have sought to provide some broad background to this question by highlighting why there is so much current interest in children’s participation, as well as introducing some of the research evidence that
supports the importance of children’s participation for children, their families and their communities. From there, I have contended that whilst there is evidence of a change in the language and rhetoric of children’s participation, it is nevertheless permeated by ambiguity and tension. This is most evident in a disjuncture which exists between claims about children’s participation in family law and policy and practices that support and facilitate their inclusion in decision-making practices. As part of the discussion I have described how this tension first became evident to me in a small-scale study, undertaken in 2004, which is also outlined. Following a statement of the research question and aims, I have signalled the relevance and value of critical hermeneutics for the study. I will conclude the chapter by outlining the contribution of the study to the literature on children’s participation in family law.

In Chapter Two, I set the political and legislative context for this study by positioning children in the key policy developments, debates and discussions leading up to the implementation of the new Family Law Amendment (Shared Parental Responsibility) Act on 1 July 2006, as well as within the new legislation itself. I examine the ways children are recognised and positioned in family law mediation in Australia, in particular, in the new Family Relationship Centres. As part of this discussion, I show that a plethora of legislative provisions, procedures and policies, while creating the impression of acceptance of the principle of children’s participation, are ambiguous in that they ensure that children make little or no contribution to the decisions that determine such important matters as where they will live, and with whom and how often they will have contact. The chapter thus highlights the disjuncture, outlined in Chapter One, that exists between the rhetorical orientation of the Australian legal and policy framework and evidence of a change in the extent to which children, and what they have to say, are recognised in everyday family law settings.

In Chapter Three, I focus on the ways in which children’s participation has been defined, theorised and problematised in the childhood literature and in broader discussions of participation more generally. Here I provide a detailed examination of the key elements of children’s participation: ‘children’ and ‘participation’. Taking the concept of ‘childhood’, I examine closely how we have come to conceptualise children as ‘participants’ in social and political life, including in family law decision-making.
The new childhood studies, socio-cultural theory and United Nations Convention on the Rights of the Child (UNCRC) are discussed. I show how, despite a fundamental shift in thinking about children and the role they have to play in decision-making processes, new conceptualisations of children as social agents have not necessarily translated into everyday practices in which children’s participation is respected. For this reason, I suggest the need for closer examination of participation itself, in particular the influence that its procedural enactment plays in the everyday practice of children’s participation.

From here, I take the concept of ‘participation’ and show how wider developments in understandings of participation and democracy have shaped and influenced the development of children’s involvement in family law. The contested and contextualised nature of children’s participation is highlighted and shown to contribute to the ambiguity and tension that currently inform its application in family law decision-making. I argue that there is, however, a shift underway in broader discussions and debates about participation towards understanding it as taking place in and through dialogue. I suggest such a shift has potential to enable us to move beyond the ambiguity of children’s participation by focusing more closely on the ways in which we invite, engage and interpret dialogue and conversations with children. I conclude the chapter by suggesting that if such a shift is underway, it holds far reaching implications for the ways in which children, and what they have to say, are recognised in social and political life, including in family law. Not the least of these, I suggest, is the critical explication of dialogue itself.

**Chapter Four** provides an overview of the critical hermeneutic framework underpinning the study. The influence of philosophical hermeneutics and post-structuralism on critical hermeneutics and the implications of such influences are discussed. The work of Han Kögler, in particular his critical explication of the nature of dialogue and the implications of his work for this study, are discussed. The concept of dialogue is a key feature of this study, and is discussed both in relation to the dialogue with children which supports this study, as well as in relation to children’s wider participation in family law processes.
In Chapter Five, I explain the research design and methodology. While discussion in this chapter provides a detailed account of how the study was conducted, it also focuses on the ethical and methodological implications of adopting a critical hermeneutic approach on the research process. The discussion highlights some of the ethical complexities of undertaking research with children from a dialogical perspective.

In Chapter Six, a detailed analysis of the interview data is introduced. In this chapter, the meaning and importance children attach to having a say is reported as the chapter seeks to foreground later discussion and analysis of the children’s narratives. In order to set the broader context of decision making, children’s narratives about their views and experiences of supervised contact precede discussion of their narratives of participation in decision making. The chapter then reports on the following four key themes: children’s experiences of having a say, what is having a say, is having a say something children want and how does having a say feel.

In Chapter Seven, I seek to show, through my further analysis of the interview data, that children emphasise a dialogic interpretation of their participation in family law decision making based on renewed understandings of recognition and respect. At the same time, I show how unresolved, and often unacknowledged, practices of power act to enable, limit and shut down opportunities for children to participate in decision making in the way they envisage. Taking the children’s narratives as grounds for enabling a more differentiated response to understanding their participation in family law decision making, the chapter attempts to explicate a conception of children’s participation as a struggle over recognition. The objective of such an undertaking is to attempt to engage with the dialogical approach to participation which is focused on the recognition of children and what they have to say as important and valuable contributors to family law decision making. The chapter concludes by drawing out a number of questions that the children’s reframing of participation in dialogical terms provokes.

Chapter Eight returns to the research question ‘How are children, and what they have to say, recognised in family law decision-making processes?’ in light of discussion in previous chapters. It highlights the key insights emerging from the study and discusses
what implications they might hold for children, families and the family law system. The chapter concludes with a brief personal reflection.

1.7 The Significance of this Study

This study builds on the substantial body of empirical and jurisprudential work which has explored children’s experiences of decision making following separation and divorce, in order to examine the meaning and importance children themselves attach to having a say. Exploring participation from the perspective of children requires an approach which departs from a more traditional analysis which has tended to focus on arguments for and against the participation of children in family law decision making. The study is significant in that it concentrates on diversity of meanings, powers and knowledges at work in children’s lives when they are invited (or not) to have a say about matters of concern which shape and influence how children, and what they have to say, are recognised in the context of family law decision making. This includes an examination of the power relations and practices which enable or constrain the readiness of the family law system to hear and respond to children, and what they have to say.

The study also makes a valuable contribution to the research literature in that the children included in the study were all the subject of ongoing family law disputes at the time of their interview. The majority, then, were also the subject of a Family Court order that they attend supervised contact with a parent. Therefore, unlike the majority of studies in which children are reflecting back on their experiences of participation, the children in this study were at once reflecting back, looking forward and living the outcomes of family law decision making, acutely aware of its power and influence in shaping relationships, activities and events in their everyday lives. The study therefore brings a sharp focus to some of the dilemmas and tensions arising for children.
1.8 Chapter Summary

The chapter introduced the subject of this study, children’s participation in family law decision-making. I have outlined why there has been so much interest in recent years in children’s participation. As part of this discussion I have drawn attention to the influence of the new childhood studies, socio-cultural theory and the UNCRC in repositioning children as participants in decision making in family law processes that have been traditionally more concerned with their protection. I have also contended that children’s participation is increasingly contested, as evidenced by the tension and, at times, resistance to the translation of the principle of children’s participation into practice. I have explained that this study itself has arisen in response to the tension that increasingly characterises children’s participation. After introducing the research question and aims, I introduced critical hermeneutics as the theoretical framework for the study. In the following chapter, I examine the political and legislative context of children’s participation in Australian family law.
Chapter 2: The Australian Family Law Context

The main focus of the changes is that children come first. When working out shared parental responsibilities following a family breakdown, the new laws make it clear that it’s all about putting the needs and the best interests of the children first. (Attorney General’s Department, 2006, p.1)

This chapter situates children’s participation within the broader political and legislative background of Australian family law. It provides an overview of the policy developments leading up to the implementation of the new legislation, as well as the legislative principles which govern how children, and what they have to say, are recognised in post-separation decision-making processes. Attention is directed, in particular, towards the ways in which children are positioned in such debates, discussion papers and within the legislative regime itself. Throughout the discussion, I seek to examine the tension which surrounds children’s participation, as outlined in Chapter One, between the rhetoric and reality of ‘child-inclusive’ and ‘child-focused practice’ within the current family law context in Australia.

The chapter begins by providing an overview of the key policy developments that have taken place leading up to the implementation of the new Family Law Amendment (Shared Parental Responsibility) Act on 1 July 2006. Next, the chapter turns to the Family Law Act to examine how children and what they have to say are recognised and positioned within the new legislative provisions. Finally, I examine the ways in which children are recognised and positioned within the Australian family dispute resolution framework (FDR), as well as the role of the new Family Relationship Centres (FRCs) which were established outside of the legislation to provide dispute resolution services to families separate from the Family Court.
2.1 A New Family Law System: Setting the Policy Context for Children’s Participation

The Australian family law system has recently undergone a period of radical change. The Federal Government, having funded the largest-ever investment in family law in Australia (four-hundred million dollars over three years), has embarked on the implementation of new legislation and the provision of new services aimed at effecting a ‘cultural change’ in family law (Attorney General’s Department, 2005, p.4). The reforms are extensive and touch on every aspect of family law, policy and practice. At the time of their introduction, the then Attorney General, Philip Ruddock, announced that the reforms would:

... bring about a major change in the way family breakdowns are handled in this country. We want to help parents sit down with each other and talk about what is best for their children, rather than immediately entering into the adversarial legal system. (Attorney General’s Department, 2005, p.1)

The amendments to the Family Law Act 1975 contained in the Family Law Amendment (Shared Responsibility) Act 2006 came into effect on 1 July 2006. The philosophical cornerstone upon which the reforms are built is unambiguous: that the optimal post-separation arrangement for children is equal-time shared parenting (Berns, Sheehan, Banks, Hunter & Hook, 2004). This is evident in the model of shared parenting in the legislation and in family dispute resolution processes in the form of shared parenting messages intended to convey to parents that contact with both parents is considered crucial for children’s welfare, and that in cases not involving violence, parents should share responsibility, including giving serious consideration to sharing the child’s time between them (Fehlberg & Behrens, 2008; Kaganus & Diduck, 2004). Significantly, while the legislation stops short of introducing a presumption of ‘equal time’, in effect, equal shared parental responsibility is the starting point for decision making about major long-term issues for the benefit of the child. When parents have equal shared responsibility for the child, s 65DAA(1) provides that the court must consider children spending equal time with each parent subject to the best interests test. If equal time is appropriate, s 65DAA(5) provides that the Court must consider whether equal time is practicable. If equal time is not appropriate, s 65DAA(2) provides that the court must
then consider substantial and significant time with each parent. These provisions are intended to ensure that courts ‘consider arrangements that are much more than “one weekend a fortnight and half of the holidays or an 80:20 arrangement’” (Family Law Council, 2006, p. 20).

This strongly normative goal of equal shared parenting represents a most important development in family law policy in Australia, and signals a deep shift in the way that family relationships are to be conceptualised, analysed and regulated by the family law system in the future (Kaspiew, 2005; Trinder, 2003). In particular, the reforms aim to change the way that children living in single parent families, mostly with their mothers, have contact with their non-resident parent, usually their father, to ensure that they are given every opportunity to spend an equal or substantial amount of time with both parents (Kaspiew, 2005). Parenting remains framed in terms of parental responsibility, and because dominant family legal discourses provide no space for parental rights, disputants unwilling to share responsibility and/or their children’s time, must assert moral claims in contact disputes on the basis that they are good parents who will resolve their disputes amicably because they care about their children (Day Sclater & Kaganus, 2003).

While parents are the target of the government’s agenda, it is the children, however, who are claimed to be the central focus. From the earliest days, the government has promoted the reforms as progressive in their child-centredness and child-inclusiveness. Indeed, the government has declared that the purpose of the reforms is to make the family law system ‘better for all the children and young people who find themselves, through no choice of their own, in a situation where their parents cannot live together any more and must separate’ (House of Representatives, 2003, p. xi). This declaration has been followed up with a number of clear statements about the needs and interests of children being the government’s central concern:

> Family law reforms are all about the kids. (Attorney General’s Department, 2005, p. 2)
The current family law system is being changed to work better for children who face family separation and breakdowns. (Attorney General’s Department, 2006, p. 1)

We want to create a new culture….we’re going to change family law to emphasise that what we’re concerned about is the rights of the children. (Ruddock, 2005)

The sheer volume and visibility of such statements emphasising the importance of children has created the strong impression that the government has specifically set out to create the optimum conditions for improving family law for children in these latest reforms. Indeed, Chisholm (2006), a former judge of the Family Court, says of the sort of language that has preceded the introduction of the reforms, ‘you might expect to read a lot about the importance of listening to children and how it might be done, and indeed, you might expect to find something about it in the numerous statements of goals, objectives and so on’ (p. 20). The contentious nature of this claim is considered later in this chapter.

That children feature strongly in the government reforms reflects the importance and scope of the issue of separation and divorce for Australian children. Australia has a reasonably high rate of marriage and de facto relationship breakdown, with about 2% of married couples and 3% of de facto couples separating every year (Fehlberg & Behrens, 2008). This means that every year, approximately 50,000 children experience their parents’ separation and divorce (Australian Bureau of Statistics, 2006a).\(^1\) In 2003, just over one million children under the age of 17 years lived with one parent and had a natural parent living elsewhere as the result of separation and divorce (Australian Bureau of Statistics, 2006b). Many of these children will require the intervention of the Family Court to facilitate their contact with one or, in some cases, both of their parents. Every year approximately 14% of all divorces required the intervention of the Family Court, with 6% of those matters resulting in judicial determination (Family Court of

\(^1\) The number of children involved in divorce in 2006 was 48,396.
In addition, every year, around 6500 children are ordered to attend a Children’s Contact Service (CCS) because some form of supervision or support is required, typically because of child protection issues, mental health concerns or fears of physical, sexual and/or emotional abuse (Family Court of Australia, 2003b).

Supervised contact and access, which is the setting for the current study, plays a key role in implementing the Government’s reforms by supporting children’s contact with a parent even when there are issues of violence, neglect, or reunification or where there are other concerns held for the safety or wellbeing of children (Australian Government, 2004). Against a backdrop of family policy which has sought to promote shared parenting on the basis of a child’s right to contact with parents, children’s contact services have burgeoned in number. For example, up until 1995, contact services tended to be organised by church groups and community organisations, and often were reliant on family and friends to supervise (Strategic Partners, 1998). Currently, there are 65 Family Relationship Services Program (FRSP) funded Children’s Contact Services. Supervised contact and changeover are said to provide children with a safe, neutral and child-focused venue in order that children may develop, strengthen or re-establish contact with a parent or other relative, generally with the anticipation that over time, parents will move to unsupervised or ‘self management’ of their contact arrangements (Boland, 2004). The Federal Government has funded the development and implementation of CCSs through the Family Relationships Services Program (FRSP) which aims to enable children of separated parents to have safe contact with both their parents where this is appropriate and possible, ensuring safety and autonomy for all concerned. CCSs therefore play an important role in supporting contact between a parent and child. In this way, the growth of CCSs has enabled a shift to take place, from a choice between contact and no contact, to a choice between unregulated and supervised contact (Sheehan et al., 2005). The statutory and policy context of supervised contact is examined in greater detail later in this chapter.

\(^2\) Just under 66% of all applications filed involved children’s matters.
The following discussion examines in more detail the increased visibility of children in the reform process. It begins by focusing on three key policy developments, but with a particular view to examining how children’s participation in decision-making has been debated, understood and then positioned throughout the process of policy formulation and subsequently its implementation into legislation. The first is the House of Representatives Standing Committee on Family and Community Affairs, *Inquiry into child custody arrangements in the event of family separation* (hereafter, the *Inquiry*), initiated on 26 June 2003 to examine whether there should be a presumption that children spend equal time with both parents and, if so, in what circumstances such a presumption be rebutted. In addition, the Committee was asked to explore the issue of children’s contact with other persons, including their grandparents, and whether the formula for calculating child support worked fairly for both parents. The second policy development is the report of the Standing Committee, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (hereafter, the *Every Picture Report*) released on 29 December 2003 (House of Representatives, 2003). The third is the Government’s response to the Every Picture Report, *A New Family Law System*, released in June 2005 (Australian Government, 2005a). Collectively, these reports constitute the major impetus for the suite of family law reforms concerning children which are now in place.

### 2.1.1 House of Representatives Standing Committee on Family and Community Affairs: *Inquiry into Child Custody Arrangements in the Event of Family Separation*

There are a number of features about the *Inquiry* which warrant further discussion. The first concerns the question of why the *Inquiry* was called. This question is particularly relevant in light of the enthusiastic endorsement by the Government, only twelve months earlier, of the report of the Family Law Pathways Advisory Group *Out of the Maze, Pathways to the Future for Families Experiencing Separation* (2001) (hereafter The Pathways Report) for providing the Government with ‘a clear direction’ and a ‘foundation for future change’ (Australian Government, 2003, p. 8). The Family Law Advisory Group, comprised of a range of family law experts including judges, practitioners and academics, made a range of comprehensive and far reaching
recommendations for family law reform, including the development of a model of integrated service delivery and strategies for its implementation. As part of its recommendations, the Advisory Group also proposed ways for improving how children might be involved in decision-making processes. Yet, less than two years later, the Committee criticised the Pathways Report, saying that it failed to address the basic philosophical underpinnings of family law, was conservative in its solutions and did not consult widely with the community as needed’ (House of Representatives, 2003, p.3).

Since the legal regime at the time posed no barriers to couples wishing to adopt equal-time shared-care arrangements consensually, the urgency of the Government’s announcement of the Inquiry also appeared somewhat unfounded. Several commentators suggested that the announcement of the Inquiry so soon after the delivery of the Pathways Report reflected mounting pressure on the Government to respond to strongly held views in the community, predominantly from fathers’ rights groups, that the family law system is not ‘equitable and impartial’, rather than any specific agenda to make family transitions better for children (Berns et al., 2003, p.13).

It is relevant to note the role of special interest groups in the debates and discussion surrounding the Inquiry. An overwhelming number of submissions were received from the fathers’ rights groups such as the Lone Fathers Association, the Men’s Rights Agency, the Men’s Confraternity, Fathers Without Rights, the Shared Parenting Council and Dads Against Discrimination, the majority of which claimed that the family law system, including the Family Court and the Child Support Agency, is biased against men and ‘dominated by feminists’ (Berns et al., 2004, p. 13. See also Kaye & Tolmie, 1998; Rhoades, 2002; Smart, 2006b). Indeed, more submissions were received in response to this inquiry than by any other inquiry of this nature, although many of the submissions were form letters or close derivatives from fathers’ rights groups (Berns et al., 2004). At times, the political agenda of the various special interest groups was promoted under the banner of children’s ‘best interests’ as the following comment from Sue Price (2004), spokesperson for the Men’s Rights Agency, shows:

Others have talked about the children’s best interests because we have a particular view that might be a little unique, but it is, it is sensible I believe. You know, during the recent years we have had social policy and judicial
decisions that has focused on this best interests principle as being the paramount consideration, but I believe particularly that if you raise a child with only its best interests in mind, we actually create an adult who keeps only its own interests in mind – it is actually healthier to raise a child who understands that its own interests are best served when every one else’s interests are carefully considered … so you don’t raise selfish children.

The contested, and often quite hostile, political environment in which the family law system operated, was undoubtedly influential on the Government’s announcement of the Inquiry so soon after the release of the Pathways Report.

A second key feature was the naming of the Inquiry as an inquiry into child ‘custody’. In itself, this was a curious decision, given that the Family Law Reform Act 1995 had replaced the terms ‘custody’, ‘access’ and ‘guardianship’ with ‘residence’ and ‘contact’ in an attempt to do away with notions of children as property. Whatever reason stood behind the use of the word ‘custody’ (the term is not defined in the terms of reference), it signalled a shift back to proprietary understandings of children as objects of family law disputes and as being able to be ‘shared’, thus revealing how quickly notions of a child’s best interests can become conflated with the options, choices and wishes of the parents and the state (Thery, 1985).

Thirdly, the terms of reference of the Inquiry warrant further discussion and in particular the introduction of equal-time shared parenting as the starting point for all post-separation residence and contact arrangements. Certainly the policy emphasis on the importance of children having contact with both parents after separation is consistent with an international movement towards a presumption of contact. This movement has taken place not only in family law, but also across all sectors of family life, including where children are adopted or in care, although it is only in the last decade that it has begun to emerge as a legislative ideal (Kaspiew, 2005; Smart, 2004; Trinder, 2003).

While in many countries including Britain, New Zealand, Canada and the United States, discussion continues to take place about whether ‘equal shared parenting’ should be the starting point or presumption in family law decision making following parental separation, few have proceeded with the implementation of such reforms. For example,
in the United Kingdom, a Consultation Paper issued by the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law (Lord Chancellor’s Department, 2000) states that although shared parenting should be encouraged and perhaps piloted to test the effects of shared parenting orders, the usefulness of such a presumption in practice is doubtful (Day Sclater & Kaganus, 2003; Kaspiew, 2005). More recently, a report of the UK Parliament, Parental Separation: Children’s Needs and Parents Responsibilities (Department for Constitutional Affairs, 2004) revealed that the government acknowledges this is due, in part, to the complex and difficult issues that arise in contact matters where there is violence.

While the United States of America is considered to have led the way in introducing joint parenting laws, few jurisdictions actually apply a presumption in favour of joint physical custody (Kaspiew, 2005). Instead, the most recent movement in the US is away from joint custody norms in the American Law Institute’s (ALI) Principles of Family Dissolution (2002). Rather, such a presumption is only applied when there is parental agreement, and applies most commonly to parental responsibility (Bartlett, 2005; Kaspiew, 2005).

In Canada, concerns about the shared parenting agenda have dominated family law policy for a number of years. However, the Canadian Government has recently rejected the idea of including any provisions for shared parenting, including provisions about a child’s right to contact. The report of the Special Joint Committee on Child Custody and Access (1998, Chapter 4) states in relation to shared parenting that: ‘legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles’ (Department of Justice, 2001).

In New Zealand, while the review of the Guardianship Act 1968 started from a proposal for shared parenting in 2000, the Care of Children Act 2004 does not presume shared parenting, but does encourage shared cooperative parenting. Shared parenting was rejected by the Government in 2003 on the basis that any presumption about the form arrangements should take would be inconsistent with the principle of taking into
account the individual circumstances of each child to ensure that care arrangements are in the best interests and welfare of that child (New Zealand Government, 2003).

In Australia, even before the announcement of the Inquiry, shared parenting was formally recognised in legislation by the *Family Law Reform Act 1995* which sought to encourage parents to separate cooperatively and to both play an active role in their children’s lives after separation. While at the time the *Reform Act* was considered an ambitious program of law reform, with the value of hindsight, there is now evidence suggesting that the changes to parental behaviour anticipated by the legislators at the time have not been achieved, as the Family Court of Australia (2003) has observed:

> More people entered the litigation pathway, more private and public funds were used, and there were more opportunities for parents to disagree rather than cooperate about their children. (p. 6)

It is relevant to note that international research examining the implications of shared parenting for children appears to have been largely overlooked, or at least taken into consideration, in the development of the new reforms. Fehlberg and Behrens’ (2008) comments are enlightening:

> …a solid research base for change has been lacking in family law reform, with FLA parenting law and CSS changes since the 1990s having been influenced by political pressure from dissatisfied consumers, especially fathers’ groups. (pp. 9–10)

The findings from a major research project on children’s perspectives of shared parenting, undertaken in the UK between 1997-1999, provide a pertinent example. In that research, which interviewed 65 children aged 4-17 years living in shared parenting arrangements, Neale, Smart and Wade (ESRC, 2000) highlight the importance of children’s participation in determining whether the experience of being ‘shared’ across households is a positive one, or whether it merely brings with it new dilemmas for children. In particular, the authors identify three core issues as being influential on children’s overall contentment or discontentment with ‘equal shares’: first, whether the arrangement was based on the needs and wishes of the parent or whether it was based on the needs and wishes of the children; second, whether the arrangements were
flexible; and third, whether the child felt equally ‘at home’ in both their parents’ houses (Smart, 2004). While little Australian research existed at the time of the policy debates around shared parenting, this does not negate the fact that sound international research reporting children’s views of shared parenting might have been consulted so as to ensure the Australian policy response was informed by the perspectives of those most profoundly affected by such an arrangement. Smyth et al. (2003) point to the critical importance of further research in relation to children’s views on shared parenting:

Little is known about children’s views on shared care arrangements. Moreover scant data are available on the long-term outcomes for children and parents with such arrangements. The collection of such data represents a crucial plank of knowledge required to fully answer the question: How well does 50:50 care work? (p.22)

From the limited Australian research which had been undertaken on shared parenting at the time leading up to the reforms, it is evident that a significant number of factors influence whether children can successfully spend equal time with both parents, including: geographical proximity in view of its role in maintaining cohesive schooling, activities and friendships; financial independence of both parents; competence and flexibility of both parents; family-friendly work practices; and cooperation between parents (Nicholson, 2003; Smyth, Caruana & Ferro, 2003). Needless to say, such characteristics are not often evident for parents who have turned to the Family Court to help resolve their differences.

A fourth issue linked to the Inquiry concerns the involvement of children and young people in the Inquiry itself. Over six months, the Committee travelled around Australia consulting stakeholders whose views were put to the Committee in a variety of ways, including by submission, public hearings, community statements, visits to courts and mediation centres and viewing exhibits (House of Representatives, 2003). The consultations generated enormous public attention and debate, and generated a large number of submissions and intense and vocal public advocacy, particularly from fathers’ rights groups, as I have shown. In the end, the Committee heard submissions from over 2000 people – the largest ever for a House of Representatives Committee (House of Representatives, 2003). Yet, it was only at its final meeting that the
Committee met with fourteen children and young adults (House of Representatives, 2003, p. xi). The submissions of the young people were not included in the final report, and no further consultations with children and young people took place. So, while the Committee’s task was to find a way to ‘make the family law system better for all the children and young adults’ (p. x), and despite approximately one million children and young people living in Australia who have experienced separation and divorce, ultimately the gaze of the Committee was on the views of parties other than young people, particularly given the emotion generated by the Inquiry.

In failing to consult with children in an ongoing and meaningful way, the Inquiry failed to provide children with the opportunity to influence how they are perceived and understood. It also denied adults the opportunity to hear and better understand children’s experiences and capacities for such involvement. Ironically, the Committee also failed to provide children and young people with the opportunities it later observed to be lacking in the family law system or in the behaviour of separating parents:

> The emphasis on the best interests of the child as the paramount consideration is widely supported in principle but most individuals who have come before the committee focused on their own needs. A real child focus is not yet a reality in the system or in the behaviour of separating families. Opportunities for children’s voices to be heard in the context of decisions that affect them are limited, both in the community and family setting and court context (House of Representatives, 2003, p. 25).

The following discussion sheds further light on the significance for children of the recommendations resulting from the Inquiry.


The *Every Picture Report*, like the *Pathways Report* before it, proposed radical changes to the family law system. While the Committee ultimately rejected a presumption that children spend equal time with both parents, it made a number of recommendations for changes to put a new emphasis on shared parenting after separation (Fehlberg &
Behrens, 2008). In the Committee’s view, this new emphasis could be achieved by the establishment of a Families Tribunal, whereby disputes could be resolved without lawyers, in a child-inclusive, non-adversarial, informal setting, consistent with the rules of justice, thus minimising adversarial behaviour and assisting decision making:

...a completely new infrastructure with a child-inclusive, non-adversarial decision making body at its centre would provide a sufficiently radical reform to have a real impact on changing behaviour and expectations for post separation outcomes (House of Representatives, 2003, p. 88).

However, the pervasive and powerful notion of ‘equal time’ shared parenting proved too difficult for the Committee to resist, and although it rejected the presumption of equal time, the Committee accepted that ‘each parent should have an equal say in where the child/children should reside’ [added emphasis] ‘wherever possible, an equal amount of parenting time should be the starting objective’ while overlooking the limitations an ‘equal say for parents brings to the inclusion of children in decision making processes’ (House of Representatives, 2003, p. 30).

The Committee did, however, note research about the benefits of consulting children, and the availability of evidence-based models for consultation that seek to enable their views to be heard, without ‘laying responsibility on children to make choices’, and concluded that the Families Tribunal processes should be designed around maximising opportunities for children to participate (House of Representatives, 2003, p.38). Two recommendations in particular focused on supporting the inclusion of children in decision-making processes. The first was Recommendation 13, which states:

All processes, services and decision-making agencies in the system have as a priority built in opportunities for appropriate inclusion of children in the decisions that affect them (2003, p. xxiv)

The second was Recommendation 7, which states that assistance should be provided to those parents unable to achieve and sustain shared parenting on their own to:
… include the perspective and needs of their children in their decision making, with and without the assistance from the family law system (House of Representatives, 2003, p. xxii).

Given the complexity and scope of the Inquiry, and the diversity of competing interests vying for the attention of the Committee, it is significant that the Committee sought to advocate for a child-inclusive system to enable the participation of children in the decision-making process. However, while at first glance the emphasis on ‘child-inclusive’ family law practice appears progressive, it is important to examine exactly how the term ‘child-inclusive’ is used in the Every Picture Report. While recently these terms have become ‘buzzwords’ their sudden popularity belies the fact that they have frequented the language of family law for well over a decade now (Campbell, 2004, p. 1). For example, over ten years ago, the Australian Law Reform Commission’s Seen and Heard Report (1997) Recommendation 152 states:

Children should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their right to seek legal advice or initiate proceedings. (p. 411)

An interpretation of child inclusive practice as referring to children’s participation in decision making is echoed in the Pathways Report (2001) which emphasises the need for the ‘voice of the child’ to be integrated into the decisions that shape their lives:

The stress and conflict around separation frequently puts children and family members at risk, and the family’s capacity to care for children with their best interests in mind is often lost ... The Advisory Group believes that family decision making is the key to this process. Sustainable arrangements are more likely when there is involvement between adult family members, and children are involved in reaching that agreement. (p. xiv)

In addition, the Pathways Report (2001) acknowledges children’s participation rights, emphasising the relationship between ‘child-inclusive’ family law practices and children’s right to be heard:
Children have a right to be heard and to have their views taken into account regarding decisions that will affect their lives. Clearly, the best interests of the child can be best considered if the children’s voices are heard. (p. 86)

Collectively, these statements from prominent policy documents reveal an interpretation of child-inclusive family law practice that presumes children have an important role to play in the processes of family law decision making, and that their participation has benefits for children and their families following parental separation. Yet, close attention to more recent documents reveals a fundamental shift in the interpretation of the terms ‘child-inclusive’ and ‘child-focused’ by the Government. This shift is first evidenced in the Government Response to the Family Law Pathways Advisory Group Report 2003, in which the Government, rather than referring to practices that support the participation of children in decision making, refers to child-inclusion and child-focus as meaning contact with both parents:

The Family Law Pathways Advisory Group found that there was not enough focus on the best interests of the child or on child inclusive practices in family law services. Positive ongoing contact with both parents helps children to come to terms with separation and is associated with positive longer term outcomes for their development including the ability to form healthy adult relationships. (Australian Government Response, 2003, p. 11)

The acceptance of notions of child-centredness and child-inclusion as being met when children have contact with both parents, demonstrates that, in Australia at least, the rhetoric of child centredness continues to act as a proxy for continuing discourses of parents rights (Van Krieken, 2005).

2.1.3 The Government’s Response to the Every Picture Report

In response to the Every Picture Report, the Government supported most of the recommendations of the Committee, which largely emphasised shared parenting after separation, although it did not agree with the recommendation that the Government create a Families Tribunal (Australian Government, 2005a).
Significantly, however, despite the visibility of government support for a child-focused and child inclusive family law system, the government directed little attention to what active and meaningful role children and young people might have to play in their parents’ lives and in the re-formation of their family post-divorce. For example, in relation to Recommendation 13, that all processes, services and decision-making agencies have built-in opportunities for the appropriate inclusion of children, the Government responded by stating that this recommendation would be met by supporting programs which were currently in place (Australian Government, 2005a). This alone reveals a lack of interest in implementing any significant reforms that enable the involvement of children in family law processes unless, of course, newer interpretations of ‘child-focused’ practice are understood to be constitutive of children’s participation, as the following comment from the Government suggests:

The amendments should be child-focused and so will refer to the need to ensure that children are given the opportunity for their parents to have a meaningful involvement in their lives to the maximum extent possible. [italics added] (Australian Government, 2005a, p. 6)

This particular interpretation of child-inclusion is further illustrated by the discernible shift in the ‘parenting messages’ to be promoted in education campaigns around the nation. While the Pathways Report (2001, p. xix) suggests that education campaigns focus on the interests and needs of children, and targets parents to consider their parenting as a responsibility not as a right, the Every Picture Report recommends an education campaign which promotes ‘positive shared parenting’ (2005a, p. 7).

To summarise, the new reforms provide fertile ground from which to explore the ways that children have been positioned in the debates, inquiries and ultimately the implementation of the policies into legislation. The positioning of children’s need for participation as having been met when children have contact with both parents reflects particular knowledge, assumptions and understandings about children and families embodied within the new reforms, and legitimated through the interpretation of the policy regime and its translation into practice. In the case of the recent reforms to the Australian family law system, this discussion has shown that the government’s primary concern has not been to ‘put children at centre stage’. Nor has it been to support and
facilitate their role in decision-making processes. Instead, the government has utilised the language of child-centredness, child-focus and child-inclusion to ensure that children remain in contact with both parents after separation. This emphasis is reflected throughout the changes to Part VII of the *Family Law Act*, the part dealing with children, by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

### 2.2 Positioning Children within the Legislative Framework of Australian Family Law

Children have long been recognised as the focus of family law dispute resolution in Australia, through the paramountcy of the ‘best interests of the child’ principle. This principle indicates that the court should put the child’s welfare as the first and paramount consideration when making important decisions in disputes over residence and contact. As with many principles in law, the concept has been deliberately framed in open terms so as to allow the court to have wide discretion and to take into account the child’s particular situation, as well as subjective assessments of their situation (Ottosen, 2006).

At the same time, the wide discretion available to decision makers is the subject of ongoing and constant criticism, including that it is ‘indeterminate, a device for men to (re)exercise power over women and children, a vehicle for welfare professionals to dominate the rest of society, and colonialism by other means’ (Van Kreiken, 2005, p.25). Similarly, Chambers (1984) observes that decisions made regarding the best interests of the child are always subject to bias and have no objective content: ‘Whenever the word “best” is used, one must always ask “according to whom?”’ (p. 488). Chambers’ observations remain relevant in terms of the susceptibility of the best interests test to a range of social and political norms which influence, and often seek to appropriate, the notion of a child’s best interests in order to pursue a particular claim.

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3 Section 60 CA of the Family Law Act provides that a child’s best interests are the paramount consideration in making a parenting order.
In the following section, I introduce the key provisions of the new legislation which determine how, when and to what extent children and what they have to say are recognised. The discussion touches on the relevant provisions of the legislation, before and after the amendments, as both were in place over the period of the current study. Before doing so, however, I point to a number of issues concerning the normative framework of family law in Australia which are relevant to this study.

### 2.2.1 The Family Law Act 1975: Theoretical Underpinnings

The first issue which is relevant to this study concerns the normative and regulative purposes of the family law legislation in Australia. The Australian family law system is strongly oriented toward private ordering, with only six per cent of disputes requiring judicial determination, and the remaining disputes settled through alternative dispute resolution processes (Family Court of Australia, 2003a; Kaspiew, 2006). Of these, Kaspiew (2005) reports, a substantial number (68 of 91 matters determined between January and June 2003) involve allegations of violence and/or abuse. The Court’s jurisprudence therefore ‘is developed and refined in relation to the small proportion of intractable disputes that fail to settle’ (Kaspiew, 2006, p. 15).

This has become even more so with the strong focus in the recent reforms on the resolution of parenting disputes outside the court system and on supporting parents to reach agreement in a manner that does not cause further alienation or conflict (Parkinson, 2006). The orientation to private ordering underlies the twin goals of the legislation, that is, to play a normative role in setting standards for private ordering and to fulfil a regulatory function in which legal rules and standards apply when private ordering fails (Fehlberg & Behrens, 2008; Kaspiew, 2006). In this way, the Family Court acts to radiate messages to the divorcing population about how it should be behaving, including in relation to how they recognise the experiences of their children (Altobelli, 2006). When seen from this perspective, the radiating message of the new reforms is particularly relevant to this study as it signals the ideological position of the
government in relation to the resolution of disputes between separating parents (Altobelli, 2006; Fehlberg & Behrens, 2008).

A second issue which is relevant to this study concerns the conceptualisation of the best interests of the child. According to Dewar (1998) the Family Court is presented with the challenge of determining the best interests, which are framed simultaneously in terms of a child’s rights and their welfare. He suggests that what follows is not a balancing exercise between rights and welfare per se, but two very different and incompatible ways of approaching the task of conceptualising children, their needs and decision-making processes. This tension between children’s rights and their welfare is embedded in the legislation and is a recurring theme in this study.

The following section examines the key provisions of the new legislation in relation to the question of how are children, and what they have to say, recognised in Australian family law.

2.2.2 How are Children and What They Have To Say Recognised within the Family Law Act?

The Family Law Amendment (Shared Parental Responsibility) Act 2006 made significant changes to Division VII of the Family Law Act 1975 which governs disputes concerning children. The changes embody the legislature’s aspiration for a ‘cultural change’ whereby, as I have described above, they require parents to resolve disputes cooperatively and for children to have contact with both parents on a regular basis. This is reflected in the statement of the four new objects inserted into Part VII, Section 60B(1) of the Act, which are intended to ensure that ‘the best interests’ of the child are met by: both parents having meaningful involvement in children’s lives to the maximum extent consistent with the child’s best interests, protection from harm, adequate and proper parenting and ensuring parents fulfil their duties and responsibilities concerning the care, welfare and development of their children. In addition, Section 60B2 outlines five principles which underlie the objects of the Act: children’s right to ‘know and be cared for by both parents’, children’s rights to ‘spend
time on a regular basis’ with both parents and other significant people including grandparents, the obligation on parents to ‘jointly share duties and responsibilities’, an obligation on parents to ‘agree about the future parenting of their children’ and children’s right to enjoy their culture.

In contrast to the extensive amendments to the Family Law Act, which aim to promote equal time shared parenting, only two changes have been made to the legislative mechanisms which allow for children’s views to be heard. First, a number of changes in terminology have been made. These include: replacement of the child’s ‘wishes’ with the child’s ‘views’ (Section 60CC3(a)); removal of reference to a child’s age, with the child’s views now to be taken into consideration by the Court subject to the child’s maturity (Section 60CC3(a)); and changes in terminology regarding lawyers, who are now referred to as the Independent Children’s Lawyer (ICL).

The second change is more significant. Section 60CC introduces a two-tiered structure for the determination of the child’s best interests: ‘primary’ considerations, those of shared parenting and protection from harm and ‘additional’ considerations, which are found in Section 60CC3(c), and include a ‘checklist’ of factors relevant to the determination of the best interests test under the old legislation. The child’s views are thus one of a number of ‘additional’ considerations to be considered by the Court in determining their best interests.

The introduction of a two-tiered approach to the determination of a child’s best interests is arguably a retreat from pre-2006 reform participatory provisions, and debate continues about the extent to which it might potentially restrict children’s participation in decisions that directly affect them (Fehlberg & Behrens, 2008). Several senior members of the judiciary, the Family Court, and the Law Council of Australia, have all expressed concerns that the two-tiered approach might unduly complicate the best interests test by elevating some factors above others (Chisholm, 2006; Family Court of Australia, 2005; Law Council of Australia, 2006). Indeed, the interpretation of the effect of the two-tiered system itself is uncertain. For example, Chisholm (2007) states ‘the two tier system does not involve any fundamentally different approach to decision-making, but rather ensures that the court does not overlook the importance of the
primary considerations’ (p.165). On the other hand, Parkinson (2007) cites the following comments from the Attorney-General (2006) as supportive of the view that primary considerations are to be given priority over additional considerations:

The parliament is giving advice for the courts to view these matters as matters that should be addressed in priority. The others are factors that can be taken into account, but they are not equal. (p.25)

The failure to direct attention to the needs of children for information and support so as to participate in family law decision making may be contrasted with legislation in common law countries internationally. For example, in New Zealand, section 6 of the Care of Children Act 2004 requires any views expressed by a child (either directly or through a representative) must be taken into account. The importance and relevance of the child’s views is strengthened by section 4, which provides that consideration of the section 5 principles that are relevant to the determination of the welfare and best interests of the child (including, for example, parental responsibility, protection and cultural identify) does not limit section 6 (the child’s views). Further, all reasonable steps must be taken by the child’s lawyer (or other person representing a child) to ensure that the effect of a parenting order is explained to the child, to an extent and in a manner and in language that the child understands (section 55(4)) (Taylor, 2006).

In England, Wales and Northern Ireland, the specific duty placed on Courts by the Children Act 1989 to ascertain the wishes and feelings of children and to take them into account, has been strengthened with the introduction of the European Convention on Human Rights and Fundamental Freedoms (ECHR) into national law (Kelly, 2006). The Human Rights Act 1998, which became law in April 2000, has had the effect of incorporating the Convention into national law thus strengthening children’s procedural rights and facilitating the exercise of their participation rights by ensuring that children are informed and allowed to participate (Kelly, 2006).

In Scotland, the Children (Scotland) Act 1995 goes further than other UK legislation in supporting and facilitating children’s participation by providing a range of procedural mechanisms for ensuring children are genuinely enabled to be heard and to have their views taken into account (Tisdall, Bray, Marshall & Cleland, 2004). For example,
children may take independent legal advice so as to explore options as to how they would like to express their views, including: support to complete Court Documents requesting their views, (Form 9); requesting the solicitor write to the court on the child’s behalf; and/or requesting the solicitor to involve the child as a party to the action (Tisdall et al., 2004). Importantly, section 6 of the Children (Scotland) Act 1995 requires that children’s participation rights be extended to non-contested matters, with adults required to exercise their parental responsibilities and rights to consult their children aged 12 years or older as they are presumed to be of sufficient age and maturity to form a view (Freeman, 2002; Taylor, 2006). The principle of children’s participation in decision making to include non-contested matters is also supported in Finland by the Child Custody and Right of Access Act 1983 which provides that parents must discuss the matter with the child and give due consideration to the child’s feelings, opinions and wishes (Freeman, 2002).

While it is yet to be seen how the Family Court will interpret the question of whether primary considerations will be given priority over additional considerations, the relegation of children’s views to a secondary tier of decision-making is significant in the context of this study. At its most basic, the legislation now prioritises a child’s right to contact and protection above his or her participation rights. As Chisholm (2006) states, the amendment is unnecessary, adds a layer of complexity and confusion and downgrades the importance of children’s views by putting them into the category of an ‘additional’ rather than a ‘primary’ consideration. The Family Court of Australia has also suggested that the relegation of the views of the child to a mere additional consideration suggests that they ‘would always or at least commonly be outweighed by one of the “primary considerations”’ (Family Court of Australia, 2005, p. 167). In this way, the legislation blurs the boundary between children’s right to contact and their responsibility to have contact with both parents since the opportunity to have a say is circumscribed by a hierarchy of interests which prioritise children’s rights to contact and protection above their participation rights.

In complex matters, such as in the making of orders for supervised contact, the court must engage in a difficult balancing act of weighing up the benefits and detriments of a child’s contact with a parent, where there is substantiated or alleged family violence,
neglect or abuse, or allegations. Certainly, the 2006 reforms emphasise the need to protect children from violence and abuse. For a start, section 61DA(2) states that the presumption of equal shared parental responsibility, and the obligation on a court which flows from that to consider equal time and ‘substantial and significant’ time, does not apply where there are reasonable grounds to believe there has been family violence or child abuse. From there, the court will likely weigh up the child’s contact rights (as stated in s60B and s60CC(2)(a)) with the primary consideration, stated at s60CC(2)(b) to ‘protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’, as well as additional considerations, stated at s60CC(3)(j) ‘family violence involving the child or a member of the child’s family’ and s60CC(3)(k) ‘any family violence order that applies to the child or a member of the child’s family’. However, as with all parenting orders, the child’s views regarding supervised contact, including whether and how much contact they want with a violent, abusive or neglectful parent, remain an additional consideration. It is relevant to note, that the Attorney–General’s Department have recently published ‘A Guideline for Family Law Courts and Children’s Contact Services’ to inform the referral process from Family Law Courts (principally the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court) to Children’s Contact Services (Attorney General’s Department, 2007). The guidelines state that the child’s views should be sought when assessing the length of time a family may use the service and that the service should take account of the child’s views, and if necessary, communicate those views to the ICL. However, the document is not legally binding and is intended to assist the Court and Children’s Services and to have an educative role.

How then, are the views of children heard in Australia? Given children are not usually made parties to the proceedings, the judge will normally learn of the child’s views through one of several mechanisms provided by the Act:

- through the Family Report (Section 62G(2))
- through a solicitor via the appointment of an independent children’s lawyer (Section 68 L)
- through an interview with the Judge (Rule 15.02 Family Law Rules 2004 (Cth)).
These mechanisms are examined in greater detail below.

The Family Report

The family report is the most commonly utilised method of reporting a child’s views, and is used in approximately 60% of contested cases (Parkinson & Cashmore, 2008; Australian Law Reform Commission, 1997). From July 2004 to June 2005, around 3000 reports were ordered in the Family Court and the Federal Magistrates Court (Family Law Council, 2006). Family reports are also highly influential, with 75% of final determinations in accord with the report writer’s recommendations, although the Family Court is not bound to accept the recommendations of the family report (Hall & Hall, 1979) (FLC 90-713).

The Chief Justice of the Australian Family Court, The Honourable Diana Bryant has described family reports as reflecting a high level of skill and expertise and commented that the family report provides ‘an extremely important “window” into the family’s relational dynamics and, most importantly, provides great insight into the child’s life, past experience, family relationships, abilities and problems, needs, attitudes and wishes as they relate to the dispute before the Court’ (2006, p. 5).

Family reports are prepared by a family consultant, usually a trained counsellor, who is required to present an account of what, if anything, a child has said about his or her views, as well as comments about the age and maturity of the child, and other special circumstances (Fehlberg & Behrens, 2008). Section 60CE provides that children cannot be required to express their views.

Despite their prominence, concerns have been expressed about family reports by practitioners and researchers specifically in relation to the value of obtaining children’s views in formal settings and often at a very late stage in legal proceedings (Cashmore, 4

4 Section 62G(2) provides that the Family Court may direct a family consultant to give the court a report on matters the court considers to be important.
2003; Fehlberg & Behrens, 2008, Parkinson & Cashmore, 2008). In addition, family reports require adults to speak on behalf of children, so that even when children are directly involved in the process, their voices are edited by psychologists, solicitors, counsellors, health professionals and parents, or they go unheard (Graham & Fitzgerald, 2006; Taylor, 2006). This is before the family report is further subject to the interpretation by the ICL (discussed in the next section).

Secondly, the interpretation of family reports by the Family Court raises complex questions about the extent to which judges are able to bridge the gap between scientific and legal discourses when interpreting family reports. While the legislation assumes that socio-legal discourses can bring together two interpretative ‘sides’, that is, the psychological and the legal, to arrive at a ‘best’ solution for the child, King and Piper (1995, p. 29) suggest that attempts to merge such discourses do not necessarily result in a ‘multi-dimensional super discourse’ or an information exchange:

The nature of legal discourse is such that attempts to merge it with other social discourses can result only in ‘interference’ between the two. All that results are simultaneous statements about the child and its problems, which, like parallel lines, never meet, but continue along their own path. Instead of joint or co-operative decision making, therefore, information about the child is ‘constituted anew’ within the legal and within the social work or child care discourse’. (p. 21)

Finally, there is evidence that children are often unhappy about their lack of control of the ways their views are interpreted, feel uncomfortable about the process of participating in this form of assessment, do not like the lack of privacy and confidentiality and are uncomfortable with the filtering or reinterpretation of what they have said (Cashmore, 2003, Smart, Neale & Wade, 2001). So, while family reports might be useful for providing lawyers with a particular narrative upon which to base their view of what might be in a child’s best interests, children are sometimes uncomfortable with the fact that they can only ever reflect a ‘one-off’, atomised moment in a child’s life, and preclude children the opportunity to follow up or clarify their views following the interview for the report (Graham et al., 2004; Parkinson & Cashmore, 2008; Taylor, 2006).
Independent Children’s Lawyers (ICL)

In a small number of cases, the Court can appoint an ICL who represents the child as a best interest’s advocate, although no right to independent representation exists for children in Australia (Family Law Council, 2004; Parkinson & Cashmore, 2008). Prior to 2006, the role of the ICL was described as the child’s ‘separate representative’, with guidelines for this role set down in Re K (1994) 17 Fam LR 537. ICLs are most commonly appointed in complex cases on the order of the court, and are appointed in the majority of cases that go to trial (Parkinson & Cashmore, 2008). The Family Law Council (2004) reported that, in 2003, 3874 appointments of ICLs were made.

The model of representation is that of the ‘best interests advocate’. Section 68LA(2) outlines the role of the ICL, which is duly confined to the children’s lawyer making a decision, based upon the available evidence, about what is in the best interests of the child. Recent guidelines for ICLs endorsed by the Family Court and the Federal Magistrates Court of Australia state that ICLs are expected to meet with the child unless the child is under school age, or if there are practical limitations such as distance or where there are exceptional circumstances (Family Court of Australia and Federal Magistrates Court, 2007).

The children’s lawyer is not obliged to act on the child’s instructions in relation to the proceedings, although at the same time, they must take into account the child’s views and then put them before the Court, if the child wishes to be involved (Section 68L). Until recently, little research in Australia explored children’s views and experience of representation by an independent lawyer. However, the recent work of Parkinson and Cashmore (2008) has shed more light on the issue. Of 47 children interviewed in that study, ICLs had only been appointed to represent them in 13 instances. Generally speaking, the children’s expectations were that the lawyer should say what they wanted, and perhaps offer some advice. As far as their experiences of representation, children’s views were mixed. While children appreciated being listened to and having their views taken seriously, they were generally unsure what the lawyer had said or done in Court. As well, they were often critical of the nature of their interaction with their lawyers, stating that they felt their lawyer was uncomfortable talking to them, and at times
misinterpreted what they said. Breaches of confidentiality, as children understood these to be, were seen as a betrayal of trust by some children.

**Judicial interview**

On rare occasions, the judge will speak directly to a child in chambers in matters where, for instance, the children’s views may have changed since the time of report writing (for example, *ZN v YH*, [2002] Fam CA 453) or where the child specifically asks to speak with the judge (as in the matter of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297). Interviews with judges are provided for by Rule 15.20 of the *Family Law Rules, 2004* (Cth) which state that an interview may be conducted in the presence of a family consultant or another person specified by the judicial officer. Fernando (2008) notes that the legislative provisions allow for a judge to speak to children even where the intention of the Court is not to obtain the views of a child. She cites the matter of *N v N* (2000) FLC 93-059, where a judge used the judicial conference to personally explain his orders and reasons to an 11 year old child as ‘a demonstration of the Court’s respect for the young person in question and his rights to participate in proceedings concerning him’ (para. 7).

While the practice of judicial interviews with children remains uncommon in Australia and, indeed, is considered contentious practice, thinking about the issue has begun to change in recent years (Fernando, 2008; Parkinson & Cashmore, 2008). A key influence can be traced to the Children’s Cases Program, started in 2004 and discussed in the following chapter, which aimed at reducing the adversarial nature of children’s cases (Parkinson & Cashmore, 2008). As part of the program, judges play an active role in the process of resolution of disputes, including the option of judges interviewing children. The former Chief Justice of the FCA, the Honourable Alastair Nicholson (2006), has spoken positively about the use of judges’ interviews in the context of the Children’s Cases Program:

> The judge could interview the children at an early stage and could make use of what they said in making the decision. It may be that natural justice requirements might make it necessary for the parties to be acquainted with the
substance of what the child said, in order that they can comment upon it, but this should not prevent a judge from seeing a child. I understand that during the pilot programme, these interviews with children occurred rarely and attracted some criticism when they did occur. There has been a long standing aversion to such interviews in Australian courts. However, I think that much difficulty could be overcome by giving judges appropriate training in the interviewing of children. I think that it would be a pity if such interviews do not occur, particularly when sought by the children, as they give them another opportunity to be heard. (p.23)

However, while the practice is not common, Parkinson and Cashmore (2008), report that of the 47 children interviewed in their study, most (85%) were generally keen to talk to the judge even though most had been interviewed by an independent expert and had a child legal representative. The reasons children provided for wanting to speak to the judge were that they wanted a say and to be acknowledged, considered this would result in a better decision, that they could say things they did not want their parents to know and that their views could not be misinterpreted and filtered. As Parkinson, Cashmore and Single (2007, p. 3) report:

[M]any children and young people who have been involved in contested matters, especially where there have been allegations of abuse and violence, are keen to see the judge so that they can say what they want directly to the person making the decision. This is despite, or possibility because of, their experience of having their views ‘interpreted’ in an expert or family report, and presented to the court by a lawyer ‘representing’ what the lawyer sees as being in their best interests.

Conversely, the majority of professionals interviewed in the above study, including counsellors, lawyers and judges, were against the practice of judges interviewing children. The reasons given were risks to the quality and process of decision making, as well as risks to the child. In addition, there was consensus that judicial interviews were rare, with only four of the twenty judges interviewed having ever met with a child prior to making a decision.
It is important to emphasise that while there are a number of mechanisms in place for children to have their views heard, few children actually access these mechanisms, given the small numbers of families who proceed to hearing.\(^5\) Even when children do express their views, they are only one of many factors that are considered in determining the best interests of the child. In addition, and most importantly, the mandatory consideration of the views of the child pertains only to *contested* proceedings. No ‘right’ to be heard in *any* proceeding that affects the child exists, and nor does the child have the opportunity to express his or her views freely. While clearly, the legislative principles provide to a child the right to express his or her view, the voice of the child is only one of many factors that are considered in determining the best interests of the child. When a matter is resolved privately, and the adults are in agreement, there is no obligation to consider the wishes of the child. Instead, according to s 63B(e), parents are merely encouraged to consider the best interests of the child their paramount consideration. At no stage is information required about what the child wants, what information the child has about the legal proceedings and whether the child wants to be consulted before parents enter into a parenting plan. The key message for parents is that they should agree about matters concerning the child and that the child should spend substantial if not equal time with both parents, but they are not required to consider to what extent children should participate in the process or what explanation should be provided to them (Chisholm, 1999).

The preceding discussion suggests that the representation of the child within the legislation acts to position children in a way that ensures they remain at ‘arm’s length’ from the decision-making processes. As such, claims that children are central to the policy and processes of Australian family law are more representative of current rhetorical discourse than they are of any right of the child, or of any real concern to invite children to participate in the decision-making processes that determine their future residence and contact arrangements.

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\(^5\) The Family Court Annual Report 1999, Table 4 reports that of the 14.3% of matters initiated in the Family Court, 3.1% of defended cases will proceed to a hearing.
2.2.3 The Family Court of Australia

Despite the limited opportunities provided by the legislation for facilitating the involvement of children in decision-making processes, the Family Court plays an active role in drawing attention to the importance of recognising children and their contribution to the decisions that affect them. Indeed, judicial pronouncements dating back to the 1970s reveal that the Family Court has actively sought to promote children’s voices in decision-making processes (for example, see Harrison and Woollard [1995] 18 Fam LR 788; Re Alex: Hormonal Treatment for Gender Identity Dysphoria [2004] FamCA 297; ZN v YH [2002] Fam CA 453). The interest the Family Court has taken in children, however, has been far more substantial than merely judicial pronouncements, and is evident in a number of ways.

First, the Family Court has been instrumental in identifying, developing and implementing intervention programs focused on improving family law outcomes for children. A relevant example is the Contact Orders Program, developed by the Family Court to focus more on the needs of children in highly conflicted families. Children’s perspectives and needs are placed onto the agenda by providing information to parents about what their children have identified as their worries and feelings and their views on any effect that conflict is having on them.

Project Magellan is another example of a pilot project initiated by the Family Court to address concerns that Court delays, lack of coordinated services and the adversarial nature of proceedings have potentially dangerous implications for children (Family Court of Australia, 2007; Fehlberg & Behrens, 2008). The project is now being implemented across all states, and recent evaluations of the Magellan project reveal it has been successful in bringing about a child focus (Family Court of Australia, 2007). During 2004, the Family Court also introduced the Children’s Cases Program, which ‘set about providing a highly supportive, consensual and less formal process for separating parents to follow, to maximise their chances of settling their dispute effectively, and without full adversarial armoury’ (McIntosh, 2006, p. 6). Children are interviewed separately to their parents, and are provided with feedback. Children are also allocated a family consultant for the duration of their matter. The family
consultant provides information back to the judge, and assists with referrals to community organisations and prepares a family report if necessary (Family Court of Australia, 2007).

Finally, the Family Court plays a key role in advocating for children’s participation in decision-making processes through its submissions to Parliamentary Inquiries, Law Reform Commissions and the like. A good example is the role the Family Court played throughout the 2006 reforms in bringing attention to the importance of involving children in decision-making processes in its submissions to the Inquiry and the Government. (See, for example, The Family Court’s Submission to the Inquiry into the Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Family Court of Australia, 2005))

In concluding this discussion on the ways in which children and what they have to say are recognised in contested matters, I suggest that within the new legislation, the portrayal of children as passive dependants in need of care and protection has continued to marginalise children and to prevent them from having the opportunity to articulate their own needs and concerns and so to have any influence in decision-making processes that fundamentally concern them. Of course, the Family Court is made up of a range of stakeholders and personnel with competing and contradictory views of children, however, these examples reflect that, by and large, it has sought to develop ways in which to involve children respectfully, while at the same time acknowledging their need for care and protection. The discussion turns now to examine the newest addition to the apparatus of Australian family law dispute resolution, the Family Relationship Centre.

### 2.3 Positioning Children within the Family Law Dispute Resolution Framework of Australian Family Law

Alternative dispute resolution has been an important part of the resolution of parenting disputes in Australian family law for a long time (Parkinson & Cashmore, 2008.). Only a small proportion of disputes are resolved by a contested court order, as we have seen
in the discussion above. In this section, I outline the new family dispute resolution framework contained in the *Family Law Rules 2004*. I also introduce the centrepiece of the government’s reforms, that is, the establishment of a network of 65 Family Relationship Centres (FRCs) around the country. The section concludes with an examination of a number of child-centred dispute resolution processes currently gaining currency in Australian dispute resolution processes.

### 2.3.1 Family Dispute Resolution

While there have always been requirements aimed at encouraging settlements before trial, the 2006 reforms signalled a strong movement towards private, non-adversarial, dispute resolution that involves lawyers as little as possible (Fehlberg & Behrens, 2008). This is most evident in s 60I(7) which provides that parents are now compelled to engage in FDR before making an application unless an exception applies. Exceptions are outlined at s 60I9(a) and include situations where: consent orders have been made; there are ‘reasonable grounds to believe’ there is abuse or violence; there has been a contravention of an order made in the previous 12 months; or urgency and incapacity are involved.

The provisions contained in the *Family Law Rules, 2004* governing family dispute resolution are comprehensive and highly prescriptive, targeting the behaviour of parents as well as all those people working within the family law sector. Numerous directives are issued to service providers that they ‘must’, ‘will’ or ‘will ensure’ parents are encouraged to consider the child spending equal time with each of them, and if not reasonably practicable, substantial and significant time (for example, see s63DA(2)). At the same time there are no obligations on advisors to tell parents to consider their children’s views and perspectives, or about the need to protect children from violence. In this way, the FDR processes are imbued with the same mixed messages as the new legislation, as Fehlberg and Behrens (2008) observe:

> Again, there are mixed messages: protection is said to be a primary consideration, alongside meaningful relationships with both parents...
The mandatory use of FDR is supported by government funding which allows for three hours of dispute resolution counselling to separating couples at Family Relationship Centres (FRCs) (Commonwealth of Australia, 2006). The following section examines the role of the FRCs in the new FDR regime.

2.3.2 Family Relationship Centres

As we have seen, the FLA does not mention FRCs, but instead refers to Family Dispute Resolution (FDR) and the designated occupations of ‘family counsellor’ and ‘family dispute resolution practitioner’, some of whom will work at FRCs (Fehlberg & Behrens, 2008). This decision to keep FRCs outside the FCA marks a continuing trend away from the ‘one-stop shop’ it was originally envisaged the FCA would be, towards keeping dispute resolution services separate from adversarial processes (Fehlberg & Behrens, 2008).

FRCs now act as a single entry point into the family law system to provide information, advice and dispute resolution services in order to help parents facilitate agreement without going to court (Family Relationships Online, 2006). While there is a particular emphasis on separating couples, FRCs also provide information, advice, assistance, referrals to family services, such as counselling, relationship support, children’s contact services and services to support families to achieve compliance with the new legislation. As with the new legislation, equal-time shared parenting is imbued throughout the service delivery model of the new FRC in the form of shared parenting messages intended to convey to parents that contact with both parents is crucial for the welfare of the child and conflict is detrimental. In addition, parents are ‘steered in the right direction’ with the aid of information, education and counselling sessions offered at all Australian FRCs (Kaganus & Diduck, 2004, p. 969). While their focus is on children’s issues, they can also assist with property matters (Fehlberg & Behrens, 2008). Non-government organisations such as Relationships Australia, Burnside Australia and Interrelate Family Centres tender for contracts to operate specific sites across Australia.
In contrast to the highly detailed nature of the new provisions governing the procedures of FDR, there is surprisingly little detail outlining how the FRCs will undertake to provide services that are consistent with the rhetoric of child-inclusive and child-focused practice expounded previously. The most significant statement regarding children’s participation is to be found in (FRSP) Strategic Plan 2005–2008, para 1.1.2, which states that a key priority for FRCs is to improve responsiveness to children and young people and to facilitate the inclusion of children and young people in decision-making where appropriate:

Skilled practitioners facilitate the inclusion of children and young people in decision-making where appropriate.
FRSP services provide child focused services. (Australian Government, 2005b)

No details are provided, however, in regard to what child-responsive or child-inclusive practice entails, how it should be implemented or what indicators might be used to evaluate a child-responsive and child-inclusive FRC. Instead, different models of dispute resolution underpin different service providers’ tenders. The basic model (three hours of FDR) has no place for the child, although some organisations, such as Interrelate Family Centres, fund an additional child consultation in some matters. Details of this model are provided in the following section.

That there is little mention of children in the FRC process has prompted Chisholm (2006, p. 20) to comment that ‘one of the most fundamental questions facing the Family Relationship Centres will be the role of children themselves in the process’. This does not mean children are wholly excluded from FRCs, just that the involvement of children is highly discretionary. It does show, however, that little attention has been given by the Government to what active and meaningful role children and young people might have to play in their parents’ lives and in the re-formation of their family post-divorce. Despite the rhetorical emphasis on children, it is evident that reference to child-centred practice that is ‘child-inclusive’ and ‘child-focused’ refers to approaches to mediation, and more recently FRCs, which have emerged alongside the development and implementation of the new reforms. The following section outlines the rationale for the
child-centred processes which are increasingly influential in mediation processes and in FRCs.

### 2.3.3 Child-Centred Dispute Resolution

In Australia, the work of Jennifer McIntosh and Laurie Moloney has been strongly influential in determining the definition, nature and intent of child-centred family dispute resolution, that is, in non-contested proceedings. This work comprises two ‘treatments’ (child-focused and child-inclusive) aimed at improving ‘the psychological resolution of parental conflict with associated reduction of distress for their children’ (McIntosh, Wells & Long, 2007, p.8). These interventions, which have been shown to significantly reduce conflict between parents following separation, have been developed with the primary aim of assisting ‘parents to re-establish or consolidate a secure emotional base for their children after separation (McIntosh, Wells & Long, 2007, p.10). McIntosh (2003) defines child-focused practice as ‘finding the voice in the absence of the child’. She believes child-focused practice should aim to encourage disputing parents to consider the needs of their children by facilitating a parenting agreement that preserves significant relationships and supports children’s psychological adjustment to the separation. McIntosh defines child-inclusive practice as ‘finding the child’s voice, in the presence of the child’. Child inclusive practice, according to McIntosh, aims to form a strategic therapeutic loop back to the child’s parents by consulting with the child in a supportive, developmentally-appropriate manner about their experiences of family separation and dispute in a way that avoids and removes any burden of decision-making. McIntosh (2003) emphasises that an important aspect of child-inclusive practice is that it is two-dimensional in its intent and effect, in that it aims to give children a voice and to provide parents with skilled and sensitive feedback which has an informative and therapeutic intent.

While it is early days, there is anecdotal evidence which suggests this model of child-focused practice is now widely adopted amongst service providers of FRCs, and parents are now encouraged to consider the needs of their children throughout the process of the resolution of their dispute. However, it is also increasingly apparent that the use of
‘child inclusive’ practice is limited by a number of factors. Firstly, children’s consultations will not be ordered where there are allegations of violence, intractable disputes or where one of the parents is not considered ‘ready’ to hear the voices of their children. In addition, dual parental consent is required before a child can participate in a children’s consultation. Consultations are often shared between siblings and no feedback is provided to children. In this way, models of child-inclusive practice currently underpinning a range of FRCs appear to be focused primarily on the task of resolving the dispute between fathers and mothers, rather than on any ‘right’ of the child to participate in decision-making processes. While the following chapter explores the principle of children’s participation in more detail, it is sufficient to observe here that, in its current form, the principle of ‘child-inclusive’ practice means the wellbeing of children is assumed to be met when FRCs facilitate and encourage parents to communicate, or as the Attorney General’s Department (2005, p.1) puts it, to help parents ‘talk about what is best for their children’ (italics added).

Before concluding this discussion, it is important to acknowledge that a number of initiatives show a fundamental interest in improving family law policy and practice for children by broadening the participatory process available to them. For example, the Children & Families in Transition Project, is an ongoing, collaborative research-based project currently underway which aims to identify strengths and gaps in service provision and to develop a best practice, culturally appropriate model of child-centred service delivery for families and children (Bagshaw et al., 2006). This project, still underway, aims to develop a ‘best practice’ model of service delivery which, amongst other things, will enhance opportunities to contribute to decisions that affect their future (Bagshaw et al., 2006). As well, there are some promising signs that Government is open to further exploration of ways in which children can be supported to be involved in decision-making processes. For example, in the 2007-2008, nearly fifteen million dollars was allocated to a new service, the Supporting Children after Separation Program, to assist children from separating families to deal with issues arising from the breakdown in their parent’s relationship and to be able to participate in decisions that impact on them (Ruddock, 2007).
Announcements such as these suggest that framing the reforms in the language of child-inclusive practice, whilst sometimes driven by powerful political agendas which act to marginalise children and what they have to say, can in fact open the way for those many individuals and organisations that are genuinely committed to continue to critically examine how to create child-centred family law practice such that children are involved in meaningful ways.

However, while these initiatives are welcome news, they might be described as too little, too late. Australia now has an entrenched family law policy which although framed in the language of child-inclusion more than ever ignores, resists or shuts down altogether the opportunity for children to engage meaningfully in the decision-making processes that determine their living and contact arrangements. A plethora of procedures and processes ensure that children have little or no input into the decision-making processes that determine such important decisions in their lives, including where they will live, and with whom and how often they will have contact. Instead, major challenges are presented by the Government’s new reforms, which have to a large extent ‘co-opted, depoliticised and stripped’ the concept and language of participation of its meanings which originated from efforts to achieve social change for children (VeneKlasen, Millar, Clark & Reilly, 2004). Despite the promise and high profile of participatory language, there remains ambiguity about the nature of children’s participation, particularly in relation to what the government means by terms such as child-centred, child-focused, child-inclusive and child-responsive practice. Consequently, the relationship of the rhetoric of child-inclusive and child-focused family law practices to questions of power, empowerment and good governance within a family law setting must continue to be questioned. While child-inclusive and child-focused practices have the potential to recognise the role of children in family law decision-making processes, as well as to significantly transform services to meet children’s therapeutic needs during times of family transition, the new policies and reforms downplay the importance of attempting to access and understand the world of children. In doing so they fail to acknowledge the wider benefits of children’s participation including its potential contribution to improving outcomes for children, their families and their communities. The following chapter examines the benefits of children’s participation in family law decision-making in more detail.
2.4 Chapter Summary

This chapter has sought to provide the political and legislative context for the study on children’s participation in family law decision-making. I have drawn attention to the ways in which children are positioned in current policy debates, which have been framed in the language of child-centredness and child-inclusion, particularly in relation to new policies concerning the shared care of children following separation. I have suggested that the government’s policy stance presupposes that children’s participation in the decision-making processes is, by and large, assumed to be met when parents agree to have equal or substantial amounts of time with their children, and that the active involvement of children in such decision making is neither envisaged or understood. I have shown how the focus and events surrounding recent inquiries and reports all contribute to this positioning of children as outsiders to decision making, both in the debates leading up to the implementation of the Family Law Amendment (Shared Parental Responsibility) Act on 1 July 2006 as well as within the new legislative and policy reforms themselves. As part of the discussion, I have explained the current legislative framework which determines how children and what they have to say are recognised, as well as highlighting the theoretical tensions that arise in decision making that concerns children, most notably in relation to the determination of the ‘best interests test’, which is framed within a dialectic of rights and welfare.

In order to better understand the tension that exists in Australian family law in relation to the rhetoric and practice of family law, the following chapter turns to the broader context of children’s participation, in particular to wider discussions and debates about the nature and conceptualisation of the two key elements of children’s participation, ‘children’ and ‘participation’.
Participation is about ensuring that the voices of children and young people are heard. Practice needs to be focused upon creating opportunities for engagement in dialogue between children and young people and decision makers. (ESRC Seminar Series Participants, 2004, p. 103)

In the previous chapter, I outlined the ways children, and what they have to say, are recognised in Australian family law processes. From this discussion, it is evident that although central to the family law policy agenda, children are rarely heard. This tension between rhetoric and practice is evident in Australia in the readiness of policy makers to embrace the ideals and language of a model of family law practice that is ‘child-inclusive’ and ‘child-centred’, while at the same time pursuing policies and legislation that act to distance children from participating in decision making relating to how best to meet their needs. Children are at once said to be at ‘centre stage’ of the reforms, yet important decisions that concern them can be made with little or no involvement of children themselves. In Australia at least, it can be said that children’s participation in family law, while expressed in terms of child-focused or child-inclusive practice, has come to hold a number of different meanings which continue to change and evolve in response to political and social debate.

This chapter further explores the tension that exists in children’s participation in family law decision making. It attempts to do this by looking beyond family law to the broader political, historical and theoretical underpinnings of children’s participation so as to identify what children’s participation is, how we have come to know and understand it and why such a culture of ‘non-participation’ exists in Australian family law at a time when children are so central to family law policy agendas. Accordingly, the analysis in this chapter should be distinguished from more traditional analysis of family law and policy which has focused on the rationale for children’s participation, that is, why children should or shouldn’t have a say.
Discourses about children’s participation abound. Such discourses exist in historically, culturally and discursively specified modes of disclosure which fall into two main categories: Those which are about *children* – which emphasise different assumptions, ideologies and characteristics of childhood, and those which are about *participation* – which emphasise different political and social ideologies, theories and policies of participation. In themselves, these two distinct discourses have important implications for understanding *children’s participation*. With this distinction in mind, I suggest this chapter must first ‘unpack’ a number of substantive and deeply embedded assumptions about *children* and about *participation*. Before doing so, however, given the term ‘children’s participation’ has acquired a range of meanings, an important starting point is to examine how the term is defined and theorised in the existing literature.

### 3.1 Defining Participation for Children

Children’s participation is still a relatively new phenomenon, and it is only in the last two decades that there has been a discernable shift, in principle at least, toward children being viewed as participants in social and political life (Cairns, 2006; Daly, 2004; Prout & James, 1997; Smart et al., 2001; Smith, 2002; Taylor, 2006). This dramatic growth in interest in children’s participation, including the flourishing of empirical and conceptual literature on the subject does not, however, make the task of defining children’s participation any more straightforward.

One of the key recurring themes to emerge from the substantial body of international jurisprudence and social science research on children’s participation is that it is an ‘essentially contested’ concept (Lister, 1997, p. 14), one that is deliberated at every level, from its meaning, its importance and benefits, its political and social application, to its implications for children (Crimmens & West, 2004; Davis, 2007; Hill et al., 2004; Lister, 1997; Lister, Smith, Middleton & Cox, 2003). In addition, it is a highly contextualised concept, in that it is practised in diverse ways in differing places and spaces, and its meaning and interpretation vary according to its various contexts (Lister, 2008b).
The complex nature of children’s participation is also suggested by the etymological origins of the word ‘participation’. Derived from two Latin words *part* or *pars* (a ‘piece’) and *capere* (‘to take’), the word participation, *particeps* (‘partaker’) is defined in the *Oxford English Dictionary* (1989) as:

1. the action or fact of partaking, having or forming part of; the partaking of the substance, quality or nature of some thing or person;
2. the fact or condition of sharing;
3. taking part, association or sharing (with others) in some action or matter;
4. A participating bond or share.

Implicit in the formal definition of participation itself are three meanings: the first *to take part in*, implies output on the part of the participant, to speak up, to take action and to become involved, that is, to give; the second, *to have a certain quality*, implies a passive sense of the word, that is to receive something but not requiring any further action; and the third, *to possess something of the nature of a person, thing or quality* (Skrbina, 2001). The third definition implies participation is something that captures the essence of a thing, incorporating it, and even becoming in a sense *changed* by it, in other words, participation is a state not merely of being, but also of becoming, that is, an exchange takes place (Skrbina, 2001).

The formal definition of participation thus points to its inherently multidimensional, relational and aspirational nature, and its etymology suggests that the question of ‘what is participation’ is not easily or simply answered. When applied to the lives of children, the meaning of participation necessarily overlaps with the social and cultural meanings of childhood that exist both within and between countries over time (Morrow, 1999). As Smith (2002) says:

> At its most broadest and most general level, participation means involvement in activities, but there are many levels of participation, which are influenced considerably by roles, expectations and relationships within society at a particular time. (p.74)

Despite the difficulty in arriving at a comprehensive definition of participation, I suggest that there is general agreement about some of its essential features. The following section attempts to capture some of the dimensions of children’s participation.
as expressed in the literature, although it does so with the following caveat, expressed by Beers et al. (2006):

[S]ome crucial conceptual work remains to be carried out by and within organisations promoting children’s participation. The often-repeated terms ‘meaningful participation’, ‘enabling environment’ and ‘participation’ itself, remain unclear or have different meanings to different social groups and agencies … the definition of participation implicit in most responses … was teleological, by which we mean a definition according to what is done in the name of participation rather than what children’s participation means for children and society in the long term. (pp. 29-30)

In its broadest sense, children’s participation refers to children taking part in decision making in a range of settings, both collective (for example, voting, participating in youth parliaments, schools, local councils etc.) and personal (for example, having a say in family law and care and protection matters, family relations etc.) (Davis & Hill, 2006). As Lansdown (2006) says:

Understanding of what is meant by participation varies widely but, if it is to be meaningful, needs to be an ongoing process of children’s expression and active involvement in decision making at different levels in matters that concern them. (p.139)

Much of the literature draws distinctions between different dimensions of participation in relation to decision making, including the level, focus, content, nature, frequency and duration of children’s participation (Cashmore, 2002; Daly, 2004; Kirby, Lanyon, Cronin & Sinclair, 2003; Lansdown, 1995; Neale, 2004; Thomas, 2007). For example, Hill et al. (2004, p. 83) distinguish consultation from participation, defining consultation as ‘seeking children’s views’ and participation as ‘the direct involvement of children in decision making’. Sinclair (2004) agrees, suggesting that consultation should be contrasted with more active forms of participation which envisage that children and young people can legitimately and rightfully put forward their views in the expectation that they will be listened to and respected. Roche (1999) further clarifies this difference between consultation and participation, observing that the purpose of consultation is often to persuade children of the rightness or inevitability of a certain outcome, rather
than necessarily acting on their ideas. Participation, then, is more than mere consultation and involves more than simply ‘taking part’.

According to Lansdown (2000; 2006), a number of indicators might be seen as facilitating effective and meaningful forms of participation. These include: children understanding what the project or the process is about, what it is for and their role in it; transparent power relations and decision-making structures; early involvement of children; equal respect for all children regardless of their age, situation, ethnicity, abilities or other factors; and the establishment of ground rules with all children at the beginning and voluntary participation. McNeish and Newman (2002) further suggest that children’s participation can be said to have taken place when a personal or social benefit flows to the young people involved.

A number of models have been developed in recent years that seek to conceptualise different levels of engagement for young people in participatory processes ranging from non-participation through consultation to full participation. For example, Hart’s (1992) modelling of children’s participation as a ladder, with its eight rungs from manipulation, decoration and tokenism representing non-participation, assignment and consultation as part of informing children about how and why they are involved, to young people initiating, directing and sharing decisions with adults at the top. Shier’s (2001) model distinguishes between consultation and participation on the basis of decisions which are ‘actually made’, as opposed to where children’s views are invited. The most basic form of children’s participation in Shier’s model begins with the question, ‘Are you ready to listen to children?’ before progressing through a number of pathways to the question ‘Are you ready to share some of your adult power with children?’

Non-linear models, such as those of Lardner (2001) and Halldorson, Bramley, Cook and White (1996), highlight the power nuances and multi-layered relationships that exist in participatory practices, including the idea that children and young people might legitimately exercise varying degrees of power in some aspects of an activity and not others (for example, planning but not implementation), or in some activities but not others. The implications of power relations for children’s participation are examined in closer detail in Chapter Four.
A more recent development is the way in which children’s participation is emerging as a chief prerequisite of an inclusive democracy. According to Cairns (2006), children’s participation is ‘the fundamental right of citizenship, the means by which democracy is built and the “axial” principle of post-industrial liberal democracies’ (p.219). Hart (1992, p. 5) supports this broad definition, describing it as ‘the means by which a democracy is built and it is a standard against which democracies should be measured’. Rather than viewing children’s citizenship as residing in national identities and entailing a bundle of rights, children’s citizenship is increasingly being reconceptualised in more inclusive terms as the exercise of children’s agency (Cornwall, 2000).

Most work on citizenship emphasises a number of elements which have more recently come to shape and inform notions of children’s participation. For example, Lister (2008a) shows how T.H. Marshall’s classic exposition of four ‘building blocks’ of citizenship – membership, rights, responsibilities, and respect – continue to be influential on emerging understandings of children’s participation by providing an ‘image of ideal citizenship and participation against which achievement can be measured, and toward which aspirations can be directed’ (Marshall cited in Lister, 2008a, p. 9). The first, membership, draws attention to the role participation plays in engendering a sense of belonging and thus allowing children to be counted as important members of the community. As Roche (1999) suggests:

> Participation is about being counted as a member of the community; it is about being governing and being governed. (p.484)

Through participation, children and young people are seen as being able to lay claim to the status of citizen within a community (Cairns, 2006; Kulynych, 2001; Neale 2004; Roche, 1999). For example, in her seminal essay on children’s citizenship, Kulynych (2001) argues that ‘the crucial axis of children’s citizenship in the contemporary world is membership in the common political culture, and the key to children’s citizenship lies in their incorporation into that political culture’ (p. 232). Children’s participation is therefore seen as allowing children to be full members of the community by asserting...
their entitlement to take part in decision making in social, economic, cultural and political life (Cairns, 2006; Kulynych, 2001; Lister, 2008a; Taylor & Smith, 2009).

A pivotal aspect of membership is rights, and most accounts of children’s citizenship take the UNCRC as their starting point, in particular Article 12, as the source of children’s participation rights, which along with provision and protection rights, covers all the contexts of children’s lives – civil, political, economic, social and cultural. The Convention is perhaps the most potent and symbolic recognition of children’s participation, with its near universal ratification, including by Australia in 1990, widely acknowledged as signalling a new era in the relationship between children, the state and the international community (Greene & Hill, 2005; Davis et al., 2006). The UNCRC is discussed later in this chapter.

Responsibilities are a third key aspect of participation and of citizenship, and there is a growing body of research that points to examples of how children understand and assume responsibility in both public and private spheres (Lister, 1998; Taylor & Smith, 2009). For example, in a recent international study of children’s views of citizenship, Taylor and Smith (2009) report that children consider that citizenship entails certain responsibilities, ranging from responsibilities for self care, family, personal moral, school, environmental and community responsibilities. Taylor and Smith’s study is consistent with an earlier study by Lister at al. (2003) who report that children take a socially constructed approach to citizenship, which entails ‘contributing to society, helping the community, being a good neighbour and supporting the vulnerable’, and at its less proactive entailed ‘being polite, courteous and considerate, and abiding by the law and being non-destructive’ (p. 427).

Finally, participation is increasingly considered to have a role to play in respecting the identity of children as citizens with a valuable contribution to make to social and political life and, in turn, as enhancing their self esteem. As Mathews (2003) contends, children’s participation is ‘an essential and moral ingredient of any democratic society – enhancing quality of life; enabling empowerment; encouraging psycho-social well being; and providing a sense of inclusiveness’ (p. 270). For Davis (2007), participation
helps children to feel connected to and respected by their communities, as it enables them to contribute to processes of change by cooperating with adults.

The definitions of children’s participation introduced above present a picture of children as valuable members of civil society and as such, of a radically different way of thinking and rethinking children, family and society. In the following section I show that imagining children as participants in social and political life, including in family law, has been influenced by a number of developments in the way we understand children and childhood, and which go some way to explaining why children’s participation has come to occupy a central place in social life and policy.

3.2 Exploring the Potential of Children’s Participation through Three Perspectives of Childhood

A number of theoretical influences on thinking about children and childhood are closely bound up with more contemporary understandings of children as having strengths and competencies which have transformed children from invisible objects into subjects with legitimate voices of their own (Neale & Flowerdew, 2007; Prout & James, 1997; Smart et al., 2001.). As we have seen in Chapter One, key amongst these influences are the new childhood studies, socio-cultural theory, and the UNCRC. Each has independently and jointly played an important role in shaping contemporary understandings of children as having the voice and status of citizens and thus as being capable of participation in various aspects of social and political life, including family law. This chapter examines how these three influences have shaped the conceptualisation of children’s participation.

3.2.1 New Childhood Studies

The new childhood studies have emerged as a key player in recent times in challenging thinking about the nature of childhood and the place occupied by children in a number
of social and public settings (Greene & Hill, 2005; Prout & James, 1997; Kjørholt, 2004; Smart et al., 2001). Informed by a diverse range of interdisciplinary perspectives from sociologists, psychologists, anthropologists, geographers, historians, philosophers and others, researchers working within the new childhood studies have called for attention to the lived realities of children’s lives (Taylor, 2006). This has led to the consolidation of a view that children are persons with the capacity to act, interact and influence their social worlds (Greene & Hogan, 2005; James, Jenks & Prout, 1998; Prout & James, 1997; Smith & Taylor, 2000). In turn, the new childhood studies have initiated and contributed to a fundamental rethink about the nature of childhood and the status of the child and have challenged representations of children as natural, passive, incompetent and incomplete (Prout & James, 1997). This is evident in the substantial body of research now directed to children’s roles as citizens and social actors with their own views and strategies for actively participating in family and community life, and to childhood, which has come to be regarded as ‘significant in its own right, not merely as a precursor to adulthood’ (Taylor, 2006, p. 154).

Two key principles inform the new childhood studies. First is an idea of childhood as a phenomenon, and as such, is culturally, socially and historically variable (Kjørholt, 2004). Drawing upon post-structural accounts emphasising the importance of cultural systems in framing reality, the new social studies of childhood have sought to explain the conceptual organisation of childhood not as natural, but as constituted by difference (Davies, 1994; James, et al., 1998). Childhood is thus understood as entirely separated from variables such as class, gender, generation, history, culture or ethnicity.

Second, children are viewed as playing an active role in society and therefore as contributing to its ‘(re) production’ and ‘(re) interpretation’ (Christensen & Prout, 2005, p. 50). Implicit in this understanding, as previously indicated, is the idea that children are social actors, actively involved in the construction of their own lives, the lives of those around them and of the families and societies in which they live. Far from being seen as passive subjects in social structures and processes and as ‘products’ of culture, children are understood as having the capacity to actively contribute to the constitution of their own reality (Christensen & Prout, 2005). By emphasising the plurality of children’s lives and the potential of children to actively construct their social lives,
new childhood studies have contributed to children increasingly being valued in recent times as ‘knowers’, in relation to how they negotiate rules, roles and personal relationships, how they balance autonomy with (inter)-dependence, and how they take responsibility for their own wellbeing and the wellbeing of others.

These two key principles of the new childhood studies have enabled a fundamental rethinking of how we understand and engage with the concepts of the child and of childhood. Far from being insulated from social life, children are increasingly acknowledged as being deeply involved in the creation and reproduction of meaning, a process from which there is no standing wholly apart (Giddens, 1993). From this perspective, children are understood as ‘concept bearing beings’ whose concepts enter constitutively into social science and everyday action (Giddens, 1993, p. 13). Giddens (1993) describes this dynamic process as a ‘double hermeneutic’ (p.9), whereby the ‘findings’ of social science consistently re-enter and re-shape the ‘subject matter’ they were designed to describe. From this perspective, the new childhood studies can be seen as having opened up a theoretical space for exploring the conceptions of childhood as an institution, as well as of the agency of children (Prout & James, 1997).

When children are understood as participants, they are understood as being in possession of the agency, capacity, voice and status to participate in social, cultural and political life. As ‘knowers’ children are well placed to play a valuable role as participants in social and political life. This view of children contrasts with previous conceptions of children as ‘non citizens’, ‘not-full citizens’ or ‘citizens in the making’, and as unable to know their own best interests, and as being in need of looking after and protection (Davis and Hill, 2006; Taylor, 2006). Qvortrup (1994) has famously described this conceptual difference as approaching children ‘as human beings rather than as human becomings’ (p. 4). This conceptual difference is summarised by Neale and Flowerdew (2007, p. 26) as follows:

**Children as Welfare Dependents**
- Children are Dependents
- Children are incompetent and vulnerable
- Children need care, protection and control
- Children’s childhoods are determined by adults
Children as Young Citizens

Children are People
Children have strengths and competencies
Children need recognition, respect and participation
Children influence their own childhoods

These conceptualisations of childhood provide two very different pictures of children’s place in social and political life. The welfare paradigm emerges out of a protectionist framework which sees children as relatively incapable and vulnerable to harm, and thus in need of adult protection, support and control (Neale & Flowerdew, 2007). The child’s welfare is prioritised over their rights, because the child is understood as being incapable of fully exercising his or her rights (Kaganus & Diduck, 2004). As Neale and Flowerdew (2007) say, welfare is ‘something that is applied to children by adults in a way that leaves adults firmly in control’ (p. 27). It is a protectionist framework that sees children as relatively incapable and vulnerable to harm, and forms the basis for arguments that children should not participate in family law processes on the grounds that participation is harmful to children, and places undue burdens of responsibility and guilt onto children and compromises their loyalties (Neale, 2002). In this formulation, adults (parents, lawyers, social workers, medical practitioners etc.) are considered best placed to evaluate children’s best interests and to speak on behalf of the child. The discussion in Chapter Two shows the pervasive influence of the principle of welfare embedded in the family law system which regards children as passive welfare dependants, victims of separation and divorce and objects of concern in any disputes that follow, and in need of care and protection.

Until recently, such modernist discourses have deflected critical scrutiny and the role of children as active participants in family law has been marked not by an absence of interest in children but by their silence (Prout & James, 1997). At the heart of such marginalisation is the idea of children as ‘different’. One further dimension of this difference can be seen when adults see children not only as different but also inferior. By creating hierarchical boundaries between adults and children on the basis of ontological differences between the two, adults have positioned children in structurally powerless positions in society, as projects to be managed and governed, and whose
knowledge is considered inferior to that of adults (Smart et al., 2001). Far from historical artefacts, these numerous, contradictory and competing images of childhood remain readily identifiable in a range of contemporary social policies and continue to contribute to the marginalisation of children. This difference can be seen particularly in family law which, as Chapter Two has shown, insists on the editing of children’s voices by any number of adults, including parents, professionals and lawyers before they even can begin to be heard by decision makers, most often judicial officers in contested proceedings.

In progressing discussions of children as competent social actors with an important role to play in social and political life, the new childhood studies have also provoked critical thinking about the ways in which we theorise children and childhood. Indeed, Christensen and Prout (2005) argue for the importance of clarifying the nature of the relationship between children and social institutions as well as the structure and meaning of these relationships in the lives of children and their families.

The work of James, Jenks and Prout (1998) is particularly helpful for undertaking this task. They suggest that four dominant analytical approaches to theorising the agency of children can be discerned within the new childhood studies: the socially constructed child, the tribal child, the minority group child and the social structural child. While sharing the basic premises concerning the fundamentally ‘social’ and ‘social structural’ nature of the child outlined above, these four approaches emphasise or locate children at various points along a spectrum between a focus on childhood as a component of social systems and a focus on children as social actors. The authors emphasise the need to acknowledge the potential implications of adopting different approaches to childhood, so as to ensure ontological approaches to understanding childhood are consistent with the epistemological assumptions about the nature and theories of childhood. Given such considerations, the following section outlines briefly the points of influence and divergence of each of the four theoretical approaches suggested by James et al. (1998) and their relevance to this study.
The social structural child

This first approach to theorising and researching childhood, the socially structured child, sees childhood as a constant, recognisable and enduring (although changing) feature of society (Kjørholt, 2004). Children are part of society and should therefore be understood as an integral form within social systems. As a large group in society, children have the potential to claim a strong sense of identity with each other and, as such, to experience the solidarity that derives from recognition of their place in social structures. At the heart of the social structural approach to childhood is a commitment to a global rather than a localised position, one from which it ‘derives its persuasive strength and political impact’ (James et al., 1998, p. 209). As such, researchers working from a predominantly ‘social structural’ approach report children’s experiences often in terms of their interrelationships with other categories, such as social class, race and gender. The contribution of this approach to conceptualisations of children’s participation can be seen in the analysis of the status of childhood ‘as a structural category and childhood itself as a permanent form that never disappears in the structure of any society’ (Kjørholt, 2004, p. 22). There are therefore parallels between an analysis of children’s participation from the perspective of the ‘social structural child’ and a social class perspective ‘emphasising socio-economic factors and children’s possibilities for exercising power and control’ (Kjørholt, 2004, p. 22).

The minority group child

The second approach, the minority group child, is described by James et al., (1998) as ‘an embodiment of the empirical and politicised version of the social structural child’ (p. 210). Qvortrup (1994) has described the ‘minority child’ approach as moving away from perspectives that view childhood as transient, to a perspective of childhood that suggests it is a permanent form, one which never disappears. He suggests that understanding childhood in this way demands that the structural changes of childhood be acknowledged as we do any other socio-economic groupings – that is, as influencing each other and as being exposed in principle to the same external forces (Qvortrup, 1994). Within this approach, childhood is understood as a universal category in relation
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to its rights, status and personhood. Children are ‘first and foremost presented as rights-claimers’ with the same rights as adults (Kjørholt, 2004, p. 22).

Conceptualisations of children’s participation influenced by this approach are evident in the comparable demands for the voice of the child to be heard and for children’s rights, interests and needs to be taken into account in international conventions and legislative reforms such as the UNCRC and the European Convention on the Exercise of Children’s Rights. Christensen and Prout (2005) suggest that such a perspective encourages the comparative analysis of childhood with other population groups, as well as the consideration of childhood as a structure and how it changes over time. So, for example, they highlight three aspects of contemporary childhoods. The first, institutionalisation, recognises that children’s everyday lives are increasingly spent in early day care institutions such as preschools, play groups and long day care centres, schools, and after-school groups and clubs. The second, familialisation, is characterised by the tendency for children to be viewed as increasingly dependent on and contained within their families and is evidenced, for example, by the trend towards parental involvement in schools, the identity of other young people as their family, government policy intervention in families, as well as in the decline of children’s autonomous movements around the neighbourhood. At the same time, this aspect of childhood has seen the proliferation of special locations that concentrate children together under adult supervision. The third, individualisation, which Beck (1992) argues is part of a second wave of modernisation, refers to people, adults and children thinking of themselves as unique individuals with chosen rather than prescribed identities, and which has seen children as having a voice in determining their lives and in shaping their identity.

These three trends in the way children are conceptualised in the public sphere have important implications for the ways in which their participation is conceptualised. Such trends operate not in isolation, but ‘in tension with each other, pushing and pulling childhood in rather different directions’ and ‘contribute another layer of complexity to children’s participation in contemporary life’ (James et al., 1998, p. 51). Prout (2000) suggests a good example of this tension can be seen in the acknowledgment of children as persons in their own right, able to participate in social and political life, whilst on the other hand, their lives are marked by increasing control, regulation and surveillance of
children’s lives in the public sphere. Thus, while the visibility of children in the social sciences may seem superfluous given the centrality of children in Western culture, there remains the important challenge of highlighting the ways in which traditional perspectives of childhood resist or restrain children from having influence over their own social representation (Christensen & James, 2005).

The socially constructed child

The third approach to studying childhood, the socially constructed child, draws predominantly upon the insights of social constructionism in order to focus on culture and difference. To describe childhood as socially constructed assumes that knowledge of a child and of a child’s world is constituted in relation to her social, political, historical and moral contexts, and thus points to a variety of childhoods which children experience (Davis, 1998; James et al., 1998). Childhood is therefore understood to be multiple, constructed in a particular place and at a particular time in history (Kjørholt, 2004; Smart et al., 2001). Within this approach, there is no essential or universal child to engage with, only one that is built up through constitutive practices. Theorists working within a social constructionist approach set out to suspend a belief in the taken-for-granted meanings that surround notions of childhood, and so open up to critical inquiry and analysis the structural constraints and multiple discourses that contribute to the constitution of childhood in an attempt to shed light on contemporary understandings of the plurality of childhoods (James et al., 1998).

When children’s participation is approached through the lens of social constructionism attention is drawn to the multitude of discourses of both ‘childhood’ and of ‘participation’ which act to enable and to constrain children to think of themselves and interpret their encounters with the world within their own particular cultural contexts. Researchers working within this approach highlight the complexity of children’s participation, including the sometime contradictory wishes and expectations, both within and between the voices of children (Davis, 1998; Komulainen, 2007). Approached in this way, however, the contradiction in children’s accounts of the world
is not only seen as providing valuable insights, but is welcomed as an illustration of a child’s entirely different perspective on the world (James et al., 1998; Kjørholt, 2004).

The tribal child

The fourth approach to studying childhood, the tribal child, can be said to honour the difference of children and to celebrate their autonomy. Within this approach the commonality of childhood is emphasised, and contrasted with that of adulthood (James et al., 1998). Children’s worlds are understood as real places and as such demand to be understood in these terms. James et al. (1998) liken this approach to that of the enlightened anthropologist who sees children’s social action as structured, but unfamiliar to us as adults. Researchers working within this approach often immerse themselves in the lives of their subjects before attempting to produce a contextualised reproduction and interpretation of the stories told by children. Most importantly, researchers reject the role of the ‘detached observer’, often refusing the position of authoritative adult in an attempt to enter children’s worlds (James et al., 1998).

The tribal child approach emphasises the possibilities of revealing children’s worlds through research and particularly from ethnographic and interpretative perspectives that welcome children’s social action as structured, but within a system that is unfamiliar to us (James et al., 1998). Children’s childhoods are celebrated and their social worlds seen as real places, and not as fantasy games and children are no longer judged as “non-adult” and found wanting; instead they are understood to be “just different”(James et al., 1998, p. 182).

The tribal child approach has been influential in conceptualisations that celebrate children’s worlds, children’s competence and children’s agency. By drawing attention to children’s ‘cultures of communication’ the tribal child approach holds out a number of possibilities for facilitating a sustained focus on children’s language, language acquisition and language games – and consequently on their status and competence as participants in social and political life (Christensen & James, 2000; James et al., 1998).
In concluding this discussion, it is important to emphasise that a commonality between the different approaches to the study of childhood, outlined above, is an epistemological turn towards recognising children’s social relationships and cultures as worthy of study in their own right, and not just in respect to their relationship to adults and to society. These newer conceptualisations of childhood have contributed in a significant way to thinking about children as active social beings, creating and negotiating social relationships within the social, political and discursive frameworks of their lives. It has also contributed to shaping understandings of childhood as a phenomenon that is neither politically neutral or value free and so unable to be separated from negotiations over power, knowledge and the production of truth. As such, these developments in the way children and childhood are conceptualised have been revolutionary in their challenge to traditional understandings of childhood, which have conceptualised children as objects but not subjects of family law decision making, but which continue to inform contemporary family law policy, as Chapter Two has shown.

### 3.2.2 Socio-cultural Theory

Socio-cultural perspectives on the nature of childhood have significantly shaped contemporary views of children’s participation by drawing attention to the relationship between the child, interpersonal interactions and his or her broader historical and cultural context (Tudge & Hogan, 2005). The theories of the Russian psychologist Lev Vygotsky (1896–1934) and of the American psychologist Urie Bronfenbrenner (1917–2005) have been highly influential in the development of socio-cultural theory. A key contribution of socio-cultural theory to the way children’s participation is conceptualised has been to emphasise that children learn from actively participating in practices involving them with others. Socio-cultural theory emphasises that when children participate and engage in collaborative activities, they develop new skills, concepts and knowledge which are transformed on the basis of the child’s own characteristics, experiences, skills and knowledge (Tudge & Hogan, 2005). Hence, children’s development occurs through their activities within particular social and cultural contexts, especially their relationships and interactions with other people. In this way, socio-cultural theory places the social, cultural and historical frameworks at
the centre of inquiry, rather than as background information (Smith & Taylor, 2000; Taylor, 2006). As Greene (2005) notes:

Socio-cultural perspectives on the construction of self suggest persuasively that how we relate to the world is largely a function of the cultural context, particularly those discourses which are central to structuring the world and the individuals place in it. Thus children come to think of themselves and interpret their encounters with self, the world and others in very different ways depending on the discourses that are dominant in their culture. (p. 4)

While developmental and sociological theories of childhood have traditionally set parameters around the age at which children are expected to accomplish tasks and the stages children progressively move through, socio-cultural theorists argue that there is no one pathway for development. Instead, socio-cultural theory emphasises that childhood development and socialisation are creative, fluid and relational processes that are worked out in dynamic and complex ways in the lives of individual children (Neale & Flowerdew, 2007).

By approaching development in this way, socio-cultural theory suggests that the competence of children is achieved within a reciprocal partnership whereby:

Children gradually come to know and understand the world through their activities in communication with others in the context of cultural processes located in a particular historical time … The greater the richness of the activities and interactions that children participate in the greater will be their understanding and knowledge. (Smith, 2002, p.77)

Because of this partnership between adults and children, instruction and support for children should be more closely linked with the child’s potential level of development, rather than to any level of measured, actual development (Taylor, 2006). Rather than waiting for developmental readiness, skilled adults and peers can greatly extend a child's competency by stimulating their development within the range between what a child can do on their own and what they can achieve with the assistance of others who are more skilled in a particular domain of knowledge (Taylor, 2006).
The socio-cultural view of development has been instrumental in provoking adults to consider the nature of the support they provide to children as participants in order to enable their participation in social and political life. In Smith’s (2002) words, this requires ‘providing enough, but not too much support’ (p. 85). Building on the work of Vygotsky, Smith (2002) uses the metaphor of ‘scaffolding’ (p.80) to explain the gradual assistance provided to children by skilled partners to support their participation until they can acquire competence to perform independently – as a child’s competence increases the scaffolding is gradually withdrawn until the child can do alone what could only be done before with the support of an adult. Children’s capacity to participate is highly dependent on the social and cultural context of their participation, and a key aspect of children’s participation is the nature of the relationships between those skilled adult partners and children (Smith, 2002). For children to become active and competent participants they require a trusting and reciprocal relationship with adults so that they can learn to communicate their intentions and views, from a very early age, and so that adults can be responsive to their views:

For children to learn to speak up and voice their opinions, for example, it is important for adults to create participatory spaces and to provide support and guidance in partnership with children, in order to help them formulate their views. (Smith & Bjerke, 2009)

Socio-cultural theory is valuable, therefore, in drawing attention to the role of adults in supporting children’s participation. As Taylor (2006) says:

It is not just children whose emerging participatory skills need scaffolding, but also adults (parents and professionals) who need support, training and resources to help them engage with children. (p. 9)

The influence of socio-cultural theory in shaping the current study is evident in several ways. First, it draws attention to the need for this study to pay critical attention and to be sensitive to the social needs of children as they find their way in and around the processes of participation available to them. Second, it calls for an emphasis to be placed on the processes for undertaking this study, including in the interviews with children, the analysis of the data and on the ways in which children understand the role of myself as the researcher.
3.2.3 The UN Convention on the Rights of the Child (UNCRC)

The third major influence on conceptions of children as participants in social and political life is the extension of participation rights to children by the UNCRC. The article of the UNCRC that deals specifically with children’s participation rights is Article 12:

State 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.

However, several other articles give expression to children’s participation rights, including the right to get and share information and freedom of expression (Article 13), freedom of association (Article 15), rights to information (Article 17) and freedom of thought, conscience and religion (Article 14). Article 4 of the Convention states that governments have a responsibility to take all available measures to make sure children’s rights are respected, protected and fulfilled. Taken together, these articles reflect ‘a new global consensus that, as soon as children are able to express a preference about a matter affecting them, they have the right to form an opinion, make it known to others and have it considered’ (Melton, 2006, p. 7). Indeed, Hogan (2005) suggests there is considerable consensus that the UNCRC reflects ‘an unprecedented value for the subjective worlds of children and for their right to be consulted and taken seriously’ (p. 35).

Central to the role that the UNCRC has played in positioning children as participants has been the continuous advocacy of their participation rights. By framing children’s participation as a fundamental human right, the Convention has articulated it as something special and as something to continue to strive for. In this way, children’s participation has become a powerful reference point for the way children are respected and understood. As Dershowitz (2004) suggests, ‘most people see rights as something special, to be respected and not to be treated lightly’ (p. 20). Affording children participation rights has not sought to afford children special status; nor does it assume
that the interests and views of children are the same. Rather children, like adults, are accepted as citizens entitled to participate in social, cultural and political life. Nelson Mandela’s (2000) words about the purpose of UNCRC are authoritative:

The Convention on the Rights of the Child is that luminous living document that enshrines the rights of every child without exception to a life of dignity and self-fulfilment.

While there is general agreement that children have the ‘right to participate’, the term ‘participation’ does not appear in Article 12 or, indeed, in any of the closely related provisions (Melton, 2006). This is despite the direct reference to the term in the General Comments of the Committee, as well as in other articles. For example, Article 9(2) provides that ‘all interested parties’ shall have the opportunity to participate and be heard in legal proceedings pertaining to child custody, a provision Melton (2006) suggests must surely include children themselves.

This said, in addition to enunciating ‘participation’ as a specific right, participation rights are identified as ‘general principles’ for interpreting all other provisions of the Convention (Melton, 2006). This idea of ‘participation’ as an overarching guarantee provided by the Convention, along with the key principles of the best interests of the child (Article 3), non-discrimination (Article 2) and survival and development (Article 6) reflects the intention of the UNCRC that a child’s participation rights be given special emphasis in order that they might:

…guide the way each individual right is ensured and respected; a criterion to assess progress in the implementation process of children’s rights; and an additional dimension to the universally recognized freedom of expression, implying the right of the child to be heard and to have his or her views or opinions taken into account. (UNICEF, 2008a, p. 1)

In this way, participation can be understood as ‘a procedural right through which children can act to protect and promote the realisation of other rights’ (Lansdown, 2005, p. 17). The Convention therefore articulates a concept of children’s participation as something special, something to strive for and be taken seriously and thus a powerful reference point for the way children are understood. As Freeman (2007) says:
Rights are important because they recognise the respect their bearers are entitled to. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and on integrity. Rights are an affirmation of the Kantian basic principle that we are ends in ourselves, and not means to the ends of others. (p. 7)

Affording children participation rights does not afford children a right to decide, and nor does it assume that the interests and views of children are the same. However, it does assume that children, like adults, are accepted as citizens and are entitled to participate in social, cultural and political life (Cairns, 2006). UNICEF (2008b) describes the role of participation rights in the following way:

... [an] underlying value that needs to guide the way each individual right is ensured and respected; a criterion to assess progress in the implementation process of children’s rights; and an additional dimension to the universally recognized freedom of expression, implying the right of the child to be heard and to have his or her views or opinions taken into account. (p.1)

Another important theme in the children’s rights literature is an expansive approach to children’s rights which focuses on rights as a political and social process through which children ‘engage in claiming, expanding or losing rights’ (Isin & Turner, 2002, p. 4). For example, Melton (2006) suggests that the Convention’s attention to ‘both what is done for children and how it is done’ (p.15) reveals the conceptual links between civil and political rights and social and economic rights underpinning the Convention. This means assurance is sought by the Convention that children not only have access to necessities for survival, but also to the resources they need to develop a coherent system of personal values, form opinions about issues important to them, and build skills in the expression of those ideas in a community context (Melton, 2006, p.15).

This broader approach to rights builds on a definition of children’s rights in three ways: as a developmental concept, recognising the extent to which children’s development, competence and emerging personal autonomy are promoted through the realisation of their rights; as a participatory or emancipatory concept, which emphasises the rights of children to respect for their capacities and transferring rights from adults to the child in accordance with their level of competence; and as a protective concept, which
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acknowledges that because children’s capacities are still evolving, they have rights to protection on the part of their parents and the state from activities that are likely to cause them harm (Melton, 2006). Within this context, participation is understood as supporting the ‘evolving capacities’ of children, a term which Lansdown (2005) says ‘establishes that as children acquire competencies, there is a reduced need for direction and a greater capacity to take responsibility for decisions that affect their lives’ (p. ix).

While it is an important influence on the ways in which children’s participation is conceptualised, the notion of rights is not, however, without its difficulties. As VeneKlasen et al. (2004) suggest:

...rights do not come in neat packages, but rather are part of dynamic, sometimes messy processes of resistance and change that work to engage and transform relations of power. (p. 4)

Without pre-empting discussion later in this chapter, it is relevant to note that the concept of rights is neither ‘neutral nor unproblematic’ (Dahlberg & Moss, 2005, p. 30). It is a concept that is constituted by particular liberal and legal discourses which are premised upon liberal values of participation as a contractual exchange between calculating individuals, who are themselves assumed to be independent, rational and autonomous (Dahlberg & Moss, 2005; Davies, 1994; Tully, 2004). The lack of clarity regarding children’s rights is evident, in particular, in Australian family law which expresses children’s participation rights within a frame work of welfare and protection. As the previous chapter has shown, children’s rights are framed in terms of the child’s rights to contact with both parents (provision rights) and protection from harm (protection rights), discourses which themselves are shaped by liberal and legal discourses of family law. Consequently, in Australia at least, children’s participation rights are ‘heavily laden with past interpretations whilst also flirting with the notion of children as persons/citizens/rights-holders within civil society’ (Taylor, 2006, p. 217). Consequently, as Taylor (2006) says, this has led to the framing of children’s rights as existing within and between a number of conceptually ambiguous discourses, that is, between children as ‘active moral and social agents who can influence the shape of their own childhoods, or children as dependants whose lives are structurally determined for
them’ (p 217). Such discourses and their implications for the ways in which children’s participation is understood and practised are explored later in this chapter.

The preceding discussion has attempted to make visible the ways in which the parallel developments of the new childhood studies, social cultural theory and the UNCRC have radically transformed contemporary understandings of childhood by challenging historical theories of childhood development and childhood competency. It has described how the fundamental shift in thinking about children’s intellectual and emotional status, and about their capacity to participate in the decision-making processes that affect their everyday lives, has been profoundly influential in shaping broader discourses of children’s participation. Increasingly, children are being recognised and represented in theoretical, social and political discourses as social actors with a valuable role to play in the lives of their families and communities.

Yet, as we have seen in Chapters One and Two, the conceptualisation of children as competent, social actors has not necessarily translated into children being taken seriously as participants, and nor has it progressed significantly the ways in which their status and voices are recognised in social and political life. In response to such concerns about the growing ambiguity and tension that characterise children’s participation, a small but growing number of scholars has suggested that fertile grounds for better understanding such ambiguity lie within discussions and debates of participation, even though children have rarely featured in such analysis (Arnott, 2006; Lister, 2008a; 2008b; Prout, Simmons & Birchall, 2006; Kulynych, 1997; 2001). The following section examines the emergence of contemporary understandings of participation more broadly, as distinct from children’s participation specifically, and their role in shaping how children participate in family law decision making.

3.3 Exploring the Potential of Children’s Participation through the Politics of Participation

Until now, debates about children’s participation have been located primarily in discourses of childhood, and have been largely ascribed to the momentum achieved by
the near-universal adoption of the UNCRC, as well as to developments in childhood studies. Yet, the path towards children’s participation has also been part of a widespread twentieth century movement in Western society towards acknowledging participation as central to the way that we understand democracy (Arnott, 2006; Lister, 2008a). Understood from this perspective, children’s participation can be said to have emerged in response to a ‘concatenation of factors’ that have challenged the very nature and meaning of democracy itself (Christensen & Prout, 2005, p 53). Kulynych (1997) captures the magnitude of such changes, which she says have included:

The unique political and economic configuration of advanced, welfare state capitalism, the subtlety and ubiquity of disciplinary power, the simultaneous solidification and fracture of personal and collective identity, and the advance of technology and bureaucracy combined with an increasing philosophical scepticism toward truth and subjectivity to produce a world that is often incompatible with our traditional understandings of democracy. (p. 316)

Such developments in Western democracy challenge democratic norms that govern the inclusion of individuals and groups as they struggle for recognition of their ethnicity, race, class, gender and, more recently, age, in order to be able to participate as citizens (Christensen & Prout, 2005; Kulynych, 2001). This is evident in the changing relationships between government, civil society and the individual, as governments have sought to respond to widespread anxieties about the capacity of contemporary democratic institutions to take account of their citizens’ specific cultural and social differences. Arnott (2006) argues the days are gone when it was possible to view democracy within hierarchical and linear models of governance. Instead, she suggests, we are witnessing an increasingly complex governance and policy environment where government’s key role is to ‘co-ordinate and steer the diverse range of policy actors’ (Arnott, 2006, p. 5). Participation is a central platform in these changes and, as such, acts as a mechanism through which governments and the community attempt to respond to calls for recognition of the voice and status of groups otherwise positioned in the margins of society, including children and young people (Arnott, 2006, Cornwall & Coelho, 2007; Gaventa 2002b).

At the same time, conceptions of participation are under contestation. For example, Gaventa (2007) argues the quality of democracy is in crisis, with increasing concerns of
‘diminishing democracy’ and a widespread search for new ways to revitalise it through new forms of citizen engagement (p. xi). Such unease about the forms and meanings of democratic participation are critically relevant to the nature of children’s participation. The challenges and problems faced by democracy at the start of the twenty-first century can thus be said to lie at the heart of the complexity that surrounds children’s participation (Arnott, 2006; Kulynych, 2001).

In order to investigate children’s ‘entrée’ into participation, it is evident that important insights are to be gained from closer analysis of the assumptions embedded in accounts of what participation is, who participates, and under what conditions. While the exploration of the emancipatory dimensions of participation is now well under way, including its possibilities for contributing positively to children’s lives, there remains the need to continue to subject participation itself to closer scrutiny in order to create critical spaces for reflection on the unresolved tensions, questions and social power relations and practices which constitute children’s participation, but which often go unnoticed in social policy concerning children. Discussion in the previous chapter suggests that this is particularly so in the context of Australian family law.

One way of analysing contemporary discourses of participation is to approach participation in theoretical terms as a ‘an invited space’, that is, as a space that exists between the individual and the social systems within which participation is enabled, supported and encouraged, as well as constrained, resisted, and sometimes arrested altogether (Cornwall & Coelho, 2007, p. 11). Within this space the conditions of participation are negotiated, as are the norms and practices of governance and self-governance, examination of which has the potential to reveal power relations, as well as cultures of participation that are carried in from other spaces:

These are spaces of contestation as well as collaboration, into which heterogeneous participants bring diverse interpretations of participation and democracy and divergent agendas. As such they are crucibles for a new politics of public policy. (Cornwall & Coelho, 2007, p. 2)

Participation can therefore be seen as being constituted, in a most fundamental way, by discourses about how, when and why individuals and groups are recognised within
particular political and democratic cultures. Thus any serious understanding of children’s participation will demand further focus on participation as a contested site – at a philosophical, theoretical and practical level. For this study, family law is one such site, and constitutes a setting which is replete with volatility and conflict.

To this end, I propose three key ‘moments’ in the recent history of participation, which have shaped the ways in which individuals and groups pursued and negotiated the terms of their participation and which capture the ways they have been recognised within particular political and democratic cultures. Hence, these ‘moments’ signal how participation has been shaped and acted upon.

3.3.1 Three Key Moments in the Recent History of Participation

Although Denzin and Lincoln (2005a) caution against historicising or punctuating moments within interpretative research, they suggest that there are moments in the fabric of qualitative research:

… what we call moments are themselves the appearance of new sensibilities, times when qualitative researchers become aware of issues they had not imagined before. (p. 1116).

Benhabib (1992) might describe such moments as the ‘deeply shared sense that certain aspects of our social, symbolic and political universe have been profoundly and most likely irretrievably transformed’ (p. 1). In describing participation in terms of moments, I refer to an array of discourses which act to determine the horizon and background of the conceptual and discursive field of participation (Kögler, 1999). Discursive fields are understood in critical hermeneutics as the speech acts, assumptions, and interpretative attitudes and procedures which affect and shape the creation of a fictitious and yet politically and socially efficacious interpretative reality (Kögler, 1999). The endurance and continuity of ‘participation’ is thus explained through the coherence achieved by discourses of participation which are supported, grounded and transformed as discursive myths constructed according to a set of internal conceptions, rules and procedures prevalent at particular times and places (Kögler, 1999).
The approach I am taking in positioning participatory moments is not intended to include, and does not extend to, a discussion or examination of political theories of participation. Rather, it seeks to outline the emergence of the contemporary situation of participation by broadly sketching its historical ‘horizons’, that is, by describing the evolution and content of particular discourses of participation in recent history. This means there will inevitably be aspects of participation that sit outside this analysis. However, notwithstanding the risk that accompanies oversimplifying historical and theoretical traditions, there are significant benefits to be gained from examining the ways in which individuals and groups have sought to participate within particular political and social communities.

3.3.2 The First Moment: The Claim for Participation Based on Equality

For much of the twentieth century, the theory and practice of participation has been influenced by a range of philosophical and political positions which claim fundamental differences in relation to the question of what constitutes citizenship and participation. For example, liberal theory has been largely hostile to the idea of group rights, while radical pluralistic theories reject explicit theories of consensual communitarianism and liberal pluralism (Janoski & Gran, 2002). In liberal accounts there is a preoccupation with the formal rights that underpin participation, while communitarian accounts focus on attitudes and actions that constitute the identity of the citizen (Lister, 1997). Underpinning all approaches, however, has been an idea of rights, including participation rights, and the need to assure every citizen the possibility of asserting a claim to rights (Janoski & Gran, 2002). Honneth (1995) has described the centrality of rights in contemporary understandings of participation:

There came a moment during the first decades of the twentieth century in which the belief established itself, once and for all, that every member of a political community must be accorded equal rights to participation in the process of democratic will formation. (p.116)
The first ‘moment’ can be seen in the 1960s and 1970s, when predominant approaches to participation embedded within juridical theories, rules and policies became strongly aligned with the right of every (adult) citizen to equal participation in political life. Throughout this time, political and social theorists sought to unfold a conception of participation based within a framework of citizenship and strongly aligned with the right of every citizen to equal participation in political processes. Within that framework, participation has been conceptualised and premised upon the principle that every citizen should have basic civil liberties, rights and obligations – that is, the recognition of individuals as free and equal (Barry, 2001; House, 2005, Rawls, 1971). With the move to equality came a politics of universalism, emphasising the equal dignity of all citizens, and the equalisation of the right and entitlement to participation (Taylor, 1995; Tully, 2004).

A number of powerful assumptions are embedded within first moment accounts of equal participation, both in relation to who is invited to participate and how. Taking the question of who first, it is apparent in the first moment, that the norms or characteristics of who should be invited are strongly conceived within liberal theory as the rational, autonomous and competent adult capable of exercising their rights and bearing responsibility for their actions.

This construction of the identity of the subject of the first moment thus allows for the artificial legal distinction between adult and child based on the idea that children do not possess these requisite qualities of legal capacity and moral accountability (Archard, 1993). Because children are seen as lacking legal capacity, they are unable to assert a claim based upon any right they might possess, regardless of the basis of the claim.

The ‘subject’ of participation in the first moment also accords with more traditional, but nonetheless prevailing, discursive myths of childhood, in particular, about what children are not (Arneil, 2002). Subsequently, as Lister (2003) describes, a dichotomy permeates the very fabric of citizenship: a dichotomy she characterises as the deeper epistemological deficit which has also acted to render invisible the absence of children from conceptions of citizenship and participation. This dichotomy manifests in the divisions between adult and child, autonomy and dependence, rationality and
irrationality, maturity and immaturity, cultural (in the sense of childhood) weakness and inferiority. Such discourses enable conceptions of the child as physically, mentally and emotionally immature, in need of protection and who ought to be separate from the stresses and burdens of adult life (Kulynych, 2001). The question of who participates in the first moment thus reveals the powerful influence of a number of discourses of ‘childhood’ and of ‘participation’ which come together to define who is invited to the participatory space of the first moment. For children, this subject position is unattainable, for they possess neither the moral, legal or political status to ‘qualify’ as participants.

The question of how individuals participate in the first moment is determined, to a large extent, by the identity of the individual subject of the first moment, who is assumed to know, and to agree to, the principles of procedural fairness that assign to basic rights and duties of participation (Almqvist, 2004; Bottomley, Gunningham & Parker, 1994). In other words, the identity of the subject determines the conditions of participation.

The conditions of participation in the first moment can be best described as proceeding from a monological perspective, that is, one that begins with a focus on the claim for recognition, advanced by an agent and then evaluated in abstraction from the field in which it was raised (Taylor, 1995; Tully, 2004). This approach can be readily identified in the work of theorists, courts and policy makers who look to juridical theories, rules, models and policies in order to formulate participation as a claim for equal rights (Almqvist, 2004; Tully, 2004). From this perspective, participation is guided predominantly by the assumption that conflicts arising in relation to claims for participation rights are a matter for the courts, capable of resolution by legal rules and policies and thus beyond rules for negotiation and compromise (Almqvist, 2004; Tully, 2004).

Implicit in such a monological perspective are a number of assumptions about the ways in which participation can take place. These assumptions can be seen as preconditions for entry into the ‘invited space’ of participatory institutions (Cornwall & Coelho, 2007). First, participation is limited to those who are able to assert a claim. These must not only be subjects who possess legal status, but they must also be in a position to
assert a claim to be recognised as having the right to equal participation (Cornwall & Coelho, 2007; Tully, 2004). Without this status, subjects are unable to gain access to the rights, duties and entitlements that attach to the identity under which they are recognised.

Second, a claim must be made out. Consequently, a claim for participation must be framed in ways that will allow the claim to proceed. Legalistic models of participation are premised upon notions of equality whereby all claimants are presumed to be equal and so no exceptions are allowed or tolerated which might take into account the specific circumstances of the claimant (Taylor, 1995; Tully, 2004). Individuals are deemed to accept the initial position of equality as defining the fundamental terms of their association, and must behave accordingly, by framing their claim in a way that enables it to be heard within a legal forum (Tully, 2004). In accepting equality as underpinning the terms of association, individuals consciously or unconsciously accept the terms of their association. Conflicts over the terms of an individual’s right to participate will be worked out by legal rules and policies for negotiating conflicts (Tully, 2004).

Third, participation is premised upon normative ideas of the neutral state, which in turn is presumed to provide a neutral space within which to resolve conflicts that may arise in relation to claims by individuals and institutions for recognition of their right to participate (Tully, 2004). Decision makers are assumed to be independent of, unaffected by, and neutral with respect to such claims.

Fourth, solutions to conflicts within the space of participation are handed down from on high, rather than passing through the democratic will formation of those who are subject to the solution. Consequently, decisions are experienced as ‘imposed rather than self-imposed’ (Tully, 2004, p. 91).

Finally, because distributive principles of justice themselves derive from the rule of law, one fundamental influence on the way that participation was to be characterised at this time concerned the interpretation of the goal of participation, a goal characterised in terms of achieving (or being imposing from the top) a definitive and final solution capable of ‘neutral’ translation that is handed down to individual members ‘from on
high’ that is by theorists, courts and policy makers (Dahlberg & Moss, 2005; Tully, 2004).

The preconditions of participation in the first moment act to overlook, ignore and exclude a number of individuals from the invited space of participation. Children, in particular, are not, and cannot, be assigned the status of the subject and so cannot possess the right to participation. This means the almost total exclusion of children from the process of participation, and so from the larger community precisely because they did not have the ‘entrance requirements’ necessary to participate (Arneil, 2002).

It is important to note that the discursive framing of participation in the first moment is not bound to that moment in history, but instead continues to inform modern understandings of participation and to take on new meanings in a contemporary context. While the strength of a rights formulation based on the notion of equal rights for children’s participation lies in its recognition of all humans as equally worthy of respect, the weakness which stems from its dependence on a formulation which originates in the autonomy of the individual must be acknowledged. Such a formulation is inherently exclusive of children. As Arneil (2002) suggests, political theories built on rights continue to conceptualise the individual as a discrete entity and the relations between people as contracts of mutual consent, and thus:

…not only is the child a distorted image of the adult in liberal theory, but he/she is excluded at birth from belonging to this community until he/she can consent to it. (p. 75)

The end of the first moment can be evinced in an increase in tension and conflict surrounding the failure of attempts to deny or subordinate the claim of minorities to be granted equality of rights (Tully, 2004). As well, increasing opportunities for participation in society generally saw the establishment of a platform for citizens to learn about the processes of exercising political agency and for new ways to articulate broader demands for participation (Cornwall & Coelho, 2007). Such ‘top-down encouragement’ to listen to what individual citizens were saying, also allowed for the emergence of citizen dissatisfaction with the opportunities they were receiving and with their lack of control over them (Barnes, 1999, p. 75). In response to the expanding field
of claims for participation rights, many theorists and policy makers sought to enrich the principles of freedom and equality by working out theories and policies addressing minority and cultural rights that might acknowledge the legitimacy of rights to equal participation (Isin & Wood, 1999; Kymlicka, 1995; Parekh, 2000; Taylor, 1995; Tully, 2004). In other words, what began to emerge was a claim for participation rights based on a politics of difference. While there is a universalist basis to a politics of difference, in that everyone should be recognised, what is distinctive in the second moment, as will be made evident in the discussion below, is the basis for the claim:

With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognise is the unique identity of this individual or group, its distinctiveness from everyone else. (Taylor, 1995, p.234)

### 3.3.3 The Second Moment: Claims for Participation Based on Difference

With its early origins in the US civil rights movement, the rise of a politics of difference was accompanied by a shift in the exclusive focus on participation as a political right towards a more inclusively understood concept of participation as an activity that could also be realised in social and cultural spheres (Benhabib, 1992). This shift was evident in the increasing demands for rights to participation to be understood in the realms of institutional life, in personality formation and the development of individual identities and in the sphere of cultural tradition and social practice (Habermas, 1989). The second moment thus witnessed further change in the ways in which individuals and groups were able to express their political agency and to participate in social and political life, underpinned by the pursuit of a more inclusive interpretation of participation which might better accommodate diversity.

Although relative latecomers to the participatory scene, the unique identity of children is acknowledged during the second moment as participants, with their right to participation taken seriously for the first time. The philosophical and moral shift towards understanding children as being entitled to participation rights is reflected in
the UNCRC (particularly Articles 12 and 13), as well as in the emergence of bodies of theoretical work such as new childhood studies and socio-cultural theory as outlined earlier in this chapter. Prompted by a new discourse of children as social actors, the ‘invited space’ of participation in the second moment reveals a rethinking of the possibilities around ‘children’s rights’, central to which is the idea of recognising the child as a capable, social agent.

Yet, as I have already signalled, the acknowledging of children’s rights to participation has not necessarily resulted in what might be described as deeply authentic participation. Instead, children’s participation has continued to be characterised by a gap between expectations for their participation and their lived experiences of participation across the many settings of their lives. In this way, the second moment can be said to have enabled to a far greater degree the symbolic inclusion of children, but at the same time has struggled to address an underlying resistance to their political and social agency embedded in monological approaches to participation. Unlike the claims of other minority groups for participatory rights, children’s social rights can be seen to have been afforded without the usual platform of civil and political rights which accompany the claim for recognition. Indeed, it is relevant to note Janoski and Gran’s (2002) observation that considerable evidence exists which suggests ‘when a country leaps over political rights to social or participation rights, there will be problems protecting legal and developing rights’ (p. 37).

A notable feature of the second moment is that although the basis for the claim for participation is expanded to include children, the conditions are very similar to those in the first moment. As we have seen, monological approaches are not conducive to inviting or supporting children’s participation. Indeed, the conditions of children’s participation in the second moment are not distinguishable from the first and although the basis of the claim has shifted to accommodate children, the conditions of participation can be seen to act to prevent it from gaining influence in a family law setting, as discussion in the second chapter has shown. Therefore, even within this later orientation toward participation, the process of resolving conflicts over struggles for the right to participate continue to focus on the claim itself – that is, they focus on whether
the claimant should be accepted as a citizen with equal rights to participation, regardless of whether the claim has been based in identity, rights or culture (Tully, 2004).

Participation in both moments is framed within legalistic terms, whereby the identity of the subject is addressed by reference to a set of formal principles which delineate the conditions for participation. Thus, even though in the second moment, children are recognised as holding rights to participate, they continue to be indirectly excluded from the ‘invited space’ of participation because they are unable to assert or claim participation rights. In this way, the discursive space of participation in the first moment can be seen to influence the conditions of participation in the second.

The exclusion from the participatory processes not only ignores the contribution of children to public dialogue and decision making, but also restricts the scope of public dialogue itself, which becomes radically confined to the interests of those particular subjects who satisfy the ‘prerequisites’ to participate in the first and second moments (Benhabib, 1996). Hidden from public view, then, are not only ‘all contestatory, rhetorical, affective, impassioned elements of public discourse’ but also the dynamics of power which act to hide the inequality of access to participation (Benhabib, 1996, p 76). As well, Tully (2004) argues the transformation in the understanding of participation in more inclusive terms generates further problems in theory and practice, whereby:

The most powerful and vocal minorities gain public recognition at the expense of the least powerful and most oppressed; the set of rights tend to freeze the minority in a specific configuration of recognition; they fail to protect minorities within the groups who gained recognition; and they do little to develop a sense of attachment to the larger cooperative association among members of minorities, occasionally increasing fragmentation and secession (the problem they were meant to solve). (pp. 90–91)

It is apparent then, that while there has been a shift towards acknowledging the voices of children, their status as participants remains largely untouched by the possibilities that arise out of a politics of difference, because the procedural enactment of participation is largely unchanged in the second moment. Understood in this way, children’s participation reveals a paradox: while contemporary calls for children to ‘have a say’ and for adults to listen ‘to the voices of children’ have gained much
prominence as a result of the emerging politics of universalism and difference, the framing of the procedural terms of participation within first and second moment contexts continues to ensure that few children are able to assume the requisite subject position from which to assert the claim for recognition of that right. Indeed, the focus on elevating children’s voices, can be seen to be a product of monological approaches to participation which focus on the child in isolation, rather than on the conditions of their participation, including the relationships which enable or resist their agency. This is a key defining feature of the landscape of children’s participation and sheds some light on why children’s participation is increasingly seen as ambiguous and contested.

In the final part of this chapter, I suggest that the dominant approaches that have characterised participation in the first and second moment, while having played an important role in resisting and shutting down opportunities for children to participate, are once again in a state of radical transformation. Rather than approaching participation from a monological perspective, theorists, courts and policy makers are seeking to address the conflictual and contested nature of participation by inviting people and groups to speak in their own terms – in other words, to approach participation from a dialogical perspective (Drysek, 2000; Taylor, 1995; Tully, 2004).

3.3.4 The Third Moment: The Turn to Dialogue

As the concept of participation has increasingly expanded to accommodate growing calls to hear the ‘voices’ of the people, so too have calls for more active forms of democratic participation to enable new forms of engagement and inclusion between individuals and the state (Gaventa, 2002b). Implicit in such calls are challenges to the notion of democracy as a set of rules, procedures and institutional designs, and of participation as merely engagement in elections. While powerful liberal and neo-liberal influences continue to dominate the debate on how best to respond to citizen participation in these new democratic spaces, there is little doubt, as Cornwall and Coelho (2007) describe, that this new expansion of understandings of participation has brought the idea of citizen engagement in governance to centre stage:
Shifting frames for development intervention have brought debates that have absorbed generations of political philosophers to the forefront of contemporary development policy. From local ‘co-governance’ and ‘co-management’ institutions promoted by supra-national agencies and institutionalized by national governments, to the explosion in the use of participatory and deliberative mechanisms, from Citizens Juries to Participatory Poverty Assessments, the last decade has been one in which the ‘voices’ of the public, and especially of ‘the poor’ have increasingly been sought. (p. 4)

This turn towards expanded notions of democratic engagement is evident in the burgeoning array of decision-making practices which have gained prominence in recent years, where the primary aim is resolution of conflict through inclusive and dialogical practices, and is perhaps best exemplified by the United Nations in its approach to recognising suppressed minorities and nations (Tully, 2004). Such processes are designed to ensure that individuals are able to enter into dialogue with those who govern and who have a duty to listen and to respond, to reach or fail to reach agreement and to ensure that open review, evaluation and perhaps renegotiation are possible in the future (Tully, 2004). From this perspective, participation is increasingly being seen as ‘a process through which citizens exercise ever-deepening control over decisions which affect their lives through a number of forums and in a variety of arenas’ (Gaventa, 2007, p. vii).

This dialogical turn is further revealed in recent calls to engage children in conversation and dialogue that is context specific, and which arises out of their lived experiences. For example, the discussion in Chapter Two has outlined the recent movement by the Family Court of Australia towards less adversarial processes and ways of engaging all stakeholders in dialogue about important issues arising in relation to post-separation residence and contact arrangements. There is also a gradual, but discernable movement towards a call for dialogue with children in the research literature (Cook-Sather, 2007; Komulainen, 2007; Lodge, 2005; Neale, 2002). This dialogical shift is significant in that it implies that children’s participation is not tied to the efforts of an individual child asserting a claim, but rather emerges within a mutual, interdependent and intersubjective space which offers the possibility of hearing and responding to what children have to say. Relationships and interactions become a key component in enhancing children’s voices and participation (Smith, 2002, 2007). Significantly, in terms of the focus of this chapter, a turn to dialogue resonates with the views of young
people and emphasises the importance of dialogue for supporting their forms of participation.

These more recent developments in the ways participation is conceptualised and practised have the potential to provide further insight and understanding of the inherent ambiguity and tension that surrounds children’s participation. Moving beyond notions of equality and difference towards more inclusive forms of participation based on dialogue has the potential to enable new positions to emerge during a process within which other viewpoints are taken account of (Lister, 1997). When understood in essentially dialogical terms, the mutually constituted nature of participation can be more explicitly acknowledged, and as such, allows for further exploration of the contingent, contested and political nature of participation which shapes and frames how it is to be understood and formulated. Lister (1997) describes this process as one in which ‘each group becomes better able to consider other groups’ standpoints without relinquishing the uniqueness of its own standpoint or suppressing other groups’ partial perspectives’ (p. 83). Such an approach, as the discussion above reveals, contrasts strongly with approaches in the first and second moment which assume an intentional, self-determining, autonomous agent, a notion linked to a wider individualisation process embedded in liberal Western democracies, which by its very nature acts to exclude the participation of children in social and political life (Komulainen, 2007).

In summary, the preceding analysis of participation has taken quite a different route to the earlier analysis of childhood which focused on contemporary theoretical influences on how children are conceptualised as participants in social and political life. The reason for undertaking a different approach relates to the position of children within both discourses: while there is a strong emphasis on the importance and value of children’s participation within the theoretical context of childhood, the opposite can be said of the theoretical underpinnings of participation – children have rarely been included in discussions of citizenship, at least until very recently. Consequently, discussion about children’s participation has taken place largely within an interpretative framework which has privileged discourses of the agentic child, capable of participating in social and political life, while at the same time hiding from view monological approaches to participation which act to resist conceptions of children as capable social
agents. In bringing together these two threads of children’s participation, that is children’s agency and evolving participatory process, I have sought to show that each stands in an ongoing relationship to the other, whereby children’s agency remains the object of political struggles that support, resist or shut down altogether their participation.

The turn to dialogical approaches holds out much promise for moving beyond the ambiguity and tension of children’s participation. However, embedded within the dialogical turn are a number of significant challenges. The first concerns the critically important task of articulating what it is we mean when we refer to dialogue, and importantly, dialogue with children. It seems if we are to continue to pursue claims for the importance and relevance of dialogue for progressing children’s participation, then there is an inherent need to better understand the essential aspects of the dialogue that supports their participation. While at first glance the significance of dialogue with children seems self-evident, there is a need to ensure ‘dialogue with children’ is not simply adopted as another new orthodoxy such that we fail to understand the implications of the underlying structure of dialogue and the dangers inherent in its uncritical appropriation. Developing an adequate theorisation of dialogue that supports its ongoing theoretical development as a mechanism for children’s inclusion and engagement is therefore an important feature of this study’s production of, and critical reflection on, children’s participation. The following chapter addresses this challenge by examining the potential and demands of dialogue and conversation for theorising the ways in which children, and what they have to say, are recognised in family law.

The second challenge concerns the need to examine ways in which we invite, facilitate and support dialogue with children in order that the dialogical processes we are pursuing reflect the meaning and importance children attach to their participation in a particular situation. Implicit in a dialogical perspective is an emphasis on the importance of children as partners in dialogue, and of children as influencing, and being influenced by, the dialogue that takes place in relation to matters that concern them. This perspective has the potential to shed further light on the ambiguity and tension of children’s participation, by allowing participatory processes to be informed by children
themselves. The views of children and young people about their participation in decision-making are the focus of discussion in Chapters Five, Six and Seven.

### 3.4 Chapter Summary

This chapter has sought to locate the current study within the broader theoretical contexts of children’s participation in family law. After defining the concept of children’s participation, a discussion which highlights its ‘essentially contested and contextualised’ (Lister, 2003, p. 14) nature, I have examined how it is that children have come to be conceptualised as participants in social and political life. The discussion points to a range of influences that have contributed to children’s participation occupying a central place in social life and policy, including the new social studies of childhood, socio-cultural theory and the UNCRC. Conceptualisations of children’s participation, however, have also been influenced by broader political processes which have acted to shape the conditions of children’s participation, including its ambiguous and contested nature. For this reason, I have sought to analyse closely the procedural enactment of participation by proposing three key ‘moments’ in the recent history of participation. Such moments attempt to capture the ways in which individuals and groups have been recognised within particular political and democratic cultures and hence, how their participation has been shaped and acted upon. In the final part of the chapter, I suggest we are currently witnessing a shift towards understanding participation as a negotiated space that is dialogical rather than monological in nature which, in turn, has the potential to more adequately capture the mutual and interconnected layers of children’s participation. I conclude the chapter by suggesting that accompanying a turn towards dialogical approaches to participation are a number of theoretical challenges for researchers and practitioners who endeavour to respond to the inherent emphasis within a dialogical approach.
Chapter 4: Introducing Critical Hermeneutics

In our complex, fragmented society, understanding requires dialogue, a public conversation among those involved. Children are talked about. What needs to change is how they are talked about and how children can connect with and participate in such conversations (Roche, 1995, p. 293).

Up until now, this study has focused on prevailing legal, political and social definitions and practices of children’s participation so as to provide insights into how children, and what they have to say, are currently recognised in Australian family law. The intent of this discussion has been to provide the ‘horizons’ of the study within and against which the interpretation of the children’s narratives emerging from the dialogical encounter of the research interview will be situated.

The purpose of this chapter is to develop the theoretical approach necessary to critically explore the strengths and limitations of a dialogic approach to children’s participation both for theorising children’s participation and for grounding this study, including the interviews with children. The chapter is divided into two parts. In the first part I introduce critical hermeneutics and, in particular, its theoretical interests which support the interpretation of what children have to say in family law and enable an analysis of the dialogical conditions of children’s participation. The relationship of critical hermeneutics to the broader tradition of hermeneutics and to poststructuralism (particularly through the work of Michel Foucault) is reviewed as part of this discussion. In the second section, I examine the methodological and ethical implications of adopting critical hermeneutics for the study.
4.1 Critical Hermeneutics: Interpretation, Understanding and Dialogue

As a critical social theory critical hermeneutics is primarily interested in the meaning and purpose of interpretation. The critical hermeneutic tradition holds that there is only interpretation, and the task of researchers working within the tradition is to attempt to think through and clarify the conditions under which interpretation takes place (Kinchloe & McLaren, 2003). Critical hermeneutics argues that ‘understanding is not a procedure- or rule-governed undertaking; rather, it is a condition of being human. Understanding is interpretation’ (emphasis in original) (Schwandt, 2003, p. 301). Accordingly, all research is merely an act of interpretation, no matter how vociferously researchers may argue that the ‘facts speak for themselves’ (Kinchloe & McLaren, 2003, p.443). Against this background, critical hermeneutics seeks to understand and expose the ways in which human agency is inextricably tied to power, including undertaking the ongoing analysis of the productive effects of power imbued throughout

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6 While critical hermeneutics emerges out of the tradition of hermeneutics, there are quite important differences in relation to the ways in which the relationship between the inquirer and the subject make it necessary to differentiate critical hermeneutics from other traditions of hermeneutics. Historically, hermeneutics, or hermeneutical theory, has focused on interpretation as a methodology for the human sciences and thus has resembled a technical theory (Bleicher, 1980; Palmer, 1969). The word hermeneutics refers to the ‘science or art of interpretation’, that is, a theory or methodology that promises to lay out rules governing the interpretation of texts (Grondin, 1991; Palmer, 1969). It is often this historical understanding of hermeneutics that arouses criticism, particularly amongst literary and social critics, who conceive of hermeneutics as ‘quasi-teleological’ and as such, merely a methodological and rule-based examination of dialogue (Grondin, 1991). However with the work of the German theologian Friedrich Schleiermacher and the German philosopher Wilhelm Dilthey hermeneutics begins its departure from a purely textual interpretation of understanding to an ontological one, by proposing the subordination of the particular rules of exegesis and philology to the general problematic of understanding. Paul Ricoeur (1981) has described this subordination as ‘a reversal in the relation between the theory of knowledge and the theory of being takes place; the capacity for knowing must be measured before we confront the nature of being’ (p.45). This shift from epistemology to ontology is the defining characteristic of philosophical hermeneutics: ‘‘Understanding ceases to appear as a simple mode of knowing in order to become a way of being and a way of relating to beings and to being’ (Ricoeur, 1981, p.44). This shift is borne out in the expanded sense of the terms ‘text’ and ‘reader’, terms, which are by no means limited to forms of written expression, but instead extend to all interpretation that takes place. The dialogic encounter is therefore to be understood in its expanded sense to include verbal and non-verbal communication, including pre-verbal practices, verbal cues etc. A hermeneutic understanding of text is thus consistent with poststructuralist understandings of the text as a metaphor for something which claims our attention, whether it be a text, symbol, event, belief or practice, and it is this broad interpretation of dialogue that is used in this study. As a latecomer to the tradition of hermeneutics, critical hermeneutics should not be differentiated too sharply from philosophical hermeneutics in that they share in common a commitment to the systematic, critical explication of the act of dialogue by seeking to think through and clarify the conditions under which dialogue takes place.
everyday life (Kögler, 1999). In this context, critical hermeneutics grounds a critical research program in attempts to connect the everyday realities and injustices individuals face to the broader issues of power, justice and democracy. Kinchloe and McLaren (2003) describe the task of critical hermeneutics well:

In its ability to render the personal political, critical hermeneutics provides a methodology for arousing a critical consciousness through the analysis of the generative themes of the present era. Such generative themes can often be used to examine the meaning making power of the contemporary cultural realm. (p.450)

In offering a theorisation of dialogue, critical hermeneutics engages with its interpretive demands at a number of different levels by proposing a framework that stresses both the structural constraints on dialogue as well its emancipatory potential. Kögler (1999) presents a conceptualisation of dialogue and conversation as possible and trustworthy, but one which attends to the social or power-political constraints on dialogue (identified by postmodernist and poststructuralist thinkers) which threaten to derail it:

On the one hand, what is at issue here is the liberating, problematizing, innovative, and unpredictable potential of conversation, which is capable of leading us to new insights and critical self-reflection through experiencing the other. On the other hand, however, what is meant by power in the genuine sense of the word, which, as a constraint on open discussion is capable of undermining the critical dimension of dialogue. (p.1)

In the context of this study, Köglér’s conceptualisation of dialogue allows for a focus to be placed on the often neglected aspect of children’s participation, that is, on what children themselves consider to be meaningful and important about their participation. At the same time, it invites rigorous inquiry into the capacity of power practices to constrain, resist, and arrest, as well as transform, dialogue and conversation with children and consequently their participation in family law matters. Hendrickson (2004) captures this dilemma when he asks: ‘How we can take up a critical or reflexive distance toward contexts of meaning and power while acknowledging our own situatedness in those contexts?’ (p. 384).
Critical hermeneutics attempts to take up this challenge by working between two quite different and, some would say contradictory philosophical traditions, that is between a philosophical hermeneutic approach criticised for overestimating the potential for philosophical knowledge (by philosophical foundationalism) and a poststructural approach criticised for underestimating a view of philosophical knowledge (by poststructural critiques of reason) (Kögler, 1999). In this way, critical hermeneutics is useful for addressing what has been a central challenge for this study: how to approach a conceptual understanding of dialogue and conversation as both possible and trustworthy (philosophical hermeneutics), while at the same time acknowledging the need to lay bare the often unrecognised connections between power and practice which act to prevent, resist and enable such dialogue (post-structuralism).

Critical hermeneutics does this, not by proposing that philosophical hermeneutics and critical theory be treated as universal bodies of theoretical thought, or by proposing any sort of ‘meta-theory’ or fusing of these two distinctly different bodies of theoretical work. Instead, it acknowledges that each tradition speaks from a different place, while addressing the insights that differing approaches to meaning and understanding generate (Kinchloe & McLaren, 2003). As Ricoeur (1986) says:

…each may be asked to recognise the other, not as a position that is foreign and purely hostile, but as one that raises in its own way a legitimate claim. (p.295)

The challenge for critical hermeneutics, and inevitably for this study, lies in attempting to forge a way between these two traditions of social theory, an approach Kögler suggests is possible by at once protecting the independence of philosophical reflection from the foundationalist position whilst holding fast to ‘radical trenchancy of the analytical “gaze”’ of the radical critique of reason (Kögler, 1999, p.11). In order to explain the relevance of critical hermeneutics for this study, both empirically and conceptually, I propose to outline the key tenets that both philosophical hermeneutics and critical theory traditions bring to bear on critical hermeneutics and its use in the study.
4.2 Why Critical Hermeneutics?

This study draws in particular on the work of the critical hermeneutical philosopher Hans Herbert Kögler, *The Power of Dialogue*, in which he argues for a radicalisation and strengthening of philosophical hermeneutics by incorporating the insights of poststructuralism. This is necessary, he suggests, because the ‘methodological and conceptual advances gained by the Foucauldian approach cannot simply be ignored’ (p. 6). Like critical theory, critical hermeneutics seeks out the emancipatory potential of reason, which draws attention to the need for critical examination and elucidation of concepts such as ‘pre-understanding’, ‘dialogue’, ‘truth’ and ‘meaning’. Like poststructuralism, critical hermeneutics seeks to problematise normative and universal claims by highlighting the need for the critical examination and elucidation of concepts such as ‘discourse’ and ‘power’. In this section, I outline the features of philosophical hermeneutics and post structuralism which are present in a critical hermeneutic approach to research.

Philosophical hermeneutical approaches to dialogue are based on mutual understanding, respect and a willingness to listen. In addition, philosophical hermeneutics understands dialogue to be a source of meaning and understanding because it conceives of understanding as essentially a way of being and as belonging to human existence (Gallagher, 1992). This dialogical approach to understanding draws attention to the hermeneutic idea of understanding as deriving from our everyday, lived relationships and experiences with others. By its very nature, the participatory understanding of dialogue proposed by philosophical hermeneutics situates understanding in an individual’s personal history, culture, biography, gender, age, ethnicity and class. In contrast to typical Enlightenment epistemologies which are about ‘knowing truth’ (and which conceptualise truth in instrumental terms as universal, factual and objective), a hermeneutical ontology of understanding is concerned with what constitutes ‘truthful knowing’ (which conceptualise truth as receptive, participative, relational and engaging)
Philo(4)losophical hermeneutics and critical hermeneutics share the conviction that it is possible to lay claim to an interpretive understanding which precludes all arbitrariness of interpretation. Therefore, while the situated, embodied and dialogical nature of understanding means there can never be any final truth, hermeneutics invites a conceptualisation of conversation and dialogue as capable of leading us to new insights and critical self-reflection through experiencing the ‘other’ (Kögler, 1999). This is because philosophical hermeneutics offers a conception of dialogue which trusts the ways in which children make sense of the world, in others words, a commitment to the self-understanding and reflexivity of children, while at the same time providing an analytic approach to the analysis of children’s knowledge.

Critical hermeneutics also turns to post structuralism in order to lay bare the often unrecognised relationships between power and knowledge. This is because critical hermeneutics criticises philosophical hermeneutics as too readily assuming a trusting and cooperative stance of subjects, and for its ‘idealist misrecognition of meaning as devoid of any influence of power’ (Kögler, 1999, p.viii). Foucault’s work, in particular, is considered by critical hermeneutics to offer invaluable insights into the practices of power and domination implicit in discourses such as those that shape children’s participation in family law and policy, and of course, in their participation in this study (Kögler, 2005). While Foucault (1979) does not offer a single coherent theory of power, he does offer various theorisations of power based on a series of historical interrogations which draw attention to the nature of power as pervasive and productive, that is:

… as a mode of action which does not act directly and immediately on others. Instead, it acts upon their actions: an action upon an action, on existing actions or on those which may arise in the present or the future … it incites, it seduces,

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7 It is important to clarify the philosophical hermeneutic interpretation of truth – for it has been the subject of misunderstanding, especially in post-structuralist circles. The hermeneutic claim that truth can be achieved in dialogue is probably better described as a ‘participatory truth’, for it is in dialogue with others and oneself that hermeneutics says that it is possible to arrive at truths that enlighten us. In this way, hermeneutics holds a very modest notion of ‘truth’, proposing that ‘truth’ be conceptualised and formulated as something that happens when we understand differently. Grondin describes the hermeneutic ‘truth claim’ as consonant with understanding differently.
it makes easier or more difficult; in the extreme it constrains or forbids absolutely. (p.220)

It is this conceptualisation of power that distinguishes Foucault, who argues for the productive nature of power and suggests a vocabulary for grasping its pervasive and productive dimensions (Gallagher, 2006b). In this way, his work offers an alternative orientation to the possibilities of dialogue, arguing that power relations are bound up in social practices which influence and shape the conditions of dialogue. From this perspective, serious questions arise in relation to the potential for dialogue to generate understanding and meaning, which Foucault would argue do not, in themselves, engender the openness vis-à-vis another’s meaning that is necessary for genuinely dialogic reciprocity (Marshall, 2003; Kögler, 1999).

However, while post structuralist accounts are attuned to relationships of power imbued within discourses of children’s participation, its potential to reduce meaning produced through dialogue to a totalising and transcendental category is criticised by critical hermeneutics. From a critical hermeneutic perspective, Foucault inverts power and knowledge, with the result that the ontological lens through which an individual’s experience and knowledge are seen, are effectively reduced to relations of power. Furthermore, his analysis of power relations does not sit easily with an approach that values children’s accounts as renderings of coherent meanings, which are mutually negotiated, not simply discovered, in the act of dialogue and conversation (Schwandt, 2003). Moreover, in the context of this research, though Foucault’s analysis is relevant to any claim for the acknowledgement of marginalised voices, an important question emerges as to how interpretative researchers and theorists can argue for the elevation of children’s voices, and hence for dialogue with children, if we cannot also believe that those conversations have the potential to achieve and experience meaning. While Foucault’s account of dialogue is exceptional in its capacity to draw attention to the power-ladenness of social practices within which children are engaged, there are limitations to adopting an approach to research with children that is not conceptually oriented toward a communion with an event of meaning or with multiple truth claims, and thus distrusts the potential of dialogue and conversations with children. As Gallagher (2006b) has observed in his discussion of power and children’s participation,
power might also be seen to manifest its purpose in its effects rather than the conscious intentions of those who exercise it.

How then does critical hermeneutics, and in particular the work of Köglèr, respond to the conceptual and methodological advances gained by philosophical hermeneutics and a radical post-structuralist critique of power? First, in order to accommodate the conceptual and methodological insights of *philosophical hermeneutics*, in particular the idea that it is possible to engage openly and reciprocally in meaningful dialogue and conversation in ways that lead to deeper insights, critical hermeneutics reformulates and radicalises the basic assumption of philosophical hermeneutics that there can be an underlying unity or consensus with another’s meaning. According to Köglèr (1999), while Gadamer is right to propose that dialogue can be conceptualised as an event of meaning and truth, this does not necessarily mean that a ‘good’ or ‘authentic’ conversation entails agreement or consensus with one another (p.83). While we must acknowledge the constraints of power on dialogue, Köglèr argues, this should not come at the expense of dialogue, but with a more modest understanding of meaning, that is, one which does not attempt to guarantee a comprehensive truth or an assured goal of a final consensus (Kögler, 1999).

In order to do this, critical hermeneutics proposes an approach to meaning and understanding as a reciprocal, challenging process whereby partners in dialogue seek to ‘make present one’s own constraints through an understanding of the other, and of gaining knowledge of certain limits of the other through one’s own perspective’ (Kögler, 1999, p.84). The alterity of the partner in conversation thus serves as the anchor and point of departure for new understanding. Meaning emerges in response to challenges to my own pre-understanding and assumptions which are intrinsically bound to a shared background of meaning with another partner in dialogue (Kögler, 1999).

Imbued through that shared background, however, are social and political power relations acting as a constraint on dialogue. Such constraints are capable of undermining the meaning and reflexivity of agents, and therefore can never be separated from the political, social and cultural contexts, such as those outlined in Chapters Two and Three, in which dialogue takes place (Gadamer, 1975; Kinchloe & McLaren, 2003). In
order to accommodate the conceptual and methodological insights of post structuralism, critical hermeneutics integrates the basic concepts and methods of a Foucauldian conception of power as a methodological tool for deciphering social power relations, rather than accepting Foucault’s work as a theory or ontology of power. Critical hermeneutics, as expounded by Kögler (1999), does this by proposing that power is not the ‘exclusive ontological substrate of social relations, nor is it the metaphysical ground of every symbolic or social meaning, every action, every possible knowledge’ (p.232). This is a crucial aspect of a critical hermeneutic formulation of dialogue which assumes that the freedom and agency of subjects is always presupposed as enabling them to resist and negate power – which is to say, power does not and cannot determine the subjective freedom of agents, but rather is inscribed within social relations and social structures, which in themselves form part of a subject’s effective history. In doing so, critical hermeneutics avoids a theorisation of power as a totalising and transcendental category. This is also an important aspect of a critical hermeneutic formulation of power, as critical hermeneutics does not subscribe to the idea that the self-understanding of agents should be viewed through a filter of power relations; to do this would reflect an approach to understanding which inverts power and knowledge which produces a one-sided ontology whereby what children say about participation and having a say are merely by-products of wider networks and relations of power. As the previous discussion has made clear, critical hermeneutics insists on an ontology which sees individuals as ‘beings-in-the-world’ who actively negotiate the world as a place which holds meaning. Such negotiations, whereby individuals both influence and are influenced by meaning, take place in dialogue. Critical hermeneutics would argue that only then can we claim that children are truly active social agents in their everyday lives.

Kögler (1999) describes this critical hermeneutic position as approaching power as a category ‘specific enough to discriminate power practices from social practices, while still general enough to grasp the particularities and structure of various power contexts’ (p.230). Indeed, this stance is consistent with Foucault’s (1996) earlier work on power:

...when I examine relationships of power, I create no theory of power, I examine how relationships of power interact ... I am no theoretician of power. The question of power in itself doesn’t interest me. (pp. 360–361)
In summary, critical hermeneutics holds to the experiential dimension of meaning, subjectivity and experience of agents in dialogue, while acknowledging they are always imbued with power relations consisting in the historical situation of agents in dialogue, and that such power relations form the hermeneutic background against and within which the knowledge and experience of agents is situated. It therefore attempts to work between these two quite different, and some would say contradictory, philosophical traditions, that is, between a philosophical hermeneutic approach criticised for overestimating the potential for philosophical knowledge and a post-structuralist approach criticised for underestimating it. Consequently, as well as the elements of philosophical hermeneutics outlined above, one also finds in critical hermeneutics clear traces of Foucault’s theory of power in its commitment to exposing and analysing power practices. The following section outlines the hermeneutically sensitive theory of power proposed by critical hermeneutics.

4.3 Reconceptualising Dialogue: Introducing a Hermeneutically Sensitive Theory of Power

Having shown how critical hermeneutics reconceptualises philosophical hermeneutical accounts of meaning and poststructuralist accounts of power, this section outlines the implications of such a reconceptualisation for a model of dialogue. This discussion addresses a central underlying issue for this study, namely how to take up a critical or reflexive stance towards participation as a context of meaning and power while acknowledging our own situatedness in those contexts (Hendrickson, 2004).

In Kögler’s (1999) model of dialogue, attention focuses not simply on the recovery of meaning, but on the emancipatory potential of dialogue itself. Unlike Gadamer, Kögler acknowledges that this potential is sometimes shaped by discursive power practices that threaten to undermine it. Unlike Foucault, Kögler refuses to reduce experience and discursive truth to power. Kögler argues that critical hermeneutics is able to negotiate these competing claims by: (1) exposing and analysing the underlying structure of dialogue as capable of leading us to new insights and critical reflection through
experiencing the other; and (2) proposing a reflexive approach to interpretive practice which stresses both the structural constraints and limitations placed on dialogue by power, as well as the critical capacity of dialogue to make us conscious of, and free from, such constraints and limitations (Kögler, 1999). Therefore, just as important as any explanation of the significance of my role as the interpreter in this study, is the systematic explication of the range of interpretative choices that have been made throughout the research process. Kögler (1999) describes the idea of systemic explication in the following way:

By systematic explication of critical interpretation, I mean exposing and analysing the underlying structure of the interpretative act so as to provide us interpreters with a more reflexive and adequate approach to interpretative practice. (p.1)

The uniquely critical hermeneutic response to the question of power is that, ontologically speaking, standing over and against power is human individuality and agency which can never be completely integrated into frameworks of disclosure or practical systems of power (Kögler, 1999). Rather, the ‘essence’ of individuality consists in ‘projecting itself anew; in developing innovative and different ideas about self, world, and society; in opposing the prevailing interpretations and practices’ (Kögler, 1999, p. 246). As such, Kögler (1999) suggests, power and individuality are always situated in orders within which ‘the antagonism between complete conformity to a system and individual self-realisation is capable of being first ignited’ (p. 246–247). This is made possible by approaching understanding as a process of ‘reflexivity-in-interpretation’ where neither interpretative truth, nor self-reflexive subjectivity is equated with power (Kögler, 1999, p. 255).

The methodology of Kögler’s critical interpretation underpinning this study is summarised by Hendrickson (2004) to be as follows: First, the hermeneutic first person perspective of participants (which acknowledges Gadamer’s participatory stance) is methodologically combined with the distanciating perspective of a third-person
observer (which acknowledges Foucault’s insight that speakers are often unaware of how symbolic orders and power practices structure meaning). This synthesis of hermeneutic and distanciating approaches yields a novel conception of reflexivity, whereby the theorist’s (my) unfamiliarity with the agent’s (child’s) taken-for-granted assumptions position the theorist as an ‘outsider’ – a position which equips me to analyse the assumptions and context that would otherwise go unthematised by the agent. What is significant about this stance, however, is that the distance between me and the agent (children, parents, texts) does not arise from my own predetermined explanatory grid, but from the hermeneutic encounter with the unfamiliar meanings arising in conversation with the children. Reflexivity is therefore defined not as something whereby I see through ‘distortions’ in the children’s narratives or in the broader discourses in which those conversations are situated, but whereby the unfamiliarity of their narratives presents to me – as both agent and theorist alike – as a distancing ‘view from somewhere’. The question of power is thus determined within a dialogical encounter which remains attuned to the self-reflexiveness of both partners in the conversation. Hendrickson (2004) states how this relationship unfolds:

…the dialectic between theorist and agent works itself out in the reciprocal recognition of their interdependence in ‘defining’ power: while the theorist helps the agent to get a clearer understanding of how power works by profiling hitherto unthematised facets of the agents context, the agents conception of a good or just life ‘helps the theorist to recognise which structural constraints should count as power. (p. 383)

Critical hermeneutics therefore opens up a dialogical space for critical reflection so that situated agents can reconceptualise their identity in conversation with another in ways that allow for their taken-for-granted assumptions about power to become visible to them. As Kögler (2005) puts it, a ‘theory of hermeneutic competence lies at the centre of any serious understanding of understanding’ (p. 248). Crucial to this encounter is the insistence that an agent’s capacity for practical deliberation is taken seriously:

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8 Ricoeur (19821) defines the concept of distanitation as the ‘dialectical counterpart of the notion of belonging, in the sense that we belong to an historical tradition through a relation of distance which oscillates between remoteness and proximity’ (p. 111).
interpreters are epistemically forced to take the self-understanding of the other seriously: ‘Even though all interpretation starts unavoidably from one’s own taken-for-granted assumptions, the interpretive process of “making sense of the other” must be understood as guided by an orientation at the other’s self-understanding’ (Kögler, 2005, p. 248). So, for example, in an interview with children about their participation in decision-making processes, what counts as power for an individual child in the interview may not count for me as the theorist, due to our differing ethical and political convictions (Hendrickson, 2004). Yet, as critical hermeneutics suggests, it is only in dialogue that such further insights into the productive and dominating influence of power are made possible. Critical theory is thus cast as collaborative practice whereby the self-distantiation of the theorist arises not from her epistemic superiority or authority, but from her cultural alterity (Kögler, 1999). The following section highlights some of the specific methodological and ethical implications of adopting such a critical hermeneutic conceptualisation of dialogue for this study.

4.4 Conversation and Dialogue: Theoretical Possibilities and Challenges

In this second part of the chapter, I focus on the application of the theoretical principles of dialogue outlined above. While hermeneutics is not interested in defining a ‘methodology’ of dialogue and conversation, it is nonetheless important in a study like this that the essential features of ‘dialogue’ and ‘conversation’ are articulated if they are to have any methodological and ethical relevance.

Before doing so, however, it is apt to make a comment on the reason why the words conversation and dialogue are not distinguished too sharply in this study. Indeed, the reader will have noted both terms are referred to more colloquially to denote the hermeneutic ‘dialogical encounter with the other’. Interestingly, the etymology highlights the similarities implicit in both words. The word dialogue derives from two Greek words – logos meaning ‘the word’ or ‘what is talked about’ and dia, meaning ‘through’, thus suggesting a flow of meaning ‘among and through us and between us’, including within oneself (Bohm, 1996, p. 6). When approached from a critical hermeneutic perspective these two words, logos and dia, highlight the need for further focus on the question of whether, and to what extent, meaning is possible in dialogue, as
well as to reflect on the ‘in-between space’ wherein such meanings are produced and negotiated.

The corollary to dialogue, commonly used to describe our interactions with children in the context of participation, is ‘conversation’. The word conversation is derived from two Latin words – *conversari*, which means ‘to dwell’ or ‘to keep company with’, and *conversatio*, which means ‘to change’, ‘to convert’, ‘to alter’, ‘to refresh’ or ‘to turn’. The word conversation suggests a movement towards the other (*conversari*) and a movement towards oneself (*conversatio*) (Whelan, 2007; Concise Oxford English Dictionary, 2008). ‘Conversation’ thus suggests the need for openness to question one’s existing assumptions, prejudices and understandings, and if necessary, to change (Bernstein, 1991). Engaging in conversation thus implies submitting oneself and one’s point of view to interpretation and reinterpretation, and assumes that the understanding that emerges in dialogue is productive rather than reproductive (Whelan, 2007). Gadamer (1979) captures this conceptualisation as:

> [Conversation is] a process of two people understanding each other. Thus it is a characteristic of every true conversation that each opens himself to the other person, truly accepts his point of view as worthy of consideration and gets inside the other to such an extent that he understands not a particular individual, but what he says. (p. 347)

Taken together, the words ‘conversation’ and ‘dialogue’ are useful for this study, in that they provoke further consideration of the dialogical encounters that constitute the research process.

### 4.4.1 ‘Doing’ Conversation and Dialogue

In earlier discussion, I have emphasised that critical hermeneutics places dialogue and conversation in the context of the weight and influence of history and tradition. Understanding is thus made possible by our participation in cultural, historical and linguistic traditions (Veling, 1996). As Gadamer (1975) is often cited as saying, ‘we are always already affected by history’ (p.300), which is to say, history and tradition determine in advance both what seems to be worth inquiring about and what will appear
as an object of investigation. Gadamer calls this conditioning our ‘effective history’ or the principle of historical effect: all understanding involves preconceptions, and all interpretation is informed by traditions which are ‘already there, ahead of us, conditioning our interpretation, and shaping how we understand the world’ (Gallagher, 1992, p. 91).

Accordingly, hermeneutics asserts, there is no ‘starting point’ for dialogue and conversation (or for its critical analysis, for that matter). However, this does not prevent the possibility of discerning dialogical ‘movements’ of interpretation integral to its working, a possibility investigated in the work of Terry Veling (2005). In particular, Veling asks a number of questions that signal key features, or movements, in the dialogical encounter. The following section outlines these questions in greater detail.

What are you saying to me?

This question is critically important in the interpretative act because it signals a willingness to listen and to take the conversation seriously; as Veling (2005) says, ‘it directs my attention to you and allows your words to speak to me’ (p.4). Failure to ask this question also represents a crucial moment in the interpretative act, because without this question there is no need for any interpretation at all. Indeed, failure to ask this question, Veling (2005) suggests, will almost certainly prevent or shut down a conversation, and hence interpretative understanding, and indicates to the other person an unwillingness to listen to and to recognise what they have to say.

This question is also important as it draws attention to the hermeneutic idea that the interpreter, as a partner in conversation, is ‘always, already’ implicated in the act of interpretation (Gadamer, 1975, p. 300). Recalling that hermeneutics proposes that interpretation is a dialogical event, Veling (2005) emphasises that the interpreter cannot excuse herself from the interpretative encounter. Interpreters are neither conceptualised as standing outside the interpretative process (as in positivist accounts), nor as subjects reduced to the will to power (as in a postmodern critique of reason); rather, they are conceptualised as partners in a conversation, whose situation must be brought into play.
At the same time, hermeneutics emphasises that the prejudices and preunderstandings of a researcher in this process are largely hidden. As such, I am unable to make them available or explicit through my own efforts:

The prejudices and foremeanings that occupy the interpreter’s consciousness are not at his free disposal. He cannot separate in advance the productive prejudices that enable understandings from the prejudices that hinder it and lead to misunderstandings. (Gadamer, 1975, p. 300)

In the context of this study, this means that even my most authentic efforts to understand will always already be imbued by symbolically mediated and historically determined meanings (Grondin, 2003; Kögler, 1999) In this way, my every act of interpretation is grounded in my own particular political, social, moral and ethical commitments. At the same time, however, my preconceptions and assumptions are understood as necessary for provoking new questions in the effort to make sense of the particular phenomenon I am seeking to understand:

… every explicit interpretation is impossible without pre-understanding [which is] rooted in the everyday cultural way of being of the subjects: consequently the hermeneutics interpreter, regardless of her will or knowledge remains intrinsically bound to this generally shared background of meaning. (Kögler, 1999, p. 86)

My experience is placed at risk

In this ‘movement’, Veling reveals the hermeneutic idea that all interpretation requires that something of the interpreter’s experiences be put ‘at risk’. For the interpretative task to proceed, the interpreter must follow the questions no matter how strange or unfamiliar and no matter how far outside the realm of the interpreter’s experience. Veling (2005) describes how placing experience ‘at risk’ holds possibilities for deepening understanding:

…while it is true—as every teacher knows—that the best learning happens when it engages the experiences of students, it is also true that no learning
happens if it doesn’t provoke or widen the experience of students into new learning and deeper understanding. (p.5)

Placing experience at risk allows the interpreter to reinterpret and reassess her situation in ways that open up new understandings and also break down prior understandings of both herself and the world. For, as Veling suggests, it is only through the ‘break down’ of prior understanding that there can be any possibility of a ‘break through’ into new understanding. Finally, Veling emphasises that the interpreter must be prepared to face the risk that her understanding might change. Without the interpreter placing her experience at risk it is difficult to say that interpretation has occurred if she enters into an interpretative encounter only to come out of the process unchanged and unaffected. This is because interpretation, for Veling (2005), is ‘always an event that always affects my understanding or it is no event at all’ (p.6).

In the context of this study, the question of whether I place my own experience at risk reminds me, as the interpreter, to ask whether I am open to a genuine encounter with someone who is different, strange and unfamiliar, rather than simply remaining with what it is that I know and am comfortable with. This is a distinctly ethical stance, the implications of which are examined later in this chapter.

What is this text asking of me?

One reason why dialogue opens up such fruitful possibilities for understanding ‘differently’ is because the questions are directed not just at the subject of conversation but also at the partners to the conversation, who allow themselves to be questioned by the dialogue, as it were (Grondin, 1993). This approach invites an image of conversation which is mutual, playful, open-ended and productive, whereby partners engage in a back-and-forth movement which allows the subject matter to assume primacy (Palmer, 1969; Veling, 1996)

Hermeneutic writers often refer to this dynamic of conversation as participating in a game in which the partners give in to the dialectical movement of question and answer (Tracy, 1987). Within the dialectic of question and answer, meaning is not an assertion,
but something to be responded to and engaged with; indeed, it is only with the formulation of a question that dialogue can be set in motion, but in a way that the other’s as well as one’s own views are treated as substantive and potentially true:

Thus a person who wants to understand must question what lies behind what is said. He must understand it as an answer to a question. If we go back behind what is said, then we inevitably ask questions beyond what is said. (Kögler, 1999, p. 122).

The act of questioning thus has the potential to form and transform the dialogue, for it is in open-ended questioning that it possible to genuinely attend to the other and to sense a partial identity with what is or has already been experienced or understood (Tracy, 1987).

In the context of this study, the relationship of partners in conversation is understood to be not simply one of cognition or co-habitation, nor of discussion and debate; in keeping with the peripatetic heritage of philosophy, the dialectic of question and answer demands a willingness to follow the question wherever it leads. Such an adventurousness is often ruled out by the many forums where children participate. These forums appropriate the term dialogue for what, in reality, are more restricted outcomes, and which often fail to acknowledge the agency of the children in the interpretative process, and their role as ‘shapers’ of my interpretation (Bruns, 2003). Falzon (1998) captures the relevance of acknowledging the active agency of the children as partners in conversation when he observes:

Whilst we actively organize the other, the other is not passive either. It is not simply what we make of it, whatever we want it to be. It also resists our interpretations, eludes them and affects us in turn … in knowing we both interpret the world and are guided by it. (p. 38)

From a hermeneutic perspective, the children who participated in this study, while objects of my attention, are not passive but dynamic actors in their own right, in the sense that their engagement with me in dialogue is seen as productive terrain for generating and changing my frameworks of meaning.
The matter of concern

In the fourth ‘movement’, Veling draws attention to the importance of what matters to the text; as he observes, when we hear the question of the text, the subject matter is ‘no matter at all’ unless we are drawn into consideration of the matter of concern that it raises. Interpretative dialogue does not simply mean that ‘I understand you’ or that ‘you understand me’; rather, it means that ‘I’ and ‘you’ come to an understanding together as we consider the subject matter that is a matter of concern between us (Kögler, 1999). In other words, it is the subject matter that we are seeking to understand, not simply each other. It is the subject matter that must lead conversations, rather than the will of either partner. A conversation is not led by me or my opinions alone, nor is it led by you or your opinions alone.

It is in this fourth movement that Gadamer (1979) reminds us that we do not come to understanding by coming to answers, so much as by hearing questions that present themselves to us. For Veling (2005), this means that the question must lead the conversation, and that it is not so much our ready-made answers, but rather a listening for the question that matters:

“If I let my pre-formed opinions or ready-made answers lead the conversation, then I may as well be talking to myself, because everything I say will only lead back to me and what I already know. If interpretation means anything at all, it must surely mean trying to understand a voice that is other than my own. (p. 10)"

According to this approach to dialogue, understanding is not reached by simply trying to reproduce our conversation partner’s meaning or intent (Veling, 1996). Accordingly, the purpose of conversation is not to identify the other’s meaning but to relate to the possible truth of what she says to one’s own perspectives and assumptions; in other words, to be open to the other in a way that allows what they say to be brought to bear on oneself (Kögler, 1999). As Stewart (1983) says, ‘the listener is not simply “open” to what the other means so that he or she can reproduce it; instead, the listener is open to meanings that are being developed between oneself and one’s partner’ (p. 384). Every
conversation thus offers the possibility for individuals to modify the views of what makes sense to us; indeed, hermeneutic understandings of dialogue have been founded upon a speculative element, whereby in each new encounter with meaning, we take over and modify the views of what makes sense to us (Gadamer, 1975; Grondin 1991).

**What do you say? How will you choose to respond?**

Although this fifth ‘movement’ is not a final one, given the circular or spiral nature of dialogue, it is within this movement that the interpreter must ask what the text means for her. As Gadamer says, the interpreter ‘must relate the text to [the] situation if she wants to understand at all’ (cited in Veling, 2005, p.12). By opening up the question, Veling suggests, the text invites the interpreter’s own questioning, demanding that his or her own concrete situation talk back to the text, bringing forth its own particular questions and dilemmas. Thus, while inviting children to have a say is an important first step, the extent to which our own knowledge, values and assumptions are open to question will largely determine the process and outcomes of children’s participation in terms of the dialogic encounter constituting their participation. A dialogical approach to participation requires processes that will enable new understandings and insights which cannot be generated by one of the partners alone. Gadamer explains that understanding can never emerge if we remain fixed on what seems to us to be self-evident; rather, it entails a critical and radical change in us, whether in terms of revision of prior understandings or, more radically, in terms of a conversion of our habitual modes of thought and feeling to other ways of being that are opened up in conversation (Bruns, 2003). From here, as Horn (2000) says: ‘All change, reform or progress must start with conversation. The status quo can be changed when conversation occurs’ (p. 70). It is important to note, however, that while entering into conversation with an openness to change is a precondition of conversation, change is a possibility not a necessity. Instead, as Bruns (2003) says, in a hermeneutic conversation: ‘we find ourselves always in the accusative mode or mode of responsibility. Hence understanding always entails a call for action’ (p. 33).
The five movements of ‘conversation’ and ‘dialogue’ outlined above provoke us to reconsider the ethical and methodological dimensions of how we recognise children, and what they have to say when we invite their participation in family law decision making. By its very nature, the conceptualisation of dialogue in hermeneutics presupposes an ethical encounter with another. Instead of constructing the child as foreign, and their difference as an obstacle to overcome, manage and control, critical hermeneutics prompts questions about how situated, embodied subjects, participating in the event of dialogue, should relate to each other (Veling, 2005). In the following section, I examine the ethical implications that flow in research when we are epistemically forced to take the self-understanding of children seriously.

4.5 The Implications of Critical Hermeneutics on the Research Ethics

Taking children’s views, perspectives and assumptions seriously also entails an ethical dimension when understanding is seen to emerge in a relationship of interest and concern, rather than out of disinterested regard (Grondin, 1991; Moss & Dahlberg, 2005). A dialogical approach to ethics, in turn, draws attention to a certain kind of ethical practice—one which is comfortable with the provisionality and messiness that listening, reflecting, interpreting and engaging with children in conversation and dialogue inevitably bring (Dahlberg & Moss, 2005). When the interpretative process of dialogue is guided by an orientation towards children’s self-understanding, the individual agency of each child—their competence, determination, dependency and vulnerability—does not determine their inclusion or exclusion from the participatory processes, but rather informs the conditions in which their participation takes place. As Readings (1996) suggests:

[Respect for the other] must precede any knowledge about the other. The other speaks and we must owe the other respect. To be hailed as an addressee is to be commanded to listen and the ethical nature of the relation can not be justified. We have to listen without knowing why, before we can know what we are listening to. (p. 162)
As producers rather than finders of knowledge, interpreters in a hermeneutic dialogue are expected to engage with the contemporary complexities of children’s lives rather than stand over and against them in an effort to limit and confine them. In this way, critical hermeneutics engages an understanding of research as a site of everyday ethical research practice. This underlying approach to understanding accounts for why some argue that hermeneutics presupposes ethics. If communication rests not in episteme but in the interpretative capacity of the individual, then critical hermeneutics suggests that our relationships are constituted not by reason but by our existence (Bruns 2003).

Critical hermeneutics thus signals a fundamental shift away from formulations of ethics which seek to affirm a normative, universal code of ethics to govern practice; ‘a totality of rules, norms, principles equally applicable to everyone and acceptable to every rational, thinking person’ (Dahlberg & Moss, 2005, p. 67). In a universalistic ethics, everything that is particular, specific or ambiguous is excluded from the interpretative picture, in order for ethical principles to be established on purely rational grounds. Embedded in a universalistic approach to ethics is a particular idea of the subject as abstract, timeless, and existing in a social and historical vacuum (Dahlberg & Moss, 2005; Falzon, 1998). Ethics so understood presupposes that behaviour originates in a unified mind or subject, and hence that the proper kind of behaviour is that which is in accordance with the mind’s universal principles (Dahlberg & Moss, 2005; Tronto, 1993). A universalistic ethics asserts that all subjects be held to the same standard of conduct irrespective of race, class, gender or age. ‘Ethics here is,’ Dahlberg and Moss (2005) emphasise, ‘the “should” question: from a normative and universalistic perspective, how should we think and act?’ (p.66). The moral subject is reminiscent of the rational, autonomous, objective and capable subject of modernity, able to stand outside of and know the world (Dahlberg & Moss, 2005). The relationship between subjects is thus determined by a contractual view of ethical conduct, one which is inscribed in liberalism and one in which, as I have described in Chapter Two, the key elements are calculation (a balancing between rights and responsibilities) and contract (an agreement on duties and expectations) (Dahlberg & Moss, 2005).

Ethics understood in this way disengages with the particularity, uncertainty and messiness of moral subjective life, and consequently, experience is devalued and
mistrusted, a theme to which this chapter returns. This, in turn, allows for power and responsibility to become detached, thus shifting the ethical to the technical (Dahlberg & Moss, 2005; Falzon, 1998). A dialogical interpretation of ethics contrasts with subject-centred approaches to ethics, which emphasise the importance of universal rules, principles and codes to govern research practice and evaluation, but in such a way that arguably seeks to place researchers above reproach (Bruns, 2003; Dahlberg & Moss, 2005).

Having said this, it is not possible to talk about one hermeneutic approach to ethics. While Heidegger’s work has been instrumental in shifting ethical frameworks away from universal and rule-driven approaches to ethics, there are distinct and important differences between various hermeneutic thinkers since Heidegger. For example, Gadamer’s philosophical hermeneutics, which insists that we cannot set apart our belonging to historical traditions and our own prejudices, is primarily interested in what happens to these prejudices in a dialogical encounter (Kögler, 1999; Veling, 1996). Emmanuel Levinas would argue that Gadamer’s formulation does not go far enough in taking the claim of the other seriously. In his ethical theory, he proposes that it is the dispossession of the self that is the condition of dialogue or an ethical encounter with ‘the Other’ (Bruns, 2003). Levinas distinguishes between two kinds of ‘truth’ in dialogue. On the one hand, he suggests, there is a truth of representation and cognition which governs the integration of difference into an individual’s order of things, and on the other, there is the truth of experience that is essentially the reversal of this reduction (Bruns, 2003; Levinas, 1981). Levinas would say that the first view accords to Gadamer’s approach, in that it trusts in the potential of dialogue:

The actual reality of human communication consists in the fact that conversation does not advance the view of one interlocutor against the view of another. Nor does conversation simply add the view of one to the view of another. The conversation alters both. A successful conversation is such that one cannot fall back into the dissent that instigated the discussion. This kind of commonality does not involve my view or your view, but rather a common interpretation of the world. (Gadamer, 1986, p. 188)

According to Levinas, and like critical theorists such as Kögler, Gadamer’s proposal that it is possible to reach a substantial consensus in dialogue is problematic on two
fronts. First, the contention that ‘successful conversation’ ultimately culminates in a common interpretation is criticised on the grounds that it reduces the diversity and particularity of discursive orders and social power relations with the subject’s hermeneutic self-understanding and meaning perspectives (Kögler, 1999). As the previous discussion reveals, critical hermeneutics demands an interpretation of dialogue which concentrates on the productive nature of dialogue, whereby a conversation might not unite all those party to it, but still opens up new insights of the subject matter, thus altering their existing world views.

Second, Levinas would say that defining a successful conversation as having reached consensus is based on a movement of recognition of the Other, whereby ‘I take the other into my world, gathering up the other as a component of my self-possession or as part of my domestication or familiarisation of my world’ (Bruns, 2003, p. 35; Levinas, 1981). Levinas subscribes to the later view of dialogue noted above, whereby the face-to-face encounter of dialogue calls consciousness into question, whereby ‘the I loses its sovereign self-confidence, its identification’ and exists not for oneself, but for another (Bruns, 2003, p. 30). The ethical relation for Levinas is thus not so much reciprocal, but one where the I is replaceable: ‘I am responsible for everything and everyone, but no one is responsible for me’ (Bruns, 2003, p. 30). Levinas thus highlights how a critical hermeneutical conceptualisation of dialogue presupposes ethics by its very nature, because it is concerned with the relationship that grounds a dialogical encounter with another. Instead of constructing the research subject as foreign, and as an obstacle to overcome, manage and control, hermeneutics prompts questions about how situated, embodied subjects, participating in the event of dialogue, should relate to each other (Veling, 1996). Such an interaction, suggests Bruns (2003), is not merely one of cognition, and nor does it take place along a level plane, because:

…we are always in a condition of exposure to what we want to understand; that is, in the understanding of anything—whether of a text or the world or of other people—we always find ourselves under a claim. (p. 33)

Levinas’s theory of ethics can be seen as the ‘high bar’ in ethical thinking when applied in relation to undertaking research with children, emphasising the importance of responsibility, relationships, situatedness and otherness in the research process.
However, regardless of the differences between the approaches of Gadamer and Levinas, these central values of a critical hermeneutic ethics lead to a commitment to deal with differences, not only between individuals and social groups, but also within the self. This is made possible because a definition of the self as multiple and unstable is no longer seen as a threat but rather as a part of life and, importantly, implies a self able to deal with diversity and alterity, with the fact that subjects are different and in this sense are both ‘strange’ and ‘knowable’ to each other (Sevenhuijsen, 1998).

How we respond to such epistemic and ethical insights and challenges from children brings us back to what Morrow and Richards (1996, p. 98) contend is the ‘biggest ethical challenge for researchers working with children’, that is, the disparities in power and status between adults and children. Each one of the five hermeneutic movements is bound up in our everyday power practices, which simultaneously constrain and enable dialogue and conversation and any emancipatory possibilities that may emerge from it. While inviting children into conversation is the first step in a dialogical participatory process, the accounts they share within the to-and-fro of conversation cannot be heard outside of, or free from, the political, legal, social and cultural discourses that potentially enable, inhibit and resist what they have to say (Kögler, 1999).

In all conversation with children there are unquestionably relations of power, whether this is adults imparting ‘knowledge’ to children or vice versa. Imbued through such exchanges there are differences in power and status, most particularly in relation to the status of adult and child. For example, viewing children as weak, vulnerable and in need of care and protection can mask power relations which ultimately enable the voices and roles of adults to dominate, and places high expectations on adults and children to act in ways that are consistent with children requiring nurture and protection (Dahlberg & Moss, 2005). Similarly, viewing children as highly competent communicators can act to mask specific vulnerabilities that children bring to the dialogical encounter (Kjørholt, Moss & Clark, 2004). At its heart, however, lies the question ‘what is an adult?’ This is a question, or indeed a social and political category, which remains relatively unproblematised despite its centrality to any analysis of research that involves children (Christensen, 2004). Listening to children requires a radical re-evaluation of political, economic and cultural structures that have for years regulated the lives of children. In
this study, one way to explore these dynamics is to identify and analyse ‘recalcitrance, resistance, refusal or renegotiation of power and the exploration of possibilities of existence that transgress or modify power relationships and identities’ (Lloyd & Thacker, 1997, p. 60).

I use the word ‘resistance’ in order to invoke the discursive relationship between resistance and power. Foucault’s (1988) claim that ‘as soon as there is a power relation, there is a possibility of resistance to it’ (p.123) is attractive in this context in that it implies that resistance forms right at the point where relations of power are exercised:

There are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through the compatriot of power. It exists all the more by being in the same place as power; like power, resistance is multiple. (Foucault, 1980, p. 142)

The point of resistance thus becomes a fertile site for exploring and articulating the dynamics of the exercise of power in a research project. It further holds potential for exploration of the ways in which children are represented – as researchers we are implicated in the process of knowledge production, and explanations of truth (for example, of children’s lives) and power should be inseparable. Unfortunately, resistance, like power, is diffuse and multifaceted, and ‘that point’ is not easy to locate. In attempting to locate resistance, it is helpful to distinguish between resistance that emerges when power is imposed upon oneself and resistance that emerges when one’s power is being challenged. Increasingly, researchers are documenting the ways in which children resist the power of adults in a research context by using strategies such as the adoption of humour, silence, reticence and non-responsiveness, in order to bring a broader ethical dimension to the reporting of their research (Kay, Cree & Wallace, 2003; Smart et al., 2001). This approach to the analysis of power also informs the reporting of the ethical decisions and dilemmas that have arisen in this study, which are discussed in the following chapter. However, before doing so, the final part of this chapter examines briefly some of the implications of adopting critical hermeneutics for the research methods of this study.
Chapter 4: Introducing Critical Hermeneutics | Page 142

4.6 The Implications of Critical Hermeneutics on the Research Methods

For hermeneutics the very notion of method, both as possible and ideal, is highly problematic (Kinchloe & McLaren, 2003; Grondin, 1999; Weinsheimer, 1985). If understanding is only ever partial and incomplete, then, hermeneutics argues, portraying understanding as a rule-governed exercise ignores the essential unavailability of understanding, and fails to acknowledge that no method can produce authoritative understanding, knowledge, or in the case of this study, the ‘truth’ in regard to children’s participation in family law decision making (Bruns, 2003; Grondin, 1999, 2003; Kögler, 1999). Weinsheimer (1985) captures the hermeneutic idea that human being precludes definitive self-knowledge and that understanding is limited and partial:

The fact that we are—which precludes definitive self-knowledge—is precisely what also gives us those limitations of what we are that we do possess. Refining ourselves out of time, out of world, and out of existence, in the name of objective knowledge, turns out to be just as undesirable as it is impossible. (pp 11–12).

Critical hermeneutics challenges research methods that subordinate the general problematic of understanding children’s experiences to the rules and procedures of exegesis in research. Such research methods have privileged, and often refused to recognise, their own existence and the resultant practices (Canella & Lincoln, 2004). Hermeneutic philosophers refrain from offering or developing particular methods or procedures of understanding precisely because they are suspicious of any inquiry that sets out to conceal the reality of understanding or of inquiry oriented to a cognitive ideal of truth or understanding that can never be fully realised (Grondin, 1991).

At the same time, while seeing ‘methods’ to be a problematic construct is consistent with post-modern and hermeneutic theorising that examines how knowledge is constituted and produced, it would be a mistake to take hermeneutics as standing against method. On the contrary, hermeneutics does not argue for the abandonment of all methods, but rather for the critical explication of methods that have been too easily ‘tamed or explained’ or separated from their essential dimension or basis from which
they have been formulated: ‘The great enticement of modern methodology is to persist in making us forget it’ (Grondin, 1991, p. 20).

Merely stating the problematic nature of methods, however, is not helpful for this study. If one agrees that the event of understanding takes place not methodically, but dialogically, this study must still address the more fundamental question of how do we judge whether ‘meaningful’ or ‘authentic’ dialogue has taken place. This question is an important one because it reminds us of the risks and challenges that accompany any claims that ‘dialogue’ has taken place. Conflating methods and interpretation does not mean that this study can claim to constitute ‘good research’, or that the dialogue and conversation that took place as part of the research were ‘good dialogues’ (Guba & Lincoln, 2005). Nor does it preclude or remove the need to address questions about the role of methods and methodology and what criteria will be used to evaluate the research. As Kögler (1999) argues, a central task of critical hermeneutics is not only to address theoretical issues such as the significance of language for knowledge and understanding but also the ‘methodology of critical interpretation, the relationship between evaluating validity and understanding meaning and how analysis of social power practices are to be related to the self understanding of other speakers’ (p.11).

Kögler’s hermeneutically sensitive theory of power is therefore useful in addressing this question because it recognises the problematic nature of method, and the need to question the too-easy assimilation of research methods that have the potential to give a too objective slant to the experience of understanding children and their participation in family law processes. At the same time, the importance of maintaining a ‘view from somewhere’ must be recognised. This view is a methodological place to stand and from which to undertake critical reflection. Critical hermeneutics thus allows the study to depart from paradigms of research that have been concerned with describing and explaining children and childhood from ‘the outside’ by promoting an open and critically reflexive mode of listening in which we ‘willingly join with our conversation partner in a mutually participative process that brings out the nature of the subject matter guiding us’ (Veling, 1996, p.40). Hence, instead of approaching children from the ‘outside’, hermeneutics allows for the conceptualisation of the research in terms of a fundamental encounter with children and young people as ‘Other’. Such an encounter
takes place in a dialogic sense, and in ways that have the potential to allow for the alterity, strangeness and unfamiliarity of the ‘otherness’ of children to provoke a revision or enlargement of our settled understandings, for example, in relation to their participation in decision-making processes (Veling, 1996).

Consequently, the research ‘methods’ in this study are understood not as a description of the research procedure but rather as a site of vital creativity, generated by the dialogical interplay between myself and the texts which form the basis of the study. Implicit within this dialogical hermeneutic approach to the research is the idea that my role in constructing understandings of children’s experiences of participation in family law decision making needs to be acknowledged and articulated, not assumed, in order that the research might begin to understand and connect the lives of children to the issues of power and representation (Woodhead & Faulkner, 2000). This task is an entirely ethical endeavour and not without its conceptual challenges. As Holstein and Gubrium (2005) emphasise, it is one thing to describe what is going on and how things or events take shape, but the question of why things happen can lead to ‘inferential leaps and empirical speculations’ that they suggest propel qualitative analysis ‘far from its stock in trade’ (p. 498). The following chapter shows how this study attempted to address some of these ethical and methodological challenges.

4.7 Chapter Summary

This chapter has focused on exploring the potential of critical hermeneutics for this study which focuses on how children and what they have to say are recognised in family law. I have shown how critical hermeneutics frames an approach to the interpretation of dialogue with children and young people, as well as to the intersubjective space that constitutes participation. Further, I have revealed that critical hermeneutics offers significant insights because it is conceptually oriented towards dialogue as meaningful. I concluded the chapter by suggesting that the dialogical approach of critical hermeneutics raises a number of important ethical and methodological challenges. Having briefly outlined the theoretical basis for the ethical and methodological
implications of using critical hermeneutics as the framework for this study, the following chapter shows how the research attempted to respond to these challenges.
Chapter 5: Methodological and Ethical Considerations of the Study

5.1 Introduction

In the previous chapter, I introduced critical hermeneutics as the theoretical framework for the study. I suggested that critical hermeneutics holds promise for pursuing a dialogical approach to children’s participation because it assumes that understanding (in this case, children’s understanding about their participation and how they want to influence the world around them) is not reproduced through ‘arms length’ analysis by an objective or uninvolved observer, but is produced in a dialogical encounter that is ‘participative, conversational and dialogical’ (Schwandt, 2003, p. 302).

The purpose of this chapter is to explain the implications of adopting a critical hermeneutic approach for the research process, keeping in mind that a hermeneutic explanation of methods necessitates the critical engagement with the research process by focusing on the structural constraints and possibilities inherent in the research design as well as reporting on the conditions of the production of knowledge generated in the study (Kinchloe & McLaren, 2003). This chapter therefore takes a multi-layered approach to explaining the research design, moving between an account of the study’s research methods and an account of the interpretative choices that have been made about these methods so as to allow for discussion of the study’s findings in following chapters. Consequently, the description of methods, including an explanation of the design of the research, a description of the target population, procedures for recruiting participants and eliciting informed consent; an explanation of the data collection and analysis, a statement about the risks and benefits for participants, the strategies for dealing with possible distress, copies of the interview questions and letters to participants summarising the information in the ethics application, is but one aspect of the chapter (Halse & Honey, 2005). As I have indicated in Chapter Three, critical hermeneutics supports this methodological process by grounding the familiar concept of reflexivity as a methodological and ethical concept. This means that my own
interpretative decisions are also brought under scrutiny as I seek to offer a critical and reflective analysis of the ethical and methodological decisions that have informed the study. Halse and Honey (2005) describe this task as a ‘dangerous, but politically necessary conversation, and one which needs to take place in order to make visible the investments, dilemmas and implications of researchers’ ethical decisions and moral choices’, which, they argue, are ‘usually secreted away, buried, concealed and hidden from public scrutiny, thereby crafting an illusion that “good” research is being done by “good” researchers’ (p. 2142). Such an approach to reporting the research methods is not only consistent with a hermeneutic approach to research, but also with postmodern calls to researchers to allow for the contemporary complexities of the research project to be opened up for debate and critical interrogation.

5.2 The Development of the Research Proposal

This study originally set out to investigate children’s experiences of having a say in family law decision making. It commenced at a time when there was a burgeoning use of Children’s Contact Services (CCSs) to ensure children could maintain contact with a parent in matters where there are issues such as family violence, child abuse and/or neglect, parental drug and alcohol issues or where a parent had not been in contact with a child for a significant period of time. As mentioned in Chapter One, an opportunity arose for me to situate my study within a CCS context when I was approached by staff from a regional CCS to discuss the findings of a recently completed study. Consideration of the context in which the data were to be collected required further reflection on, and refinement of, my research question, which was clarified as an examination of how children, and what they have to say, are recognised in family law decision making.

This study proposed that semi-structured, in-depth interviews be conducted with the 40 children attending supervised contact with a parent at two CCSs hosted by the partner organisation. The two centres were located in a regional area, approximately 250 kilometres apart. In preparation of the research for ethics approval, I relied heavily on discussions with my supervisor, colleagues and staff members at the CCS, in order to
clarify my own ethical position and to address particular dilemmas that arose over the
time of the study, most particularly in relation to the task of balancing the dual concerns
of prevention of harm to children in research and avoiding the risks of silencing and
excluding children from research. Guidance was sought from the growing body of
research emerging at the time of the development of the research proposal. In
particular, I found the work of Priscilla Alderson (1995) in her book, *Listening to
Children: Children, Ethics and Social Research*, to be highly relevant in designing the
study. Alderson identifies ten topics for consideration by researchers undertaking
research projects with children: the purpose of the research; costs and hoped-for
benefits; respecting privacy and confidentiality; the selection, inclusion and exclusion of
children; issues about funding; review of research aims and methods; information for
children, parents and carers; consent (who gives consent and how); dissemination, and
finally, the impact on children, both those who participate in the research and on
children more widely. These ten themes provided an invaluable point of reference for
thinking through some of the practical and ethical considerations of this project.

In the early stages of the study, I also sought the advice of a youth advocacy committee
(Young People Big Voice) on the design of interview materials and information about
the study to be sent to children. The information provided to children was refined on
the basis of these discussions and the views of the members of the youth advocacy
committee also served to heighten my awareness of possible obstacles that may limit
ongoing consent and of participants’ understanding of confidentiality. For example, the
information sheet included the following statement:

> I know you will have great ideas that will help me to understand what it is like
for kids like you who visit your (Mum/Dad/other) at the children’s contact
centre.

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9 Members of the Young People Big Voice (YPBV) are young people, aged 13-21 from a wide range of
backgrounds and experiences who meet regularly to advise the Centre for Children & Young People on
important issues for its research, education and advocacy activities.
Several members of youth advocacy committee thought that this statement might indicate that there were high expectations held for children to contribute ‘great’ ideas and such expectations might frighten them or make them feel anxious about the interview. Others discussed the importance of explaining clearly the promise and limitations of confidentiality, and requested that I explain how I would talk this promise through with very young children. Being asked to role play this aspect of my research was an invaluable part of my preparations and focused my attention on the challenges of providing information to children in ways likely to be understood by them.

5.3 Considering the Ethical Dimensions of the Study

Guillemin and Gillam (2004) suggest there are two major dimensions of doing and reporting research: ‘procedural ethics’, that is, the process of seeking approval from a relevant committee to undertake research involving humans, and ‘ethics in practice’, that is, the everyday ethical issues that arise in the doing of research with children (p.262). Critical hermeneutics, as I have suggested in the previous chapter, adds a third dimension, that being an analysis of how the formal ethical principles of this study are translated and interpreted in practice. The following discussion considers all three dimensions of reporting and doing research.

This study, like all research projects involving children, was subject to the formal process of review by the host university’s ethics committee, established pursuant to the National Health and Medical Research Council Act 1992 (NHMRC). Ethical approval for the project was sought and granted from the University’s Human Research Ethics Committee.

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Committee. Once approval had been obtained, the board of the partner organisation which facilitates CCSs granted approval for the study to proceed.

In order to gain ethics approval, a number of significant constraints and barriers to the involvement of children in the study had to be overcome. The first concerned the issue of the ‘maturity’ of children to participate in the study. There are two key sections in the NHMRC National Statement on Ethical Conduct Involving Humans (1999) (subsequently referred to as the ‘Statement’), which govern the participation of children and young people in research. The first is the glossary, which includes explicit definitions of children and young people. A child is defined as a minor who lacks the maturity to make a decision whether or not to participate, subject to law in the relevant jurisdiction. A young person is defined as a minor who may have the maturity to make a decision whether or not to participate in research, subject to law in the relevant jurisdiction.

The second, Section 4: ‘Research Involving Children and Young People’, provides that researchers must ensure research is conducted only when: the research is important to the health and wellbeing of children and young people; the participation of children or young people is indispensable; the study method is appropriate for children and young people and the safety of the child or young person is provided for. Consent must be provided by children and their refusal to consent must be respected by researchers. Parents/guardians or organisations must also provide consent, although the Statement is not clear as to whether the consent of one or both parents is required for the child’s participation in research. Finally, Human Research Ethics Committees (HREC) must not approve of research that is not in the best interests of the child.

These two sections of the NHMRC statement reveal the highly contradictory starting point for all research involving children: children are defined as lacking maturity to participate in research (and young persons as potentially lacking maturity), but

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11 Southern Cross University HREC Committee. Approval number ECN-02-46.
guidelines are nevertheless provided for undertaking research with children. This inconsistency is further complicated by reference to an interpretation of the terms *child* and *young person* being subject to the law in relevant jurisdictions. Researchers who seek to involve children in research can only assume an evaluation of a child’s *maturity* (or lack of maturity) should be interpreted in light of jurisprudential interpretations of *competence* by reference to jurisdictional factors such as the age and circumstances of the child and the nature of the decision to be made. Australian courts determine legal competence according to the decision of *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] *AC* 112. ‘Gillick-competence’ stipulates that a competent child is one who ‘achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed’ and has ‘sufficient discretion to enable him or her to make a wise choice in his or her own interests’ (Morrow & Richards, 1996). In the state of New South Wales, where this study took place, it seems that while all children are assumed to lack *maturity*, this does not mean that they lack the *competence* to consent subject to legal definitions of competence, which might take into account age, maturity and the context and nature of the decision-making task. However, there is no further clarification or direction in the Statement as to how either maturity or competence are to be defined; nor is there direction as to who is to assess a child’s maturity, how such an assessment should proceed or how to determine whether the research is in a child’s best interests.

Key differences between adults and children are also assumed in the Statement in relation to children’s competence to make decisions ‘about whether to participate in research, and competence to provide valid sociological data’ (Morrow & Richards, 1996, p. 98). Children are characterised as a unique group whose participation should be considered in terms of a ‘last resort’, a vulnerable group in need of protection (Cashmore, 2006). Ironically, little guidance or provision is made within the Statement for ensuring the adequate protection of children from harmful or useless research once children are actually involved, as evidenced particularly by the lack of attention directed towards the ongoing nature of ethical considerations and the dilemmas that may arise at any stage of the research process (Powell & Smith, 2006). This is notwithstanding that the dominant focus of the Statement is on the protection of children (primarily through
excluding them from participation in research – a focus that is consistent with most ethical research codes internationally).

From this brief introductory discussion, it is evident the ethical principles of the NHMRC Statement stand in contrast to the dialogical approach to ethics which animates this study. Consequently, it is necessary for the study to straddle two quite different ethical frameworks – that is, to strike a balance between a formal ethical framework governing the procedural aspects of the research and the reflexive methodologies inherent in critical hermeneutics which acknowledge both the agency (and vulnerability) of children. This is not to say that the process of developing the research proposal for the University Ethics Committee was not a valuable first step in subjecting the study to external scrutiny, nor to suggest that the process for ensuring the research met ethical guidelines did not play an important role in planning the research. As Alderson and Morrow (2004) say, ethics committees can ‘help prevent poor research, safeguard research participants, and be a protective barrier between potential ‘participants and researchers’ (p.77). Ultimately, however, as with all research, many situations arose over the duration of the study for which no guidelines were available but which required a choice to be made. These choices, which were solely my responsibility, were often made in difficult circumstances, with little time to reflect or consider their broader implications. The following section attempts to outline some of these choices and decisions in order to provide insight into the ways they informed and guided the research process.

5.4 Setting Out: Seeking the Support of Parents for the Study

The following section describes the process of recruitment for the study, highlighting some of the difficulties that arose for recruiting children, as well as how these difficulties were negotiated.
5.4.1 The Recruitment Process

Recruitment of families was ongoing between August 2004 and November 2006. Protocols for identifying and approaching families were developed in consultation with the executive, regional managers and case managers of the partner organisation. It was decided that the case workers from both centres would recruit families, although managers and administrative staff would play an important role promoting the study and encouraging families to consider the involvement of the children in the study.

Three factors were identified that would inform a caseworker’s decision to invite particular families to the study. First, caseworkers would have experience working with a family to ensure families had ‘settled in’ to the service so as to minimise any possibility the research would disrupt contact arrangements. Second, the study would not seek to involve pre-lingual children or very young children, although it would not preclude very young children who showed an interest in the research. Third, caseworkers would have an established relationship with the child in order that they could assess the benefit (or detriment) to a child of participating in the study.

An important consideration was to engage the support and trust of caseworkers, managers and staff, and to invite their ongoing involvement and participation in the study. I prepared a briefing which overviewed the following issues: the purpose of the research, benefits and challenges of hearing children’s views, an overview of the research design and process, the issue of consent, strategies for seeking parental consent, and the importance of ensuring staff represented the research to children and families in a way that was consistent with the research aims, that is, to enable the authentic telling of children’s stories, from their own perspective without conveying an expectation that children produce particular responses in the research. Colour flyers describing the research were also posted on noticeboards at both CCS’s (See Attachment A).
5.4.2 Addressing the Issue of Parental Consent: Protecting Children’s Confidentiality
When They Have a Say or Maintaining the Status Quo?

While research with children in family law matters is normally undertaken when the legal proceedings are completed, the children participating in this study were the subject of ongoing legal proceedings at the time of their interview. Consequently, issues over privacy and confidentiality assumed heightened significance. With this in mind, the active consent of both parents for their child to participate was sought. This decision was influenced by two major considerations.

The first concerned the legal status of researcher promises of confidentiality to children participating in family law research in Australia. This issue was addressed in the Family Court decision of *T v L* (unreported, 12 October, 2001, Collier J, Parramatta). The case arose from research conducted by University of Sydney researchers, Judy Cashmore and Patrick Parkinson, in relation to a major study on children’s participation in decision making about residence and contact following their parents’ separation. As part of the study, which sought to involve only families whose legal proceedings were completed, Dr Cashmore interviewed a father, Mr T, and his children, after seeking assurance from Mr T that no further proceedings were contemplated. Later, however, proceedings flared and Mr T issued a subpoena seeking Dr Cashmore’s notes and recordings from the interviews. Justice Collier struck down the subpoena on three grounds (Parkinson, 2002). In doing so, His Honour noted the importance of confidentiality as the basis for undertaking research:

.. it is essential that people who wish to take part in these programs know that there is confidentiality. Equally, and possibly more significantly, it is of vital importance that the researchers know that when they conduct interviews in confidence as part of their research, that the confidentiality that they have set up as the basis of those interviews and the whole of the research can not be impinged upon by the use of a subpoena in circumstances such as the present case. I would be satisfied, and find, that on the public policy aspect alone, the subpoena should be struck down.

The second consideration was that the partner organisation indicated a strong preference for dual parental consent on the grounds that it reflected the organisation’s
philosophical commitment to working with both parents to assist them to focus on parental responsibilities after separation and on the needs, wishes and views of their child or children.

In seeking dual parental consent when there is no legal obligation to do so, my position, is consistent with that of Alderson (1995) who suggests that ‘the safest course, though it can be repressive, is to ask for parental consent and also to ask for children’s consent when they are able to understand’ (p. 22). Consequently, my decision might be considered highly conservative when examined in light of the wide range of views expressed in the research literature in relation to the issue of parental consent (Cashmore, 2006). For example, Carroll-Lind (2006) and Thomas and O’Kane (1998) adopt an approach which suspends the ‘usual rule’ about parental consent by using ‘passive consent’ procedures, whereby children participate when their parents do not refuse consent. Others, including Masson (2000) and Neale and Smart (1998) emphasise the importance of respecting children’s rights and challenge the conventional requirement for the consent of both parents in separated families when children are deemed to have the capacity to make a decision to consent. For my part, however, given the litigious environment of the research interviews, in particular the fact that the majority of children were the subject of ongoing disputes in the Family Court, I could not invite the children to the study with the uncertainty and reservations I held following a short period of time working in the Family Court. Here I witnessed the behaviour of some parents who I considered would go to great lengths to gather ‘evidence’ against another in order to pursue their claim for contact and/or residence arrangements, including issuing a subpoena for transcripts of interviews with their children.

Once the consent of both parents was secured by the caseworker, the resident parent or carer was asked for permission to provide their contact details to me. Following contact, if parents agreed, we arranged a time to meet the child, so that I could invite the child to take part in the study. In late 2005, due to a low response rate from families at one of the CCSs, an information pack promoting the study was posted to every family attending the CCS at that time. However, no further families consented for their children to be involved in the study. Recruitment of families continued at the second
CCS until November 2006, when I decided that, after a prolonged effort at recruiting children, that I could no longer delay commencing the study, albeit with a much smaller sample than originally anticipated.

However, the promise of confidentiality is no doubt a double-edged sword, and it became apparent that the extra steps taken to ensure confidentiality took me further away from an inclusive research process that might potentially include any child interested in being involved in the study. This is evident in the Table 1 below, which provides an overview of the numbers of families using the service, the numbers approached and the final number of families where both parents consented for their child to participate in the study.

<table>
<thead>
<tr>
<th>Number of families…</th>
<th>CCS Site One</th>
<th>CCS Site Two</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>…using the service</td>
<td>146</td>
<td>171</td>
<td>317</td>
</tr>
<tr>
<td>…approached</td>
<td>44 (30.1%)</td>
<td>35 (20.5%)</td>
<td>79 (25.0%)</td>
</tr>
<tr>
<td>…who agreed to be contacted</td>
<td>17 (38.6%) (of approached)</td>
<td>1 (2.9%) (of approached)</td>
<td>18 (22.8%) (of approached)</td>
</tr>
<tr>
<td>..where both parents consented</td>
<td>10 (22.7%)</td>
<td>1 (2.9%)</td>
<td>11 (13.9%)</td>
</tr>
</tbody>
</table>
Table 1 reveals a number of barriers existed to recruiting children to participate in the study. First, of the 317 families attending supervised contact and supervised changeover, only 79 (25%) of families were approached by caseworkers over a period of nearly two years. While a number of factors could immediately exclude a family from being approached, in particular the fact that some families using the services had very young children, the figures reveal the important role caseworkers played as gatekeepers in this study. Informal feedback from caseworkers suggested a range of reasons for the low recruitment numbers, including limits and stresses on caseworkers’ time and the difficulties of introducing the research to families at a time of significant stress in the lives of children and their families. The difference in recruitment between the two centres also highlights the differing levels of support for the study at the two centres.

Table 1 also shows that a second major barrier to inviting children to the study was gaining parental consent. Of the 79 families approached, 18 families (22.8%) agreed to be contacted. Informal feedback given to caseworkers by parents uninterested in their children participating in the study included a desire to protect the privacy of the family, to prevent children revealing problems in their families and/or a belief that the child could not be trusted to tell ‘the truth’. For others, the acrimony of their dispute with their ex-partner overshadowed their view of the need or desire that their children might have had to participate in the study.

Of the 18 families who agreed to be contacted, seven decided not to provide consent following discussion with me about the study. The carers who made the decisions for these families included four residential mothers, one grandparent and two contact...
parents. There were eleven children in these seven families. A number of reasons were provided as to why they were initially interested in the study but had decided not to proceed. Several carers spoke about the tension that existed between their support for the study and their own responsibility to protect their children. For example, the grandmother of four young children was strongly supportive of the research, stating that more work needed to be done to draw attention to the experiences of children attending supervised contact, in particular to what she described as the silencing of children who attend supervised contact. Her experience was that both parents’ needs and wishes had dominated the decision for her grandchildren to attend supervised contact at the expense of consideration of her grandchildren’s needs. At the same time, however, she did not want her grandchildren involved in the study, as she considered supervised contact itself to be already too stressful for the children. She described how ‘anything’ could trigger anxiety for the children, including talking about supervised contact, and so considered the research could not offer any significant or apparent benefits to the children. Indeed, she considered that it could be detrimental for the children.

In a second instance, a resident mother indicated that her son, who had recently made allegations against his father of sexual and physical abuse, had made express wishes not to see his father in any circumstances, and was extremely angry with his mother that supervised contact had been ordered because he perceived she should be able to stop contact with the father altogether. Given these circumstances, she considered that inquiry about the child’s experiences of decision making would only act to further traumatising the child. However, the mother was strongly supportive of the research and consented for her second son to participate.

In a third instance, a resident mother decided to withdraw consent as she thought the contact father would ‘hassle’ and ‘disturb’ the child about the research and inquire as to what she might say in the interview if she agreed for the study to go ahead.

In a fourth instance, a resident mother indicated that she could not bring herself to discuss the research with the child because their current situation was emotionally tenuous, with both her daughter and herself living in fear of the father. The father had repeatedly breached an Apprehended Violence Order (AVO) in place at the time of the
interview, and her daughter was fearful about her father coming to the house and hurting either the mother or herself. The mother indicated that her whole focus was on keeping the child safe during a highly volatile and upsetting time, and that discussion with the child about such events was already too stressful for the child.

In the fifth instance, the residential mother, after initially providing consent, decided to withdraw consent, although no reason was given. In addition, in two instances, consent was initially provided by both parents, but subsequently, withdrawn by the contact father following an argument with the resident mother. I have included these details to highlight the dilemmas which parents also face when deciding whether to let their child participate in research, and to reiterate the scope of ethical considerations arising in a study of this kind.

Ultimately, 13 children from 11 families were recruited through the service (see Attachment B). This figure represented 3.5% of the total number of families using the service and 13.9% of families approached. The sample is therefore not representative of children who attend supervised contact and the findings should be read in light of this. It is also important to note that these children were in a small minority whose parents both consented to their inclusion in the study, and may well have been more inclined towards their children ‘having a say’ about supervised contact and family law decision making. However, it is not possible to know this as no information was collected from those contacted about the study who subsequently declined to be involved. The present study is therefore limited in that it is based on a purposive sampling approach to inviting families and children to participate in the study.

Two further comments are necessary regarding the research methods. First, it is relevant to note that participating parents were invited to complete a short survey inviting feedback on their reasons for supporting the study. Parents included reasons such as children should be heard in family law processes but their own children had not been heard (see Attachment C). However, while all parents returned the survey, few completed information other than basic details (such as children’s age, gender, relationship to child and time since separation, type of contact). Consequently, no further analysis of the survey has taken place. Second, a focus group with children was
originally planned, however, given the extended recruitment period, did not proceed as the majority of children had moved or their contact details had changed, and were therefore unable to be included.

Table 2 below shows the numbers of children invited to participate in the study, the numbers who consented, the numbers excluded and the final number of children interviewed.

<table>
<thead>
<tr>
<th>Table 2: Child recruitment, consent and participation details – August 2004 to November 2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of children...</td>
</tr>
<tr>
<td>…invited to participate</td>
</tr>
<tr>
<td>…consenting to participate</td>
</tr>
<tr>
<td>…excluded by the researcher</td>
</tr>
<tr>
<td>…participating in the study</td>
</tr>
</tbody>
</table>

One of the most significant features of this study can be seen in the response of children to the invitation to participate in the study. As Table 2 shows, all 17 (100%) of the children invited to participate in the study consented to be interviewed. A number of reasons might explain this response from children. First, this group of children, while from a diverse range of backgrounds and experiences, shared in common a desire to talk about their views and experiences in the context of this study. Second, consent was
explained as something that was ongoing and so conveyed a message to children that their involvement was not something they had to do (like going to school) and that it was they who determined if and when the interview would continue. However, I also acknowledge the possibility that the unequal power relations that existed between me as researcher and the children may also have influenced their decision.

Table 2 also reveals my own role as a gatekeeper in this study. While 17 children provided consent to participate in the study, I intervened to exclude, or was placed in a position where I was unable to involve, four children (23.5% of the final group). In one instance the need to ensure the safety of children, as well as considerations about the potential harm of undertaking the interview with children informed my decision to cancel interviews with two brothers. Amidst allegations that the father had sexually abused both boys, I was advised that previous contact sessions had been fraught, with both boys visibly upset at the end of each contact. The boys were also the subject of a Department of Community Services (DOCS) investigation and were also being interviewed by police and DOCS staff in relation to the allegations. I did not consider that conducting a research interview at this time would be of any benefit to either boy. The parents of these children were advised of ongoing research and informed of the possibility of involvement of the children at a later date. While my decision to exclude the two boys was not taken lightly, in this situation at least, it points to a decision-making process whereby considerations of protection were privileged over those of consulting with the child about my protection concerns.

The mother of a third child contacted me the day before the interview to express significant concerns that the contact father would question the child about the interview and that the child would find his approach stressful. The caseworker on duty at the time supported the mother’s concerns and I agreed not to proceed. In the case of a fourth child, early in an interview, I considered there was not ongoing informed consent, and stopped the interview. After attending a two-hour contact with her father, the four-year-old girl appeared tired, nervous and uncertain, and readily accepted my invitation not to go ahead with the interview.
Whilst these decisions were framed by my legitimate responsibilities as a researcher in ensuring that children were not harmed by their involvement in the study, as well as by my own interpretation of the dynamic nature of informed consent, it highlights the difficulties in negotiating the boundaries between facilitating children’s telling of stories about supervised contact and deciding on their behalf that such telling might be inappropriate at that time in their lives. Not only was I unable to approach children directly to invite their participation, but even when children consented, I too gave priority to my adult duty to protect children, a factor which ultimately took precedence over children’s competence and right to participate in the study.

This discussion shows some of the early negotiations that took place as I sought to provide a safe environment for those children included in the study. While many researchers have noted the number of gatekeepers with whom researchers must negotiate the involvement of children, this study is notable for showing the extent to which this group of children is hidden from view in contemporary family law discourses – a group who must surely be the most silenced group of children in the jurisdiction of family law, and whose voices are also unheard in this study (see Alderson, 1995; Cashmore, 2002, 2006; Walsh, 2005).

5.5 Inviting Children to Participate in the Study

When it comes to inviting children to participate in research, Morrow (2004) distinguishes between children’s consent and assent: consent is taken to mean when someone ‘voluntarily agrees to participate in a research project, based on a full disclosure of pertinent information’, while assent refers to a ‘parallel process in which the parent or guardian agrees to allow a minor ward to participate in a research project, and the child assents or agrees to be a subject in the research’ (p.5). While the children in this study may have merely assented to their initial involvement, I wanted to ensure that their ongoing participation in the study was based on informed consent.

The issue of children’s informed consent is, however, not so straightforward. When we seek children’s consent to participate in research, we make a number of decisions about
children’s capacity to participate and the possible harm or distress such participation might entail, as well as a number of undertakings in relation to confidentiality and privacy. While most discussion about children’s competence to consent usually focuses on the age of the children concerned, I drew on broader definitions of competence, in particular, Lansdown’s (1996) idea of children’s evolving capacities which, as I indicated in Chapter Three, argues for an approach to children’s competence to participate in research as depending partly on the context of the research and partly on what it is they are consenting to do. The following discussion shows how the notion of evolving capacity informed the interviews with children, in particular, my evaluation of whether informed consent was ongoing.

The first step taken towards obtaining children’s consent was to ensure that children were properly informed about the research and what their involvement in the study might mean for them. As a preliminary step, letters were sent to children outlining the study (Attachment D). For young children and children with literacy difficulties, I requested the resident parent discuss the study with the child. In seeking to ensure children’s consent was given on the basis that they understood what would be involved should they participate, and were happy to do so, I addressed the issue of consent as having two aspects: explicit consent as evidenced by conformity to ethical standards determined by the NHMRC and implicit consent as determined by the notion of consent as ongoing throughout the research process. This is an important aspect of this study, for as Danby and Farrell (2005) highlight, the area of gaining consent from child research participants has been ‘an area of research and ethics which has been largely invisible’ (p. 49). The following section discusses how each of these aspects of consent were addressed in this study.

5.5.1 The Ethics of Consent: Balancing the Competing Issues of Confidentiality, Privacy, Protection and Researcher Duty of Care

At the beginning of each interview, I asked children if they had any questions about the information letter or about the research itself, including clarification of the research question, what the interview would involve and what feedback was planned.
Discussion then turned to the issue of confidentiality and privacy, and children were promised that no information would be passed on to the parents, caseworkers or other adults. They were advised that pseudonyms would be chosen for them and that I would change any details in their stories if I considered that they might identify the child. Children were also informed of the secure storage of tapes and associated files and the fact that all files would be destroyed when the report was completed.\textsuperscript{12}

From here, I outlined the limits to confidentiality and the implications for the child if he or she did decide to tell me that someone was hurting them. In this study, I elected to adopt the role of a mandatory reporter. Although a strict reading of the \textit{Children and Young Persons (Care and Protection) Act 1998} does not provide a legal mandate for researchers to report suspicions of child abuse, I considered that given the context of this study, any concerns I might have about the existence of abuse required that I report such information.\textsuperscript{13} Any disclosure of abuse and/or neglect in an interview would be responded to by me reminding the child about the limits of confidentiality and inviting a caseworker into the interview for the child to talk to. Caseworkers would then follow up the reporting process by contacting the Department of Community Services (DOCS) to report the disclosure.

Adopting the role of mandatory reporter in relation to confidentiality is considered by some to be a conservative position for a researcher to assume. For example, Waksler (1996) and Thomas and O’Kane (1998) suggest children have their own views, priorities and strategies for dealing with difficulties and researchers should not adopt procedures for dealing with disclosures that fail to allow space for these. Given that in

\textsuperscript{12} The study protocols for storage of information were compliant with the \textit{National Statement on Ethical Conduct in Human Research} and the Centre for Children and Young People’s \textit{Code of Ethical Research Practice}.

\textsuperscript{13} Section 27(a) of the \textit{Children and Young Persons (Care and Protection) Act 1998} provides that a person who, in the course of his or her professional work or other paid employment, delivers health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children, and if a person to whom this section applies has reasonable grounds to suspect that a child is at risk of harm, and those grounds arise during the course of or from the person’s work, the person must, as soon as practicable, report to the Director-General the name, or a description, of the child and the grounds for suspecting that the child is at risk of harm.
most jurisdictions, including in New South Wales, researchers are not bound by institutional or legal requirements to report abuse, Thomas and O’Kane argue that passing on confidential information can be seen as ‘an inappropriate intrusion into the relationship between researcher and subject’ (Thomas & O’Kane, 1998, p.340). Thomas and O’Kane (1998) further suggest that researchers who say that they want to allow children the autonomy to decide what they want to say and to whom, and who invite trust, must ensure that a promise of confidentiality is not limited in any way:

> It was important for us to be able to give children an assurance that we would not repeat what they told us to other people, and for children to know that they could trust us. Any disclosure of information to us during the research would be an indication that the child was ready to pass on the information to someone they trusted. (p. 340)

However, I was unconvinced that even the most supportive and understanding researcher in the context of this study is well positioned to support a child in any meaningful or committed way following a disclosure, and nor do I consider that this is the role of the researcher. While my obligations as a mandatory reporter were determined by ethical rather than legal concerns, I considered my duty of care to the children required they not be placed at risk due to their involvement in the study. I was keenly aware of the sensitive and complex nature of the research context, that is, of children currently visiting a parent under supervision, and the potential for the research to place the children in a position of danger or harm was never far from my mind. Walsh (2005) has described some of the difficulties that arise when we conduct research with children, especially those who have experienced child abuse and neglect:

> Sensitive research can involve a measure of risk to participants which ‘renders problematic the collection, holding and or dissemination of research data’. Further, the sensitivities of such research can produce methodological complexities, ethical dilemmas and safety concerns. (p.68)

Assuming the role of mandatory reporter did not, however, preclude me from attempting to put into place processes and procedures that allowed children some control over the management of the information they might choose to tell me and about the way a disclosure would be acted upon. Because the nature of the study involved
conversation about matters where there was a probability of disclosure of family violence, abuse and/or neglect, an important aspect of providing children with information about confidentiality was to establish a sound approach for communicating to children not only the benefits and limits of confidentiality, but also the procedure for managing a disclosure, in the event a child chose to tell me that they were being harmed.

Guidance was also provided by the Centre for Children and Young People’s (CCYP) Child Protection Guidelines and Duty of Care Guidelines which require that steps be taken by researchers working in the Centre to ensure the safety of participants and to satisfy the researcher’s duty of care to the child. Both these guidelines, which included the requirement that I undertake all employee-related child-protection checks, were adhered to. In addition, procedures were put into place to ensure that in the unlikely event that a child required counselling as a result of participating in the interview, this would be made available at no cost to the child’s family.

Once children indicated a willingness and understanding of what their participation involved, a shared statement of consent was then read out together and signed by both myself and the child (Attachment E). Finally, as mentioned above, informed consent was understood as being implicit throughout the interview process. In addition, if I perceived that the child’s interest had waned, if the child was upset or uncomfortable, or if the child had become frustrated, bored or disenchanted, I would ask questions such as:

- How is this conversation going for you?
- Should we keep talking about this or would you be more interested in ...?
- I was wondering if you would like me to ask some more questions about this or whether we should focus on x,y,z [x,y,z being other options].
- Do you want to finish talking with me now? (Morgan, 2000, p. 3)

This study sought to undertake a process whereby the conversation with children about their participation in research played a significant role in producing a collaborative approach to how the question of informed consent might be assessed and implemented. Although it is not possible to know whether the authentic consent of children was
provided, it is hoped that the steps taken moved some way towards respecting the children as subjects and not objects of this research study.

5.6 The Participants

Families attending the CCSs drew from a geographical range of approximately 500 square kilometres, and from diverse regional and rural areas (inland and coastal regions). Table 3 provides details of the children who agreed to participate.

Table 3: Details of the children who agreed to participate

<table>
<thead>
<tr>
<th>Child</th>
<th>Age</th>
<th>Type of supervision</th>
<th>Contact with</th>
<th>Arrangements made by</th>
<th>Family Court report ordered?</th>
<th>Lawyer appointed?</th>
<th>Reason for using service</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>7</td>
<td>Contact Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Child abuse allegations</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>7</td>
<td>Contact Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Child abuse allegations</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>12</td>
<td>Contact Mother</td>
<td>Family Court</td>
<td>No</td>
<td>Yes</td>
<td>Child did not want to see mother</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>13</td>
<td>Contact Mother</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Mental health issues</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>11</td>
<td>Contact Mother</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Mental health issues</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>8</td>
<td>Contact Mother</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Mental health issues</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>6</td>
<td>Contact Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Violence towards mother, sexual abuse allegations</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>4</td>
<td>Contact Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Violence towards mother, sexual abuse allegations</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>8</td>
<td>Change-over Father</td>
<td>Recommended by solicitor</td>
<td>Yes</td>
<td>No</td>
<td>Alcohol abuse</td>
<td></td>
</tr>
</tbody>
</table>
### 5.6.1 Numbers and Ages of Children Participating

Seventeen children between the ages of four and 13 consented to participate in the study. Thirteen of these children were interviewed between December 2004 and November 2006. The final group of thirteen children interviewed comprised eight boys and five girls. Interviews with four children did not proceed. All the children attended the CCS to see a parent, although two children had also seen a grandparent at the centre.

### 5.6.2 Ethnic and Cultural Background of the Children

All children involved came from Anglo-Australian backgrounds. Consultation was undertaken with the manager of the partner organisation’s indigenous counselling services to discuss the study in relation to the involvement of Indigenous children. At that meeting the manager informed me that Indigenous children should not be specifically targeted or excluded. Ultimately no Indigenous children participated in the

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<table>
<thead>
<tr>
<th>Child</th>
<th>Age</th>
<th>Type of supervision</th>
<th>Contact with</th>
<th>Arrangements made by</th>
<th>Family Court report ordered?</th>
<th>Lawyer appointed?</th>
<th>Reason for using service</th>
</tr>
</thead>
<tbody>
<tr>
<td>10</td>
<td>9</td>
<td>Change-over</td>
<td>Father</td>
<td>Recommended by solicitor</td>
<td>Yes</td>
<td>No</td>
<td>Alcohol abuse</td>
</tr>
<tr>
<td>11</td>
<td>5</td>
<td>Contact</td>
<td>Mother</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Alcohol abuse</td>
</tr>
<tr>
<td>12</td>
<td>11</td>
<td>Contact</td>
<td>Mother</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Alcohol abuse</td>
</tr>
<tr>
<td>13</td>
<td>4</td>
<td>Change-over</td>
<td>Father</td>
<td>Self</td>
<td>Yes</td>
<td>No</td>
<td>Parenting skills</td>
</tr>
<tr>
<td>14</td>
<td>9</td>
<td>Contact</td>
<td>Father</td>
<td>Family Court</td>
<td>No</td>
<td>No</td>
<td>Family violence</td>
</tr>
<tr>
<td>15</td>
<td>8</td>
<td>Contact</td>
<td>Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Sexual abuse, neglect</td>
</tr>
<tr>
<td>16</td>
<td>6</td>
<td>Contact</td>
<td>Father</td>
<td>Family Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Sexual abuse, neglect</td>
</tr>
<tr>
<td>17</td>
<td>10</td>
<td>Contact</td>
<td>Father</td>
<td>Self</td>
<td>No</td>
<td>No</td>
<td>Family violence</td>
</tr>
</tbody>
</table>

N.B. Entries shaded in grey refer to children whose parents agreed for them to participate in the study, but who were not interviewed.
study. This is not unusual, however, as Aboriginal children and children from Non-English Speaking Backgrounds (NESB) are infrequently referred to CCSs (Sheehan et al., 2006).

5.6.3 Reasons for Referral

Of the 17 children consenting to participate in the study, 13 (76.5%) had been ordered by the Family Court to attend the CCS for supervised contact or supervised changeover.\(^{14}\) All were interim orders and by consent. Where no orders were in place, parents had either been referred by a solicitor or their parents had self referred. The rates of referrals to the centres by the Family Court are consistent with data nationally suggesting that the majority of referrals to CCSs are made by court order (Sheehan et al., 2006).\(^{15}\) The children involved in the study had been ordered to attend the CCS for a number of reasons, and often for more than one reason. Table 4.3 below summarises the reasons for the referrals.

A child’s representative had been appointed in 12 matters (70.5%) and 14 (82%) children had been the subject of a Family Court Report. Of the children interviewed for this study, a child’s representative had been appointed in 10 (77%) matters and 11 (85%) children had been the subject of a Family Court Report.

5.6.4 Form of Contact

The majority of children involved attended the CCS for supervised contact, although two children had recently moved from having supervised contact to supervised


\(^{15}\) But note that although the majority of referrals are by court order, thus allowing courts to monitor the referral process and to enforce good practice, the majority of court orders for supervised contact and changeover are also made by consent and that therefore such monitoring has not occurred systematically
changeovers. Eleven children (65%) visited their father at the centre, while 6 children (35%) visited their mother. Of the original group of 17, 11 were siblings, including step siblings. The duration of supervised contact ranged from six weeks to two and a half years.

5.7 The Design of the Study

In Chapter Four, I outlined the critical hermeneutic approach adopted for this study. As part of this discussion I explained how hermeneutic philosophy, including critical hermeneutics, has traditionally been unconcerned with method, and as such offers little guidance or direction regarding its use in research, and indeed, calls into question the notion of method both as being possible and as an ideal. Nonetheless, critical hermeneutics offers a basic philosophical foundation from which it is possible to develop methodological processes which are congruent with the critical hermeneutical commitment to raising questions about the purposes and procedures of interpretation (Kinchloe & McLaren, 2003). While I have outlined previously how critical hermeneutics has informed this study, from the conceptualisation of the research process, through the analysis of literature, as well as the ethical and methodological underpinnings, the following section outlines the method of critical hermeneutic interviewing developed for the purpose of this study.

5.7.1 The Hermeneutic Interview

A critical hermeneutic interview is a conversation which is oriented towards sense making and the interpretation of meaning (Denzin & Lincoln, 2003; Clegg, 2004; van Manen, 2002). Grounded by the hermeneutic circle, critical hermeneutics suggests that an interview is part of the wider interpretative conversation whereby both the researcher and the participant search for greater understanding, coherence and the disclosure of meaning. In contrast to structured interviewing, hermeneutic interviewing does not seek a final interpretation, nor is it concerned with the manipulation or prediction of
empirical events (Danaher & Broid, 2005). There are no formal procedures or pre-established rules that must be applied universally to every interview, but rather a distinct attitude and methodological orientation exist between the researcher and the participant (Clegg, 2004; Danaher & Broid, 2005). Geertz (1983) describes this approach to interviewing as ‘an intellectual movement … a continuous dialectical tacking between the most local of local detail and the most global of global structure’ (p. 69).

In this study, I set out to undertake the interviews in the form of a collaborative conversation which sought to mobilise both myself as researcher and the children as participants in a way that would allow for the richness and depth of the children’s experience to emerge. In this way, the interviews were designed to acknowledge and to explore the situated and subjective nature of the children’s experiences and aimed for as much interpretative insight as possible (Alldred & Burman, 2005; Van Manen, 2002).

At the same time that a hermeneutic interview does not set out to impose an a priori categorisation that might limit the conversation that takes place, there is still, however, structure to the hermeneutic interview. There is clearly an interview setting, identifiable participants, as well as an overview of guiding questions or concerns that have been identified by the researcher in light of his or her lived experiences. These guiding questions and concerns are based on a serious interest and commitment to a better understanding of the participant’s world (Danaher & Broid, 2005). Such questions, which can be seen as a primary influence on the study, having influenced the research from its conception, are important as they form the core of the dialectic of question and answer which is so integral to a hermeneutic approach to interpretation.

To this end, a semi-structured interview guide (Attachment F) was developed, as well as activities for the children to engage in which were designed to encourage focused discussion around the quite difficult theme of children having a say in family law processes.
5.7.2 The Interview Guide

The interview themes included in the guide were developed to align with the research questions which, in turn, had been informed by the earlier study overviewed in Chapter One. Open-ended, exploratory questions were developed which sought to facilitate children’s telling of their own stories of their experience of supervised contact and its consequences and meanings for their lives (Hogan & Gilligan, 1997).

The conversational nature of hermeneutic interviewing lends itself well to narrative approaches, hence the stance, tone and commitment to open ended and in-depth questions that underpin narrative inquiry played a significant role in developing the interview guide and in shaping the process of the interview itself. The guide was arranged into four sections: experiences and understandings of supervised contact, experiences of legal decision-making processes, views of having a say and advice to parents, lawyers, CCS and judges about children having a say. Given that an underlying interest in the study is with authorising children’s voices, I sought to situate the children in a way that privileged their experience before introducing and positioning the research focus.

5.7.3 The Interview Setting

All interviews took place at the CCS or in the homes of the children, in a space that provided reasonable privacy whilst maintaining full visibility of myself and the child. Unless families or children requested that interviews take place in the home, my preference and that of the partner organisation was for interviews to take place at the CCS. This was for several reasons. First, the children had met and were familiar with caseworkers, and caseworkers could introduce me to the children. Second, the fraught nature of the circumstances of the families involved in the study elevated concerns about the safety of the children and my own safety. Several children and their resident parents were the subject of AVOs and the CCS provided relative security and a familiar surrounding for the children. Thirdly, previous experience of interviewing children in
their homes suggested that children often worry about parents hearing what they might say.

Having said this, two families requested that the interviews take place in their homes. The first request was made on the grounds that the resident parent did not want interviews to take place before or after contact, but at the same time was not in a position to travel the distance to the contact centre for the interviews. The second parent was uncomfortable and unhappy with the staff at one of the CCSs and requested the interview take place in her home.

Upon reflection, there were benefits and limitations in both settings. Both CCSs were located in old, comfortable weatherboard homes. Buildings were secured at both entrances, and once children were inside, the interior of the house was comfortable and relaxed, and not too different to that of visiting a friend or family member. In both buildings, the kitchen sat alongside a comfortable lounge room scattered with toys, and looking out over a back garden. Interviews took place in small, but comfortable rooms, with access to a small lounge room usually used for debriefing and to the hallway leading back to the kitchen and main lounge, where contacts took place. On the other hand, in the interviews undertaken in the family homes, children appeared relaxed and comfortable in their own spaces and their parents, in most interviews, maintained a comfortable distance in adjoining rooms, thus assuring the children a sense of their presence, while at the same time affording them a large degree of privacy. Only in one case did a step-parent continue to stand outside an open window, only to walk away when I would glance over at the window. The child in this interview was aware of the presence of the step-parent and would pause until she had moved away.

5.7.4 The Interview Structure

Interviews began with children talking about their families – their favourite activities, games, toys, music, and computer games as well as about important people in their lives, their relationship to those people and the favourite activities or interests of those people. These conversations were highly informal, and took as a starting point anything
or anyone the child showed an interest in. Most children used bear stickers, depicting old, young, male, female, big and small bears with different personalities and demonstrating different feelings to describe their wider families, their attachments to various family members and their understanding of why their parents had separated. From here, children were asked to tell a story about supervised contact or to draw a picture of the CCS in order that their experiences of contact and the related meanings they attached to those experiences emerged before research questions were introduced. Discussion then moved to exploration of their experiences of supervised contact – what has been helpful, what has been difficult, whether it is something they would like more or less of. Children were also asked their views on the actual contact centre, the staff and the activities that were available to them during their visits.

The focus of the interviews then shifted from children’s experiences of supervised contact towards exploring their understanding and experience of family law decision making. In particular, discussion focused on the decision making that had taken place that had resulted in them attending supervised contact. Following on from this discussion, focus turned to the question of ‘what is having a say?’ Drawing on Nigel Thomas and Claire O’ Kane’s (2000) work exploring children’s participation in decisions when they are looked after, three decision-making activities were adapted to enable exploration of children’s views of what decisions are important to them, who the most important people are in making those decisions and what aspects of making decisions is important to each child.

In order to explore the question ‘what is having a say?’ in family law decision making, it was necessary to discuss a few preliminary concepts with the children. This was considered important because the question of ‘what is having a say?’ immediately raises the question ‘having a say in what?’ The first activity was to complete a decision-making grid, which involved discussing with the children the kinds of decisions they took part in, what were important decisions in their everyday lives and who made those decisions for them.

Broad discussion about decisions regarding clothing (what I wear), food (what I eat), activities (what I do), friends (who I see, how often and if/when I have sleepovers) and
family then took place. Then children were invited to identify which people were involved in making these decisions. Most commonly, children nominated their residential parent, followed by contact parents, school teachers, the supervised contact staff and the Family Court. During this discussion, the decisions and the names of those people identified as making those decisions were written onto flash cards. Flash cards with labels from other children listing decisions, such as having friend over, watching TV, what to have for dinner, who the child sees and when, were then shown to the child. Children were invited to add their own decisions to existing decisions set out on the flash cards. If a child wanted to add another decision, blank flash cards were filled in. The most important decisions were then placed horizontally across the top of a grid and the adults involved in those decisions were placed vertically down the left-hand side of the grid.

We then examined the level of influence that children considered they had in making those decisions. Children nominated how much say they had with particular people in making decisions. Three flash cards, a green square labelled ‘lots of say’, a red circle labelled ‘some say’ and a yellow triangle labelled ‘no say’ were then placed in corresponding boxes to complete the grid. Children were then asked questions about the grid, including:

- How do you feel when you look at this chart?
- Is this decision here OK with you?
- What does this say is important to you?

In the second activity, I took the important decisions identified as the basis for further discussion about the weight and importance the child attached to that decision. For very young children, this activity took the form of labelling a cup (i.e. seeing Mum, seeing Dad) and filling the cup with up to ten lollies. For others, the activity took place by indicating the importance of the decision on a picture of a ladder with ten rungs.

The third activity built on the first and second activities. Having explored children’s understanding of important decisions, and who was involved in making those decisions,
the interview turned to explore two further questions: what is a decision and what are important aspects of decision making.

Children were invited to consider a number of statements about decision making and whether these statements represented something that was an important aspect of having a say. In other words, the emphasis in the interview shifted to what mattered most to the children about having a say. The nine aspects of decision making identified by Thomas and O’Kane (2000) were introduced and discussed:

- To be listened to
- To let me have my say
- To be supported
- To get what I want
- To find out what is going on
- To be given choices
- To have time to think about things
- For adults not to pressurise me
- For adults to make good decisions

Children were then invited to place the decision flash cards into a triangle, placing what they thought to be the most important aspects at the top of the triangle and the least towards the bottom. The interview concluded with an invitation to the child to provide advice to other kids, parents, lawyers and staff at supervised contact centres. I also asked children for any feedback about what was good and not so good about meeting me, and what I should change to make the interview approach better for other children.

Although the four general themes identified in the interview guide enabled me to cover all of the aspects of the research question, each interview had a unique focus based upon the issues most salient to each child, and not all questions included in the guide were used. At all stages of the study I sought to allow the child the opportunity to raise questions and issues. While this often led to many wider-ranging discussions, including computer games, the latest ‘best’ music and CDs, nightmares and other things important to the children at the time, I considered that it allowed for the child to explore issues and tell me stories in a safe environment, as well as conveying to the child my interest and
curiosity in their stories. Most important to the process, however, was that the interview remained open to the experiences of the children. Integral to the interview was facilitating a process whereby both the children and I could continue to ask questions. As Gadamer (1975) suggests, the art of keeping the interview open is to keep asking questions. The extent to which interviews achieved this openness and truly invited the children to ask me questions in ways that might overcome the power imbalance between the children and me is discussed further in Chapter Seven.

Once the interview was finished, I gave the children a small gift. While opinions differ on the desirability of giving children gifts, with some suggestion these can be seen as inducements, I wanted to convey to children I had valued their decision to participate and that their participation was essential to the success of the research (Alderson, 1995; O’Kane, 2000). In order to avoid any overtones or messages of inducement, the presents were only given to children at the conclusion of the interview and children did not know that they would be given a gift. I did, however, contact the resident parent to find out what the child was interested in so that the gift would be something that the child liked and enjoyed. Comments from all the children indicated that the gift was something that they appreciated.

5.8 Approach to Data Analysis

All interviews were taped on a tape recorder. At the end of every interview I made case notes recording my initial impressions and thoughts. In addition, I listened to the tapes following each interview. Given the interviews involved a three-hour drive home, I was afforded a good opportunity to reflect upon each interview. During that time, I also voice recorded my own reflections, including when things did not go well, misunderstandings and the times when I perceived that my own ability to engage with the children was lacking.

I found the tapes to be invaluable in allowing me to return to the interviews and to be reminded of each conversation, including the nuances, silences and idiosyncratic responses that are sometimes lost in the process of transcription. Later, as Sacks (1992)
has pointed out, it is these responses, rather than the single, isolated phrases that allowed me to make sense of conversations:

Having available for any given utterance other utterances around it, is extremely important for determining what was said. If you have available only the snatch of talk that you’re now transcribing, you’re in tough shape for determining what it is. (p.729)

In this way, both the tapes and transcripts became the basis for analysis of the conversations that took place with the children.

### 5.8.1 Transcription

All interviews were transcribed verbatim by me. Each interview was listened to at least twice to ensure the accuracy of the transcription. Tapes were filed away in a locked space. The names of every child were changed and I chose pseudonyms in order to protect children’s anonymity. Given the small number of children involved in the study and the fact that the research took place in two relatively small regional communities, the ages of children have not been included in the reporting and analysis of the children’s narratives in the following chapter.

### 5.8.2 Responding to the Text

The process of transcribing both the interviews and my own responses, initiated an ongoing process of listening to and responding to the interview – both to what the child was saying to me and my own response to the child. As I have outlined in Chapter Four, adopting a hermeneutic approach requires engagement of the prejudices and assumptions that I bring to the interpretive task. An important aspect of my early readings was also to identify the times when my actions undermined or shut down the conversation with children, thus creating barriers to understanding, as well as the times when they made understanding possible. After completing transcripts, I undertook
multiple re-readings of the transcripts, adding my own comments and reflections in the margin for later analysis.

Themes were identified, shaped, and added to and once interviews were completed, I sought to identify the final themes for discussion and analysis. In this way, the early analysis resembled a grounded theory approach in that I wanted to understand the experiences of the children in a rigorous and detailed manner in an iterative process. Grounded theory is a process whereby the interpreter becomes ‘grounded’ in the data and thereby develops richer concepts and models of how the experiences of the participants relate to the theoretical models underpinning the study (Ryan & Berghard, 2003). Once transcripts were completed, I began the process of highlighting key underlying themes and phrases, even if they only made what Sandelowski (1995, p. 373) describes as ‘some as yet inchoate sense’.

Engaging in an iterative process of close and repetitive readings of transcripts, listening to interviews, contemplating the narratives in light of the research questions and reflecting on the conditions created for the children’s participation in this study generated a myriad of ideas. This back-and-forth of conjecture and affirmation yielded the constituent parts or thematic development of a number of meanings linked to children’s involvement in decision making as my attention moved between the detail and context of the children’s narratives. Within this process, the mutual positing of concepts provided me with a ‘bridgehead’ to link these themes to conceptions of children’s participation (Dortins, 2002; Kögler, 1999; Love, 1994).

This is the crux of the critical hermeneutic circle, whereby the explication of the children’s understanding and experience of having a say required that I first lose myself in each of the children’s differing narratives and context, in order to gain distance from my own assumptions and to see the otherness of my own context. This reciprocal and reiterative process allowed for the emergence of a number of ‘conceptual points of reference’ from the narratives of the children which have come together in a tentative, loosely formed conceptual framework from which I report the findings of the study. These key themes form the basis of reporting the narratives of the children in the following chapter, Chapter Six.
5.9 Chapter Summary

In this chapter I have outlined the methodological and ethical implications of adopting a critical hermeneutic approach for the research process. I have sought to do this in two ways. First, I have provided a description of the procedural aspects of the study. Second, in an attempt to avoid monological and reductionist approaches to the reporting of the research methods, I have discussed the interpretive choices made in relation to the planning of the study. I have done this in an attempt to shed light on the dialectical relationship between the knowledge produced about the ways in which family law recognises children and what they have to say, and the children’s stories about their experiences and views of having a say. In doing so, I have sought to report the research methods in a way that is consistent with Lincoln and Cannella’s (2004) call to researchers to open up for examination and questioning the methodological and ethical decisions that inform and shape their research:

…engage in a very public reconceptualisation and reclaiming of research as construct … [whereby] the ontological and epistemological goals of research as construct and the resultant questions that are investigated … be re-examined, reconceived and renamed. (p.14)

At the heart of the critical hermeneutic approach informing this study is the idea that children, as partners in a dialogue, are not passive in the face of their participation, but actively shape and influence the research process as well as more nuanced understandings of their participation in family law decision making. The study now introduces the narratives of the children invited to participate in the study.
Chapter 6: What Did the Children Have to Say?

In previous chapters, I have suggested that children have been largely excluded in family law decision-making that instead has privileged the voices of adults and, in so doing, produced authoritative knowledge on the children’s behalf. This study has sought to redress this imbalance by inviting children to talk about their views and experiences of ‘having a say’ when their parents separate and divorce, in particular, in relation to their contact with a parent at a CCS. While inviting children to participate in research includes its own methodological and ethical challenges, as Chapters Four and Five have outlined, the participation of children in this study is intrinsic to leading us to more nuanced understandings of their participation and, importantly, to differentiated responses to recognising children, and what they have to say (Hill et al., 2006).

The purpose of this chapter is twofold. First, it introduces the narratives of the thirteen children interviewed in this study in a way that allows the reader to engage with the exact words of the children in the dialogical encounter of the research interviews. Second, it links the children’s narratives with broader research narratives so as to begin to make sense of what they had to say. As part of this analysis, I attempt to capture the rich insights evident in the narratives of the children and explore how such insights confer significance on the way children participate in decision-making processes more broadly. As Fielding (2000) says, the very act of children speaking encourages epistemic agency, that is, it encourages them to take responsibility for their own thinking and to develop a capacity to understand and engage in the production of knowledge about them.

The chapter begins by setting the context of the children’s involvement in the study, that is, by introducing their narratives concerning their views and experiences of supervised contact and supervised changeover at the CCS. For these children, their understanding and experience of family law decision-making was intimately connected to having a say about supervised contact and changeover, and this preliminary discussion is important for highlighting the local and situated nature of their participation. While the discussion
in the early section of the chapter may present as somewhat disconnected from the focus of this study, the children’s stories about supervised contact are critical for beginning the journey with them into the complexity of decision-making in the current context of their lives. Next, the chapter introduces four key themes in the narratives of the children in relation to different aspects of their participation in family law decision-making: the experience of having a say, views on having a say, perspectives on whether children want a say and how having a say (or not having a say) made the children feel. The chapter concludes with some observations about the children’s experiences of supervised contact and the impact that such an experience had on their views of having a say.

Exploring children’s participation in decision-making from the perspective of children who, at the time of the interviews, were living and experiencing the ‘pointy end’ of family law decision-making allows me, to a limited extent, to ‘stand in the shoes of children’ as I seek to understand how they experience a process of decision-making that determines such important outcomes as where, when and under what circumstances contact with a parent is to take place (Smart, 2002, p. 318). At the same time, standing with children does not presuppose any ability or authority on my part to step in and speak for children, but rather, concedes the limits of my knowledge in attempting to represent their views and experiences in their own language. Nevertheless, by allowing me, the researcher, to listen and learn generates some potential to gain insight into children’s understanding of their position in relation to the decision-making processes taking place around them. For this reason, the discussion, at times, moves between the narratives of the children themselves and my own voice as the narrator endeavouring to grasp the ways in which the children make and acquire meaning about their involvement in decision-making and how to interpret this in relation to prevailing discourses of children’s participation.

Finally, discussion in this chapter seeks to ensure the children’s voices remain central in answering the research question. As such, they should not be treated as fixed or unchanging accounts of the children’s stories but rather, as ‘a device to help to see some of the features of, and difference between, the accounts’ (Smart, 2006a, p. 158). While acknowledging the risk that a thematic account of the children’s experience poses for
homogenising the voices of the children who, for all intents and purposes, share only the experience of supervised contact in common, the following analysis attempts to take into account the differences that existed within and between the children’s accounts, differences which in turn reflected the diversity of family and life experiences which the children brought to this study.

6.1 Setting the Context: Children’s Views of Supervised Contact

This study differs from previous research that has interviewed children in supervised contact in that it focuses primarily on their experience of decision-making and the meaning and importance they attach to it. The following section sets the context for the children’s views and experiences of decision-making by outlining their views and experiences about the ‘good’ and ‘difficult’ things concerning supervised contact and changeover for these children.

6.1.1 Good Things about Supervised Contact

Most of the children involved in this study generally enjoyed their experience of supervised contact and appreciated the opportunity it afforded them to see their contact parent. This finding is consistent with research both in Australia and internationally, which has found that children appear satisfied with their experiences of supervised contact at CCSs and were comfortable with supervised changeovers (Gollop, 2008; Ministry of the Attorney General (Ontario) 1994; Sheehan et al., 2005; Sproston et al., 2004; 2004; Strategic Partners, 1998). Of the 13 children interviewed, 11 identified seeing their contact parent at the CCS as being a ‘good thing’ about supervised contact and as something that they wanted. Like many children attending supervised contact, the children in this study expressed a strong desire to spend time with their parent and reported enjoying their contact (Sheehan et al., 2005; Sproston et al., 2004). For example, Sam, who had been visiting his mother for over two years in supervised contact, described how excited he felt on the morning he was going to have supervised contact, because he would be ‘seeing mum, cause we hardly ever see her’. Ellen
described how, on the morning of contact, ‘I feel good, because I am going to see Dad’, while Harry said that the CCS was a ‘good place, because you get to see your dad … and you can have fun with him’.

In addition to seeing their parent, seven children reported a good thing about supervised contact was that it helped them to feel safe during contact visits. These children liked the fact that staff were ‘watching’ their contact parent and so they felt as though they could not be hurt. For example, Harry commented that staff ‘look after you and in case you get hurt, they help you’. Zoe made similar comments, saying ‘just all the people around us I know that they are good and they won’t hurt me’. Finally, Max said a ‘good thing’ about the CCS was he knew his father could not hurt his mother, and so she was safe:

Because Dad can’t see us or what we are talking about or what we are doing and he doesn’t know. He doesn’t know where we live … and because Dad can’t hurt Mum.

A third ‘good’ thing noted by four children was that supervised contact was good for their parents. Children offered a number of reasons why this was so. For Charlie, supervised contact allowed his mother some contact, which he felt was better than no contact at all. He described how his mother had been ‘deeply upset’ when contact had previously been stopped, saying she found no contact at all:

…really hard to go through life without … cause she has always had us … and she only has (older children from previous relationship) now. She gets really upset and stressed and she is like … it helps her well. She is a whole lot better when she gets there because she gets to spend time with us … but she has always been a really good mum … helpful for us, cause I get to see her.

Max thought supervised contact was good, saying that ‘it makes me feel happy and in a good happy mood’. He then went on to say:

Mum and Dad don’t get into fights and um and another thing is … Dad can not hurt Mum’s feelings.
Zoe thought that supervised contact helped assure her mother that she was safe while in the presence of her father:

It is just that I know my mum is feeling comfortable about it

*Why do you think she is feeling comfortable about it?*

Because she doesn’t want us to get hurt or anything.

Two children thought supervised contact had been helpful for both parents because they had less opportunity to fight. As Rebecca observed: ‘Mum and Dad don’t have fights anymore because they don’t have to see each other more’. One child, Sallie, commented that supervised contact had also been helpful in improving her relationship with her contact mother:

Here [at the CCS] … she won’t call me anything like she did, cause she…..when she got mad or upset … but she has been pretty good lately. She hasn’t called me anything for ages …

Seven children said attending the CCS for supervised contact was fun. For example, when asked if CCSs are ‘good places for kids’, Sam replied:

It is really fun – they have little bead things and you make a necklace with your name on it.

Most children attending the CCS described how they enjoyed engaging in a range of activities provided for them, including craft, painting and playing with toys. Several children also described how they had enjoyed cooking with their contact parent. For example, Charlie said:

… my mum really likes it when I cook for her cause I used to cook like once a week and she really liked my cooking … cause on her birthday I cooked for her.

Several of the older children said that they enjoyed going on excursions, including down to the jetty for a swim. John said he enjoyed going to the beach and having a swim, while Sam described a good thing about the CCS was that the staff sometimes
took them to ‘get an ice-cream … go to the jetty, have a swim if we are allowed, we go for a walk up to the muttonbar … like up along the jetty … we look for fish’. Sallie described how she enjoyed going to the park and going to the shops to show her mother what she might like for Christmas. In addition to activities taking place at the CCS, Rebecca said she enjoyed meeting different people during contact, including both staff and other children.

Of the eight children who commented, all spoke positively about the CCS staff. Children said that they felt the staff provided good support and care for all children attending the centre. Indeed, Rebecca nominated one of the staff members as one of four important people in her life. When asked about what it was that made this staff member important, Rebecca replied: ‘she takes good care of me’. Sam said that staff were ‘just really nice’ and that they were not too intrusive during contact with his mother. This was important to Sam as he thought that he was in the process of moving towards unsupervised contact and regular contact with his mother at her home.

Zoe liked the fact that staff provided her with information about the next contact:

*And how does he (case worker) help you when you come here?*

When it is over, he talks to us in the room.

*Is that good to have him talk to you?*

Some of the time ... he tells us how long we are going to be staying here next time.

*Do you think kids should have information about what is going on?*

Yes … because they like knowing other stuff that parents like to know.

Finally, two children commented on the ways in which staff helped parents during contact. For example, Ben described how he had noticed that one of the staff was ‘very good at helping all the other kids’ by supporting their parents in contact:

*He was very fun, and I still remember him – I don’t remember anyone else.*

*What would you say he did well?*

He was very good at helping all the other kids who used to come here … and he helped them with their dads as well.
Charlie described how staff helped his mum during contact by keeping his younger siblings occupied so that each child could have one-to-one time with his mother:

So one is playing with the race car track and they want mum to come play with them while she is trying to play with someone else, they like talk to them, try to say Mum will come and see them later, she is with the other boys right now, so why don’t you let them and you do that by yourself and then the other boys will have it by themselves – do that sort of thing.

The narratives of the children in relation to ‘good things’ about CCS are consistent with findings in other studies which report that the majority of children enjoyed some aspect of supervised contact and generally felt safe and well supported by CCS staff (Ministry of the Attorney-General (Ontario), 1994; Sheehan et al, 2005; Sproston, Woodfield & Tisdall, 2004). What the children had to say about CCS and supervised contact reveals a palpable pragmatism about the opportunity supervised contact provided for them to see their (contact) parent in a safe and supported environment. Fun activities and excursions and feeling safe and supported by staff were of central relevance to the children in describing their experiences. Several children spoke about the importance of the CCS staff in their lives and the role they played in facilitating their contact and providing them with information about future contacts.

6.1.2 Difficult Things about Supervised Contact

The majority of children also identified a number of issues that made supervised contact difficult. While many of the children were pragmatic about the benefits of supervised contact, especially seeing their contact parent, such pragmatism did not prevent the experience from being a profoundly conflicted time in their lives, with the changes accompanied by a sense of sadness and loss. Despite the near consensus from children that they looked forward to and enjoyed seeing their parent, at the same time many of the children said the experience made them feel sad, that they missed seeing their contact parent or that contact made their parents sad. Others did not make specific reference to how they felt, but conveyed their sadness through the choice of bear
stickers to depict themselves as sad, lonely or crying, and through facial expressions, pauses and silences. A number of factors further contributed to the sense of sadness and loss conveyed by the children. The first and most basic was the *loss of regular contact* with one of their parents, as well as with other siblings, wider family members and their pets. For example, when asked what she would like to have known about what it is like for kids starting out in supervised contact, Zoe said that adults should know that attending supervised contact can be upsetting for kids:

*What would you have liked to have known?*

Well that it’s OK … that it’s kinda fun sometimes and you get to play with new things. They should have known that it might make me a little bit upset if I was just seeing my Dad all the time here.

Charlie told me how much he missed seeing his mother, and that he had sometimes ‘wagged’ school to visit her due to the limitations supervised contact placed on the time he was able to spend with his mother. He described how for the past two and half years he had seen his mother for two hours every second week which, in effect, meant that he had spent two and half days each year with her:

I still figured out that in a year we get [to see Mum] approximately two and half days a year.

In addition, Charlie described how contact was made even more difficult for him by the fact that he had to share it with his siblings, thus elevating his sense of how little time he felt he had with his mother:

Because we don’t even have enough time for the contact centre for all of us, like even have an hour with Mum, so we all have to squish in … squish and Mum gets really frustrated because we are all calling at her and the siblings are really immature so they get really annoyed with Mum and yell at her and she gets really upset when that happens.
Ben also described how he did not get enough contact time with his mother:

We don’t get enough time. There is not much time at all. We get only two hours, so we practically get there … have like a five minute swim … get day and get back … so it is really fast.

Many children also wanted to see their contact parent in their own home, and missed the privacy and continuity of unsupervised time with a parent. John, who also shared contact with his siblings, described how he would like to see his mother ‘just alone’ at her house, and also to spend time with ‘other people we have not seen’ since he began supervised contact.

In addition to the loss of contact with his mother, Charlie also described how he had lost touch with wider members of his mother’s family:

I haven’t seen my nana in months or anything, and she is really sick my mum tells me … I haven’t seen my niece (step sister’s young child) for very long at all … she knows my name already.

Sallie described how she missed seeing her brother Liam who lived with her contact mother:

We lost Liam. He was living with us and all of a sudden he had to go.  
So do you think it would have been good if you had been able to say that you wanted to stay together with Liam?
Yeah, because well Liam went from having … well he had me. We used to do stuff with Liam and the dogs.

Sallie only saw her brother at school or irregularly on weekends, and identified a number of difficulties for their relationship that had flowed from that:

I only see him on every couple of weekends and at school sometimes – but he comes and talks with me but he is always with his friends, and his friends be stupid and stuff.
Sallie also mentioned that her parents’ separation meant she had lost contact with her pets. She told me she hadn’t seen her cat ‘in ages’ because the cat had gone to live with her contact mother, while she had been left in charge of looking after the dogs at her father’s house. She spoke about how the animals also missed her brother after he had moved in with their mother:

   And all the dogs, the dogs you know, they were all sad and they just moped around the house.

In listening to what the children had to say in relation to the ‘difficult’ things about supervised contact, it is clear their experiences were profoundly shaped by a sense of grief and loss. There is now extensive evidence that indicates the experiences of these children is similar to many children who experience parental separation. For example, Kelly and Emery (2003) report that while painful memories and experiences may be a ‘lasting residue’ of the process of separation and divorce for children, there are a number of factors that contribute to the sense of grief and loss children feel when their parents separate (p. 359). These include spending less time with parents, wanting to spend more time with their contact parent and with wider family members, including grandparents and cousins and loss of contact with pets.

It has been widely reported elsewhere that the initial period following parental separation is stressful for the vast majority of children and young people (Bagshaw, 2006; Graham, 2004; Kelly & Emery, 2003; Pryor & Rodgers, 2001). This body of research has identified a number of key relevant and contributing factors, including the existence of conflict or violence, parental adjustment, the stability of economic resources and the re-partnering of one or both parents, and the physical upheaval that results for children who must live between two households, adapt to different guides, rules and spaces, accommodate the absence of the other parent and in some cases the presence of a step-family. Such responses have been conceptualised in terms of grief responses, although these are neither inevitable nor universal (Graham, 2004). In this study, not only did the children refer to the loss of contact with their non-resident parent, but also siblings, wider families, social support networks and pets. In this way, what the children had to say is also consistent with the wider body of research literature
which reports that children experience economic loss and hardship, loss of community, familiar neighbourhood, sense of self identity, loss of idealisation of parent figures and the mother/father relationship, loss of symbols and traditions and the continuity of the whole or intact family (Bagshaw et al., 2006).

However, less well known is the extent to which children’s experiences of sadness and loss are influenced by their sense of being able to influence or change the events taking place around them, in particular, by participating in decision-making processes. The close connection between the grief identified in the children’s narratives and of their participation in decision-making processes was particularly evident in the way the children frequently segued between accounts of supervised contact and of their involvement in decision-making. Thus, conversation about the emotional difficulties that were part of supervised contact were often expressed in relation to their unhappiness with existing contact arrangements. Therefore, while many children reported a variety of good things about supervised contact, this did not necessarily mean that they wanted the supervised contact to continue or that they were happy with the current arrangements. Of the ten children who commented on the question of whether they wanted supervision to continue, eight expressed dissatisfaction with the current contact arrangements and wanted them to stop. For example, John wanted unsupervised contact with his mother, saying that when he started to see his mother at the CCS it had made him feel sad:

Do you know why I put a crying picture there?

*Why?*

Because I can’t see … because I have to see mum here.

*So you don’t want to see mum here … that makes you feel like crying. What about if you didn’t see Mum here, what would your picture look like?*

I can’t find it (bear sticker) … Happy! I am doing a handstand!

Charlie described how he wanted unsupervised contact with his mother just as he had a few years earlier and supervised contact with her just made him feel stressed and unhappy:
I was extremely happy a few years ago. That was when I was like a lot happier and I wasn’t as stressed. I get stressed a lot … um I used to have a week with my Dad and a week with my mum and I liked that a lot better cause um … when we have a long time, Mum always like does special things like, Mum doesn’t have to work and she has all this time for us.

Charlie became quite upset when he described how, as a result of only seeing his mother in supervised contact, he had little or no contact with his step-siblings and that he felt strongly that he should:

Yeah well I am thirteen. I don’t think that I should have to tell them (resident parents) about who calls me. She is my sister … they just say she’s just your half-sister because they are not her dad. I get greatly upset when they say that.

Two children were highly ambivalent about seeing their parent at all, regardless of whether contact was supervised or otherwise. In Rebecca’s case, it was not evident whether she wanted supervised contact in order to see her father, or whether in fact she enjoyed visiting the CCS and seeing the staff, who she described as caring and fun. This was apparent early in the interview, when Rebecca described supervised contact as ‘really, really, really fun!’ but said that she did not like seeing her father:

I don’t like seeing my father… I don’t like seeing my father. I feel very, very happy …[ about coming to the CCS] … I feel happy but I don’t like Dad.

Rebecca’s ambivalence was heightened by her perception that her mother did not want her to visit her father at all. This was evident later in the interview, as she moved between saying she did not want any contact at all with her father and saying that she wanted to see him, but only under supervised contact arrangements, but she could not tell anyone this. For example, after Rebecca described how she did enjoy seeing her dad at the CCS and how she liked his new partner, I observed:

_It sounds like you want to see your dad here – would that be fair to say?_

Yeah … I want to see him here every weekend.
Despite this ambivalence about seeing her father, Rebecca was adamant that she did not want unsupervised contact with her father:

I like seeing him at the contact centre, but I don’t like it when it … without … without people watching.

Ben was also ambivalent about seeing his father, stating that although he liked seeing him at supervised contact, he did not want to see him unless the contact was supervised, his main worry being that his father might hurt him. Ben was attending supervised contact because of disclosures made against his father of sexual abuse, and although he did not refer to any abuse in the interview, he was quite clear about his reasons for not wanting unsupervised contact ‘if they (staff) weren’t here Dad might hurt me’.

Of the children who were unhappy with their contact arrangements, all felt they had no choice and no power to change their circumstances, particularly in relation to when and whether they had supervised contact. Like the children interviewed in Scotland, these children felt that they had little or no control over whether contact would continue, and if it did, for how long and when (Sproston et al., 2004). For example, Harry said one of the hardest things was that ‘other people decide when I see my mum’. When asked about what things could make the transition back from supervised to unsupervised contact difficult, Ellen said ‘if Mum makes all the decisions’. Charlie described how he did not enjoy supervised contact when he was ‘forced to go’:

I’ve got really important things to do and if I am forced to do it, then I don’t have a good time there anyway. It is kind of like school. If you don’t want to do it, you aren’t going to learn anything. If the person doesn’t want to go, they are not going to be communicative and not communicate.

Another example of the perceived sense of powerlessness experienced by children was when children said they had been referred to counsellors without any say or choice in the decision. This is captured by Sallie, who, when asked to offer advice, said:

Well tell them to be [ready] to be pushed around and … um … having to do stuff like going to counselling. I had to go to the school ones.
Sallie’s situation highlights the ‘Catch-22’ predicament children sometimes found themselves in where they felt forced to talk to people they did not want to talk to, or did not understand why they were talking to them, while at the same time perceiving that they would have liked to talk to someone they trusted, but they did not know who (Smart et al., 2001).

While most children felt they had no choice or control, Charlie described how his resident father had allowed him to make the choice between attending a regular weekend activity, which Charlie enjoyed and considered an important part of his life, and seeing his mother for supervised contact. However, as Charlie was quick to point out, attending the weekend activity, while an example of a choice given to him, was an instance of a difficult choice as it also meant he could not see his mother for a month:

I do (weekend activity), so I do a lot of going away. So sometimes I have to choose between my mum and going away. I had the chance to go to (the activity) or Mum’s and contact … but it (the activity) is really important to me and I don’t want to miss anything.

Four children said that one difficult aspect of supervised contact was they did not like being supervised. This finding was consistent with the experiences of Canadian children (Ministry of the Attorney General (Ontario), 1994). The most consistently cited reason was that it made children feel uncomfortable and inhibited in what they felt they could say to their parent. For example, Max described how he was unable to say what he wanted to say to his mother because of the presence of staff:

It is kind of… we can’t say what we want to say. There is … we always, like, want to talk to my mother. I have to go away.

John said that he ‘just doesn’t feel comfortable’ being supervised, nor did he consider supervision was necessary:

Well, I don’t think it is fair that she … they don’t trust us and they reckon we need to be supervised. I think we are old enough to look after ourselves. I
liked it better when we had it week by week, cause then we could have her all alone, instead of contact people.

Ellen mentioned on two occasions that a difficult thing about supervised contact is that ‘they watch us nearly all the time’. Zoe said that being watched was upsetting:

I can’t see my Dad without the other people
And how does that feel?
A little bit upsetting sometimes, but sometimes it is alright.

Two children spoke with sadness and sometimes anger about the disruption attending supervised contact meant for their own lives, including missed opportunities to attend friends’ parties, sleepovers or to engage in regular weekend activities. For these children, supervised contact could be disruptive and affected their everyday lives, in particular, weekend activities:

Like (when) I stay with friends. I have to leave a lot earlier than I would or if there is a movie for the day, I can’t stay all day, or I can’t get there till late.

Missing some stuff like parties and stuff.

But the bad thing about it … I can’t see my best friend.

…some of the kids who come here all afternoon tell me they don’t like missing out on parties.

Harry said that the major change that had taken place as a result of supervised contact was that he and his mother had ‘changed to a new house’. Harry also found contact difficult because the contact centre was so far away and he felt it took a long time to get there. Harry’s concern signals an important reminder of how different issues, such as estimations about travelling time to contact for children in rural areas, loom large for some children who can travel for several hours to have supervised contact with a parent.
Finally, three of the older children said that they thought contact was boring and that there was not much to do:

At the beginning I found it boring, cause there is not much to do and all of it was for little kids. It is better when we went on excursions, cause well at the contact centre there is not as much to do as at the jetty.

One of the most obvious features of the children’s narratives was the deep ambivalence conveyed by the children about the contact arrangements in place at the time of the interviews. This was evident particularly in the tension expressed by children between enjoying visiting their parent and the sense of sadness, anger, frustration and loss that accompanied their contact arrangements. Children were pragmatic about accepting supervised contact as holding out benefits for them, most especially the opportunity to see their parent in a safe and fun environment, but their pragmatism did not prevent their experience of supervised contact from being a reminder of the profound loss in regard to parental and familial relationships.

The conversations with the children about their experiences of supervised contact were therefore critical to this study because they point to the complex and unpredictable realities of children’s lives which, in turn, shape the meaning and importance they place on being involved in decision-making. From these conversations, it is possible to see that the landscape of decision-making can not be easily identified or described as consisting in a self-contained or encapsulated entity. As critical hermeneutics maintains, meaning making cannot be ‘quarantined from where one stands or is placed in the web of social reality’ (Kinchloe, 2005, p.342).

It is from within this context of supervised contact that further conversation with children about having a say in family law decision-making took place. Providing the children with an opportunity to have a say about their experiences of supervised contact helped then to facilitate the subsequent shift in the focus of the interview to their involvement in decision-making.
6.2 Key Themes in the Children’s Narratives about Having a Say

The core interest of this research is whether and how children, and what they have to say, are recognised in family law decision-making. The issue of ‘having a say’ was clearly important for the children in this study. As I have mentioned, not only were the children in this study the subject of family law disputes for a number of years, but the disputes were ongoing at the time of the interview. Consequently, when I talked with the children about having a say, they were at once reflecting backwards as well as anticipating any future role they might play in the ongoing decision-making processes.

In addition, the ‘in-between’ space that supervised contact represented was a highly uncertain and emotionally charged place for children to be reflecting on the meaning and importance of decision-making processes and thus added many layers of complexity to the children’s stories.

The following analysis organises the children’s narratives into four broad themes. Each theme focuses on different aspects of children having a say and, consequently, of their participation in family law decision-making. The first theme centres discussion around the children’s experience of having a say. The second theme centres discussion around children’s views on having a say and attempts to bring into relief the children’s own vision of what having a say means, that is, their interpretation of what participation in decision-making is and what it involves. The third theme draws together discussion in the interviews in relation to the question of did children want a say? This theme builds on the findings of an earlier study (overviewed in Chapter One) which suggest children’s narratives move between wanting a say and not wanting a say in relation to decisions determining contact and residence. This theme sheds further light on the complex and ambivalent feelings that sometimes arise for children when they are invited to have a say. The fourth theme is centred on children’s narratives about how having a say (or not having a say) made children feel. Discussion in this section necessarily links children’s feelings about having a say with their experiences of supervised contact.
6.2.1 Children’s Experiences of Having a Say

When children were asked about their own experiences of having a say about the decision to attend supervised contact, almost every child (12) reported that the decision had been made without their input or involvement. Indeed, several children noted that they had not even known that a decision was being made, as Sallie’s comments reveal:

… cause I knew they were at court and that Dad was all you know, nervy for a week and we had to sort of tip toe around because we didn’t want him to get mad and stuff, and I didn’t know the day. I forgot. But then I knew because when Dad got up he was all stroppy and had to avoid me when he was sad and … he was a bit sad so I just figured out it was. Then Dad got dressed up …its a bit … so I figured it out.

Charlie was adamant that he had not had a say in the decision-making in the two and a half years he had been attending supervised contact with his mother:

I just want to think about that [the Court ordering supervised contact] and whether you feel like you had a say in that as well?

Well I didn’t really … um I didn’t have any say in at all. I don’t have much say in anything that I do, apart from the things I choose to do, no say in anything anymore practically. I think I should have lots of say, because it is my life. I am [age] now, I should get to choose what I do … where I am going.

This situation had persisted for Charlie who felt he continued to have no say about whether he could see his mother or his siblings from the mother’s previous marriage:

Do you have a lot of say about … who you see?

In some things I have no say – so what do I put there?

You can do a bit of both

Right, well I get no say to see my (siblings) or my mum. I can’t just say, go and see them. I think I should have full say about who I see – they are my family – I should be allowed to see them – I do not see niece, I am not allowed to see my siblings – I think I am allowed to see [family member], but not allowed to see [family member] because she sided with my mum – so Dad will not allow me to see her – so I do not think that is fair – so I think I should have all the say in who I see.
Spencer also noted the disparity between his wish to have a say and his experience of not being heard:

*When you moved from Mum’s house ... did you have a say about whether you were able to stay with Mum if you wanted to or to move to Dad’s?*

No.

*Do you think you should have had a say?*

Yes.

*And what would you have said?*

I want to stay with Mum.

*... and so do you want a say if things change again?*

Yes.

These findings are consistent with those of a recent Scottish study exploring children’s expectations and experiences of child contact centres, which found that ‘children did not generally report any sense in which the decision to use a centre was made with their best interests at heart, they uniformly described having little input into decision-making’ (Sproston et al., 2004, p. 89). While all of the children in this study reported that they had not been consulted about their contact arrangements, it is important to recall the low rates of consultation generally with children in relation to contact and residence arrangements (outlined in Chapter One). The findings of this study are significant, however, in that only one child could recall that they had been given a say. The children’s experiences are thus consistent with research which suggests that the more say a child has, the more likely they are to be happy with subsequent decisions (Butler et al., 2002; Smith et al., 2003)

In addition to having little or no say about supervised contact, the children appeared to be unsure about the reasons for particular decisions and procedures taking place around them. Indeed, it was apparent that the children had little or no understanding of the decision-making processes leading up to their visits at the CCS. In all interviews, it was very difficult to engage the children in conversation about legal processes, and while children held strong insights into the implications of the decision-making processes, they knew relatively little about the legal process.
Children’s poor understanding of the legal processes, including the need for them to have contact at the CCS, was evident in a number of ways. First, a number of children were uncertain about the role of various adults in the decision-making processes that had taken place at the time of the interview, as well as impending decision-making processes. Charlie was unsure whether he had seen a lawyer or a social worker before the decision was made, and in any case was quite dismissive of the role they had played, in hearing what he had to say:

They [unsure if lawyer or social worker] didn’t really do anything cause I think all of us said they wanted more time with Mum – this is many years ago – we haven’t spoken to anyone – three years at least.

While the direct involvement of children with lawyers is generally low, as outlined in Chapter Two, the majority of children (12) had been appointed separate representatives due to the highly conflicted nature of their parent’s separation, as well as allegations of abuse and neglect. However, there is little evidence that the appointment of the lawyer improved children’s understandings about their parent’s separation and divorce, the supervised contact arrangements or, indeed, about the role of the lawyer in their own legal proceedings.

While almost all the children in the study (10) had been appointed a lawyer, only two could recall talking with the lawyer. Rebecca knew that ‘her lawyer’s name was Stephen, that ‘he had glasses’ and that he ‘always listens to me’, although she was not clear about whether she had spoken to him about her wishes regarding contact with her father. This was despite later articulating very strong wishes about whether contact with her father should continue. Indeed, Rebecca inferred that she would have liked further opportunity to talk about the contact arrangements with her father in the way we were discussing it in the research interview:

*I see ... did you ... when he was talking with you about coming [to supervised contact with Dad] ... did you have any issues?*

I wished that I had lots to tell like this [referring to the interview].
Sallie was the only child in the study who talked with confidence about the role her lawyer might have in bringing her views to the Court. While she considered she had not been heard by her lawyer at the time initial orders for supervised contact were made, she felt more confident she would be heard in the upcoming proceedings which would determine whether contact would change from supervised back to unsupervised contact with her mother:

But this time when they are at Court we do now ... cause they are on for Thursday and me and Liam are going to see our lawyer on Thursday before school.

In addition to the lack of understanding about the role of lawyers, a number of children confused social workers and case workers with lawyers, or had no idea at all of the role various adults had played in supporting them and their families following their parents’ separation. For example, while 14 of the original sample of 17 children had been the subject of a Family Court report, none mentioned that they had spoken with a report writer when asked who they had spoken to. Further, Charlie and Dylan believed that the CCS staff had responsibility for ordering supervised contact to take place at the CCS. Although Charlie was happy with the staff and their role in facilitating contact with his mother, he also thought they had primary responsibility for making contact orders, saying that CCS staff prevented him from having unsupervised contact with his mother:

Well I think they are really good. The people who are there are really good [but] ... because they wouldn’t let us, let Mum drive us anymore. They try to make it difficult.

When asked about his views of attending the CCS, Dylan said:

Well. I don’t really think it is fair, that she ... they don’t trust us and they reckon we need to be supervised. I think we are old enough to look after ourselves.

Dylan’s belief that it was he who was not trusted to have supervised contact with his mother provides an example of the children’s attempts to make sense of the reasons for their attendance at supervised contact when little or no information was made available
to them and little opportunity had arisen to talk with someone whom the child trusted. Given both Charlie and Dylan had attended the CCS for over two years, such an interpretation was clearly detrimental to the children whose piecing together of why they were attending supervised contact was filled with many gaps which contributed to both children appearing quite confused about why they were in supervised contact at all. In addition, such flawed assumptions about the role of supervised contact staff clearly limited staff potential for providing support to children. Dylan’s quote also reveals his belief that his capacity to handle the perceived risk, or at least to play a role in determining how the risk might be managed, was overlooked in decision-making concerning his supervised contact arrangements.

A second and significant reason for children’s poor understanding of the legal process related to the fact that the majority of the children (12) reported they had been given little or no information about what supervised contact was, and did not understand what it meant for them until their first contact visit. Ben revealed that he had initially been bewildered at the idea of seeing his father under such circumstances, and reported that when he was first informed of the decision:

I felt like freaked ... like freaked.

Sallie ended up finding out what supervised contact was through talking about the court orders with friends:

Dad and I had never heard about these centres before and anything but when I told one of my friends, she said oh yeah … I had to go to one of them to see my dad once … yeah and then I found out after ... that a few of my friends actually had to come here a couple of times.

Several children (four) thought they would have liked to be given more information, such as an information package, or had a ‘neutral’ person visit them, and allow them to ask questions so that they could find out information. For example, Ellen said she would have liked someone to come and talk to her about what ‘it all meant’, so that she could have been sure that she knew ‘what was going on’ and that ‘no one is hiding stuff’.
When asked who would be a good person to talk to about their experiences, two of the children nominated me, even though they understood my role as a researcher:

I wanted to know what ‘broke up’ means

OK ... do you think that is something that should be explained to kids?

Mmm [nodding]

And who do you think would be the best person to talk to?

You!

Thirdly, it appeared that some children felt they had no one to talk to about what was happening, let alone to discuss their thoughts about going to supervised contact and whether this was something that they wanted. In contrast to other research, where children reported that key confidants were grandparents and friends, several children commented that they had not spoken with anyone about their feelings and experiences of supervised contact or about current and future arrangements for supervised contact (see Dunn & Deater-Deckard, 2001; Smart et al., 2001). However, this situation appeared to arise from the fact that children did not trust anyone. For example, Charlie informed me that he had only consented to participate in the research on the grounds that no-one would be informed of what he had said.

Sam also described how he had not told anybody in over two years his wishes for the supervised contact to be changed to unsupervised contact:

You said you were happier when you didn’t have supervised contact, did you think you should have had a say about having supervised contact?

Yeah

Did you have a say?

No.

What would you have wanted if you had had a say?

I would have just asked if, Dad, if we could just like have contact out of the contact centre, cause I reckon we are old enough.

Have you told any one this?

No.
In this way, the children’s narratives reveal the isolation experienced by children who attend supervised contact, with children reporting limited opportunities to engage in conversation with parents, decision makers and case workers about these issues. Certainly children felt unable to influence even the most basic issues concerning their supervised contact, such as how often and when contact would take place and how long it would continue. Consequently, children were unlikely to be listened to, to express their views, or to have the opportunity to clarify their understanding of events taking place around them.

The lack of information and consultation are not only significant for bringing to light some of the ways in which children are excluded and marginalised by legal processes. In addition, we see from the children’s narratives that poor information further inhibited their capacity to adjust to the changes that were taking place in their lives, to shape an understanding of what was happening and to anticipate what lay ahead of them. Consequently, children were unable to account for why they were attending supervised contact except in anecdotal, ‘symptomatic’ terms (Robinson & Kellett, 2004). Smart (2003) suggests that children cope far better with family transitions when they have appropriate and meaningful involvement and are helped to understand and participate in the changes:

… ignorance (including partial and partisan information) meant that [children] could not make sense of what was going on around them. In turn, this made children powerless in relation to their parents and sometimes they withdrew. Knowledge and understanding did not necessarily make them happy, but it could give them an emotional and cognitive map of the terrain they occupied. (p.15)

Zoe’s observation that not having information about supervised contact meant she was not even sure if she should have a say is evident in her comment that:

… you don’t even know about the thing … so you don’t know if you should have a say, you don’t even know about it … so then you wouldn’t have information ...
For Sallie, having unreliable or no information contributed to her perceived lack of control over events:

_Would you have liked more information from your lawyer?
Mmm not really, well but … well yea … well what’s going to happen. Cause I always know what Dad and what Mum wants but I never know what is going to happen._

The failure to invite children to speak is significant for a number of reasons. First, while the legislation clearly states that the wishes (now views) of children must be heard in all decision-making processes that concern them, it is clear from the children in this study that this principle was not applied in any tangible way.¹⁶ As the children’s narratives reveal, few children were invited to participate, most were confused about the roles of various adults in the decision-making processes taking place around them, few were able to recall being provided with relevant information about the events and processes taking place and most appeared not to make any connection between the adults they had spoken to and their own sense of whether they had a say in the decision-making processes. The children’s experiences position them strongly outside the ‘participatory sphere’ and when they did speak, it was as an ‘uninvited guest’ in the events taking place around them. Thus children’s stories of participation in decision-making and being able to have a say were told through a different lens and negotiated through different norms to other participants in the decision-making process, and were often spoken in a different language (Cornwall & Coelho, 2007; Alcoff, 1991).

Consequently, the meaning children in this study attached to having a say was not shaped by their experiences of involvement in decision-making per se, but by their marginalisation and exclusion from such participation. This is especially evident in the children’s accounts by their unfamiliarity with the language of participation itself, with

¹⁶ At the time of this study, s 68F(a) stated that the court must consider the ‘children’s wishes’. The _Family Law Amendment (Shared Responsibility) Act 2006_ replaced ‘children’s wishes’ with ‘children’s views’.
their narratives sometimes appearing tentative and uncertain. The following section now turns to report the children’s views and experiences of having a say.

6.2.2 Children Tell Us About Having a Say

An important aspect of exploring children’s experience of decision-making involved identifying important decisions in their lives as well as identifying the individuals who made them. This meant that in later discussion about the question ‘what is having a say?’ I was able to refer back to the different types of decisions children had participated in, whether it be at school, at home or in the community. In addition, this aspect of the interview ensured that the children could clarify what they thought ‘having a say’ meant, or if they were unsure, to signal to me that we should explore the question further. Harry’s comment is a good example of what an elusive concept ‘having a say’ was for some children:

*What do you think ‘having a say’ is?*

Don’t know… something amazing I guess!

In order to scaffold this part of the conversation for children, I talked with children about decisions regarding clothing (what I wear), food (what I eat), activities (what I do), friends (who I see, how often and if/when I have sleepovers). The most common response was that residential parents made most decisions, followed by school teachers, the supervised contact staff and the Family Court. The conversations with the children then turned to examine the level of influence children had in making those decisions that had been discussed with them. By nominating how much say they had (‘lots of say’, ‘some say’, ‘no say’) in making decisions, children shed light on the patterns of their participation in decision-making and their everyday experiences of having a say, while at the same time providing insight into what they consider is an important decision and what constitutes having a say in that decision.

Of the nine children who participated in this activity, the question of whether, how often or where children might see their contact parent was unanimously nominated as being
the most important decision. The desire to have a say in the decision to see their parent at a supervised contact centre was a recurring one throughout the children’s narratives.

After identifying important decisions in their lives and who made those decisions, children considered the cards which had short statements about various aspects of ‘having a say’, and we discussed whether these statements represented something that was an important aspect of decision-making, in other words, what mattered most to the children about having a say. Every child had a different perspective on why a particular aspect of having a say was important, according to their own experiences and circumstances. While there was also inevitably some overlap, as children would sometimes compare different aspects in order to emphasise a particular point they were making, the following comments were made about which aspects of decision-making were important and why.

Nearly every child interviewed (10) thought that having a say was an important principle and something all children should have:

- Everyone should be listened to and to have their say.
- I want to have a say.
- I reckon we should have a bigger say than what we get.
- I think I should have lots of say, I am thirteen now, I should get to choose what I do.
- It should be lots of say.
- Should have a say … good to have a say.
- Kids should have their say.
- So the grown ups don’t tell us what to do and we get to have our say.
Of the three children who did not think children should have a say, one did not comment at all, one thought children should not have a say and one said they should and should not have a say. Overall, however, these findings are consistent with broader research findings reported in Chapter One which suggest that there is an overwhelming call from children to be heard in decision-making processes that affect them. This finding is no different in research with children whose parents have separated and divorced (see Butler et al., 2002; Campbell, 2005; Kaganas & Diduck, 2004; Parkinson & Cashmore, 2008; Smart et al., 2001; Smith & Gollop, 2001; Taylor, 2006; Taylor et al., 2007)

The critical importance of listening permeated the children’s stories, with a significant number of children (seven out of the nine who commented) stating that being listened to was the most important single feature of having a say, and that being listened to was something that is, or at least should be, part of life, and something children should be entitled to expect. For example, Ellen stated the most important aspect of having a say was ‘like to be listened to and supported’. Sallie stated that everybody should be listened to:

Because, well everyone should be listened to and to have their say and be
listened to – that is important.

The emphasis children placed on being listened to as part of their participation in decision-making was reinforced when children were asked to provide advice to various decision makers. By far the most common advice offered to adults by the children at the conclusion of the interview was that adults should listen to children. For example, John called on parents to ‘listen to the kids – don’t, like, be too hard on them ... because then they won’t tell you what is going on’. For Charlie, better decisions are made when children are listened to because children know what they want:

Listen to the kids, because they know what they want. Even like ten year olds
most of them would know what they want ... the kids should have more say
than the adults do ... um because, they know what they want ... the parents
don’t always do what the kids want.
This said, however, the landscape of listening evident in the narratives of the children was portrayed as involving far more than adults merely hearing what children had to say. For the children in this study, the process of having a say was perceived as offering both space and possibilities for thinking through what choices children might have and for clarifying their understandings (and misunderstandings) of what was taking place around them as well as for reflecting on the choices available to them. For example, Sallie described how ‘having time to think about things’ was important in considering what the decision might involve and what she might like to say about it:

Yeah but sometimes you have decisions thrown on straight away. And that is not a very good thing to happen. It might take a while to think about what you wanted to say.

Similarly, Sam said:

Because, so then like, instead of them just saying … um like … instead of them like saying as soon as you ask them if they can talk to you about something and just not saying no straight away.

Several children (four) discussed the importance of ‘having a say’ in terms of it enabling them ‘to find out what is going on’ not only so they knew what was happening but also to confirm that nothing was being ‘hidden from them’.

And what about finding out what is going on?
So you know what is going on and no-one is hiding stuff.

On the other hand, Sallie emphasised that it was sometimes important for children not to be informed of all the details of important decisions that concern them in order that they not be exposed to information that might upset or harm them:

Well, I put to find out what’s going on towards the middle, because sometimes we shouldn’t know everything as it might upset us and so it might be better for us not to know all the details.
Having a say, and being listened to, were therefore seen by children as important, if not essential, for good decision-making, and children thought parents and other decision makers would be better able to know what children feel and want if they listened to what children had to say. Indeed, children thought parents and other decision makers were not at all well placed to make a good decision if they were unaware of what children had to say, a situation which some noted might have far-reaching consequences for children who must then live with the ‘bad choice’. Many children expressed the view that if adults listened to them, they would not be in a situation where they were made to do something they did not want to do. For others, the very fact of their supervised contact was the end result of not being listened to.

Charlie’s view that adults would make better decisions if they listened to the child and knew what the child thought and wanted were echoed by several other children, as Sallie’s comments show:

*Why did you put ‘for adults to make good decision’ towards the top?*

Well, for adults to make good decisions … is because … if they make bad choices, it can come back on their kids or someone else.

A number of children (three) also referred to the importance of children having a say for ensuring good outcomes for children. For example, Max thought:

*If you give me a say … you know what I want. But if you don’t give me a say … you might end up with something I don’t want.*

However, few children thought that having a say meant getting what you want. This did not mean they were not interested in the outcome, with many children stating that they would like to see different contact arrangements in place. Of the nine children who completed the decision-making activity explained in Section 5.7.4, seven placed the statement ‘to get what I want’ at the bottom of the triangle. What was more remarkable was that these seven children identified this statement not only as being least important, but that it should stand alone at the bottom of the triangle:
All important except to get what I say – not really important.

Get what I want – not so important.

This was in sharp contrast to all of the children ranking not one, but several, statements at the top of the triangle. For many children, getting what they want and getting what they need were two aspects of decision-making that they thought should be sharply differentiated, with three children weighing up these two aspects of decision-making in a manner similar to the judicial task of establishing the best interests of the child! The following comments illustrate this point:

*So do you want to say why you put ‘to get what I want’ as the least important?*

Um well – all these things. To get what I want is not getting what I need um … to get what I want … like I make [craft activity]. I don’t get them all the time … but that is what I ask for as presents … getting what I want … like when I wanted chips, but I did not want to spend my Mum’s money, so I just said ‘I will just have ice cream’… not the most expensive one … and Mum gets very happy when I do that. To get what I want is different to get what you need.

To get what I want is not very important – or sometimes it is not – or well it kind of is about in the middle. To be supported, to be listened to … Not to put pressure on me – that is very high.

Only one child stated that getting what he wanted was of the highest importance, placing the card at the top of the triangle. Although he prioritised ‘to get what I want’ as being most important along with a number of other decisions, he had consistently said throughout the interview that he wanted to have unsupervised contact with his mother, that no one listened to him and that he should have a say. Two children considered getting what they wanted to be an important outcome of ‘having a say’. Importantly, both were attending supervised contact as a result of serious allegations of sexual abuse made by the children against their fathers. In these cases, the relationship between children’s participation and their protection was highlighted by the strength with which the children expressed their views about their own need for protection. While the number so children involved in this study mean this finding must be approached with some caution, it is relevant to note research by Parkinson and Cashmore (2008) where four children involved in highly contested matters (including
three who had been exposed to serious violence or abuse), whilst concerned about the direct and immediate consequences of having a say (such as being ‘hit’, ‘hurt’ or ‘not let them in the house’ (p. 70)), still wanted to have a say and thought it appropriate that they do so.

Max also captured the importance of choice in decision-making and how it could contribute to finding alternative outcomes: ‘so then you do not have to do exactly what they say’. Several children (four) said that they did not like feeling pressure from adults to make a decision about their contact arrangement. For example, when asked why she had put the card ‘for adults not to pressurise me’ at the top, Ellen said:

So they don’t force you to make decisions.

*How do you feel when you are forced to make a decision?*

I feel angry.

*Angry ... and what do you do when you are angry?*

I try to make other decisions.

Ellen’s comment that she tries to make other decisions when she is given no choice also points to the importance for children of having some control over some of the events in their lives.

The issue of ‘getting what I want’, however, was not at all straightforward. As the interviews unfolded, it became evident that ‘getting what I want’ was an idea which itself held multiple meanings for children. While the children in this study generally did not agree with the principle that having a say meant getting what they wanted, this did not necessarily mean that children did not want to assert their wishes about what they wanted so that adults could make a ‘good decision’. In other words, some children implied that once adults knew what children wanted they would surely not proceed with a decision that the child did not want. The following comment from Sam captures the difficulty and confusion children sometimes revealed when pressed to explain why they placed ‘getting what I want’ as the least important aspect of having a say.

*And why did you put ‘to get what I want’ down the bottom?*
Because it doesn’t really matter – as long as I get to see Mum, that is all that matters.

Adding to the complexity about choice was the emphasis children placed on the role adults should play in relation to decisions about their contact arrangements. Children thought that to speak and be listened to should be something that happens in a supportive and unpressured environment by important adults in their lives, including parents, teachers and case workers at the CCS. While there was strong support for children having a say, children also thought that it was adults’ responsibility to make decisions about their future contact.

While children considered that adults would make better decisions if they knew what children wanted, there was some confusion as to the circumstances in which adults should be making decisions. For example, Zoe thought that the decision about children moving from supervised to unsupervised contact should be up to the kids themselves, but then had second thoughts:

The decision should be up to the kids … but sometimes the decision should be given to the adults, cause sometimes kids pick silly things and they might mess the whole thing up?

So the decision should be up to the adults, but ...

Sometimes up to the adults … if it is a big decision.

Finally, imbued throughout the children’s accounts was the idea of having a say as a process, which children thought should enable a better understanding of what was going on and knowing that they had been recognised, listened to and their views and experiences taken into account, with better decisions subsequently made. Having a say was therefore not something that children considered to stand alone, or to take place in isolation from family life, but rather allowed choice:

Because, so then like, instead of them just saying … um like … instead of them like saying as soon as you ask them if they can talk to you about something and just not saying no straight away.
The distinction between participation in decision-making and responsibility for the final decision is a critical one, and reveals that children tended towards wanting to engage collaboratively with supportive adults, who they perceive, and at times hope, would not proceed with a decision that would go against what children said they wanted. As Taylor (2006) has reported, most children want a say, but do not necessarily want to take responsibility for decisions, and they do recognise that compromises must be reached. For the children in this study, the relational nature of having a say was a significant reason why having a say could be such a difficult thing to put into practice. For the children in this study, their participation in decision-making was understood within the fabric and context of family life, and accordingly, as the following section shows, family life and relationships played a significant role in shaping when and how children were invited to have a say, as well as whether or not children wanted to have a say. This is not to suggest that some children did not want a say, and we also see that for some children, having a say did mean getting what they wanted, that being a change in supervised contact arrangements.

### 6.2.3 Having a Say: Is it Something Children Want?

In the previous discussion, it is clear most of the children thought they should have a say in important decisions that affect them, such as the decision to attend supervised contact. At the same time, all of the children reported having little or no say or input in relation to this decision.

However, their experience of being excluded cannot be simply attributed to their participation being constrained by adults. Rather, what emerged from the narratives was a more complex situation whereby many of the children did not want to participate or were highly ambivalent about whether they wanted a say. This was in relation both to earlier decision-making processes that had taken place up until the time of the interview, as well as in relation to future decisions that might be made about their own contact and residence arrangements. Six children stated that they were either unsure or did not want their views known about supervised contact. They also emphasised that they had not wanted a say about the decision to see their parent or did want to have a say at that point.
in any upcoming decision-making processes. This was despite having stated quite clearly at other times during interviews that they thought children *should* have a say. This question of whether children *wanted* to have a say in their own family’s decision-making processes thus revealed another layer to the children’s understanding and interpretation of ‘having a say’ which appeared to be, to some extent, contradictory in terms of their desire for participation.

The children provided several reasons for not wanting a say. First, some children either explicitly or implicitly expressed a fear of a parent’s response to what they really wanted. This theme was especially evident in conversations with Charlie who, perhaps more than any other child interviewed, had expressed strong and strident views that children should be heard when decisions are being made about supervised contact, and that he had not been heard. At the same time, he had agreed to participate in the interview only because of the promise of confidentiality, asking me quite clearly at the beginning of the interview whether it was true that no-one would know what he had to say. This fear was based on a previous experience several years earlier in which he had disclosed his unhappiness about the arrangements to a CCS caseworker, following which his father had been angry with him for doing so:

No. I don’t feel comfortable in telling anyone. Because last time I did … I was talking to the contact people [and] I got upset and said I wanted to go to my Mum’s house and spend a night with her and they told my Dad and said will you let him stay a night with his Mum, cause he is a bit upset…and they (residential parents) got really angry at me for saying that.

The second reason for children not wanting a say was a fear or concern about hurting and/or distressing one or both parents if they were to hear of the children’s views on the contact and residence arrangements they would like. This view was especially evident in the conversation with Zoe, who was acutely aware, and excited that preparations were currently in place to move to an unsupervised contact arrangement with her father. While earlier in the conversation Zoe expressed the idea that, as a general rule, children should have a say about whether they want to attend supervised contact, when it came to her own situation she did not want to have a say:
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_How long do you want to keep coming here?_
I don’t know … as long as it is good.

_As long as it is good … yeah. Do you think when they decide that you will see Dad more, or you will not see you dad more here, do you think you should have a say in that decision?_
Uh uh [No, laughs].

Rebecca also revealed the difficulty and tension that arises for children when they believe their views and wishes about contact might upset a parent:

_Sounds like you want to see your dad here – would that be fair to say?_
Yeah … I want to see him here every weekend.

_Every weekend … Do you feel like you can tell anyone that?_
Sort of.

_Can you tell Mum that?_
Um, no because she would get sad … because she really is worried about me seeing him.

A third reason cited by children for not wanting a say was they thought there was not much point in having a say, because in their experience no-one would listen even if they did express a view about the contact arrangements:

_You said that you didn’t have a say when you started coming here, but that you would like a say to say when you want to stop._
Yes.

_And do you think people will listen?_
No.

_And why do you think that is?_
Because Mum likes us coming here.

_And why do you think other adults would not listen?_
Because we are just kids.

Charlie considered that his stepmother not only did not listen, but in fact would actively attempt to turn his father against him having more contact with his mother:
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Yeah – I can’t tell her [step mother] – she goes ‘Well fine if you go to your mum, don’t bother coming back’, because that pressures us, because we want to come back and see my brothers and Dad … but you don’t want to come back … you don’t want to see her. She actually makes, like convinces Dad to go see things that she wants. She doesn’t care about what we want … um … she used to … then she realised she had power and then it all went bad.

Fourthly, children said that adults should have the responsibility for making decisions about children’s contact and residence arrangements and whether supervised contact should continue or cease. For example Sallie, who had been quite strident in her view that children should have a say about whether and for how long they attend supervised contact, talked at length about the limits she felt existed on children’s decision-making. After outlining her view that regardless of what a child wants or thinks that she needs, in some circumstances ‘sometimes the people will know what is better for you’. This was because she considered that making a ‘good decision’ requires knowledge and information which she felt in some cases might not be appropriate for children to be privy to:

Well, I put ‘to find out what’s going on’ towards the middle, because sometimes we shouldn’t know everything as it might upset us and so it might be better for us not to know all the details. And to get what you want … well, sometimes what you want is not what you need and sometimes what you want is what you need.

Sallie went on to say that if there was uncertainty about a particular contact arrangement then children should be given ‘a bigger say’:

So do you think kids should have a chance to change things over the years?

Um, if it benefits them and everyone knows that, then no … they shouldn’t really. But if it is like 50/50 – like some people reckon it will benefit them and some of them reckon it won’t, then kids should have a bigger say in it.

In this way, we see that the children oscillated between demanding to have a say, as evidenced by quite assertive statements about the importance of children having a say and resisting or avoiding it, as reflected in children’s reports that they did not want a say, felt unable to have a say or were fearful of having a say in their own situation. In the same way as the children in the earlier study appeared to ‘to and fro’ between their
desire to participate in the processes and decisions taking place around them and their accounts of hurt and powerlessness associated with supervised contact, the children in this study revealed a similar dynamic: all children considered, as a general principle, that children should have a say, and so aspired to the agency that accompanies having a say, but at the same time shied away from this ‘alternative vision’ of participation when it came to ‘having a say’ in their own lives. This view was captured by Sallie, who noted:

Well sometimes we shouldn’t know everything as it might upset us and so it might be better for us not to know all the details, and … well, sometimes what you want is not what you need and sometimes what you want is what you need.

The children’s narratives concerning whether they wanted a say highlights why children’s accounts of participation are sometimes hesitant and ambivalent, even when they think children should have a say. At the same time, as we have seen, many children said that they did want a say in future decisions (even though they had not wanted a say until now) and they provided clear and articulate statements to this effect as well as indicating they wanted a say in any future decisions. The following statements reveal the children wanted to make an autonomous choice about contact arrangements:

I would rather people to hear it [child’s wish to see his father only in supervised contact].
All should be green ['lots of say’ card]. I should get to choose … my choice.
They shouldn’t have control over what we want.
We should have lots of say.
So the grown ups don’t get to tell us what to do and we get to have our say.

This tentative and ambivalent understanding of ‘having a say’ is a less well-reported aspect of children’s participation in family law processes. Far from providing grounds for dismissing the children’s accounts as inconsistent or unreliable, the ‘to and fro’ evident in the children’s narratives revealed a rich account of the complex layering linked to participation as children reflected on the possibilities and constraints that
shape ‘having a say’. While earlier chapters have shown that contemporary research literature has tended to promote children’s participation (in theory at least) in terms of their competency, rights and demands to be heard, the children’s narratives reveal a far more complex dynamic at work. This issue of the complex and ambiguous nature of the children’s accounts of participation in decision-making is examined in greater detail in the following chapter. In the next section, I introduce one final theme emerging from the children’s narratives, that being, how it feels to have (or not have) a say.

6.2.4 How Does Having a Say / Not Having a Say Feel?

When asked directly how having a say felt, the children’s responses were immediate. Being listened to and having their views heard made children feel happy, while the converse was also true – not having a say made them feel sad. Recalling that the children understood having a say in terms of being listened to, being given information and having a choice, the children were quite clear in their summation of how having a say made them feel. While the findings outlined above suggest the children rarely had a say in relation to the changes taking place in their family, the following views reveal the strong links between the recognition they experience when given the opportunity to have a say and the emotional response that children feel when they are not recognised and when their views are not heard:

So if you say you wanted a say, what’s it feel like when you don’t or didn’t have a say?
It makes me feel left out ... like I had no choice about what’s going to happen and stuff.

OK and what would that have felt like if you had had a say?
Oh I would have been a lot happier about it ... like when I first came here I was pretty upset.

So if someone gives you a say how do you feel?
Happy.

And how do you feel if they don’t?
Bad and angry.
Because if you don’t get listened to you don’t get decisions.

*How do you feel when people listen to you?*

Very good.

*How about when they don’t listen to you?*

I feel sad.

Mmm … not really, well… but . well what’s going to happen. Well yeah … cause I always know what Dad and what Mum wants but I never know what is going to happen.

*And if you know what is going to happen, what’s going to be the best thing about that for you?*

Well, then I will be happy!

*What about then if you don’t know? How does that affect you?*

Well then you don’t know and you feel a bit upset because you don’t know what’s going to happen.

*And here you have said for adults not to put pressure on me … why did you put that at the top?*

So they don’t force me to make decisions.

*Force you to make decisions … how do you feel when you are forced to make a decision?*

I feel angry … so I try to make other decisions.

To suggest that having a say is ‘good’ and not to have a say is ‘bad’, would be to ignore the nuanced account of participation in family law decision-making weaving through the children’s narratives. As we have seen, while children envisaged participatory processes both in terms of their own agency (a sense of being enabled and so acting upon what they can influence), they also envisaged that it should accommodate their vulnerability and dependency (being constrained by acting upon decisions, processes or family dynamics they can’t or don’t wish to influence). In this way, their understanding of participation appeared at times to be located within and between a number of quite different discourses, revealing once again that children ‘to and fro’ between wanting to be involved and, at the same time, expressing a number of emotions, including anger, hurt, sadness, loss and grief in relation to the processes occurring around them (Graham & Fitzgerald, 2006). So, for example, a number of children indicated they enjoyed
supervised contact and found it fun, but did not want to see their father at supervised contact, although they missed their dad a great deal. These same children went on to say that all children should have a say, that having a say made you feel good, but that they did not, and never would want, to play a role in decision-making about future contact arrangements. Yet, such an ambivalent stance does not mean that children should be dismissed or removed as participants in the ‘invited space’ of family law decision-making, nor should it ignore children’s basic sensibility that ‘in principle’ participation is a good thing, as the narratives included above suggest.

The children’s ability to traverse the possibilities of participation, despite their limited experience of having a say, provides us with an extraordinary starting point for seeing children, and what they have to say in family law decision-making, in a different light. Taylor (2007) captures the power of the children’s innovation for gaining new and different insights into the research questions:

> The people who are actively engaging in constructing their community may have no theory or concept of what they are doing … Their common understanding of what they are doing operates more at an imaginary or symbolic level … the social imaginary occurs at the moments we reimagine moments of freedom, autonomy, change – when we innovate by reinterpreting. (p. 29)

In the following chapter, I attempt to take up Taylor’s challenge to re-imagine children’s participation through a process of reinterpretation and analysis which connects the children’s stories into the wider philosophical and theoretical context of the study from the viewpoint of critical hermeneutics.

### 6.3 Chapter Summary

In this chapter I have introduced the narratives of thirteen children talking about their views and experiences of supervised contact and of ‘having a say’ in family law decision-making. The narratives of the children were presented in relation to different aspects or themes of children having a say and, therefore, of their participation in family law decision-making. The first theme centred the discussion on the children’s
experience of having a say. This was an important starting point for the discussion because it provided insight into the ways in which children had engaged in decision-making activities up until the time of the interviews. This theme thus provided insights into the conditions of participation, that is, the participatory space of family law decision-making, including ‘who enters these spaces, on whose terms and with what epistemic authority’ (Cornwall & Coelho, 2007, p. 4). Discussion about children’s experiences of supervised contact and having a say also revealed that such experiences are often accompanied by a sense of sadness, anxiety, confusion, grief and loss. So, while the children’s narratives about their experiences of decision-making provide evidence of the ongoing exclusion of children from decision-making processes, they also highlight the impact of such exclusion on the children’s sense of wellbeing.

The second theme centred discussion on children’s views on having a say and brought into relief the children’s own vision of what having a say meant for them – in other words, their interpretation of what participation is and what it involves. As the chapter revealed, the children held nuanced and layered understandings and expectations about their participation in decision-making for contributing positively to their lives and to their sense of wellbeing. Children perceived participation as multidimensional, relational and contingent, where all actors negotiate their relationships in a caring and responsive environment based on mutual respect for each other.

The third theme drew together discussion in the interviews in relation to the question did children want a say? The children’s narratives, like the children in the earlier study, described in Chapter One, moved between accounts of wanting a say and not wanting a say in relation to decisions determining contact and residence. This ambivalence, which is revealed in the way children appeared to ‘to and fro’ between accounts of their hurt and powerlessness associated with their parents’ divorce and ongoing conflict and their desire to participate in the processes and decisions taking place around them, while a key finding of the study, was not understood by children as grounds for removing them from the participatory sphere of decision-making, or for refusing to invite them to conversation and dialogue. Children emphasised that their ambivalence should not, in and of itself, preclude the respect and recognition that children have important things to say (regardless of whether they are invited to have a say or not). This discussion shed
light on the complex and ambivalent feelings that sometimes arise for children when they are invited to have a say, and underscores the need to continue to better understand the highly contested terrain of family law decision-making differently, that is, from the perspective of children.

The fourth theme centred on children’s narratives about how having a say (or not having a say) made children feel. This discussion highlighted that a most basic feature of having a say, being listened to, has positive implications for the way children feel about themselves and their place in the world.

The chapter thus revealed that the participatory space of children’s participation is experienced by children as both collaborative and contested, a space where children moved within and between countless discursive practices as they attempted to negotiate the norms and practices of governance and self governance imbued through family law decision-making processes. Such contestation is not limited to tension between the adults and children, but also occurs within children themselves, as evidenced in the dissonance within the children’s narratives in relation to their desire to have a say and to be heard and their ambivalence and resistance to having a say. Despite the nature of children’s participation in family law, children envisaged themselves as actors within the participatory space, regardless of whether they were invited to participate or not. Consequently, the ways in which such negotiations, whether positive or negative, were undertaken held important implications for their sense of wellbeing and happiness.
Chapter 7: Children’s Participation as a Struggle Over Recognition

This chapter begins by suggesting that the children’s narratives offer a number of important insights into children’s participation in family law decision-making processes. The first is that participation is about dialogue. This insight arises from the children’s need, and at times, demand, to be listened to and to have someone to talk with – in other words, for conversation and dialogue. For the children in this study, participation entails much more than ‘listening to their voices’, but instead, points to the importance and potential of a dialogic approach for supporting and facilitating their participation in family law decision-making.

The second insight is that participation is about recognition, and arises in relation to children’s call for recognition, as well as from their experience of misrecognition. Regardless of whether children did or did not want a say, or indeed, regardless of their ambivalence about having a say, children wanted to be acknowledged as important individuals worthy of recognition and respect. This chapter further analyses the inherent emphasis children placed on recognition and dialogue as key features of their participation in family law decision-making. The emphasis on recognition and dialogue in the children’s narratives immediately points to a third insight, that is, that children’s participation is about power. As we have seen, the children’s narratives are imbued with power relations which are implicated in supporting and resisting children’s participation. Such power relations can be seen in the children’s narratives as both repressive (adult’s power over children) and productive (children’s power over themselves).

From here, I suggest that imbued through the children’s narratives is an account of children as engaged in a struggle over recognition – over their identity, status and voice in family law decision-making processes. As I will show, conceptualising participation in terms of a struggle over recognition holds broad implications for this study and
invites further examination of the multiplicity of ways in which children (and childhood) are not only recognised, but also misrecognised and unrecognised in the ongoing negotiations, communications and relationships of which children are subjects and through which they are governed. By focusing on recognition as a site from which to explore participation, I depart from existing empirical work focused on ‘the claim for’ or ‘the case for’ children’s participation, instead focusing attention on the dialogical space, that is the ‘invited space’, of participation within which children and what they have to say are recognised.

Following on from the theoretical consolidation of the children’s narratives of participation as a struggle over recognition, the chapter concludes with a brief reflection on the dialogical encounter envisaged by critical hermeneutics in light of the findings of the study. Returning to a critical hermeneutic formulation of dialogue, I offer a reformulation of Veling’s dialogic movements within the context of children’s participation, in order to prompt further reflection on the ways in which parents, professionals and researchers recognise, invite, accommodate and respond to the rich and sometimes ambiguous and contradictory accounts that emerge in, and through, a participatory approach based on dialogue with children.

In the following section, I take the first of the three elements of participation emerging from the children’s narratives, that is, a call to adults to listen to children and to hear and to respond to what they have to say – in other words, a call to dialogue.

### 7.1.1 Children’s Participation: A Call for Dialogue

When the children in this study called upon adults to listen to them, their call was grounded in a desire for close and caring relationships with parents and professionals. Participation was perceived to be an active, creative and reflexive process whereby adults and children might be given the opportunity to clarify what was happening, to consider new possibilities, to create more choices, and to help adults and children make meaning of the events taking place in their lives. Importantly, the conversations children envisaged might constitute their participation in decision-making were
portrayed as enabling change. In this way, children assumed a dialogical approach to having a say – whereby a listener might be open to hearing what they had to say, in ways that enabled choice and freedom for children in relation to their contact arrangements. This more dynamic interpretation of children’s participation is captured well by Bellamy (2003):

> Child participation involves encouraging and enabling children to make their views known on the issues that affect them. Put into practice, participation is adults listening to children – to all their multiple and varied ways of communicating. It ensures their freedom to express themselves and takes their views into account when coming to decisions that affect them. Engaging children in dialogue and exchange allows them to learn constructive ways of influencing the world around them. (p. 4)

A number of assumptions about the dialogical conditions of participation are implicit in the children’s narratives about the meaning and importance they attached to having a say. First, children located themselves well within the participatory sphere of decision-making. This does not imply that the children proposed or imagined their participation to always be ‘a good thing’ or that it should be *fait accompli* in any situation of decision-making, but that, as a general rule, they should not be distinguished from their parents as having important things to say.

Second, at the same time children locate themselves within the participatory sphere, they also assumed that they could and, indeed, at times should, occupy a unique position. For many children, having a say was a painful, upsetting and at times, fearful experience, with such emotions strongly informing their reluctance to participate in decision-making at any level. While ‘having a say’ could potentially be painful, upsetting, fearful, or something children were not ready to do, such an ambivalent stance was portrayed by children to be, in some instances, an absolutely necessary one, and reasonable grounds for allowing them to claim a unique position in the participatory sphere. The children’s accounts can therefore be seen to occupy a complex, in-between space, in which children are able to speak in direct and indirect ways, sometimes ‘deliberately or unwittingly opaque’ and sometimes succinct and clear, but speaking nonetheless (Brown & Gilligan, 1992, p. 23).
Third, while ‘being listened to’ assumed an invitation to participate, children also considered that adults had an important role to play in supporting and facilitating the invitation to children to participate in decision-making. Far from being something that took place in isolation, having a say was understood in the contexts of children’s relationships with their parents, and other important adults in their lives. In keeping with socio-cultural theorisations of participation, children focused primarily on a conceptualisation of participation which assumed adults to be trusting, respectful and child-centred people who wanted to make it easy for children to talk (Neale & Smart, 2001; Smith & Taylor, 2000; Taylor, 2005). Participation was understood as taking place at different levels, in different contexts and in a diversity of ways, and the desire of children to work collaboratively with supportive adults in a democratic process of decision-making during, for example, family transition.

As part of this relational understanding of participation, children perceived having a say as carrying with it a deep responsibility, most especially in relation to their parents whom they did not want to upset, worry or hurt any further. This understanding of participation and of having a say was not specifically stated, but rather permeated the children’s narratives and revealed they were keenly aware of the profound implications ‘having a say’ might hold for their relationships with important people in their lives. Like many children involved in family law decision-making, the children in this study differentiated participation in decision-making from responsibility for decisions and most children, whilst wanting to be consulted, often did not want to take all the responsibility for decisions (Butler et al., 2002; Cashmore, 2003; Parkinson & Cashmore, 2008; Smart et al., 2001; Smith et al., 2003; Thomas & O’Kane, 2000). At the same time, as Cashmore and O’Brien (2001) suggest, while children readily distinguished between ‘having a say’ and ‘having their way’, for some children, particularly those who had reported abuse, there was a stronger claim for respecting their views and for taking their views and experiences into account in the decisions and actions. In this way we see that participation was not about choice or voice, but rather as holding out possibilities for both, depending on the circumstances of each child.

Fourthly, far from being a ‘one-off’ event, children imagined that the conversations supporting and facilitating their participation to be part of an ongoing process which
allowed them time for the development of rapport and trust before the sharing of sensitive information could take place. This finding is consistent with research internationally which reports children having access to information allows them to make more informed decisions and helps them to cope with the events around which decisions were being made (Butler et al., 2002; Cashmore, 2002; Chisholm, 1999; Hill et al., 2004; Lansdown, 1995; Lodge, 1995; Parkinson & Cashmore, 2008; Partridge, 2005; Taylor, 2006)

Finally, for the children in this study the opportunity to engage in dialogue about the events taking place around them was not about gaining access to a forum whereby they could talk about their views, experiences, fears, desires and uncertainties. As well, the invitation to dialogue constituted recognition of the children themselves. In the following section, I examine the children’s call for recognition implicit in their narratives about having a say.

7.1.2  **Children’s Participation: A Call for Recognition**

A second key insight emerging from this study is that children’s conceptions of ‘having a say’ appeared to turn on the need, and sometimes demand, for recognition of their identity as subjects of the family law decision-making processes. While the children in this study moved between wanting a say and the reality that having a say could also be confusing, upsetting and/or painful for them and/or their parents, these emotional narratives did not alter the fact that children needed, and wanted, recognition. As we have seen, the children conveyed that they believed their emotional responses should not in and of themselves render them at risk of harm, and that nor should they be silenced in their endeavours to promote children’s agency. Instead, the interplay between dependency and agency points to the more productive potential of children’s grief responses, as evidenced in the children’s extraordinary capacity for coping, problem solving, decision-making and goal setting. This said, children would clearly have preferred a more supportive social environment which might have enhanced their agency (a sense of being enabled and so acting upon what they can influence) as well as providing recognition and support for their vulnerability (being constrained by acting
upon decisions, processes or family dynamics they can’t or don’t wish to influence) (Graham, 2004; Smith, 2002; Smith et al., 2003; Taylor, 2006).

The children’s narratives thus conveyed participation as being inextricably tied to recognition of the self-identity and reflexivity of the children themselves. Such calls for recognition can be seen as arising in relation to recognition of the children themselves, as well as what they had to say (including their narratives of agency and vulnerability). In this way, recognition can be seen as a prior issue and merely a starting point for inviting their participation.

Adding to this complexity, the children’s need for recognition was strongly present in the absence of that recognition. Whether children had wanted to have a say or not, the failure to recognise them was a dominant theme in their narratives of exclusion and isolation. Unfortunately, this was most evident in the children’s experiences of misrecognition, which refers to the times when children felt they had been invited to participate but considered their role to be tokenistic, and so unlikely to change things. It was also evident in the non-recognition imbued throughout the children’s narratives of being silenced and marginalised, which, in turn, impacted on their sense of self respect, belonging and wellbeing. The children in this study had few people they could identify who they could trust with their thoughts about contact with their parents, few people who the children perceived valued what they might have to say, and very little, if any, choice about the events taking place around them. In this way, we see that when left unmet, the children’s need for recognition revealed itself in their confusion, sadness and sense of isolation. Further, as the children’s narratives show, such nonrecognition appeared to compromise the children’s ability to understand, cope and adapt to the change in their families’ circumstances.

The children’s view of participation as intimately linked to recognition resonates with Neale’s (2004) postiting of participation as children’s entitlement to recognition and respect, and the recent work of Ruth Lister (2008) on the relevance of a politics of recognition, in particular the work of recognition theorists such as Nancy Fraser, Charles Taylor and Axel Honneth, to children’s participation. This reframing of
children’s participation in terms of recognition thus calls for some explication before further asserting its relevance in the current context.

The *Concise Oxford Dictionary* (1964, 2008) defines recognition as the action of acknowledging as true, valid or entitled to consideration; formal acknowledgement as conveying approval or sanction of something; hence, notice or attention to a thing or person. The question of how the concept of recognition is to be translated, however, has proved far more complex, and continues to be the subject of extensive academic debate. For example, both Charles Taylor (1995) and Axel Honneth (1995) have developed theories of recognition within a broader paradigm of self-realisation, maintaining that recognition is a precondition for fulfilling self identity. According to Taylor (1995), recognition is not simply a social courtesy but instead constitutes a ‘vital human need’ (p. 226). Honneth’s (1995) elaboration of recognition links recognition and its attendant implications for identity formation to three intersubjective conditions: *self-confidence*, which is about a child’s underlying capability to express needs and desires without fear of abandonment but instead with a high estimation of ability; *self-respect*, which is understood as having less to do with having a good opinion of oneself than with the possession of the universal dignity and self-reflexive agency of persons, that is, to have a sense of oneself as a person; and *self-esteem*, which is a sense of one’s uniqueness and difference, that which makes a person feel valuable. Furthermore, Honneth and Taylor argue, the converse is true: misrecognition consists in the depreciation of such identity by the dominant culture, and has the potential to inflict damage and harm, imprisoning individuals within a ‘false, distorted, and reduced mode of being’ (Anderson, in Honneth, 1995, p. xi).

Honneth’s three conditions for identity formation are not inconsistent with a large body of research that attempts to identify key elements of children’s resilience, including their need for security, self-esteem and self-efficacy (see, for example, Bernard, 2006; Graham, 2004; Masten, Nest & Garmezy, 1990). Applying Honneth’s concepts of recognition and resilience to this study, it can be argued that the marginalisation and exclusion we hear in the children’s accounts of having a say, not only have the potential to limit the formation of children’s identity, in that such key forms of exclusion violate children’s self-confidence, self-respect and self-esteem, but also to seriously limit their
capacity to cope with the events taking place around them (Anderson & Honneth, 2005; Daniel, Wassell & Gilligan, 1999; Masten et al., 1990) Honneth’s conceptualisation of recognition thus supports the view of Gorrell Barnes (1999) that ‘emotional narratives … entangle or trap children in ways that do not promote resilience and may actively work against their development’ (p. 427). Viewed from this perspective, participation is not just about a process of listening to children, hearing their voices or accessing their views, experiences, fears, desires and uncertainties; it holds out possibilities for children to discover and negotiate the essence of who they are and their place in the world. As Taylor (1978) has observed: ‘making sense of one’s life as a story is also, like orientation to the good, not an optional extra: that our lives exist also in this space of questions, which only a coherent narrative can answer’ (p. 47). In the context of children’s lives, Neale (2004) suggests, it is only ‘when children are recognised as people in their own right that adults can acknowledge that they have their own ways of understanding the world and are capable of defining their own needs, rights, interests and responsibilities’ (p. 9).

Other philosophers, however, insist that the ‘identity model’ of recognition, such as that taken up by Taylor and Honneth, is deeply problematic (Lister, 2008b). Most prominent in this debate is the work of Nancy Fraser, who argues that constructing recognition in terms of damaged identity places an emphasis on the importance of human agency over social institutions (Fraser, 1997, 2000, 2007). Instead, Fraser (2000) proposes a ‘status model’ under which recognition is not so much a question of identity, but rather of social status. This view suggests that what recognition requires is ‘not group specific identity but rather the status of group members as full partners in social interaction’ (Fraser, 2000, p. 100). Accordingly, misrecognition, refers not to the depreciation of identity, but rather to the social subordination that results when individuals or groups are prevented from participation as peers in social life (Fraser, 2000). Fraser’s status model is based on a principle of participatory parity which recognises the right of all to participate and interact with each other as peers in social life (Liebenberg, 2008). Further, Fraser identifies two major obstacles to promoting greater parity in social life, and overcoming the intuitional subordination of different classes and groups: misrecognition, which entails a form of status subordination ‘in which institutionalized patterns of cultural value impede parity of participation for
some’ (Fraser & Honneth, 2003, p. 87); and distribution, which arises when actors lack the necessary resources to achieve participatory parity (Liebenberg, 2008).

For the purposes of this discussion, I suggest both formulations of recognition are helpful from the perspective of children in that they attest to the importance and relevance of recognition itself – both of children’s identity and status. I agree with Lister (2008) that reframing the debate in terms of both recognition and redistribution has important implications for the way in which individuals and groups, including children, are represented and treated at all levels of society. The work of Taylor and Honneth is particularly important for drawing attention to the relationships between participation and children’s self-realisation, including the importance of relationships within which children seek to fulfil their own identities (Taylor, 1995; Honneth, 1995, 2004). Fraser brings an unashamed political focus to questions about children’s participation, most especially to the conditions, processes and resources necessary for children to participate in decision-making processes. This is evident in Fraser’s recent comment that: ‘Overcoming injustice means dismantling institutionalised obstacles that prevent people from participating on a par with others, as full partners in social interaction’ (2007, p. 20). For this reason, as Neale (2004) suggests, and consistent with the narratives of the children in this study, recognition should be viewed as a precondition of children’s participation, precisely because it is crucial to children’s wellbeing as well as their need for care and protection. In terms of translating the conditions and elements for recognition and resilience into possibilities for progressing children’s participation, it then becomes obvious that relationships with important adults (parents, teachers, case workers, lawyers) potentially feature as a key locus of self-discovery and self-affirmation. Indeed, as Neale (2004) suggests, without recognition and respect, participation ‘may become an empty exercise, at best a token gesture or, at worst, a manipulative or exploitative exercise’ (p. 9).

This said, there is limited research, particularly in the context of family law, that has sought to explore the relationship between children’s participation and the psychological and emotional implications of misrecognition. In Australia, the question has been touched on in the work of Parkinson and Cashmore (2008) in their research about children’s participation in decision-making. Whilst in their study having a say in
the arrangements did not determine how happy children were with the arrangements, Cashmore (in press) suggests that this finding ‘hid’ a complexity in relation to the dynamics of recognition, particularly in relation to children’s acknowledgement and acceptance of what they could and could not change (p.12). So, in those instances where children had little say, they were less likely to be accepting of the arrangements if they perceived little effort by the parent and a lack of recognition of their feelings.

There has been important work on the relationship between misrecognition and its implications for children’s sense of identity and wellbeing in relation to children’s experiences of poverty. According to Lister (2008b), there is evidence to support the case for acknowledgment of the psychological dimensions of misrecognition which requires further weight to be given to the significance of the contingency of social injustice on the identity of individuals. She argues: ‘if we look at poverty from the perspective of children, we see how lack of participatory parity and the psychological impact of poverty are intertwined’ (p. 166). Lister cites the experiences of the researcher Adair of her poverty as a child as evoking the psychological scars of misrecognition and their embodiment: ‘poverty was written onto and into our beings as children at the level of private and public thought and body’ (2005, cited in Lister 2008b, p. 165). The children in this study suggest that their experiences of being marginalised and unheard also evoked the scars of misrecognition as evidenced through the grief, sadness and, at times, anger they felt at having little or no influence over the events taking place around them. The work of Smart, Neale and Wade (2001) is also relevant. While they have not explicitly explored the relationship between misrecognition and children’s experiences of grief and loss, they are suggesting that recognition, rather than rights, should form the basis of family law decision-making. Smart (2004) says that when children talk about their experiences of parental separation, they speak about the importance of their parents listening to them, consulting with them, acknowledging them as individuals, and acknowledging their changing needs:

[Children do not] identify the family as a site of legal rights…..[but] as an arena of emotions, care, security, closeness and love. But they also saw it as a place where they could (or should) be themselves and where they could develop and thrive…..These are precisely the elements that Honneth (1995) argues combine to create the context for respect for the other, which in turn is the principle he argues should guide policy. (p. 499)
The findings of this study suggest the need for more research examining the relationship between children’s participation in decision-making and its implications (both positive and negative) for their wellbeing. As Honneth argues, ‘one misses the “moral grammar” if one fails to see that the claims to recognition can only be met through greater inclusion in participatory processes’ (Anderson, 1995, p. xviii).

7.1.3 Children’s Participation: Exploring Relations of Power

At the same time, one hardly needs to add that children do not enjoy a priori recognition and nor do relationships with adults necessarily afford them this. Indeed, as Lister (2008a) puts it, ‘a common theme in the literature is the lack of recognition and respect for the responsibilities that children exercise’ (p. 13). When participation is posited as intimately connected to the recognition of children and the development of their self-identity, we must also acknowledge that recognition has to be won through an exchange or struggle, and that struggles over meaning are also struggles over power (Gallagher, 2006b; Lara & Fine, 2007; Taylor, 1995). However, in order to gain insight into the workings of such power relations, I suggest it is neither useful, nor possible, to simply assert that particular institutions (such as the family, school, legal system or government) are powerful influences over children. Nor is it merely a straightforward case of constructing participation as the giving or taking away of power by the adults involved, or in juridical terms, as states possessing and distributing power (Kögler, 1999). As Foucault (1979) asserts, there is no such ‘thing’ as power but rather a network of relations within which power is exercised. Such a theorisation, it would seem, acknowledges the power practices at work within and around participation as a more complex endeavour which must identify and analyse networks of power. In other words, any analysis of children’s participation must recognise power as ‘a network of relations, constantly in tension, in activity, rather than a privilege one might possess’ (pp. 26–27). This requires further explication of how power practices facilitate, limit and/or mediate children’s struggle to be recognised.
When the power that is at work when we ‘do’ participation is understood as predominantly pervasive and productive, it can also be seen as varying according to the nature of the relationships and power struggles among and between the adults and children involved. Gallagher (2006a) captures well the complex nature of this relationship, that is, the interplay between individual agency and institutional structures, when he posits that participation is ‘the locus of an ongoing struggle, where the will of an organisation and the will of its subjects engage with and attempt to influence and realign one another’ (p. 159). Such a conceptualisation is useful in that it attends to the myriad ways in which power is at work in the processes and strategies we employ in any participatory project. Further, though, it challenges us to acknowledge that when we speak of children’s participation as a ‘struggle over recognition’ we must tune in closely to the more subtle ways in which such power shapes and informs what it is we are prepared to recognise in these participatory encounters. By its very nature, then, the process of participation is imbued with networks of power relations as we attempt to respond to the ‘ever shifting, contextual and relational, and language-and-culture-based identities and voices as they are constructed and played out within various webs of power and practice’ (Cook-Sather, 2007, p. 396).

The power at work within the children’s narratives too can be seen as multifaceted and diffuse, with a complex network of social and political power practices acting to enable and constrain opportunities for children to ‘have a say’ in decision-making processes. At first glance, this exercise of authority can be seen mostly as constraining children’s agency, particularly in the limited opportunities provided by families, CCSs and the Family Court for children themselves to define the nature of the decision-making processes, as well as to share in and exercise collective authority in and over how, and in what ways, children are able to participate. As we have seen, the majority of children in this study were denied the opportunity, and right, to have a say – despite the legislative requirement of the Family Law Act that children’s wishes/views be ascertained by the Court, despite the majority of children having either been the subject of a Family Court Report or having their best interests represented by an independent lawyer, despite the proactive stance of the Family Court to hearing children’s views and despite the central position of children in policy debates, as outlined in Chapter Two. This finding further reflects and re-enforces existing research reported in Chapter One.
that suggests while mechanisms exist which are intended to enable the views and perspectives of children to be heard, that children continue to report profound limitations in the extent to which they are actualised (Bagshaw et al., 2006; Butler et al., 2002; Cashmore, 2003; Neale, 2002; Parkinson & Cashmore, 2008; Smart, 2002; Smith & Taylor, 2003 Smith et al., 2003). This denial of authority to children to have a say is evident both in the failure to recognise children as having the moral status, competence and voice to participate (recognition) as well as in the lack of economic resources allocated to supporting their participation in family law decision-making (redistribution). Cornwall and Coelho (2007) capture the subtleties of the power at play in participatory process once dialogue is underway:

Professionals valued for their expertise in one context may be unwilling to countenance the validity or value of alternative knowledges and practices in another; and citizens who have been on the receiving end of paternalism or prejudice in everyday encounters …may bring these expectations with them into the participatory sphere. (p. 12)

This study would suggest that Cornwall and Coelho’s observations about professionals are just as applicable for parents who also play a powerful role in keeping children at arm’s length to the decision-making processes. Adopting a dialogical approach needs to be correlated with a duty on the part of those powerful adults and institutions to listen and respond to what children have said and to provide reasons for maintaining or disrupting existing configurations of social and power practices.

The children’s narratives further attest to the dominance of first and second moments of participation, described in Chapter Three, which continue to frame participation in monological approaches to participatory practice and which privilege liberal notions of who can participate (the autonomous, rational, adult) and how they can participate (seeking definitive outcomes, authoritative, non-consultative processes). Tully (2004) describes this power at work which acts to resist and shut down possibilities for children’s participation:

Due to both the relational and normalizing character of norms of mutual recognition, therefore, a conflict that modifies the way one member is recognised necessarily alters the forms of recognition, types of subjectivity,
modes of cooperation and access to resources of the other members of the system of cooperation to some extent. (p. 88)

However, it is not only the structures of family law and policy which determine how agency is denied to children and given to others. According to Fraser (1988) the importance of public spheres, such as family law, as sites of power and domination, lies in the process of how hegemony effectively unfolds and so masks how ‘unequally empowered social groups tend to develop unequally valued cultural styles’ (p. 79). In this study, one such ‘unequally valued cultural style’ as a site of social and power practices can be seen in the ambivalence prevalent in the children’s narratives of having a say.

Yet, for the children in this study, this ‘to and fro’ was a necessary aspect of what Fraser (2000, p. 108) refers to as the ‘parity of participation’, that is, participating as a peer in social life. As the discussion in this thesis has shown, while children necessarily moved between discourses of agency and vulnerability, this did not prevent them from possessing the agency and capacity to negotiate the events taking place around them and which presumed adults should listen to them and recognise them as individuals with views and perspectives worthy of attention. Yet, while so much of the children’s participation agenda is ostensibly about dialogue and conversation with children (there is no shortage of calls to hear the voices of children, to listen to children and for adults to engage in dialogue and conversation with children), it seems ironic that one of the key findings from this study is the failure to invite children to engage in conversation and dialogue about the family decisions taking place around them. What is clear, however, is the way in which the inherently monological understandings of participation imbued through the decision-making processes at the time of the children’s parents’ separation and divorce can be seen to resist the children’s agency and capacity to participate. Diduck (1999) captures this disjuncture between monological and dialogical approaches to participation, whereby ‘this intimate and dependent subjectivity is difficult for liberal notions of justice to accommodate, based as they are on abstracted autonomy, independence and disconnection from other subjects and social conditions’ (pp. 124–125).
Further, not only do the children’s narratives highlight the disjuncture between children’s own agency and capacity to negotiate the ‘to and fro’ of participation, traditional narratives of childhood combine with monological narratives of participation to cement a dichotomy between vulnerability and agency, in ways that render almost invisible children’s calls for dialogue and recognition. Instead of responding to children’s call for recognition through dialogue, children are conceptualised as being ‘this or that’. In other words, they are seen as possessing or lacking the autonomy to assert a claim for rights. Despite the ambivalent nature of the accounts given by the children in this study, the failure to invite them to have a say can be seen to have had the effect of hiding from view their individual competencies to negotiate the complex web of relationships. It has also hidden from view the individual strengths and limitations children might feel at this time in their lives. In turn, those aspects of the decision-making process that are important and meaningful to them also remain hidden, as does the opportunity to gain insight into the unresolved tensions, ambiguities and social power relations which undermine children’s potential and capacity to participate.

At the same time, the power at work in children’s participation can also be seen in the children themselves, and in the resistance of children to having a say arising from unequal relations of power, whereby the reality of a parent’s rebuke or response to hearing what the child had to say acted to constrain their own participation in the interests of self preservation, safety and coping. Whether consciously or unconsciously, it is evident that many parents of children in this study governed and manipulated their children’s lives by creating conditions of participation bounded by fear and uncertainty which left their children feeling dominated by their parents’ concerns. Indeed, such unequal power relations are evidenced in the exacerbation and resignation expressed by children that there would be little point in having a say because they are ‘just children’. Insofar as these accounts reveal the exercise of power by adults, we also see, to some extent, what Foucault (1988) describes as the normalising or subjectifying behaviour of subjects in children’s accounts, where children act and speak in accordance with the norms under which other individuals and groups recognise them, that is, as relational subjects to and of the systems of government of which they are a part.
It is important to also acknowledge this research as a site of complex power practices at play in the children’s narratives. Despite a primary focus for this project being to attend to relations of power inherent in inviting children to ‘have a say’, it is evident that I too exercised power and authority over the life of the project in a myriad of ways. The following two examples are included to illustrate this point.

The first concerns the ways in which I undertook interviews and, in particular, the occasional sense with which I left some interviews knowing I had not attended well to a particular invitation from the child to engage further in conversation, and in doing so, had moved away or shut down opportunities for children within the interview to have a say. In previous chapters I have outlined how a key feature of this study was to ensure children felt welcome and important. Accordingly, this involved the provision of a child-friendly space, created by conducting the interview on a rug with younger children, or at a coffee table with older children surrounded by colourful books and books, crayons and pencils, food, drinks and sweets, reminiscent of a small party scene. Children always entered the room with curiosity and a sense of anticipation about the research and especially the activities. My reflections on an interview with Rebecca reveal a typical beginning to an interview:

Rebecca was keen to proceed with the interview. She was enthusiastic, open and chatty. She was clearly concerned about wanting to ensure that she had my mobile phone number in the event that she might want to contact me further if she forgot to tell me everything. In particular, Rebecca was very excited to be there and keen to begin – when the tape did not work briefly, she was commenting that we should just start anyway.

Yet, at the end of an interview, I was sometimes left with the feeling that the invitation to the children to ‘have a say’ had not been genuine, and that as a knowing and controlling observer I had stepped too quickly away from the particulars of a child’s story, and thus prevented the child from being able to proceed with making meaning for themselves. This was particularly so in relation to children’s stories of abuse and violence. This is illustrated by a further example of my reflections on an interview:

Early on, when we are choosing bears for family members, Sasha says that Mum is a sad bear and Dad an angry bear, Daddy always being mean to Mum,
bashing Mum and hurting Mum. My response is to guide the interview away from this discussion. It’s problematic and does not sit well with the pragmatically influenced decision not to ‘dig too deeply’ into children’s stories of why they go to the CCS promised to the families of the children and in my ethics application. I consider that my power as an adult and distant inquirer was never clearer than at these critical moments in an interview. Ultimately, my desire to use my privilege to elevate the voices of children and to redress inequity in power relations must now be acknowledged as having the potential to perpetuate thin descriptions of children’s experiences and marginalise the concerns and experiences of children living in situations of violence and conflict. Whilst this dilemma was framed by my responsibilities as a researcher in a research, not a therapeutic environment (nor was it intended to be), it nevertheless highlights some of the difficulties in negotiating the boundaries between having a say and facilitating the child’s telling of stories. Such resistance draws attention to the nature of power relations in research. Far from ‘possessing’ power, as the researcher, I can be seen as bound in a network of power relations which illuminate the multiple networks of power at work in each decision made in the research.

In concluding this examination of the children’s narratives, I suggest that the recognition of children must be seen as having to be won through an exchange or struggle (Taylor, 1995). Merely granting children rights or proclaiming them as participants in social and political life does not, in and of itself, enable effective participation. Nor does it progress significantly the ways in which their status and voice are recognised in social and political life. Instead, children’s struggles for recognition take place within an intricate web of power relations which invite, exclude and resist the conversations and dialogue which have the potential to support and facilitate their participation, as well as to constrain and arrest it altogether. To speak of children’s participation as a struggle over recognition therefore suggests that we must move between acknowledging the functions and effects of power (which grounds children’s struggle for recognition) whilst pursuing deeper understandings of just what it is we seek to recognise (and are prepared to recognise) when we recognise the presence of children in the participatory sphere. Accordingly, I suggest that approaching children’s participation as a struggle over recognition requires a focus on the critically important
role dialogue plays in creating the conditions for recognising children, including facilitating and supporting the development of children’s agency, their capacity to understand themselves and to define their identity, while always cognisant of the practices of power embedded in dialogue itself. Lodge (2005, p.134) refers to this in her work on participation in schools as the critical need for the ‘building of shared dialogue’, which similarly accords with the ‘intergenerational dialogue’ that Mannion (2007, p. 410) calls for in negotiating child-adult spaces.

A dialogical approach implicit in a conceptualisation of children’s participation as a struggle over recognition requires an openness to new understandings and insights which cannot be generated by one of the partners alone, particularly given the notion that children’s perspectives can ‘place a stutter’ in adult narratives (Dahlberg & Moss, 2005, p.160). When recognition is understood to be a ‘precondition’ of participation, dialogue is elevated to a central place and the relationships with important adults (parents, teachers, case workers, lawyers) within which dialogue takes place feature as a key locus of self-discovery and self-affirmation of children’s status and voice as participants in family law decision-making processes.

Focusing on the ways in which children are recognised, misrecognised or unrecognised draws attention to the need for further engagement with the less obvious implications of current participatory practices of family law decision-making that often fail to include children in decision-making or to provide children with the opportunity to talk about their views, experiences, fears, desires and uncertainties. Understood in this way, both ‘conversation’ and ‘dialogue’ hold much potential for more fully recognising children as we invite them into a participatory encounter. First, we are ontologically forced to consider how we understand the nature of dialogue itself. According to Taylor, if we are to better understand the close connection between identity and recognition, we must take into account the overwhelmingly monological bent of mainstream modern philosophy which has ‘rendered almost invisible’ the dialogical character of human life:

We become full human agents, capable of understanding ourselves, and hence defining our identity … always in dialogue with, sometimes in struggle against, the things that our significant others want to see in us (1995, p. 230).
For the purpose of this discussion, Taylor is suggesting that while children’s identity is crucially dependent on their relationships with others, the ongoing tension that prevails in Western societies between monological and dialogical understandings continues to limit how we conceptualise participation. Such tension, I suggest, goes to the heart of children’s struggle over recognition.

Second, we are *epistemically* required to take the self-understanding of children seriously. When our conversations with children are guided by an orientation towards their self-understanding, children’s ‘participation’ is not simply constructed or perceived as the exercise of the individual agency of each child. Consequently, their competence, determination, dependency or vulnerability does not determine their inclusion or exclusion from participatory processes, but rather informs the way in which their participation takes place.

Thirdly, approaching children’s participation as a dialogical encounter presupposes an *ethical* dimension because it implies our conversations with them begin from a standpoint of respect for their views, perspectives and assumptions. A dialogical approach thus draws attention to participation as a space for a certain kind of ethical practice, that is, one which is comfortable with the provisionality and messiness that listening, reflecting, interpreting and engaging in conversation and dialogue inevitably bring (Dahlberg & Moss, 2005). This includes, in particular, acknowledging the implications of dialogue for the adults engaged in the conversation. While inviting children is an important first step in facilitating their participation, the extent to which our own knowledge, values and assumptions are open to question will largely determine the process and outcomes of the encounter, including what we select to report or act upon. How we respond to new insights generated through dialogue will significantly influence how children are recognised and how their sense of themselves, and what matters to them, is shaped through the encounter. The consequences are significant, for it is only through participating that children can come to acquire an identity as participants, as Tully (2004) has observed:

> One comes to acquire an identity as a citizen through participation in the practices and institutions of one’s society through having a say in them and over the ways one is governed. (p. 100)
How, then, do we approach dialogue such that it is oriented towards children’s self-understanding and individual agency, as well as towards the self-understanding of the adults involved? The following section addresses this question by focusing on the ways in which we think about, invite, engage in and respond to dialogue with children given our belief that it is integral to the participatory project.

7.2 Rethinking the Participation of Children in Family Law: From Listening to Dialogue

In this final section I attempt to bring into focus a number of questions or dialogic movements, iterative in nature, which may be useful for prompting further thinking about the dialogue that takes place with children about their participation in decision-making processes, including the terms of the conversations, who participates in them and how, and the ways we act on what comes of the conversations. The questions are essentially a reformulation of the five movements of dialogue proposed by Veling (2005) in Chapter Four and attempt to capture a number of the dimensions of children’s struggles over recognition within the broader ethical and methodological framework of this study, so as to direct critical attention to how we understand and ‘do’ dialogue with children.

What are you saying to me?

This first ‘movement’ concerns the ways in which we invite and engage children in conversation as part of their participation. The question reveals a ‘movement’ towards children as the ‘other’ which, according to Whelan (2007, p. 2), conveys a sense of ‘I … take the initiative and make a choice to be with you in some positive and creative way’. When we invite children into dialogue, we signal a willingness to listen and to take the conversation seriously. So while the question ‘What are you saying to me?’ does not, in and of itself, create, effect or transform their participation in everyday life, it nevertheless prompts us, as researchers and practitioners, to acknowledge the child and
their viewpoint, to listen, to respond and to clarify. Failure to ask this question will almost certainly shut down any opportunity for the meaningful and relevant participation of children in family law decision-making.

For those working with children across any number of settings, I suggest the question ‘What are you saying to me?’ is rarely asked in relation to many of the decisions made about matters that concern them. As earlier discussion has highlighted, there are a number of consequences for children, families and communities when we fail to create a social or political environment in which children can participate. Children miss out on the opportunity to talk about their views, experiences, fears, desires and uncertainties. There is less likelihood that informed, relevant decisions will be made – whether the decisions concern post-separation residence and contact arrangements, choice of schools or social policy issues of a more public nature such as planning, public housing or transport. Inviting children into dialogue through this first movement, then, offers them the opportunity to discover, negotiate and, if necessary, transform understandings of who they are and their place in the world.

**Do we place our own experience at risk when we ‘listen’ to children?**

This question signals a second ‘movement’ that is, a movement towards myself. It motions to the hermeneutic idea that dialogue requires something of the interpreter’s experiences to be put ‘at risk’. As Whelan (2007, p. 2) puts it: ‘I … open myself to discovery and change through the encounter’. For understanding (of both adults and children) to develop within a dialogic encounter, we must enter the conversation willing to follow it and the questions that emerge from it. To do so, however, requires placing our own experience at risk and acknowledging our prejudices and pre-understandings.

The question of whether, and to what extent, we place our own experience ‘at risk’ is significant in that it directs attention towards ourselves and the environment within which we work. So, while children’s participation in various settings is often accompanied by the rigorous evaluation of the risks that may or may not accompany their inclusion (for example, in legal decision-making processes and research ethics
committees), we rarely conceptualise ‘risk’ in terms of our own experience or, indeed, in terms of its productive or generative potential in dialogue. To do this creates disequilibrium in existing power relations and in social and institutional norms that are firmly fixed on the capacity of the child to participate, rather than on our own capacity to respond to what children have to say. A relevant example can be found in the context of research, where considerations of whether to invite children to participate are predominantly focused on children’s capacity to consent and to adhere to other aspects of formal ethical guidelines that ‘protect’ them, rather than on attempting to ensure that the researchers involved are capable of responding to what children have to say and to establishing the conditions for recognition through the dialogic encounter.

Having acknowledged our own prejudgments and prejudices, and the fact that these may largely be hidden from us, the second movement then draws attention to our own stance in the conversation, in particular what personal, political, social, moral and ethical commitments we are willing to risk by opening them up for interpretation and reinterpretation as part of the dialogic encounter of participation (Kögler, 1999; Whelan, 2007).

Does what the child is saying help me to see the matter of concern ‘differently’? Are we (together) able to generate new understandings?

The third ‘movement’ draws attention to the ‘in-between’ space of conversation, that is, to its productive potential, as well as to the power practices imbued within any dialogical exchange. From the perspective of this question, the subject matter is irrelevant unless we are drawn into consideration of the particular concerns it raises (Veling, 2005). Within this ‘in-between’ space, a dialectic of question and answer is allowed to flourish where meaning doesn’t manifest as assertion, but instead as something to be responded to and engaged with. Indeed, it is only through the formulation of this question around ‘seeing differently’ that dialogue can be set in motion, but in a way that the other’s as well as one’s own views are treated as substantive and potentially true (Kögler, 1999). Through dialogue with children about their participation, there is potential for long-standing assumptions to dissolve, new
questions to be asked, mistrust to be overcome, mutual understanding to be generated, visions to be shaped, new insights and perspectives to be gained and new levels of community to be strengthened (Seet & Tee, 2003). The productive intent of conversation implicates the partners well beyond merely talking and listening, particularly when taking into account the kind of ‘rules’ described by Tracy (1987):

Conversation is a game with some hard rules: say only what you mean; say it as accurately as you can; listen and respect what the other says, however different or other; be willing to correct or defend your opinions if challenged by your conversation partner; be willing to argue if necessary, to confront if demanded, to endure necessary conflict, to change your mind as the evidence suggests it. (p. 18).

This description of conversation signals the critical importance of the interpreter being open to influence – both their own and that of the other. Having opened up our own assumptions and prejudgments, this third movement suggests that children, too, actively shape and are shaped within the productive process of dialogue. In this context, the relationship of partners in conversation is understood to be not simply one of cognition or cohabitation, nor of discussion and debate. Rather, the dialectic of question and answer demands a willingness to follow the question wherever it leads, an adventurousness ruled out or limited in many forums of public discussion that appropriate the term ‘dialogue’ for what in reality are more constrained outcomes (Bruns, 2003). In addition, the reiterative approach imbued in a dialectic of question and answer draws attention to the agency of the children in the interpretative process and their role as ‘shapers’ of interpretation. In this way, the conversations we engage in as part of any participatory endeavour offer rich possibility for modifying the views of what makes sense to us.

What do you say? How will you choose to respond?

This question (which is not a final question, but rather the last in a movement of question and answer) invites us to consider how we choose to respond to children and what they have to say. Children’s participation involves an individual or organisation reflecting critically on what it is that dialogue with children is and isn’t asking for and
an acknowledgement of what it likely will and will not be able to change. This includes the child’s capacity to participate and the adult’s capacity to acknowledge, reassess and reposition existing understandings such that the conversation opens up a new space for transformation and change. This fourth movement, then, builds on the assumptions of the previous movements in that it again requires us to approach dialogue from a position that strives to understand, and to trust, how children themselves make sense of the world. It is important to note, however, that while entering into conversation with an openness to change is a precondition of conversation, change is a possibility, not a necessity nor a given. As Lonergan (1972, p. 231) puts it, ‘Be attentive, be intelligent, be responsible, be loving, and, if necessary, change’.

In concluding this discussion, it bears noting that ambivalence arising in children’s narratives of their participation is understood to weave throughout each movement of dialogue, that is, within partners in dialogue, as well as within the dialogic encounter itself. A key challenge in responding to the children’s narratives, then, seems to be the need to begin to better understand and feel comfortable with such ambivalence in dialogue. This response needs to be in relation to both the ambivalence imbued through the children’s narratives, as well as embedded within the act of dialogue itself. As Komulainen (2007, p. 13) says: ‘Before we can simply “give a voice” to children, we need to acknowledge that there are ambiguities involved in human communication, and that these ambiguities result from the “socialness” of human interaction, discourses and practices’. The movements of a dialogical encounter with children in relation to their participation suggested above are just one response to the complexity of identities and voices which call on us to be more attentive to children’s ‘languages, lived (context-specific) experiences, and how and by whom those are represented’ (Cook-Sather, 2007, p. 396). Dahlberg and Moss (2005) capture something of the essence of this experience:

In a ‘real’ listening to the child … one realises that what the child has got to say has often been excluded, marginalised, ignored or just seen as something cute or funny. Listening can make us both surprised and shocked as we find out how rich and intelligent children’s thoughts are. (p. 101).

However, my intention in revisiting Veling’s dialogical movements in light of the children’s narratives is to emphasise the critically important role of dialogue as the
conceptual bridge between how we interpret and render ourselves, and how we can work with children to interpret and render themselves in participatory contexts and so, together, re-imagine children’s participation. With contemporary claims for the central importance of children in participatory processes, including in family law, it is becoming clear that the ways in which we invite, support, resist and shut down opportunities for dialogue with children will figure prominently. How we understand such dialogue, including the clarification of its meaning and scope must surely be integral to the forging of new relationships, based on the recognition and respect of children, in the resolution of disputes about matters of such importance as their family relationships.

7.3 Chapter Summary

This chapter has provided a detailed analysis of the children’s narratives to explore the meanings and importance they attached to having a say. I have shown how the children in this study, although highly ambivalent about the idea of ‘having a say’, provided a nuanced and insightful account of participation. I have shown that the children attached meaning and importance to the role of dialogue and recognition in the process of decision-making that takes place following their parents’ separation. I have also shown that the children’s call for recognition and dialogue is also imbued with power relations which are, at once, complex and diffuse. I have suggested that three features emerging from the children’s narratives, namely power, dialogue and recognition, provoke a re-reading and the further conceptualisation of their narratives as a struggle over recognition. Approaching children’s participation as a struggle over recognition underscores the fact that, while recognition struggles are ‘boundary-making activities’, such ‘boundary making’ takes place in and through dialogue (Hobson, 2003, p. 6).

Reframing of children’s participation as a struggle over recognition prompts the need for critical reflection on what it is children are calling on us to recognise, as well as on how we, as researchers and practitioners, acknowledge, pursue, accommodate and respond to the rich and sometimes contradictory and ambiguous meanings that come into existence in dialogue with children. This study has shown that debates and tensions
about children’s status and the fact that children’s identity can be ‘precarious, contradictory and in process’ (Weedon, in Cook-Sather, 2007, p.393). Given this, I have sought to respond to such ambivalence embedded within children’s accounts of participation by posing a number of dialogical movements or questions that might be considered when endeavouring to engage and respect a voice that is not fixed or absolute, but rather evolving in dialogue with adults.

In the final chapter, Chapter Eight, I attempt to thread together the key themes emerging from previous chapters in order to address the research question, ‘how are children, and what they have to say, recognised in Australian family law?’
Chapter 8: Moving Beyond Ambiguity: The Potential of a Dialogical Approach to Children’s Participation

In this study, I have critically examined how children and what they have to say are recognised in family law decision-making in Australia. The narratives of 13 children, who at the time of the interview were the subject of Family Court proceedings, have been central to this analysis. The study has sought to lay bare prevailing and often hidden practices of power which act to resist what children have to say and hence their recognition. Such complex power relations are strongly implicated in the extent to which meaningful conversation takes place with children in family law decision-making.

At the same time, the study has sought to keep firmly in view the meaning and importance which children attached to their participation in family law decision-making processes. The study has shown recognition and dialogue to be key features of children’s conceptualisation of participation. By bringing children’s perspectives into the theoretical and policy debates, this study has attempted to contribute new perspectives and insights into the ways we conceptualise and negotiate children’s participation, beyond the issues and concerns of adults.

This final chapter commences with a brief review of Chapters One to Seven, addressing the research question, ‘How are children and what they have to say recognised in Australian family law decision-making?’ Following this, a number of insights arising from my engagement with the children’s narratives, and the unresolved tensions that characterise this interaction, are proposed. I conclude the chapter with a brief personal reflection on undertaking the study.
8.1 Pulling Together the Threads: A Critical Hermeneutic Analysis of Children’s Participation

In Chapter One, I positioned the research question, ‘How are children, and what they have to say, recognised in Australian family law decision-making?’ within the broader context of legal and theoretical discourses of children’s participation. I described how the idea of children as participants in social and political life, including in family law, has come to occupy a central place in the way we think about children in recent years both in Australia and overseas. I drew attention to research which shows there are benefits for children, families and communities when children participate and have a say in decision-making processes. As part of this discussion, I also highlighted ‘the problem’ of children’s participation, in particular focusing on the ambiguity and contradiction that increasingly accompany children’s participation across a number of settings. I pointed to evidence of this tension in the setting of family law, where, on the one hand, children report a number of benefits arising from their participation in decision-making processes, while on the other, they attest to the limited opportunities afforded to them around participatory processes. I posited the need for a critical hermeneutic approach to engage with the ambiguity and contradictions in relation to children’s participation. I signalled how this approach lends itself to exposing the nature of relationships of power embedded in children’s participation, without losing sight of its benefits and possibilities.

In Chapter Two, I positioned children within the political and legislative context of family law decision-making. I signalled the emergence of a new rhetorical framework in Australian family law and policy which, although framed in the language of child-inclusive and child-focused family law practice, has quite a different focus, that being to secure equal shared parenting arrangements following parental separation and divorce. I highlighted how this new rhetorical framework has hidden from view a fundamental shift in the ways in which children’s participation is interpreted in an Australian setting. This shift is seen in policy that moves away from an emphasis on the inclusion of children in decision-making to an assumption that participation occurs when children have a meaningful relationship with both parents. Consequently, children are positioned at arm’s length to decision-making processes but are, in fact, deeply implicated in the
negotiation of parent’s ‘rights’ to contact following separation. This anomaly was shown to exist in the apparatus of family law, in particular, the legislation and dispute resolution processes. I concluded the chapter by proposing that current family law discourses about children’s participation are shaped and influenced by broader social discourses of participation, which require further examination.

In Chapter Three, I suggested that the contested nature of children’s participation in family law is inseparable from the diverse array of discourses that have shaped it. Indeed, even the definition of children’s participation itself is contested. Accordingly, I proposed to analyse children’s participation in terms of the wider discussion and debates in relation to both children and participation. Taking discourses of children and childhood first, and drawing on the theoretical insights from the childhood studies, socio-cultural theory and UNCRC, I described the shift that has taken place in the ways in which we understand children. This movement has been away from notions of children as immature, vulnerable and in need of care and protection towards notions of children as social agents with an important role to play in social and political life. Despite this shift, however, understandings of children as active, social agents have not translated easily in research, policy or practice. As well, I suggested that the analysis of the limitations of participation has taken place largely in isolation from a broader theorisation of participation. Discussion included an analysis of the procedural enactment of participation. Here I proposed three key ‘moments’ in the recent history of participation in an attempt to capture the ways in which individuals and groups have been recognised within particular political and democratic cultures and, hence, how their participation has been shaped and acted upon at a philosophical, theoretical and practical level.

I suggested that, until recently, the discursive framing of participation has primarily been in monological terms. Such discourses have privileged notions of autonomy, capacity and self-determination, while at the same time hiding from view the limitations of monological approaches to the inclusion of children as participants. Consequently, the movement towards children’s participation has hidden a paradox: even when children are positioned as possessing the requisite agency and autonomy (for example, within childhood studies and the UNCRC) their agency is rendered almost invisible by
the overwhelmingly monological bent of mainstream approaches to children’s participation which consequently resist the procedural enactment of their participation. Notwithstanding such complexity, I concluded this chapter by suggesting a change can be detected in the way participation is theorised and practised. I observed a movement of theorists, courts and policy makers towards reconciling tensions arising from monological approaches and the gradual emergence of a dialogical perspective. With this in mind, I suggested the need for more critical reflection on the ways in which we understand and theorise dialogue itself.

In Chapter Four, I explained how critical hermeneutics is able to pursue dialogical forms of knowledge because it explicates a theorisation of dialogue whereby children’s accounts are understood as renderings of coherent meanings, which are mutually negotiated (not simply discovered), in the act of dialogue. I argued that this study required a perspective and process of dialogue and conversation that strived to understand, and to trust, how children themselves make sense of the world. In addition, I showed the need for an approach which trusted the potential of dialogue itself to access the self understanding and reflexivity of children. At the same time, I recognised that undertaking research with children requires ongoing critical attention and exposure to the political, legal and social structures of power and domination that act to mediate the dialogue and conversation that takes place when children participate. I suggested that hermeneutics is suited to research projects such as this because it addresses the inherent theoretical and ethical difficulties of a participatory approach, including issues of representation, voice and researcher responsibility. As such, critical hermeneutics facilitates a departure from monological approaches to understanding which have masked the meaning and importance children attach to having a say in matters that concern them, as well as attending to the invisible artefacts of power which have operated to govern children’s participation in a multitude of ways.

In Chapter Five, I outlined the methodological and ethical implications of adopting a critical hermeneutic approach for the research process. I discussed some of the methodological and ethical tensions that arose in this study, including tensions between the dialogical approach animating this study and the more formal ethical framework governing its process. I described some of the challenges and dilemmas I faced in
attempting to balance the participatory principles underpinning the study and the need to protect the children from harm. I discussed, in particular, the difficulty and challenge of recruiting children, an issue which also provided me with important insights into some of the reasons why the experiences of children, especially children in supervised contact, have been almost wholly hidden from view in research literature and in everyday life. As part of this discussion, I provided a detailed description of the research process.

In Chapter Six, I introduced the children’s narratives of having a say in family law decision-making. After first setting the context of their participation, by reporting their views and experiences of supervised contact, I provided the children’s narratives about their participation in family law decision-making. Discussion focused on four themes: their experiences of having a say, what having a say is, whether they wanted to have a say and how it felt to have a say or not to have a say. Children reported that they had been largely excluded from the decision-making that had taken place leading up to supervised contact and access. Despite this, they had rich insights into how children, and what they have to say, should be recognised. The children were committed to the importance of the principle of children having a say, saying that it was something ‘all children should have’. Children conceived of participation primarily in terms of listening. Far from approaching participation in terms of adults listening to what children have to say, children conceived of listening in its broadest sense as being afforded the opportunity to know what was happening around them, time to think and be supported, choices about what arrangements might work (and might not) and, of course, the invitation to have a say. In addition, children’s accounts of listening emphasised the importance of relationships, trust, care and respect towards other members of their family, most particularly their parents. For this reason, I suggested that the children in this study understood participation such that it could be conceptualised as a call for recognition and dialogue.

When it came to having a say about the decision for them to have supervised contact, however, children’s responses were ambivalent at best. In this study children moved within and between a number of emotional and pragmatic spaces as they attempted to negotiate and to explain the norms and practices of governance and self governance.
Such contestation was not limited to tension between adults and children, but also within children themselves, which was evident in the dissonance within the children’s narratives. Like the children in the earlier study reported in Chapter One, the children’s accounts appeared to ‘to and fro’ between their desire to have a say and be heard and accounts of vulnerability, sadness, loss and hurt associated with the ongoing conflict of their parent’s separation and divorce. This ‘to and fro’ between such accounts, however, was not perceived by children to be grounds for excluding them from the invited space of family law decision-making, but something to be negotiated depending on the circumstances of their own situations. In this way, the children’s narratives pointed to the importance they placed on recognition of their status and voice as they sought to negotiate the events taking place around them. Finally, children spoke briefly about the relationship between having a say and their emotional wellbeing, saying that having a say made them feel ‘good’ while being excluded from decision-making could make them feel sad and alone.

A key focus of the analysis in Chapter Seven was to attempt to draw together the close connections between recognition and dialogue, emerging out of the children’s narratives, whilst at the same time attending to the relations of power imbued through the children’s narratives about having a say. For the children in this study, a key feature of their participation was recognition, with dialogue the key vehicle for enabling, facilitating and supporting such recognition. Unfortunately, rather than recognition, it was misrecognition and non-recognition that characterised children’s experiences of family law decision-making, experiences which I suggested were evident in children’s sense of sadness, loss, grief and powerlessness expressed in response to the events taking place around them. The significant role of power in shaping and influencing children’s narratives about having a say in family law decision-making was also discussed in relation to how the children’s knowledge and thoughts about participation were organised and sustained. So, while the self-knowledge and reflexivity of the children grounded the analysis, I sought to identify sites of resistance in order to unmask power practices which constrained children’s participation.

With these three themes in mind, recognition, dialogue and power, I suggested that implicit in the children’s accounts of having a say is a conceptualisation of
participation, in theoretical terms, as a struggle over recognition. I suggested that such a conceptualisation holds out a number of benefits for better understanding children’s participation: first, it departs from approaches to children’s participation which focus on ‘the claim for’ or ‘the case for’ their participation, and invites further examination of the multiplicity of ways in which individuals and groups (children and childhood) are not only recognised, but also misrecognised, governed and blocked in the ongoing negotiations, communications and relationships of which they are subjects and through which they are governed. In other words, such a conceptualisation allows for the critical examination of the prevailing norms under which children, adults and institutions are led to recognise each other, and upon what it is that children call upon us as adults to recognise. Secondly, it opens up new possibilities for children’s participation. Far from oversimplifying the conditions which shape our interactions with children, conceptualising children’s participation as a struggle over recognition invites an ongoing focus on the challenge that lies at the heart of a dialogical approach and the ways in which we invite and facilitate children’s participation. The questions at the heart of this challenge include: How do we engage in dialogue with children and young people about the issues that matter to them? What do we do with their sometimes disinterested or contradictory accounts? How do we respectfully hear and act upon what children tell us is important to them? I concluded the chapter by revisiting Veling’s reiterative questions so as to provoke further critical thinking as to how we might acknowledge, remain open to and engage with the complex and contested nature of children’s participation, including its ambiguities.

In this chapter, Chapter Eight, I identify some of the critical challenges that have arisen in this study which require serious attention if we are to continue to progress children’s participation in family law decision-making. These include the challenge of developing the transformative potential of a dialogical approach to children’s participation in family law and research settings and avoiding the appropriation of dialogue as a new orthodoxy. I conclude this chapter with a short reflection on the process of writing this thesis – where it started, what it has taught me and the difficulty of concluding it.
8.2 Where To From Here?

This study has proposed a ‘dialogical turn’ in participatory practices that locates recognition as its raison d’être. The emphasis the children in this study placed on the importance of recognition, as well as their desire for a more nuanced dialogue as part of family law decision-making processes, suggests children themselves are very much part of this broad transformation. Yet, as the children in this study also remind us, we cannot confuse an emerging emphasis on dialogical approaches to participation with the degree to which these translate into improved practice. Gaventa (2007) draws attention to this uncertain nature of participation, reminding us that potential spaces for change always ‘interact with different histories, cultures and forms of power to produce radically different outcomes’ (p. xv). As a prominent site of participatory practice, family law is deeply implicated in the nature, forms and quality of engagement for children in decision-making processes when their parents separate. In this final section, I outline a number of challenges that will need to be addressed if we are to better respond to children’s calls for recognition and dialogue. These relate to challenges as they arise in the contexts of family law decision-making, research involving children, as well as in relation to thinking critically about the pitfalls of adopting dialogue as a new orthodoxy.

**Developing the potential of a dialogical approach to children’s participation in the context of family law decision-making**

A key challenge emerging from this study is how family law, policy and practice might be re-orientated towards dialogue as a key to facilitating the respectful recognition of children and what they have to say. The following discussion examines a number of policy implications arising from this challenge.

Children’s participation in family law decision-making can be viewed as taking place at three different levels: structurally, that is, at the level of family law legislation, policy and organisational practice; relationally, that is, between adults (lawyers, professionals and parents) and children; and reflexively, that is, where individuals (judges, lawyers,
family court professionals and parents) think critically about their role in supporting (and preventing) children’s participation.

Family law legislation and policy

In Australia, the Family Law Act, particularly the ‘two-tiered’ best interests test, is a central broker of power relations in facilitating the recognition of children and what they have to say. As it currently stands, the relegation of children’s views in the legislation to one of a number of additional considerations in the determination of their best interests implies that their views and experiences are less important than the primary considerations of their protection and the benefit of having a meaningful relationship with both parents. Hence, depending on the weight that will be given to the additional considerations by the Family Court in future decision-making, children’s views may well transpire as secondary to considerations of the importance of protection and of a meaningful relationship with both parents.

At the risk of contributing to reform ‘fatigue’, amending the Family Law Act to ensure children’s views are given equal standing alongside their protection and the importance of a meaningful relationship with both parents, would be a significant step forward. For example, including children’s views as a 60CC(2) ‘primary’ consideration would signal the importance of embedding a decision-making process which is open and responsive to the reality of children’s lives. Alternatively, the insertion of a subsection, similar to that of New Zealand’s Care of Children Act 2004 section 4(6), stating that determination of section 60CC(2) ‘primary‘ considerations does not limit section 60CC(3)(a) (the child’s views), would redress the current lack status around children’s participation in the Family Law Act 1975. Ensuring children’s views are a primary consideration, alongside their contact and protection rights, would strengthen Australia’s adherence to its obligations as a signatory to UNCRC, in particular to Articles 12, 13 and 9 (2). It would also be consistent with the National Framework for the Protection of Australia’s Children, which states children’s participation in decisions affecting them is one of a number of core principles to guide national policy and ensure compliance with Australia’s obligations as a signatory to the UN Convention on the Rights of the Child (Commonwealth of Australia, 2009).
In addition to amending section 60CC(2) of the *Family Law Act* 1975, the findings of this study suggest that the requirement for the court to hear the views of children could be further bolstered by other amendments to the legislation which strengthen and support children to participate in meaningful and constructive ways, if they so choose.

The experiences of the children in this study, in particular, would suggest the need for a number of additional mechanisms to strengthen the participation of children in decision-making regarding supervised contact. A significant first step would be the introduction of legislative mechanisms to ensure a child is always consulted by an ICL *before* orders for supervised contact are made. The inclusion of such a mechanism would be an important act of recognition in that children would be positioned as participants in the decision-making process rather than merely informed about decisions made without their input or knowledge. Such a provision would go some way towards ensuring children know and understand that a court is considering supervised contact as an option for contact with one or both parents, and that their views are important to the court. This extra provision would also ensure children’s views are sought in relation to any matter the child might wish the court to consider in determining whether contact should be supervised (e.g. practical considerations such as how often supervised contact would take place, where, when and whether time would be shared with siblings). Finally, children would also be informed that their views about any changes to contact, for example, from supervised to unsupervised contact or to no contact, would be sought before such changes were made.

In addition to amending the legislation, significant steps need to be taken towards the ongoing development of resources so children can access information regarding the legal processes underway and the role of individuals within this process (for example, the Family Court judge, lawyer, contact workers, parents and the child). Resources reporting other children’s views and experiences of family law decision-making would be especially useful in helping to normalise the process. However, the findings of this study suggest that such resources need to be human as well as material. While written and web-based resources are invaluable for allowing children to access information immediately and privately (the recently launched website ChaT First
(www.chatfirst.com.au is an excellent example), the children in this study highlighted the importance of talking with someone who could assist them. Resourcing the ICL to establish a relationship with the child beyond seeking the child’s view, so as to provide them with relevant information and the opportunity to process it, would be a substantial starting point.

This study also points to the need for legislative recognition of children and what they have to say to extend beyond decision-making in contested matters to family dispute resolution and privately ordered decision-making processes including, in particular, the principles and procedures underlying Family Relationship Centres. This finding is consistent with that of Parkinson and Cashmore (2008), who emphasise that while a great deal of work has been done on children’s participation in trials, there exists the need to now consider children’s participation outside of legal paradigms:

Families are dynamic. Court orders are not. … The focus on hearing the voice of the child in judicial proceedings can distract attention from the importance of involving children in decision-making about how to adjust the parenting arrangements in light of changing circumstances and needs. (p. 210)

Extending the scope of the child participatory provisions in the Family Law Act 1975 to include family dispute resolution and privately ordered decision-making processes would represent a fundamentally important recognition of children, and what they have to say. There should be provision for children to participate whether in litigation or in family dispute resolution – regardless of whether they choose to take up the opportunity. While children will vary as much as adults concerning whether, and to what extent, they want to participate this study suggests that such differences do not preclude children’s basic need for recognition (with this taking place in the form of an invitation to dialogue) regardless of whether decisions are being made in contested or non-contested settings. As Chisholm (2003, p. 59) observes, “Some children will be outraged if they don’t get to say their piece; others would shrink from the prospect”.

Finally, the findings of this study would suggest the need for policy makers to review how current participatory processes are currently understood, facilitated and evaluated across family law contexts so as to ensure children’s views are heard and their right to
participate in decisions that affect them are promoted and protected. The sophisticated insights of the children in this study are further evidence of the need for policy makers to secure the involvement of children and young people in the development of such policies as well as to participate in their ongoing evaluation.

Simply elevating the status of children in legislation is, however, just the first step. As this study has shown, recognition takes place in dialogue and, as such, requires consideration of the conditions of such recognition to ensure effective and inclusive participatory practice. Affording greater legislative acknowledgement of the importance of children’s participation in all decision-making processes, in turn, should lead to separating parents and family law professionals being more informed about the importance of continually inviting and respecting children’s views and experiences as they change over time. This challenge takes us to the second level of decision-making, that is, between adults (lawyers, professionals and parents) and children.

**Between adults (lawyers, professionals and parents) and children**

This study suggests that focusing attention on the ways in which the courts, family law professionals and parents enter directly (and indirectly) into conversation and dialogue with children is critical in progressing effective child participation. As Percy-Smith and Weil (2003) argue, the degree to which the professional and/or parent is responsive to the child, and the extent to which adults and children can work together to explore the problem and to find mutually beneficial solutions, is critical to effective participatory practices.

Initiating a movement towards the recognition of children as a guiding principle of family law must therefore address the question of how to best negotiate the contingencies of family law culture, in particular, how professionals and parents understand children’s participation, and how they are guided to support children to participate. Weaving notions of recognition, respect and participation into family law policy and practice resides to a large extent with the attitudes, behaviour and power practices of adults, as Neale (2004, p. 179) also observes: ‘Trying to change children’s place in the world cannot occur without a shift in adult attitudes, values and behaviour’.
At its most basic, inviting children’s participation requires considerable support, education and guidance for adults (parents, caseworkers, lawyers, judges and policy makers) and children if there is to be a shift towards recognising children as important and valuable citizens in family law settings and inviting their participation in such settings.

Taking adults first, this study suggests policy makers need to direct attention to improving the understanding and skills of the adults involved so they might better recognise children and take their views seriously following separation. Given the limited policy focus that currently exists, there is a range of possibilities policy makers might consider. For example, the development of parenting programs and resources which improve the willingness and ability of parents to invite their children to conversation as well as address their own fears around giving children increased opportunities for having a say. Improving the knowledge and understanding of family law professionals about the principles and practice of children’s participation would contribute to the deeper recognition of every child’s capacity to influence and shape themselves and their world.

Children, too, require support to participate. An important implication emerging from this study is the need for policy makers to consider how to strengthen children’s capacity to participate in family law decision-making. At its most basic, this requires improving children’s understanding of the legal processes following separation. This might take place in a number of ways – from having someone to talk to that they can trust or have confidence in, through to having access to information and resources. In addition to information, children’s participation in decision-making requires developing children’s social and emotional wellbeing to support them to discern what it is they want to say, and how they want to participate in the process. Opportunities to learn from other children with similar experience, and access to follow up information are further ways of supporting children to participate in meaningful and constructive ways.

In addition to resources, support and education, this study points to the critical need for a paradigm shift in the way that children’s participation is conceptualised and practiced
if the possibilities for children’s participation are to be realised. Children’s participation in family law decision-making takes place over time, in a process that involves adults and children working through a number of stages of decision-making. It has been my contention that, in spite of the changing context of family law in which children are said to be the focus, there has been a lack of critical reflection on the processes which facilitate their participation. Consequently, children’s views and perspectives have been easily lost in the ‘one-off’, ‘top-down’ (first and second moment) approaches to participation. In response to this challenge, Neale (2004) suggests that it is useful to think about the process of participation as taking place in a number of iterative stages, including:

...identifying an issue or theme to investigate; planning methods of investigation; engaging particular children and adults in the process; exploring issues through discussion or other methods of communication; analysing findings; feeding back, crystallising viewpoints, discussing possible courses of action or future plans; facilitating whatever plans are agreed; monitoring and evaluating the effectiveness of the process, assessing outcomes; and refining future strategies for participation. (Neale, 2004, p. 169)

To speak of the recognition of children in family law decision-making suggests we must commit to a deeper consciousness of how we intend to respond to children throughout the decision-making process. Thinking about participation as a process is not only crucial for effective decision-making, but is also significant for the well being of children themselves. We have seen in this study that conversations with children about their participation in family law decisions are not just a process to which children are (or are not) invited to talk about their views, experiences, fears, desires and uncertainties: rather, these conversations create a space within which children discover and negotiate the essence of who they are and their place in the world – in other words, their identity and status. Adopting a dialogical approach challenges understandings of the ways in which children are recognised which, in turn, adds impetus to the acknowledgement of their rights and their capacity to participate. This includes the recognition and respect of their choice to participate in decision-making processes, for ‘unless children participate through choice, then the process may come to feel more like ‘intervention’, or, even worse, “interrogation”’ (Neale, 2004, p. 174).
The third level of decision-making is the need for individuals (judges, lawyers, family court professionals and parents) to think reflexively about their role in supporting (and/or preventing) children’s participation. The dialogical movements outlined at the conclusion of Chapter Seven provide the basis for thinking critically about the iterative process of decision-making that takes place between adults and children in family law decision-making. So, for example, at each of the stages identified by Neale above, the findings of this study might prompt individuals working with children to ask themselves whether the invitation to children to participate is accompanied by an intention on their part to take the views of children seriously, to respond to what they have to say and, if necessary, to change. As Neale (2004) argues, inviting children to have a say not only requires tangible resources to ensure participatory processes are properly developed, staffed and resourced, but also that adults ‘rethink’ the way they see children:

Adults need time to rethink the way they ‘see’ children, to practise and reflect on new ways of relating to them and, most importantly, to build these new ways of working into their daily routines. Overall, then, the new ethos needs to be built more effectively into the infrastructure of public policy. (pp. 179-180)

Children are an important part of our society and have much to contribute to its development; however, this study suggests that recognition and respect of children’s insights and knowledge must continue to be fostered through conversation and dialogue, no matter how complex and contested. Inviting authentic participation from, and dialogue with, children requires a new set of skills from parents and professionals, requiring them to work alongside children, familiarising themselves with the child’s context, orienting themselves to ‘read’ and understand the child’s point of view, and providing respectful but non-intrusive support for their engagement in dialogue.

As well, there must be acknowledgment of the deep-seated power relationships that are imbued within historical and cultural discourses of childhood and participation, including through current family law, policy and practice. At the same time, we are required to question how we involve ourselves in participatory initiatives and so contribute to the conditions and procedures that enable, facilitate, support and prevent the recognition of children through dialogue, in much the same way as Gallagher (2006) suggests:
What are the strategies and tactics of participation? Is power being exercised through tactics of coaxing, persuasion, refusal, persistence or evasion? Is it being exercised through the medium of space, bodies, objects, hearing, vision or words? Is it being exercised through economic resources, sanctions, punishments, rewards? (p. 8)

Smart (2001) urges us to acknowledge the role of history when we think about our personal role in effecting change, when she says that ‘history is part of our living present and if we forget this we continually underestimate how hard it is to achieve change’ (p. 9). While there is the need to effect social change, there is also the need to continue to change our understanding of what we mean when we claim to engage in dialogue and conversation with children. As Tracy (1987) observes, ‘there is no release for any of us from the conflict of interpretations if we would understand at all’ (p. 114). At the same time, however, effecting change is not a challenge we should shy away from. Individual reflection by all stakeholders on the dialogical process of participation is a necessary part of any change or transformation that must take place in the family law system if we are to recognise children as important and valuable partners in the decision-making process and to bring their experiences into view. Only then will the language of child-centred family law practice truly reflect the needs and best interests of children.

Implications of a dialogical approach to children’s participation in research settings

A second key challenge emerging from this study, closely related to the first, is the implications of a dialogical approach in the setting of research rather than in family law. It concerns the question of how we are to re-orientate research practices so as to recognise children as embodied, active agents in the midst of dialogue with adult researchers. As this study has shown, a number of methodological and ethical challenges flow when attention shifts to the dialogical exchange between the researcher and the child as the primary focus of inquiry. A good example, provided in Chapter Five, is resistance within the current regulatory ethics framework in Australia to inviting children to conversation in research contexts. This resistance is revealed in a number of ways, including: conflicting definitions of the capacity and maturity of the child, dominant focus on risk management; a lack of clarity and transparency around the
question of what constitutes risk, and a failure to define notions such as a child’s ‘best interests’, ‘maturity’ and ‘capacity’ in the National Statement on Ethical Conduct in Research Involving Humans (1999).

However, although these issues present important challenges to the involvement of children in research, less easy to negotiate are the boundaries around what constitutes ‘acceptable’ or ‘good’ ethical research, what types of studies ethics committees will approve and what kinds of data will be collected (Lincoln & Cannella, 2004). In Australia, institutional discourses about ethics have generated a new system of meanings which now permeate academic and research institutions and promise to severely curtail opportunities for children to participate in research (Halse & Honey, 2007). Framed in terms of compliance and assessment of risk to children, the potency of such discourses lies particularly in their power to include or exclude children (Cannella & Lincoln, 2004; Halse & Honey, 2007, Masson, 2004). This is increasingly evident in the role of ethics committees in gatekeeping children out of research on the basis of potential risk and in their resistance to and discomfort with participatory research methods premised upon inviting children to have a say (Graham & Fitzgerald, 2008). Halse and Honey (2007) capture the complex nature of contemporary institutional ethics discourses which regulate the work of researchers seeking to involve children:

[There has] emerged an intricate, institutional discourse of ethical research that is both an ideology and an instrument of governmentality and that encompasses an ever-expanding suite of technologies, structures, and practices, including a new class of professional committed to its political ethos. Moreover, the capillary work of these forces extends beyond the realm of scholarly research and the academy, weaving itself in general and specific ways through the nooks and crannies of institutions and into national policies, legislation, and law and into their supporting infrastructures. It is a discourse that has potentially profound implications for the moral imperative to respect others. (p. 341)

The dissonance between the monological bent of institutional research ethics and dialogical approaches to research practices, reveals the depth of entanglement of child-inclusive research with broader moral questions, political tensions and theoretical discord that constitute current institutional discourses of ‘research’ and ‘ethics’. To call for dialogue, in this context, thus represents nothing short of a call for a ‘radical
epistemological transformation of what ethical research is taken to mean’ (Halse & Honey, 2007, p. 343). As Morrow and Richards (1996) have argued, respect for children’s competencies needs to become ‘a methodological technique in itself’ (p.100). In research involving children, this implies a fundamental shift away from conceptions of children in terms of what they are not, towards the recognition of children as integral to the research process and to the production of research knowledge about them.

**Avoiding the appropriation of dialogue as a new orthodoxy**

This third challenge brings a more cautionary note to the discussion. While the study has sought to explore the possibilities of a dialogical approach to participation, my intention has not been to promote dialogue as the new orthodoxy of children’s participation, or to elevate it to the status of the ‘new solution to all problems of recognition’ (Tully, 2004, p. 101). Critical hermeneutics is particularly forthright about the need to continually attend to the dangers inherent in the uncritical appropriation of dialogue as a new solution to all problems, such that we fail to understand the implications of the underlying structure of dialogue. This study, too, has highlighted that it is both idealistic and naive to approach dialogue as if it were devoid of power or to assume that deeply embedded practices of power and authority can be readily untangled from the ways we listen to, interpret and act upon what children have to say. A commitment to engaging in dialogue with children necessarily brings with it a major inherent challenge – namely that all dialogue is interpretation. Research involving dialogue with children is essentially an interpretive enterprise where researchers are ‘engaged actively in formulating meanings for participants’ narrative expressions, often in quite different terms than the participants themselves would’ (Smythe & Murray, 2005, p. 176). Hermeneutics cautions about the dangers of dialogue – in this case, when the voices of children are conflated with that of the researcher, or indeed, elevated outside the interpretive enterprise.

At the same time, this study has sought to resist post-modern tendencies to reduce meaning to relations of power, thus diminishing or overlooking the potential of dialogue, however tentative, for envisaging emancipation and transformation. In this study, I have responded to the challenge of negotiating the relationship between power
and meaning by endeavouring to remain open to the complexity of the children’s narratives as they have presented themselves. Accordingly, the insights gained in seeking to better understand how children, and what they have to say, are recognised in family law decision-making are, I suggest, at best ‘limited, fragile, necessary exercises in reaching relatively adequate knowledge’ (Tracy, 1987, p. 81). I agree with Margaret Summerville (2006, p.200) that ‘complexity and meaning making have a symbiotic relation: complexity is necessary for meaning-making, and meaning-making is necessary to deal with complexity’. For me, the challenge is to continue to embrace the complexity of dialogue itself so as to continue to pursue approaches to research with children that take seriously the dialogical act within which we seek to ground the subjectivities of children. In positing the critical links between participation, recognition and dialogue, where the explication of dialogue is informed by critical hermeneutics, I hope to have contributed further to the development of what Neale (2002) describes as a ‘more nuanced understanding of the position of children in relation to adults, one which acknowledges the possibility of mutuality as well as oppression, and the value of connectedness as well as individuality’ (p. 470).

8.3  ‘Concluding’ Reflections

Denzin and Lincoln (2005) suggest that the end of a work should signal neither a conclusion nor final word so much as a punctuation in time. Until recently, however, such sentiments did not help me as I considered how best to ‘conclude’ this study. Instead, the thought of writing this final section only seemed to bring into sharper focus the vastness of the landscape of children’s participation, and the seeming impossibility of attempting to bring new and different insights to the questions that it raises. I have also found it difficult to settle questions and concerns as to whether I have adequately captured what it is the children wanted me to know, and whether I have reported this with integrity and candour. As I reflect back over the interviews there is no doubt that there were times when the model of hermeneutic dialogue embedded within the study seemed at odds with some interviews which were marked by a sense of uncertainty, discomfort and unease – sometimes mine and sometimes that of the children. I have also felt overwhelmed at the complexity and embeddedness of power relations which weave through children’s lives and which, more often than not, appeared to resist and
shut down opportunities for the recognition of the children – of who they are, their competencies, strengths and vulnerabilities. Indeed, I perceived that at times, the network of power that acted to maintain children as ‘deliberately silenced or … preferably unheard’ (Roy, 2004, p.1) might never be disrupted or undone.

On other occasions, however, I have experienced a deep sense of mutual recognition and trust, which, when combined with new and fresh insights into the lives of the children I came to know in this study, confirmed my view of the potential and possibilities of dialogue. This was so both in relation to children, many of whom beamed with happiness at having had the opportunity to ‘have a say’ as well as for me as I experienced the potential of dialogue for heightening my understanding of the complex sensitivities that accompany the invitation to children to have a say in the decisions that shape their lives.

I have come to realise though, from the many conversations that have taken place over the life of this study, that the challenge of ‘concluding’ the study is not so much about settling such questions and concerns, but more about accepting that this study has also brought to life new questions and fresh insights. It is in this spirit, which is captured so eloquently by Veling below, that I surrender the study to the possibility of new beginnings and re-imaginings that lie at the heart of the research endeavour:

> It is writing that is willing to disperse itself so that words can be sown and borne in new contexts and new fields. It is free, gratuitous, grace-filled writing: surrendering itself to the many possible paths … into what Taylor calls a ‘mazing grace’. (Veling, 1996, p. 201)
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2. Caselaw

*Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS [1986] AC 112*

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*Harrison and Woolland [1995] 18 Fam LR 788*

*N v N, (2000) FLC 93-059*

*Re Alex: Hormonal Treatment for Gender Identify Dysfunction [2004] FamCA 297.*

*Re K (1994) 17 Fam LR 537*
T v L (unreported, 12 October, 2001, Collier J, Parramatta).

ZN v YH [2002] Fam CA 453

3. Legislation

Care of Children Act 2004 (NZ)

Children and Young Persons (Care and Protection) Act 1998.

Family Law Act 1975 (Cth)

Family Law Reform Act 1995 (Cth)

Family Law Amendment (Shared Responsibility) Act 2006 (Cth)

Family Law Rules, 2004 (Cth)

Guardianship Act 1968 (NZ)

National Health and Medical Research Council Act 1992

4. Treaties

Supervised Contact and Family Court Orders

What Can Children and Young People Tell Us?

How do children experience supervised contact?

How do children experience the Family Court?

How do children see themselves as having a role in the process?

What information they would like to have about supervised contact and about the Family Court?

Researchers at the Centre for Children and Young People at Southern Cross University are working together with [Children’s Contact Centre] to ask these questions as part of an important research project that seeks to hear and better understand children’s experiences and understandings of supervised contact and of the Family Court. The research will contribute to the development of effective ways to support children during supervised contact and to be heard on legal matters that shape their lives and futures. If you would like more information about participating in the research, you can speak to Jane Kelly or contact Robyn Fitzgerald at the Centre for Children and Young People on 02 66 203802 or 0411 800 447.
INFORMATION SHEET FOR FAMILIES

Supervised Contact and Family Court Orders –
What can children and young people tell us?

11th December, 2004

Dear ………………………………..

Researchers at the Centre for Children and Young People at Southern Cross University are working together with [Children’s Contact Centre] in an important research project that seeks to hear and better understand children’s experiences of supervised contact and of Family Court Orders. In Australia, thousands of children experience supervised contact every year, yet little is known about the children’s feelings and experiences of supervised contact, nor their understanding of the legal processes that surround such contact. Our role will be to write about the experiences that children describe and try to link this with other children’s experiences and then to current literature on how children are ‘heard’ in family law proceedings, particularly those children experiencing supervised contact.

The research will take the form of interviews with children over 35 – 40 minutes. In order to discuss and explore each child’s particular experience of supervised contact and of the Family Court, the interview will be semi-structured. This means that the questions asked will be partly determined by your child’s responses.

The interviews will need to be audio-taped so that they may be carefully analysed. Only Robyn Fitzgerald will have access to the taped interviews. If your child participates in the research, all 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 a child discloses a situation of abuse or neglect we are obliged, under NSW Child Protection legislation, to report the matter.

Once all interviews are finished a group focus session will be offered to the children who have participated. This session will provide the children with the opportunity to provide further feedback to the researchers and to hear the stories of other participants in the research project. The requirements of confidentiality outlined above will also apply to the group focus session.

The interviews have been carefully designed to ensure that participation in the research causes no distress to any child. Should your child agree to participate and in the unlikely event that any distress should occur we will refer him/her to professional counseling with [Children’s Contact Centre] at no cost to yourself.

Interviews will be held at the [Children's Contact Centre] on [details]. If your child decides she or he wants to discontinue participation at any time, they may do so without giving a reason and their right to do so will be respected. If both you and your child agree to participate, we will contact you to organize interview times. We will also send your child information about the project, including a consent form confirming that they want to take part.

We have also enclosed with this information sheet two forms that need to be completed by you if your child agrees to participate. The first provides the researcher with background information to the legal proceedings that have taken place to date. The second is a consent form that must be read carefully, signed and returned to Robyn Fitzgerald or John prior to the commencement of the first interview.
If you have any queries or complaints regarding this project that cannot be answered by the person responsible for this research project you can also contact:

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

If you have any questions please do not hesitate to contact

Robyn Fitzgerald
Centre for Children and Young People
Southern Cross University
02 66 203802 (during work hours)

Thank you for your interest in the research project. We believe the research will develop current understandings of children’s views of supervised contact and family law proceedings in ways that are not possible without the significant contribution that only children and young people experiencing supervised contact can give us as researchers, parents, professionals and policy makers.
CONSENT FORM
Supervised Contact and Family Court Orders –
What can children and young people tell us?

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 one interview for approximately 35-40 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 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 supervised contact and family law proceedings in Australia. I know that I can contact Robyn Fitzgerald on 02 66 203802 during working hours with any queries that I have. I understand that the project is funded by a Southern Cross University Internal Research Grant.

Signed:

Date:
Attachment C

PARENT QUESTIONNAIRE

Supervised Contact and Family Court Orders –
What can children and young people tell us?

PART A: Residential Family Details

Parent
Relationship to child/children

Father □
Mother □
Other □ Please specify...........................................

How long has it been since you separated from your partner for the final time?
3-6 months □ 6-12 months □ 1-2 years □ over 2 years □

Child/children

Child 1

Name: ........................................
Age: ........................................
Place of Birth; ..............................

Child 2

Name: ........................................
Age: ........................................
Place of Birth; ..............................
Child 3

Name: ..............................................
Age: ..............................................
Place of Birth; ..............................................

Child 4

Name: ..............................................
Age: ..............................................
Place of Birth; ..............................................

PART B: Contact arrangements

Which type of contact do you use the [Children’s Contact Centre] Contact Centre for?
Changeover ☐ Supervised contact ☐

How were the arrangements for contact made?
Ordered by the Family Court ☐ Recommended by solicitor ☐
Sought privately ☐

For what reason were arrangements for supervision made?
........................................................................................................

Was a Family Report ordered? Yes ☐ No ☐

How long have you been using the service?
.........................years.

How long do you want supervised contact to continue?
.........................years
PART C: Contact arrangements and the children

What have the benefits of supervised contact been for your child/children?
...........................................................................................................................................
...........................................................................................................................................
...........................................................................................................................................

What have been the problems of supervised contact for your child/children?
...........................................................................................................................................
...........................................................................................................................................
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If you had some advice to give to law-makers or governments in 2004 about supervised contact, what would this be?
...........................................................................................................................................
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...........................................................................................................................................
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How was your child/children informed about the contact arrangements?
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...........................................................................................................................................

Did he/she/they have any input into the decision to have supervised contact. If so, in what ways?
...........................................................................................................................................
...........................................................................................................................................
...........................................................................................................................................

How much do you think your child/children knows or understands what is in their best interests when it come to decisions about who they will live with, and who they will have contact with?

<table>
<thead>
<tr>
<th>They know nothing at all</th>
<th>A little</th>
<th>A Moderate amount</th>
<th>Very much</th>
<th>A great amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>
Do you think that society and the legal system considers that children have the capacity to participate in family law decisions about residence and contact?

<table>
<thead>
<tr>
<th>No capacity at all</th>
<th>A little capacity</th>
<th>A Moderate capacity</th>
<th>A good capacity</th>
<th>An excellent capacity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

How important is it for children to participate in family law decisions about contact orders with their parents?

<table>
<thead>
<tr>
<th>No capacity at all</th>
<th>A little capacity</th>
<th>A Moderate capacity</th>
<th>A good capacity</th>
<th>An excellent capacity</th>
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<td>1</td>
<td>2</td>
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</table>

In what ways could family law procedures that surround the making of orders for supervised contact be improved?

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Thank you for your help
As you know, thousands of children go to visit one of their parents at contact services. But, so far, researchers have not asked children much about the things they like about contact services or about the things they would change.

I plan to listen to boys and girls over the next few months, to hear what they have to say about visiting their parents at a contact service. I will then write a report about their views and stories.

The aim of the research is to help adults know and understand children’s views about supervised contact to try to make things better for children.

What questions will the project ask?

• What is supervised contact like for you and for your family? What has been helpful and what has been hard or difficult?
• How could the people at contact centres help you when you are visiting?
• Do you remember when you first were told you would visit your parent at the supervised contact centre? Did you want to have a say in that decision? What did you want people to know when the decision was made?
• When are children old enough to help make decisions about going to a contact centre? Is it important for children to take part in those decisions? If so, what are the most important things about taking part in that decision?
• What advice would you give to other children about supervised contact? What about people who work at the centres? What about people who make laws for children?

Who will be in the project?

Forty children from x and x who visit [Children's Contact Centre] Supervised Contact Services.

Do I have to take part?

You will decide if you want to take part. Even if you say yes, you can drop out at any time. When we are talking and you do not feel like answering a question you don’t have to. You do not have to tell me anything unless you want to. You can also end the meeting if you want to stop or have a break.

What will happen to me if I agree to take part?

I will meet you at the contact service to talk to you. Because I will be talking with lots of kids, I would like to tape-record you to help me to remember what we have talked about. I will be the only person who listens to the tape. You might play some games and talk with me for between 30 and 60 minutes. I am not looking for right or wrong answers, as it is what you think that matters most to me. Later, I will invite you to meet with other children I have spoken with to hear what they have to say and to test an information book I will write.
Could there be any problems for me if I take part?

I hope you enjoy talking with me. A few children get upset when they talk about their lives, and if they want me to stop, I stop. If they wish, I also put them in touch with someone to help them. If you have any complaints about the project, please tell me or contact Mr John Russell at Southern Cross University on 66203705.

Will doing the research help me?

I hope you like helping me and you learn about what other kids think about visiting their parent at a contact service. But my main aim is to write reports that will help other children and families in the future. Maybe you will find the report useful as well.

Who will know if I am in the research or what I have talked about?

The things you tell me are private and your name will not be used in any of the papers that I write or the stories that I tell. This means I will choose a pretend name for you. The only time I will break this promise is if you tell me that someone is hurting you or that you are not safe. The law says I have to tell someone outside your family who can help you and do something to stop it. If so, I will talk to you first about the best thing to do.
I will keep my tapes and notes about you in a safe, locked place and will delete all your details after the project is finished.

Will I know about the research results?

I will send you a short report in the middle of next year, 2005. You can also see the longer reports if you want to.

Who is paying for the project?

The project is funded by a Southern Cross University Scholarship and a Law Foundation Research grant. It was approved by the Southern Cross University Research Ethics Committee, project number ECN-04-113 and by [Children's Contact Centre].

The researcher, Robyn, works at the Centre for Children and Young People. She does research and writes reports about children's views of family law. You can also email her with any further thoughts about the project at rfitzger@scu.edu.au or ring on 0411 800 447

Thanks for reading this information.