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THE CHANGING STATUS OF CHILDREN WITHIN FAMILY LAW

From Vision to Reality?

Robyn Fitzgerald and Anne Graham*

It is almost five years since the previous Coalition government embarked on an agenda for the radical reform of the family law system, with parents the target of the reform agenda and children the espoused beneficiaries. In this article, we argue that little is known about the experience of children in relation to their participation in such decision-making, or about how the amendments are working from their perspective. We look critically at what we mean by children's 'participation' in the context of family law and examine recent, if still limited, research evidence that draws on children's perspectives. We focus particularly on the tension between children's need and desire to participate in decision-making processes and the limited opportunity for most to do so, positing a number of reasons why such a gap might exist when children have been foregrounded within the reform agenda. We conclude with some issues that beg further attention if we are to realise a family law system that 'works better' for children and young people.

Five years on from the 2006 family law reforms, practitioners, policy-makers and researchers alike are presented with a paradox. Hailed as bringing about the largest ever changes to family law, with the explicit purpose 'to work better for children who face family separation and breakdowns',¹ we know little about how the amendments are working from the perspective of the very people for whom the reforms were intended, children and young people² themselves. That the views and perspectives of children have barely registered on the political landscape serves only to support the contention that family law and related policy continue to be about balancing the rights of fathers and mothers, with children the *object* but rarely the *subject* of family law decision-making. At a time when further reforms to the *Family Law Act 1975* are being considered, it is opportune to

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¹ Attorney General's Department (2006), p 1.

² For ease of reading, the term 'children's participation' is used to refer to the participation of both children and young people under the age of eighteen years.

re-examine how children are positioned in relation to family law, policy and associated research, and to consider whether and how the perspectives of children could usefully inform future developments.

This article begins by situating the concept of children's 'participation' in relation to existing family law and policy initiatives. The discussion draws attention to the rhetorical manoeuvres to position children at 'centre stage', including through an emphasis on the importance of 'child-inclusive' and 'child-focused practice'. We define children's participation in light of the UN Convention on the Rights of the Child (UNCRC)³ and national and international literature before providing an overview of existing mechanisms of child participation and examining recent related research in family law decision-making. While acknowledging the complexity and challenges of involving children in post separation decision-making processes, we contrast children's need and desire to participate with the lack of opportunity for the majority to do so. We then posit a number of reasons why such a gap exists between the principle and practice of children's participation, noting that the views of children and young people are also not yet well represented in research evidence at a time when children are ostensibly so central to family law debate and reform. The article concludes with a brief discussion of some of the challenges and opportunities still awaiting the attention of policy-makers, practitioners and researchers as they seek to ensure a family law system that 'works better' for children and young people.

At the outset, we acknowledge that the issue of children's participation is one of the most intensely contested in family law, not least because it brings to the surface considerable concern in relation to children's protection. In asking how we might improve the status, rights and voice of children in family law settings, we do not wish to minimise the challenges and dilemmas of listening authentically (and responding) to children. On the contrary, we proceed on the basis that the vexed nature of children's participation highlights the urgency and importance of asking some hard questions about its nature, purpose and outcomes so as to ensure that family law can be responsive to the needs of children and young people.

A New Family Law System: Setting the Policy Context for Children's Participation

It is almost five years since the Howard government embarked on an agenda for the radical reform of the family law system, amending the *Family Law Act 1975* (Cth)⁴ and introducing new services aimed at effecting a 'cultural change' in family law.⁵ The reforms were extensive and the then Attorney-General, Philip Ruddock, announced they would:

³ Ratified by Australia in 1990.

⁴ The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which amended the *Family Law Act 1975*, was enacted on 1 July 2006.

⁵ Attorney-General's Department (2005), p 4.

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.⁶

The philosophical cornerstone upon which the reforms have been built is unambiguous: the facilitation of shared care parenting arrangements and maintaining an ongoing relationship with both parents, where possible, as the optimal post-separation arrangement for children.⁷ This is evident in the model of shared parenting in the amended legislation, which provides that the court *must* consider a child spending equal time or substantial and significant time with each parent in certain circumstances.⁸ Family dispute resolution practitioners working in 65 Family Relationship Centres (FRCs) nationally are required to assist parents to attempt family dispute resolution prior to taking their matter to court.⁹ When advising about the parenting plan, practitioners ‘must inform people that they could consider the option of the child spending equal time, or substantial time, with each person’.¹⁰

Yet, while parents have been the target of the reform agenda, it is children who are claimed to be the beneficiaries. Claims that the reforms put ‘children at centre stage’¹¹ of family law and policy increasingly have been reflected in the language of child-inclusive and child-focused practice, thus signalling the place of children as individual bearers of rights and as central to decision-making processes.

The volume and visibility of such statements conveyed a strong impression that the government had specifically set out to create the optimum conditions for improving family law for children. Indeed, Professor Richard Chisholm, a former judge of the Family Court, says of the sort of language that 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’.¹² Positioning children as a central concern of family law and policy, according to Chisholm, must surely include children’s views and experiences about issues that so profoundly affect them.

There is little doubt that children’s participation is an important element in family law and associated policy. A number of key policy imperatives aim

⁶ Attorney-General’s Department (2005), p 4.

⁷ Australian Government (2005). See in particular, Part 3, Facilitating Shared Parenting.

⁸ *Family Law Act 1975*, s 65DAA(1) and (2). Note that since 2006, the terms ‘residence’ and ‘contact’ have been replaced by the term ‘parenting orders’, which refers to orders regarding ‘whom a child will live with’ and the ‘time a child is to spend with a parent or other person’. See Section 64B(2)(a) and (b).

⁹ Since July 2008, s 60I(7).

¹⁰ Family Dispute Resolution Practitioner Obligations, p 5.

¹¹ Attorney General’s Department (2005), p 2.

¹² Chisholm (2006), p 20.

to elevate the voices of children into decision-making processes. For example, the Commonwealth's Family Support Program (FSP) makes provision for child-focused and/or child-inclusive services, including in the family dispute-resolution processes of FRCs.¹³ The *National Framework for Protecting Australia's Children 2009–2020* recognises the central importance of children's participation as part of its broader social inclusion agenda, describing children's participation as 'a principle to guide our actions'.¹⁴

The importance the government has placed on children's participation in family law is consistent with broader international support for respecting children's dignity as human beings. However, the emergence of children's participation has not been without contest, with debates emerging in relation to placing children at centre-stage in their parents' conflicts, parents unduly attempting to influence children, burdening children with the responsibility of decision-making, and concerns that involving children potentially undermines adult – particularly parental – authority. Such views and debates have introduced complex tensions, discussed later in this article, into the everyday practice of ensuring that children and young people are included in family law decision-making.¹⁵

Before turning to examine recent research examining children's views and perspectives of their participation in family law decision-making, it may be useful to clarify what we mean by 'children's participation' so as to locate further discussion within existing understandings of children's participation – both from the UNCRC, which was ratified by Australia 20 years ago (in December 1990) and from key researchers.

What is Children's Participation?

The influence of the UNCRC has been significant, and has prompted a surge in activity under the mantle of children's participation.¹⁶ The UNCRC encompasses an extensive range of civil, political, social and cultural rights. In particular, Article 12 provides for a child's right to be heard and to have those views taken into account.

Article 12 constitutes one of four underlying principles of the Convention that guide its application, the others being the right to non-discrimination (Article 2), the right to life, survival and development (Article 6) and the primary consideration of a child's best interests (Article 3).¹⁷ Participation is therefore not only a right in itself but should be considered in the interpretation and implementation of all other rights – that is, 'as part of the process and part of the answer'.¹⁸

¹³ Commonwealth of Australia (2009a); see also Australian Government (2007).

¹⁴ Commonwealth of Australia (2009b), p 12.

¹⁵ For further discussion of these debates, see Houghton (2008); Lansdown (2006).

¹⁶ Thomas and Percy Smith (2010).

¹⁷ UNICEF Convention on the Rights of the Child, www.unicef.org/crc/index_30177.html.

¹⁸ Hill et al (2004).

According to the UN Committee on the Rights of the Child, the term 'participation' is now widely used to describe:

ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.¹⁹

The committee stresses the importance of focusing on how participation should effectively be implemented by outlining five key steps: (1) *preparation of the child* by those responsible for hearing the child to ensure he/she is informed about the right to express an opinion; (2) *hearing the child* in enabling and encouraging contexts so that the child can be sure that the adult responsible is willing to listen and take seriously his or her views; (3) *assessing the capacity of the child* on a case-by-case basis; (4) the requirement that *information about the weight given to the child's views* must be provided by the decision-maker to the child, informing the outcome of the process and how his or her views were considered; and (5) *complaints, remedies and redress for children* when their right to be heard, and for their views to be given due weight, is disregarded and violated.²⁰

While the meaning and interpretation of these five steps will vary considerably according to its various contexts, Lansdown suggests a number of indicators for evaluating whether effective and meaningful forms of participation have taken place. 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; the establishment of ground rules with all children at the beginning; and voluntary participation.²¹

In summary, while there is no definitive theory of children's participation, there is general agreement among scholars that it entails 'taking part' and 'knowing that one's actions are taken note of and may be acted upon'. Such participation is most meaningful when it is active, relevant and rooted in children's everyday lives.²²

The following section examines the key provisions of the *Family Law Act 1975* in relation to how children's participation rights currently are recognised in Australian family law contexts.

¹⁹ Committee on the Rights of the Child (2009), p. 3.

²⁰ Committee on the Rights of the Child (2009), p. 3.

²¹ Lansdown (2006).

²² Boyden and Ennew (1997); Thomas and Percy-Smith (2010).

How Do Children Currently Participate within the Australian Legislative Framework?

A child's best interests are the paramount consideration in making a parenting order under the *Family Law Act 1975*.²³ Section 60CC(3)(a) provides that courts must consider *any views expressed by the child* when making such orders, subject to the child's maturity, level of understanding and the strength and duration of those wishes.²⁴ Children can also apply for a parenting order directly (under section 65C(b)), although this rarely occurs.

The Family Court of Australia actively promotes the importance of children's participation. The Less Adversarial Trial (LAT) and the Child Responsive Program (CRP) provide good examples of its approach to strengthening existing mechanisms provided by the Act for bringing the child's views to the attention of the court.²⁵ The court will normally learn of the child's views through one of several mechanisms provided by the Act:

- the Family Report²⁶
- a solicitor, via the appointment of an independent children's lawyer, or²⁷
- an interview with the judge.²⁸

A comprehensive picture of children's participation cannot be achieved, however, without considering these provisions in light of the legislative pathway taken by the court to arrive at parenting orders.

When family courts are making decisions in parenting matters, the key sections are Section 60CA – the child's best interests, Section 60B – objects and principles, the two-tiered framework of considerations set out in section 60CC and the shared parenting provisions set out in sections 65D(1), 61DA and 65DAA. Children's views, however, barely register in each of these various elements of the legislation; consequently, the expression of children's participation rights in section 60CC(3)(a) is diluted when considered within the broader legislative framework. This is evident in a number of ways.

First, section 60B objects and principles do not mention children's participation rights. This is a significant omission given the Full Court's statement in *Goode and Goode* that the 'objects and principles contained in s 60B provide the context in which the factors in s 60CC are to be examined, weighed and applied in the individual case'.²⁹ Children's own views of who

²³ Section 60CA.

²⁴ Section 60CC(3)(a); *In the Marriage of Harrison and Woollard* (1995) 18FamLR788; (1995) FLC 92-598.

²⁵ Family Court of Australia, 'The Child Responsive Program' www.familycourt.gov.au/wps/wcm/resources/file/eb30d94daf25775/BRCP_0908w.pdf, 7 February 2011.

²⁶ Section 62G(2).

²⁷ Section 68L.

²⁸ Rule 15.02 *Family Law Rules* 2004.

²⁹ *Goode and Goode* (2006) 206FLR 212; [2006] FamCA 1346 at [10].

they will live with and who they will spend time with are thus positioned outside the context for consideration of their best interests.

Second, section 60CC provides that a child's views are 'additional' to two 'primary' considerations a court must consider in determining a child's best interests:³⁰

1. the benefit to the child of having a meaningful relationship with both of the child's parents,³¹ and
2. the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.³²

While the approach of the court has been to make a holistic assessment of the case by looking at the 'additional' before the 'primary' considerations,³³ thus minimising the potential impact of downgrading children's views, we suggest that the relegation of children's views diminishes the importance they deserve.³⁴ As Chisholm observed in the recent Family Court Violence Review, the 'artificial prominence given to the two factors under the present law seems to reflect ideas about parental entitlement',³⁵ and is 'not an ideal guide to children's best interests'.³⁶ Importantly, the relegation of the child's views to an 'additional' consideration is inconsistent with the intention of the UNCRC – which, as we noted earlier, emphasises participation rights as being foundational, not additional, to decision-making processes.³⁷

Third, the provisions concerning the presumption of shared parental responsibility, including those that require the court to consider the time the child should spend with each parent, as set out in sections 65D(1), 61DA and 65DAA, are framed without any reference to the child's views about such arrangements.

Finally, the legislation does not extend the obligation to consider a child's views in non-contested matters – that is, private agreements about parenting. When a matter is resolved, and the adults are in agreement, parents are encouraged to regard the best interests of the child; however, no information is required about what the child's views are or whether the child

³⁰ Section 60CC.

³¹ Section 60CC(2)(a).

³² Section 60CC(2)(B).

³³ *Marvel and Marvel* (2010) 240 FLR 367. This approach is consistent with early guidance provided by Professor Parkinson (2009), where he suggests that 'it is through detailed examination of such additional considerations as may be relevant, that a judge may be assisted to determine the significance of the primary considerations and what orders to make'.

³⁴ Cooper (2011).

³⁵ Chisholm (2009), p 9.

³⁶ Chisholm (2009), p 127.

³⁷ UNICEF Convention on the Rights of the Child, www.unicef.org/crc/index_30177.html, 7 February 2011.

wants to be consulted. This is the case with both parenting plans³⁸ and consent orders.³⁹ In this way, none of the mechanisms outlined above are utilised in family dispute resolution (FDR), despite there being ‘many reasons why children might be more easily and more fruitfully involved in primary dispute resolution than in litigation’.⁴⁰ This does not mean children are excluded in non-contested matters, just that their involvement is highly discretionary.

We now turn to examine the growing body of research reporting the views and perspectives of children concerning their participation in post-separation decision-making. This research, reflecting contemporary developments in the study of childhood, is interested in directly accessing the views and experiences of children, rather than having these filtered through the perspectives of adults.

Recent Research about Children’s Participation in Family Law

There are now several Australian studies that have included children’s views on post-separation decision-making processes.⁴¹ Consequently, there is a growing body of research reporting ‘what matters’ to children – that is, the experiences, conversations and events that help them navigate the changes that follow parental separation.

In the following discussion, we examine a number of key themes concerning children’s participation, highlight the resonance with national and international studies, and draw attention to the possibility that the insights of children can extend what we *know*, not simply what we *believe*, about what might be in their best interests.

As part of the discussion, we include data from children involved in three of our studies examining children’s participation in family law decision-making, since we are very familiar with the contexts in which these data were generated and can report them accurately.⁴² The first study involved eight children (aged from six to nineteen years) with diverse experiences, from privately ordered divorce to a matter currently listed before the Family Court.⁴³ The second study examined children’s

³⁸ Section 63B(e) of the *Family Law Act* provides that the parents of a child be encouraged, in reaching their agreement, to regard the best interests of the child as the paramount consideration.

³⁹ Section 60CC(5) provides that if a court is considering whether to make an order with the consent of all parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in section 60CC(2), ‘primary considerations’ and section 60CC(3), ‘additional’ considerations.

⁴⁰ Chisholm (1999).

⁴¹ Cashmore et al (2010); Bagshaw et al (2010); Parkinson and Cashmore (2008); Graham and Fitzgerald (2006, 2010); Bagshaw et al (2006); Campbell (2004); Fitzgerald and Graham (2011); Lodge and Alexander (2010).

⁴² We do not include the ages of children in these studies due to a concern to ensure adequate de-identification of data.

⁴³ Graham and Fitzgerald (2006).

experiences of participating in decisions regarding supervised contact.⁴⁴ In this study, thirteen children (aged four to thirteen years) were interviewed in relation to the following questions: What are children's experiences of having a say? What are children's understandings of having a say? Did children want a say in the decision regarding supervised contact? How did having (or not having) a say feel? The third study examined the understandings, experiences and expectations of key stakeholders in FRCs concerning children's participation (55 practitioners, managers, parents and twelve children aged between seven and eighteen).⁴⁵ All are small-scale qualitative studies involving in-depth semi-structured interviews with children lasting between 60 and 90 minutes.

Key themes emerging in the research

Children Want and Need to Have a Say

There is now considerable evidence from children suggesting that they consider children should be asked their views and that these views should be afforded weight in decision-making processes.⁴⁶ For example, in a recent study exploring shared care parenting arrangements since the 2006 reforms, in which 136 children (aged eight to sixteen) responded to an online survey and four children were interviewed, Cashmore and colleagues report that a key concern for the children was that they had some say in the arrangements.⁴⁷ Children who felt they had some say were happier with the arrangements than those who had not.⁴⁸ In another study examining children's views, Parkinson and Cashmore report that 91 per cent of children (40 of 44 aged between seven and eighteen) thought they should participate in family law decision-making.⁴⁹ The strength of children's views varied with their experience, with children involved in contested matters more likely to insist on making autonomous decisions about who they lived with and who they spent time with: 'children who had experienced violence, abuse, or conflict [had] less reason to respect their parents' feelings or trust their parents capacity to consider their needs and care for them'.⁵⁰ In a recent major study exploring how adolescent children view their experiences of separation, most of the 623 adolescents (aged twelve to eighteen years)

⁴⁴ Fitzgerald and Graham (2011).

⁴⁵ Graham and Fitzgerald (2010). A booklet entitled *Having a Say ...When Your Parents Separate* (2010) was written by the authors and children involved in the study, and reports the narratives of the children more extensively.

⁴⁶ Cashmore et al (2010); Bagshaw et al (2010); Parkinson and Cashmore (2008); Graham and Fitzgerald (2010); Bagshaw et al (2006); Campbell (2004); Fitzgerald and Graham (2011).

⁴⁷ Cashmore et al (2010), p 22.

⁴⁸ Cashmore et al (2010), p 124.

⁴⁹ Parkinson and Cashmore (2008).

⁵⁰ Parkinson and Cashmore (2008).

interviewed wanted a say in the decision about who they would live with.⁵¹ In our FRC study, all children thought having a say about post-separation arrangements was important.⁵²

A small but growing body of evidence suggests children want to participate actively in decisions and solutions, even where there are concerns for their safety, and that such participation helps them to cope and should be encouraged.⁵³ For example, a recent study by Bagshaw and colleagues reports that the majority of children interviewed in a phone-in (nine of twelve aged between nine and seventeen years) said it was important for children to be given at least a say in parenting decisions; the remaining three 'did not know'. Of 65 responses to an online survey, 75.4 per cent (49) children strongly agreed that children had 'a right to have a say about the things they want or would like', 6.2 per cent (four) suggested children should sometimes have a say and 9.2 per cent (six) said they did not know. No child (in either the phone-in or online survey) thought children should *not* have a say.⁵⁴ Of the three children in Parkinson and Cashmore's study who had been exposed to serious violence and abuse, all still wanted to have a say and thought it appropriate to do so. This was despite holding concerns that a parent might 'hit', 'hurt' or 'not let them in the house', for example, as a direct and immediate consequence of doing so.⁵⁵

In our supervised contact study,⁵⁶ of the ten children who commented, all thought having a say was important, and that it was something all children should have. For example:

I would rather people to hear it [child's wish to see his father only in supervised contact].

I should get to choose ... my choice.

They shouldn't have control over what we want.

We should have lots of say ... so grown ups don't get to tell us what to do and we get to have our say.

Six of these children, however, were uncertain about or did not want a say. Fears of a parent's response, concerns for parents' feelings and/or a sense of apathy about the purpose of having a say were cited as reasons why.

⁵¹ Lodge and Alexander (2010).

⁵² In our work, the concept of participation was approached with children from the standpoint of 'having a say', since it was considered that most children across the age bracket interviewed could relate to the notion of 'having a say' as being participatory in intent.

⁵³ Houghton (2008).

⁵⁴ Bagshaw et al (2010).

⁵⁵ Parkinson and Cashmore (2008), p 70.

⁵⁶ Fitzgerald and Graham (2011), p 22.

Few children necessarily wanted a determinative say, but rather emphasised the importance of being offered choice and flexibility as central to their participation. This finding is consistent with international and national studies.⁵⁷ All children, however, supported the general principle of children's participation in decision-making, a result echoed in the international research literature.⁵⁸

Children's Participation has Benefits – for Children and Parents

The benefits of children's participation in family law decision-making are clearly identified within the current research agenda. First, when children's voices inform decision-making, the outcomes are shown to be sensitive to children's needs, thus increasing the potential for better decisions and greater durability of any agreements and orders.⁵⁹ The Family Court of Australia's Child Responsive Program, which supports children's participation as part of a broader aim of bringing the views, feelings and experiences of children into sharper focus, has had significant success, diverting '40% of disputes away from litigation with 73% durability of arrangements arrived at the CRP'.⁶⁰

Children, too, perceive that better decisions can be made – for both children and parents – when they are included in decision-making processes.⁶¹ Children generally view their participation as a matter of practical utility and efficiency, ensuring adults – including decision-makers – know more about their lives and individual circumstances and thus are able to make better and more informed decisions.⁶² The following comments from children involved in our study on children's participation in FRCs⁶³ are illustrative:

Well, children can definitely teach them [parents] stuff about themselves. They always say that about kids – you know – when you have kids you know all this stuff about yourself and that sort of thing. (Maddie)

[Having a say] is important so that people know about what the child needs to do. If [children are not asked] then parents don't know and you can't solve the problem of it. (Grace)

⁵⁷ Parkinson and Cashmore (2008); Lodge and Alexander (2010); Taylor (2006); Butler et al (2002); Smart et al (2001); Smith et al (2003).

⁵⁸ Smith et al (2003); Butler et al (2002); Neale (2002); Pryor and Rodgers (2001); Smart et al (2001); Taylor (2006).

⁵⁹ Timms (2001); Taylor (2006); Butler et al (2002).

⁶⁰ McIntosh and Long (2007), p 23.

⁶¹ Cashmore et al (2010).

⁶² Thomas and O'Kane (1999); Taylor et al (2007).

⁶³ Graham and Fitzgerald (2010).

Second, children attribute a great deal of importance to being recognised as individuals with opinions and feelings of their own, able to contribute constructively to decisions made in their everyday lives.⁶⁴ When children participate in decision-making, they feel respected and are more likely to respect others, to be committed to decisions and to share responsibility for decisions.⁶⁵ They are also better placed to differentiate between that which they can and cannot change, and to understand and accept that there are some things that will be different in their lives, as John in our first study suggests:⁶⁶

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

Children also see participation as being positively linked to their sense of individual identity and self-esteem, a finding supported by Kelly, who reports that a significant association exists between children's positive feelings about themselves and having a voice and role in decision-making processes.⁶⁷ The following insights from children in our FRC study are illustrative:

Having a say feels nice. It feels like they're listening to me, they've heard what I said. (Timothy)

It makes us feel more confident. Speaking to people. If you just keep it bundled inside, then it's not going to really do anything. So you need to tell someone before it just washes away and goes really bad. (Gabby)

Third, children report that participation helps them learn how to make good decisions and to grow into the responsibilities of citizenship.⁶⁸ This point was summarised succinctly by Nathan, who argued that children needed practice in participating in decision-making because:

If they're controlled like that all their life – they're just going to one day go and probably screw themselves up, because one day they'll be let free – they won't have any boundaries and they'll just go berserk.

Finally, a largely overlooked aspect of participation in existing research is the impact of *non-participation* on the well-being of children. In our research, children were clear that not participating had negative implications,

⁶⁴ Bagshaw et al (2010); Parkinson and Cashmore (2008); Smart et al (2001); Butler et al (2002).

⁶⁵ Cashmore (2003); Graham and Fitzgerald (2010); Graham (2004); Neale (2002).

⁶⁶ Butler et al (2002); Graham (2004).

⁶⁷ Kelly and Emery (2003); Pryor and Rodgers (2001).

⁶⁸ Lister (2008); Thomas and Percy-Smith (2010).

reporting that being excluded from decision-making left them feeling angry, confused, lonely, upset and sad.⁶⁹ For example, in response to being asked what it was like *not* to have a say, Zac reflected:

Really bad. I get really angry because they never listen and I just – I get my hand and I hit my head, because they won't listen.

Parkinson and Cashmore also note that counsellors and parents perceived risks in *not* giving children a voice in terms of problems down the track, including depression.⁷⁰

What we hear from children is that participation matters, that it takes place in many ways and that there are myriad benefits when children are recognised as being involved in the process. Children *are* involved in the matter of their parents' separation and divorce, and inviting them to have a say and respecting their views potentially are very significant 'protective factors'.⁷¹

Children Have Little Say or Access to Information

An important finding in Australian research is that children perceive they have little significant involvement in the formulation of initial or ongoing arrangements concerning who they live with and who they spend time with, and feel largely excluded from family law decision-making processes.⁷² Of those children who said they were involved, many reported that when they were invited to participate, it was usually to express a view on a decision that had already been made. For example, Bagshaw and colleagues report that none of the children in their study reported that they had 'a lot of say' in their current living arrangements. Half (six of the twelve) stated that they had 'a little say' (by participating in Family Report interviews and counselling sessions), five reported having 'no say' and one 'didn't know'.⁷³ In our supervised contact study, only one child of thirteen interviewed recalled having input or involvement into the decision.⁷⁴ Notably, children in our FRC study who had participated in child consultations also reported that they did not feel heard. Brooke's comments are illustrative:

⁶⁹ Graham and Fitzgerald (2006); Fitzgerald and Graham (2010); Graham and Fitzgerald (2010).

⁷⁰ Parkinson and Cashmore (2008). The authors also refer to perhaps the only empirical study to date – Kaltenborn (2001) – following up with children on the long-term outcomes of arrangements made against children's preferences and attachments, and with which children report significant difficulties and trajectories of suffering.

⁷¹ Butler et al (2002); Houghton (2008).

⁷² Bagshaw et al (2006); Bagshaw et al (2010); Cashmore (2003); Cashmore et al (2010); Fitzgerald and Graham (2011); Graham and Fitzgerald (2010) Parkinson and Cashmore (2008); Campbell (2004).

⁷³ Bagshaw et al (2010).

⁷⁴ Fitzgerald and Graham (2011).

I wanted to be asked what I wanted. And it didn't really get asked that much. It was more Mum and Dad who made all the decisions. I guess when I said something I didn't really believe that it was going to go that way.

In a study involving children reflecting back on their parents' divorce, Parkinson and Cashmore found higher rates of children's participation, reporting that 60 per cent of children (27 of 45) said they had some say (either 'a bit' or 'a fair bit') at some stage.⁷⁵ Of these children, 55 per cent were involved in contested matters, although the authors highlight that many of the children were quite young (ranging from five months to sixteen years, with a mean age of 7.1 years) at the time of separation.⁷⁶

Children further report 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.⁷⁷ Reflecting on data collected from interviews with 20 children, Bagshaw and colleagues 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 parents' separation and what would happen to them in the process.⁷⁸

Participation is Not Easy

While children were supportive of the principle of participation, this did not mean that they considered having a say to be unproblematic, or that it was something they always necessarily wanted. In our research, children pointed to a number of issues that made their participation difficult or that prevented them wanting to have a say. These included concerns about formulating their own views at a distressing time, concerns about having their views misunderstood or taken out of context by parents, hurting their parents' feelings, weighing up the risks and benefits, and previous experiences of not being heard. Having a say is also an immediate reminder that parents are actually separated, as Gabby observed:

You know when we said that having a say isn't easy sometimes ... well sometimes you wake up and you think, every day you think, you

⁷⁵ Parkinson and Cashmore (2008).

⁷⁶ Parkinson and Cashmore (2008), p 31.

⁷⁷ Bagshaw et al (2010); Cashmore et al (2010); Fitzgerald and Graham (2011); Graham and Fitzgerald (2006, 2010); Parkinson and Cashmore (2008); Campbell (2004). This finding is consistent with research internationally.

⁷⁸ Bagshaw et al (2006), p x.

want your parents to get back together. Then you have to start trying to get yourself to believe it is over, and you have to stick with it.

Lodge and Alexander report a similar finding in their study of adolescents in separated families stating ‘one in three adolescents did not wish to be involved in the process of resolving parenting arrangements following separation’.⁷⁹

Despite the difficulties, the importance of participation as a principle, and where possible as a practice, met with overwhelming support. We turn our attention now to considering how the Australian family law system is faring in terms of supporting children’s participation in decision-making.

Why is There a Gap Between the Principle and Practice of Children’s Participation in Australian Family Law?

In this section, we identify a number of issues concerning children’s participation as it is currently understood and practised in Australia, signalling some yet to be realised opportunities to improve current family law, policy and practice for children.

Conflating Children’s Participation with Shared Parenting

It has been said of children’s participation that it is ‘a principle in search of a meaning’, and this is no more evident than in the context of Australian family law.⁸⁰ Despite a lot of rhetoric about the importance of children and their views, less attention has been directed towards the processes and procedures that would most effectively and respectfully invite and support children’s participation in all family law contexts. This situation stands in sharp contrast to state jurisdictions, where standards for child participation in care and protection matters exist almost without exception.⁸¹

The lack of clarity and agreement regarding the meaning of children’s participation within Australian family law has given way to increasingly conflated interests between child and parental rights, most notably in relation to the shared parenting agenda.

Ten years ago, for example, the Family Law Pathways Advisory Group in its 2001 report, *Out of the Maze*, advocated for children to be heard and their views acted upon in the decisions that shape their lives:

Children have a right to be heard and to have their views taken into account regarding decisions that will affect their lives. Clearly, the

⁷⁹ Lodge and Alexander (2010), p vi.

⁸⁰ Thomas and Percy Smith (2010), p 1.

⁸¹ See, for example, Queensland Department of Child Safety, *Children and Young People’s Participation Strategy, 2008–2011*, www.childsafety.qld.gov.au/fostercare/youth/documents/cyp-participation-strategy.pdf; NSW Children’s Guardian Standards, www.kidsguardian.nsw.gov.au/example-folder-5/Standards/Standard%201.7%20Participation%20in%20decision%20making.pdf/view?searchterm=participation.

best interests of the child can be best considered if the children's voices are heard.⁸²

Yet, by the time of the *Government Response to the Family Law Pathways Advisory Group Report* in 2003, the meaning and enactment of children's participation had become bound up with concerns about 'positive ongoing contact' with both parents, whereby notions of 'child inclusion' emerged as a proxy for child *participation*, with child-inclusive and child-focused practice primarily concerned with maintaining an ongoing meaningful relationship with both parents, where possible:

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.⁸³

Two further examples can be found in the federal government's response to the following recommendation in the *Every Picture Report* (2005). First, the government notes:

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.⁸⁴

Second, in response to Recommendation 7 – that assistance 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 – the government is silent on the need to support children to have their views heard:

The government agrees with this recommendation. Establishing the new network of Family Relationships Centres will be central to providing parents with this assistance. In addition, the government has considered what other services can help parents achieve and sustain shared parenting. The government is quadrupling the size of the Contact Orders Program from 5 to 20 services at a cost of \$23.3 million over four years. The program is highly effective in improving parents' ability to resolve conflict and to focus on and communicate about their children's needs. The government is also expanding the Men and Family Relationship Program, family relationships education, counselling and skills services and a range of

⁸² Family Law Pathways Advisory Group (2001), p 86.

⁸³ Australian Government (2003), p 11.

⁸⁴ Australian Government (2005), p 6; italics added.

dispute resolution services to provide a range of help for parents to improve their parenting and communication skills and resolve disputes.⁸⁵

Paradoxically, then, while family law and policy are now framed in the participatory language of child-inclusive and child-focused practice, children and what they have to say have been placed at arm's length to decision-making processes.

Lack of Legislative Commitment to Children's Participation

The failure of policy-makers to direct attention to the needs of all children for information and support that would enable them to participate in family law decision-making in safe and appropriately negotiated ways may be contrasted with legislation in common law countries internationally.

For example, in New Zealand section 6 of the *Care of Children Act 2004* states that a child must be given reasonable opportunities to express views on matters affecting them. Any views expressed by a child *must be taken into account*, a provision that is strengthened by section 4, which provides that the determination of the welfare and best interests of the child does not limit the child's views.

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 incorporation of the European Convention on Human Rights and Fundamental Freedoms (ECHR) into national law, strengthening children's procedural rights, including their right to be informed.⁸⁶

In Scotland, the *Children (Scotland) Act 1995* provides a range of procedural mechanisms for ensuring children are genuinely enabled to be heard and to have their views taken into account.⁸⁷ For example, children may take independent legal advice in order to explore their options as to how they would like to express their views, including support to complete court documents requesting their views;⁸⁸ requesting the solicitor to write to the court on their behalf; and/or requesting the solicitor to involve them as a party to the action.⁸⁹ Importantly, children's participation rights extend to non-contested matters, with adults required to consult their children aged twelve years or older.⁹⁰

It is relevant to note that, at the time of writing, the Australian government had approved the release of an exposure draft of the Family Law Amendment (Family Violence) Bill 2010, which introduces an additional

⁸⁵ Australian Government (2005), p 8.

⁸⁶ Kelly (2006).

⁸⁷ Tisdall et al (2004).

⁸⁸ Form 9.

⁸⁹ Tisdall et al (2004).

⁹⁰ Section 6.

object to give effect to the UNCRC. If adopted, this provision will likely strengthen the right of all children to have their views heard in all decisions affecting them, though it will not preclude the need for further reforms, as discussed below.

Ambiguity Regarding the Meaning and Purpose of Children's Participation in Family Dispute Resolution

As foreshadowed earlier, further uncertainty arises in considering whether and how child-inclusive and child-focused models of dispute resolution reflect contemporary theory and evidence on children's participation, and the intention of the UNCRC. While such processes are framed within participatory discourses, the primary purpose of child-focused and child-inclusive processes is to assist parents to re-establish or consolidate a secure emotional base for their children after separation.⁹¹ One of the architects of child-inclusive and child-focused practice, Jennifer McIntosh, affirms this purpose when she describes child-inclusive practice as embracing 'the psychology of family transition and the paramount need to assist warring parents to refocus on and plan for the needs of their children post-separation'.⁹² Whether, and to what extent, a child will be involved in the process is assessed on the basis of 'parental readiness', *not* a child's right to have a say – although the process clearly supports this right for those children whose parents are assessed as 'ready' to hear them.

In itself, the issue of 'parental readiness' signals immediate limitations for 'child-inclusive' practice, since a lack of parental readiness will likely preclude children from any participation at all. Perhaps the issue of 'parental readiness' could be a factor considered in assessing how to best *support* children to understand the events and processes taking place around them and in identifying *with* children their needs, desires and willingness to express their views in decision-making processes. The purpose of assessing parental capacity could then shift from determining *whether* a child is to be involved to considerations of *how* the child's involvement might look.

The ambiguity concerning the meaning and purpose of children's participation in family dispute resolution was very evident in our recent study (discussed above) exploring children's participation in FRCs.⁹³ There were significant differences in stakeholder understandings, for example, about whether the main emphasis of the child consultation was on establishing a 'parental alliance' for children to be heard, for children to be assessed, to reduce parental conflict, for children to have someone to speak with – or all of the above. Concerns were expressed about the reasons why only a limited number of children 'qualify' for a child consultation, the weight to be given to children's perspectives, why children are not provided with information beforehand, and why there is no provision for follow-up

⁹¹ McIntosh (2007).

⁹² McIntosh (2007).

⁹³ Graham and Fitzgerald (2010).

with children. Perspectives also varied among practitioners as to the weight to be attributed to the views of the child and, indeed whether children's views on parenting arrangements should be sought at all.

Parkinson and Cashmore⁹⁴ report similar ambiguity between lawyers, family consultants, mediators and counsellors in their understanding of the meaning and practice of participation. On the one hand, there was widespread agreement that children ought to have a say – for a variety of reasons. Lawyers emphasised that involving children was important for reasons of workability. Lawyers and judges emphasised the importance of ascertaining children's capacity as relevant to the respect that should be accorded to their views. Mediators were more likely to emphasise the role of children's participation as enlightening parents and thereby promoting settlements. Counsellors emphasised the benefits for children of being treated with respect and having some control over their environment.

In both policy and practice, the evident lack of clarity around the meaning and purpose of children's participation remains a pervasive problem, as does the fact that this is not something to which all children are entitled. In contested matters, child participation is framed as an 'additional' consideration, while in non-contested matters children's inclusion is framed as an 'intervention' – that is, 'child-inclusive' or 'child-focused' practice. Consequently, while the majority of children are the 'focus' of decision-making processes, they are rarely active participants.

Our purpose here is not to refute the extensive evidence⁹⁵ pointing to the fact that most children do better when they have both parents in their lives – subject to such arrangements being safe for children – but rather to question any assumption that the current processes, largely intended to facilitate 'shared parenting', constitute children's 'participation'. As discussion earlier in this article suggests, *all* children whose parents are separating or divorcing are implicated in the processes taking place around them. From a child's perspective, their participation includes being afforded information and being supported to express their views and to have these taken into account, even when this means simply conveying their preference not to be involved.

Ambiguity Regarding Children's Participation in the Evidence Base

As signalled in the introduction, children occupy a rather ambiguous place in research and evaluation. On the one hand, there is a small but growing body of research that seeks to foreground children's voices, both in terms of the substantive focus of the research and by way of methodological approaches for including them in the process of generating evidence about their lives.

On the other hand, research that places a premium on measuring children's behaviour and assessing child well-being from the perspectives of adults continues to dominate understandings of what constitutes reliable and robust research evidence. Despite countless studies, government reports,

⁹⁴ Parkinson and Cashmore (2008).

⁹⁵ See, for example, Macintosh et al (2009); Kelly and Emery (2003); Pryor and Rodgers (2001); Amato (2010).

inquiries, discussion papers and evaluations, it seems we are still failing to routinely collect and report the views of children as part of the 'evidence base' of Australian family law and policy. The evaluation of the 2006 family law reforms is a case in point.⁹⁶ While this evaluation sought input from 28,000 parents, lawyers, judges, family relationship services and other family law professionals (which makes it one of the largest public consultations ever undertaken in Australia), it did not directly seek the perspectives of children in relation to the reforms and how well these were working for them.⁹⁷ While the recent publication of the AIFS study exploring the views of 623 adolescents in separated families goes some way towards addressing this gap, there is a potential disconnect between these findings and the evaluation of the new reforms, which has focused primarily on the durability and stability of arrangements.⁹⁸ Hence the assessment of children's well-being is framed in terms of factors that largely reflect the policy agenda of family law at the time of the reforms ('care-time' arrangements, the quality of inter-parental relationships and children's safety). While we know these factors to be important, research evidence suggesting the importance and benefits of children's participation, for both children and families, remains sidelined.

While it is outside the scope of this article to engage in debates about research paradigms, the problematic status of children within current research evidence is both a methodological and ethical issue. Talking with children in family law settings is still considered rather 'risky' and resource intensive, so research methodologies veer towards research that is *on*, rather than *with*, children. Consequently, we still know very little from children themselves about how they experience the changes that accompany family transition, nor about various aspects of family law that profoundly affect them. We don't know, for example, what Australian children's views are regarding a 'meaningful relationship' with a parent, or what role children play in protecting themselves from physical or psychological harm.⁹⁹ Yet the process of research offers the opportunity for children to define themselves and their circumstances, rather than simply being the object of adult concerns, interests and biases. Including children in research also goes some way towards building foundations for making relevant and accessible family law and policy.¹⁰⁰

⁹⁶ Houghton (2008); Taylor (2006).

⁹⁷ Kaspiew et al (2009). The analysis of child well-being was based primarily on data from the Longitudinal Study of Separated Families (LSSF) and based on parents' reports, and from the Longitudinal Study of Australian Children (LSAC), which commenced in 2004 with two cohorts – families with four- to five-year-old children and families with infants aged from birth to one year – and which is deriving information from a smaller number of parents, teachers and young children.

⁹⁸ Lodge and Alexander (2010).

⁹⁹ For examples of work overseas that has explored these issues, see Trinder (2009); Houghton (2008).

¹⁰⁰ Grover (2004).

Children's Participation in Family Law Settings is Complex

The gap between the principle and practice of children's participation cannot merely be attributed to resistance or uncertainty around the place of children in family law, policy and research. There is also a growing realisation that while listening to the voices of children represents an important start, actually *engaging* adequately and authentically in the listening (and responding) in family law contexts is challenging. Sometimes, children's accounts of their views and experiences of their parents' separation are ambiguous, with many expressing that they 'do' and 'don't' want to be part of decisions that are being made.¹⁰¹

There is also emerging evidence that the provision of legislative mechanisms to hear children's voices does not necessarily lead to children's views being taken into account. For example, in a New Zealand study analysing 120 Family Court cases, Henaghan reports that despite a child's views needing to be ascertained and taken into account, in 46 per cent of the total case sample, children's views were not ascertained in a written judgment.¹⁰² Weight was given to children's views in only 33 per cent of alienation cases, while only 32 per cent of relocation cases reported giving weight to their views.

Hinton and colleagues have noted that 'a host of important questions surrounding the precise nature, politics and ethical status of participation remain unasked and unanswered', and these questions point to the complexity of the issue of child participation.¹⁰³ Well-documented concerns, such as placing children at centre-stage in their parents' conflict and parents unduly attempting to influence children and burdening them with the responsibility of decision-making, further highlight the challenges of keeping children safe in participatory processes.¹⁰⁴ The competence and capacity of children to participate, and the challenges of protecting children from the conflict, pain and violence (in some cases) when they do, all point to the need for further research in this area.¹⁰⁵

Yet, while there is much work to be done in this complex and deeply contested area of family law, we suggest giving voice to children is not simply or only about inviting children to speak (or not), but rather exploring the unique contribution children's perspectives can provide to our understanding of, and theorising about, family law, policy and research.

¹⁰¹ For further discussion of the 'to and fro' of children's accounts in family law, see Graham and Fitzgerald (2006, 2010).

¹⁰² Henaghan (in press).

¹⁰³ Hinton (2008), p 281.

¹⁰⁴ Houghton (2008); Parkinson and Cashmore (2008); Tisdall et al (2004).

¹⁰⁵ For further discussion of these debates, see Houghton (2008); Lansdown (2006).

Bridging the Gap: Taking Children's Participation Seriously in Practice and Policy

Reconciling 'what matters' to children when their parents divorce, with existing opportunities and processes for facilitating their participation, poses a number of significant challenges for policy-makers. In this final section, we examine a number of areas for consideration in any future developments in Australian family law.

Clarifying the Meaning and Purpose of Children's Participation

While a range of mechanisms currently exist to hear children in family law settings, such opportunities are constrained by a lack of clarity about the meaning and purpose of participation and by the evident difficulties in determining how this might best be implemented and evaluated. Given this, we suggest that an important first step lies in the development of a national framework for children's participation in family law processes. This would require a clear statement about what children's participation means, consistent with current social science research as well as the basic principles provided in the UNCRC. In addition, such a framework might set out the basic requirements (principles and procedures) for the implementation of the right of the child to be heard. The UN General Comment provides an excellent starting point in that it sets out the basic requirements for the implementation of this right more broadly.¹⁰⁶ Importantly, all participatory processes must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported, safe and sensitive to risk, as well as accountable.

Elevating Children's Views to an Object and Principle of the Family Law Act and a 'Primary' Consideration

The development of principles of good practice, however, can only go so far in embedding children's participation within policy and legislation. If children are to be taken seriously, their views about who they live with and who they spend time with – including in situations where there are concerns for their safety – must be central to decision-making processes. This includes consideration of information children require to 'make sense' of events taking place around them as well as respecting children's wish not to be involved.

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.

Including children's views as a section 60B object and principle would acknowledge the importance of embedding decision-making processes that are open and responsive to the reality of children's lives, including their right and need to have a say.

¹⁰⁶ Committee on the Rights of the Child (2009).

The elevation of children's views to a primary consideration or the insertion of a sub-section, similar to section 4(6) of New Zealand's *Care of Children Act 2004*, 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 of status around children's participation in the *Family Law Act 1975*. Alternatively, more serious attention could be given to Richard Chisholm's recommendation in the Family Court's Violence Review that the government remove the artificial distinction created in the present Act between 'primary' and 'additional' considerations altogether.¹⁰⁷

In addition, the requirement for the court to hear the views of children should be extended beyond decision-making in contested matters to family dispute resolution in privately ordered decision-making processes, in particular the principles and procedures underlying Family Relationship Centres.¹⁰⁸

While it would be a vexed undertaking to mandate processes when parents agree on arrangements without legal intervention, it is relevant to note that children's participation is most meaningful when it is rooted in children's everyday lives.¹⁰⁹ As awareness grows regarding the benefits of children's participation, so too does attention on how parents might best facilitate their children's involvement in family decision-making about matters that concern them. This is essentially an issue about the nature and quality of *relationships* between parents and children, and may largely depend on whether listening to children and encouraging their involvement in decisions was a feature of family life *prior* to the separation or divorce. While this is a matter that resides beyond the legislative sphere, improving parents' awareness of their children and the importance of supporting them through family transition might well be served by persistent public education.

Finally, we suggest that provision for children to participate should exist 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, such differences do not preclude children's basic need and desire for recognition. Such recognition, we suggest, is best realised through dialogue *with* children, regardless of whether decisions are being made in contested or non-contested settings.

Evaluating and Monitoring Children's Participation

The importance of children's participation will be realised more effectively when a commitment is made to monitoring and evaluating the extent to which it is taking place. As well as developing and integrating standards for children's participation in decision-making (for example, through a national framework), we suggest there is a commensurate need for the development

¹⁰⁷ Chisholm (2009) p 8.

¹⁰⁸ Parkinson and Cashmore (2008).

¹⁰⁹ Thomas and Percy Smith (2010).

of tools for assessing and collecting evidence about the *impact* of participation.¹¹⁰ Such tools would also evaluate the benefits and risks of child participation in family law settings. Lansdown suggests three dimensions to be addressed when considering how children's participation might be measured and evaluated:

- Scope – what degree of participation has been achieved?
- Quality – to what extent have participatory practices complied with recognised standards for good practice?
- Impact – what has been the impact on the young people themselves, families and the supporting agency, and on the wider realisation of young people's rights within families, local communities and at local and national government levels?¹¹¹

Along with a framework, the development of tools for assessing and collecting evidence has a critical role to play in operationalising and integrating children's participation in family law decision-making processes. Importantly, close attention needs to be given to children's contributions in evaluating their participation.

Ensuring Children's Voices are Reflected in the Evidence Base

There remains a need to better understand separation and divorce from the perspective of children themselves. In particular, there is still a lot to learn about how children make meaning of their experience when their parents separate and how the programs and services available to them actually assist with this important process. Children's meaning-making processes are critical to their identity-formation and to their sense of well-being.¹¹² It is therefore important that we have access to rigorous, ethical research that enables the diversity of children's experiences to be reported so as to assist our understanding of how children think about and adapt to divorce, as well as what they perceive to be the most effective way of supporting them through family transition.

Conclusion

Our purpose in this article has been to contribute to public debate about whether family law in Australia is achieving its aspirations in relation to children. If we assume the 2006 reforms were, as indicated at the outset, an attempt to improve the status of children, then it is now time to examine critically whether and how this is being achieved. A burgeoning evidence base over the past 20 years about the impact of divorce on children and what they require in order to adapt to the changed realities of everyday life has been helpful, up to a point, in refining legislation and developing policy that

¹¹⁰ Crowley and Skeels (2009).

¹¹¹ Lansdown (2006).

¹¹² Graham and Fitzgerald (2010).

has influenced parenting arrangements in particular. However, what is missing from much of the research – with the exception of a small number of recent studies – is hearing directly from children about the issues that impact on them, including the conditions for, and benefits of, their involvement in decision-making. The evidence from children that *is* available begs close consideration in light of the emphasis they place on the importance of their participation and their ability to articulate their views and experiences about the systems, processes and programs available to facilitate this.

The movement towards creating a family law environment that recognises children, including both their agency *and* vulnerability, is painstakingly slow. However, this movement will not occur at all if we fail to come to terms with some of the more difficult questions about the status of children, both in family life and in broader society. This includes addressing how we understand and implement opportunities for children's participation within family law and whether we can measure its benefits for children's well-being. At the heart of such issues lies a critically important challenge: whether we have the political will to advance the status of children such that what matters most for them is heard, understood and acknowledged, without necessarily being conflated with what matters most for their parents. Such a process, according to the UN Committee on the Rights of the Child, necessitates 'dismantling the legal, political, economic, social and cultural barriers that currently impede children's opportunity to be heard and their access to participation in all matters that affect them'.¹¹³

The process of negotiating such complex terrain begins with some simple but important questions: Are we prepared to have conversations with children so that their views and concerns can be heard? Do we know how to hold these conversations? Are we prepared to act on what children say? Can we trust their accounts? Are we prepared to change our minds, be flexible and have our opinions altered in light of what children tell us? What resources are we willing to invest into developing environments, programs and resources that support and enable children to have a say? Such questions – perhaps somewhat contentious in some circles and totally overlooked in others – now require our close attention. Changing the ways in which we engage with children in family law-related contexts depends on more than just further research evidence; it requires critical examination of the attitudes, values, beliefs and assumptions about children and childhood that have come to shape our existing policies and practice, and that may ultimately limit or enable the possibilities for children's meaningful participation.

¹¹³ Committee on the Rights of the Child (2009).

References

- Paul Amato (2010) 'Research on Divorce: Continuing Trends and New Developments' 53 *Journal of Marriage and the Family* 43.
- Attorney-General's Department (2005) *Family Law Reform News*, Commonwealth of Australia.
- Attorney-General's Department (2006) *Fact Sheet One: A New Family Law System*, Commonwealth of Australia.
- Australian Government (2003) *Government Response to the Family Law Pathways Advisory Group Report*, Commonwealth of Australia.
- Australian Government (2005) *A New Family Law System: A Government Response*, Commonwealth of Australia.
- Dale Bagshaw et al (2006) *Children & Families in Transition*, University of South Australia.
- Dale Bagshaw et al (2010) *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006*, Commonwealth of Australia.
- Jo Boyden and Judith Ennew (1997) *Children in Focus: A Manual for Participatory Research with Children*, UNICEF.
- Ian Butler et al (2002) 'Children's Involvement in Their Parents' Divorce: Implications for Practice' 16(2) *Children and Society* 89.
- Alan Campbell (2004) 'The Voice of the Child in Family Law: Whose Right? Who's Right?', unpublished thesis, University of South Australia.
- Judy Cashmore (2003) 'Children's Participation in Family Law Matters' in C Hallett and A Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century*, Routledge.
- Judy Cashmore et al (2010) *Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department Sydney*, Commonwealth of Australia.
- Richard Chisholm (1999) 'Children's Participation in Family Court Litigation' 13 *Australian Journal of Family Law* 197.
- Richard Chisholm (2006) 'The Family Laws Amendment (Shared Parental Responsibility) Bill 2006: Putting Children at Centre Stage', paper presented at the Contact and Relocation: Focusing on the Children, Centre for Children and Young People, Southern Cross University, Lismore, 6 May.
- Richard Chisholm (2009) *Family Court's Violence Review*, 27 November 2009.
- Committee on the Rights of the Child (2009) *General Comment No 12*, Fifty-first Session, Geneva.
- Commonwealth of Australia (2009a) *Family Support Program*, Commonwealth of Australia.
- Commonwealth of Australia (2009b) *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020*, Commonwealth of Australia.
- Donna Cooper (2011) 'Continuing the Critical Analysis of 'Meaningful Relationships' in the Context of the "Twin Pillars"' 25 *Australian Journal of Family Law* 33.
- Anne Crowley and Anna Skeels (2010) 'Getting the Measure of Participation' in B Percy-Smith and N Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice*, Routledge.
- Family Dispute Resolution Practitioners Obligations,
[www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801F9\)-FDR-Practitioner+Obligations.pdf/\\$file/FDR-Practitioner+Obligations.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801F9)-FDR-Practitioner+Obligations.pdf/$file/FDR-Practitioner+Obligations.pdf).

- Family Law Pathways Advisory Group (2001) *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, Commonwealth of Australia.
- Robyn Fitzgerald and Anne Graham (2011). "‘Something Amazing I Guess!’ Children’s Views on Having A Say About Supervised Contact" *Australian Social Work*, in publication.
- Anne Graham (2004) ‘Life is Like the Seasons: Responding to Change, Loss and Grief Through a Peer Based Education Program’ 80(6) *Childhood Education* 317.
- Anne Graham and Robyn Fitzgerald (2006) ‘Taking Account of the ‘To and Fro’ of Children’s Experiences in Family Law’ 31(2) *Children Australia* 30.
- Anne Graham and Robyn Fitzgerald (2010) ‘The Changing Landscape of Family Law: Exploring the Promises and Possibilities for Children’s Participation in Australian Family Relationship Centres’ 84 *Family Matters* 53.
- Sonja Grover (2004) ‘Why Won’t They Listen To Us? On Giving Power and Voice to Children Participating in Social Research’ 11 *Childhood* 81.
- Mark Henaghan (in press) ‘Why Judges Need to Know and Understand Childhood Studies’, in M Freeman (ed), *Law and Childhood Studies*, Oxford University Press.
- Malcolm Hill et al (2004) ‘Moving the Participation Agenda Forward’ 18 *Children and Society* 77.
- Rachel Hinton et al (2008) ‘Children and Young People’s Participation in Public Decision-Making’ 16 *International Journal of Children’s Rights* 281.
- Claire Houghton (2008) ‘Participation of Children and Young People Experiencing Domestic Abuse’, in Cathy Humphreys et al, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse – Directions for Good Practice*, Scottish Government.
- Rae Kaspiew et al (2009) *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies.
- Joan Kelly and Robert Emery (2003) ‘Children’s Adjustment Following Divorce: Risk and Resilience Perspectives’ 52(4) *Family Relations* 352.
- Bernadette Kelly (2006) ‘Children’s Participation in Family Law Decision-Making: Lessons from Overseas’, paper presented at the Contact and Relocation: Focusing on the Children, Centre for Children and Young People, Southern Cross University, Lismore, 6 May.
- Gerrison Lansdown (2006) ‘International Developments in Children’s Participation: Lessons and Challenges’, in K Tisdall et al (eds), *Children, Young People and Social Inclusion: Participation for What?* Policy Press.
- Jodie Lodge and Michael Alexander (2010) *Views of Adolescents in Separated Families*, Australian Institute of Family Studies.
- Ruth Lister (2008) ‘Unpacking Children’s Citizenship’, in A Invernizzi and J Williams (eds), *Children and Citizenship*, Sage.
- Jennifer McIntosh (2007) *Child Inclusion as a Principle and as Evidence Based Practice: Applications to Family Law Services and Related Sectors*, Australian Family Relationships Clearinghouse.
- Jennifer MacIntosh et al (2009) ‘Parenting after Separation: A Position Statement prepared for the Australian Psychological Society’, www.psychology.org.au/Assets/Files/Parenting_separation_PP.pdf.
- Jennifer McIntosh and Caroline Long (2007). *The Child Responsive Program, Operating within the Less Adversarial Trial: A Follow-Up Study of Parent and Child Outcomes*, Report to the Family Court of Australia.

- Bren Neale (2002) 'Dialogues with Children: Children, Divorce and Citizenship' 9(4) *Childhood* 455.
- Patrick Parkinson and Judith Cashmore (2008) *The Voice of the Child in Family Law Disputes*, Oxford University Press.
- Jan Pryor and Bryan Rodgers (2001) *Children in Changing Families*, Blackwell.
- Carol Smart et al (2001) *The Changing Experience of Childhood*, Polity Press.
- Anne Smith et al (2003) 'Rethinking Children's Involvement in Decision-Making After Parental Separation' 10(2) *Childhood* 201.
- Nicola Taylor et al (2007) 'Respecting Children's Participation Rights' 15(1) *International Journal of Children's Rights* 61.
- Nicola Taylor (2006) 'What Do We Know About Involving Children and Young People in Family Law Decision-Making? A Research Update' 20(2) *Australian Journal of Family Law* 154.
- Nigel Thomas and Barry Percy-Smith (2001) 'Introduction', in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice*, Routledge.
- Nigel Thomas and Clare O'Kane (1999) 'Children's Experiences of Decision-Making in Middle Childhood' 6(3) *Childhood* 369.
- Judith Timms (2001) 'Can We Protect Children and Protect Their Rights?', paper presented at the World Congress on Family Law and the Rights of the Child and Youth, Bath, 20–22 September.
- Kay Tisdall et al (2004) 'Children's Participation in Family Law Proceedings: A Step Too Far or a Step Too Small?' 26(1) *Journal of Social Welfare & Family Law* 17.
- Liz Trinder (2009) 'What Might Children Mean by a "Meaningful Relationship"?' 15 *Journal of Family Studies* 20.

Cases

- Goode and Goode* (2006) 206FLR 212; [2006] FamCA 1346
- In the Marriage of Harrison and Woollard* (1995) 18FamLR788
- Marvel and Marvel* (2010) 240 FLR 367

Legislation and International Instruments

- Family Law Act 1975* (Cth)
- Family Law Amendment (Family Violence) Bill 2010 – Exposure Draft
- Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)
- Family Law Rules 2004*
- United Nations Convention on the Rights of the Child*