

Taking account of the 'to and fro' of children's experiences in family law

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This paper outlines the possibilities and tensions that emerge in legal and social discourse when popular images and narratives of children as 'at risk' are juxtaposed with more revised constructions of the child as capable and autonomous. The paper explores this shift in representation of children against a background of extensive family law reform currently under way in Australia. It then reports insights from a pilot study which found that children 'to and fro' between accounts of hurt and powerlessness associated with divorce, and their desire to participate in the processes and decisions taking place around them. The paper posits that discourses of participation taken up in research, practice and policy need to acknowledge a dialectic relationship between agency and vulnerability if we are to respond to children in ways that include rather than marginalise. The paper concludes by highlighting some of the challenges that exist for researchers and practitioners seeking to be open to new ways of thinking about children's lives – ways based on an ethic that refuses the kind of normalisation and neat analyses conventionally pursued through research endeavours.

What I say ought to be taken as 'propositions', 'game openings' where those who may be interested are invited to join in: they are not meant as dogmatic assertions to be taken or left *en bloc*.

(Foucault 1981, p. 4).

The views and perspectives of children are critical if we are to create social institutions (families, schools, legal systems, government and non-government services) that are responsive to children and young people. This implies that we need to engage methods and processes in our professional work that enable us to listen and learn from what children have to tell us about their experiences and to integrate this into our responses to them. Our paper builds upon the case for participation that has already been well argued by others (Hart 1992; James & James 1999; Landsdown 1995) and challenges a reflexive engagement with the paradoxes and ambiguities evident in children's participation.

Our interest in writing about children's participation in decision-making in the context of family law has been influenced by a number of key factors, not the least of which is the increasingly evident emergence of tensions inherent in both the 'principles and pragmatism' of participation (Prout 2000, p. 304). As both researchers and practitioners, we at times occupy a tense and disconcerting space between competing conceptualisations of the child as *being* – either 'subject' or 'object', 'autonomous' or 'dependent', 'competent' or 'vulnerable' – and an emerging realisation through our dialogue with children that they can simultaneously be all of these. In listening to children's stories about the world and their place in it, we suggest children 'to and fro' between discourses, sometimes assuming power to speak in their own voice, sometimes speaking in ways they consider permissible and sometimes allowing silence to communicate the essence of their lived experiences (Belenky, Field, McVicker, Goldberger & Tarule 1986; Sampson 1993).

A number of questions remain unsettled for us as a result of our work and some of these underpin this paper.

- How do we as researchers (re)present the experience of children?

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- Do our interpretations limit or enable the 'otherness' of children's experience?
- How do we pursue research methodologies that privilege children's voices and yet resist a 'too neat' analysis of what we hear?
- How well do we recognise, respect and report the ambiguity, or the 'to and fro', of children's different states of 'being'?

This paper takes the construct of 'children's participation' and provokes us to refrain from applying it unproblematically in terms of children's involvement in decision-making in the family law context. We take as a point of departure the idea that there are many complex and contributing conditions that shape the object of children's participation. Such an approach draws tentatively upon post-structural theorising with its emphasis on knowledge as partial, as interested, and as performative of relations of power (Britzman 1995; Foucault 1980). Post-structuralist theories are useful for this discussion because they bring to the fore concerns about what it is that structures meanings, practices and bodies, about why certain practices concerning children become intelligible, valorised or deemed as traditions, while other practices become discounted, impossible, or even unimaginable.

In recognising that the approach taken in this paper may be somewhat contentious in some circles, it might be timely to consider Foucault's own words in relation to the possibilities and limitations of such an approach:

Whenever I have tried to carry out a piece of theoretical work, it has been on the basis of my own experience, always in relation to processes I saw taking place around me. It is because I thought I could recognise in the things I saw, in the institutions with which I dealt, in my relations with others, cracks, silent shocks, malfunctionings ... that I undertook a particular piece of work, a few fragments of an autobiography. (Foucault 1988, p. 156)

Our perception that there may be some 'cracks' in emerging discourses concerning children's participation within family law prompted our further inquiry. This perception has been shaped and challenged particularly through our dialogue with children, conversations made possible through ten years of work writing and implementing an education intervention for children whose parents have separated or divorced (Graham 1996; 2004), through undertaking a small scale research project exploring children's involvement in decision-making in family law (Fitzgerald & Graham 2003) and through a study currently under way which is exploring children's experiences of supervised contact (Fitzgerald, in progress). In all three contexts, these conversations have prompted a deepening of our recognition and respect for the ways in which children can simultaneously accommodate and resist the very discourses that shape their lives.

PARTICIPATION AS DISCOURSE

There is now an extensive body of literature on children's participation that has significantly enhanced the ways in which we think about children's lives, including the central importance of involving them in decision-making (Cashmore 2003; Smart, Neale & Wade 2001; Smith, Taylor & Tapp 2001, 2003). Whilst the discourse of participation is increasingly evident in a range of policy and program initiatives in Australia, there remain significant concerns about the extent to which participation rights are being realised – see, for example, the *Non-government report on the implementation of the United Nations Convention on the Rights of the Child* (National Children's & Youth Law Centre & Defence for Children International 2005). A focus on participation as discourse is critically important if we are to ensure its use doesn't mask a range of programs and activities, including research, that perpetuate the marginalisation of children whilst purporting to do the opposite. Understood this way, participation is treated as an object of knowledge, a meta-narrative, that is itself ordered and constructed by other discourses which determine what is 'seeable' and 'sayable' in relation to children's experience. As Ball (1990, p. 2) asserts:

Discourses are about what can be said and thought, but also about who can speak, when, and with what authority.

Discourses embody meaning and social relationships, they constitute both subjectivity and power relations.

Discourses about children's participation abound. These discourses reflect views and ideologies in relation to rights and welfare, agency and dependency, autonomy and vulnerability, capacity and harm, risk and resilience, to name a few. This being the case, it seems important to critically reflect on whether it is possible to ever completely capture children's experience within the possibilities and limitations of these discourses. This means that as researchers and practitioners, we are challenged to listen and respond effectively and with respect to the ways in which children 'to and fro' between accounts of hurt and powerlessness and their desire to participate in the processes and decisions taking place around them.

In the following section we examine briefly the limitations that rights and welfare discourses impose on children's participation in the context of family law in Australia.

WELFARE AND RIGHTS DISCOURSES IN THE AUSTRALIAN FAMILY LAW CONTEXT

Discourses of welfare and rights have a long history in family law (Neale & Smart 1999; Taylor 1998; van Krieken 2005). While discourses of the 'welfare' or the 'best interests' of the child date back to the assertion of the *parens patriae* jurisdiction in 1696, discourses of family law 'rights' have historically been articulated in terms of fathers'

and, more recently, mothers' rights to the custody of children (van Krieken 2005). Thus, whilst providing a comprehensive history of the shifting balances in power between men and women, rights discourses have been notable for their absence of a focus on children (Taylor 1998).

It is not until the emergence of revised understandings associated with the new childhood studies and the United Nations Convention on the Rights of the Child (UNCROC) that the principle of a child as a bearer of rights begins to claim an existence *independent* of the competition between mothers' and fathers' rights (Taylor 1998; van Krieken 2005). However, centuries of particular understandings of family life are not easily overturned. Additionally, the appropriation of the best interests test as a crucial vehicle for balancing power between men and women has meant the idea of allowing an independent voice to children regarding where they should live, with whom they should have contact and in whom parental responsibility for them should be vested, remains illusive (Smith 1997).

Children's rights are not only understood within a framework of parents' rights, but are also taken up within a range of welfare discourses. Such discourses focus on the harmful effects of divorce on children and have, to some extent, colonised understandings of children's rights discourses in that family law legislation, whilst providing that children have rights, adopts only the provision and protection rights of UNCROC. These rights allow for children to know and be cared for by both parents and to have contact with both parents on a regular basis, as well to be protected from physical harm. By failing to fully implement a child's right to be heard as expressed in Article 12 of UNCROC, the legislation affords children limited opportunity to express their wishes in all family law proceedings that concern them and, therefore, continues to position children at the margins of participation.

This position has been further entrenched in the new Commonwealth Government *Family Law Amendment (Shared Parental Responsibility) Bill 2005* which formally differentiates between children's provision, protection and participation rights. Whilst providing that children have rights, it adopts a two-tiered structure of 'primary' and 'additional' considerations, whereby a child's *provision* and *protection* rights are allocated 'primary' importance, whilst a child's *participation* rights are allocated as merely additional considerations. In this way, the legislation affords children limited opportunity to express their wishes. Thus children, as subjects of the law, continue to be characterised as lacking in capacity to participate on the grounds of innocence, immaturity and incompetence (Prout & James 1997; Smith 1997). Neale (2002) argues that these understandings of children are essentially adult constructions that assume children to be inadequately socialised dependants in need of care, protections and control and, as such, sit uneasily with

the idea of children as holders of rights with the capacity to act, interact and influence the shape of their childhoods.

Views of the child as lacking or incompetent are also not well aligned, with research both in Australia and overseas supporting the idea that involving children in decisions that affect them and taking their views seriously has far reaching benefits for all stakeholders (Butler, Scanlon, Robinson, Douglas & Murch 2002; Cashmore 2003; Smart et al. 2001; Smith et al. 2003). 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. 159).

Many children have a quite extraordinary capacity for coping, problem solving, decision making and goal setting.

Children attach immense importance to being listened to, and to participating in the decision-making processes that profoundly affect them, with those children who have had some involvement in their residence and contact arrangements also indicating higher degrees of satisfaction with the arrangements subsequently made (Butler et al. 2002). Yet, children consistently report their exclusion from discussions about their parents' separation and divorce and the changes that this brings to their lives. Smart, Wade and Neale (1999, p. 366) have observed that:

One of the ironies of this exclusion of children from open discussions about divorce and changes in family life is that they are a fount of knowledge and information themselves on what it is like, on how to cope, on how to intervene (even in limited ways) and what it all feels like. They may have a very different perspective on the process when compared to parents, and they may even have solutions to some typical problems thrown up by parenting across households.

As researchers, we have concerns that the extensive body of research that supports children's capacity to act positively in family law matters that concern them (Cashmore 2003; Robinson, Butler, Scanlan, Douglas & Murch 2004; Smith et al. 2001, 2003) has yet to make a significant impact in terms of Australian family law policy and legislation. Considerable government funds have been allocated for the conduct of major national inquiries – e.g. *Every picture tells a story* (House of Representatives Standing Committee on Family and Community Affairs 2003), and the commissioning of reports and discussion papers – e.g. *A new approach to the*

family law system (Australian Government 2005); *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill* (House of Representatives Standing Committee on Legal and Constitutional Affairs 2005), yet children and young people have been afforded little opportunity to participate in either the consultations or in their evaluation preceding the announcement of reforms. An example is evident in the conduct of the House of Representatives Standing Committee on Family and Community Affairs whereby, despite receiving and hearing over 2000 submissions, it was only at its final meeting that the Committee met with fourteen children and young adults.

In failing to consult with children in an ongoing, meaningful way, the Committee missed a key opportunity to both demonstrate and lead a genuine, respectful commitment to a child focus within the family law system:

- 2.20 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 ... (*Every Picture Tells a Story* 2003, p. 25).

In emphasising the importance of children's participation in decision-making processes, we do not seek to polarise children's welfare with their rights. The welfare or best interests of the child are rightly the ultimate concern of the Family Court, especially given the high percentage of allegations of abuse and violence that come before it (Family Court of Australia 2003). However, we agree with Smart et al. (2001, p. 22) that the 'genuine desire to improve the lives of children is quite a separate phenomenon to the powerfully symbolic and politically useful' rhetoric of welfare discourses that seek to describe children as vulnerable and in need of protection.

Instead we hope to highlight not only the potential for the 'best interest' standard to act as a vehicle for enabling the meaningful and appropriate participation of children in ways that will contribute to their emotional well-being, but also for keeping children one degree removed from any contest in power between fathers and mothers (van Krieken 2005).

LOCATING CHILDREN'S EXPERIENCE: DISCOURSES OF HARM AND CAPACITY

The discussion above prompts us to be alert to the ways family law policy serves to marginalise the direct involvement of children whilst ostensibly acting to protect children who are the 'innocent victims of divorce' (Smart et al. 2001, p. 22). Key in providing legitimacy to such an approach has been a plethora of research over a considerable

period of time concerning the effects of separation, divorce and remarriage on children; including whether divorce does, or does not, harm children (see, for example, Amato 1993; Amato & Booth 1997; Dunlop & Burns 1988; Emery 1994; Funder 1996; Hetherington 1999; Ochiltree & Amato 1985; Pryor & Rodgers 2001; Wallerstein & Kelly 1980). Implicit in such research has been the child as an object of concern, although it is now widely argued that we should 'refashion the child of divorced parents as a person rather than as an object of concern' (Smart et al. 1999, p. 366).

'Refashioning' the Australian child as a rights holder, however, remains fraught and has led to a questioning of how best to acknowledge the agency and capacity of children, without denying the well-known emotional responses often triggered by separation and divorce such as sadness, anxiety, anger, resentment, confusion, guilt and loyalty tensions (Bagshaw 1998; Graham 2004; Worden 1996). Such responses have been conceptualised in terms of grief responses (Graham 1996; 2004; Worden 1996), although these are neither inevitable nor universal. Importantly, 'grief' in this context is not construed as a pathological condition that positions children as victims or dependent, but as a state of being that provides them with both the space to acknowledge their hurt or distress as well as to resist powerlessness and passivity in the face of their changing and often stressful family circumstances (Graham 2004). In constructing their experience in this way, we open up the possibility that children themselves are active in their own well being, that is, they can engage their own knowing to act on themselves in relation to divorce and the changes it brings in their lives (Kaganas & Diduck 2004).

Children's emotional responses should not in and of themselves render the child at risk of harm, nor should they be silenced in endeavours to promote children's agency. Instead, we can acknowledge the interplay between dependency and agency by giving more attention to the productive potential of children's grief responses. Many children have a quite extraordinary capacity for coping, problem solving, decision making and goal setting (Graham 2004) although clearly they do best in developing competence with these in the context of a supportive social environment (Smith 2002). Given timely and appropriate support, children are capable of reconstructing their experience in ways that enhance agency (a sense of being *enabled* and so acting upon what they *can* influence) as distinct from dependency (being *constrained* by acting upon decisions, processes or family dynamics they *can't* or *don't wish* to influence).

A key issue emerging from the above discussion is whether, as adults, we can accommodate the idea that children's participation requires a capacity on our part to uncouple ourselves from the often polarising discourses embedded in rights and welfare narratives which potentially act as paradigmatic self enclosures that limit what we hear.

Instead, we are challenged to live with the ambiguity of children's experience as they 'find their way about' (Giddens 1993, p. 151) within and between such discourses.

THE AMBIGUITY AND CONTRADICTION OF CHILDREN'S VOICES: A PILOT STUDY

In a recent pilot study (Fitzgerald & Graham 2003), we interviewed eight children from northern New South Wales about their participation in decision-making in relation to residence and contact arrangements after their parents had separated. From the outset, the children provided thoughtful, articulate views on their understanding of legal processes and of their role in those processes. A common theme expressed by the participants was a clear statement of an ideal whereby adults acknowledge and listen to children:

... when I am listened to, I don't have to say it ten thousand times and I have just to say it once and they will talk to me ... I guess I know what is going on and stuff. (Avril)

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

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

Whilst the children expressed a strong desire to be heard, their constructions of 'participation' appeared to be located within and across quite different discourses, suggesting a 'to' and 'fro' between wanting to be involved and, at the same time, expressing hurt and confusion in relation to the processes occurring around them:

If the kids could listen to what's happening, like actually happening, straight facts not just curvy ones that are not really true, but also scared sometime, like it's not really good to hear them, but it gives an understanding and you know what is happening. (Johnny)

Thus appeals by the children to be treated by adults with respect and as 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.

The limited agency of the children was further evident in a lack of consultation and information afforded them throughout their parents' separation:

I was not really asked ... I think you should understand that children don't get much choice about it. They don't get much choice. (Christy)

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

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

... representations of the child within law must take into account the dialectic relationship between vulnerability and capacity, dependency and autonomy, and risk and resilience.

It is clear that the children above spoke in voices that could best be described as 'tentative' as they moved between accommodating the dynamics of their parents' divorce and simultaneously attempting to adapt to their changed circumstances. Our challenge as researchers and practitioners lies in how to interpret this dynamic in an authentic way. On the one hand, to interpret or render this tentative voice such that it elevates discourses of *harm* and *risk* potentially marginalises the child's agency and silences the narratives relating to their *capacity*. On the other hand, to interpret or render the child's appeals to be heard as calls for autonomy potentially fails to acknowledge the voices of hurt, vulnerability and sadness.

If the key personal resources for resilient children are social competence, problem-solving skills, autonomy and sense of purpose (Masten, Nest & Garnezy 1990), then marginalising children's participation on the basis that their tentative voices translate as being a burden and therefore harmful, will seriously limit the opportunities to recognise and position children within discourses of capacity. This supports the view of Gorrell Barnes (1999, p. 427) that:

... emotional narratives ... entangle or trap children in ways that do not promote resilience and may actively work against their development.

Images of the children emerging from our conversations with them are considerably at odds with the images that emerge from discourses of risk and harm. However, neither did what we hear entirely accord with images of the child as autonomous, competent and always able to act in their own best interests, a child of the type Kaganas and Diduck (2004) refer to as the post-liberal child or the 'good' child of divorce or separation, 'a well-adjusted, adequately educated child who eschews antisocial activity' (p. 968). The accounts of the children seem to occupy quite complex and competing spaces somewhere in between, spaces in which the children spoke in indirect ways, and where their voices were 'deliberately or unwittingly opaque' (Brown & Gilligan 1992, p. 23).

Our claim in presenting this work is not that the children we spoke with represent all children, but rather what we learned from them seemed worthy of the attention of others. In attempting to progress what we know about participation through what these children have shared, we are seeking also to respond to what James, Jenks and Prout (1998, p. 3) describe as the need to theorise the field of childhood studies by 'embracing the variety of approaches that will open up and also critique both extant and emergent debates about children' in ways that invite engagement and simultaneously resist closure.

CHILDREN'S PARTICIPATION: WORKING PRODUCTIVELY WITH THE 'TO AND FRO'

The children in our study welcomed the limits imposed on their decision-making, whilst simultaneously wanting recognition of their identity and capacities to act in the processes occurring around them. The idea of the child as human subject is an underlying theme of this paper, particularly in regard to the way in which the tension between constraint and agency is played out. To be a subject can be understood in the sense of being subject *to* something. Being subject carries a connotation, therefore, of being dominated, repressed, constrained or silenced – subjugated by some force or limits. Children's participation may be seen to act in this way, particularly when we hear their tentative voice within discourses of harm. In another sense though, the child subject is attributed with agency and is therefore empowered to act on the object of participation. This is particularly evident when we hear in children's voices the capacity to both accommodate and resist the discourses that identify them as being either 'competent' or 'at risk'.

A key element at work in this discussion is the concept of power and the ways in which it influences the positioning of children in both policy and practice. This is consistent with Hill, Davis, Prout and Tisdall's view that:

... almost all discourse about young people's participation refers back at least implicitly to notions of power; less often,

however, does that involve explicit identification, clarification and deconstruction of what is meant by power and how power operates (2004, p. 89).

We contend that the power at work in the children's lives as briefly described in this paper is not one that is necessarily repressive (adult's power over children) but rather productive (children's power over themselves). Like Hill et al.'s (2004) analysis, our own has taken up Foucault's (1980) conceptualisation of power as making an important contribution to understanding the 'to and fro' of children's experience of participation:

Power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising power (Foucault 1980, p. 98).

Clearly, if a new culture of elevating and facilitating children's participation in family law processes is to find expression and legitimacy, representations of the child within law must take into account the dialectic relationship between vulnerability and capacity, dependency and autonomy, and risk and resilience. We hope the narrative emerging from this paper may prompt a further opportunity to think the unthought on children's participation and to trace how children as subjects can at times transcend the very discourses that define them. Such an approach will remain useful insofar as it reminds us of the diversity of powers and knowledges at work in constructing and facilitating children's participation in family law. ■

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