

How are children heard in family law proceedings in Australia?

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If we had a keen vision and feeling of all ordinary human life, it would be like hearing the grass grow and the squirrel's heart beat, and we should die of that roar which lies on the other side of silence.

—GEORGE ELIOT, *Middlemarch*

Abstract

This paper seeks to situate current discussion about how children are heard in family law proceedings that affect them by exploring the representations and understandings of childhood that are evident in Australian family law. Inquiry proceeds upon the notion that childhood is to be understood as a social construction: while the immaturity of the child is a biological fact, the ways in which this immaturity is understood and made meaningful is a fact of culture.¹ In Australia, the Family Law Act 1975 (Cth) and its implementation construct certain meanings of childhood and make assumptions that allow for the regulation of children's voices. This paper explores some of those underlying assumptions by conceiving a legal identity of a child subject and situating that legal identity within liberal ideology. By identifying and acknowledging assumptions underpinning legal representations, it is hoped that this paper will participate in the process of understanding and communicating with children as a group conventionally cast as other.² Recognising some of the assumptions may not generate answers, but rather facilitate different ways of enabling children to speak and

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¹ Prout A & James A, "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems" 1997 in Prout A & James A (eds), *Constructing and Reconstructing Childhood*, Falmer Press, London, 1997, p 7.

² Davies M, "Legal Separatism and the Concept of the Person", in Cambell T & Goldsworthy J (eds), *Judicial Power, Democracy and Legal Positivism*, Ashgate Dartmouth, Sydney, 2000, p 117.

generate different insights into the complex issues that confront children in family law today.

Introduction

Ideological debate concerning how the child should be heard within legal proceedings is contentious. Advocates of children's rights argue that judicial decisions are informed by attention to the child's welfare or best interests, thus avoiding a proper recognition of children's rights or a willingness to enhance their autonomy.³ In Australia, the law's willingness to allow children an independent voice in private and public proceedings concerning where and with whom they should live has been criticised.⁴ This debate is reflected in the *Family Law Act 1975 (Cth)* ⁵, where children's rights are enumerated within a framework of duties imposed upon the State and adults to promote their welfare. The Family Court is thus presented with an issue framed simultaneously in terms of rights and welfare.⁶ It is not surprising that recent Australian cases at times reflect an incongruence between the child's expressed wishes and their best interests.

The most consistent feature of the debate has been the tendency to polarise notions of children's rights with those of their welfare. Instead of clarification and progress, the debate about children's rights has led to a "quagmire of competing conceptual interpretations and

³ For example Smith C, "Children's Rights: Judicial Ambivalence and Social Resistance" (1997) 11 *International Journal of Law, Policy and the Family* 103, Cambell T D, "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6 *International Journal and the Family* 1, Eekelar J, "The Importance of Thinking that Children Have Rights" (1992) 6 *International Journal of Law and the Family* 221, Levine D, "To assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals" (1996) 64 *Fordham Law Review* 2023

⁴ For example: Bailey-Harris R, "The Family Law Reform Act 1995 (Cth): A new approach to the parent/child relationship" (1996) 18 *Adelaide Law Review* 83; Behrens J, "Shared Parenting: Possibilities...and Realities" (1996) Vol 21, (5) *Alternative Law Journal* 213; Rayner M, "The right of the child to be heard and participate in legal proceedings; Article 12 of the UN Convention on the Rights of the Child" *Paper* 1st World Congress on Family Law and Children's Rights Sydney 5-9 July, 1993.

⁵ *Family Law Reform Act 1996 (Cth)*

⁶ Dewar J, "The Normal Chaos of Family Life" (1998) 61 *Modern Law Review* 472.

ideological convictions”⁷, without reference to the ideological framework within which legal discourse concerning the child takes place. This paper does not enter into the debate, but rather draws on it to provide a theoretical framework of inquiry into how children are heard within legal processes, with the intention of highlighting the cultural context and presuppositions of the Western and liberal understandings evident in how the law allows children to be heard.⁸ From this perspective the writer suggests that claims for the right of the child to be heard are framed by liberal constructions of childhood and are perhaps incapable of recognising such claims.

The theoretical framework of this paper is underpinned by the notion of the child being heard within legal processes. The idea of a child’s voice contained in this notion can be understood in a variety of contexts. For example, it can refer to the physical voice of the child and the procedural and structural processes that regulate how a child is heard. Defining ‘voice’ as having access to representation without recognising the discursive parameters and rules that frame children’s responses in legal proceedings, such as the permission to speak, overlooks the fact that such discursive rules limit and may even obstruct the representation of children, confining them to the conventionally acceptable. Such an understanding of ‘voice,’ moreover, tends to be accommodative; that is, the new voice is superimposed on to the existing one without fundamentally changing the existing voice.⁹ A transformative voice on the other hand allows for the possibility of a child being heard in their own way and reflecting their specificities and interests.¹⁰ To speak only when one is told to speak in the forms laid down by the legislation undermines the emergence of a self-determining voice. As Margaret Davies says, the point of finding a voice as an outsider is not to find a niche within someone else’s version of reality, but to challenge and go beyond its idea of truth.¹¹

Different understandings of ‘voice’ relate to different aspects of this paper. In Section 1, the paper summarises the legislative framework and the mechanisms of the *Family Law Act* (“*The Act*”) which

⁷ Smith, note 3, p 105.

⁸ Davies, note 2, p 117.

⁹ Sampson S S, “Identity Politics” (1993) *American Psychologist* 1220.

¹⁰ Sampson S S, note 10.

¹¹ Davies M, *Asking the Law Question*, Law Book Company, Sydney, 1994, p 203.

regulates how and when a child is allowed to speak in family law proceedings, both privately ordered and contested.¹² Thus the first context ‘voice’ appears in is as a description of legal principles that allow for the child to speak, that is, to express their wishes.

In Section 2, a legal identity or legal construction of a child ‘subject’ is extrapolated from the *Family Law Act* and the mechanisms that control how the child is heard. The identity of this ‘child subject’ can be described as lacking in autonomy and capacity, a characterization presuming children are to be understood as objects of concern and intervention, subjects of law but not participants. This ‘child subject’ is a construct of the law and can be distinguished from the individual child, who is conceptualised as being prior to or outside the law.¹³ In this context, it becomes apparent that the child’s ‘voice’ appears only as accommodative at best and so often not heard at all.

In Section 3, the paper situates the legal identity of the ‘child subject’ conceived above within the liberal ideology embedded in the law, in particular the *Family Law Act*. By identifying and acknowledging liberal assumptions, it is hoped that the paper participates in the reflective process of understanding and communicating with children, many of whom have been conventionally cast as other.¹⁴ In this context George Eliot’s observations that we should die of that roar that lies on the other side of silence comes to mind. However, it is hoped that throughout this paper that the transformative voice of the child, one that holds that the possibility of a child being heard in their own way and reflecting their own specificities and interests, can be heard whenever liberal assumptions about the child are acknowledged.

The use of the word ‘identity’ in this paper describes a discursive construction evident in the concrete body of rules that regulate how children are heard within family legal proceedings in Australia, and does not presuppose one legal identity, but rather many identities that

¹² Although family law is not the only area in which children encounter legal processes, it is valid to limit inquiry to family law given the large number of children involved in proceedings every year. The Australian Law Reform Commission, *Seen and Heard: Priority for children in the legal process*, Report No 84, 1997 at p 42, states that about 1% of children can expect to have their parents divorce for each year of life, that is, 5% of 5 year olds, 10% of 10 year olds and 15% of 15 year olds.

¹³ Davies, note 2, p 117.

¹⁴ Davies, note 2, p 117

have evolved from similar sources and display similar characteristics. Similarly, use of the word 'child' or 'children' is not an insistence that all children participate in a common political identity called 'child'.¹⁵ Avoiding the pitfalls of "essentializing"¹⁶ a concept like 'identity' is especially important in an account of the limitations of the representative mechanisms regulating the voice of children in family court proceedings. Any approach to questions of how children are heard in family proceedings can be guilty of subsuming individual needs to generalising prescriptions.¹⁷ However, collectively referring to 'children's rights' remains important to children as an avenue to participating in the debate as to how their voices can be heard.¹⁸

This paper will approach the issue of the identity of the child by aspiring to be the kind of tightrope walker Braidotti describes, that is, by accepting the dissonance and sustaining the tension between having an identity as defined by the dominant discourses and practices of one's time and place and simultaneously challenging that very identity by probing its history, its production and its uses.¹⁹ A discussion of liberalism in this context, it might be argued, tacitly legitimates a particular form of human relationship and privileges those most clearly conforming to an 'ideal' type.²⁰ However, liberalism remains the framework for current legal structures in Australia, and arguments aiming at eliminating social oppressions have historically taken place and will continue to be framed within this

¹⁵ Schillmoller A, "The Incredible Woman: Power and Sexual Politics" (1998) 2 *Southern Cross University Law Review* 177.

¹⁶ In: Grosz E, *Space, Time and Perversion: The Politics of Bodies*, Allen & Unwin, St Leonards, 1995, Elizabeth Grosz refers to essentialism as "the existence of fixed characteristics, given attributes and ahistorical functions that limit possibilities of change and thus social organization".

¹⁷ Sampson, note 9, p 1220.

¹⁸ Berns S S, "Through the Looking Glass: Gender, Class and Shared Interests. The Myth of the Representative Individual" (1993) 11(1) *Law in Context* 98. Berns observes that it is often those whose 'rights' are not in question who affirm the destructive role of rights-talk, while those less fortunate may wonder at the disappearance of the sole avenue they have for dismantling their role as other and insisting their voices be heard and acknowledged.

¹⁹ Braidotti R, *Patterns of Dissonance: A study of women in contemporary philosophy*, New York, Routledge, 1991 cited by Sampson, note 9, p 1219.

²⁰ Berns, note 18, p 98.

context.²¹ “It is good to swim in the waters of tradition,” said Mahatma Ghandi, adding “but to sink in them is suicide.”²²

1. How is the child presently heard within the Family Court of Australia?

The fundamental principle of the *Family Law Act* is that the child’s best interests must be regarded as the paramount consideration when the court is deciding what parenting order to make.²³ The object of Part VII is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.²⁴ The principles underlying the objects are that, except when it is or would be contrary to a child’s best interests:

- (a) Children have the right to know and be cared for by both their parents, regardless of whether the parents are married, separated, have never been married or have never lived together; and
- (b) Children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) Parents share duties and responsibilities concerning the care, welfare and development of their children
- (d) Parents should agree about the future parenting of their children.

In determining the best interests, a court is obliged to show regard for a number of factors that derive from a ‘statutory checklist,’ including the consideration of the wishes of the child in the light of any factors

²¹ Davies, note 7, p 132.

²² Bulbeck S, “Individual versus Community” in Bulbeck C, *Re-Orienting Western Feminisms: Women’s Diversity in a Postcolonial World*, University Press, Cambridge, 1998, p 88.

²³ *Family Law Act* 1975 (Cth) Section 65E. All future reference to sections within legislation refer to this Act.

²⁴ Section 60B(1)

that the court deems relevant, such as the child's age and level of understanding.²⁵

The paramountcy of the welfare of the child in family law proceedings is consistent with the intent of the *United Nations Convention on the Rights of the Child, Article 3.1*: "In all actions concerning children, whether undertaken by...courts of law...the best interests of the child shall be a primary consideration." Although the notion of including children in proceedings stems from *UNCROC*, the *Family Law Act* has not incorporated *Articles 12.1* and *12.2* which provide;

- (1) State Parties shall assure to the child who is capable of forming his or her own views *the right to express those views* freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided with the *opportunity to be heard* in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Clearly, the legislative principles provide for the child the right to express his or her wishes; however, the voice of the child is only one of many factors that are considered in determining the best interests of the child. Implicit in any understanding of these legal principles is the fact that the obligation to apply the "best interests" checklist applies only to *contested* proceedings. It is apparent no '*right*' to be heard in *any* proceeding that affect the child exists, and nor does the child have the opportunity to express his or her views freely.²⁶ When a matter is resolved privately and the adults are in agreement, there is no obligation to consider the wishes of the child.²⁷ For example, the form of application for a parenting plan²⁸ requires information about

²⁵ Section 68F(a)

²⁶ The Family Court *Annual Report* 1999, Table 4.3, reports that 3.1% of defended cases will proceed to a hearing. However, when analysis is confined the documents initiating proceedings in the Family Court, 14.3% of cases reach a final hearing.

²⁷ Section 68F(3)

²⁸ Form 26A

the proposed arrangements for the child but at no stage is information required about what the child wants, what information the child has about the legal proceedings and whether the child wants to be consulted. Parents are encouraged to agree about matters concerning the child, but not encouraged to consider to what extent children should participate in the process or what explanation should be provided.²⁹

The fact that most matters are settled before a final hearing and private negotiation occurs in the shadow of the law, the authority of both statutory provisions and judicial pronouncements become more diffuse, in the sense that there is no need to make a rational decision about how to weigh the 'rights' and 'welfare' of the child in a way that is open to public scrutiny.³⁰ Further, the mechanisms of private negotiation involve translation of legal principles by professional counsellors and advisors that reflect not only the theoretical orientation of the mediator, but also aspects of the legal process that confer bargaining endowments (such as court delays).³¹ Saposnek has reported that a divergence of opinion between mediators and decision-makers exists about involving children in mediation regardless of the legislation. There are those who believe that the mediator's role is simply to be a neutral facilitator of negotiations between two parents, while in contrast, there are those who believe the mediator's role is to be a strong advocate for the child.³²

In *contested proceedings* in which the wishes of the child have to be taken into account, children are not normally made parties to the proceedings and the judge will normally learn of the child's wishes through one of the several mechanisms provided by the Act.³³

²⁹ Chisholm R, "Children's Participation in Family Court Litigation" (1999) 13 *Australian Family Law Journal* 201.

³⁰ Dewar, note 6, p 474.

³¹ Dewar, note 6, p 474. For example, Tom Altobelli in his report "*Its time for a change: Resolving Parenting Disputes in the Family Court of Australia*" presented at International Society of Family Law – 10th World Conference, states that the time from filing to hearing can range from 10.8 months to 42.5 months.

³² Saposnek D T, "The value of children in mediation: a cross-cultural perspective" (1991) 8 (4) *Mediation Quarterly* 325.

³³ This paper summarises the most commonly used mechanisms. Others that exist include a judge interviewing a child to obtain the child's wishes under O23 r5(1) of *Family Law Rules*, and a child instituting proceedings him/herself under section 69C and section 65C(b). In practice these two sections are rarely used.

The family report is the most commonly utilised method of reporting the child's wishes.³⁴ Although the *Family Law Act* does not specifically state that the child's wishes must be reported, the Court Counselling Service guidelines recommend that counsellors include the wishes of the children in reports.³⁵ The family report, however, is difficult to obtain until proceedings have progressed into their later stages.³⁶

A second mechanism that allows for the child's wishes to be heard is through affidavits and evidence of the parties to proceedings and their witnesses, both expert and lay. However, the child is not independently represented and often the child's wishes are expressed as part of a self-serving affidavit of the parent.³⁷ This is acknowledged in *H v W*³⁸, where the court states that a problem in ascertaining the wishes of the child lies in the interpretation and assessment of evidence in the face of conflicting evidence.

A third mechanism is the appointment of a child representative. Recently the *Law Society of NSW* laid down guidelines for the representation of children.³⁹ The guidelines reflect the decision of *P v P*⁴⁰ as to the proper role of the child representative, emphasising the need for the child representative to assist the court in determining the child's best interests rather than to speak on behalf of the child. Central to this determination is the need to establish the competence of a child, although there is no requirement to recognise the provisions and intent of *CROC Article 12* and the specific requirement to recognise a child's competence that flows from those provisions. In *P v P*, the test of competence stated is the "Gillick competent" test:

Parental right yields to the child's right to make his [*sic*] own decisions when he reaches a sufficient understanding and

³⁴ *Family Law Act* 1975 Section 62G(2). Reports are used in about 60% of contested cases. See: ALRC, note 12, at [16.35].

³⁵ Family Court of Australia, *Guidelines for the Ordering and Preparing of Family Reports*, Court Counselling Service, Office of the Chief Executive, Sydney, February 1993.

³⁶ Redman J, "The Voice of the Children in Family Disputes" (1997) 12 (1) *Australian Family Lawyer* 29

³⁷ Redman J, note 36 at 30.

³⁸ [1995] FLC 92-598.

³⁹ Law Society Report: "Representation Principles for Children's Lawyers" (2000) 38(11) *Law Society Journal* 50.

⁴⁰ [1995] FLC 92 – 615.

intelligence to be capable of making up his own mind on the matter requiring the decision⁴¹

The application of *P v P* to disputes between parents is not clear, given that the court decided an application for medical treatment on behalf of a 17 year old girl. The court in *H v W* clarified this issue to a certain extent when it stated the *Gillick*-competent test was helpful by analogy only. In *H v W*, the court clearly stated that the primary concern of a court is the determination of the best interests of the child and at no time does a question of “self-determination” arise. The court in *H v W* stated the current Australian law as to how the wishes of the child should be heard is that as stated in *Doyle v Doyle*:

If the court is satisfied that the wishes expressed by the child are soundly based and founded upon proper considerations as well thought through as the ability and state of maturity of the child will allow, it is appropriate to have regard to those wishes and give such weight to them as may be proper in the circumstances.⁴²

It seems then that competence is relevant to the determination of the weight to attach to the child’s wishes. For example, in *H v W* the court extensively evaluated recent psychological research before stating support for a rebuttable presumption that children of the age of seven are capable of making a “considered decision, a decision in which reason is employed...[as long as] the child’s wishes are free from the influence of others and the child possess a sufficient level of maturity...” In determining an age-based assumption, the court relied heavily on the work of Jean Piaget’s theory of cognitive development, a point addressed later in the paper.⁴³

In summary, the role of the child representative is to put forward the wishes of the child to the Court but the representative may make submissions contrary to those wishes if they are considered to be in the best interests of the child. Implicit in the Court’s evaluation of the

⁴¹ (1986) 1 AC 113 and applied in Australia in *Marion’s case (Secretary, Department of Health and Community Services v JWB and SMB)* (1991-1992) 175 CLR 218)

⁴² (1992) FLC 92 -286

⁴³ See note 63.

weight to be attached to the wishes of the child is an estimation of the child's level of understanding. This determination becomes complicated in cases involving abuse as the wishes of the child arise in situations where there is often further risk of harm and where secrecy sometimes surrounds sexual abuse.⁴⁴ In these situations, the court must determine the best interests of the child by adherence to the 'unacceptable risk principle' stated in *M v M*⁴⁵.

The present Australian law as to how children are to be heard in family law proceedings can be summarised by the following statement from the English decision in *Re P (A Minor)(Education)*:

the courts have become increasingly aware of the importance of listening to the views of older children and taking into account what children have to say, not necessarily agreeing with what they want, nor doing what they want, but paying proper respect to older children who are of an age and the maturity to make up their own minds as to what they think best for them.”⁴⁶

To summarise so far, it is evident that the *Family Law Act* reflects a concern with the care and protection of children rather than a willingness to allow them an independent voice in private and public proceedings which concern where they should live, with whom they should have contact and in whom parental responsibility for them should be vested.⁴⁷ Thus family law operates out of a paradigm in which the child's ability to be heard is circumscribed within a framework of enumeration of 'needs' and best interests. From this framework it is possible to construct a legal representation of the child 'subject'.

⁴⁴ Redman, note 29, p 35. In matters involving child abuse, a separate representative must be appointed.

⁴⁵ (1988) FLC 91-979

⁴⁶ (1992) 1 FLR 316. In *H v W*, the court quoted this statement as a summary of the position of Australian law.

⁴⁷ Smith, note 3, p 107.

2. Who is the child ‘subject’?

The legal identity of the child ‘subject’ emerging from this paradigm can be described as having some of the following characteristics as evident in both the legislation and its application. Reflecting on representations of the child ‘subject’ can provide insight into the ways in which the immaturity of the child is understood and made meaningful within the *Family Law Act* and in relevant caselaw.

Central to this characterization is a child who is lacking in autonomy. In contested proceedings, the legislation is structured in a way that only allows the voice of the child to come to the court as a narrative that has been edited and shaped by parents, counsellors and legal representatives. In mediated settlements the legislation, while exhorting parents to agree about ‘the future parenting’ of their children and including a range of provisions that encourage parents to favour mediation and counselling over litigation, is silent as to the relevance of the child’s wishes or their participation.⁴⁸

From this observation it appears that the child’s identity is not distinguished from that of his or her family. By distinguishing between how a child shall be heard in public and private proceedings the legislature has provided a mechanism that privileges parental autonomy over that of the child. Underpinning these provisions is an ideology of family autonomy whereby the parents as family are considered to be, in general terms, best able to determine and promote the child’s interests and correspondingly, judicial scrutiny of parental arrangements is exercised sparingly.⁴⁹ The child’s identity then is not that of an individual with a fully formed identity, but of an incomplete individual who is merely a participant within his or her family identity. The French sociologist Irene Thery describes this loss of identity when she states: “The discourse of judges and lawyers who claim to take account of only the interest of the child, should be countered by showing that, when they speak of the child, they are always and inevitably speaking of something else: the father, mother, the family itself.”⁵⁰ Implicit in Thery’s observations is the idea that

⁴⁸ Rhoades H, “Posing as Reform: The case of the Family Law Reform Act” (2000) 14 *Australian Journal of Family Law* 143.

⁴⁹ Bailey-Harris, note 4, p 85.

⁵⁰ Thery I, “The Interest of the Child and the Regulation of the Post-Divorce family” (1985) 14 *International Journal of the Sociology of Law* 341 at 345.

the child's identity is synonymous with the child's best interests. The question of what are a child's best interests is relevant. They states that the concept of the child's best interests has no determinate meaning outside the process through which that issue is addressed. The interest of the child is not considered in isolation, but rather in the context of a system of relationships, that aim to evaluate and regulate not the life of the child but the totality of familial relationships after divorce. Seen in this context the best interests of the child are barely distinguishable from those of the parents.⁵¹ John Dewar has found that while the new Part VII provisions have made it easier to achieve distributive justice between parents, that is, how parents give time and make decisions with respect to children in ways that are acceptable to parents, they have tended to "occlude" the introduction of the child's perspective on the arrangements being made.⁵² He reports that counsellors, often faced with the fact that the 'least lousy option' is the best that can be aimed for, tend to define a good agreement as one 'that the parties can live with' as being consistent with the child's best interests. In this way, the child's best interests become conflated with the options, choices and wishes of the parents.⁵³ Consequently, the legal identity of the child is universalised and constructed by recourse to adult versions of order, competence and rationality.⁵⁴

A second characteristic of a so-called child 'subject' is evident in the way the law limits the child's autonomy by making assumptions about children's legal capacity to participate in legal processes. For example, Halsbury's *Laws of England* state:

An infant does not possess full legal competence. Since he [*sic*] is regarded as of immature intellect and imperfect discretion, English Law ... will carefully protect his [*sic*] interests and not permit him [*sic*] to be prejudiced by anything to his [*sic*] disadvantage.⁵⁵

⁵¹ They, note 50, at 351-2.

⁵² Dewar J & Parker S, Family Law Research Unit Working Paper, March 1999, <<http://www.gu.edu.au/centre/flru/wp3.pdf>>

⁵³ They, note 49, p 352.

⁵⁴ Jenks C, *Childhood*, Routledge, London, 1996.

⁵⁵ Quoted in: *Re X (A Minor)* [1991] Fam 47

This principle is reflected in the paramountcy principle and in judicial discussion as to the relative weight to attach to children's wishes within the framework of the child's best interests.

The child's legal capacity is premised upon two assumptions. First, the law creates an artificial distinction between adults and children whereby the child is perceived to have an identity that is unformed, immature and incomplete, while adults are considered to make well-informed and balanced decisions in the child's best interests. Once again, the best interests test is relevant as it is premised on the assumption that the child is incompetent and requires an adult to speak on behalf of the child. Further, the application of this test depends for its normative force upon the possibility of a representative individual who is capable of standing in for the child whoever he or she is.⁵⁶ The test then gives the impression of universal objectivity and in this way reflects a particular account of justice reliant upon an accepted account of a common perspective that is applied to define the child's needs.⁵⁷ The 'best interest' test is also capable of concealing the assumptions about children present in the *Family Law Act*. They has suggested that the real function of the best interests test is to permit the setting up of a reorganised family unit after the marital breakdown, and the test is an instrument of regulation.⁵⁸

Second, in contrast to the fully autonomous adult, the stability of a child's identity is characterised as a matter of development and degree, and is accompanied by a belief that children's capacity develops in relation to increasing maturity and experience.⁵⁹ In this regard the law can be said to have been shaped in accordance with general scientific understandings of childhood, particularly child development theories. Although reflecting a movement away from "rule of thumb" or calling on life experience as the basis for decision making, the use of psychology within law can allow for ideologies of childhood, disguised as scientific truths, to serve as a basis for judicial action.⁶⁰

⁵⁶ Berns, note 18, p 97.

⁵⁷ Woodhead M, "Psychology and the Cultural Construction of Children's Needs" in James A & Prout A (eds), *Constructing and Reconstructing Childhood*, Falmer Press, London, 1997, p 74.

⁵⁸ They, note 49, p 345.

⁵⁹ Smith, note 3, p 106.

⁶⁰ Brophy J, "New Families, Judicial Decision-Making, and Children's Welfare" (1992) 5 *Canadian Journal of Women and the Law* 484 at 490. Brophy also raises

Historically, the movement towards the use of child psychology within the law began in earnest when a recognizably ‘modern notion’ of childhood emerged early this century, one that saw a compulsory relationship involving the child, the State, the family and public health and welfare services being legislated into practice.⁶¹ Significant legislative Acts, such as age of consent, prevention of cruelty to children and school medical inspection allowed welfare bureaucracies of national and local government to impose certain class dominated and “expert formulated” concepts of childhood on the general population.⁶²

The dominant developmental approach to children’s cognition underpinning this relationship has been Jean Piaget’s approach, based on the idea of natural growth.⁶³ In Piaget’s account, childhood is seen as a series of predetermined stages leading towards achievement of logical competence, that is, adult rationality. The singularity of the ‘child’ in Piaget’s writings is constructed around twin assumptions of the naturalness and universality of childhood. The ‘child’ is a bodily manifestation of cognitive development that represents all children from infancy to adulthood.⁶⁴ The model has the goal of explaining competences, which are defined as capacities to solve empirical-analytic or moral practical problems.⁶⁵ The problem solving is measured objectively either in terms of the truth claims of descriptive

the issue that judges are not necessarily trained to interpret and identify relevant research.

⁶¹ Hendrick H, “Constructions and Reconstructions of British Childhood: An interpretative Survey, 1800 to the Present” in James A & Prout A (eds), *Constructing and Reconstructing Childhood*, Falmer Press, London, 1997, p 35.

⁶² Hendrick, note 61, at 50.

⁶³ Piaget’s work continues to inform contemporary western orthodoxies about child rearing practices and lies at the heart of current educational thinking and practice. See: Walkerdine V, (1984) “Developmental psychology and the child-centred pedagogy: The insertion of Piaget into early education” in Henrique J, et al (Eds), *Changing the Subject: Psychology, Social Regulation and Subjectivity*, Methuen, London, 1984.

⁶⁴ Walkerdine, note 63, at 11.

⁶⁵ Habermas J, *Moral Consciousness and Communicative Action*, MIT Press, Cambridge, 1991, p33. Habermas states that there is a parallel between Piaget’s work and Lawrence Kohlberg’s theory of moral development. Both have the goal of explaining competences, which are defined as capacities to solve particular types of empirical-analytic or moral practical problems. The problem solving is measured objectively either in terms of the truth claims of descriptive statements, including explanations and predictions, or in the terms of the rightness of normative statements, including justifications of actions and the norms governing them.

statements, or in the terms of the rightness of normative statements, including justifications of actions and the norms governing them.⁶⁶ Implicit in Piaget's model is an account of children who are "immature, irrational, incompetent, asocial and acultural" with adults being "mature, rational, competent, social and autonomous."⁶⁷ This conceptualisation has encouraged the idea that children are marginalised beings awaiting passage and emphasises incompetence and ignorance at the expense of grounding cognitive development in the child's social experiences.⁶⁸ Piaget's work continues to inform contemporary western orthodoxies about child psychology and has also been uncritically absorbed into judicial pronouncements concerning how children are to be heard in legal proceedings.⁶⁹

This is illustrated in *H v W*⁷⁰, where the court summarised Piaget's five stages of cognitive development to support the idea that children by the age of seven are capable of deductive reasoning. This formed the basis for stating the existence of the rebuttable presumption that children are capable of making a considered decision. Further, in summing up, the judges stated that the children were "in Piagetian terms, able to make a decision based upon the real rather than the abstract."⁷¹

Although it is beyond the scope of this paper to provide an exposition of the how psychological and legal concepts interact and correspond with the ways childhood is constructed, the following summary serves to highlight what Foucault described as 'regimes of truth'. These regimes operate like self-fulfilling prophecies: ways of thinking fuse with institutionalised practices to produce self-conscious subjects who think and feel about themselves through the terms of those ways of thinking.⁷² In the same way the evolving 'modern notion' of childhood described above has fused into legal principles that regulate how the child is to be heard in family law.

⁶⁶ Habermas J, note 65.

⁶⁷ Mackay J, "Conceptions of Childhood and Models of Socialisation" in Dreitzel H P, (ed), *Childhood and Socialisation*, Collier-Macmillan, 1973, p 28.

⁶⁸ Prout, Note 1, p 11.

⁶⁹ Prout, Note 1, p 12.

⁷⁰ [1995] FLC 92-598

⁷¹ [1995] FLC 92-598 at 108

⁷² Foucault, M, *Discipline and Punish*, Allen Lane, London, 1977. M King has described the law as "enslaving welfare science", quoted in Dewar, note 6, p 479.

Central to the creation of an artificial distinction between adults and children, and to the theorising of childhood as a universal series of stages is the assumption that the child ‘subject’ is irrational. Rationality represents the universal hallmark of adulthood with childhood representing a period of apprenticeship.⁷³ This assumption has been questioned on the grounds of whether the rationality of a person can support such a distinction. Formulations of rational action as ‘one which avoids all mistakes deriving from inadequate reflection’ and ‘an adequate judgment of probable outcomes’ serve to illustrate that many adults would be found wanting if their actions were evaluated against these criteria.⁷⁴

The legal identity of the child ‘subject’ has recently been challenged and is reflected in the emergence of a concern with children’s rights. Prout and James suggest that the gradual growth in awareness that the meanings that attach to the category ‘child’ and ‘childhood’ might differ across time and space have begun to destabilise traditional models of child development and socialisation. Thus an emergent paradigm begins with the assumption that a child is socialised by belonging to a ‘particular culture at a particular stage in history’.⁷⁵ These insights suggest that social relationships are not fixed but can be reconstituted on a different basis. Children are being reformulated as social actors and childhood as a particular kind of social reality.⁷⁶ Central to this reformulation is the child as a holder of rights. The idea that a child has rights is accompanied by extensive and complex debate as to the nature of rights themselves and tends to occur within a context of a balancing act between the rights and welfare of the child.

To summarise so far, a legal identity of the child that emerges out of the *Family Law Act* and recent caselaw, can be characterised as lacking in autonomy. Informing this characterization are the following assumptions about the legal identity of the child: the child participates in the legal system as part of the wider family identity, the child does not have legal capacity to fully participate in legal proceedings and is to be distinguished from adults on the grounds that the child is immature, irrational and incompetent. From this characterization, children are understood as objects of concern and intervention, the

⁷³ Prout, note 1, p 10.

⁷⁴ Smith, note 3, p 106.

⁷⁵ Prout, note 1, p 14.

⁷⁶ Prout, note 1, p 14.

subjects of the law but not the participants.⁷⁷ Ultimately the child's voice is edited or unheard subject to her or his best interests.

3. Who is the liberal 'subject'?

The legal identity of the child subject described above is conceived from within a liberalist ideology embedded in the law. Liberal thinking is not the only political ideology that has shaped the law but it is thought to be the dominant Western ideology of the twentieth century.⁷⁸ Although there are competing visions of liberalism and differences exist as to the permissible scope of law and how to best recognise individual freedom, it is possible to extract certain broad propositions about liberalism present both in legal discourse in Australian family law and in its conception of the child. In this way it is hoped that recognition of some of those assumptions may enable different insights into issues that surround how the child is heard.

The liberal subject is by nature free. Central to this freedom is the absence of interference, typically State interference, with the individual's capacity for self-determination.⁷⁹ Historically, liberal societies have conceptualised liberty by distinguishing between the protection of negative liberty ("freedom from") of a citizen, and the promotion of positive liberty ("freedom to").⁸⁰ With negative liberty, the state is obliged to refrain from interfering in the individual's freedom to pursue his own aims and activities, but is not obliged to assist the individual. Correspondingly, the individual, and the individual's liberties lie at the heart of society.⁸¹

Liberal law is realised in the rule of law, which acts as a condition of freedom, ensuring distinctness of law from the individual so that the individual may live free of the arbitrary rule of personalities and

⁷⁷ Australian Law Reform Commission, *Seen and Heard*, Report No 84, AGPS, Canberra, 1997, p14.

⁷⁸ Davies, note 11, p 158.

⁷⁹ Bottomley S, Gunningham N & Parker S, "Liberalism, Formalism and the Rule of Law" in Bottomley S, et al, *Law in Context*, Federation Press, Sydney, 1994, p 13.

⁸⁰ Bottomley S, note 79.

⁸¹ Davies, note 11, p 159.

power.⁸² Central to this freedom lies the distinction between the public and private spheres of society. The public sphere is the realm of law, of regulation, of the state and of political participation, while the private sphere is the realm of the individual and her or his particular social, familial, religious and cultural affiliations, excluding the actions of the state.⁸³ In this way the law is capable of being conceptualised as separate from the individual and capable of retreating from private life.⁸⁴

A second element of the western liberal tradition is individualism. Liberals assert that it is the liberty of the individual that they seek to protect and they see society as comprised of individual human beings that come to society as fully formed human beings.⁸⁵ Implicit in this characterisation is the prioritising of the individual over the collective. This opposition between self and society can be seen as a western construction.⁸⁶ Roberto Unger illustrates this by distinguishing a tribal society from a liberal one by looking at the associations people have and their sense of insiders and outsiders.⁸⁷ He observes that impersonality, formal equality and indifference are characteristic of liberal society in which people associate with others in complex ways and the sense of identity with a particular large group diminishes. Therefore personhood is achieved by being a rights-bearing autonomous subject.⁸⁸ In contrast, members of a 'tribal' society are more likely to regard themselves as members of a community connected to society through roles and responsibilities, thus personhood is achieved and constructed through kin, relationship, sex, age and other factors.⁸⁹

⁸² Leane G, "Testing Some Theories about Law: Can we Find Substantive Justice Within Law's Rules?" (1997) 19(4) *Melbourne University Law Review* 924.

⁸³ Davies, note 2, p 119.

⁸⁴ Davies, note 2 p 119.

⁸⁵ Bottomley, note 79, p 18.

⁸⁶ Bulbeck C, *Re-Orienting Western Feminisms: Women's Diversity in a Postcolonial World*, Cambridge University Press, Cambridge, 1998, p 79.

⁸⁷ Unger R M, "Liberal Political Theory", in Hutchinson A, (ed), *Critical Legal Studies*, Rowan and Littlefield, 1989.

⁸⁸ Bulbeck, note 86, p 179.

⁸⁹ Graham A P, "Governing Unemployment: A Study of the Functions and Effects of working Nation", Unpublished Thesis, Southern Cross University, Lismore, p187.

Under the rule of law, everybody is seen to be equal before the law and liberal legal theory demands that all subjects be held to the same standard of conduct and that in turn the law will treat all its subjects identically, irrespective of race, class, gender or age.

Any relationship between the individual subject and the state is predicated upon the idea of a *man* who is presupposed to be rational, self-contained, self-controlled and responsible for his own actions but not those of others.⁹⁰ All individuals are essentially rational beings who calculate the consequences of various lines of action and then make their choices. In doing so they become ‘authors of their own lives’.⁹¹ The Enlightenment ideal of the “rational man” is central to a conception of legal relations between both the individual and the state. Hegel has defined this relationship:

[I]n the state...man is recognised and treated as a rational being, as free, as a person; and the individual, on his side, makes himself worthy of this recognition by overcoming the natural state of his self-consciousness and obeying a universal, the will that is in essence and actuality will, the *law*; he behaves, therefore, toward others in a manner that is universally valid, recognising them – as he wishes others to recognise him – as free, as persons.⁹²

Axel Honneth explains that the structure from which Hegel can derive his definition of the legal person takes on a legal form of recognition once it becomes dependent on the premises of a universalistic conception of morality. From there, the legal system can be understood as an expression of the universalised interests of all members of society where exceptions and privileges are no longer admissible. Since a willingness to adhere to legal norms can only be expected of partners to interaction if they have in principle been able to agree to the norms as free and equal beings, a new reciprocity enters the relationship of recognition based on rights.⁹³

⁹⁰ Davies, note 11, p 223.

⁹¹ Bottomley, note 79, p 32.

⁹² Hegel GW F, *Hegel's Philosophy of Mind*, quoted in Honneth A, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Polity Press, Cambridge, 1995.

⁹³ Honneth, note 92, p109.

In this sense, if the legitimacy of the legal order is dependent on a rational agreement between individuals with equal rights then one must be able to suppose that the legal subjects have the capacity to make reasonable, autonomous decisions. Therefore central to the structural qualities of legal recognition is the question of determining the universal capacity of a person.⁹⁴ In this light, the legitimacy of the legal order is dependent on a rational agreement between individuals and is therefore founded on the assumption of the moral accountability of its members.⁹⁵

This conceptualisation of capacity within liberal legal theory lies philosophically at the heart of the child's struggle for recognition to be heard within the *Family Law Act* and its interpretation. Fundamental to legal recognition of an individual's autonomy lies the characterisation of the individual as having the capacity to make rational, reasonable and autonomous decisions. Further, recognition of someone as a legal person is bound up with the social esteem accorded to individual members of a society in the light of their social status.⁹⁶ The construction of an artificial legal distinction between the adult and the child is predicated upon the idea that children do not possess these requisite qualities of moral accountability. It seems then that biological immaturity underpins moral accountability. The principles of the *Family Law Act* have been formulated within a developmental approach to childhood based upon the "naturalness" of childhood. This model assumes the child developing into an adult represents a progression from simplicity to complexity of thought, from irrational to rational behaviour.⁹⁷ These notions of childhood have been espoused and supported by child development theorists and continue to be integrated into the legal discourse that surrounds the issue of how children are to be heard within legal proceedings.

The conceptualisation of capacity is premised on the liberal western philosophical ideals of selfhood that dichotomise mind and body and privilege the mind as central to personhood at the expense of any account of the body.⁹⁸ Traditionally the status of the body as a focus

⁹⁴ Honneth, note 92, p109.

⁹⁵ Honneth, note 92, p 114.

⁹⁶ Honneth, note 92, p 111.

⁹⁷ Prout, note 1, p 10.

⁹⁸ Mykitiuk R, "Fragmenting the Body" (1994) 2 *Australian Feminist Law Journal* 76.

for inquiry within philosophical discourse has been that of an impediment, a distraction, something to be controlled and increasingly absent.⁹⁹ Consequently, the structures and practices of legal liberal theory have been founded on a conception of a person with an absent body. The absent body at the centre of liberal discourse is not absent, but one who has been generalised as normative by the discourse, that is a white, male, able-bodied adult.¹⁰⁰ The embodied child is barely contemplated within these structures of law; and given that “the nature of the liberal subject determines the logic of liberal theory,” to use Sandra Berns words, this should not surprise us.¹⁰¹

Within legal discourse, it is not the individual child who imparts meanings to the discourse, but rather the discourse that provides an array of ‘subject positions’ which these individuals may occupy.¹⁰² The child ‘subject’ of the *Family Law Act* occupies a position that has in part been derived from the liberal ‘subject’, and now continues to be limited by the liberal ‘subject’. In privileging this narrative of the child, the *Family Law Act* is predicated upon the exclusion of other narratives. In practice this means that children are not envisaged by and cannot adopt or understand the legal narrative.¹⁰³

It is clear that erasure of the dichotomy between mind and body would threaten fundamental liberal concepts informing the *Family Law Act* and challenge the autonomy and liberty of the adults who currently participate on behalf of children in family law proceedings. At a societal level this erasure would challenge the ability of the State to regulate the autonomy of children, given that the State has a vested interest in ensuring that children grow up to become responsible and competent citizens.¹⁰⁴

At a parental level, erasure would challenge the authority that is bestowed upon parents enabling them to privately order their affairs. In reflecting on this issue, Carol Smith observes that *adults* cannot manage without the notion of children’s best interests. Although the distinction reflects a particular construction of the child, it also reflects

⁹⁹ Mykitiuk R note 98.

¹⁰⁰ Mykitiuk R note 98 at 80

¹⁰¹ Berns, note 18, p 120.

¹⁰² Graham, note 89, p 44.

¹⁰³ Davies, note 7, p 131.

¹⁰⁴ Smith, note 3, p 132.

how responsibility is closely related to control, how loving meets the needs of adults as well as children and how parent-child relationships allow parents to locate themselves in a stable and continuous emotional world.¹⁰⁵

Conceptualisations of liberal theory are also only evident in the *Family Law Act* in its exposition of children as rights holders. The cumulative expansion of children's rights claims has sought to challenge the dominant liberal paradigm that regulates how children's voices are heard. The question of what elements of liberalism are manifest in attempted reconstructions of the child as a holder of rights within family law will now be addressed.

Historically, liberal theorists have recognised that individual liberty must be limited by the autonomy of others, and therefore the inevitability of intervention by the State in order to achieve minimal regulation of society.¹⁰⁶ Although early formulations of John Stuart Mills' "harm principle" were used to delineate and justify certain forms of interference, the concept of individual liberty has evolved through the creation of specifically legally protected rights.¹⁰⁷ The development and creation of rights began in the eighteenth century, with the formulation of civil rights guaranteeing liberty, followed in the nineteenth century with the establishment of political rights guaranteeing participation and in the twentieth century with the creation of social rights guaranteeing basic welfare.¹⁰⁸ The establishment of each new class of rights was compelled by arguments that referred implicitly to the demand for fully-fledged membership in the political community.¹⁰⁹ It was only in the twentieth century that the belief established itself that every member in a political community must be accorded equal rights to participate in the democratic process. Underpinning the development of rights within liberal society is the Kantian principle that the right to autonomy derives from the exercise of 'pure reason':

The first rights to be asserted therefore concerned liberties and non-interference with men's autonomy. Rights were justified

¹⁰⁵ Smith, note 3, p 136.

¹⁰⁶ Davies, note 11, p 59.

¹⁰⁷ Davies, note 11, p 59.

¹⁰⁸ Honneth, note 92, p 115.

¹⁰⁹ Honneth, note 92, p 115.

in terms of appropriate respect for the highest human good;
reason.¹¹⁰

The German philosopher Kant formulated rights in a way that extended and altered the natural rights formulation. Kant distinguished between rights derived from *a priori* principles (natural rights) and rights that proceed from the will of the legislator.¹¹¹ He further divided them into innate and acquired rights. The innate right (*human right*) includes the right to equality, the right to be one's own master and the right to communicate. This *human right* makes it possible to settle disputes regarding acquired rights; however, the right of the person must be held sacred, whatever the cost to the ruling power.¹¹² To a deontological liberal, the category of rights includes natural rights.¹¹³ Thus individuals are an end in themselves and should not be used merely as means to an end.¹¹⁴

Kant can be described as a *deontological* liberal, that is, one who seeks to evaluate an act not in terms of consequences but in terms of the right of the actor to do the act.¹¹⁵ A deontological liberal gives priority to right over good, thus certain things are right regardless of their consequences. Ronald Dworkin is a prominent deontological liberal who argues that rights cannot be made to give way to the wishes of the majority or to policies aimed at promoting the good of "society." The ultimate or basic background right is the right to "equal consideration and respect."¹¹⁶ This is in contrast to a teleological liberal who evaluates acts in terms of their consequences for reaching a goal.¹¹⁷ This form of liberalism is evident in utilitarianism and its central goal stated by Bentham, of the greatest happiness of the greatest number of people and its maximization the proper end of

¹¹⁰ Smith, already cited n 3, p107.

¹¹¹ Patapan H, "Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia." (1997) 21 *Melbourne University Law Review* 503.

¹¹² Kant I, "Perpetual Peace" (first published 1795) in Beck L, (ed), *Kant on History*, 1963, p85.

¹¹³ Bottomley, note 79, p 44.

¹¹⁴ Bottomley, note 79, p 27

¹¹⁵ Bottomley, note 79, p 27.

¹¹⁶ Bottomley, note 79, p 27.

¹¹⁷ Bottomley, note 79, p 27.

human kind. David Lyons states that the central idea of utilitarianism is “that acts and institutions must be judged solely by their effects on human welfare, where the welfare of the individual is understood to be determined by facts about the individual’s interests, wants and need.”¹¹⁸

Several themes emerge from this brief overview of the development of rights and their role in the legal recognition of individuals. First is the implicit assumption that the rights holder is an autonomous individual capable of making rational decisions. Within rights discourse, the strength of rights formulation lies in its recognition of humans as individuals worthy of respect; however, the weakness of formulating rights for children within this discourse must be acknowledged to be its dependence on a formulation which originates in the autonomy of the individual.

Second, the framing of children’s rights in the context of their welfare can be observed to reflect the tension between the deontological and the teleological liberal. Deontological liberals favour entrenching the right of the child to be heard in *all* legal proceedings. They see it as a means of empowering children, allowing them to exercise self-determination and falling in line with the standards agreed upon by the United Nations. This is evident in the emergence of children’s rights discourse in Australia, especially since the ratification by Australia of the *United Nations Convention on the Rights of the Child* in 1989. On the other hand, teleological liberals favour the paramountcy test and continue to advocate the protection of children’s welfare over any notion of self-determination.

4. Concluding comments: How is the child presently ‘heard’ within family court proceedings?

The preceding discussion suggests that the representation of the child within the *Family Law Act* is shaped, informed and interpreted by dominant liberal discourses that have provided a ‘subject position’ for the child ‘subject’ to occupy. The *Family Law Act* has appropriated those ‘subjects’ and in doing so dissociated the law from the individual identity and status of children.¹¹⁹ From this perspective,

¹¹⁸ Bottomley, note 79, p 30.

¹¹⁹ Davies, note 2, p 119.

claims for the right of a child to be heard in legal proceedings are framed by liberal constructions of childhood that are perhaps incapable of recognising such a claim. As such, the claims become representative not of any right of the child but of current rhetorical discourse.

The child in this case is denied any possibility of being heard in a way that is able to reflect their own specificities.¹²⁰ Liberal accounts of the individual has privileged the faculties of the mind while providing little account of the body. This dichotomous account of the person has created what Elizabeth Grosz describes as an impasse posed by the constraints of our intellectual heritage, where there is no language to describe an understanding of “embodied subjectivity, of psychical corporeality.”¹²¹ That is, an account which not only avoids dualism, reductionism and universalism, but also the problem of dualism that makes alternatives to it and criticisms possible. Until recently, the metaphors which postulate relations between the biological and the social have been those represented by the model of binarized opposition.¹²² What is needed, Grosz suggests, are metaphors and models that implicate the subject in the object and that include representation of the psychical and social dimensions of the subjects as interactive.¹²³

The developing body of discourse about embodiment is beginning to challenge the mind/body dichotomy and to provide an account of the body as a site of social, political, cultural and geographic inscriptions, productions and constitutions.¹²⁴ It is this experience of embodiment that has been absent from legal discourse in defining the characteristics of the individual. In fact it is the embodiment of the child that deprives them of having the legal capacity at a time where a corporation can enjoy the legal status of a person.

In conclusion, the child as a ‘subject’ of the family law is constructed by traditional legal understandings of what constitutes childhood; the child can be said to speak with a borrowed voice and to ventriloquise the wishes of the family and the state. However, this paper is not an

¹²⁰ Davies, note 2, p 119.

¹²¹ Grosz E, *Volatile Bodies*, Allen & Unwin, St Leonards, 1994, p 22.

¹²² Grosz E, note 121.

¹²³ Grosz E, note 121.

¹²⁴ Grosz E, note 121, p 23.

argument for the abandonment of this historical framework, but rather for its acknowledgment as the dominant influence in family law's construction of the 'child'. Such acknowledgment would allow for the conscious adoption of certain constructions of childhood within the dominant ideology of liberalism and might better inform the discourse that surrounds the issue of how we are to hear children in family law proceedings in the future.