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CHILDREN'S RIGHT TO DECISIONAL PRIVACY IN AUSTRALIAN FAMILY LAW

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ABSTRACT

This thesis develops a theory of children's decisional privacy in the context of Australian family law. Decisional privacy gives individuals the freedom to act and to make decisions about how they live their lives, without unjustifiable interference from other individuals or the state. Difficulties persist in recognising and respecting children as capable of enjoying decisional privacy rights. These difficulties emanate from the dominant conception of children in Western liberal societies as vulnerable, dependent on adults, and incapable of rational decision-making. Adopting a children's rights approach, this thesis argues that the Family Court of Australia, through the exercise of its welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Cth) to authorise medical treatment for children diagnosed with gender dysphoria, has denied those children their decisional privacy rights. It also argues that recognising children's substantive right to decisional privacy requires attendant procedural rights that facilitate children's meaningful participation in decision-making about their best interests. This thesis demonstrates that negotiating the tensions between children's rights, parental responsibilities and state duties in relation to children's best interests, lies at the core of understanding children's right to decisional privacy. It gives adults who make decisions that impact children's lives an opportunity to reflect on how they make those decisions, and how children can play a more meaningful role, and be heard, in decision-making processes.

DECLARATION

I make the following declarations:

(i) The thesis comprises only my original work towards the degree of Doctor of Philosophy (Law);

(ii) Due acknowledgement has been made in the text of this thesis to all other material used; and

(iii) This thesis is fewer than 100,000 words in length, exclusive of the bibliography.

Georgina Dimopoulos

PREFACE

This thesis was supported by an Australian Government Research Training Program Scholarship. I also received funding from Melbourne Law School Research Support Funds to present research based on my doctoral thesis at various conferences, seminars and workshops.

I presented draft parts of chapters 1, 2 and 7 at the Postgraduate Workshop of the Australasian Society of Legal Philosophy Annual Conference at the Julius Stone Institute of Jurisprudence, University of Sydney in 2019. I presented a draft version of chapter 6 at a Health Law and Ethics Network seminar at Melbourne Law School in 2019, and a draft version of chapter 5 at the Melbourne Doctoral Forum on Legal Theory in 2018.

I published parts of chapters 1, 4 and 7 as Georgina Dimopoulos, 'Embracing Children's Right to Decisional Privacy in Proceedings under the *Family Law Act 1975* (Cth): In Children's Best Interests or a Source of Conflict?' in Shazia Nasir (ed), *Conference Proceedings of the Research Association for Interdisciplinary Studies 11th International Conference on Social Sciences* (John Hopkins University, Rockville, USA, 19-20 November 2018) 129-138.

I published parts of chapter 1 as Georgina Dimopoulos, '"Divorce with Dignity" as a Justification for Publication Restrictions on Proceedings under the *Family Law Act 1975* (Cth) in an Era of Litigant Self-publication' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 161.

Parts of chapters 2, 3 and 6 have been accepted for publication as Georgina Dimopoulos, 'Rethinking *Re Kelvin*: A Children's Rights Perspective on the "Greatest Advancement in Transgender Rights" for Australian Children' (2021) 44(2) *University of New South Wales Law Journal* (forthcoming).

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Just as ‘it takes a village to raise a child’, so too, in my experience, does it take a village to write a doctoral thesis.

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I commenced my first 'real' academic job four weeks prior to submitting this doctoral thesis for examination. My new colleagues at Swinburne Law School have given me the warmest possible welcome. I have felt like one of the team instantly, and am thrilled to have joined such a dynamic and supportive law school. Thank you especially to Professor Mirko Bagaric, for his encouragement, support for my career development, and his sense of humour.

And of course, to my family and friends, who I am certain are breathing a collective sigh of relief that I have submitted this thesis, after seven years.

To my husband, George, for his love, patience, and for supporting me to indulge in what I love: legal research and writing. Having already completed a PhD, George was a sounding board for ideas, and my greatest source of reassurance that I could, and would, finish this project. He always gave me perspective when the project became overwhelming.

To my brothers, Greg and Sam, for their comic relief and (often unsolicited) advice. To my aunt, Christina, for her sage advice. To my other aunts and uncles, cousins and friends, whom I have taken on the PhD journey with me, sharing complaints and achievements, thank you.

Finally, two special acknowledgements – the first in my capacity as a parent, the second in my capacity as a child.

I have been blessed with two children during my PhD candidature. Daria and Alec have known their mummy as a 'student' who is always at 'uni'. I can tell them now proudly that I have finished the 'very long essay' that is even older than they are! I thank Daria and Alec for their unconditional love, and for giving me the chance to see the world again through their eyes. I endeavour to live out the children's rights approach to decisional privacy that I have developed in this thesis with them (although not always successfully). They are, and always will be, my greatest achievement.

My mother, Stephanie, has offered me unconditional love, support, direction, and stern advice that only a mother can give (the best being, 'hurry up and finish that thesis!'). She has reminded me of my number one priority: my family. She has also been the best Nona to Daria and Alec. Without everything she has offered so selflessly, I would not have completed this doctoral thesis.

My father, Nick, died a fortnight before I commenced my PhD candidature. He was my number one supporter, and I miss him dearly. I have inherited my father's stubbornness and determination to succeed, which have indeed served me well in this doctoral journey. I dedicate this thesis to his memory.

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PART A

PRIVACY AND CHILDREN'S RIGHTS: A THEORETICAL PERSPECTIVE

INTRODUCTION

> *[I]t frustrates me deeply that I have to go to court to be who I am. It frustrates me that anyone has to endure this. It shouldn't be the court's decision. It is my body, and only I have the right to decide what goes into it. It is acceptable for my family or the experienced doctors to advise me, but in the end, it should all be up to me. However, this right has been taken completely out of my hands.*[1]

This thesis begins with the voice of a young person, as expressed in a letter to the Family Court of Australia.[2] That young person is Georgie Stone, who in 2011 at the age of 10, became the youngest person in Australia to be granted approval by the Family Court to commence hormonal treatment for gender dysphoria. Australia was, until quite recently, the only country in the world in which court authorisation was required for the medical treatment of transgender children.[3]

Often absent – and starkly so – from public discourse and debate about decision-making by, for and about children, are the voices of children themselves. Georgie's frustration, as articulated in her letter, highlights the perceived incursion by the Family Court on children's right to make decisions about their own medical treatment, and the active role that children should play, guided by their parents and other caregivers, in decision-making about matters that affect them. Georgie's sense of anguish at being deprived of the right to make decisions about her own body and identity, about how she would like to live and the person she would like to be, lies at the crux of this thesis.

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[1] Georgie Stone, letter to the Family Court of Australia, as quoted in *Re Jamie* [2015] FamCA 455 (16 June 2015) [65].

[2] I use the term 'family courts' to refer collectively to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia, and the term 'Family Court' to refer to the Family Court of Australia.

[3] Jacqueline K Hewitt et al, 'Hormone Treatment of Gender Identity Dysphoria in a Cohort of Children and Adolescents' (2012) 196 *Medical Journal of Australia* 578, 578.

My aim is to develop a new conceptual model for enabling and listening to children's voices in Australian family law. I advance a theory of children's decisional privacy, and in so doing, I reconceptualise the meaning and value of privacy in proceedings under the *Family Law Act 1975* (Cth) (Family Law Act) in a way that recognises and respects children as rights-bearing subjects. Decisional privacy gives individuals the ability to make decisions that contribute to defining their identity, without unjustifiable interference from other individuals or the state.[4]

At the core of understanding *children's* decisional privacy, a desire for which Georgie so poignantly expresses in her letter, is negotiating the tensions between children's rights, parental responsibilities, and state duties in relation to children's rights and best interests. In this thesis, I present adult decision-makers with an opportunity to reflect upon how they make decisions for and about children, and how children can play a more meaningful role in those decision-making processes.

I A NEW CONCEPTUAL MODEL OF CHILDREN'S DECISIONAL PRIVACY

Privacy, whilst still a much-contested concept, has been understood as having three domains, which are based on a normative distinction between the 'public' and the 'private'. The implications of this distinction have been much-discussed and debated in feminist and family law scholarship,[5] but less so in relation to children.[6] The public/private dichotomy captures the idea that certain dimensions of life can be left to be shaped by the individual, free from intervention by the law and the state. The private has historically been equated with the domestic sphere, including intimate and family relationships, while the public has encompassed the realms of politics, market and power.[7] The *spatial* domain of privacy covers personal space and relationships, and selective access to certain physical areas like the home. The *informational* domain concerns issues of control of and access to information. The focus

[4] Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 77-8.
[5] See, e.g., Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985); Eva Gamarnikow et al (eds), *The Public and the Private* (Heinemann, 1983); Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Anne Phillips (ed), Fe*minism and Equality* (B Blackwell, 1987) 103; Michael Freeman, 'Towards A Critical Theory of Family Law' (1975) 38 *Current Legal Problems* 153.
[6] Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 4.
[7] See Susan Boyd, 'Challenging the Public/Private Divide: An Overview' in Susan Boyd (ed), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997) 3.

of this thesis, privacy's *decisional* domain, protects an individual's ability to make his or her own decisions and to act and behave without unjustifiable interference from other individuals or the state, which contribute to defining his or her identity.[8]

Difficulties persist in recognising children as being able to enjoy these three dimensions of privacy. These difficulties emanate from the dominant conception of children in Western liberal societies as vulnerable, dependent on adults, and incapable of rational decision-making.[9] The law is one social institution that views childhood as 'a singular, fixed, and universal stage of life',[10] and constructs children as binary opposites to adults, or defines them as 'unrealised' adults who lack will and capacity.[11] According to O'Neill, the child's 'main remedy is to grow up'.[12] The facts of children's dependence on adults for their physical and cognitive development and for their various needs to be met;[13] and children's capacity to develop the ability to meet their own needs in the future,[14] mean that children prove a challenge to the task of conceptualising and theorising privacy. I take up that challenge in this thesis, by developing a children's rights approach to decisional privacy, and applying my theory for illustrative purposes in one context: proceedings before the Family Court of Australia for the authorisation of medical treatment for children diagnosed with gender dysphoria. However, I envisage that the conceptual model I advance for recognising and respecting children's decisional privacy rights could apply just as robustly to other areas involving children, including post-separation parenting arrangements, child protection, child safety, education, and youth justice. The aim is

[8] DeCew, *In Pursuit of Privacy* (n 4) 77-8.
[9] Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 31; Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306, 306-07; John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael Freeman (ed), *Law and Childhood Studies: Current Legal Issues* (Oxford University Press, 2012) 55, 58-9; Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 7; David Archard, *Children: Rights and Childhood* (Routledge, 2nd rev ed, 2004) 53-4.
[10] Varadan (n 9) 307. See also John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 182; Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Studies, 2005) 9-10, 22; Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martin Nijhoff, 1995) 50; Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98 *Ethics* 445, 462.
[11] Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14 *Cardozo Law Review* 1747, 1827.
[12] O'Neill (n 10) 463. See also Kate Federle, 'Rights Flow Downhill' (1994) 2 *International Journal of Children's Rights* 343, 344.
[13] Tobin and Varadan (n 10) 159.
[14] Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 31, 40, 43.

to 'reconceptualise the agenda for decision-makers',[15] so that they are alive to children's rights in decision-making processes.

A *Decisional Privacy and Children's Rights: Forging New Connections in Australian Family Law*

In forging the connection between decisional privacy and children's rights in Australian family law, an important preliminary question arises: why should Australia's family law system 'take children's rights seriously',[16] and in particular, children's decisional privacy rights seriously? Although Australia has ratified the *United Nations Convention on the Rights of the Child* (UNCRC),[17] this Convention has not been incorporated into Australian law. The Family Law Act does not require judges to consider children's rights in their decision-making.[18] Nor are judges mandated to take a child's privacy into account when determining the child's best interests under Part VII of the Family Law Act, which deals with children's matters, including the making of parenting orders and orders relating to the welfare of children.[19]

As mentioned above, decisional privacy gives individuals the freedom to act and to make decisions about how they live their lives, without unjustifiable interference from other individuals or the state. Yet children's perceived vulnerability, dependence, and incapacity for rational decision-making, has impeded the recognition of, and respect for, children's decisional privacy rights. It is therefore not surprising that children's right to decisional privacy has not been theorised in the context of Australian family law. Privacy in this context has generally

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[15] John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 79.

[16] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5. See also Colin Macleod, 'Are Children's Rights Important?' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 191; Jane Fortin, 'Children's Rights: Are the Courts Now Taking them More Seriously?' (2004) 15 *King's Law Journal* 253; Michael Freeman, 'Taking Children's Rights Seriously' (1987) 1 *Children and Society* 299; Michael Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 55.

[17] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).

[18] As I explain further below, while section 60B(4) of the Family Law Act provides that an 'additional object' of Part VII is to give effect to the UNCRC, the Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth), which introduced sub-section (4), explains that its purpose is 'to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention' (at [23]).

[19] *Family Law Act 1975* (Cth) s 60CC(2), (3) lists the primary and additional considerations that courts exercising jurisdiction under the Act must take into account when making parenting orders.

been understood through its informational dimension as the antithesis of publicity, and it manifests legislatively in the form of publication restrictions imposed on proceedings by section 121 of the Family Law Act.

I argue that the principle of the best interests of the child as the paramount consideration, which is the key reference point for decision-making under Part VII of the Family Law Act, provides the nexus between the concepts of decisional privacy and children's rights in Australian family law.[20]

Section 60CC of the Family Law Act lists the primary and additional considerations that the court must take into account in determining what is in a child's best interests. The child's views are the first of the additional considerations, qualified by the requirement that the court take into account any factors, such as the child's maturity or level of understanding, that the court thinks are relevant to the weight it should give to the child's views.[21] Children's right to decisional privacy, as I develop it in this thesis, manifests in a practical sense in children's meaningful, active participation in decision-making about matters that affect them.[22] This includes by children expressing their views and having those views listened to, heard and taken seriously by decision-makers. The Family Court also has a wide discretion to take into account 'any other fact or circumstance that the court thinks is relevant' to the best interests assessment.[23] This provision arguably enables the judge to consider the model of children's rights under the UNCRC to determine the best interests of the child in each case.[24]

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[20] In support of this argument, see Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 57-8, 66. See also Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 40-41; Eekelaar and Tobin (n 15) 87; UN Committee on the Rights of the Child (CRC Committee), *General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [6], [32]; Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Chid: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF Innocenti Studies, 1996) 9-10.

[21] *Family Law Act 1975* (Cth) s 60CC(3)(a).

[22] See also Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 12 (noting that '[t]he notion of children's rights in relation to post-separation parenting arrangements has translated into an acceptance that children must also have rights in relation to the process').

[23] *Family Law Act 1975* (Cth) s 60CC(3)(m).

[24] The Full Court of the Family Court in *Re B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 743 said that the UNCRC must be given 'special significance' for the purpose of interpreting domestic law, and that this convention 'is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision'. See also John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 621 n 255; Stalford and Hollingsworth (n 9) 41.

This argument is supported by an express legislative commitment to make the UNCRC relevant to judicial decision-making under Part VII of the Family Law Act, through the insertion of an 'additional object', which is 'to give effect to the Convention on the Rights of the Child'.[25] The purpose of this additional object is to confirm, in cases of ambiguity, the obligation on decision-makers to interpret Part VII consistently with Australia's international obligations.[26] Accepting that the contents of the UNCRC 'are not enshrined as operative principles of law' in Australia, and that 'the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act',[27] section 60B(4) is nonetheless significant, for it embeds ideas about children's rights into the legislative framework of Part VII. For their part, Family Court judges are becoming increasingly receptive to the notion of children as rights-bearers, and the family law jurisdiction is arguably at the forefront of judicial engagement with children's rights.[28] The UNCRC has instigated a significant 'change in thinking' in Australian family law.[29]

The right to decisional privacy, as I develop it in this thesis, reinforces or facilitates a number of other rights under the UNCRC: notably, the child's right to express his or her views and to be heard (article 12); to receive appropriate direction and guidance in the exercise of his or her rights from the child's parents, in a manner consistent with the child's evolving capacities (article 5); to preservation of identity (article 8); to protection of privacy (article 16); and to freedom of expression (article 13(1)). Children's right to decisional privacy manifests most practically in children's ability to express their views, and to have those views heard and taken into account in the determination of their best interests.[30] As I have just noted, when assessing a child's best interests in Part VII proceedings, any views expressed by the child are the first of the additional considerations that the court must consider.[31] Interpreting the best interests principle under Part VII of the Family Law Act by reference to these other Convention rights,

[25] *Family Law Act 1975* (Cth) s 60B(4).
[26] Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [23].
[27] *Ralton & Ralton* [2017] FamCAFC 182 (7 September 2017) [18]. See also *Oram & Lambert* (2019) FLC ¶93-886, 78,778 [156].
[28] See, e.g., *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) 31 Fam LR 503; *Re Alex (No 2)* (2009) 42 Fam LR 645, 685-88 [178]-[186]*; Re Jamie* (2013) 50 Fam LR 369, 395-98 [120]-[122], [129], [134]; *Karamalis & Karamalis* (2018) 57 Fam LR 588, 590 [12]; *Xiu & Hodges* [2019] FamCA 251 (15 March 2019) [39]-[41]. This trend has also been observed in the English courts in children's cases: Fortin, *Children's Rights and the Developing Law* (n 20) 54.
[29] Parkinson and Cashmore (n 22) 12.
[30] Eekelaar and Tobin (n 15) 85; John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 416-18.
[31] *Family Law Act 1975* (Cth) s 60CC(3)(a).

and enabling children themselves to participate meaningfully in identifying their own interests,[32] enables the Family Court to recognise and respect children's right to decisional privacy. Put differently, principles of 'internal and external system coherence'[33] mean that a decision cannot be in a child's best interests where the outcome would infringe another right under the UNCRC.[34] The principle of the 'best interests of the child' as the paramount consideration in proceedings under Part VII of the Family Law Act requires that the child's rights under the UNCRC be respected.[35]

From a philosophical perspective, privacy is valuable not only for individuals (which is much-emphasised in justifications for its value),[36] but also for society more broadly.[37] A right to decisional privacy promotes and enables the values of autonomy, freedom of expression and preservation of identity, which are vital for children's development, and by extension, to the development of liberal societies.[38] In denying children the opportunity to participate in decision-making processes, children are simultaneously denied the opportunity to develop the capacity for autonomy, and so the argument becomes circular: children's perceived incapacity apparently justifies the failure to afford children decisional privacy.[39] Understanding privacy

[32] Tobin, 'Justifying Children's Rights' (n 30) 416.
[33] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1, 37-9.
[34] Eekelaar and Tobin (n 15) 87; CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 20) [6], [32]; Alston and Gilmour-Walsh (n 20) 9-10.
[35] Hollingsworth and Stalford (n 20) 66. See also Fortin, *Children's Rights and the Developing Law* (n 20) 40-41; Eekelaar and Tobin (n 15) 87; CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 20) [6], [32]; Alston and Gilmour-Walsh (n 20) 9-10.
[36] Judith Wagner DeCew, 'The Feminist Critique of Privacy: Past Arguments and New Social Understandings' in Dorota Mokrosinska and Beate Roessler (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 85, 85.
[37] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010) 86; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 98; Priscilla Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press, 1995) 212-14.
[38] Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 399 (emphasis in original). See also Jeremy Roche, 'Children: Rights, Participation and Citizenship' (1999) 6 *Childhood* 475; Ranjan Poudyal, *Children and Young People as Citizens: Partners for Social Change* (Save the Children, 2003) 6; CRC Committee, *General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [24]; Anne B Smith, Nicola Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making After Parental Separation' (2003) 10 *Childhood* 203.
[39] Gerison Lansdown, 'International Developments in Children's Participation: Lessons and Challenges' in E Kay M Tisdall, John M Davis, Alan Prout and Malcolm Hill (eds), *Children, Young People and Social Inclusion: Participation for What?* (The Policy Press, 2006) 139, 140-41; Fortin, *Children's Rights and the Developing Law* (n 20) 7; Micha de Winter, *Children as Fellow Citizens: Participation and Commitment* (Radcliffe Medical Press Ltd, 1997) 26.

as a value underpinning the Family Law Act[40] embraces its social importance and redefines the issues of children's participation and children's voices in proceedings under Part VII of the Family Law Act. In so doing, it offers a stronger argument for enabling children to be more active participants in the determination of their best interests in those proceedings.

B *The Guiding Research Questions*

This thesis is guided by two research questions, which serve to interrogate the complex connections between decisional privacy and children's rights in Australian family law:

1. Has the Family Court of Australia recognised children's right to decisional privacy?

2. What are the implications, in theory and in practice, of judicial recognition of and respect for children's right to decisional privacy in proceedings under the Family Law Act?

To answer these research questions, this thesis uses as a case study the Family Court of Australia's exercise of its welfare jurisdiction under section 67ZC of the Family Law Act in special medical procedure applications for children diagnosed with gender dysphoria. Section 67ZC enables the Family Court to make orders relating to the welfare of children, having regard to the best interests of the child as the paramount consideration. This thesis adopts a children's rights approach, which is buttressed by the legal and normative framework of the UNCRC and builds on the important work of other children's rights scholars,[41] to analyse two judgments of the Full Court of the Family Court in gender dysphoria proceedings, as illustrations of the exercise of the welfare jurisdiction: *Re Jamie*[42] and *Re Kelvin*.[43]

[40] Australian Law Reform Commission (ALRC), *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) 357 [12.1].
[41] See Tobin, 'Judging the Judges' (n 24) 584-92; Jane Fortin, 'Accommodating Children's Rights in a in a Post Human Rights Act Era (2006) 69 *Modern Law Review* 299, 305; Stalford and Hollingsworth (n 9) 18-21; Michael Freeman, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, 2011) 21, 33.
[42] (2013) 50 Fam LR 369.
[43] (2017) 57 Fam LR 503.

C *The Argument of this Thesis*

This thesis argues, using a children's rights analysis of the judgments of the Full Court of the Family Court in *Re Jamie* and *Re Kelvin*, that the Family Court of Australia's exercise of its welfare jurisdiction under section 67ZC of the Family Law Act to authorise medical treatment for children diagnosed with gender dysphoria, has denied those children their decisional privacy rights. It argues that recognising children's *substantive* right to decisional privacy requires attendant *procedural* rights that facilitate children's meaningful participation in decision-making about their best interests.

My argument develops in three stages: (i) conceptual; (ii) methodological; and (iii) practical. I outline each stage in turn below.

1 *Conceptual: Understanding the Meaning and Value of Privacy*

The first stage of my argument develops the concept of decisional privacy (**chapter 1**). It addresses the questions, 'what is privacy?' and 'why is privacy important?' An important step in understanding what privacy 'is', is articulating why privacy is valuable. In this thesis, I argue that privacy is valued as a prerequisite for achieving the Western liberal ideal of autonomy. I understand autonomy to embrace both freedom *from* intervention by the state and others (that is, negative freedom); and freedom *to* develop and pursue one's own life plan for self-fulfilment (that is, positive freedom).[44] I accept that privacy is important because it protects the diversity of personal choices, actions and ways of life, and provides the conditions or environment to enable individuals to live autonomously.[45] Put differently, individuals require decisional privacy in order to be able to experience autonomy. However, the notion of autonomy does not sit well with conceptions of children as incapable of rational decision-making, vulnerable and dependent. Such conceptions reflect the will or choice theory of rights, which conceptualises a right as 'the protected exercise of choice',[46] and so denies children the status of rights-bearers owing to their perceived incapacity and inability to exercise rational choice.[47]

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[44] See Robert Young, *Personal Autonomy: Beyond Negative and Positive Liberty* (Taylor & Francis, 2017). Cf. Gerald McCallum, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312.
[45] Nissenbaum (n 37) 82; James Griffin, *On Human Rights* (Oxford University Press, 2008) 223; Beate Rossler, *The Value of Privacy* (Polity, 2005) 72-3; Fortin, *Children's Rights and the Developing Law* (n 20) 19.
[46] Archard (n 9) 58.
[47] See, e.g., Brighouse (n 14) 45-6; James Griffin, 'Do Children Have Rights?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 19, 27; O'Neill (n 10)

My approach to children's decisional privacy is premised upon a competing theory of rights: the interest theory.[48] Under this theory, children's entitlement to rights exists *irrespective* of their capacity to exercise those rights.[49] The interest theory understands a right as something that protects a sufficiently important interest, and imposes duties on others, the performance of which ensures that the rights-holder can enjoy that interest.[50] I advocate that children's evolving autonomy – their capacity for autonomy and in some cases, actual autonomy – is the interest to be promoted by recognising and respecting children's right to decisional privacy.[51] In so doing, I embrace an understanding of autonomy as a relational, evolving and gradual concept.[52] Understanding autonomy as evolving, rather than absolute, enables children to be treated as active subjects with agency, consistent with their evolving capacities – rather than vulnerable objects of concern and protective intervention by adults.[53] I also propose that the development and realisation of autonomy is a relational, gradual process – individuals learn to become, and

462-63; Laura M Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Cornell University Press, 1992).

[48] See Joseph Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1; Neil MacCormick, 'Children's Rights: A Test-Case' in Neil MacCormick (ed), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, 1982) 154; Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights, Philosophical Enquiries* (Clarendon Press, 1998) 7; Samantha Brennan, 'Children's Choices or Children's Interests: Which Do Their Rights Protect?' in David Archard and Colin Macloed (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 53; Freeman, 'The Human Rights of Children' (n 6) 21; Robert E Goodin and Diane Gibson, 'Rights, Young and Old' (1997) 17 *Oxford Journal of Legal Studies* 185; Tobin, 'Justifying Children's Rights' (n 30) 403; Fortin, *Children's Rights and the Developing Law* (n 20) 13-14; Tom D Campbell, 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Clarendon Press, 1992) 1, 4-5.

[49] Fortin, *Children's Rights and the Developing Law* (n 20) 13; Tobin, 'Justifying Children's Rights' (n 30) 403; Campbell, 'The Rights of the Minor' (n 48) 5.

[50] See Raz, 'Legal Rights' (n 48) 5; MacCormick (n 48) 154; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 165-92.

[51] Fortin, *Children's Rights and the Developing Law* (n 20) 20, 23; John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42, 53.

[52] See, e.g., Tobin, 'Justifying Children's Rights' (n 30) 424; John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143, 156; Jonathan Herring, *Relational Autonomy and Family Law* (Springer, 2014) 48-49; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in Allan Hutchinson and Leslie Green (eds), *Law and the Community: The End of Individualism?* (Carswell, 1989) 219, 225; Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, 2011); Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4.

[53] John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 171; John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 559; Lundy, Tobin and Parkes (n 38) 396; Parkinson and Cashmore (n 22) 7; Peter Newell, *Taking Children Seriously: A Proposal for a Children's Rights Commissioner* (Calouste Gulbenkian Foundation, 2000) 18; Robyn Fitzgerald, 'How are Children Heard in Family Law Proceedings in Australia?' (2002) 6 *Southern Cross University Law Review* 177, 180, 193-94.

to be, autonomous in and through social relations, including family relationships.[54] In this regard, parents are both a source of, and a potential threat to, their children's autonomy.[55] Such an understanding of autonomy responds to the criticisms that children are not, and cannot be, autonomous; and that, even if children are recognised as autonomous beings, they cannot in fact exercise that autonomy, because they lack the capacity to do so.

2 *Methodological: A Children's Rights Approach to Decisional Privacy*

The second stage of my thesis is methodological (**chapters 2 and 3**). I present a children's rights approach to decisional privacy. I first articulate the dominant approach to determining children's best interests – the welfare model – whereby parents are obliged to promote and protect their children's best interests, and state intervention is justified by parents' failure to do so. The 'best interests' principle, which underpins the welfare model, has been 'very beneficial for children', having shifted the exclusive focus from parental interests to a consideration of children's interests.[56] However, the welfare approach also involves adults exercising the power to determine the content and nature of children's best interests.[57] The idea of bestowing children with rights is seemingly at odds with the paternalism of the welfare model.

To avoid the assertion that '"children's rights" is a slogan in search of a definition',[58] my approach to children's decisional privacy draws on the understanding and formulation of children's rights contained in the UNCRC. While the vision of children's rights promoted by this international convention remains subject to criticism,[59] the model and underlying values

[54] See, e.g. Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The Free Press, 2004) 35; Herring, *Relational Autonomy and Family Law* (n 52) 48-49; Nedelsky, 'Reconceiving Autonomy' (n 52) 225; Jonathan Herring, *Caring and the Law* (Hart Publishing, 2013); John Eekelaar, 'Family Law and Legal Theory' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 41, 52.
[55] Nedelsky, 'Reconceiving Autonomy' (n 52) 235.
[56] Tobin, 'Justifying Children's Rights' (n 30) 410, citing John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) 159.
[57] Eekelaar, *Family Law and Personal Life* (n 56) 159.
[58] Hillary Rodham, 'Children under the Law' (1973) 43 *Harvard Educational Review* 487, 487.
[59] For a good discussion of such criticism, see Freeman, 'Why It Remains Important' (n 16). See also Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 39; Fortin, *Children's Rights & the Developing Law* (n 20) 45-46; Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20 *International Journal of Children's Rights* 155; John Tobin, 'Justifying Children's Rights' (n 30) 16, 22; Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177; Sonia Harris-Short, 'International Human

that the UNCRC embodies offer a sound basis for conceptualising children's decisional privacy. Expanding on the important work of other children's rights scholars,[60] I propose four salient features of a children's rights approach to decisional privacy.

The first feature requires that children be recognised and respected as subjects with rights and interests that are *distinct* from those of their parents and other family members. This feature is alive to the potential perils of 'family privacy' discourse for children. Attaching decisional privacy to the family as an entity assumes that children's interests are subsumed within those of the family as a collective, and that parents will make decisions and act in their children's best interests.[61] Yet the hierarchical relationship – and attendant power imbalance – between parents and their children traditionally has been masked and reinforced on the basis of so-called 'non-intervention' by the state in the 'private' sphere of the family.[62]

Secondly, children must play an active role, consistent with their evolving capacities, in decision-making about their own best interests. This notion of evolving capacities, which is contained in article 5 of the UNCRC, is importantly a 'positive and enabling' one,[63] which is used to promote children's agency and capacity for autonomy, or their actual autonomy, in the exercise of their rights.[64] The evolving capacities principle refers to the 'processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding',[65] and recognises that parental rights and power over the child diminish with the child's growing maturity. Understood thus, the principle of evolving capacities supports the right of all children, regardless of age, to experience increasing agency, autonomy and responsibility in the enjoyment and exercise of their rights as they develop and mature.[66]

Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130.

[60] See Tobin, 'Judging the Judges' (n 24) 584-92; Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (n 9).

[61] Suzanne A Kim 'Reconstructing Family Privacy' (2006) 57 *Hastings Law Journal* 557, 595-96; Fortin, *Children's Rights and the Developing Law* (n 20) 324.

[62] Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497, 1511, 1566. See also Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge, 2014) 187; Kim (n 61) 571; O'Donovan (n 5) 8.

[63] CRC Committee, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [17]. See also CRC Committee, *General Comment No 20*, UN Doc CRC/C/GC/20 (n 38) [18].

[64] Varadan (n 9) 329, 331, 333.

[65] CRC Committee, *General Comment No 7,* UN Doc CRC/C/GC/7/Rev.1 (n 63) [17].

[66] Tobin and Varadan (n 10) 177-78. See also CRC Committee, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [85].

The third feature is that children's relative vulnerability and immaturity require that they are provided with appropriate direction and guidance from their parents in the exercise of their rights, and also for the protection and enforcement of those rights.[67] The emphasis must remain on the *child's* right to receive appropriate direction and guidance from his or her parents, rather than on *parents'* rights to non-interference by the state in the exercise of parental rights and responsibilities.[68]

The fourth feature of a children's rights approach to decisional privacy is children's meaningful participation in decision-making about their lives. Article 12(1) of the UNCRC gives children who are capable of forming a view the right to freely express their views in all matters affecting them, with those views being given due weight in accordance with the child's age and maturity. I argue that children's substantive right to decisional privacy is empty unless it is accompanied by procedural rights that enable children to participate effectively in decision-making processes.[69] This nexus between recognising children's decisional privacy, and giving children the opportunity to actively participate in decision-making processes, demonstrates respect for children's evolving capacity for autonomy. Put differently, giving children the right to express their views meaningfully, and affording them the opportunity to be heard, are the essence of children exercising their right to decisional privacy effectively.

Within this conceptual framework, my focus then narrows to court judgments. I distinguish the features of a children's rights judgment through four stages of the judicial decision-making process. These features are consistent with, although differently calibrated to, the five 'primary characteristics' of a children's rights judgment presented by Stalford and Hollingsworth,[70] and the dimensions of a 'substantive rights approach' formulated by Tobin.[71] The first feature is selecting and framing: conceptualisation of the issues from the child's perspective. The second is court procedures that enable the child to participate meaningfully in the decision-making process. The third is reasoning and analysis: how the judge, having considered the evidence, analyses and justifies the resolution of the issues for determination in the proceedings. The fourth feature is communicating and enabling: a judgment that has the child as the focal point

[67] UNCRC, art 5.
[68] Tobin and Varadan (n 10) 161.
[69] Freeman, 'The Human Rights of Children' (n 6) 18; Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 *Law and Philosophy* 19, 42; Parkinson and Cashmore (n 22) 12; Fortin, *Children's Rights and the Developing Law* (n 20) 234.
[70] Hollingsworth and Stalford (n 20) 53.
[71] Tobin, 'Judging the Judges' (n 24) 603-19.

and enables the child to share his or her own voice and narrative, and which is written with the child (or children generally) as its audience. Together, these features of a children's rights judgment strive to make children's rights a 'way of thinking' for judges in proceedings under Part VII of the Family Law Act – and to suggest ways that judges might embrace a children's rights approach in their decision-making,[72] to make children more visible in the law.[73]

In the third stage of developing my thesis argument, I apply the children's rights approach to decisional privacy and the elements of a children's rights judgment, to re-read judgments of the Full Court of the Family Court through a children's rights lens.

3 *Practical: Applying the Children's Rights Approach to Decisional Privacy to Full Court Judgments in Gender Dysphoria Proceedings*

The third stage of my thesis is the practical application of the methodological stage, within the conceptual framework of the first (**chapters 4 to 6**). It draws on a case study – and within that case study, two judgments of the Full Court of the Family Court of Australia – to examine whether, and if so, how, the Family Court has conceptualised children's decisional privacy rights. The case study is the welfare jurisdiction under section 67ZC of the Family Law Act, and its exercise by the Family Court of Australia to authorise special medical procedures for children diagnosed with gender dysphoria.[74]

Below, I offer an overview of the seminal decisions in the development of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act, which establish the problem that this thesis seeks to address. The Family Court framed the dilemma in the following way:

> How far, indeed, is the Court to intrude into the family unit and by what set of values should a Judge decide that he or she knows better than the parents what is best for their child?[75]

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[72] Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 1, 31-2.
[73] Hollingsworth and Stalford (n 20) 53.
[74] It is important for me to acknowledge my privileged position as a cisgender person, and to note that I do not, in this thesis, claim to speak for or on behalf of transgender people in any way.
[75] *In re a Teenager* (1989) FLC ¶92-006, 77,217 (Cook J).

Applications for Family Court authorisation of what are known as 'special medical procedures', and the complexities that emerge in relation to the scope of state intrusion into a seemingly private family matter, provide a prime example of children's ability to possess, and to exercise, decisional privacy rights.

(a) The Family Court's Welfare Jurisdiction and Authorisation of Special Medical Procedures

The Family Law Act reflects the assumption that parents are best placed to protect the interests of their children,[76] and provides that subject to any court order in force, parents have a 'bundle of rights'[77] which the Act defines as 'parental responsibility': '[a]ll the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[78] While it is generally within the bounds of parental responsibility for parents to be able to consent to medical treatment for and on behalf of their child, there are 'special medical procedures' which fall beyond that responsibility and require determination by the Family Court as part of its welfare jurisdiction under section 67ZC of the Family Law Act. Section 67ZC provides that, in addition to the jurisdiction under Part VII in relation to children, a court has jurisdiction to make orders relating to the welfare of children, having regard to the best interests of the child as the paramount consideration.

The decision of the High Court of Australia in *Secretary, Department of Health & Community Services v JWB & SMB* (*Marion's case*)[79] delineated the scope of the welfare jurisdiction under section 67ZC of the Family Law Act. *Marion*'s *case* was an application for the sterilisation of a 14-year-old girl with intellectual disabilities. The High Court held that the Family Court has jurisdiction, pursuant to section 67ZC, to make decisions about a child's proposed medical treatment where that treatment is invasive, permanent and irreversible, and non-therapeutic (that is, not carried out 'to treat some malfunction or disease').[80] The crux of the High Court's decision was that a child must either be capable of giving informed consent to the medical treatment; or if the child is not so competent, the court, rather than the child's parents, should

[76] Fortin, *Children's Rights and the Developing Law* (n 20) 22, 321, 739-40; Gerald Dworkin, 'Consent, Representation, and Proxy Consent' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 191, 204.
[77] *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013) [82]. See also Eekelaar and Tobin (n 15) 89.
[78] *Family Law Act 1975* (Cth) s 61B.
[79] (1992) 175 CLR 218 (*Marion's case*).
[80] Ibid 250.

grant authorisation for that treatment. The effect of *Marion's case* was to subvert the decision-making autonomy of families: Family Court authorisation was necessary, as essentially a 'procedural safeguard',[81] in medical treatment cases that had the features identified by the High Court.

(b) Gender Dysphoria as a Special Medical Procedure

In 2004, the Family Court of Australia in the case of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (*Re Alex*)[82] extended the concept of 'special medical procedure', as developed by the High Court in *Marion's case*, to hormonal treatment for children diagnosed with gender dysphoria. Gender dysphoria involves a person experiencing a conflict between their self-perception of being female or male, and their birth sex.[83] At the time of writing, diagnosis is governed by the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5),[84] and the accepted medical treatment occurs in two stages: the administration of puberty-suppressant hormones; and the administration of either testosterone or oestrogen.[85] The effect of the *Re Alex* decision was to require parents of children diagnosed with gender dysphoria to apply to the Family Court for authorisation of medical treatment for their child – even where the child, the child's parents and the treating medical practitioners agreed on the proposed treatment.

Almost a decade after *Re Alex* was decided, the Full Court of the Family Court in the case of *Re Jamie* was asked to consider whether medical treatment for gender dysphoria was a 'special medical procedure' that required court authorisation. The Full Court considered itself 'bound by what the High Court said in *Marion's case*'.[86] It held that stage two treatment for gender dysphoria required court authorisation pursuant to section 67ZC of the Family Law Act, unless the child was competent to give informed consent. The Full Court also held that the nature of

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[81] Ibid 249.
[82] (2004) 31 Fam LR 503 (*Re Alex*).
[83] Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28 *Australian Journal of Family Law* 83, 83.
[84] American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013).
[85] World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-nonconforming People, 7th version* (WPATH, 7th version, 2007) 18 <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf>.
[86] *Re Jamie* (2013) 50 Fam LR 369, 398 [138].

stage two treatment was such that the Family Court had to determine the child's competence to consent.[87]

The Full Court's decision in *Re Jamie* generated considerable dissatisfaction, including amongst the Family Court judiciary,[88] legal commentators,[89] and the medical profession.[90] A special bench of the Full Court of the Family Court in *Re Kelvin* did not follow its decision in *Re Jamie*. However, reluctant to find that *Re Jamie* was 'plainly wrong', the Full Court justified its departure from that decision on the basis of advancements in medical science in the intervening period.[91] The practical effect of the Full Court's decision in *Re Kelvin* has been to swing the pendulum of decision-making authority for transgender children's medical treatment from the Family Court back to the child, the child's parents and the child's treating doctors: it is once again a 'private' issue. Yet the Full Court left open the possibility of court involvement where there is a 'genuine dispute or controversy' about whether treatment should be administered – such as if the child, the child's parents and the treating doctors are unable to agree.[92]

The argument that I develop through the *Re Jamie* and *Re Kelvin* case studies, whose selection I justify in Part II below, is that the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act originally served to protect children whose interests might otherwise be eroded by the problematic liberal notion of family privacy. However, the development of this jurisdiction through Family Court jurisprudence in childhood gender dysphoria proceedings has shown that the protectionist rationale has been superseded by perceptions of incursion, and denial of transgender children's decisional privacy rights.

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[87] Ibid [136]-[137].
[88] See, e.g., *Re Martin* [2015] FamCA 1189 (23 December 2015) [27], [36], [38]; *Re Harley* [2016] FamCA 334 (22 April 2016) [42]; *Re Tahlia* [2017] FamCA 715 (8 September 2017) [4]; *Re Lucas* [2016] FamCA 1129 (22 December 2016) [10], [53], [71], [73].
[89] Kelly (n 83); Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38 *University of New South Wales Law Journal* 426.
[90] Michelle Telfer, Michelle Tollit and Debi Feldman, 'Transformation of Health-care and Legal Systems for the Transgender Population: The Need for Change in Australia' (2015) 51 *Journal of Paediatrics and Child Health* 1051.
[91] *Re Kelvin* (2017) 57 Fam LR 503, 527 [152], 529 [165], 530 [175].
[92] Ibid 529 [167].

II ENTWINING 'THE INTENSELY PERSONAL AND BROADLY POLITICAL':[93] RESEARCH DESIGN AND CASE STUDIES

A *Gender Dysphoria Proceedings: A Paradigm Example of Children's Autonomy and Identity, and Tensions in the Relationship Between Children, Their Parents and the State*

Post-separation parenting disputes, regarding parental responsibility for, and time with, children, comprise the majority of cases that are heard by the Family Court of Australia under Part VII of the Family Law Act. Gender dysphoria proceedings comprise but a narrow facet of the Family Court's jurisdiction. However, I have selected the case study of gender dysphoria proceedings before the Family Court for its capacity to draw out, most effectively, the tensions and complexities that germinate from translating the contested concepts of decisional privacy and children's rights into practice in Australian family law. The case study is intended to demonstrate how the theory of children's right to decisional privacy might apply in a particular context. As I noted earlier, I foresee this conceptual model applying to a range of areas that directly affect children's lives, beyond Australian family law, but these areas are beyond the scope of this thesis.

Gender dysphoria proceedings are a paradigm example of children's decisional privacy rights because they are *literally* about children's autonomy, identity and self-presentation, and their ability to ask and answer the questions of how they would like to live and what kind of person they would like to be. According to Tobin and Todres, the term 'identity' in article 8 of the UNCRC, which provides for the child's right to preservation of identity, can be understood as 'a constellation of historical and evolving characteristics' that are attributable to, and can be identified with and by, an individual child.[94] These characteristics are said to 'provide children with an understanding of where they have come from, who they are, and the right to decide who they will become'.[95] The Family Court's involvement in the medical treatment process for

[93] Janet Batsleer, 'Commentary 4: Methods and Frameworks' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 193, 194.
[94] John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 285, 293.
[95] Ibid 285.

gender dysphoria, until the decision of the Full Court of the Family Court in *Re Kelvin*, denied children diagnosed with that condition their decisional privacy rights. To return to the words of Georgie Stone, 'it frustrates me deeply that I have to go to court to be who I am. … It shouldn't be the court's decision. It is my body, and only I have the right to decide what goes into it'.[96] The court authorisation process deprived children such as Georgie of the ability to exercise, consistently with their evolving capacities, autonomy in asserting their gender identity and 'who they are', and their right 'to decide who they will become'. As I explained earlier, decisional privacy offers the conditions or environment to enable the individual to live autonomously, or to ask and answer the 'practical question'[97] of how he or she would like to live and what kind of person he or she would like to be. The autonomy of children diagnosed with gender dysphoria is constrained to the extent that their birth sex and their self-perception of being male or female do not align.[98] For these children, having the Family Court determine whether they could commence treatment, or whether they had the capacity to consent to treatment, took their right to decisional privacy 'completely out of [their] hands'.[99]

I have also selected this case study for its ability to draw out the tensions between children's rights, parental responsibilities, and state duties in relation to children's best interests, which I suggest lies at the core of understanding children's decisional privacy. Fortin has argued that '[c]hildren's rights should not be lost somewhere … between parental, medical and judicial paternalism'.[100] Gender dysphoria proceedings raise – although do not necessarily answer – the challenging questions of *when* intervention by adults to limit children's decision-making ability and choices can be justified,[101] and *who* is best-placed to protect the child's rights in this context. These questions are made more challenging by my endeavour in this thesis to embed a theoretical account of children's right to decisional privacy into decision-making under Part VII of the Family Law Act.

[96] *Re Jamie* [2015] FamCA 455 (16 June 2015) [65].
[97] Rossler (n 45) 43.
[98] Kelly (n 83) 83.
[99] *Re Jamie* [2015] FamCA 455 (16 June 2015) [65].
[100] Fortin, *Children's Rights and the Developing Law* (n 20) 402.
[101] Ibid 21.

B *A Focus on Court Judgments: Justifying* Re Jamie *and* Re Kelvin

As a principle of judicial accountability, in Australia, judges must give reasons for their decisions.[102] The High Court of Australia has held this obligation to be a feature of the administration of justice,[103] with published reasons susceptible to appeal and open to criticism and scrutiny by litigants, other judges, academics, the media and the community.[104] Gender dysphoria proceedings before the Family Court have tended to attract considerable public and media attention.[105] In 'controversial' cases attracting an expanded audience, judges are compelled to justify their reasoning and to articulate their assumptions in such a way as to pre-empt and deflect criticism.[106] The narratives of judgments in children's cases convey socio-cultural understandings of children, childhood, the parent-child relationship, and the scope of state involvement in the private sphere of the family. In gender dysphoria cases, these narratives reflect contemporary judicial views about the normative meaning and value of transgender children's decisional privacy rights. The power of judgment writing lies in the scope of narratives to 'challenge and unsettle the legal status quo',[107] and to represent voices, perspectives and experiences that have been marginalised, omitted or ignored in the development of law and policy.

Given that I could have chosen any one or more judgments in gender dysphoria proceedings before the Family Court for analysis, I must explain my selection of the judgments of the Full Court in *Re Jamie* and subsequently in *Re Kelvin*. These two Full Court decisions mark two pivotal moments in the development and trajectory of the welfare jurisdiction under section 67ZC of the Family Law Act in relation to childhood gender dysphoria.

I chose the Full Court's judgment in *Re Jamie* because this case provided the first *appellate* opportunity to consider whether the law should depart from *Re Alex:* that is, whether Family

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[102] Michael Kirby, 'Judicial Accountability in Australia' (2005) 6 *Legal Ethics* 41, 46.
[103] *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656, 666; *Fleming v The Queen* (1998) 197 CLR 250, 260.
[104] Kirby (n 102) 46; Kenneth Hayne, 'Letting Justice be Done Without the Heavens Falling' (2001) 27 *Monash University Law Review* 12, 19.
[105] *Re Kelvin* (2017) 57 Fam LR 503, 519 [115] (observing that 'this case, and other earlier cases involving Gender Dysphoria, have attracted widespread media attention', but that some of the media reports 'have, at best, been incomplete and, at worst, inaccurate').
[106] Jonathan Montgomery, 'Rhetoric and "Welfare"' (1989) 9 *Oxford Journal of Legal Studies* 395, 397.
[107] Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 5.

Court authorisation of medical treatment for gender dysphoria should still be required, and whether the Family Court should still be involved in determining whether the child is competent to give informed consent to stage two treatment. The Full Court's decision in *Re Jamie,* as I noted earlier, affirmed that transgender children, insofar as their bodies and identities were concerned, were far from 'active shapers of their own lives'.[108]

I chose the Full Court's judgment in *Re Kelvin* because this case provided a useful comparison with *Re Jamie*, being the only other (at the time of writing) opportunity that the Full Court has had to decide on the scope of transgender children's decisional privacy rights. The Full Court in *Re Kelvin*, acknowledging that '*Re Jamie* can be viewed as being decided at a particular point in time, and at a particular stage in the development of legal principle, and even more importantly of medical science',[109] recognised that judicial decisions do indeed demand debate, argument and ongoing re-assessment in light of changing societal values, understandings and experiences.

A defining feature of the 'protective' and 'paternalistic'[110] welfare jurisdiction under section 67ZC of the Family Law Act is its regulation of decision-making for, on behalf of, and about, children. The welfare jurisdiction has developed within a 'narrative of protection',[111] premised upon assumptions of children's vulnerability, dependence and need for protection from harm or the risk of harm[112] These assumptions, seemingly justifying the exercise of the welfare jurisdiction, have been the subject of relatively little critique in Australian family law. This is notwithstanding the changing status of children in society, and advancements in child development research. Consequently, 'children's rights' discourse in relation to transgender children has tended to focus on protecting the 'rights' of these children from a protectionist perspective. It has not asked the pivotal questions of *which* rights, and *whose* rights, are being undermined by the Family Court's involvement in the medical treatment process, and *why* those rights are both worthy and capable of protection. I ask and seek to answer these questions

[108] *W and G (No 1)* (2005) FLC ¶93-247, 80,053 [108].
[109] *Re Kelvin* (2017) 57 Fam LR 503, 529 [165].
[110] See *Re Alex* (2004) 31 Fam LR 503, 529 [154].
[111] Zach Meyers, 'Protecting "Innocence"? Deconstructing Legal Regulation of Child Sexuality' (2007) 27 *Australian Feminist Law Journal* 51, 56.
[112] See, e.g., Freeman, 'The Human Rights of Children' (n 6) 13; Alison Diduck, *Law's Families* (LexisNexis Butterworths, 2003) 80-83; Felicity Kaganas and Alison Diduck, 'Incomplete Citizens: Changing Images of Post-Separation Children' (2004) 67 *Modern Law Review* 959.

in this thesis, through a children's rights analysis of the Full Court's judgments in *Re Jamie* and *Re Kelvin*.

At the core of *Re Jamie* and *Re Kelvin* was the issue of transgender young people's bodily autonomy and identity. The explicit legal questions for the Full Court's determination in each case were whether court authorisation was required for a child diagnosed with gender dysphoria to commence stage two medical treatment, and who should determine the issue of the child's capacity to consent to that treatment. Beyond these questions lay a more fundamental one: to what extent do transgender children possess autonomy in relation to their own bodies, and the ability to control the presentation and development of their identities, through judicial recognition of and respect for their decisional privacy rights? The interplay between the explicit legal questions and the broader questions of transgender children's rights, make these judgments most apt for a comparative analysis, to illustrate how my theory of children's decisional privacy can operate in practice.

III THE AIMS AND NOVEL CONTRIBUTION OF THIS THESIS

Decisional privacy, children's rights and family law are three dynamic, contested subjects of inquiry and debate.[113] Yet the interconnections between them has not been the subject of scholarly attention in Australia. This thesis endeavours to fill that lacuna, by using a children's rights approach to develop a normative understanding of the meaning and value of children's decisional privacy in proceedings under the Family Law Act.[114]

[113] See, in relation to the 'chaotic' nature of privacy as a concept, Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 477; Hyman Gross, 'The Concept of Privacy' (1967) 42 *New York University Law Review* 34, 34-5; Jonathan Franzen, *How to Be Alone: Essays* (Straus and Giroux, 2003) 42; Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7; Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4 *Philosophy and Public Affairs* 295, 295; Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 3, 8; Judith Eichbaum, 'Towards and Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy' (1979) 14 *Harvard Civil Rights – Civil Liberties Law Review* 361, 361. Regarding the 'incoherence', 'anarchy' and 'chaos' of family law, see John Dewar, 'Family Law and its Discontents' (2000) 14 *International Journal of Law, Policy and the Family* 59, 79. See also Lucinda Ferguson and Elizabeth Brake, 'Introduction: The Importance of Theory to Children's and Family Law' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 1.

[114] In this thesis, I use the terms 'child' and 'children' rather than the composite phrase 'child or young person' or 'children and young people', for the purposes of consistency, save for where the semantic distinction is significant, as I discuss in chapters 5 and 6.

A *The Decisional Privacy of Children: Two New Lenses for Analysis*

My thesis offers a novel approach to conceptualising privacy in Australian family law from two perspectives. The first is its focus on the *decisional* dimension of privacy. Unlike the United States, where decisional privacy has found concrete expression in Supreme Court constitutional cases regarding family decision-making in matters such as reproductive control,[115] lifestyle,[116] and schooling,[117] decisional privacy in Australian family law jurisprudence in relation to children has not been theorised. Privacy in Australian family law has generally been conceptualised and articulated through its informational dimension, which I noted earlier operates to protect individuals from the (mis)appropriation and (mis)use of their personal information. Informational privacy protection for participants in family law proceedings manifests legislatively in the form of publication restrictions imposed by section 121 of the Family Law Act.[118] The Family Court, the federal legislature and family law policy-makers have generally understood privacy as the antithesis of publicity, and have emphasised the need to shield family law litigants, particularly children, from the perceived harms of unwanted media attention. My thesis articulates a conception of privacy in Australian family law that moves beyond merely information over which adults exercise control.

The second contribution that my thesis makes relates to the focus of analysis within decisional privacy: children. Participants in proceedings under the Family Law Act relinquish some of their privacy, as they call upon the Family Court – in proceedings conducted (usually) in open court – to determine disputes over their property and children that they have been unable to resolve between themselves (in the case of separating spouses), or to authorise special medical procedures for children (the case study of this thesis), amongst other matters. Former Chief Justice of the Family Court of Australia, Diana Bryant, has described family law as 'an area which really intrudes into people's lives', in which judges 'make orders that tell people where they can and can't live, how often or if they will see their children at all'.[119] Another example

[115] See *Griswold v Connecticut,* 381 US 479 (1965); *Eisenstadt v Baird*, 405 US 438 (1972); *Roe v Wade* 410 US 113 (1973).
[116] See *Loving v Virginia*, 388 US 1 (1967); *Stanley v Georgia*, 394 US 557 (1969).
[117] See *Pierce v Society of Sisters*, 268 US 510 (1925).
[118] Section 121 of the Family Law Act prohibits the publication or dissemination of an account of family law proceedings that could identify a party, witness or other person associated with the proceedings. Contravention of this provision is an indictable offence, punishable by imprisonment.
[119] Diana Bryant, as quoted in 'Retiring Chief Justice reflects on thirteen years in the Family Court', *The Law Report*, Australian Broadcasting Corporation Radio National, 19 September 2017 <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>.

is the advent of 'no fault' divorce with the enactment of the Family Law Act, which was justified by legislators at the time as giving 'adult people … the credit and the dignity of being able to make decisions for themselves'.[120] In one submission to the Australian Law Reform Commission's inquiry into Australia's family law system, it was observed that:

> Children – their voices, fears, questions and interests – were largely absent from the debate on the Family Law Bill in the 1970s. Argument was very much centred around the process of divorce, and how it was experienced by the adult parties to the marriage, in isolation from their roles as parents. Sensibilities around children's views and voices (independent from those of their parents) … are relatively recent.[121]

These remarks reinforce my observations that first, Australian family law has not engaged with the concept of decisional privacy, and secondly, that children have been 'relegated to the shadows' of privacy discourse in this area of law.[122] As a result of this focus on adults' privacy interests, difficulties persist in recognising and protecting children's – as distinct from their parents' – decisional privacy interests. The law's construction of 'the child' as an identity – as vulnerable, immature and incapable of rational decision-making – has contributed to children's invisibility in the conceptualisation of privacy's meaning and value.[123] Recognising and respecting children's right to participate in decision-making processes, and to make decisions that might conflict with their parents' and the state's wishes, remain significant, and unresolved, challenges for Australian family law. My thesis shifts the critical and analytical spotlight to children, and in particular, to children's ability to enjoy and exercise effectively their decisional privacy rights. In doing so, it contributes to the multidisciplinary research on how children's rights theories operate in practice.

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[120] Commonwealth, *Parliamentary Debates*, Senate, 19 May 1975, 2419 (Kep Enderby).
[121] Relationships Australia, Submission No 11 to Australian Law Reform Commission, *Review of the Family Law System – Issues Paper* (IP 48) (7 May 2018) 73.
[122] Alice Hearst, *Children and the Politics of Cultural Belonging* (Cambridge University Press, 2012) 14. See also Freeman, 'The Human Rights of Children' (n 6) 5; Benjamin Shmueli and Ayelet Blecher-Prigat, 'Privacy for Children' (2011) 42 *Columbia Human Rights Law Review* 759, 762, 787.
[123] Tobin, 'Courts and the Construction of Childhood' (n 9) 58-9.

B *Bridging the Gulf Between Children's Rights Theory and Judicial Decision-Making in Australian Family Law*

Children's right to decisional privacy remains unarticulated in academic research. My thesis articulates that right and seeks to influence its understanding and protection in judicial decision-making by the Family Court of Australia. The challenge, as Stalford, Hollingsworth and Gilmore have noted, lies in 'transposing rights from abstract expressions into meaningful, fruitful and enduring commitments by all of those associated with the child'.[124] Children's rights research has operated as a 'driving force' for upgrading children's status in society.[125] However, Fortin has observed 'an unfortunate disjunction between theory and practice' in describing the approach of judges and legal practitioners to children's rights.[126] Accepting that the theoretical underpinnings of children's rights are 'intimately connected' to their implementation in the law,[127] in contextualising children's right to decisional privacy through the case study of gender dysphoria proceedings, my thesis shifts the focus from abstract theorising about children's rights, to Australian family law, policy and practice. In particular, it responds to the 'theory gap'[128] by assessing the impacts, from a children's rights perspective, of the Family Court's involvement in the medical treatment process for children diagnosed with gender dysphoria on the lives and rights of those children.[129]

An important point made by Stalford, Hollingsworth and Gilmore[130] is that case notes and existing research on children's rights have analysed and critiqued the understanding and application of children's rights in particular family law judgments,[131] or the influence of the UNCRC and other international conventions on judicial decision-making.[132] Yet in arguing that

[124] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 7. See also Fortin, *Children's Rights and the Developing Law* (n 20) 3-4.
[125] Ann Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 *International Journal of Children's Rights* 233, 233.
[126] Fortin, *Children's Rights and the Developing Law* (n 20) 29. See also Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 6.
[127] Ferguson, 'Not Merely Rights for Children' (n 59) 182.
[128] Ibid.
[129] Philip Veerman and Hephzibah Levine, 'Implementing Children's Rights on a Local Level: Narrowing the Gap Between Geneva and the Grassroots' (2000) 8 *International Journal of Children's Rights* 373; Quennerstedt, 'Children's Rights Research' (n 125) 242.
[130] Stalford, Hollingsworth & Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 6.
[131] See, e.g., Kelly (n 83); Rachael Wallbank, '*Re Kevin* in Perspective' (2004) 9 *Deakin Law Review* 461.
[132] See, e.g., Tobin, 'Judging the Judges' (n 24); Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015); Julia Sloth-Nielsen, 'Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137; Michael

judges have made decisions affecting children's lives 'in an empirical and theoretical vacuum',[133] often ignored in this academic work are the practical realities of judicial decision-making. These are the various constraints – institutional, structural, socio-political and personal – that affect judges' willingness and ability to adopt a children's rights approach in proceedings under the Family Law Act. My thesis offers those insights. It situates the case study and the judgments analysed within their broader 'real life' context, including an understanding of the history of the welfare jurisdiction under section 67ZC of the Family Law Act and the factors that might encourage or detract from a children's rights approach to judicial decision-making.

The role of the judiciary in protecting and advancing children's rights has been the subject of increasing scholarly attention in recent years.[134] Children's limited capacity to enjoy and assert their rights independently of adults, and their 'invisibility and vulnerability' under the law and 'lack of political voice' add weight to the perspective that judges 'step in where other adults (state authorities, parents, doctors) fail or disagree on how to give effect to children's rights'.[135] The case study of this thesis scrutinises and critiques this unique judicial role, and suggests ways in which judges might more actively and meaningfully advance children's right to decisional privacy in their decision-making.

As I noted earlier in this chapter, Family Court judges are becoming more receptive to the idea of children as rights-bearers, particularly in light of the additional object in sub-section 60B(4) of the Family Law Act, which is 'to give effect to' the UNCRC. Children's rights, then, are shaping the 'general intellectual environment'[136] in which Family Court judges contemplate their adjudicative approach. In *Re Alex,* the Family Court cautioned that the welfare jurisdiction under section 67ZC of the Family Law Act 'in modern thinking about children and young people … must be understood with regard to their rights'.[137] Yet in the absence of an express

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Freeman, 'Children's Rights as Human Rights: Reading the UNCRC' in Jens Qvortrup, William A Corsaro and Michael-Sebastian Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave Macmillan, 2009) 377.

[133] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 6.

[134] See, e.g., Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011); John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 *International Journal of Children's Rights* 3; Aoife Daly, *Children, Autonomy and the Courts* (Routledge, 2017); Sir Mark Hedley, *The Modern Judge – Power, Responsibility and Society's Expectations* (LexisNexis, 2016); Jane Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (2011) 41 *Family Law* 176.

[135] Stalford and Hollingsworth (n 9) 21.

[136] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 88. On Dworkin's failure to acknowledge children's rights in his influential text, *Taking Rights Seriously* (Gerald Duckworth & Co, 1977), see Freeman, 'Why It Remains Important' (n 16) 5.

[137] *Re Alex* (2004) 31 Fam LR 503, 529 [154].

human rights framework in Australia, the extent to which children's rights are articulated, protected, respected and given effect to in family law proceedings is necessarily limited. Some Family Court judges conceptualise children's rights through a protectionist lens, consistent with the dominant welfare model. Others omit analysis of children's rights in their judgments; although acknowledging, again, that there is no express legislative obligation upon the Family Court to consider children's rights in decision-making under Part VII of the Family Law Act. Examples of judges embracing and adopting a substantive children's rights approach to determining proceedings,[138] and to producing a 'child-friendly' judgment,[139] are still few and far between.

This is particularly so in cases involving the exercise of the welfare jurisdiction under section 67ZC of the Family Law Act, which has been concerned with identifying risks, preventing harm, and protecting children from their parents' decision-making.[140] The welfare jurisdiction has not lent itself to judicial contemplation of children's rights in the sense that they are conceptualised in this thesis: understanding children as active participants in decision-making about matters that affect them, with rights and interests distinct from those of their parents and other caregivers. And so, the theory of children's rights remains abstracted from day-to-day legal practice.[141] That court judgments contain 'limited, often distinctly disempowering approaches to children's rights' is not a characteristic unique to Australian family law, but spans jurisdictions within Australia and overseas.[142] This makes an emphasis on children's rights problematic, in Ferguson's view, because of the lack of a 'sufficiently workable child-centred conception of children's rights'.[143]

My thesis seeks to develop a workable child-centred understanding of children's right to decisional privacy, and to inform judicial thinking about how this right can be incorporated into judicial reasoning in proceedings under Part VII of the Family Law Act. In doing so, it tests the potential of academic research to inform and influence the judicial decision-making process, and to highlight the tensions and challenges that judges face in adopting a children's rights approach in their determination of a child's best interests. The ultimate goal is to bring

[138] A notable example is the approach of the Family Court in *Re Alex* (2004) 31 Fam LR 503, which I discuss in chapter 4 of this thesis.
[139] See *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012).
[140] Michael King and Christine Piper, *How the Law Thinks About Children* (Arena, 2nd ed, 1995) 65.
[141] Stalford and Hollingsworth (n 9) 19.
[142] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 6.
[143] Ferguson, 'Not Merely Rights for Children' (n 59) 182.

children's right to decisional privacy to the fore of the adjudicatory process – acknowledging, as noted earlier, that it is not an explicit factor for judges to consider when determining a child's best interests.

The most significant contribution that academic scholarship on children's rights can make, in my view, is to promote judicial self-awareness of *how* decisions for and about children are made; and to encourage dialogue about new ways of thinking about children and childhood, and about what decisional privacy for children means and why it is valuable in this context. My thesis contributes more broadly to a rich body of socio-legal work about how, in a particular context, children's rights can and should be exercised within the dynamics of the family and in court processes.[144] It offers a 'testing ground'[145] for how and why academic research on children's rights is relevant to Family Court judges in their challenging, value-laden, invariably emotional day-to-day work in an area of law that 'really intrudes into people's lives'.[146] It should encourage discussion and debate about how the practical – judicial decision-making – and the theoretical – academic research on children's rights – can influence and improve one another.

My ultimate aim, through this thesis, is to generate dialogue and debate among judges, lawyers, policy-makers, academics, and children themselves, about whether and how the vision for a children's rights approach to judicial decision-making should be implemented in Australian family law to advance children's right to decisional privacy.[147] My contribution emphasises that recognising and respecting children's decisional privacy rights has significant implications not only for children themselves, but simultaneously for the dynamics and boundaries of the relationship between children, their parents and the state. However, the new conceptual model for recognising children's voices in Australian family law that I develop in this thesis can be accommodated within the existing framework of the Family Law Act,[148] so that children are not only seen, but also heard, and most importantly, listened to, in decision-making about matters that affect their identities and lives.

[144] See Lawrie Moloney, 'Beyond Custody and Access: A Children's Rights Approach to Post-separation Parenting' (1993) 7 *Australian Journal of Family Law* 249, 253.
[145] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 7.
[146] Bryant, as quoted in 'Retiring Chief Justice reflects on thirteen years in the Family Court' (n 119).
[147] Tobin, 'Judging the Judges' (n 24) 625.
[148] Tobin, 'Seeking to Persuade' (n 33) 50.

IV THE STRUCTURE OF THIS THESIS

My thesis consists of two parts. Part A lays the theoretical groundwork and encompasses the conceptual and methodological stages of my argument set out earlier. It explains the notions of privacy, autonomy and children's rights, which form the conceptual foundation of my argument. It also presents a children's rights approach to decisional privacy and to re-reading judgments from a children's rights perspective.

Chapter 1 forges the nexus between privacy and autonomy, and articulates how privacy enables and protects an autonomous way of life. I argue that the notion of autonomy sits uneasily with conceptions of children and childhood in Western liberal societies. I explain how a theory of children's right to decisional privacy draws on an interest theory of rights to bestow rights on children irrespective of their capacity to exercise those rights. I also propose a gradual, relational and evolving understanding of autonomy to overcome the criticism that children cannot exercise autonomy because they lack the capacity to do so.

Chapter 2 develops a children's rights approach to decisional privacy. I present what I consider to be four salient features of a children's rights approach, and highlight some potential constraints on judges' willingness and ability to engage with children's rights in their decision-making.

Chapter 3 presents what I consider to be the key features of a children's rights judgment. I explain how, through four stages of the judicial decision-making process, such a judgment can enhance the child's decisional privacy in proceedings under the Family Law Act.

Part B, which forms the practical stage of my argument, applies the theory developed in Part A to scrutinise the exercise of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act in special medical procedure applications, using gender dysphoria proceedings as a case study.

Chapter 4 explains the nexus between gender dysphoria proceedings and children's decisional privacy rights. It raises a number of decisional privacy issues at play in these proceedings, and

traces the socio-historical trajectory of the Family Court's welfare jurisdiction in special medical procedure applications.

Chapters 5 and 6 apply the children's rights approach to decisional privacy developed in chapters 2 and 3 to critically analyse the judgments of the Full Court of the Family Court in *Re Jamie* and in *Re Kelvin* respectively.

Chapter 5 argues that, through the Full Court's conclusion in *Re Jamie* that the Family Court must remain involved in medical treatment for gender dysphoria, by determining the issue of the child's capacity to consent, the Full Court denied decisional privacy to Georgie Stone and to other transgender children and young people in relation to their own bodies and identities. This is notwithstanding the Full Court's effort to engage with children's rights in its judgment.

Chapter 6 challenges the alleged strides that the Full Court in *Re Kelvin* made in championing the rights of children diagnosed with gender dysphoria. I argue that, when analysed using a children's rights approach, the Full Court's decision was not concerned with children's decisional privacy rights at all; rather, it was about the extent to which the Family Court should encroach on parents' ability (and responsibility) to make medical treatment decisions for and on behalf of their children.

Chapter 7 responds to concerns that recognising children's decisional privacy rights will fracture family relationships, undermine parental authority, and incite conflict between children and their parents. It also proposes three interrelated processes for translating a theory of children's decisional privacy into Australian family law policy and practice, and explains the social value of children's decisional privacy in this context.

The concluding chapter reflects on the tensions exposed between children's rights, parental responsibilities and the Family Court's duty to 'protect the rights of children and to promote their welfare',[149] in re-conceptualising the meaning and value of privacy in proceedings under the Family Law Act. It highlights the challenges involved in effectively implementing children's decisional privacy rights, and offers suggestions for future research.

[149] *Family Law Act 1975* (Cth) s 43(1)(c).

1

THE MEANING AND VALUE OF PRIVACY

I INTRODUCTION

In this chapter, I explain the meaning and value of the broad, contested notion of privacy. In Part II, I present an overview of competing conceptions of privacy, and lay the foundations for my view that privacy serves the liberal ideal of autonomy. In Part III, I elaborate on the value of privacy within the liberal democratic framework. I explain how privacy is instrumentally valuable as a condition that enables individuals to pursue their own conceptions of the good life. The crux of my framework is that individuals value privacy because they value autonomy, and autonomy can only be fully realised and experienced through the conditions of privacy.[1] I understand autonomy to embrace both freedom *from* intervention by the state and others; and freedom *to* develop and pursue one's own life plan for self-fulfilment. I then explain how privacy is understood as enabling autonomy through its three dimensions. The spatial dimension facilitates authentic behaviour through the scope that it provides for self-reflection, self-invention, and the possibility of intimate and family relationships. Informational privacy enables individuals to present themselves to others in different roles and in different ways, through selective, self-controlled information disclosure, thereby protecting the conditions for autonomy. Decisional privacy offers individuals the freedom to make important decisions about how they live their lives, and the self-expression that it enables gives individuals the independence to forge their identities and to define their values.

In Part IV, I articulate the challenges inherent in re-conceptualising the meaning and value of privacy in proceedings under Part VII of the *Family Law Act 1975* (Cth) (Family Law Act). Courts exercising jurisdiction under the Family Law Act must have regard to 'the need to protect the rights of children and to promote their welfare'.[2] I suggest that children's limited

[1] Beate Rossler, *The Value of Privacy* (Polity, 2005) 1, 75; Joseph Kupfer, 'Privacy, Autonomy and Self-Concept' (1987) 24 *American Philosophical Quarterly* 81, 81.
[2] *Family Law Act 1975* (Cth) s 43(1)(c).

participation in proceedings under Part VII of the Family Law Act epitomises the dominant welfare approach to decision-making, underpinned by the principle of the 'best interests of the child' as 'the paramount consideration'. I argue that the notion of autonomy sits uneasily with conceptions of children and childhood in Western liberal societies, which emphasise children's vulnerability, immaturity and incapacity for rational decision-making, to justify the disparity in rights and responsibilities bestowed on children and adults respectively.[3] I elaborate on the significance of children's capacity (or lack thereof) for two competing theories of rights[4] – the interest theory, and the will or choice theory. I then explain how a theory of children's decisional privacy draws on the interest theory to bestow rights on children irrespective of their capacity to exercise those rights. Whilst acknowledging the perils inherent in the notion of 'family privacy' for children, I suggest that a gradual, relational and evolving understanding of autonomy – through which individuals learn to become, and to be, autonomous in and through social relations – overcomes the criticism that children cannot exercise autonomy because they lack the capacity to do so.

II WHAT IS PRIVACY?

The concept of privacy is conceived as an 'umbrella term' that serves a range of interests.[5] Some theories endeavour to explain privacy's meaning through a single defining feature. The most enduring and influential of these accounts include: the right to be let alone;[6] secrecy;[7]

[3] Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 31; Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306, 306-07; John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael Freeman (ed), *Law and Childhood Studies: Current Legal Issues* (Oxford University Press, 2012) 55, 58-9; Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 7; David Archard, *Children: Rights and Childhood* (Routledge, 2nd rev ed, 2004) 53-4.

[4] Cf. Lucinda Ferguson, 'Not Merely Rights for Children But Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177, 179, 191-95 (arguing that both the interest theory and the will or choice theory 'fail as accounts of children's rights'). See also Samantha Brennan, 'Children's Choices or Children's Interests: Which Do Their Rights Protect?' in David Archard and Colin Macleod, *The Moral and Political Status of Children* (Oxford University Press, 2002) 53, 62.

[5] See, e.g., Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 13; Daniel Solove, 'A Taxonomy of Privacy' (2006) 154 *University of Pennsylvania Law Review* 477, 486; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 45; Annabelle Lever, *On Privacy* (Routledge, 2012) 4, 7.

[6] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193, 193, 195 (citation omitted).

[7] Sissela Bok, *Secrecy: On the Ethics of Concealment and Revelation* (Vintage Books, 1983) 11; Sidney Jourard, 'Some Psychological Aspects of Privacy' (1966) 31 *Law and Contemporary Problems* 307, 307.

limited access to the self;[8] control over information;[9] intimacy;[10] and personhood.[11] Recent privacy scholarship has emphasised theories that position social context as pivotal to understanding, defining and justifying privacy.[12]

A minority of scholars has argued against an independent right to privacy. The most noteworthy in this 'sceptical' or reductionist school is Judith Jarvis Thomson, who contends that a right to privacy does not exist, because any violation of such a right violates another right that is not the same as, or included in, the right to privacy.[13] Thomson's challenge to privacy is that it has no unique value. She submits that privacy is a 'cluster of rights' that 'derives' its value from other, more fundamental rights or interests, particularly property rights and rights over the person. As such, Thomson argues that privacy should be 'reduced' to these other values and rights.[14] Critics of Thomson's view emphasise that it is just as plausible that rights of ownership and rights to bodily security are 'derivative' from privacy rights,[15] because privacy does in fact protect 'something unique', and it is intrinsically valuable. If it is assumed that the values which privacy upholds fall under the umbrella of the values that are generally protected by property rights and personal rights, then it is likely that that 'something unique' will be overlooked if privacy is held to have no distinct value of its own.[16]

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[8] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 423; Hyman Gross, 'The Concept of Privacy' (1967) 42 *New York University Law Review* 34, 35-36.

[9] Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7; Arthur Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers* (University of Michigan Press, 1971) 25; Jerry Kang, 'Information Privacy in Cyberspace Transactions' (1998) 50 *Stanford Law Review* 1193, 1205; Charles Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475, 482.

[10] Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 56; Robert Gerstein, 'Intimacy and Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 265, 265, 270-71.

[11] Stanley Benn, 'Privacy, Freedom and Respect for Persons' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 223, 228-9; Jeffrey Reiman, 'Privacy, Intimacy and Personhood' (1976) 6 *Philosophy and Public Affairs* 26, 37.

[12] On contextual accounts, privacy depends on the actors, relationships and information involved in any given context, such that what is considered 'private' changes over time, and is influenced by changes in society, policy and technology. Contextual accounts argue that privacy has no 'overarching value', and that its value is influenced and determined by the context in which privacy is invoked. Two of the most influential 'contextual' theories are the pragmatic approach, devised by Daniel Solove, and Helen Nissenbaum's 'contextual integrity' theory. See Daniel Solove, 'Conceptualizing Privacy' (2002) 90 *California Law Review* 1088; Solove, 'Taxonomy of Privacy' (n 5); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010).

[13] Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4 *Philosophy & Public Affairs* 295.

[14] Ibid 306, 312-13.

[15] DeCew (n 5) 3, 29, citing William Parent, 'A New Definition of Privacy for the Law' (1983) 2 *Law and Philosophy* 305, 307. See also Thomas Scanlon, 'Thomson on Privacy' (1975) 4 *Philosophy and Public Affairs* 315.

[16] Reiman (n 11) 28. See also Scanlon (n 15) 317-18.

To 'reduce' the notion of privacy in the Australian family law context to the 'more fundamental' rights to which Thomson refers – namely, property rights, and rights over the person – would be to generate both conceptual and practical difficulties in the application of the 'best interests' principle in proceedings under Part VII of the Family Law Act, which deals with children's matters. At the conceptual level, the doctrine of *patria potestas* (paternal power) in Roman law bestowed fathers with property-like rights of custody and control over their children.[17] This doctrine constructed social perceptions of the parent-child relationship as being akin to property ownership. The child's role in society was predominantly to further the interests of the family as an entity, by maintaining the family's land-holding.[18] The progress of family law has been such that property norms regulating the relationship between parents and children have been displaced by an emphasis on children's best interests as the paramount consideration.[19] The Family Court of Australia has observed that the definition of parental responsibility in the Family Law Act 'deliberately omits any reference to rights in order to discourage any perception the parents own, or have some form of property in, their children'.[20] The Family Court has emphasised that '[t]he paramount consideration is not what the parents think is appropriate, not what they think is fair for them as parents, not what their parental rights are – but what is in the children's best interests'.[21] Furthermore, 'the tenor of the Act itself emphasises any rights that exist sit with the children and any notions of the parental "ownership" of children are discouraged'.[22] The contemporary justification for the rights of parenthood, then, is that such rights exist so as, and only so far as, to protect and nurture children until they reach adulthood and independence.[23] Any notion of privacy that entertained the view that parents had property rights over their children would be fundamentally antithetical to the foundations of contemporary family law.

[17] Jill E Hasday, *Family Law Reimagined* (Harvard University Press, 2014) 133; John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161, 162; Barbara Bennett Woodhouse, '"Who Owns the Child?" Meyer and Pierce and the Child as Property' (1992) 33 *William and Mary Law Review* 995; David Archard, 'Do Parents Own their Children?' (1993) 1 *International Journal of Children's Rights* 293.
[18] Eekelaar, 'Emergence of Children's Rights' (n 17) 162-63.
[19] Woodhouse, '"Who Owns the Child?"' (n 17) 1038-39.
[20] *W and G (No 1)* (2005) FLC ¶93-247, 80,052 [86].
[21] *Arunya & Dobson* [2010] FamCA 155 (15 February 2010) [7].
[22] *Pickle & Sackville* [2017] FCCA 1456 (11 July 2017) [85].
[23] Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths, 1995) 23. See also *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 183-84 ('The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child': per Lord Scarman).

An additional, related problem with the reductionist conception of privacy in the family law context is that notions of 'ownership' over property and over the person – that 'our bodies are ours and so we have the same rights with respect to them that we have with respect to our other possessions'[24] – are bound up with the notion of children's evolving autonomy. If, as I argue below, the value of privacy inheres in upholding autonomy – the condition that enables people to pursue their own conceptions of the good life – then privacy is not derivative, but rather, provides the preconditions required for individuals to consider their existence their own, and to be able to meaningfully claim personal and property rights.[25] The conception of privacy that I advance in this thesis is concerned with the *choices* that the child can make in relation to his or her possessions (property rights) and his or her body (rights over the person), consistent with the child's evolving capacities and guided by the child's parents, so that the child can answer the 'practical question'[26] of how he or she would like to live and what kind of person he or she would like to be. This question can only be answered if privacy is recognised as a distinct right or interest, valuable because it enables one to live an autonomous life. Acknowledging that the status of the term privacy remains open to scholarly debate,[27] in this thesis, the sources of children's right to decisional privacy are philosophical – drawing on scholarship on the meaning and value of the concept of privacy; and legal – drawing on international human rights law, in particular, the *United Nations Convention on the Rights of the Child* (UNCRC).[28]

The liberal concept of privacy is constructed around three domains, which are predicated on an ideological separation of life into seemingly opposite spheres of 'private' and 'public' responsibilities and activities. The history of the 'private' as the sphere of the family precedes liberalism, with its classic enunciation by Aristotle. The 'polis', a structured realm of political and civic activity, was strictly demarcated from the 'oikos', a private sphere attached to the home and the family.[29] The private has historically been equated with the domestic sphere, comprising intimate, family and sexual relationships, while the public has been used to denote a realm of politics, market and power.[30] This conceptual distinction between 'public' and

[24] James Rachels, 'Why Privacy is Important' (1975) 4 *Philosophy & Public Affairs* 323, 332.
[25] Reiman (n 11) 43.
[26] Rossler (n 1) 43.
[27] Gavison, 'Privacy and the Limits of Law' (n 8) 424.
[28] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).
[29] See Arlene Saxonhouse, 'Classical Greek Conceptions of Public and Private' in Stanley Benn and Gerald Gaus (eds), *Public and Private in Social Life* (St Martin's Press, 1983) 363.
[30] Susan Boyd, 'Challenging the Public/Private Divide: An Overview' in Susan Boyd (ed) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, 1997) 3, 8-10.

'private' assumes the value of a distinct realm of non-intervention for the family and family members in their intimate and caretaking relationships.[31] The public/private divide has long had a gendered, hierarchical aspect: the public considered the sphere of men, the private the sphere of women,[32] with children subordinate to adult decision-makers in each sphere. I elaborate on this point below in the context of challenging the liberal concept of 'family privacy'.

Each of privacy's three domains serves the ideal of autonomy in different ways, by regulating access to the individual; by regulating the selective withholding and disclosure of information by, and about, the individual; and by protecting the individual's capacity to make decisions, behave, take action and pursue a way of life of his or her choosing. The essence of the privacy-autonomy nexus in liberal societies is that 'it is only through … "spaces" marked out by the borderline between private and public that the design, development and exercise of (certain aspects of) autonomy become possible'.[33] Below, I explain the spatial and informational dimensions of privacy to the extent that they are relevant to the notion of family privacy. My primary focus is on privacy's decisional dimension and how decisional privacy has been – and should be – understood in relation to the determination of children's best interests in proceedings under Part VII of the Family Law Act.

A *The Spatial Dimension: The Home as the Locus of the Family's Private Life*

The spatial dimension of privacy recognises the sanctity of the home as a private or personal realm, where individuals can expect protection from arbitrary interference, intrusion and surveillance by the state or others. The family, on liberal accounts, is a symbol of private space; and the home the localisation of the family's 'true private life',[34] valued as a secluded physical

[31] Suzanne Kim, 'Reconstructing Family Privacy' (2006) 57 *Hastings Law Journal* 557, 581.
[32] See Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497, 1499-1501; Boyd (n 30) 3.
[33] Rossler (n 1) 73.
[34] Rossler (n 1) 142-43, 152-53. The traditional focus of family privacy on the home as a 'private sanctuary' or place of seclusion and inviolability, is reflected in the phrase 'a man's home is his castle'. This statement derives from ancient Rome: '*quid enim sanctius, quid omni religione munitius, quam domus unusquisque civium?* What more sacred, what more strongly guarded by every holy feeling, than a man's own home?' (Cicero). It is also reflected in the eminent words of Sir Edward Coke, '[t]hat the house of every one is to him as his Castle and Fortress as well for defence against injury and violence, as for his repose' (*Semayne's Case*, 77 Eng Rep 194, 195; 5 Co Rep 91, 195 (KB 1604)) and the comment of William Blackstone that 'the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle' (*Commentaries on the Laws of England*, book 4 ch 16).

space for the possibility and realisation of both intimate and family relationships, and individual solitude.[35] Through the scope that it provides for self-reflection and self-invention, spatial privacy facilitates authentic behaviour: the ability to withdraw from others gives individuals the freedom to define themselves.[36] However, the spatial dimension of privacy has, as feminists have successfully exposed, been used to legitimise violence against women and children in the home on the basis of 'non-intervention' in the family,[37] by viewing that violence as 'intimate' and non-systemic.[38] This is where spatial privacy poses a dilemma: it is both fundamental to understandings of the family in contemporary liberal societies, yet bears the potential to foster and disguise situations that endanger individual family members, particularly women and children. This tension between individual and group rights, with respect to the relationship between parents and children within the family, is discussed further below.

B *The Informational Dimension: Access to and Control Over Information*

The essence of the informational dimension of privacy is 'who knows what about a person and how they know it'.[39] Informational privacy operates to protect individuals from actual and potential invasions of privacy through (mis)appropriation and (mis)use of information, and offers control in deciding who will access that information and for what purposes. It enables individuals to present themselves to others in different roles and in different ways, through selective, self-controlled information disclosure, thereby protecting the conditions for

[35] Rossler (n 1) 168.
[36] Charles Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Harvard University Press, 1970) 143; Reiman (n 11) 40.
[37] Frances Olsen, 'The Myth of State Intervention in the Family' (1984–5) 18 *Michigan University Journal of Law Reform* 835.
[38] Law reform campaigns, driven by the catchphrase, 'the personal is the political', have sought to shift or demolish the metaphorical boundaries around the family as a 'sacrosanct private sphere'. See, e.g., Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2, 11; Katherine O'Donovan, 'Divisions and Dichotomies' in Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) 2, 8-11; Jena McGill, '"What Have You Done for Me Lately?" Reflections on Redeeming Privacy for Battered Women' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 157, 160-66; Hilary Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 243, 254; Kim (n 31) 572, 574-5; Martha Albertson Fineman, 'What Place for Family Privacy?' (1999) 67 *George Washington Law Review* 1207, 1217; Barbara Bennett Woodhouse, 'The Dark Side of Family Privacy' (1999) 67 *George Washington Law Review* 1247, 1254-55; Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge, 2014) 188; Reva B Siegel, '"The Rule of Love": Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2117, 2153; Ruth Gavison, 'Feminism and the Public–Private Distinction' (1992) 45 *Stanford Law Review* 1, 14-18; Carol Smart, 'Regulating Families or Legitimating Patriarchy? Family Law in Britain' (1982) 10 *International Journal of the Sociology of Law* 129.
[39] DeCew (n 5) 75-6. See also Rossler (n 1) 111.

autonomy and identity development.[40] In doing so, informational privacy contributes to the individual's engagement in a 'self-creative enterprise'[41] and ability to define his or her own self-presentation to others. The notion of self-presentation illustrates the active role that individuals play in constructing their social identity, by acting to be seen by others in the way they want to be seen.[42]

Consider the example of a family law litigant self-publishing details of his or her litigation on Facebook, which is Australia's most widely-used social media platform.[43] If that litigant has sought to restrict the disclosure of information posted, whether by having a 'private' Facebook profile or limiting the 'friends' who can view his or her posts, then the subsequent sharing of that information by others beyond the audience intended would amount to a privacy violation, by fundamentally altering the conditions in which the litigant acts and makes choices.[44] This is known as 'context collapse'.[45] Privacy offers individuals the capacity to 'compartmentalize information' about themselves.[46] The 'spreading of information beyond expected boundaries',[47] or a loss of control over what other people know about an individual, and who has access to information about the individual, impairs the authenticity of that individual's self-determined and self-controlled behaviour, thus violating the conditions for autonomy. So a violation of an individual's informational privacy can occur not only where previously concealed information is revealed, but also where information already made available is made more accessible.[48]

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[40] Beate Rossler, 'What is There to Lose? Privacy in Offline and Online Friendships', *Eurozine* (online), 27 February 2015 <http://www.eurozine.com/articles/2015-02-27-rossler-en.html>; Kirsty Hughes, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in Dorota Mokrosinska and Beate Roessler (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 225, 226.

[41] Benn (n 11) 242.

[42] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 15-16.

[43] Roy Morgan, 'Facebook on top but Instagram and Pinterest growing fastest' (Press Release No 7979, 17 May 2019) <http://www.roymorgan.com/findings/7979-social-media-trends-march-2019-201905170731>.

[44] Reiman (n 11) 37.

[45] Jenny L Davis and Nathan Jurgenson, 'Context Collapse: Theorizing Context Collusions and Collisions' (2014) 17 *Information, Communication & Society* 476. See also Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media* (Routledge, 2014) 130.

[46] Tunick (n 45) 45; Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962, 973.

[47] Solove, 'Taxonomy of Privacy' (n 5) 535; see also Lior Jacob Strahilevitz, 'A Social Networks Theory of Privacy' (2005) 72 *University of Chicago Law Review* 919, 921.

[48] Daniel Solove, *The Future of Reputation:* Gossip, Rumor, and Privacy on the Internet (Yale University Press, 2007) 170; Tunick (n 45) 151.

C *The Decisional Dimension: Freedom for Self-Expression and Decision-Making*

The focus of this thesis, privacy's decisional domain, protects an individual's ability to make decisions which contribute to defining his or her identity, free from the interference of other individuals or the state.[49] It creates an area for choices, and the development of 'plans of life'[50] and a sense of self. Decisional privacy is facilitated by social relations of varying degrees of intimacy.[51] If autonomy lies in the individual being the 'author of her [or his] own biography', then the individual's life must be free from the 'interpretative sovereignty' of others (whether in the form of commentary, criticism, objections, influence) that may restrict or hamper the individual in his or her decision-making, behaviour and way of life.[52] For instance, both negative comments and objections ('you shouldn't allow your child to walk to school by themselves at such a young age'), as well as approval and positive remarks ('your child is so polite'), can amount to a violation of decisional privacy, as both might amount to unwelcome attention and interference in the seemingly 'private' matter of how a parent raises his or her child. A vital aspect of decisional privacy, which is drawn out by the case studies in chapters 5 and 6 of this thesis, is the issues of to whom, and how, an individual should justify his or her decisions, actions or ways of life.

III UNDERSTANDING THE VALUE OF PRIVACY

Having responded to the question of privacy's meaning, I now turn to address privacy's value. Pinpointing the value of privacy is vital to the task of conceptualising privacy; yet demonstrating that privacy is valuable can be difficult. The widespread disagreement about 'privacy' as a concept emanates from disagreements about the values that privacy serves, and from different views on how those values are conceptualised. Consequentialist (or

[49] DeCew (n 5) 77-78.
[50] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 407-15, §63.
[51] John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 566, 578-9. See also *Niemietz v Germany* (1993) 16 EHRR 97 ('Respect for private life must … comprise to a certain degree the right to establish and develop relationships with other human beings'); *Botta v Italy* (1998) 26 EHRR 97, [32] and *Von Hannover v Germany (No 2)* [2012] ECHR 228, [95] (the right to respect for private life includes the individual's capacity to develop 'relations with other human beings'); *Coereil and Aurik v The Netherlands,* Comm No 453/91 (9 December 1994) CCPR/C/52/D/453/1991, [10.2] ('the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone').
[52] Rossler (n 1) 84, 88.

instrumentalist) theories on the one hand, and deontological (or intrinsic) theories on the other, differ in their answers to the question of why privacy is valued. Consequentialist approaches view privacy as instrumental to something else that is assumed or known to be valuable. The value of privacy lies, for instance, in its ability to foster intimate relationships;[53] to ensure individual autonomy;[54] to promote psychological well-being;[55] and to enable the effective functioning of democratic governments.[56] Privacy is worthy of protection for its beneficial consequences. By contrast, deontological approaches treat privacy as inherently or intrinsically valuable; privacy derives its value for what it 'is', rather than what it 'does'. The instrumental and intrinsic values of privacy are not necessarily mutually exclusive.

In this thesis, I contend that privacy has an instrumental value; and that it is valued as a prerequisite for the liberal ideal of autonomy. Privacy is normatively important because it protects the diversity of personal choices, actions and ways of life, and it is a necessary condition of the development of an autonomous self. Thus, the concept of privacy is more than the absence of unwarranted interference by the state or other individuals. Privacy rights, Feldman has observed, 'have extended beyond their original concern – threats to private space, particularly the home – to encompass personal security, self-fulfilment, and identity, including the organisation of family life and relationships'.[57] Privacy extends to the control that individuals, including children, have over their personal spaces and boundaries, and their capacity to define their relationships with others and to define themselves in relation to those others, including their families and communities.[58] Central to the idea of control and capacity is the notion of autonomy.

Classic definitions of autonomy within liberalism embrace the autonomous individual as 'a (part) author of his [sic] own life',[59] who has the 'capacity to choose his or her own roles and

[53] Gernstein (n 10) 265; Inness (n 10); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Vintage Books, 2001) 8.
[54] Rossler (n 1) 1, 75; Kupfer (n 1) 81.
[55] Westin (n 9) 35.
[56] Gavison, 'Privacy and the Limits of Law' (n 8) 455; C Keith Boone, 'Privacy and Community' (1983) 9 *Social Theory and Practice* 1, 8; Solove, *Understanding Privacy* (n 5) 80.
[57] David Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) 3 *European Human Rights Law Review* 265, 266. See also Tobin and Field (n 51) 560. Cf. James Griffin, 'The Human Right to Privacy' (2007) 44 *San Diego Law Review* 697.
[58] Tobin and Field (n 51) 599; Terri Dowty, 'Pixie-dust and Privacy: What's Happening to Children's Rights in England?' (2008) 22 *Children and Society* 393, 397.
[59] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 369.

identities, and to rethink those choices'.[60] A person is autonomous if he or she can ask the 'practical question', and live accordingly. That question is, 'how do I want to live, what sort of person do I want to be, and how I should best strive for my own good in my own way?'[61] The essence of the concept of autonomy is the notion of a person being able to live authentically, guided by desires, characteristics, values, conditions and considerations that are not externally imposed, but are self-governed and one's own.[62]

Australian family law has developed within a society shaped by the 'four basic pillars' of liberty, equality, democracy and neutrality of the state.[63] As such, the law itself has been, and continues to be, shaped by those values. Australia's institutions, including the Family Court, are premised upon the clear view that 'liberal values are, and should be, foundation principles for the nature and conduct of our society'.[64] However, what exactly is captured by the term 'liberal values' is vague and contested. Difficulties persist in defining liberal values, and how to reconcile them when they conflict.[65] Additionally, liberal values have been critiqued, reinterpreted and reshaped by a rich body of feminist scholarship[66] and children's rights scholarship.[67] The concepts of autonomy and privacy, then, are no longer wedded to the traditional liberal ideal of the rational, competent, independent adult who has the capacity to determine and act in his or her own best interests.[68] Rather, those concepts now embrace

[60] Helen Reece, *Divorcing Responsibly* (Hart Publishing, 2003) 13.
[61] Rossler (n 1) 43, 50-51.
[62] John Christman and Joel Anderson, 'Introduction' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005) 1, 3. See also Rossler (n 1) 53-60. The European Court of Human Rights has held that the right to privacy – expressed as the right to respect for private and family life under art 8 of the ECHR – 'is primarily intended to ensure the development, without outside interference, of the personality of each individual' (*Botta v Italy* (1998) 26 EHRR 97, [32]; *Von Hannover v Germany (No 2)* [2012] ECHR 228, [95]); and that 'the notion of personal autonomy is an important principle underlying its interpretation' (*Pretty v United Kingdom* (2002) 35 EHRR 1, [61]).
[63] Rossler (n 1) 10. See also Charles Taylor, *Philosophical Arguments* (Harvard University Press, 1995) 287 (identifying 'freedom, self-government, and a rule of right founded on equality' as values that a 'viable' liberal society must take account of).
[64] Marilyn Warren, 'Australia, Values and the Future: Getting to the Heart of the Matter' (Australian Future Directions Forum, Melbourne, 5 February 2006) 1.
[65] Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them' (1997) 21 *Melbourne University Law Review* 237, 272.
[66] See, e.g., Margaret Thornton, 'The Development of Feminist Jurisprudence' (1998) 9 *Legal Education Review* 171; Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995); Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Harvester Wheatsheaf, 1993) 69; O'Donovan, *Sexual Divisions in Law* (n 38).
[67] See, e.g., John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 161; Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1; John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) ch 7.
[68] Tobin, 'Understanding Children's Rights' (n 67) 161.

relationality,[69] which I discuss below, and they also acknowledge children's evolving capacities,[70] which has shifted understandings of who has rights and who can enjoy privacy and autonomy.

With this more nuanced understanding of autonomy, I submit that privacy in liberal societies is valuable and necessary for both freedom *from* intervention by the state and other individuals; and freedom *to* forge a life plan and fulfil that plan in pursuit of a rewarding life.[71] There are two aspects of freedom. The negative aspect aligns with the Hobbesian definition of the absence of obstacles or interference.[72] The positive aspect of freedom is the conditions and capacity for autonomy, or the ability to 'will' and a sufficient range of options from which to choose. Privacy enables one aspect of freedom by addressing the other: it provides the conditions of negative freedom, within which an individual can exercise positive freedom.[73]

'Autonomy' and 'freedom' are sometimes used interchangeably, yet they are distinct values. Griffin[74] distinguishes them thus: 'Autonomy is a feature of deliberation and decision; it has to do with deciding for oneself. [Freedom] is a feature of action; it concerns pursuing one's aims without interference'.[75] An individual requires freedom to be able to exercise autonomy, and yet not every free action can be simultaneously labelled autonomous.[76] Hence a child may make

[69] See, e.g., John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143, 156; Jonathan Herring, *Relational Autonomy and Family Law* (Springer, 2014) 48-49; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in Allan Hutchinson and Leslie Green (eds), *Law and the Community: The End of Individualism?* (Carswell, 1989) 219, 225; Catriona MacKenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, 2011); Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4; Kathryn Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76 *Modern Law Review* 1046, 1049.

[70] See, e.g., John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159; John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42.

[71] Rossler (n 1) 44.

[72] Thomas Hobbes, *Leviathan*, ed Crawford Brough Macpherson (Penguin, 1968) 261ff.

[73] See also Catriona MacKenzie, 'Three Dimensions of Autonomy: A Relational Analysis' in Andrea Veltman and Mark Piper (eds), *Autonomy, Oppression and Gender* (Oxford University Press, 2014) 15 (setting out two external conditions for autonomy: 'freedom' conditions, being the 'social and political constraints that interfere with the exercise of self-determination and the political and personal liberties that enable it', and 'opportunity' conditions, which are 'the opportunities that need to be available to agents in social environments for them to have claims about what to value, to be and to do').

[74] Who, I explain further below in setting out two competing theories of rights, argues that children do not possess human rights: see James Griffin, *On Human Rights* (Oxford University Press, 2008) 90.

[75] Ibid 226.

[76] Ibid 150-51.

a decision without independent thought and reflection, on the basis of conformity to the values of his or her parents (which could be the product of manipulation, indoctrination, domination), although that child might nonetheless be free to pursue those values as he or she desires.[77] On this example, the child can be said to have freedom, but not autonomy. This nuance enlivens the practical question: an autonomous life is one in which an individual has an attitude to himself or herself; the opportunity to contemplate his or her desires and actions, and to ask how he or she seeks to live a rewarding, self-determined life – his or her own conception of the good life.[78] The capacity to understand what one considers to be the good life involves being able to both construct, and act upon, one's own set of values and life goals that provide the individual with direction and scope for self-reflection.[79] Fulfilment of this liberal ideal of being able to lead an autonomous life depends on the conditions of, and on claims to, privacy.[80] That is, privacy delineates the realms that the individual requires to enjoy the freedoms protected in modern liberal societies, including autonomy. But it does more than simply protect those freedoms – privacy 'substantialises' them, by securing the conditions that individuals need to be able to exercise and enjoy those freedoms.[81]

Such an understanding of privacy's value aligns with the interpretation of the right to privacy in international human rights law. Article 16 of the UNCRC protects the child against 'arbitrary or unlawful interference with his or her privacy, family, home or correspondence'. International human rights jurisprudence has identified at least five discrete aspects of the right to privacy under article 16, including physical and psychological integrity; decisional autonomy; personal identity; informational privacy; and spatial or physical privacy.[82] Similarly, the European Court of Human Rights (ECtHR) has held that the 'right to respect for private and family life' under article 8 of the *European Convention on Human Rights* (ECHR)[83] embraces all activities within the personal autonomy of an individual and 'covers the physical, moral and

[77] Ibid 151.
[78] Rossler (n 1) 51-2.
[79] Griffin, *On Human Rights* (n 74) 32, 150; Eric Mitnick, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006) 21.
[80] See Nissenbaum (n 12) 82; Griffin, *On Human Rights* (n 74) 223; Rossler (n 1) 72-3.
[81] Rossler (n 1) 72, 81.
[82] Tobin and Field (n 51) 560-61. See also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2005) 385-92.
[83] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). Some scholars have argued that the term 'private life' under article 8 of the ECHR and the term 'privacy' under article 16 of the UNCRC 'basically mean the same thing': see Nowak (n 82) 385; David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 3rd ed, 2014) 305.

psychological integrity of a person … [and] can sometimes embrace aspects of an individual's physical and social identity'.[84] Article 8 of the ECHR has also been held to protect 'a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world'.[85] These interpretations of the scope of article 16 UNCRC and article 8 ECHR align with my understanding of autonomy as capturing a form of positive freedom, namely, personal self-determination and reflection about how an individual wishes to live his or her life.

In this Part, I have justified the value of privacy as offering the environment that enables individuals to live autonomously. Fortin has argued that 'children, as human beings, should, like adults, … be free to lead their own lives according to their own conception of a good or worthwhile life, provided that this does not illegitimately restrict the liberty of others to do the same'.[86] However, the notion of autonomy in relation to children and their lives remains problematic. Two obvious challenges to my justification of privacy's value come to mind in developing a theory of children's decisional privacy. The first is that children are not, and cannot be, autonomous. The second is that, even if children are recognised as autonomous beings, they cannot in fact exercise that autonomy, because they lack the capacity to do so. In Part IV, I will show that these challenges are without foundation. I argue that children's capacity for autonomy and in some circumstances, their actual autonomy, must be recognised, as must children's ability to enjoy their decisional privacy rights irrespective of their autonomy.

IV THE CHALLENGE OF (RE)CONCEPTUALISING CHILDREN'S DECISIONAL PRIVACY

The concept of *capacity* is fundamental to the distinction between two competing theories of rights – the interest theory, and the will or choice theory. The theory of children's decisional

[84] *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]. See also *Georgel and Georgeta Stoicescu v Romania* [2011] ECHR 1193 (26 July 2011) [48]-[49] (setting out the general principle that 'the concept of private life includes a person's physical and psychological integrity'). See further, John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 284. For an overview of the ECtHR jurisprudence on art 8 of the ECHR, see Harris, O'Boyle, Bates and Buckley (n 83) ch 9; Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (Oxford University Press, 6th ed, 2014) ch 16.
[85] *Bensaid v United Kingdom* (2001) 33 EHRR 10, [47].
[86] Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 19, citing Richard Lindley, 'Teenagers and Other Children' in Geoffrey Scarre (ed), *Children, Parents and Politics* (Cambridge University Press, 1989) 75.

privacy developed in this thesis is premised upon an interest theory of rights. Under the interest theory, children's entitlement to rights exists *irrespective* of their capacity to exercise those rights. The interest theory understands a right as involving the protection of a sufficiently important interest, and the imposition of duties on others, the performance of which ensures that the rights-holder can enjoy that interest.[87] This is the preferred theory of rights under international human rights instruments, including the UNCRC, and it is also endorsed by many scholars.[88] I take children's evolving autonomy – their capacity for autonomy and in some cases, actual autonomy – as the interest to be promoted by recognising and respecting children's right to decisional privacy.[89] However, this interest must be capable of withstanding two common criticisms from children's rights detractors or proponents of the will theory of rights (although the two are not necessarily synonymous). To recapitulate, those criticisms are that children are not, and cannot be, autonomous; and that children are incapable of exercising autonomy. To understand the source of these criticisms, it is important to first explain the dominant understanding of children and childhood in Western liberal societies, which reflects a will or choice theory of rights. That theory, as I explain below, denies children rights on the basis of their perceived lack of capacity or competence.

A *The Dominant Western Conception of Children and Childhood: Emphasising Vulnerability, Dependence and Irrationality*

Childhood continues to be idealised in Western liberal societies, constructed as 'the "not-yet-ness" of adulthood'.[90] Pervasive in such idealisations are notions of the child as an innocent, dependent and vulnerable becoming,[91] constantly threatened and in need of protection from

[87] See Joseph Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1, 5. See also Robert E Goodin and Diane Gibson, 'Rights, Young and Old' (1997) 17 *Oxford Journal of Legal Studies* 185, 188.
[88] See, e.g., Neil MacCormick, 'Children's Rights: A Test-Case' in Neil MacCormick (ed), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, 1982) 154; Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights, Philosophical Enquiries* (Clarendon Press, 1998) 7; Freeman, 'The Human Rights of Children' (n 67) 21; Goodin and Gibson (n 87); John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 403.
[89] In this thesis, I acknowledge, but do not engage with, different approaches in the scholarship to determining the basis for justifying interests as rights: see, e.g., Raz, *The Morality of Freedom* (n 59) 176-83; Griffin, *On Human Rights* (n 74) 179-87; Allen Buchanan and Kristen Hessler, 'Specifying the Content of the Human Right to Health Care' in Allen Buchanan (ed), *Justice and Health Care: Selected Essays* (Oxford University Press, 2009) 203, 213; Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) 109-110.
[90] Archard (n 3) 48.
[91] Tobin, 'Understanding Children's Rights' (n 67) 158, 160.

'the kinds of thoughts and feelings the rest take for granted',[92] and also from participation in decision-making about matters that affect them.[93] The law seeks to protect the child from the perceived dangers of decision-making by those entrusted to act in the child's best interests (usually the child's parents), and also, somewhat incongruously, from the child's own behaviours and understandings.[94] Understanding children as 'vulnerable' in this context comprises both children's exposure to the possibility of harm, and their inability, or limited ability, to protect themselves from that harm.[95] This is reflected in the preamble to the UNCRC, which provides that childhood is a period of 'special vulnerability during which children are in need of special protection'.[96] The UNCRC assumes children's vulnerability to the risk of self-inflicted ('endogenous') harm, and imposes obligations on adults to take measures to protect children against such a risk.[97] This assumption is evident in article 3(1) of the UNCRC, which permits state intervention in a child's life where necessary to protect the child's best interests, and in article 5, which requires states to respect the rights, responsibilities and duties of parents to provide appropriate direction and guidance to children in the exercise of their rights. This approach under the UNCRC, which seeks to protect children from themselves, is consistent with Freeman's notion of 'liberal paternalism',[98] and it is arguably justified in light of children's lived experiences and the reality that '[c]hildren do not always act in ways that are consistent with their best interests'.[99]

[92] Joanne Faulkner, *The Importance of Being Innocent: Why We Worry about Children* (Cambridge University Press, 2011) 9.
[93] Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 219.
[94] See John Stuart Mill, *On Liberty*, ed Edward Alexander (Broadview Press, 1999) 52 ('Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury'). See also Samuel M Davis, *Children's Rights Under the Law* (Oxford University Press, 2011) 418.
[95] John Tobin, 'Understanding Children's Rights' (n 67) 167. See also Doris Schroder and Eugenijus Gefenas, 'Vulnerability: Too Vague and Too Broad?' (2009) 19 *Cambridge Quarterly of Healthcare Ethics* 113, 117 (who define vulnerability as a 'significant probability of incurring an identifiable harm while substantially lacking ability and/or means to protect oneself').
[96] See further discussion in Kirsten Sandberg, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84 *Nordic Journal of International Law* 221; cf. Griffin, *On Human Rights* (n 74) 85. Two other international instruments that acknowledge children as being in need of special protection are the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(1); and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10(3).
[97] Tobin, 'Understanding Children's Rights' (n 67) 164; Tobin, 'Justifying Children's Rights' (n 88) 428-29.
[98] Freeman, *The Rights and Wrongs of Children* (n 3) 54-60.
[99] Tobin, 'Understanding Children's Rights' (n 67) 165. According to Gerald Dworkin, paternalism as a doctrine justifies 'interference with a person's liberty of action … by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced': see Gerald Dworkin, 'Paternalism' in Richard A Wasserstrom (ed), *Morality and the Law* (Wadsworth Publishing, 1971) 107, 108.

Yet characterising children as vulnerable comes with the attendant risks 'that they will be defined by their vulnerabilities',[100] and that adults will fail 'to appreciate the particular skills and talents … that individual children have'.[101] These risks impede the recognition of children as capable of having and exercising decisional privacy rights. While the preamble to the UNCRC stresses children's vulnerability and children's need for 'special protection', the substantive text – in particular, the evolving capacities principle (article 5) and children's right to express their views in all matters affecting them (article 12) – demands a shift away from the welfare model,[102] towards an understanding of children as 'active participant[s] in the promotion, protection and monitoring of their rights'.[103] If it is accepted that vulnerability is a 'permanent and immutable feature of the human condition',[104] then the binary conception of children as vulnerable, dependent objects, and adults as autonomous, independent and competent agents, can be deconstructed.

The children's rights approach to decisional privacy developed in this thesis, the salient features of which I present in the next chapter, draws on these paradigms of children's evolving capacities and participation that underpin the UNCRC. Significantly, it does not deny that children are vulnerable. It accepts that all human beings are vulnerable – adults and children alike, albeit to differing degrees.[105] It also accepts that measures to protect children and their decisional privacy rights are in some circumstances warranted. However, as Tobin has argued, '[c]hildren's vulnerabilities are not simply a basis for legitimising adult intervention in children's lives'.[106] A children's rights approach to decisional privacy accepts and respects children's evolving capacities and right to meaningful participation in decision-making about matters that affect them, consistently with those evolving capacities, and requires that adults support and enable children to develop their decision-making capacities.

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[100] Tobin, 'Understanding Children's Rights' (n 67) 157.
[101] Jonathan Herring, 'Vulnerability, Children, and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (Oxford University Press, 2012) 243, 249.
[102] Tobin, 'Understanding Children's Rights' (n 67) 174.
[103] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [14].
[104] Tobin, 'Understanding Children's Rights' (n 67) 161-2. See also Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 10.
[105] Tobin, 'Understanding Children's Rights' (n 67) 157; Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006) 25-26; Fineman, 'The Vulnerable Subject' (n 104) 9-10; Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251, 255, 267; Herring, 'Vulnerability, Children and the Law' (n 101) 253, 257; Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 13, 13; Annette Ruth Appell, 'Accommodating Childhood' (2013) 19 *Cardozo Journal of Law & Gender* 715, 778.
[106] Tobin, 'Understanding Children's Rights' (n 67) 177.

The law is but one social institution that constructs children as binary opposites to adults. Children are presumed to be dependent, irrational and incompetent; adults are presumed to be independent, rational, and competent to determine and act in their own best interests.[107] In light of their vulnerability, children are conceptualised as human beings who do not yet have the essential attributes of citizenship – including autonomy, reason and the capacity for self-determination – but who will have these in the future.[108] As I explain below, these essential attributes have also been linked with an entitlement to rights,[109] and the distinction between the interest theory of rights and the will or choice theory of rights.

The dividing line between childhood and adulthood under the law is arbitrarily fixed by age.[110] Article 1 of the UNCRC defines a child, for the purposes of the Convention, as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.[111] In Australia, 18 years provides the age of 'instantaneous transformation' from childhood to adulthood.[112] However, to deny children rights on the basis of age alone, in Archard's words, 'would be morally arbitrary and unjust'.[113] Something more than age is used to deprive children of rights-bearer status: capacity, or more accurately, a perceived connection between children's age and their attainment of a relevant capacity or competence.[114] As the High Court of Australia explained:

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[107] Ibid 161; Freeman, 'The Human Rights of Children' (n 67) 9; Nick Lee, *Childhood and Society – Growing Up In an Age of Uncertainty* (Maidenhead, 2001) 8; Stalford and Hollingsworth (n 3) 31.
[108] Barbara Arneil, 'Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 70, 70-71. See also Freeman, 'The Human Rights of Children' (n 67) 9; Freeman, *The Rights and Wrongs of Children* (n 3) 56; Lee (n 107) 8.
[109] Tobin, 'Justifying Children's Rights' (n 88) 413.
[110] Stalford and Hollingsworth (n 3) 31; Freeman, 'The Human Rights of Children' (n 67) 14; Freeman, *The Rights and Wrongs of Children* (n 3) 58.
[111] But see Tobin, 'Justifying Children's Rights' (n 88) 399-401 (observing a 'lack of certainty with respect to when childhood begins and ends' in the definition of 'child' under article 1 of the UNCRC, which is said to raise the question of 'whether the particular conception of childhood under the CRC can be justified').
[112] Robert Ludbrook, 'Children and the Political Process' (1996) 2 *Australian Journal of Human Rights* 278, 283.
[113] Archard (n 3) 85.
[114] Ibid. See also Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Kluwer Law International, 1997) 34-5; Laurence D Houlgate, 'Children, Paternalism, and Rights to Liberty' in Onora O'Neill and William Ruddick (eds), *Having Children: Philosophical and Legal Reflections on Parenthood* (Oxford University Press, 1979) 274; Melinda Jones, 'Adolescent Gender Identity and the Courts' in Michael Freeman (ed), *Children's Health and Children's Rights* (Martinus Nijhoff, 2006) 121, 129.

> Children are presumed to be incompetent at birth and gradually to acquire legal competence for various purposes at different stages of their development until they reach the age of majority (eighteen), in which case they are presumed to have full legal capacity.[115]

It is important, however, to distinguish between competence or capacity and rights. Children's actual or perceived lack of capacity provides a common justification for denying rights to children,[116] and separates the interest theory of rights (upon which a children's rights approach to decisional privacy is based) from the will theory of rights. According to Tobin:

> Children may lack capacity to exercise their rights but they do not lack interests, and it is their *interests*, not their *capacity*, which form the foundation of rights under an interest theory.[117]

That is, on the interest theory, the status of being a human being is enough to entitle a child to rights; the child's capacity is irrelevant to that entitlement. However, that an individual must possess certain capacities, including the capacity to make rational choices, as a precondition to holding rights, has been pervasive in Western liberal philosophy. This understanding of rights is firmly rooted in notions of autonomy and reason in social contract theory.[118] The social contract theorists advanced the idea of a contract between citizen and state, based on the citizen's voluntary consent to be governed, with that notion of consent premised upon the citizen's ability to reason. Incapacity thus justified exclusion from the social contract. Yet the social contract theorists also envisioned a role for the child's parents and family in protecting the child.[119] The view that a lack of capacity justifies a denial of rights, as I noted earlier, forms the foundation of the will or choice theory of rights.[120] This theory conceptualises a right as 'the protected exercise of choice',[121] and so denies children the status of rights-bearers, owing

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[115] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 40 (McHugh J).
[116] Tobin, 'Justifying Children's Rights' (n 88) 433.
[117] Ibid 403.
[118] Tobin, 'Understanding Children's Rights' (n 67) 158.
[119] John Locke, *Two Treatises of Government and a Letter Concerning Toleration*, ed Ian Shapiro (Yale University Press, 2003) 125, §61; Jean-Jacques Rousseau, *The Social Contract, Or Principles of Political Right*, tr Henry J Tozer (George Allen & Unwin, 1948) 101; Mill (n 94) 52.
[120] See, e.g., HLA Hart, 'Are there Any Natural Rights?' (1955) 64 *Philosophical Review* 175; Carl Wellman, *Real Rights* (Oxford University Press, 1995); Hillel Steiner, *An Essay on Rights* (Blackwell, 1994); L W Sumner, *The Moral Foundation of Rights* (Clarendon Press, 1987).
[121] Archard (n 3) 58.

to their perceived inability to exercise rational choice. Brighouse, a proponent of the will theory, has argued that '[t]he further an agent departs from the liberal model of the competent rational person, the less appropriate it seems to attribute rights'.[122] Thus, Brighouse considers that children should not be entitled to fundamental agency rights, because they are assumed to lack competency and so they depart from this liberal model of the 'competent rational person'.[123] Griffin similarly has claimed that infants cannot possess human rights because they are 'not normative agents',[124] while Hart has argued that '[i]f common usage sanctions talk of the rights of … babies, it makes an idle use of the expression "a right"'.[125] The essence of such 'capacity scepticism'[126] is that for an individual to be a rights-holder presupposes capacities for rational choice, which children lack.[127]

A diluted version of the will theory proposes a 'proxy' exercise of choice: that is, children do have rights, but children's representatives (usually their parents) must make decisions on their behalf while children cannot exercise decision-making autonomy.[128] Where the child and his or her parents disagree about a matter, Dworkin has suggested that parents should choose for their children, 'not as they might want, but in terms of maximising [children's] interests that will make it possible for them to develop life plans of their own'.[129] The parental role, on Dworkin's view, is to maximise the child's *future* potential to exercise autonomy, and what Rawls has called 'primary goods' such as 'liberty, health and opportunity'.[130] The assumption

[122] Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 31, 31.
[123] Ibid. Brighouse does, however, accept that children are entitled to 'welfare rights' (or economic and social rights), on the basis that such rights are consistent with an interest theory of rights. Yet Brighouse argues that children's agency rights are not compatible with the interest theory because children do not have the competency to know what is in their best interests, and so it is not in children's interests to have the agency to waive their welfare rights: at 38-39.
[124] Griffin, *On Human Rights* (n 74) 83. Accepting that children's vulnerability imposes 'substantial obligations' on society that are not imposed by those who are able to look after themselves, Griffin argues that 'one must not run together a justification of an obligation and a justification of a right', and that there are obligations that are 'not correlative to a human right': at 85. For a critique of Griffin's reliance on agency to justify human rights, see Tobin, 'Understanding Children's Rights' (n 67) 159-60; Tobin, 'Justifying Children's Rights' (n 88) 402-03; John Eekelaar, 'Naturalism or Pragmatism? Towards an Expansive View of Human Rights' (2011) 10 *Journal of Human Rights* 230, 234.
[125] Hart (n 120) 181.
[126] Colin Macleod, 'Are Children's Rights Important?' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 191, 200-201.
[127] Freeman, *The Rights and Wrongs of Children* (n 3) 57.
[128] See HLA Hart, 'Bentham on Legal Rights' in Alfred W B Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Oxford University Press, 1973) 171, 184 n 86; Ferguson (n 4) 193-94; James G Dwyer, *The Relationship Rights of Children* (Cambridge University Press, 2006) 131.
[129] Gerald Dworkin, 'Consent, Representation, and Proxy Consent' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 191, 205.
[130] Rawls (n 50) 62; Dworkin, 'Consent, Representation' (n 129) 205.

of the will or choice theory of rights is that children do not appreciate the actual value of their choices and their ability to make those choices, and so should be deprived of the ability to choose. However, when rights depend on an individual possessing competency or capacity, then they become 'exclusive and exclusionary',[131] which effectively denies children access to rights discourse and its attendant potential for accountability and empowerment.[132]

In the next section, I contextualise this theoretical understanding of children's right to decisional privacy and the dominant conception of children and childhood, by explaining the welfare approach to decision-making in proceedings under Part VII of the Family Law Act.

1 *Decision-Making under Part VII of the Family Law Act: A Welfarist Approach to the Best Interests of the Child as the Paramount Consideration*

The 'paramountcy' principle – the notion of 'the best interests of the child' as the paramount consideration – remains the key reference point for decision-making under Part VII of the Family Law Act.[133] This principle (which is also enshrined in the UNCRC, although best interests being *a primary* consideration)[134] underpins the welfare model.[135] It requires that parents act in the best interests of their child(ren), and state intervention is justified by parents' failure to so act.[136] To the extent that it has shifted the sole focus away from parental and adult interests by emphasising children's best interests, the welfare model has been 'very beneficial for children'.[137] However, the 'dark side' of the welfarist approach, according to Eekelaar, is that the obligation to promote and protect the child's best interests also involves adults

[131] Katherine Hunt Federle, 'Rights Flow Downhill' in Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Koninklijke Brill, 2011) 447, 448.
[132] Tobin, 'Understanding Children's Rights' (n 67) 159-60.
[133] For a more detailed discussion of the 'paramountcy' principle, see Richard Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87; John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237; Jonathan Herring, 'Farewell Welfare?' (2005) 27 *Journal of Social Welfare and Family Law* 159; Robert van Krieken, 'The "Best Interests of the Child" and Parental Separation: on the "Civilizing" of Parents' (2005) 68 *Modern Law Review* 25; Joan Kelly, 'The Best Interests of the Child: A Concept in Search of Meaning' (1997) 35 *Family Court Review* 377.
[134] See John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 95-6.
[135] Tobin, 'Understanding Children's Rights' (n 67) 171.
[136] See Eekelaar, *Family Law and Personal Life* (n 67) 9-17 for an overview of the welfare model and its development.
[137] Ibid 56; Tobin, 'Understanding Children's Rights' (n 67) 181.

exercising the power to determine the content and nature of those interests.[138] The Full Court of the Family Court has described the Family Law Act as 'a legislative code for the way in which the welfare of children who come within its ambit [is] to be protected'.[139] Former Family Court Chief Justice Diana Bryant made the extra-curial observation that 'the "best interests" test is by its very nature paternalistic and protective'.[140] There lies a risk that the best interests principle will become a proxy for the interests of adults.[141]

Children's limited participation in proceedings under Part VII of the Family Law Act provides a powerful example of the protective and paternalistic approach to the determination of children's best interests. Children are not permitted to give evidence or be present in court during proceedings without leave of the court.[142] Children, by and large, do not 'choose' to participate in family law proceedings, in the sense of initiating or actively participating in those proceedings. Under the welfare model, children might be seen, not physically in the courtroom, but through a legislatively mandated assessment of their best interests. In determining what is in a child's best interests, 'any views expressed by the child' are the first of the 'additional considerations' that the Family Court must take into account, qualified by the requirement that the court take into account any factors, such as the child's maturity or level of understanding, that the court thinks are relevant to the weight it should give to the child's views.[143] The Family Court may inform itself of the child's views by having regard to a family report;[144] by making an order for independent legal representation of the child's interests;[145] or 'by such other means

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[138] Eekelaar, *Family Law and Personal Life* (n 67) 13, 56. See also John Eekelaar, 'Families and Children: From Welfarism to Rights' in Christopher McCrudden and Gerald Chambers, *Individual Rights and Law in Britain* (Clarendon Press, 1994) 301; John Eekelaar, 'Personal Rights and Human Rights' in Peter Lodrup and Eva Modvar (eds), *Family Life and Human Rights: Papers Presented at the 11th World Conference of the International Society of Family Law* (Gyldendal, 2004) 183.

[139] *Re Z* (1996) 20 Fam LR 651, 702.

[140] Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 199, citing *Re Alex* (2004) 31 Fam LR 503, 529 [154].

[141] van Krieken (n 133) 39. See also Tobin, 'Justifying Children's Rights' (n 88) 415.

[142] *Family Law Act 1975* (Cth) s 100B(1), (2). See Alastair Nicholson, 'Children and Children's Rights in the Context of Family Law' (Speech delivered at the LawAsia Conference, Brisbane, 21 June 2003) 3-4; Parkinson and Cashmore (n 93) 2.

[143] *Family Law Act 1975* (Cth) s 60CC(3)(a).

[144] *Family Law Act 1975* (Cth) s 62G. Section 62G(3A) generally requires the person giving the report to ascertain the child's views and to include those views in the report. Family reports are the most common means by which children's voices are 'heard' in family law proceedings, and are considered to be 'highly influential', in terms of being followed by judges in the majority of cases for which they are prepared: Australian Law Reform Commission (ALRC), *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997) [16.36]; Parkinson and Cashmore (n 93) 47-49, 149-52.

[145] *Family Law Act 1975* (Cth) s 68LA(5)(b) requires the independent children's lawyer for the child to 'ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court'.

as the court thinks appropriate'.[146] However, the Family Law Act contains no *requirement* that children be heard and listened to: indeed, section 60CE provides that nothing in Part VII of the Act permits the court or any other person to require the child to express his or her views in relation to any matter.

Conventional 'adult-centric methods' of facilitating children's participation in family law decision-making processes have not always been adequate or accessible to enable children to express their views.[147] As I explain further in chapter 2, children's voices are marginalised and subject to 'interpretation by "experts"',[148] such that children become 'the *object* but rarely the *subject* of family law decision-making'.[149] As Parkinson and Cashmore have observed, this approach to children's participation in proceedings under Part VII 'does not … mean that their voices cannot be heard in the process of decision-making nor that their wishes are unimportant'.[150] However, it does impact on how the Family Court conceptualises children and their capacities for decision-making. Tobin has described children's 'objectification and silencing' as a 'classic exposition' of the welfare model, whereby adults conceptualise children as vulnerable and requiring assistance, but ignore children's agency and evolving capacities.[151]

A recent qualitative study by the Australian Institute of Family Studies (AIFS) into the experiences and needs of young people whose parents had separated and had accessed the family law system, found that most children and young people who discussed engaging with family law system professionals described feeling negatively towards the court process, the family consultant and or family report writer and the independent children's lawyer (ICL), and were 'dissatisfied with either their level of input, or awareness, of the decision-making process or the final parenting arrangements'.[152] Acknowledging the small sample size,[153] the findings of this study are nonetheless illuminating, for they suggest a disjunct between the *potential* for

[146] See *Family Law Act 1975* (Cth) s 60CD(2)(c).
[147] Tobin, 'Understanding Children's Rights' (n 67) 179; Iris Young, *Inclusion and Democracy* (Oxford University Press, 2010) 53 (referring to the problem of 'internal exclusion').
[148] John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 591. See also Rae Kaspiew et al, *Independent Children's Lawyers Study: Final Report* (Australian Institute of Family Studies, 2nd ed, 2014) 41, 135-7.
[149] Robyn Fitzgerald and Anne Graham, 'The Changing Status of Children Within Family Law: From Vision to Reality?' (2011) 20 *Griffith Law Review* 421, 421.
[150] Parkinson and Cashmore (n 93) 2.
[151] Tobin, 'Understanding Children's Rights' (n 67) 171.
[152] Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) viii.
[153] Interviews were conducted with 61 children and young people aged between 10 years and 17 years: see ibid vi.

children's experience and expertise about their own lives to inform the determination of their best interests, and what occurs in practice.[154]

The welfare model underpinning the Family Law Act, then, posits children as vulnerable, passive objects of concern and protective intervention. This construction is tied to children's perceived lack of capacity, and their inability to exercise their rights independently of adults. As a result, the notion of autonomy sits 'uneasily with the reality of children's lives'.[155] In the next section, I propose an understanding of autonomy as gradual, evolving and relational, which enables children to be recognised as having the capacity for autonomy, and in some circumstances, actual autonomy, and as being capable of exercising autonomy.

B *Autonomy as a Relational, Gradual, Evolving Concept*

Discourse surrounding children and childhood has long emphasised the notion of development, or of 'becoming rather than being'.[156] However, as Cohen has observed, '[a]utonomous adults do not spring full blown from the womb. Children and young adults must grow into their autonomy'.[157] Children's development of their various capacities – physical, cognitive, emotional, moral, social and spiritual – is not an 'instantaneous transformation'[158] from dependence to full autonomy when the child reaches the age of majority. Rather, the child's development is 'dynamic and interactional',[159] and takes 'an evolving, albeit not necessarily linear' course as the child ages.[160] When the realisation of autonomy is understood as a *gradual, evolving* process – that is, individuals learn to become, and to be, autonomous in and through social relations, including family relationships – then children can be understood as having the capacity for autonomy, and whose identities are a 'work in progress' and a 'process of becoming'.[161] As Hollingsworth and Stalford have explained, 'children have rights in the here

[154] Tobin, 'Understanding Children's Rights' (n 67) 171-72. See also Kaspiew et al (n 148) 41, 135-37. I discuss the role of ICLs in the context of children's meaningful participation in family law proceedings in chapter 5.
[155] John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 53, 55.
[156] Sana Nakata, *Childhood Citizenship, Governance and Policy: The Politics of Becoming Adult* (Taylor and Francis, 2015) 165; Arneil (n 108) 70.
[157] Julie Cohen, *Configuring the Networked Self* (Yale University Press, 2012) 113.
[158] Ludbrook (n 112) 283.
[159] Parkinson and Cashmore (n 93) 4.
[160] Tobin and Varadan (n 70) 172.
[161] David J Phillips, 'Ubiquitous Computing, Spatiality and the Construction of Identity: Directions for Policy Response' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 303, 313.

and now *and* they are developing towards the acquisition of "full autonomy" … in adulthood'.[162] However, this gradual, evolving understanding of autonomy does not render the distinction between child and adult irrelevant or unimportant for the theory of children's decisional privacy, as I explain below in the context of the parental role to guide and direct children in the enjoyment of their rights.

The *relationality* of autonomy is such that the good life does not merely entail pursuing and promoting one's own happiness, but also fostering relationships with others and fulfilling one's responsibilities.[163] Individuals (children and adults alike) are not completely free to live their lives however they wish. Relationships, responsibilities, moral duties and roles within the family and in society influence and limit individuals' decisions and choices. My view that the value of privacy inheres in securing individual autonomy does not presuppose *fully* autonomous individuals. For instance, as members of a family unit, children do not, and cannot, enjoy complete autonomy over their lives. As I noted above, privacy is valuable for its ability to facilitate meaningful and diverse social relationships, by providing individuals with the capacity to control access to information about themselves, and to present themselves to others in different roles and in different ways.[164] A conception of decisional privacy that envisages autonomy as a relational, socialised value overcomes the objection that justifications for privacy which emphasise individual autonomy undermine respect for family relationships.[165] The crux of such a criticism is that, if the value of privacy inheres in protecting and promoting individual autonomy, the family unit will be undermined because it promotes 'a conception of childhood that is severed from, and potentially antithetical, to the idea of the family'.[166] I respond to this criticism in chapter 7. Here it suffices to note that, on a relational approach, autonomy remains an individual value, but such an approach recognises that an individual's sense of identity cannot be divorced from social context, including the role of the family in society, and the complex nature of a child's relationships with his or her parents, siblings, caregivers and extended family.

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[162] Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 73, citing Hollingsworth (n 69) (emphasis in original).
[163] See n 69 above.
[164] See, e.g., Jeroen van den Hoven, 'Privacy and the Varieties of Informational Wrongdoing' in Richard Spinello and Herman Tavani (eds), *Readings in CyberEthics* (Jones & Bartlett, 2001) 488; Rossler (n 1) 1, 9-10, 75, 117; Inness (n 10) 92; Gavison, 'Privacy and the Limits of Law' (n 8) 347; DeCew (n 5) 69-70.
[165] Herring, *Relational Autonomy* (n 69) 13.
[166] Tobin, 'Justifying Children's Rights' (n 88) 423.

C *The Family's Role in Children's Development of Autonomy*

This relational, gradual and evolving approach to autonomy is particularly important in the context of the family, because socialisation within the family – through interactions between family members – offers the conditions that enable children to develop an understanding of themselves as autonomous individuals, and as individuals who value autonomy.[167] The family provides a space for children to develop their identity, and to learn and practise their autonomy. Family informs a child's sense of identity at the most fundamental level, because that identity is deeply connected with the rights, interests and decisions of the child's parents or caregivers, who influence a child's development from infancy, through to adolescence and even adulthood.[168] The High Court of Australia has recognised that children's family relationships are vital to their identity formation, given that '[e]very child … derives his or her own identity from the parents'.[169] Children develop their own sense of self by situating themselves within their family history, and through their participation in practices that are valued by their family. It is through their belonging to, and dependence on, their parents, families and communities, that children develop their autonomy.[170] The Family Law Act reflects a relational (rather than atomistic) approach to autonomy. It embraces the assumption that parents are best placed to advance and protect the interests of their children,[171] and recognises the primacy of the parental role in relation to children's best interests.

1 *A Relational Approach to Autonomy under the Family Law Act*

Australian family law and policy promote a view of children as requiring parental authority and guidance for their development into autonomous individuals and interdependent members of society.[172] The Family Law Act requires courts exercising family law jurisdiction to have

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[167] Rossler (n 1) 167. See also David Oswell, *The Agency of Children: From Family to Global Human Rights* (Cambridge University Press, 2013) 91-8; Fortin, *Children's Rights and the Developing Law* (n 86) 89-90.
[168] Mitnick (n 79) 80; Alice Hearst, *Children and the Politics of Cultural Belonging* (Cambridge University Press, 2012) 19; Jonathan Todres, 'Children's Rights and Women's Rights: Interrelated and Interdependent' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 21, 32.
[169] *R v Cook; Ex parte C* (1985) 156 CLR 249, 258 (Brennan J).
[170] See, e.g., Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991) 130-36; Martha Minow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights' (1986) 9 *Harvard Women's Law Journal* 1; Bruce C Hafen, 'Individualism and Autonomy in Family Law: The Waning of Belonging' (1991) *BYU Law Review* 1, 30-33.
[171] Hearst (n 168) 14.
[172] This is consistent with article 18(1) of the UNCRC, which requires states to 'use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development

regard to 'the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children'.[173] This objective emanates from the significance of the family in liberal societies as 'the traditional stronghold of private life'.[174] The objects and underlying principles of Part VII of the Family Act emphasise the benefit to children of the 'meaningful involvement' of both parents in their lives and the importance of children receiving 'adequate and proper parenting to help them achieve their full potential'.[175] The objects place correlative duties and responsibilities on parents regarding the 'care, welfare and development' of their children.[176] The principles that undergird these objects – subject to when it is or would be contrary to a child's best interests – refer to children's rights to 'know and be cared for by both their parents', and to 'spend time on a regular basis with, and communicate on a regular basis with, both their parents'.[177]

Subject to any court order in force, parents have a 'bundle of rights'[178] which the Family Law Act defines as 'parental responsibility': '[a]ll the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[179] The Family Law Act assigns parental responsibility to each of the child's parents, which persists until the child turns 18 years of age and has effect despite any changes in the nature of the relationships of the parents, such as through separation or re-partnering.[180] In this way, the state bestows 'considerable power' on parents through parental status.[181] The Family Court has stated that it 'intervenes as little as possible and only to the extent that the welfare or interests of the child requires it', and that it 'does its best to avoid needless interference with parental autonomy and responsibility'.[182] However, the Family Court itself has acknowledged that 'parental responsibility is not absolute

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of the child'. Article 18(2) requires states to provide 'appropriate assistance to parents … in the performance of their child-rearing responsibilities'. See also article 29(1) of the UNCRC, which stipulates, relevantly, that the child's education (the right to which is provided in article 28) shall be directed to (c) 'the development of respect for the child's parents' and (d) 'the preparation of the child for responsible life in a free society'.

[173] *Family Law Act 1975* (Cth) s 43(1)(b).

[174] Rossler (n 1) 2-3.

[175] *Family Law Act 1975* (Cth) s 60B(1)(a), (c).

[176] Ibid s 60B(1)(d).

[177] Ibid s 60B(2)(a), (b).

[178] *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013) [82].

[179] *Family Law Act 1975* (Cth) ss 61B, 61C. Parental responsibility is presumptively vested in each parent (s 61C) or it can be allocated by court order (s 61D).

[180] Ibid s 61C(1), (2).

[181] John Eekelaar, 'Family Law and Legal Theory' in in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 41, 47.

[182] *W v R* (2006) 35 Fam LR 608, 614 [44]. See also *VR and RR* (2002) 29 Fam LR 39, 44 [30], 45 [36].

authority',[183] and it does not prevent a child from making decisions for himself or herself. Rather, '[p]arental responsibility merely provides the time frame within which it can be assumed by others … that parents are empowered at law to make decisions for the protection and benefit of the child'.[184] The key feature of childhood as a 'legal' status, then, is the ability of adults to exercise the power to assess children's best interests, and to 'impose a course of action' accordingly.[185]

The Family Law Act grants parents license to make decisions on their children's behalf, yet also identifies 'the need to protect the rights of children'.[186] For children's rights and interests to be protected, these must be separable from the rights and interests of others, particularly parents.[187] Such a conceptual split might initially appear difficult to sustain, at least within a welfare or protectionist framework, in the light of children's dependence on their parents and other adults for their needs to be met. As I explained earlier, the ability to choose between meaningful options is essential to autonomy: for if an individual has no options, or is unable to choose from those options, then that individual cannot be autonomous. But individual choice is both enabled and constrained by the context of family relationships. According to Rossler, 'the protection of privacy always has to do both with the protection *of* relations and *within* relations, protection *with* others and protection *from* others'.[188] The parent-child relationship is a kind of intimate relationship that lacks the element of 'choice', in the sense that children cannot, and do not, 'choose' their parents. Parents, then, are both a source of, and a potential threat to, their children's autonomy.[189] Children are uniquely vulnerable relative to adults, owing to their level of physical and cognitive abilities, their dependence on adults for their well-being and their various needs to be met,[190] and their capacity to assert their rights.[191] Attaching privacy to 'the family' as an entity is therefore problematic for children, by virtue of the power imbalance in the parent-child relationship.

[183] *Re Tahlia* [2017] FamCA 715 (8 September 2017) [35].
[184] Ibid.
[185] Eekelaar, 'Role of Dynamic Self-determinism' (n 70) 43.
[186] *Family Law Act 1975* (Cth) s 43(1)(c).
[187] John Eekelaar, 'Emergence of Children's Rights' (n 17) 169.
[188] Rossler (n 1) 192 (emphasis in original).
[189] Nedelsky, 'Reconceiving Autonomy' (n 69) 235.
[190] Tobin and Varadan (n 70) 159.
[191] Tobin, 'Understanding Children's Rights' (n 67) 157-58, 164. Cf. Herring, 'Vulnerability, Children and the Law' (n 101) 262.

2 *The Problematic Notion of 'Family Privacy'*

Decisional family privacy, according to Allen, is 'a right of family members to be free from uninvited, unwarranted interference with the rearing, education, discipline, health, and custody decisions, made by family members (usually adults) on behalf of members of the same family (usually infants, children, teenagers, the elderly or the infirm)'.[192] This description exposes the power dynamics within families, and power disparities between family members, that the decisional domain of privacy embodies. The liberal concept of 'family privacy', buttressed by the public/private distinction noted earlier, understands privacy as protection against unwarranted state interference in the family;[193] or as Dailey has suggested, 'the right of parents to exclude the state from intervening in decisions regarding their children'.[194] This concept assumes that the interests of children and their parents align, and that parents will make decisions and act in their children's best interests. However, family privacy historically has failed to protect women and children, by endorsing hierarchical social roles within the family.[195] As Cohen has explained:

> Insofar as privacy attached to the family, not to separate family members, and insofar as it was founded on the nature of the protected relationship, not on a conception of the autonomy … of individuals, it meshed quite well with the prevailing conception of the natural family as hierarchical, heterosexual, patriarchal, and internally structured by relations of dependency of children on parents and wives on husbands.[196]

Such a 'hands off presumption' promotes the view that how parents raise and treat their children should largely be shielded from the law's purview.[197] As a result, children are 'doubly dependent': they are denied the status of rights-bearers, and they simultaneously fall within the 'private' family sphere, 'with parents standing between them and the state'.[198] However, power

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[192] Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988) 115-16. See also DeCew (n 5) 77-8; Gavison, 'Privacy and the Limits of Law' (n 8) 448; Rossler (n 1) 84.
[193] Eekelaar and Tobin (n 134) 76.
[194] Anne Dailey, 'Constitutional Privacy and the Just Family' (1993) 67 *Tulane Law Review* 955, 985.
[195] Olsen, 'The Family and the Market' (n 32) 1511, 1566. See also Fineman, *The Neutered Mother* (n 38) 187; Kim (n 31) 571; Dailey (n 194) 985; Frances Olsen, 'The Politics of Family Law' (1984) 2 *Law & Inequality* 1, 8; Eekelaar, 'Emergence of Children's Rights' (n 17) 163.
[196] Jean L Cohen, 'Redescribing Privacy: Identity, Difference, and the Abortion Controversy' (1992) 3 *Columbia Journal of Gender and Law* 43, 60 n 52. See also Woodhouse, 'The Dark Side of Family Privacy' (n 38) 1254-55.
[197] Fortin, *Children's Rights and the Developing Law* (n 86) 9; see also 321-324.
[198] Ibid 9. See also Minow (n 170) 18.

when understood in distributive terms – that is, parents have more power than, and power over, their children within the family unit – simplifies and overlooks the structural features of the parent-child relationship, such as the mediating and supporting role of social institutions, including the law, in perpetuating that power.[199] My analysis of the Full Court's judgments in *Re Jamie* and *Re Kelvin*, in chapters 5 and 6 respectively, serve to illustrate this point.

Proceedings under Part VII of the Family Law Act that follow parental separation engage a very specific subset of families – those who are often in high conflict and involved in intractable disputes upon relationship breakdown. These families commonly have complex needs and are affected by family violence, child safety concerns, mental illness and substance abuse.[200] In circumstances of family breakdown or discord, the rhetoric of 'family privacy' often conceals coercion and conflict. To claim that there exists a collective 'family' interest or 'family' values is to mask and reinforce power disparities between more powerful family members (usually men/fathers) over less powerful members (usually women/mothers and children).[201] References to the interests or values of 'the family' must therefore be understood as interests or values determined by the more dominant family member(s).

Ascribing rights to individuals within the family – and particularly to children – is antithetical to this traditional understanding of family privacy. The theory of children's right to decisional privacy that I develop in this thesis, the salient features of which I present in the next chapter, responds to the potential perils of family privacy just articulated. These dangers cannot be glossed over, given that debates in the privacy (and particularly decisional privacy) literature about the balance of power between parents, children and the state, traditionally have overlooked the rights of children as distinct from their parents.

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[199] Freeman, *The Moral Status of Children* (n 114) 74.

[200] Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report* (Commonwealth of Australia, 2016); ALRC, *Family Law for the Future – An Inquiry into the Family Law System* (Report No 135, March 2019) 161 [5.26].

[201] Olsen, 'The Family and the Market' (n 32) 1511, 1566. See also Woodhouse, 'The Dark Side of Family Privacy' (n 38) 1257; Dailey (n 194) 985; Vicki Coppock, '"Families" in "Crisis"?' in Phil Scraton (ed), *'Childhood' in 'Crisis'?* (UCL Press, 1997) 58, 59-64; Mitnick (n 79) 195-6 n 60; Allen (n 192) 115-16; Benjamin Shmueli and Ayelet Blecher-Prigat, 'Privacy for Children' (2011) 42 *Columbia Human Rights Law Review* 759, 774-75.

V CONCLUSION

The decisional dimension of privacy in relation to children has been overlooked in proceedings under Part VII of the Family Law Act. The aim of this chapter has been to articulate a conception of children's decisional privacy. I have explained that privacy is valued because in its absence, the notions of autonomy and individual freedom that are so fundamental to liberal societies could not be realised. A children's rights approach to decisional privacy is premised upon an interest theory of rights, under which all humans have rights in virtue of their shared humanity.[202] Given that children are recognised as human *beings* under international law, not simply *becomings*, they are entitled to human rights regardless of their capacity to exercise and/or understand completely the meaning of those rights, and also irrespective of their vulnerability and dependence on adults.[203] This approach does not depend on children's actual autonomy, but on their capacity for autonomy.[204]

Bestowing children with decisional privacy rights raises the spectre of disruption to the established family law system, and to the notion of family privacy as it has been conventionally understood in liberal philosophy.[205] Questioning the status of children under Australian family law threatens fundamental values upon which the Family Law Act was drafted, the role of the state in the regulation of parenting, and the distinct rights and interests of parents and children within the family. A children's rights approach to decisional privacy acknowledges children's vulnerability, but also highlights children's evolving autonomy, participatory rights and ability to participate in decision-making processes, consistent with their evolving capacities. In the next chapter, I present what I consider to be four salient features of a children's rights approach, and explain how this approach serves to promote and protect children's decisional privacy. I also canvass various factors that might encourage, or alternatively, constrain, judges in their ability and motivation to adopt a children's rights approach in the determination of proceedings under Part VII of the Family Law Act.

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[202] Tobin, 'Justifying Children's Rights' (n 88) 403, 407; Tobin, 'Understanding Children's Rights' (n 67) 160 (noting that 'the only prerequisite to being entitled to human rights ... is that the claimant be a human being').
[203] Ibid. See also Freeman, 'The Human Rights of Children' (n 67) 9-15; Tobin, 'Justifying Children's Rights' (n 88) 403.
[204] Freeman, *The Rights and Wrongs of Children* (n 3) 54-5.
[205] Michael Wald, 'Children's Rights: A Framework for Analysis' in Barbara Landau (ed), *Children's Rights in the Practice of Family Law* (Carswell, 1986) 1, 17, 21.

2

A CHILDREN'S RIGHTS APPROACH TO DECISIONAL PRIVACY

I INTRODUCTION

In the previous chapter, I explained that decision-making under Part VII of the *Family Law Act 1975* (Cth) (Family Law Act) reflects the dominant welfare model, which constructs children as passive, vulnerable objects of concern, and emphasises the primacy of the parental role in relation to children's best interests. In this chapter, I present a contrasting approach: a rights-based approach. I set out what I consider to be four salient features of a children's rights approach to decisional privacy, and explain how such a perspective serves to promote and protect the decisional privacy of children in proceedings under Part VII of the Family Law Act. I acknowledge that there is no explicit mandate in Part VII requiring judges to take a child's rights or decisional privacy into account in their assessment of the child's best interests. However, establishing these features is intended to address the 'disjunction between theory and practice':[1] a theory of children's decisional privacy, which may lack a 'clear and practical message' for judges and practitioners in their day-to-day work, becomes more relevant and useful when translated into principles to guide decision-makers.[2] I also justify, from a philosophical perspective and a doctrinal perspective, the relevance and significance of children's right to decisional privacy in Australian family law.

In Part II, I delineate the scope of the still-contested notion of 'children's rights'. I situate my approach to children's decisional privacy within the formulation and understanding of children's rights contained in, and the values embraced by, the *United Nations Convention on the Rights of the Child 1989* (UNCRC).[3] The model of children's decisional privacy rights

[1] Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 29.
[2] Ibid.
[3] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).

builds on the significant work of children's rights scholars, including Tobin, who has articulated a 'substantive' rights-based approach to judicial decision-making,[4] and Stalford, Hollingsworth and Gilmore, who 'defend a children's rights-based approach as a legitimate perspective' in this regard and consider how children's rights can be 'integrated into judicial reasoning'.[5] It also supports more broadly the views of academics and children's rights advocates that emphasise children's resilience and evolving capacities.[6]

In Part III, I draw on the children's rights approaches and perspectives of these scholars to articulate what I consider to be four salient features of a children's rights approach to decisional privacy. The first is a recognition of children as rights-bearing subjects, and not merely objects of concern, with interests that are distinct from those of their parents and other family members. The second feature is that children must be given the ability to exercise autonomy in the enjoyment of their rights, consistent with their evolving capacities. The third feature, which flows from the second, is that children's relative vulnerability and immaturity necessitate that they are provided with appropriate direction and guidance by their parents in the exercise of their rights, and for the protection and enforcement of those rights. The final feature, and the most critical for children's ability to exercise their right to decisional privacy, is children's meaningful participation in decision-making about their lives.

In Part IV, I identify some constraints on judges' willingness and ability to engage with children's rights and to adopt such a framework in their decision-making.[7] These include each judge's personal values, views and life experiences; how judges understand the relationship

[4] See John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579; John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael Freeman (ed), *Law and Childhood Studies: Current Legal Issues* (Oxford University Press, 2012) 55.

[5] Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 17; Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 1, 5.

[6] See, e.g., Barbara Bennett Woodhouse, 'The Courage of Innocence: Children as Heroes in the Struggle for Justice' (2009) *University of Illinois Law Review* 101; Steven J Condly, 'Resilience in Children: A Review of the Literature with Implications for Education' (2006) 41 *Urban Education* 211; Staci M Zolkoski and Lyndal M Bullcock, 'Resilience in Children and Youth: A Review' (2012) 34 *Children and Youth Services Review* 34; Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306, 330; John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42; Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1.

[7] See Tobin, 'Judging the Judges' (n 4) 619-24; Stalford and Hollingsworth (n 5) 40-50.

between children's best interests and children's rights; the role of the doctrine of precedent; judicial deference to the legislature for reform; and the parties' presentation of their case, which shapes the extent to which judges have the opportunity to engage with children's rights. This chapter and the next, which narrows the focus for analysis to judgments, set the theoretical grounding for my argument that the Family Court's involvement in the medical treatment process for gender dysphoria has denied transgender children and young people their decisional privacy rights.

II CHILDREN'S RIGHTS: A STILL-CONTESTED NOTION

In chapter 1, I submitted that childhood as a social identity is not merely a 'fact of human life' determined by biology,[8] but also a social construction shaped by cultural, historical and political influences, including law.[9] So, too, are 'rights' a social construct and a tool of power that can be used to challenge the *status quo* and shift children from the periphery of law and society to the centre – if not completely, then at least a little closer. As Freeman has argued, '[t]he language of rights can make visible what has for too long been suppressed. It can lead to different and new stories being heard in public'.[10] While it is beyond the scope of this thesis to explore and contribute to debates about the notion of 'children's rights',[11] it is important to offer an understanding of this concept and its content and scope. Definitions of children's rights refer to the range of civil, political, social, economic and cultural rights relating to childhood.[12] Such rights are considered to define basic standards of respect, autonomy and protection for children, which serve to enable children to 'thrive in the present and develop to their fullest

[8] Barry Goldson, '"Childhood": An Introduction to Historical and Theoretical Analyses' in Phil Scraton (ed), *'Childhood' in 'Crisis'?* (UCL Press, 1997) 1, 2.

[9] See Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, 1990) 7-8; Goldson (n 8) 4-12; Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (Cambridge University Press, 2007) 4; Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177, 179; Lucinda Ferguson, 'An Argument for Treating Children as a "Special Case"' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 227, 235-37. Cf. John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 399-401; David Archard, *Children: Rights and Childhood* (Routledge, 2nd rev ed, 2004) 19-24, 27-36; Fortin, *Children's Rights and the Developing Law* (n 1) 26.

[10] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 6. See also Ferguson, 'Not Merely Rights for Children' (n 9) 183, citing Cass R Sunstein, 'On the Expressive Function of Law' (1995-96) 144 *University of Pennsylvania Law Review* 2021.

[11] See, e.g., Ferguson, 'Not Merely Rights for Children' (n 9); Tobin, 'Justifying Children's Rights' (n 9); Colin Macleod, 'Are Children's Rights Important?' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 191.

[12] Stalford and Hollingsworth (n 5) 17.

potential in the future'.[13] Yet the content of the notion of children's rights remains contested, and the idea that children can claim, exercise and secure enjoyment of rights independently has not gained universal acceptance.[14] As Tobin has noted, notwithstanding 'widespread engagement' with children's rights in law, policy, research and advocacy, some consider that 'the idea of children's rights has "failed to secure a coherent … intellectual foundation"'.[15] Tobin has categorised the literature regarding the 'moral justification' for bestowing children with rights into 'three broad camps':[16] supporters of the idea of children's rights as a means of protecting children's dignity;[17] detractors of the idea of children's rights due to children's lack of capacity (which I explained in chapter 1);[18] and those who oppose children's rights due to concerns about the perceived potential for those rights to undermine the family structure,[19] and due to the Western origins of human rights.[20] Scholarship has broached the threshold question of whether the language of 'rights' for children is even appropriate.[21] As Stalford and Hollingsworth have summarised,[22] it has considered whether frameworks or discourses other

[13] Ibid. Cf. Ferguson, 'Not Merely Rights for Children' (n 9) 180 n 5.
[14] Varadan (n 6) 306; Stalford and Hollingsworth (n 5) 19.
[15] Tobin, 'Justifying Children's Rights' (n 9) 395, citing Martha Minow, 'Whatever Happened to Children's Rights?' (1995) 80 *Minnesota Law Review* 267; Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005) ix.
[16] Tobin, 'Justifying Children's Rights' (n 9) 396.
[17] See, e.g., Michael Freeman, 'Taking Children's Rights Seriously' (1987) 1 *Children and Society* 299; Michael Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law and the Family* 52, 55; Freeman, 'The Human Rights of Children' (n 6) 16, 23, 44.
[18] See, e.g., Guggenheim (n 15) 10, 13-14; Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98 *Ethics* 445; Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 31, 31.
[19] See, e.g., Bruce C Hafen and Jonathan O Hafen, 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 *Harvard International Law Journal* 449; Joseph Goldstein, Anna Freud and Albert J Solnit, *Beyond the Best Interests of the Child* (Free Press, 1973); Joseph Goldstein, Anna Freud and Albert J Solnit, *Before the Best Interests of the Child* (Burnett Books Ltd, 1980); John Seymour, 'Parental Rights and the Protection of Children: A Presumption Against State Intervention?' (2005) 7 *Australian Journal of Professional and Applied Ethics* 16; Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4, 18; Clare Huntington, 'Rights Myopia in Child Welfare' (2005-06) 53 *UCLA Law Review* 637, 664; Margaret O'Brien Steinfels, 'Children's Rights, Parental Rights, Family Privacy, and Family Autonomy' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 240.
[20] Tobin, 'Justifying Children's Rights' (n 9) 418 (describing this as the 'relativist challenge'). See, e.g., Erica Burman, 'Local, Global or Globalised? Child Development and International Child Rights Legislation' (1992) 3 *Childhood* 45; Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130; Vanessa Pupavac, 'Misanthropy Without Borders: The International Children's Rights Regime' (2011) 25 *Disasters* 95.
[21] Ferguson, 'Not Merely Rights For Children' (n 9) 189-90; Lucinda Ferguson, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy – Essays in Honour of Michael Freeman* (Brill 2015) 143; Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Westview Press, 1999) 3, 176-81; Jane Fortin, *Children's Rights and the Developing Law* (n 1) 9-10.
[22] Stalford and Hollingsworth (n 5) 19.

than 'rights', such as 'well-being',[23] 'ethic of care',[24] or 'capability',[25] might more accurately reflect the reality of children's lives, particularly their relative vulnerability to, and dependence on, adults. Tobin has observed that the 'conceptual opposition' to children's rights largely reflects a preference for the will theory of rights (discussed in the previous chapter, in the context of the dominant conception of children and childhood in Western liberal societies); a failure to read the text of the UNCRC; or a failure to appreciate the potential for alternative interpretations of the Convention text that would respond to the concerns just mentioned.[26]

The theory of children's decisional privacy developed in this thesis draws on the understanding and formulation of children's rights contained in the UNCRC. Acknowledging that the vision of children's rights promoted by this international convention remains subject to criticism,[27] the conception of children – vulnerable relative to adults, but having the evolving capacity for autonomy – provides the 'conceptual foundation' of children's rights under the UNCRC.[28] My theory of children's right to decisional privacy embraces the foundation or justification of human rights as moral rights, possessed by all humans in virtue of their shared humanity ('the equal and inalienable rights of all members of the human family'),[29] not by virtue of reciprocity (that to give children rights requires that they also bear responsibilities) or capacity (the concept

[23] See, e.g. E Kay M Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' (2015) 23 *International Journal of Children's Rights* 769; John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237, 243-44.

[24] See, e.g.. Fiona Kelly, 'Conceptualising the Child through an "Ethic of Care": Lessons for Family Law' (2005) 1 *International Journal of Law in Context* 375; Tom Cockburn, 'Children and the Feminist Ethic of Care' (2003) 10 *Childhood* 71; Jonathan Herring, *Caring and the Law* (Hart Publishing, 2013) ch 3; Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2006).

[25] See, e.g., Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Harvard, 2011); Jérôme Ballet, Mario Biggeri and Flavio Comim, 'Children's Agency and the Capability Approach: A Conceptual Framework' in Mario Biggeri, Jérôme Ballet and Flavio Comim, (eds) *Children and the Capability Approach* (Palgrave Macmillan, 2011) 22.

[26] Tobin, 'Justifying Children's Rights' (n 9) 413.

[27] See Michael Freeman, 'Why It Remains Important' (n 10); Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 39; Fortin, *Children's Rights & the Developing Law* (n 1) 45-46; Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20 *International Journal of Children's Rights* 155; John Tobin, 'Justifying Children's Rights' (n 9) 16, 22.

[28] John Tobin, 'Justifying Children's Rights' (n 9) 396. See also John Tobin, 'Introduction' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 1, 1-2.

[29] UNCRC, Preamble. See also Freeman, 'The Human Rights of Children' (n 6) 16; John Eekelaar, 'Personal Rights and Human Rights' in Peter Lodrup and Eva Modvar (eds), *Family Life and Human Rights: Papers Presented at the 11th World Conference of the International Society of Family Law* (Gyldendal, 2004) 183, 188; John Eekelaar, 'Invoking Human Rights' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 336, 340. Cf. Ferguson, 'Not Merely Rights for Children' (n 9) 181; Tobin, 'Justifying Children's Rights' (n 9) 407.

fundamental to the distinction between the will theory and the interest theory of rights, discussed in chapter 1).

A *Why Should Australia's Family Law System Be Concerned with Children's Right to Decisional Privacy?*

Before setting out four salient features of a children's rights approach to decisional privacy, it is important to justify the relevance and importance of this right in the context of proceedings under Part VII of the Family Law Act, which deals with children's matters, including the making of parenting orders and orders relating to the welfare of children. Ferguson has asked, in more general terms, 'why should … children's rights necessarily be better for children than regulating them through the notions of duties owed to them, or through the "welfare principle" and concomitant "best interests" assessment?'[30] As I noted earlier, the Family Law Act does not require judges to consider children's rights in their decision-making. Nor are judges legislatively mandated to take the child's privacy into account as a primary or an additional consideration when determining the child's best interests in Part VII proceedings.[31] The answer to the threshold question of why children's right to decisional privacy should matter to Family Court judges in their decision-making in Part VII proceedings – why Family Court judges should 'take children's rights seriously'[32] and in particular, children's decisional privacy rights seriously – has both a philosophical dimension and a doctrinal one.

1 *Privacy as a Value Underpinning the Family Law Act*

From a philosophical perspective, privacy is valuable not only for individuals (which is much-emphasised in justifications for its value),[33] but also for society more broadly.[34] Yet most discussions about decisional privacy – focusing on its value for adults – have conceptualised it

[30] Ferguson, 'Not Merely Rights for Children' (n 9) 189-90.
[31] See *Family Law Act 1975* (Cth) s 60CC(2), (3).
[32] Freeman, 'Why It Remains Important' (n 10).
[33] See Judith Wagner DeCew, 'The Feminist Critique of Privacy: Past Arguments and New Social Understandings' in Dorota Mokrosinska and Beate Roessler (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015) 85, 85. See further the discussion of privacy's value in chapter 1 of this thesis.
[34] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010) 86; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 98; Priscilla Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press, 1995) 212-14.

as an *individual* interest, rather than as a societal or state one.[35] In Western liberal societies that traditionally have embraced individualistic, atomistic conceptions of privacy and its value, and have emphasised the legal protection of individual rights,[36] the challenge lies in re-framing the policy debate to capture privacy as a social policy objective. The right to decisional privacy bears significance beyond the individuals who enjoy and exercise it, or alternatively, as the case study of this thesis will illustrate, those who do not. Regan has argued that '[i]f privacy became less important to one individual in one particular context, or even to several individuals in several contexts, it would still be important as a value because it serves other crucial functions beyond those that it performs for a particular individual'.[37] Translating Regan's observation to the children's rights context, the value of recognising and respecting the decisional privacy of an individual child in one case before the Family Court, or a group of children, should not overlook the value of such recognition and respect for the dynamics of the relationship between parents, children and the state, and for the conceptualisation of children and childhood in society.

Taking a less myopic view of the value of children's decisional privacy – conceptualising it as valuable for not only the child as an individual – highlights its significance as a societal good. On this view, decisional privacy has what Regan has identified as 'common value' and 'public value'.[38] Decisional privacy promotes and enables the values of autonomy, freedom of expression and preservation of identity, which are vital for children's development, and by extension, to the development of liberal societies.[39] In denying children the opportunity to participate in decision-making processes, children are simultaneously denied the opportunity to develop the capacity to exercise their autonomy,[40] and so the argument becomes circular:

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[35] Regan (n 34) 214.
[36] Ibid 24, 33, 214-15. See also Thomas I Emerson, *The System of Freedom of Expression* (Random House, 1970) 549; Richard F Hixson, *Privacy in a Public Society: Human Rights in Conflict* (Oxford University Press, 1987) 212.
[37] Regan (n 34) 221. See also Valerie Steeves, 'Reclaiming the Social Value of Privacy' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 191, 193.
[38] Regan (n 34) 213.
[39] Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 399. See also Jeremy Roche, 'Children: Rights, Participation and Citizenship' (1999) 6 *Childhood* 475; Ranjan Poudyal, *Children and Young People as Citizens: Partners for Social Change* (Save the Children, 2003) 6; UN Committee on the Rights of the Child (CRC Committee), *General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [24].
[40] Fortin, *Children's Rights and the Developing Law* (n 1) 6.

children's perceived incapacity apparently justifies the failure to afford children decisional privacy.[41]

The public interest in promoting and protecting an understanding of children and the parent-child relationship that advances children's decisional privacy rights must be understood against the backdrop of the significant social role of family law. Family law allocates and enforces rights, duties and responsibilities on, and as between, parents, the family, and the state.[42] Such enforcement of rights and allocation of responsibilities by judges in family law proceedings takes place through a multitude of discourses and conceptual understandings of children and childhood that change over time in response to changes in the socio-political climate, technology, policy, medicine and science, amongst many other factors.[43] In *Re Kelvin,* for instance, which is the focus of chapter 6, the Full Court justified its conclusion that medical treatment for gender dysphoria no longer required the Family Court's oversight on the basis of advancements in medical science.[44] As a public value, respecting children's decisional privacy necessarily limits state interference in decision-making in the private sphere of the family.[45]

That privacy is a value foundational to judicial decision-making in proceedings under the Family Law Act was suggested by the Australian Law Reform Commission in its final report upon its inquiry into Australia's family law system:

> Many of the provisions of the Family Law Act as originally enacted, and as subsequently amended, illustrate how the objectives of informality, *privacy*, and respect for the dignity of separating couples were translated into legislation. They illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law because of the emotional and financial consequences of relationship breakdown, and its public policy impacts on the wider society.[46]

[41] Gerison Lansdown, 'International Developments in Children's Participation: Lessons and Challenges' in E Kay M Tisdall, John M Davis, Alan Prout and Malcolm Hill (eds), *Children, Young People and Social Inclusion: Participation for What?* (The Policy Press, 2006) 139, 140-41.
[42] Alison Diduck, 'What is Family Law for?' (2011) 64 *Current Legal Problems* 287, 314.
[43] Ibid.
[44] *Re Kelvin* (2017) 57 Fam LR 503, 527 [152], 529 [165], 530 [175].
[45] Regan (n 34) 225-227.
[46] Australian Law Reform Commission (ALRC), *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) 357 [12.1] (emphasis added).

Understanding privacy in the Australian family law context in this way – as a value underpinning the Family Law Act – embraces the social importance of privacy. This is not to overlook or diminish the importance of privacy to individuals.[47] But a children's rights approach understands the social value of privacy in this context as deriving from the Family Court's role to support and enable children to develop their capacity for autonomy. There is a public interest in reconceptualising children as rights-bearers and active subjects. To recognise and respect children's right to decisional privacy is to challenge the unhelpful – and arguably false – dichotomy between children's rights and best interests (I elaborate on this point below), and to disrupt the conventional construction of children as vulnerable, passive objects of concern. Reconceptualising the meaning and value of privacy in proceedings under Part VII of the Family Law Act as a social value – as *children's* right to *decisional* privacy (rather than the spatial or informational privacy of adult litigants) – also challenges the assumptions about children's dependence, incompetence, incapacity for rational decision-making and vulnerability. It redefines the issues of children's participation and children's voices in those proceedings, and offers a stronger argument for enabling children to be more active participants in the determination of their own best interests.

2 *The Best Interests Principle as the Critical Connector of Decisional Privacy and Children's Rights in Australian Family Law*

From a doctrinal perspective, I argue that the principle of the 'best interests of the child' as the paramount consideration[48] provides the critical nexus between the concepts of decisional privacy and children's rights in Australian family law. The best interests principle is the key reference point for decision-making under Part VII of the Family Law Act. It provides an additional justification for why Family Court judges should take children's decisional privacy rights seriously in their decision-making. My view is supported by scholars including Eekelaar and Tobin,[49] and Stalford and Hollingsworth.[50]

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[47] Regan (n 34) 214.
[48] In other jurisdictions known as the 'welfare' principle. See, e.g., *Children Act 1989* (UK), s 1(1), (3).
[49] See John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73; Tobin, 'Judging the Judges' (n 4) 592 n 81, 620-23.
[50] Stalford and Hollingsworth (n 5) 41 (noting that where the best interests principle governs decision-making in legal proceedings, there is 'considerable room for judicial discretion'). See also Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 57-8.

Section 60CC of the Family Law Act lists the primary and additional considerations that the court must take into account in determining what is in a child's best interests. While neither the UNCRC, nor the child's privacy, is an express consideration listed in that provision, the court has a wide discretion to take into account 'any other fact or circumstance that the court thinks is relevant' to the best interests assessment.[51] Tobin has argued that this discretion enables the judge to consider the children's rights approach developed under the UNCRC to determine what is in the best interests of the child in each case.[52] Australia's ratification of the UNCRC is important, notwithstanding that this international convention has not been incorporated into Australian law. In *Minister for Immigration and Ethnic Affairs v Teoh*,[53] the High Court of Australia held that, in the event of ambiguity in legislation, courts should favour a construction that accords with Australia's obligations under a treaty or international convention to which Australia is a party, because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.[54] The Full Court of the Family Court in *Re B and B: Family Law Reform Act 1995*[55] said that the UNCRC must be given 'special significance' for the purpose of interpreting domestic law,[56] given its almost universal acceptance, and that this convention 'is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision'.[57]

The Family Law Act has endeavoured to embed ideas about children's rights into the legislative framework of Part VII, through the insertion of an 'additional object' into the objects of that Part listed in section 60B. Section 60B of the Act sets out the objects of Part VII and its underlying principles. Sub-section (1) defines the objects, being 'to ensure that the best interests of children are met', while sub-section (2) sets out the principles underlying these objects (except when it is or would be contrary to a child's best interests). The Family Court has described these objects as 'the core values of the legislation'.[58] The 'additional object' of Part VII, which came into force in 2012, is 'to give effect to the Convention on the Rights of the Child'.[59] The Full Court of the Family Court has explained that, notwithstanding Australia's

[51] *Family Law Act 1975* (Cth) s 60CC(3)(m).
[52] Tobin, 'Judging the Judges' (n 4) 621 n 255.
[53] (1995) 183 CLR 273.
[54] Ibid 287 (Mason CJ and Deane J).
[55] (1997) 21 Fam LR 676.
[56] Ibid 743 [10.19].
[57] Ibid [10.18].
[58] *Xiu & Hodges* [2019] FamCA 251 (15 March 2019) [37].
[59] *Family Law Act 1975* (Cth) s 60B(4).

ratification of the UNCRC and the reference to this convention in section 60B(4), its contents 'are not enshrined as operative principles of law'.[60] Therefore, according to the Full Court, 'the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act'.[61] Accepting the Full Court's caveat, section 60B(4) is significant, for it demonstrates an express legislative commitment to make the UNCRC, and the rights contained therein, relevant to judicial decision-making under Part VII of the Family Law Act.

In the English case of *Nzolameso v City of Westminster*,[62] Baroness Hale of Richmond raised the 'interesting question', about which no argument was made before the Supreme Court, of whether, even where no right under the UNCRC is involved, 'welfare' in section 11 of the *Children Act 2004* (UK) should be interpreted consistently with the United Kingdom's obligations under article 3 of the UNCRC.[63] Whilst a similar argument has not, to my knowledge, been raised in proceedings before the Family Court of Australia, it could well be made: that decision-making under Part VII of the Family Law Act, where the 'best interests of the child' is 'the 'paramount' consideration, requires that the child's other rights under the UNCRC be respected.[64] Put differently, principles of 'internal and external system coherence' mean that a decision cannot be in a child's best interests where the outcome would infringe another right under the UNCRC.[65]

Children's right to decisional privacy manifests in a practical sense in children's meaningful participation in decision-making about matters that affect them. The child's right to express his or her views and to be heard (article 12 UNCRC) finds expression in the first of the additional considerations for the court to take into account in assessing the child's best interests in Part VII proceedings.[66] The UN Committee on the Rights of the Child (CRC Committee) has

[60] *Ralton & Ralton* [2017] FamCAFC 182 (7 September 2017) [18].
[61] Ibid. See also *Oram & Lambert* (2019) FLC ¶93-886, 78,778 [156].
[62] [2015] UKSC 22.
[63] Ibid [29].
[64] Hollingsworth and Stalford (n 50) 66. See also Fortin, *Children's Rights and the Developing Law* (n 1) 40-41; Eekelaar and Tobin (n 49) 87; CRC Committee, *General Comment No 14: The Right of the Child to Have his or her Best Interests Taken as a Primary Consideration*, UN Doc CRC/C/GC/14 (29 May 2013) [6], [32]; Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Chid: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF Innocenti Studies, 1996) 9-10; Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge University Press, 2016) 51.
[65] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1, 37-9.
[66] *Family Law Act 1975* (Cth) s 60CC(2)(a).

emphasised that the best interests principle in article 3(1) of the UNCRC and the child's right to express his or her views and to be heard in article 12 have 'complementary roles': the former 'aims to realize the child's best interests' and the latter 'provides the methodology' for hearing the child's views and the inclusion of those views in the assessment of the child's best interests.[67]

A considerable body of research both in Australia and overseas in the family law context has explained the value of children being afforded the opportunity to express their views and to have those views taken into account in decision-making about matters that affect them.[68] Yet research has also found that children feel marginalised by family law system processes: they are often confused or unclear about why their views are sought, and the impact of those views on decision-making processes and outcomes.[69] Children have also expressed disappointment with the level and type of involvement in family law processes, including the perception that their views and experiences are not being sought or heard by adult decision-makers, and that they are not being provided with accessible information.[70] Research has found the first additional consideration in the best interests assessment under Part VII of the Family Law Act is 'given insufficient emphasis in current family law system practice'.[71] In a study by the

[67] CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 64) [43].

[68] See, e.g., Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) 30; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 4-13; ALRC, *Family Law for the Future* (n 46) 364 [12.28]; Judy Cashmore, 'Children's Participation in Family Law Decision-making: Theoretical Approaches to Understanding Children's Views' (2011) 33 *Children and Youth Services Reviews* 515; Anne Graham and Robyn Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2006) 31 *Children Australia* 30; Rachel Birnbaum, 'Views of the Child Reports: Hearing Directly from Children Involved in Post-separation Disputes' (2017) 3 *Social Inclusion* 148; Rachel Birnbaum and Nicholas Bala, 'The Child's Perspective on Legal Representation: Young Adults Report on their Experiences with Lawyers' (2009) 25 *Canadian Journal of Family Law* 11. Rachel Birnbaum, Nicholas Bala and Francine Cyr, 'Children's Experiences with Family Justice Professionals in Ontario and Ohio' (2011) 25 *International Journal of Law, Policy and the Family* 398; Bren Neale, 'Dialogues with Children: Children, Divorce and Citizenship' (2002) 9 *Childhood* 455; Anne B Smith, Nicola Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making After Parental Separation' (2003) 10 *Childhood* 203.

[69] See, e.g., Carson et al (n 68) 3-4, 47, 51-2, 68; Kaspiew et al, *Independent Children's Lawyers Study: Final Report* (Australian Institute of Family Studies, 2nd ed, 2014) 135-6, 139; Parkinson and Cashmore (n 68) 73-4; 149-54; Lani Blackman, *Representing Children and Young People: A Lawyers' Practice Guide* (Victoria Law Foundation, 2002) 206; William J Keough, *Child Representation in Family Law* (LBC Information Services, 2000) 50-53, 61-2; Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy & the Family* 225; Nicola Taylor, 'What do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20 *Australian Journal of Family law* 154, 173-75; Robyn Fitzgerald, 'How are Children Heard in Family Law Proceedings in Australia?' (2002) 6 *Southern Cross University Law Review* 177.

[70] ALRC, *Family Law for the Future* (n 46) 364 [12.28], 365 [12.30]-[12.31]; Carson et al (n 68) 68.

[71] ALRC, *Family Law for the Future* (n 46) 168-69 [5.57], citing Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) and Carson et al (n 68).

Australian Institute of Family Studies (AIFS) into the experiences and needs of children and young people whose parents had separated and had accessed the family law system, it was observed that:

> For more than 15 years, concerns have been raised about the extent to which existing legislative and practice measures are sufficient in fulfilling Australia's obligations as a signatory to the UNCRC with respect to the participation of children and young people in decision making in the family law context that affects them.[72]

In the words of a child who participated in the AIFS study, children and young people want 'a bigger voice more of the time' in family law decision-making processes that affect them.[73] The practical effect of the procedural, legal and practical barriers to children's participation is that they 'distort' the way that children's right and children's interests are 'argued, adjudicated and ultimately, protected' by adult decision-makers.[74]

This thesis addresses the problem that children's right to decisional privacy has not been theorised in the context of Australian family law, or elsewhere.[75] Yet children's ability to participate meaningfully in decision-making processes about matters that affect them, and adult decision-makers listening to and hearing children's own voices, are persistent and ongoing areas of concern in Australian family law policy and practice. Developing children's right to decisional privacy is attended by the challenge of filling an 'interpretive void' to determine its meaning and scope.[76] Tobin has argued that this task is 'ultimately an act of persuasion'.[77] This thesis strives to construct a conceptual framework for understanding and giving effect to children's right to decisional privacy. I seek to present a new way of *thinking* about the problem

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[72] Carson et al (n 68) 3.
[73] Ibid 68, quoting Alana, aged 12-14 years. This finding is consistent with earlier research by Parkinson and Cashmore (n 68) 73-75. See also Stalford and Hollingsworth (n 5) 38 (referring to 'an overwhelming consensus, mined through empirical work involving children and young people, that children want to be given a say in decisions that affect their lives'); Megan M Gollop, Anne B Smith and Nicola J Taylor,, 'Children's Involvement in Custody and Access Arrangements after Parental Separation' (2000) 12 *Child and Family Law Quarterly* 383; Harriet Bretherton, '"Because it's me the Decisions are About": Children's Experiences of Private Law Proceedings' [2002] 32 *Family Law* 450; Carol Smart and Bren Neale, '"It's My Life Too – Children's Perspectives on Post-Divorce Parenting' (2000) 30 *Family Law* 163.
[74] Stalford and Hollingsworth (n 5) 37.
[75] See Ann Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 *International Journal of Children's Rights* 233, 241 (arguing that the field of children's rights is generally undertheorised, which she suggests is explained by the influence of the UNCRC in academic research).
[76] Tobin, 'Seeking to Persuade' (n 65) 1.
[77] Ibid 3-4.

of granting children decision-making autonomy, while being attune to 'the diverse, overlapping, and potentially conflicting interests' of the 'interpretive community'[78] in the Australian family law context – those who have an interest in the meaning and value of children's right to decisional privacy. This community includes – in addition to the state[79] – children, their parents and other family members, the Family Court, legal practitioners and others involved in Part VII proceedings, academics and policy-makers.

In this section, I have sought to explain, from both a philosophical and a doctrinal perspective, how and why children's right to decisional privacy should matter to judges in their decision-making under Part VII of the Family Law Act. I have suggested that this right falls within the assessment of children's best interests as the paramount consideration (albeit not explicitly), in the form of children's ability to express their views and be heard in those proceedings. I have also argued that, in light of the express legislative commitment in section 60B(4) to make the UNCRC relevant to decision-making under Part VII, children's rights are increasingly becoming a 'way of thinking' for Family Court judges.[80]

No explicit reference is made in either the UNCRC or the Family Law Act to 'decisional privacy'. Article 16 of the UNCRC protects the child against 'arbitrary or unlawful interference with his or her privacy, family, home or correspondence'. The concept of decisional privacy, as I explained in chapter 1, is more than a negative freedom, or a protection against unjustifiable interference by the state or other individuals. It also serves a positive freedom: a child's ability to develop and pursue his or her own conception of the good life and to make choices that are consistent with that conception, including about his or her body and self-identity. This understanding of decisional privacy reinforces or facilitates a number of other Convention rights – notably, the child's right to express his or her views and to be heard (article 12); to receive appropriate direction and guidance in the exercise of his or her rights from the child's parents, in a manner consistent with the child's evolving capacities (article 5); to preservation of identity (article 8); to protection of privacy (art 16); and to freedom of expression (article 13(1)). Decisional privacy is a foundation for or precondition to the exercise of these other rights under the UNCRC. That is, the fulfilment of these rights under the UNCRC depends in

[78] Ibid 8, 10.
[79] As 'the central actor to be persuaded by the interpretive exercise', given its primary legal responsibility for the implementation of international treaty obligations: ibid 11.
[80] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 5) 31-32.

part on the realisation of a child's right to decisional privacy. This is because children's rights are interdependent and interrelated,[81] and a sound theoretical framework for analysis of children's decisional privacy must clearly articulate this interconnectedness. In the next Part of this chapter, I draw on these various provisions of the UNCRC to set out what I consider to be four salient features of a children's rights approach to decisional privacy.

III THE SALIENT FEATURES OF A CHILDREN'S RIGHTS APPROACH TO DECISIONAL PRIVACY

The children's rights approach to decisional privacy serves as an antidote to the dominant conceptions of children and childhood set out in the previous chapter: the view underpinning the welfare model that children are vulnerable, dependent, and incapable of rational decision-making. It provides rhetorical and moral support for the proposition, recognised in the preamble to the UNCRC, that children need 'special safeguards and care'. But it also – significantly – (re)conceptualises children as capable of making decisions consistent with their evolving capacities, who should be supported and guided in the exercise of their rights.[82] The children's rights approach to decisional privacy comprises four salient features. These features are consistent with, and build on, the 'substantive' rights-based approach developed by Tobin,[83] and the work of Hollingsworth, Stalford and Gilmore in aiming to increase children's 'visibility' in law through a 'children's rights' judgment.[84]

A *Children Are Subjects with Distinct Rights and Interests*

The first feature of a children's rights approach to decisional privacy responds to the hazards associated with liberal 'family privacy' discourse, explained in the previous chapter, by

[81] See Tobin, 'Seeking to Persuade' (n 65) 37-39 (discussing the principle of internal context sensitivity). See also Jonathan Todres, 'Children's Rights and Women's Rights: Interrelated and Interdependent' in Martin Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 21, 21; Freeman, 'The Human Rights of Children' (n 6) 16.

[82] John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 170. See also CRC Committee, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [5].

[83] See Tobin, 'Judging the Judges' (n 4) 603.

[84] See Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (n 5); Hollingsworth and Stalford (n 50) 53.

requiring that children be recognised as having rights and interests that are *distinct* from those of their parents, and of the family as an entity. This is an important conceptual recognition of the 'greater democratisation' of family relationships,[85] which displaces the presumption that the interests, values and identities of family members necessarily align within a cohesive, integrated unit. Baroness Hale of Richmond, former President of the Supreme Court of the United Kingdom, has explained that '[t]hose who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right'.[86] The CRC Committee similarly has stressed that the UNCRC 'requires that children, including the very youngest children be respected as persons in their own right', and as 'active members of families, communities and societies with their own concerns, interests and points of view'.[87] This first feature does not discount the hierarchical relationship that exists between parents and their children. Yet it requires that, even within such an understanding of the parent-child relationship, children must be respected as active rights-bearing subjects, with distinct rights and interests – and not simply objects of concern and protective intervention.[88] In practice, this recognition of children as rights-bearers requires judges to adopt an interpretive framework that acknowledges children's unique status both under the Family Law Act and in society.[89] This is because, as I explained above, acting in the best interests of the child requires a recognition of children's rights, including the right to decisional privacy as a precondition to the exercise of other rights under the UNCRC.

B *Children Exercise Autonomy Consistent with Their Evolving Capacities*

The second feature of a children's rights approach to decisional privacy is that children must play an active role, consistent with their evolving capacities, in decision-making about their own best interests.[90] In the previous chapter, I explained the role of a child's family in the

[85] Parkinson and Cashmore (n 68) 10.
[86] *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, 641 [57]. See also Berry Mayall, *Towards A Sociology of Childhood* (Maidenhead, 2000) 21.
[87] CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 82) [5].
[88] Parkinson and Cashmore (n 68) 7; Carol Smart, Amanda Wade and Bren Neale, 'Objects of Concern? Children and Divorce' (1999) 11 *Child and Family Law Quarterly* 365; John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 171, 176; Stalford and Hollingsworth (n 5) 31; John Tobin, 'Justifying Children's Rights' (n 9) 410; David Archard, 'Children, Adults, Best Interests and Rights' (2013) 13 *Medical Law International* 55, 59; Tobin and Varadan (n 82) 172; Lundy, Tobin and Parkes (n 39) 396; Fitzgerald (n 69) 180, 193-94.
[89] Tobin, 'Judging the Judges' (n 4) 586.
[90] Ibid 591.

child's development of autonomy and identity, and the significance attached to the parental role under the Family Law Act. Article 5 of the UNCRC underscores the importance of the child's parents in providing 'appropriate direction and guidance' in the child's exercise of his or her rights, 'in a manner consistent with the evolving capacities of the child'. This notion of 'evolving capacities' importantly is a 'positive and enabling' one,[91] which recognises that parental rights and power over the child diminish with the child's growing maturity. Whilst children are born dependent on adults, their various capacities evolve as they age.[92] The expectation under the UNCRC is that, during this period of the child's development, parents will give their child appropriate direction and guidance, consistent with the child's evolving capacities.[93]

The CRC Committee has explained that article 5 embodies the principle that parents 'have the responsibility to continually adjust the levels of support and guidance they offer to a child'.[94] These adjustments, according to the CRC Committee, take into consideration the child's 'interests and wishes', and the child's 'capacities for autonomous decision making and comprehension of his or her best interests'.[95] The notion of children's evolving capacities, when applied in practice, envisions that a child may reach a level of understanding and maturity on a matter that is such as to obviate the need for parental guidance and direction – and so the child's own views must be respected, even when they conflict with the views of the child's parents.[96] Put more bluntly by Seymour, '[a]s a child matures, … parents must "back off"'.[97] The parent-child dialogue when a child reaches this level may shift from 'reminders and advice' from parents to 'an exchange on an equal footing'.[98] The evolving capacities principle may therefore challenge parents' perceptions of their 'proper' role. It might even expose parental reluctance to cede their authority on matters where they feel that they know what is 'best' for (and know better than) their child. I elaborate on this point in chapter 7, in the context of addressing concerns about children having and exercising decisional privacy rights. But as

[91] CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 82) [17]. See also CRC Committee, *General Comment No 20*, UN Doc CRC/C/GC/20 (n 39) [18].
[92] Tobin and Varadan (n 82) 159. See also Eekelaar, 'Role of Dynamic Self-Determinism' (n 6) 42.
[93] Tobin and Varadan (n 82) 160.
[94] CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 82) [17].
[95] Ibid.
[96] Tobin, 'Justifying Children's Rights' (n 9) 428; Tobin and Varadan (n 82) 162.
[97] John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016) 101.
[98] CRC Committee, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [84]; CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 64) [44].

Tobin has observed, '[u]ltimately the principle of evolving capacities demands that parents concede that they are not always the sole arbiters of a child's best interests'.[99] Understood thus, evolving capacities supports the right of all children, regardless of age, to experience increasing agency, autonomy and responsibility in the enjoyment and exercise of their rights as they develop and mature.[100]

Just as the principle of evolving capacities is a process of progressive acquisition of 'competencies, understanding and increasing levels of agency' that enable children 'to take responsibility and exercise their rights',[101] so too is autonomy, as explained in chapter 1, a relational, gradual and evolving concept. I have advanced the view that individuals are, and become, autonomous in and through social relationships of differing degrees of intimacy. At a practical level, this demands deference to the role of the child's family in the attainment of the child's rights, yet in a way that respects the child's evolving capacities, such that children are not 'abandoned'[102] to their autonomy and parental authority is not undermined.[103] Article 5 of the UNCRC reconceptualises the parent/child relationship from one characterised by 'unbridled parental autonomy' to an 'interdependent' one.[104] Importantly, it does not permit children to be forced to make decisions where they are unwilling, or where they feel that they lack the competence, to do so.[105] The evolving capacities principle also appreciates that to overestimate children's capacities and so prematurely withdraw parental direction and guidance, invokes the risk of exposing children to abuse, harm and exploitation.[106] A relational approach to children's decisional privacy emphasises that children's interests are intertwined

[99] John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 53, 64. See also Tobin and Varadan (n 82) 184; Tobin, 'Justifying Children's Rights' (n 9) 425-6. Cf. Matias Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights' (2012) 20 *International Journal of Children's Rights* 365.
[100] Tobin and Varadan (n 82) 178.
[101] See CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 82) [3], [17]; CRC Committee, *General Comment No 20*, UN Doc CRC/C/GC/20 (n 39) [18].
[102] See Hafen and Hafen (n 19).
[103] Tobin and Varadan (n 82) 183.
[104] Ibid 173.
[105] Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Studies, 2005) 4; Tobin and Varadan (n 82) 173.
[106] Lansdown, *Evolving Capacities* (n 105) 4; Tobin and Varadan (n 82) 173. See also Lundy, Tobin and Parkes (n 39) 405; Richard G Wilkins, 'International Law, Social Change and the Family' in Peter Lodrup and Eva Modvar (eds), *Family Life and Human Rights: Papers Presented at the 11th World Conference of the International Society of Family Law* (Gyldendal, 2004) 981, 998. In the context of post-separation parenting, see Parkinson and Cashmore (n 68) 13-18, 100-102.

with those of their parents,[107] and that these entangled interests can on occasion conflict. The primary responsibility that parents have for their child's upbringing and development (article 18 UNCRC) is qualified by the requirement that the exercise of parental responsibility is consistent with the best interests of the child, and with the attainment of the child's rights.[108] This qualification leads to the third key feature.

C *Children Require Appropriate Direction and Guidance in the Exercise of Their Rights*

The theory of children's decisional privacy developed in this thesis enables children to exercise autonomy in the enjoyment of their rights, consistent with their evolving capacities. But it also recognises that children's relative vulnerability and immaturity necessitate that they are provided with appropriate direction and guidance in the exercise of their rights, as well as means of protecting and upholding those rights.[109] Article 5 of the UNCRC therefore strives for a 'delicate balance' between acknowledging children's evolving capacities, and recognising the role of parents in helping children to realise their rights as those capacities develop, without unjustified state intervention.[110] In doing so, it helps to establish the normative basis for moderating the trilateral relationship between children, their parents and the state. Critically, the focus must remain on the *child's* right to receive appropriate direction and guidance from his or her parents, to enable the child to enjoy his or her right to decisional privacy, rather than on *parents'* rights to non-interference by the state in the exercise of parental rights and responsibilities.[111]

While parents have a broad degree of discretion in deciding how to offer that direction and guidance to their child, the discretion is not unlimited.[112] The 'appropriateness' of the direction

[107] Alice Hearst, *Children and the Politics of Cultural Belonging* (Cambridge University Press, 2012) 19; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The Free Press, 2004) 35.
[108] Article 19(1) of the UNCRC recognises that parents can exercise their rights in ways that are inconsistent with their parental responsibilities and with the objective of enabling children to realise their rights.
[109] Tobin, 'Judging the Judges' (n 4) 586; Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review* 199, 317-18.
[110] Tobin and Varadan (n 82) 160.
[111] Ibid 161; John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 558-59.
[112] Tobin and Varadan (n 82) 162; Lansdown, *Evolving Capacities* (n 105) 6 (noting that parents do not have '*carte blanche* to provide whatever direction or guidance they happen to believe is suitable').

and guidance offered refers to its consistency with all other provisions of the UNCRC;[113] and to its focus on developing the child's ability to progressively exercise and enjoy his or her rights consistently with his or her evolving capacities.[114] Thus, parents are effectively required to perform a 'trustee type role',[115] and to take positive steps to enhance the child's capacity to enjoy his or her rights.[116] In terms of enabling children's capacity to enjoy their decisional privacy rights in particular, the role of parents is to help their children develop 'the ability to conceive, evaluate alternatives, and act on a life plan'[117] – that is, as I explained in chapter 1, to assist children to develop their capacity for autonomy. The right to what Macleod has called 'an autonomy-facilitating upbringing' seeks to provide children with skills, knowledge and experience that the child will require to live autonomously: to 'deliberat[e] about conceptions of the good and pursu[e] chosen life plans'.[118] That parental power must be exercised for the *child's* benefit, and not for the parents' benefit,[119] is reinforced by article 18(1) of the UNCRC: the best interests of the child must be parents' 'basic concern'. Further, parents' right to regulate their child's right to decisional privacy is, as I explained above, subject to the evolving capacities principle.

In the previous chapter, I noted that parents have a 'bundle of rights'[120] that the Family Law Act defines as 'parental responsibility': '[a]ll the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[121] Parental responsibility is presumptively vested in each parent (section 61C) or it can be allocated by court order (section 61D). The Family Court has described the essence of parental responsibility as 'much more than exercising parental rights or power over children. It encompasses protecting and respecting the

[113] Tobin and Varadan (n 82) 162, 170.
[114] Ibid 171. See also Tobin and Field (n 111) 558; Jane Fortin, *Children's Rights and the Developing Law* (n 1) 7.
[115] Tobin and Field (n 111) 558. See also Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the child' (2009) 16 *Childhood* 518, 525 (describing parental rights as 'functional rights' that 'serve the rights of children'); Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' (2006) 117 *Ethics* 80, 95-6; Samantha Brennan and Robert Noggle, 'The Moral Status of Children: Children's Rights, Parents' Rights and Family Justice' (1997) 23 *Social Theory and Practice* 1, 11-13 (referring to 'stewardship rights'). Cf. Scott Altman, 'Parental Control Rights' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 209, 216-20.
[116] Tobin and Varadan (n 82) 171.
[117] Peter G Brown, 'Human Independence and Parental Proxy Consent' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 209, 210-12.
[118] Macleod (n 11) 198. See also Eamonn Callan, 'Autonomy, Child-Rearing, and Good Lives' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 118.
[119] Tobin and Varadan (n 82) 160.
[120] *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013) [82].
[121] *Family Law Act 1975* (Cth) s 61B.

child's rights even where they collide with their parents' contrary views or conflicting interests'.[122] The legitimacy of parental rights, on this view, derives from parental responsibilities and duties to guide and aid children to effectively enjoy their rights.[123] This concept of parental responsibility is consistent with the starting premise of the UNCRC, namely, that parents have 'both a presumptive entitlement *and* a responsibility' to determine the best interests of their child.[124] Article 5 of the UNCRC protects parents' duties, rights and responsibilities in relation to the child's upbringing and care; yet it also includes the principle of 'evolving capacities' as a limit on the exercise of parental rights, which does not feature in the decision-making framework under Part VII of the Family Law Act.[125]

The distinction between parents' provision of appropriate direction and guidance to their children in the exercise of their rights, and parents influencing or manipulating their children's exercise of decisional privacy, might not always be easy to make. A concern for the child, in this context, is that he or she will internalise the values of the family as a group; and that these social conditions will diminish or deny the child's sense of individual choice, and hence ability to exercise his or her autonomy. As I explained in chapter 1, the ability to choose between meaningful options is essential to autonomy. If an individual has no options, or is unable to choose from those options, then that individual cannot be autonomous. Any assessment of a child's autonomous choice must occur within the context of the child's family relationships, and in particular, the critical role of the child's parents in offering direction and guidance. In this regard, the child's decision-making autonomy will necessarily be influenced, perhaps even limited, by the child's relationships with his or her parents and other family members – but it does not depend on the child's capacity for rational decision-making.

Owing to the power imbalance inherent in the parent-child relationship, the potential for a child's decision to be influenced by his or her parents, and the inherent difficulties in establishing whether, and if so, how, that decision has been so influenced, are live concerns.[126]

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[122] *W and G (No 1)* (2005) FLC ¶93-247, 80,054 [111]. See also Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14 *Cardozo Law Review* 1747, 1816, 1818; Tobin, 'Justifying Children's Rights' (n 9) 424.

[123] Woodhouse (n 122) 1819-20.

[124] Eekelaar and Tobin (n 49) 89 (emphasis in original).

[125] See Garton Kamchedzera, 'Article 5: The Child's Right to Appropriate Direction and Guidance' in Andre Alen et al, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2012) 27-28.

[126] Ferguson, 'Argument for Treating Children' (n 9) 244; Mianna Lotz, 'Parental Values and Children's Vulnerability' in Catriona Mackenzie, Wendy Rogers, and Susan Dodds (eds), *Vulnerability: New Essays in*

It is here that the best interests principle is critical: it would be expected that parents act in their child's best interests in assisting their child to enjoy his or her decisional privacy rights, by providing appropriate guidance and direction, consistent with the child's evolving capacities. Furthermore, the presumption that parents are in the optimal position to determine their child's best interests – this being both an entitlement and a responsibility under article 5 of the UNCRC – does not render parental views determinative. Those views are subject to the child's evolving capacities, explained above, and the requirement that parental views amount to 'appropriate direction and guidance' to enable the child to realise his or her rights.[127] As the CRC Committee has explained, 'an adult's judgment of a child's best interests cannot override the obligation to respect all rights under the Convention'.[128] As I explain further in chapter 7, this unique notion of the child's evolving capacities both qualifies parental influence, and tempers children's alleged free rein or exercise of absolute autonomy in all matters affecting them.[129]

D *Children Must Meaningfully Participate in Decision-Making about Their Lives*

The final salient feature of a children's rights approach to decisional privacy emphatically deletes the 'not' from the anachronistic adage, 'children should be seen and not heard'. This is a requirement that children meaningfully participate in decision-making about their lives. Recognising children as 'beings', not simply 'becomings',[130] provides children with 'a voice' and acknowledges 'the dangers of wrapping them in silence'.[131] Children who are capable of forming a view have the right, pursuant to article 12(1) of the UNCRC, to express their views freely in all matters affecting them, and pursuant to article 12(2), the opportunity be heard in judicial and administrative proceedings affecting them. The right to be heard under article 12, together with the evolving capacities principle in article 5, acknowledge children 'as having

Ethics and Feminist Philosophy (Oxford University Press, 2014) 242, 260-63; Eekelaar and Tobin (n 49) 87; Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 *International Journal of Law and the Family* 132, 138-9. In the context of post-separation parenting proceedings, see Parkinson and Cashmore (n 68) 82-83, 89, 94-5, 120-22.

[127] Eekelaar and Tobin (n 49) 89.

[128] CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 64) [4]. See also CRC Committee, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [29]; CRC Committee, *General Comment No 15: (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art 24)*, UN Doc CRC/C/GC/13 (17 April 2013) [31].

[129] Tobin, 'Fixed Concepts But Changing Conceptions' (n 99) 64.

[130] Tobin, 'Understanding Children's Rights' (n 88) 160; Freeman, 'The Human Rights of Children' (n 6) 9, 20.

[131] Freeman, 'The Human Rights of Children' (n 6) 20.

agency and as having a voice that must be listened to'.[132] This feature supports my argument that recognising a child's *substantive* right to decisional privacy requires attendant *procedural* rights that facilitate the child's participation in the decision-making process. A failure to acknowledge these procedural rights renders the child's decisional privacy rights ineffective, because it 'significantly condition[s]' children's 'options for action'.[133] Participation is therefore critical to children's experience of autonomy.

The issue of children's participation in family law decision-making remains highly contested, in part owing to concerns about protecting children from conflict and harm, particularly in the context of parental separation.[134] Yet there remains a frustrating lack of clarity around the notion of 'participation' in the children's rights context.[135] Participation is a fluid process, rather than a singular event, and its parameters are influenced by the child's age and capacities, and the nature of the decision to be made.[136] The CRC Committee has noted that participation involves 'ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'.[137]

As noted earlier, article 12(1) of the UNCRC gives 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, with the child's views being given due weight in accordance with his or her age and maturity. Some scholars have interpreted the two considerations identified in article 12(1) – the child's age and maturity – as enabling 'adults to retain authority over children',[138] and allowing the UNCRC to function as an 'instrument for the denial of children's citizenship'.[139] I accept an alternative interpretation of article 12, suggested by Tobin, that these two qualifiers (age and maturity)

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[132] Archard, *Children: Rights and Childhood* (n 9) 58.
[133] Iris Young, *Inclusion and Democracy* (Oxford University Press, 2010) 145. See also Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 *Law and Philosophy* 19, 42; Parkinson and Cashmore (n 68) 12.
[134] See Parkinson and Cashmore (n 68) 13-18.
[135] See Gerison Lansdown, 'The Realisation of Children's Participation Rights' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 11. See also Lundy, Tobin and Parkes (n 39) 415.
[136] Parkinson and Cashmore (n 68) 19.
[137] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 98) [3]. See also Gary B Melton, 'Parents *and* Children: Legal Reform to Facilitate Children's Participation' (1999) 54 *American Psychologist* 935, 936.
[138] Archard, *Children: Rights and Childhood* (n 9) 66.
[139] Brian Milne, 'Is "Participation" As It is Described by the United Nations Convention on the Rights of the Child (UNCRC) the Key to Children's Citizenship?' (2005) 9 *Journal of Social Science* 31, 41.

assume that the weight to be afforded a child's views must increase as a child ages and matures,[140] and require adults to 'cede their authority over children *and* actively facilitate their citizenship'.[141]

Assumptions cannot be made about a child's capacity solely on the basis of the child's biological age, given that myriad factors influence and shape the development of children's capacities to form their own views.[142] According to the CRC Committee, the notion of 'maturity', for the purposes of article 12(1), 'refers to the ability to understand and assess the implications of a particular matter' and 'the capacity of a child to express his or her views on issues in a reasonable and independent manner'.[143] The child's level of understanding in this context should be understood as a continuum, rather than a 'binary'.[144] Significantly, 'understanding' does not equate to 'competency':[145] for the concepts to be equated would demand that children be (unfairly) held to adult standards for their views to be given due weight. I elaborate on this issue of assessment of children's competence in chapter 4. Another important feature of the right of participation embodied by article 12 of the UNCRC is that it is buttressed by the presumption that children are capable of expressing their views – and so it reverses the historical presumption of children's incompetence.[146] This right requires adult decision-makers to be aware that children can, and do, express their views in a range of ways, which might well be different to adult forms of expression.[147] As Lundy, Tobin and Parkes have suggested, 'the onus rests on adults to identify, encourage and value, rather than dismiss' the variety of ways that children express their views.[148] Article 12 of the UNCRC thus elicits new ways of understanding children's participation, with potential to make decision-making processes more inclusive and empowering for children.[149]

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[140] Lundy, Tobin and Parkes (n 39) 409. See also Tobin and Varadan (n 82) 174; Lothar Krappman, 'The Weight of the Child's View (Article 12 of the UN Convention on the Rights of the Child)' (2010) 18 *International Journal of Children's Rights* 501, 505.
[141] John Tobin, 'Justifying Children's Rights' (n 9) 418.
[142] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 98) [29]. See also Kay Tisdall, 'Challenging Competency and Capacity? Due Weight to Children's Views in Family Law Proceedings' (2018) 26 *International Journal of Children's Rights* 159, 175.
[143] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 98) [30].
[144] Lundy, Tobin and Parkes (n 39) 410, citing Parkinson and Cashmore (n 68) 4. See also Tobin and Varadan (n 82) 174.
[145] Lundy, Tobin and Parkes (n 39) 410.
[146] Ibid 400.
[147] James Garbarino and Frances Stott, *What Children Can Tell Us: Eliciting, Interpreting, and Evaluating Critical Information From Children* (Jossey-Bass, 1992) 41.
[148] Lundy, Tobin and Parkes (n 39) 400. See also CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 98) [20].
[149] Tobin, 'Understanding Children's Rights' (n 88) 180; Nigel Thomas, 'Towards a Theory of Children's Participation' (2007) 15 *International Journal of Children's Rights* 199; Harry Shier, 'Pathways to Participation:

Article 12(2) of the UNCRC provides that the child is to be given the opportunity to be heard in legal proceedings affecting him or her, either directly or through a representative or appropriate body. The primary normative justification for participation in the legal process is its instrumental role in proper and accurate decisions, and hence procedural fairness.[150] But rights to participation and to be heard can also be justified on the ground that a person has a right to promote and defend his or her interests. In liberal societies that value autonomy, adults are generally taken to have primary responsibility for advancing and defending their own interests.[151] The image of children constructed, however, is that they are unable to so protect their own interests. As a result, children are denied participatory rights, or have those rights curtailed (again, reflective of the will or choice theory of rights). This is evident in proceedings under Part VII of the Family Law Act, which have arguably struggled with the notion of the child as an active participant, in the sense that a children's rights approach understands that term.

In most Family Court proceedings, 'children are not there because they want to be'.[152] In these circumstances, children's participation in assessments of their best interests has been found to foster a sense of social and emotional empowerment, through an affirmation that children can, and do, play an active role in forging their life path.[153] The corollary is that children feel persistently and consistently marginalised by the legal system, and perceive that adult participants in the legal process, including judges, do not 'listen' to, take into consideration, or care about their views.[154] The Family Court has held that, to be given 'life or meaning', the child's right to participation demands 'active engagement with the child – meeting them, explaining their options to them and giving them the opportunity to participate how and should

Openings, Opportunities and Obligations' (2001) 15 *Child & Society* 107, 115; Hollingsworth and Stalford (n 50) 67; Tobin, 'Justifying Children's Rights' (n 9) 430-32; Cf. Bell (n 69) 236-42.

[150] Denis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 131-32. Cf. Parkinson and Cashmore (n 68) 20-21.

[151] Galligan (n 150) 141, 158.

[152] ALRC, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997) [4.16].

[153] See, e.g., Hollingsworth and Stalford (n 50) 67; Parkinson and Cashmore (n 68) 67-68.

[154] ALRC, *Seen and Heard* (n 152) [4.23].

they wish'.[155] However, the Family Law Act has adopted a 'cautious, protective approach' to involving children in decision-making.[156]

As I explained in the previous chapter, while children can, under the Family Law Act, initiate proceedings on their own behalf, this rarely occurs.[157] Children cannot give evidence or be present in court during proceedings unless the court gives leave, which is rarely granted.[158] Various provisions of Part VII of the Family Law Act also shape the extent to which children can participate by expressing their views. In determining what is in the child's best interests, the child's views are the first of the 'additional considerations', qualified by the requirement that the court take into account any factors, such as the child's maturity or level of understanding, that the court thinks are relevant to the weight it should give to the child's views.[159] The court may inform itself of views expressed by a child by having regard to a family report;[160] by making an order for independent legal representation of the child's interests;[161] or 'by such other means as the court thinks appropriate'.[162] These provisions are counterbalanced by the requirement that nothing in Part VII of the Act permits the court or any other person to require the child to express his or her views in relation to any matter.[163] The inability of the child to be physically present in court during proceedings, and to give evidence in those proceedings, deprives the child of control over how he or she, and how his or her experiences, are presented to the court;[164] this notion of self-presentation being a vital component of decisional privacy.

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[155] *Duffy & Gomes (No 1)* [2015] FCCA 1121 (16 March 2015) [106]. The judge in this case framed the child's right of participation in proceedings under the Family Law Act within the context of article 12 of the UNCRC, stating: 'The conduct of the litigation requires that the children have the opportunity, as Article 12 prescribes, to not only have their voice heard in the proceedings but to participate in the proceedings to the extent that is consistent with their best interests: at [91].

[156] Parkinson and Cashmore (n 68) 2. See also Bell (n 69) 230.

[157] *Family Law Act 1975* (Cth) s 65C(b). See, e.g., *Pagliarella and Pagliarella* (1993) FLC 92-400, where the Family Court made an order on the application of a 14 year old child to be joined as a party to proceedings. The case of *Bondelmonte & Bondelmonte* [2016] FamCA 1145 (22 December 2016) is a recent, and relatively rare, example of the Family Court finding that the child does have capacity to intervene in parenting proceedings. See also Parkinson and Cashmore (n 68) 53-55.

[158] *Family Law Act 1975* (Cth) s 100B(1), (2). See Alastair Nicholson, 'Children and Children's Rights in the Context of Family Law' (Speech delivered at the LawAsia Conference, Brisbane, 21 June 2003) 3-4.

[159] *Family Law Act 1975* (Cth) s 60CC(3)(a).

[160] *Family Law Act 1975* (Cth) s 62G.

[161] *Family Law Act 1975* (Cth) s 68L.

[162] *Family Law Act 1975* (Cth) s 60CD(2)(c).

[163] *Family Law Act 1975* (Cth) s 60CE. See, in relation to children's expression of their views in Australian family law proceedings, Parkinson and Cashmore (n 68) 68-70. See also, in relation to article 12(1) UNCRC, Lundy, Tobin and Parkes (n 39) 405; CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 98) [22].

[164] Stalford and Hollingsworth (n 5) 45.

The Family Law Act thus reflects the assumptions that children lack the capacity to actively participate in the court process, and must instead rely on the participation and protection of adults to ensure that their rights are realised. The Family Court has observed that '[w]ithout their parents or the courts children have no effective means of enforcing any of their rights'.[165] Accepting children's invisibility in family law decision-making processes as a practical reality, Family Court judges play a fundamental role in protecting and upholding children's rights, and in promoting children as active legal subjects.[166] However, adults (whether they be judges or parents) who are willing to enable children's meaningful participation are not the only 'precondition' to effective participation by children in decision-making processes.[167] Parkinson and Cashmore have identified other such preconditions as: the provision of information to children that is appropriate for their age and level of understanding; giving children an opportunity to participate, and choice about whether, and if so, how, they will be involved in the decision-making process, which includes openness about the options for their involvement; 'scaffolding' or adult support to facilitate children's participation in the process, which requires skills and resources to provide child-friendly processes; and a guarantee of confidentiality – children gaining an understanding of, and trust in, how the information that they give may be used in the decision-making process.[168]

Collectively, the above four features present a conceptual framework for analysing how children's right to decisional privacy should be recognised, interpreted and achieved. The primary aim of this framework is to make children more visible in decision-making processes about matters that affect their lives. This is achieved through adult recognition of children's status as active rights-bearing subjects and the complex dynamics of the parent-child relationship, and through processes that enable children's voices to be articulated, listened to and heard. Yet it would be naïve to suggest that all judges would be partial to such a change in perspective – from the dominant welfare model to a children's rights approach – or that it would be possible in all cases. In the final Part of this chapter, I highlight some factors that might inhibit judges from embracing, or alternatively, might encourage judges to embrace, a

[165] *W and G (No 1)* (2005) FLC ¶93-247, 80,054 [117].
[166] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 5) 5; Lundy, Tobin and Parkes (n 39) 402.
[167] Parkinson and Cashmore (n 68) 63. See also Gerison Lansdown, 'Children's Rights to Participation and Protection: A Critique' in Christopher Cloke and Murray Davies (eds), *Participation and Empowerment in Child Protection* (Pitman, 1995) 19; Phil Treseder, 'Involving and Empowering Children and Young People: Overcoming the Barriers' in Christopher Cloke and Murray Davies (eds), *Participation and Empowerment in Child Protection* (Pitman, 1995) 207.
[168] Parkinson and Cashmore (n 68) 63-64.

children's rights approach to decisional privacy in their decision-making in proceedings under Part VII of the Family Law Act.

IV CONSTRAINTS ON JUDGES' WILLINGNESS AND ABILITY TO ENGAGE WITH CHILDREN'S RIGHTS

A range of institutional, procedural, practical and personal factors – what Tobin has called 'empirical realities'[169] – constrain or embolden judges in their ability and motivation to adopt a children's rights approach to decisional privacy. Tobin has argued that there is 'a strong onus on proponents of a more active judicial approach' in the area of children's rights 'to recognise the extent of these potential obstacles and to articulate a coherent vision of how these might be overcome in order to facilitate more effective and systematic judicial involvement'.[170] My task in this final Part of the chapter is to identify and explain five such factors, drawing on examples from gender dysphoria proceedings before the Family Court, which is the primary case study of this thesis. The first of these two factors are 'individual', on Stalford and Hollingsworth's categorisation, being factors that relate to the individual judge, such as his or her personal experiences, values and characteristics.[171] The other three factors are 'structural', concerning issues beyond the individual judge, such as procedural elements of the decision-making process and a court's place in the hierarchy or the constitutional order.[172]

There are indeed many more such factors, a discussion of which lies beyond the scope of this thesis. Some of these factors necessarily impair judges' willingness and ability to adopt a children's rights perspective, while others might in fact encourage such an approach. Or the operation of factors in combination might be in favour of children's rights decision-making in some cases, but prevent such an approach in others.[173] Much depends on context. These factors shape the proceedings themselves (such as the nature and scope of the child's participation and representation of the child's views), the substance of the decision made (whether the court's

[169] Tobin, 'Judging the Judges' (n 4) 581 (identifying the following obstacles: 'the continuing controversy surrounding the concept of children's rights; the relatively open-ended nature of many of the norms; and procedural impediments at the court level', as well as 'the inferior domestic legal status of an international or regional human rights treaty').
[170] Ibid.
[171] Stalford and Hollingsworth (n 5) 41.
[172] Ibid.
[173] Ibid.

reasoning reflects a rights-based approach or a welfare approach), and the written judgment (its length, tone, structure and audience).[174] Identifying the factors that impact on judges in their day-to-day work – including each factor's scope of influence and how the factors interact – enable me to articulate a clear path for how these factors can be accommodated or addressed to encourage a children's rights approach to judicial decision-making in proceedings under Part VII of the Family Law Act.

A *Judicial Philosophy: The Judge's Own Values and Experiences*

Judicial perspectives and approaches are influenced by both 'extralegal' constraints and context,[175] and by the judge's own values, perspectives, life experiences, personal characteristics and political leanings. This is to say, 'it matters who the judge is' in each case as to whether a children's rights approach is adopted.[176] Former Justice of the High Court of Australia, Michael Kirby, described the value-laden process of 'expressing the law' as follows:

> Judges, like most mortals, have values. As judges, they have a vision of the Constitution and of society, its fairness and justice. Some are more concerned than others about protecting human rights and fundamental freedoms.[177]

In the Australian family law context, former Chief Justices of the Family Court have, through their extra-curial remarks, offered a glimpse into how their personal predilections and life experiences might colour their decision-making. Former Chief Justice Nicholson, a staunch advocate of children's rights, expressed the view that '[p]utting children first must be at the forefront of all of our thinking, and that includes legislators, the judiciary and especially parents'.[178] His successor, Chief Justice Bryant, considered it 'really important … as a judge, to understand what your own prejudices and biases are'.[179] Her self-reflection and insights into her childhood and family life, and concession that a judge should understand 'what you might

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[174] Ibid 42.
[175] Richard Posner, *How Judges Think* (Harvard University Press, 2010) 8.
[176] Stalford and Hollingsworth (n 5) 48.
[177] Michael Kirby, 'Judicial Dissent' (2005) 12 *James Cook University Law Review* 4, 5.
[178] Alastair Nicholson, 'The Child's Rights Come First' *The Age* (online), 21 June 2003 <https://www.theage.com.au/national/the-childs-rights-come-first-20030621-gdvx3t.html>.
[179] Diana Bryant, as quoted in 'Retiring Chief Justice reflects on thirteen years in the Family Court', *The Law Report*, Australian Broadcasting Corporation Radio National, 19 September 2017 <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>.

think yourself and mak[e] sure that you don't project that onto decisions that you are making',[180] are telling of the real influence that the judge's personal experiences can have on his or her role as a judge. In this sense, judging is 'personal', as well as 'political', in that judges' personal characteristics, including their socio-cultural background, personality, and their life and professional experiences, influence the task of judging.[181]

All aspects of the adjudicative process – including framing of the issues, court processes and procedures, the content of the rights in question, and the balance that is reached between competing rights – are shaped by the judge's own moral reasoning.[182] A judge whose moral reasoning is informed by a children's rights approach, shaped by the values underpinning the UNCRC, has the capacity to determine proceedings in a way that is consistent with the values underlying such an approach, even where there is no explicit legislative authority to do so. The scope of a judge's ability to adopt a children's rights approach will necessarily be constrained by the framework within which the decision-making occurs – including the doctrine of precedent, and the legislation under which the decision is made. Judges cannot simply 'drop inconvenient lines of precedent or modify propositions embodied in authoritative texts', or 'plant the flag' of their own moral convictions over existing legal frameworks and structures.[183] Notwithstanding the absence of an express human rights protection at the federal level in Australia,[184] the Family Law Act does indeed make express reference to the UNCRC.

As I explained earlier in this chapter in the context of justifying the importance of children's right to decisional privacy in Australian family law, section 60B(4) of the Family Law Act

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[180] Ibid.

[181] Posner (n 175) 369-70. See also Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 5) 3-4; Rachel J Cahill O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 *Journal of Law and Society* 596, 620 (finding from an empirical analysis of decisions of the UK Supreme Court that 'in difficult cases at least, it is the personal values of an individual judge that influences how … judicial discretion is exercised').

[182] See Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2, 12; Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 238-58.

[183] Waldron (n 182) 13; Dworkin, *Law's Empire* (n 182) 211. See also Tobin, 'Judging the Judges' (n 4) 622.

[184] Victoria, Australian Capital Territory (ACT) and Queensland have adopted legislative charters of human rights: see *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld). Other States and Territories are yet to adopt a charter of human rights. At the federal level, Australia's Human Rights Framework, implemented by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), was launched on 21 April 2010. The Act did not create a charter of human rights, but rather established a new Parliamentary Joint Committee on Human Rights, and a requirement that a Bill introduced into Parliament must be accompanied by a 'statement of compatibility', which is to include an assessment of whether the Bill is compatible with human rights.

provides that an 'additional object' of Part VII of the Act is to give effect to the UNCRC.[185] The Full Court of the Family Court has said that the objects and principles in section 60B 'provide the context' in which the court considers the factors in section 60CC, thereby aiding the court in the exercise of its discretion in determining the best interests of the child in each case.[186] At first blush, this express reference to the UNCRC in the objects of Part VII of the Family Law Act might seem an exciting development. However, as I noted earlier, the 'additional object' in section 60B(4) is only relevant as an interpretive aid in the event of ambiguity, rather than an object guiding the exercise of judicial discretion. This makes the application of the UNCRC to proceedings under Part VII of the Family Law Act both 'uncertain and contentious'.[187] The Full Court of the Family Court in *Ralton & Ralton*[188] explained that:

> although Australia has ratified the Convention and while it is referred to in s 60B(4) of the Family Law Act, the contents of the Convention are not enshrined as operative principles of law. Ratification itself has no direct legal effect upon domestic law and the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act.[189]

The growing prominence of children's rights discourse in Australian family law jurisprudence, including in debates about medical treatment decision-making for children,[190] and in post-separation parenting proceedings,[191] has indeed shaped the 'general intellectual

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[185] This provision was inserted by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 13. Australia ratified the UNCRC on 22 August 1990.
[186] *Goode and Goode* (2006) FLC 93-286, 80,889 [10].
[187] Patrick Parkinson, 'The Family Law Act and the UN Convention on Children's Rights: A New Focus on Children?', *Right Now* (online), 13 July 2012 <rightnow.org.au/opinion-3/the-family-law-act-and-the-un-convention-on-childrens-rights-a-new-focus-on-children/>. The Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) explains that the purpose of section 60B(4) is 'to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention'. That is, the UNCRC can be used as an 'interpretive aid' to Part VII of the Family Law Act; but to the extent that the Act is inconsistent with the UNCRC, the Act would prevail. The Explanatory Memorandum makes clear that section 60B(4) 'is not equivalent to incorporating the Convention into domestic law' (at [23]). For a more detailed analysis of section 60B(4), see Michelle Fernando, 'Express recognition of the UN Convention on the Rights of the Child in the Family Law Act: What Impact for Children's Participation?' (2012) 36 *UNSW Law Journal* 88.
[188] [2017] FamCAFC 182 (7 September 2017).
[189] Ibid [18].
[190] See, e.g., *Re Alex* (2004) 31 Fam LR 503, 529 [154]; *Re Alex (No 2)* (2009) 42 Fam LR 645, 685-88 [178]-[186]*; Re Jamie* (2013) 50 Fam LR 369, 395-98 [120]-[122], [129], [134].
[191] See, e.g., *Dylan & Dylan* [2007] FamCA 842 (21 August 2007) [176]-[185]; *Riemann & Riemann* [2017] FamCA 318 (1 May 2017) [89]-[90], [101]-[103]; *Karamalis & Karamalis* (2018) 57 Fam LR 588, 590 [12]; *Xiu & Hodges* [2019] FamCA 251 (15 March 2019) [39]-[41].

environment',[192] to use Dworkin's phrase, in which judges contemplate their adjudicative approach. As I discuss in chapter 7, the increasing influence of children's rights in public discourse gives judges who adopt such an approach the opportunity to be at 'the cutting edge' of interpretation.[193] More significantly, by embracing a children's rights model, Family Court judges have the potential to champion the decisional privacy rights of children, and to show respect for them as active subjects with evolving capacities for decision-making, thereby challenging the prevailing welfare approach underpinning Part VII of the Family Law Act.

Yet the extent to which judges are willing and able to engage with understandings of children as rights-bearers is, as Dworkin has noted, 'grounded in [the judge's] own convictions'.[194] Two of the three Full Court judges who decided the case of *Re Jamie* made extra-curial remarks about the influence of human rights on decision-making about children and young people. Justice Strickland foresaw that 'the language of human rights will increasingly permeate Australian decision making surrounding young people generally, and consent to medical treatment for young people specifically'.[195] Former Chief Justice Bryant opined that, when given appropriate status, international human rights law has the inherent power to transform substantive and procedural rights in domestic law.[196] She considered that '[i]f children's … rights are in issue, we should say so, rather than attempting, as I think we have done, to quietly subsume human rights considerations under the rubric of 'best interests'.[197] These remarks point to how judicial philosophy shapes understandings of the relationship between children's rights and children's best interests, as another enabling or inhibiting factor.

B *Judges' Understanding of the Relationship Between Children's Rights and Children's Best Interests*

Judges' own values – whilst most often unarticulated – insidiously influence all aspects of the adjudicatory process, from the framing of issues and the reasoning, to the outcome of

[192] Dworkin, *Law's Empire* (n 182) 88.
[193] Tobin, 'Judging the Judges' (n 4) 623; Dworkin, *Law's Empire* (n 182) 88.
[194] Dworkin, *Law's Empire* (n 182) 88.
[195] Steven Strickland, 'To Treat or Not to Treat: Legal Responses to Transgender Young People' (Paper presented at the Association of Family and Conciliation Courts 51st Annual Conference, Toronto, Canada, 28-31 May 2014) 80.
[196] Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 209.
[197] Ibid 207.

proceedings. Judicial value judgments lie at the core of perceived clashes of values.[198] In gender dysphoria cases, the tension between the child's welfare and the child's rights, and the construction of a dichotomy between them, is palpable. This tension is driven by the best interests principle as the paramount consideration in all matters under Part VII of the Family Law Act. Criticised by many scholars for its indeterminacy,[199] and still 'profoundly contested in practice',[200] Family Court judges themselves have conceded the flexibility and discretion that underlie this principle.[201] Actions to protect children (the welfare principle) might in practice conflict with enabling children to express their views in matters affecting them (principles of participation). The tension between children's welfare and children's rights, as I explain in chapter 4, is also shaped by the broader rationale for the Family Court's welfare jurisdiction, being 'a jurisdiction designed to protect against risk'.[202]

Colouring the judicial reasoning in many Family Court proceedings is the inclination to conceptualise the child's rights and the child's best interests or welfare as distinct issues.[203] Former Chief Justice Bryant remarked extra-curially that the best interests test 'is at odds with a child's right to privacy, autonomy, self-determination and freedom of expression'.[204] Both in conceptual and practical terms, two key commitments embraced by the Family Law Act – to promote the child's best interests or welfare;[205] and to enable the child to express his or her views on any matter affecting the child, giving those views due weight in accordance with the

[198] Andrew Bainham, 'Can We Protect Children and Protect their Rights?' (2002) 32 *Family Law* 279, 279-80.
[199] Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Kluwer Law International, 1997) 373 (describing the principle as 'indeterminate, speculative and value-laden'); Stephen Parker, 'The Best Interests of the Child: Principles and Problems' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994) 26; David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children s Rights* 1, 8; Jonathan Herring, *Relational Autonomy and Family Law* (Springer, 2014) 45-46; Graeme Austin, *Children: Stories the Law Tells* (Victoria University Press, 1994) 12; John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 *International Journal of Children's Rights* 3; Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226; John Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237; Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267; Raymie H Wayne, 'The Best Interests of the Child: A Silent Standard – Will You Know it When You Hear it?' (2008) 2 *Journal of Public Child Welfare* 33; Robert van Krieken, 'The "Best Interests of the Child" and Parental Separation: on the "Civilizing" of Parents' (2005) 68 *Modern Law Review* 25, 26 (the principle functions as a 'juristic black hole'); Jane Fortin, 'Children's Rights – Flattering to Deceive' (2014) 26 *Child and Family Law Quarterly* 51, 59.
[200] Stalford and Hollingsworth (n 5) 33. See also Hollingsworth and Stalford (n 50) 64.
[201] See, e.g., *Dylan & Dylan* [2007] FamCA 842 (21 August 2007) [58]-[59]; *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218, 271.
[202] *AMS v AIF; AIF v AMS* (1999) 199 CLR 160, 189 [87] (Gaudron J).
[203] Archard and Skivenes (n 199) 2; Fortin, 'Accommodating Children's Rights' (n 109) 311.
[204] Bryant, 'It's my Body, Isn't it? (n 196) 199.
[205] *Family Law Act 1975* (Cth) ss 60CA, 67ZC(2).

child's maturity and level of understanding[206] – appear to be opponents in a game of tug of war.[207] And that is how they have been understood by the Family Court. The Full Court of the Family Court in *Harrison v Woollard*[208] remarked that 'where a court is concerned with the welfare of a child no question of "self-determination" by a mature child can arise'.[209] Likewise, the Family Court in *Re B and B: Family Law Reform Act 1995*[210] described 'an inherent conflict between the child's best interests on the one side and self-determinism by the child on the other'.[211]

These judicial remarks are remnants of a welfare-based conception of the child's best interests. As Eekelaar and Tobin have explained, '[w]hereas the historical conception of the [best interests] principle was that a child should be seen but not heard, the rights-based conception … presumes that children must be seen and heard'.[212] The concern, broadly stated, is that if children were to be recognised as having and being able to exercise and enforce their decisional privacy rights, this would undermine the best interests principle that forms the core of decision-making under Part VII of the Family Law Act. On a children's rights approach to decisional privacy, children's rights and the best interests principle are not at odds or mutually exclusive. Rather, as I explained earlier in this chapter, a children's rights approach to decisional privacy requires that the determination of the child's best interests be informed by the child's other rights under the UNCRC – in particular, by the child's right to express his or her own views of his or her best interests.[213] The CRC Committee has said that:

> [a]ny decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.[214]

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[206] *Family Law Act 1975* (Cth) s 60CC(3)(a).
[207] Archard and Skivenes (n 199) 2. See also Parkinson and Cashmore (n 68) 40; Fortin, *Children's Rights and the Developing Law* (n 1) 25; Felicity Kaganas and Alison Diduck, 'Incomplete Citizens: Changing Images of Post-Separation Children' (2004) 67 *Modern Law Review* 959, 972, 978; Fortin, 'Flattering to Deceive' (n 199) 63 (describing the interaction between the best interests test and the concept of children's rights as 'the elephant in the room').
[208] (1995) 18 Fam LR 788.
[209] Ibid 800. See also *Brown and Pedersen* (1991) 15 Fam LR 173, 183 ('the difficulty with the use of the word "right" is that it detracts from the principle that the welfare of the child is the paramount consideration').
[210] (1997) 21 Fam LR 676.
[211] Ibid 749. Courts in the UK have adopted a similar approach: see *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091, [55]; *Mabon v Mabon* [2005] 3 WLR 460, [28].
[212] Eekelaar and Tobin (n 49) 85.
[213] Tobin, 'Seeking to Persuade' (n 65) 37-9.
[214] CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 64) [53].

Another way of conceptualising the relationship between children's rights and children's best interests is to understand the best interests principle itself as a right of the child,[215] which detaches it from the paternalism of a welfare approach. The CRC Committee has asserted that the location of the best interests principle within the UNCRC means that it is a right.[216] Hollingsworth and Stalford have explained the rights-based approach to children's best interests as follows:

> Framing best interests as a right implies obligations and accountability for its fulfilment on the part of adults, and it also expresses the notion that it (whatever 'it' is determined to be in the specific context) is an interest that the child plausibly claims rather than something imposed on the child by others (as is implied by welfare) or that can be waived by the actions of another.[217]

Accepting the observation that the best interests test is 'by its very nature paternalistic and protective'[218] does not preclude judges from adopting a children's rights approach – both in terms of court processes and procedures to facilitate the child's participation in the proceedings; and in terms of the court's reasoning and substantive analysis of the issues and its ultimate decision. However, expressing the best interests principle as a right means that the child's best interests must be assessed, to the greatest extent possible, from the child's perspective of his or her well-being.[219] This requirement invokes article 12 of the UNCRC, and the fourth salient feature of a children's rights approach to decisional privacy set out earlier in this chapter.

C *The Doctrine of Precedent*

Another possible curb on judges' enthusiasm for children's rights in their decision-making is the doctrine of precedent. In gender dysphoria cases, binding precedent was a prominent factor that, until the Full Court's decision in *Re Kelvin* (the focus of chapter 6), prevented judges from

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[215] Hollingsworth and Stalford (n 50) 64-5; Fortin, 'Accommodating Children's Rights' (n 109) 326.
[216] CRC Committee, *General Comment No 14*, UN Doc CRC/C/GC/14 (n 64) [6(a)].
[217] Hollingsworth and Stalford (n 50) 65. See also Fortin, 'Accommodating Children's Rights (n 109) 326 (arguing that articulating children's best interests as rights would encourage a 'more structured and analytical approach' to judicial decision-making).
[218] Bryant, 'It's my Body, Isn't it? (n 196) 199, citing *Re Alex* (2004) 31 Fam LR 503, 529 [154].
[219] John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2nd ed, 2017) 36; Eekelaar and Tobin (n 49) 92-3, 106. Cf. Archard, 'Children, Adults, Best Interests and Rights' (n 88) 55-74.

granting transgender children decisional privacy in relation to their own bodies and identities, by removing the Family Court's authorisation function from the medical treatment process. The Full Court in *Re Jamie* (chapter 5) considered itself bound by the High Court's decision in *Secretary, Department of Health & Community Services v JWB & SMB* (*Marion's case*)[220] (discussed in chapter 4). In doing so, it sustained the Family Court's involvement in the medical treatment process for childhood gender dysphoria, through the requirement that the Court determine whether a child is competent to consent to stage two treatment.[221] Subsequent first instance decisions in gender dysphoria cases were thus bound by the Full Court's reasoning in *Re Jamie*.

However, precedent can be, in Posner's colourful language, a 'death grip' if judges ignore changed circumstances that make earlier decisions 'no longer a sound guide'.[222] The doctrine of precedent serves to enable judges to 'balance the need for continuity, consistency and predictability against the competing need for justice, flexibility and rationality'.[223] That the Full Court in *Re Jamie* had not struck that correct balance was evident from the vocal judicial and community discontent with the Full Court's decision. The Family Court asserted that the 'mandatory ordeal' which children diagnosed with gender dysphoria had to endure 'seems to be anything but in their best interests', and described the court authorisation process as 'some dubious self-affirming rite of passage' that was 'plainly … of no benefit to the child, or anyone else'.[224] The Court in this case accepted that it was 'plainly bound' by the 'clear and unequivocal' law espoused in *Re Jamie*, but sought to emphasise that compliance with the Full Court's decision was not 'to be seen as some form of endorsement of it'.[225] As Tobin has also argued, the importance of precedential constraints is 'often overstated'.[226] Judges retain considerable discretion, particularly in appellate courts where the best interests principle governs proceedings. In *Re Kelvin*, submissions focused on the well-established principle that a later Full Court can depart from an earlier decision if that earlier decision can be said to be 'plainly wrong'.[227] In holding it unnecessary and inappropriate to find that *Re Jamie* was

[220] (1992) 175 CLR 218.
[221] *Re Jamie* (2013) 50 Fam LR 369, 398 [137]-[138].
[222] Posner (n 175) 111.
[223] Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111.
[224] *Re Lucas* [2016] FamCA 1129 (22 December 2016) [10].
[225] Ibid [53]. Tree J added that 'it might be thought that to go on and make any further observations is overly self-indulgent', given that there was no conflict in the authorities concerning the law relevant to applications for special medical treatment for gender identity dysphoria (at [53]).
[226] Tobin, 'Judging the Judges' (n 4) 582.
[227] *Re Kelvin* (2017) 57 Fam LR 503, 529 [169].

plainly wrong, the majority's reasoning in *Re Kelvin* suggested a judicial reluctance to overrule the earlier Full Court decision, 'to preserve the appearance of the law's continuity and stability'.[228] The majority instead preferred to distinguish *Re Jamie* on the basis of legally relevant factual differences between the two cases, relating to advances in medical science and the current state of medical knowledge.[229]

D *The Separation of Powers: Judicial Deference to the Legislature for Reform*

Whilst the doctrine of precedent constrains judges within the court hierarchy, constitutional constraints often generate judicial caution in making decisions that would affect parties beyond those in the case at hand, potentially exposing the judge to criticism that he or she has changed the law or policy.[230] The Family Court in *Re Bernadette*[231] (discussed in chapter 4) displayed immense anxiety at the prospect of making a decision that would impact on transgender children and young people beyond the young person in that case. The Court emphasised that 'it is not … the function of the single judge to make what might be called "findings of general application for future use"'.[232] Judicial deference to the legislature is also evident from the strongly articulated judicial dissatisfaction with the Full Court's decision in *Re Jamie*. Some Family Court judges stressed the 'urgent need' for legislative intervention to 'undo the consequences' of *Re Jamie*.[233] Such 'language of deference' might be used by judges to avoid children's rights-based claims, where they consider that the legislature or the executive, rather than the judiciary, should determine the issue.[234] But the Full Court's decision in *Re Kelvin* shows that the courts do step in where the legislature fails to respond. Although as I argue in chapter 6, the *Re Kelvin* decision was driven not by a desire to uphold and enable the decisional privacy rights of transgender children, but by the Family Court's desire for self-preservation, in light of the growing burden on the Court of the surge in gender dysphoria cases.[235]

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[228] Posner (n 175) 45.see also Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 156; Michael Kirby, 'Precedent – Report on Australia' (Paper presented at the International Academy of Comparative Law Conference, Utrecht, The Netherlands, 17 July 2006) 13-14; Mason, ' Use and Abuse of Precedent' (n 223) 93.
[229] *Re Kelvin* (2017) 57 Fam LR 503, 530 [172], [174]-[175], 531 [177].
[230] Stalford and Hollingsworth (n 5) 41.
[231] (2010) 244 FLR 242.
[232] Ibid 253 [67].
[233] *Re Lucas* [2016] FamCA 1129 (22 December 2016) [71], [73]. See also *Re Martin* [2015] FamCA 1189 (23 December 2015) [27], [36], [38]; *Re Harley* [2016] FamCA 334 (22 April 2016) [42]; *Re Tahlia* [2017] FamCA 715 (8 September 2017) [4].
[234] Stalford and Hollingsworth (n 5) 44.
[235] The number of patients seen by the Royal Children's Hospital (RCH) Gender Service in Melbourne increased from one patient in 2003, to approximately 200 in 2015: Kate Legge, 'Making the Switch', *The Weekend*

E *Presentation of the Case by the Parties*

The last factor that I discuss as influencing the willingness and ability of judges to adopt a children's rights approach to decisional privacy, is how parties present or frame their case.[236] Within an adversarial system, judges determine the issues put before them by the parties. The absence of submissions, evidence and argument by the parties in relation to children's rights denies judges the opportunity to engage with this dimension of the proceedings, and to determine the case within a children's rights framework.[237] In the gender dysphoria case of *Re Alex (No 2)*,[238] Chief Justice Bryant devoted a section of the judgment to a consideration of the various human rights instruments relevant to people who are sex and gender diverse, even though no submissions had been directed to the Family Court on the issue of the young person's rights.[239] In *Re Jamie*, the Full Court was presented with submissions arguing that the proceedings engaged various rights under the UNCRC and the *Convention on the Rights of Persons with Disabilities*.[240] While the Full Court in *Re Jamie* discussed these submissions at some length, I argue that it did so selectively, and without an 'internally coherent' application of the UNCRC and the children's rights model that it embodies.[241] By and large, judges in gender dysphoria proceedings have not adopted the language of children's rights in their judgments. There is yet to be a 'paradigm shift' among the Family Court judiciary to make children's rights a 'way of thinking', rather than a mere 'formalised entitlement'.[242] This has been partly influenced by the failure of parties to raise children's rights arguments in their

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Australian Magazine (Sydney, 18 July 2005) 12. From January to November 2017, the RCH received over 230 patient referrals, and over 700 between 2003 and 2017: Miki Perkins, '"I Want Control Over My Body": Transgender Kids in Landmark Court Win', *The Age* (online), 30 November 2017 <https://www.theage.com.au/national/victoria/i-want-control-over-my-body-transgender-kids-in-landmark-court-win-20171130-gzw6z4.html>. In the decade prior to 2014, there was an average of less than five referrals per year to the RCH Gender Service; in 2014, referrals jumped to 104. Fiona Kelly foreshadowed that, based on Victorian statistics, it was likely that the Family Court would experience a 'dramatic increase' in applications in 2017, when a significant number of the 2014 cohort reached the age of 15: Fiona Kelly, '"The Court Process is Slow but Biology is Fast": Assessing the Impact of the Family Court Approval Process on Transgender Children and their Families (2016) 30 *Australian Journal of Family Law* 112, 120. See also Michelle Telfer, Michelle Tollit and Debi Feldman, 'Transformation of Health-care and Legal Systems for the Transgender Population: The Need for Change in Australia' (2015) 51 *Journal of Paediatrics and Child Health* 1051, 1052.

[236] Stalford and Hollingsworth (n 5) 44-45; Tobin, 'Judging the Judges' (n 4) 620.

[237] Stalford and Hollingsworth (n 5) 33.

[238] (2009) 42 Fam LR 645.

[239] Ibid 685-88 [178]-[186].

[240] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

[241] Tobin, 'Judging the Judges' (n 4) 597.

[242] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 5) 31-32.

submissions. Although, as the other factors that I have presented in this Part suggest, the finger cannot be pointed solely at the parties. Judges' own values, experiences and understandings of the rights/best interests nexus, as well as constraints imposed by the doctrine of precedent and the separation of powers, play a role in shaping whether, and if so, when and how, judges embrace children's rights in their decision-making.

V CONCLUSION

This chapter has situated children's decisional privacy and its value, as articulated in the previous chapter, in the context of children's rights. The children's rights approach to decisional privacy developed in this chapter accounts for the power disparities between children and their parents; it recognises the vital role that family relationships – particularly the parent-child relationship – play in children's growth and development; and through a recognition of the child's evolving capacities, and the requirement that parents appropriately direct and guide children in the exercise of their rights, it strikes a carefully-crafted balance between the need to protect children and to uphold and promote their capacity for autonomy. The most significant feature of a children's rights approach to decisional privacy is participation: ensuring that children are afforded procedural rights that enable them to express their views and to be heard in legal proceedings, as a means of ensuring their substantive right to decisional privacy. In the final Part of this chapter, I set out some practical influences on the willingness and ability of judges to adopt a children's rights perspective in their decision-making, drawing on examples from gender dysphoria proceedings. These factors provide important context to my analysis of the Full Court's judgments in *Re Jamie* (chapter 5) and *Re Kelvin* (chapter 6). In the next chapter, I focus on the final product of the judicial decision-making process: the judgment. I present what I consider to be the key features of a children's rights judgment and explain how, through four stages of the adjudicatory process, such a judgment can enhance a child's decisional privacy in proceedings under Part VII of the Family Law Act.

3

RE-READING FAMILY COURT JUDGMENTS FROM A CHILDREN'S RIGHTS PERSPECTIVE

I INTRODUCTION

In the previous chapter, I presented what I consider to be four salient features of a children's rights approach to decisional privacy. I concluded that chapter by canvassing various structural, institutional and constitutional factors, as well as individual factors concerning the judge himself or herself, that influence how judges might be encouraged to adopt, or conversely, be constrained from adopting, a children's rights approach. In this chapter, I consider how some of these factors might be addressed consistently with children's right to decisional privacy.[1] I do so by narrowing the analytical focus to judgments, as the end product of the legal process for children the subject of proceedings under Part VII of the *Family Law Act 1975* (Cth) (Family Law Act). My focus is on re-reading judgments of the Family Court using a children's rights framework, with a particular emphasis on the child's decisional privacy. I engage in this re-reading exercise in chapters 5 and 6, through a children's rights analysis of the judgments of the Full Court of the Family Court in *Re Jamie*[2] and *Re Kelvin*.[3]

In Part II, I distinguish the features of a children's rights judgment through four stages of the judicial decision-making process: selecting and framing; court procedures; reasoning and analysis; and communicating and enabling. I address each stage in turn, drawing on examples from gender dysphoria proceedings before the Family Court. The common thread that binds these features is their contribution to enabling and listening to children's voices in proceedings under Part VII of the Family Law Act, as a key manifestation of children's ability to enjoy and

[1] Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 54.
[2] (2013) 50 Fam LR 369.
[3] (2017) 57 Fam LR 503.

exercise their decisional privacy rights. Whilst such rights are not expressly conferred by the Family Law Act, as I explained in chapter 2, children's right to decisional privacy manifests in a practical sense in children's ability to participate, in a meaningful and active way, in decision-making about their best interests. Facilitating children's participation in Family Court proceedings requires modifications to court processes and procedures, and involves a potentially unnerving cultural shift in how children are conceptualised within their families, under the Family Law Act, and in society more broadly. Yet it also presents the exciting potential to conceptualise what decisional privacy means and why it is important for children in the Australian family law context.

II FEATURES OF A CHILDREN'S RIGHTS JUDGMENT: FOUR STAGES OF THE DECISION-MAKING PROCESS

In this Part, I set out the features of a children's rights judgment, which I group into four stages of the judicial decision-making process. These features are consistent with, although differently calibrated to, the five 'primary characteristics' or 'markers' of a children's rights judgment presented by Stalford and Hollingsworth,[4] and the dimensions of a 'substantive rights approach' formulated by Tobin.[5] The first is selecting and framing: the conceptual and analytical tools that the judge chooses to decide the issues, and how the judge frames or understands those issues. The second stage is court procedures: legal processes that facilitate children's meaningful participation by promoting and applying child-friendly procedures. The third stage is reasoning and analysis: how the judge, using his or her chosen tools and conceptualisation of the issues, analyses and justifies the resolution of those issues. The final stage is communicating and enabling: how the judge articulates his or her decision in the narrative form of a written judgment, and in doing so, enables the child to share his or her own voice and narrative. These features of a children's rights judgment are not exhaustive or

[4] Hollingsworth and Stalford (n 1) 53. These are: '(i) the utilisation of formal legal tools including the CRC in domestic legal proceedings …; (ii) the use of scholarship to inform key concepts and tensions (such as the child's best interests and child autonomy); (iii) the endorsement of child-friendly procedures to maximise children's participation in legal processes; (iv) the centralisation of the child's voice and experience in the narrative of the judgment; and (v) the communication of the judgment in a child-friendly way': Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 1, 8.

[5] John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 603-619.

prescriptive; nor will they be appropriate in each case.[6] The ability of judges to implement them will be shaped by prevailing political agendas, the state of the law, and developments in medical science, amongst other factors, at the time that the proceedings are heard.[7] The practical task of these features, which I address in turn in the subsequent sections of this Part, is to facilitate critical analyses of judgments in legal proceedings involving children, which 'pose … child-centered questions and move … closer to providing child-centered perspectives on the answers'.[8]

A *Selecting and Framing: 'Through the Eyes of Children'*[9]

The task for the judge who adopts a children's rights approach to decisional privacy is to frame the proceedings 'through the eyes of children'.[10] This first feature of a children's rights judgment is consistent with Tobin's marker of a 'substantive' rights-based approach, which 'conceptualise[s] matters concerning children in terms of their rights'.[11] Children whose parents are involved in often intractable, bitter disputes before the Family Court to determine with whom their child(ren) should live and spend time are very often unwillingly drawn into post-separation parental conflict. In these circumstances, commonly voiced concerns are that children's participation in decision-making might harm their well-being, by putting children in the middle of parental conflict, and that children's voices might be used to enable 'irresponsible' adult decisions.[12] Another, related criticism is that 'children's rights' rhetoric is simply a vehicle for parental rights and interests.[13] However, for children diagnosed with gender dysphoria, the protective focus of the court's intervention emanated from the nature of the proposed medical treatment, the consequences of a wrong decision being made, and the potential for a conflict of interests between the child and his or her parents. I explain the rationale for the Family Court's welfare jurisdiction and its exercise in cases of childhood gender dysphoria more fully in the next chapter. In this section, I highlight how a children's

[6] Hollingsworth and Stalford (n 1) 53.
[7] Ibid.
[8] Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14 *Cardozo Law Review* 1747, 1843.
[9] *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543.
[10] Ibid.
[11] Tobin, 'Judging the Judges' (n 5) 604-5.
[12] Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 13-18, 114-15; Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 215-16.
[13] Ibid 12. See also Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005) 143.

rights judgment is one in which the judge centralises the child in framing the issues for determination, and explain how the *United Nations Convention on the Rights of the Child* (UNCRC)[14] can function as an express legal and normative framework to guide the court's determination of the child's best interests.

From a conceptual perspective, the values and model of children's rights underpinning the UNCRC can inform judicial decision-making, by shaping the 'general intellectual environment' in which judges consider their decision-making approach,[15] 'in light of the history, experience and resources' of Australia's family law system.[16] From a doctrinal perspective, as I explained in chapter 2, the Family Court of Australia has no express legal mandate to consider or take into account the UNCRC in its decision-making. However, the principle of the best interests of the child as the paramount consideration in decision-making under Part VII of the Family Law Act, I have argued, enables judges to take children's rights into account. This is achieved through the first of the additional considerations that the judge must take into account in determining the child's best interests – namely, the child's views, qualified by the requirement that the court take into account any factors, such as the child's maturity or level of understanding, that the court thinks are relevant to the weight it should give to the child's views.[17] Judges can also consider children's rights in their best interests assessment, I have argued, in the light of the wide discretion that they have to take into account 'any other fact or circumstance that the court thinks is relevant'.[18] I suggest that the content of the rights invoked must be imbued with an understanding of the lived experiences of the child who is the subject of proceedings. To be able to interpret the content of a child's right in such a way requires actual engagement with children's voices and desires, and not simply adult assumptions about children's wishes and views.[19] To do otherwise is to risk adult misuse of children's rights as a proxy for adult interests.

[14] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).
[15] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 88.
[16] Parkinson and Cashmore (n 12) 219.
[17] *Family Law Act 1975* (Cth) s 60CC(3)(a).
[18] *Family Law Act 1975* (Cth) s 60CC(3)(m).
[19] Zach Meyers, 'Protecting "Innocence"? Deconstructing Legal Regulation of Child Sexuality' (2007) 27 *Australian Feminist Law Journal* 51, 52

1 *Child-Focused Framing of the Issues*

For the Family Court to adopt a children's rights approach to decisional privacy in proceedings under Part VII, the issues before the Court must be conceptualised more broadly than simply a dispute between parents and the state. The child himself or herself must feature as the court's focal point. The court's assessment of the child's best interests,[20] which includes the requirement to consider any views expressed by the child and to take those views into account in accordance with the child's maturity and level of understanding,[21] require the court to conceptualise the issues for determination from the perspective of the child.[22] Otherwise, as I just noted, there exists a real risk that adults will use talk of 'children's rights' as a proxy to speak on the child's behalf,[23] without representing the child's best interests – because those interests have not been adequately informed by the child. Woodhouse has called this 'asking "the child question"', and has asked:[24]

> how have children's experiences and values been left out of the law? How does the mismatch between children's experiences and law's assumptions and imposed structures serve the interests of those who hold power over children? In an ideal world, what would the life situation of children look like and how could law play a role in bringing this ideal world about?

An aim of re-reading the judgments of the Full Court of the Family Court in *Re Jamie* and *Re Kelvin* from a children's rights perspective is to expose the disjunct identified by Woodhouse between children's lived experiences, and the law's assumptions about children's (in)capacity, vulnerability, and control over their identity and bodily autonomy.

[20] As the 'paramount' consideration in proceedings under Part VII of the Family Law Act, and 'a primary' consideration under article 3(1) of the UNCRC.
[21] See *Family Law Act 1975* (Cth) s 60CC(3)(a); UNCRC, art 12.
[22] John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 106. See also Tobin, 'Judging the Judges' (n 5) 605; Rob George, *Ideas and Debates in Family Law* (Hart Publishing, 2012) 127.
[23] Woodhouse, 'Hatching the Egg' (n 8) 1820.
[24] Ibid 1838 (citation omitted).

2 *Using the UNCRC as a Formal Legal Children's Rights Tool*

The UNCRC provides an express legal and normative framework to guide the application of a children's rights approach to decisional privacy in judicial decision-making. Significantly, this international convention acknowledges children as rights-holders and as actors in, and shapers of, their own development. By establishing children's right to express their views, and to be heard in judicial proceedings affecting them (article 12), the UNCRC moves beyond the confines of a welfarist or paternalistic approach to children's rights, which frames those rights in terms of protection from harm, abuse, neglect and exploitation.[25] As I explained in chapters 1 and 2, the welfare model underpins proceedings under Part VII of the Family Law Act. I expand upon the paternalistic framing of children's rights in the next chapter, in the context of the Family Court's exercise of its welfare jurisdiction in special medical procedure cases.

In chapter 2, I argued that Australia's ratification of the UNCRC is important, notwithstanding that this international convention has not been incorporated into Australian law. Section 60B(4) of the Family Law Act provides that an 'additional object' of Part VII of the Act is to give effect to the UNCRC. This sub-section demonstrates an express legislative commitment to make the UNCRC, and the rights contained therein, relevant to judicial decision-making. Judicial references to the UNCRC in family law judgments might, on their face, suggest that judges recognise children as rights-bearers and are keen to engage with children's rights in their interpretation and analysis of the issues for determination.[26] The judgment of the Full Court of the Family Court in *Re Jamie*, which I analyse in chapter 5, is a pertinent example. However, substantive engagement with children's rights requires more than token references to the UNCRC and an account of the rights that the judge considers are relevant to the proceedings. Tobin has devised a 'spectrum' of judicial approaches to matters concerning children's rights, five of which are said to 'overlook, marginalise or misappropriate' children's rights: these are 'invisible', 'incidental', 'selective', 'rhetorical' and 'superficial' rights

[25] Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 398; Michael Freeman, 'Whither Children: Protection, Participation, Autonomy?' (1994) 22 *Manitoba Law Journal* 307, 319; Parkinson and Cashmore (n 12) 10-11.

[26] Hollingsworth and Stalford (n 1) 54; Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 24. See also Ton Liefaard and Jaap E Doek, 'Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 1, 1-2.

approaches.[27] A 'substantive' rights approach, according to Tobin, exemplifies judicial decisions that are consistent with a children's rights model.[28]

The UNCRC is not the 'be all and end all of a children's rights judgment'.[29] The presence or absence of references to the UNCRC in a judgment, and the means by which the convention is used by judges to support or justify their reasoning and conclusions in any particular case, will not necessarily be determinative of whether the judge can be said to have adopted a substantive children's rights approach. Various other sources can, and do, shape judicial understandings of children's rights approaches to decision-making. Former Family Court Chief Justice Diana Bryant has suggested that a statutory human rights instrument in Australia would 'embolden' parties, lawyers and independent children's lawyers in proceedings under Part VII of the Family Law Act to 'direct their submissions towards how particular rights, such as a child's right to autonomy, should be taken into account'.[30] However, in the absence of a charter of human rights at the federal level in Australia, the UNCRC remains the most promising legal tool for bestowing children with formal rights recognition – albeit indirectly, given that the UNCRC does not create legally enforceable rights for children in Australia.

B *Court Procedures: Understanding Children's Lived Experiences*

The second stage of the adjudicative process, in the development of a children's rights judgment, is the court practices and procedures that the judge adopts to enable children to take part meaningfully in the decision-making process. Effective participation by children in legal proceedings is frustrated by the fact that the legal system is not designed for them. While Part VII of the Family Law Act posits children's best interests as the paramount consideration,[31] the procedures by which the Family Court ascertains those best interests is skewed strongly in favour of the adults involved in the decision-making process.[32] A commitment to enabling and protecting children's decisional privacy rights – through which children can exercise and experience autonomy – requires a commitment to ensuring the 'material and institutional

[27] Tobin, 'Judging the Judges' (n 5) 593.
[28] Ibid 593-603.
[29] Hollingsworth and Stalford (n 1) 58.
[30] Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 208. See also Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 4) 33.
[31] See *Family Law Act 1975* (Cth) ss 60CA, 67ZC
[32] Noel Semple, 'Whose Best Interests? Custody and Access Law and Procedure' (2010) 38 *Osgoode Hall Law Journal* 287, 289.

circumstances' of autonomy.[33] These circumstances are the means by which children actively and meaningfully participate in family law proceedings[34] – participation that subsequently enables judges to reason from children's 'lived experiences rather than in abstract, categorical terms'.[35]

As I explained in chapter 2, children are denied the opportunity to play an active role in proceedings under Part VII of the Family Law Act: their voices are absent, or at best, funnelled and distorted by adult interpretation. As a consequence, judicial interpretations of the facts and evidence are necessarily adult-centric. Unless children can experience the conditions under which their voice is expressed and heard – that is, unless the legal process is sufficiently 'child-friendly'[36] – then children's substantive right to decisional privacy will be ineffectual. This notion of 'authentic' participation requires children's 'inclusion', whereby the adult-centric system is modified to accommodate children's effective participation and values, rather than 'integration', which requires children to participate within pre-existing processes and structures.[37]

The decisions of the Family Court in *Re Alex*[38] and *Re Alex (No 2)*,[39] which I discuss in the next chapter, offer pertinent illustrations of how a 'child-centric' understanding of court procedures can effectively provide for and respect the rights of the child or young person who is the subject of proceedings.[40] They also show that judges have substantial discretion in enabling children's views and wishes to contribute to the decision-making process.[41] In both

[33] Joel Anderson and Axel Honneth, 'Autonomy, Vulnerability, Recognition, and Justice' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005) 127, 129.
[34] See *V v United Kingdom* (2000) 30 EHRR 121, [87] ('the procedures adopted must be conducive to active participation as opposed to passive presence').
[35] Rosemary Hunter, 'More than just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 *Current Legal Problems* 119, 131.
[36] Hollingsworth and Stalford (n 1) 76-7. See also Helen Stalford, Liam Cairns and Jeremy Marshall, 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information' (2017) 5 *Social Inclusion* 207; Lundy, Tobin and Parkes (n 25) 401.
[37] Barry Percy-Smith, and Karen Malone, 'Making Children's Participation in Neighbourhood Settings Relevant to Everyday Lives of Young People' (2001) 42 *PLA Notes* 18, 18-19. See also Jaclyn Jean Jenkins, 'Listen to me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings' (2007) 46 *Family Court Review* 167; Aoife Daly, 'The Right of Children to be Heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights' (2011) 15 *International Journal of Human Rights* 441; Jennifer E McIntosh, Diana Bryant and Kristen Murray, 'Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46 *Family Court Review* 125.
[38] (2004) 31 Fam LR 503, 507 [17], 511-12 [43].
[39] (2009) 42 Fam LR 645, 666 [99].
[40] See *Re Alex* (2004) 31 Fam LR 503, 511-12 [41]-[43] and Tobin, 'Judging the Judges' (n 5) 608-9.
[41] Hollingsworth and Stalford (n 1) 78.

Re Alex proceedings, the judge was prepared to have a private meeting with the young person, Alex. This judicial willingness to meet with Alex overcame the problem that, in most cases, the child in proceedings under the Family Law Act lacks the capacity to appoint a legal representative who acts solely on the child's instructions.[42] These meetings, parts of which remained confidential, enabled Alex to share his views and wishes directly with the judge who was deciding his case. It enabled the judge to see Alex as 'a real person, rather than as the object of other people's disputes or concerns'.[43]

A children's rights approach to decisional privacy also requires that court procedures be consistent with children's rights and attuned to *all* features of the proceedings, including the giving of evidence and the physical layout of the courtroom. The CRC Committee has emphasised that proceedings 'must be both accessible and child appropriate', with emphasis in particular to providing 'child friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens and separate waiting rooms'.[44] In *Re Alex*, the hearing was conducted in an inquisitorial rather than an adversarial format, in a private conference room setting around a table, and it took the form of 'an orderly discussion between witnesses and legal representatives' and the judge, thereby facilitating a 'dialogue' between witnesses about each other's evidence.[45] The impact of these procedural modifications lay in their ability to promote Alex's participation and active involvement in the proceedings.[46] Participatory rights, I argue, are essential if children are to enjoy and exercise their substantive right to decisional privacy. The feasibility of implementing

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[42] Tobin, 'Judging the Judges' (n 5) 608. See also *Duffy & Gomes (No 1)* [2015] FCCA 1121 (16 March 2015) at [94]-[96]. For perspectives on the practice of judges conducting interviews or meeting with children in chambers, see Brenda Hale, 'Children's Participation in Family Law Decision making: Lessons from Abroad' (2006) 20 *Australian Journal of Family Law* 119; John Caldwell, 'Common Law Judges and Judicial Interviewing' (2011) 23 *Child and Family Law Quarterly* 41; Fiona E Raitt, 'Judicial Discretion and Methods of Ascertaining the Views of a Child' (2004) 16 *Child and Family Law Quarterly* 151; Michelle Fernando, 'What do Australian Family Law Judges Think about Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51; Michelle Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 2 *Family Law Review* 213; Parkinson and Cashmore (n 12) 55-58, 158-88; Nicola Taylor and John Caldwell, 'Judicial Meetings with Children: Documenting Practice within the New Zealand Family Court' [2013] *New Zealand Law Review* 445; Rachel Birnbaum, Nicholas Bala and Lorne Betrand, 'Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada' [2013] *New Zealand Law Review* 465; Lundy, Tobin and Parkes (n 25) 423-25l; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 281-84; Ursula Kilkelly, *Listening to Children about Justice: Report of the Council Of Europe on Child-Friendly Justice* (Council of Europe, 2010) 16.

[43] Hale (n 42) 124.

[44] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [34].

[45] *Re Alex* (2004) 31 Fam LR 503, 511-12 [43].

[46] Tobin, 'Judging the Judges' (n 5) 609.

child-centric procedures in the Family Court will be heavily influenced by resourcing considerations and constraints,[47] as well as the proclivity of the individual judge to conducting proceedings in this way.

C *Reasoning and Analysis: Reconciling Competing Rights and Interests*

The third stage of a children's rights judgment is how the judge analyses and justifies the resolution of the issues for determination in the proceedings. Article 3(1) of the UNCRC provides that 'the best interests of the child shall be *a primary* consideration' in all actions concerning children. By contrast, the Family Law Act requires the Family Court to regard the child's best interests as *the paramount* consideration in deciding whether to make an order relating to the welfare of a child,[48] or to make a particular parenting order in relation to a child.[49] This minor semantic distinction is nonetheless an important one, which has received both scholarly and judicial attention.[50] This is because it influences the reasoning that the court adopts in resolving the issues, including how (potentially) competing rights and interests are weighed and balanced.[51]

The inclusion of best interests as 'a primary', rather than 'the paramount', consideration in the UNCRC recognises the potential for conflicts of rights to arise, as between children, their parents, and other parties.[52] It also suggests that, where such a conflict arises, children's rights will not necessarily trump the rights of others. In proceedings under the Family Law Act, a children's rights approach does not require that the child's best interests be the *only* consideration: they are 'the paramount but not sole determinant'.[53] Rather, a balancing exercise

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[47] Insufficient resourcing of and government funding for Australia's family law system have been much- and long-emphasised: See, e.g., Katherine Gregory, 'Judges Go Public: Family Court Shouldn't Be "Making Do"', *AM – Australian Broadcasting Corporation* (online), 31 October 2018 <https://www.abc.net.au/news/2018-10-31/judges-go-public-family-court-shouldnt-be-making-do/10450514>; Robyn Powell, 'Family Court Underfunded, Letting People Down, Chief Justice Says', *Australian Broadcasting Corporation* (online), 1 May 2017 <https://www.abc.net.au/news/2017-04-30/family-court-letting-families-down-chief-justice-says/8483858>; Australian Law Reform Commission (ALRC), *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) 29-30, 32. See also Parkinson and Cashmore (n 12) 219.

[48] *Family Law Act 1975 (*Cth) s 67ZC.

[49] *Family Law Act 1975 (*Cth) s 60CA.

[50] See, e.g., *ZH (Tanzania) v SSHD* [2011] UKSC 4; Stalford and Hollingsworth (n 26) 35-6; Aoife Daly, *Children, Autonomy and the Courts* (Routledge, 2017) 2.

[51] Tobin, 'Judging the Judges' (n 5) 612.

[52] Ibid 589.

[53] *Aldridge & Keaton* (2009) 42 Fam LR 369, 388 [75]. See also *Lovine & Connor* [2011] FamCA 432 (10 June 2011) [33]-[35] ('[b]est interests means "most important" as distinct from "sole"'); *Benson & Hughes* (1994) FLC

is involved, between the rights and best interests of children, and the rights and interests of other stakeholders, such as the child's parents, siblings, extended family members, and in gender dysphoria proceedings, the child's treating medical professionals. The court must acknowledge that these rights and interests of others are relevant, and engage in a meaningful discussion about how to reconcile them with the child's rights and interests.[54] For judges to do otherwise, and to simply claim that a decision reached is in the 'best interests of the child', without according due attention to the other interests involved, is unlikely to be a decision in the child's best interests. As Eekelaar has observed, it might be 'easier and more comforting simply to say that we are all doing what we think is best for the child', which 'encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake'.[55]

D *Communicating and Enabling: A Judgment about the Child and for the Child*

The final aspect of a children's rights judgment focuses on the final product of the process: the judgment, and in particular, the style in which it is written and how it is communicated. The 'how' of a children's rights judgment is just as significant as the 'what' is decided,[56] or the steps of issue framing, judicial reasoning and court processes outlined above. Storytelling is vital to law and Garner has described judges as 'the custodians of the richest and most dramatic and poignant human stories'.[57] If judges are 'storytellers', then their written narratives are another form of adjudication.[58] The rhetorical choices reflected in a judgment – choices of facts, language, structure, length and style – form the 'art and craft' of judgment writing,[59] and seek to explain how and why the judge reached his or her conclusions on the issues in the case.

92-483, 81,044-5 ('Where … there is some clear and important other conflicting interest, it seems that the law requires the Court to take into account the child's welfare but balance it against the other interest or policy').

[54] Jane Fortin, 'Accommodating Children's Rights in a in a Post Human Rights Act Era (2006) 69 *Modern Law Review* 299, 306.

[55] John Eekelaar, 'Deciding for Children' (2006) 7 *Australian Journal of Professional and Applied Ethics* 66, 77. See also Lucinda Ferguson, 'An Argument for Treating Children as a "Special Case"' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 227, 227.

[56] See Hollingsworth and Stalford (n 1) 78; Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgment Project' in Rosemary Hunter, Clare McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 44, 44-45.

[57] Helen Garner, as quoted in Carolyn Ford, 'Getting to the Heart of the Matter', *Law Institute Journal* (3 September 2018) 83, 84.

[58] Rackley (n 56) 53; Woodhouse, 'Hatching the Egg' (n 8) 1835-36.

[59] Rackley (n 56) 44. See also Richard Posner, *Law and Literature* (Harvard University Press, 3rd ed, 2009) 329-385.

There is, according to Hollingsworth and Stalford, a particularly strong imperative to persuade through narrative in children's cases, given their often 'contentious, emotionally-charged, value-ridden and life-changing' nature.[60] As with any form of narration, there is no moral neutrality in the judgment writing process.[61] The gravity of such judicial communication is magnified by the fact that a published judgment, as a publicly accessible narrative (albeit anonymised in proceedings under the Family Law Act),[62] is a textual means by which a child's identity can be shaped and constructed.[63] There are two key elements to communicating a children's rights judgment. First, the child must be the focal point, and his or her voice and perspective front and centre.[64] The second element is recognising children as one of the key audiences.[65] A children's rights judgment is written using a style, structure and language that are attune to the child's rights and needs, or includes an abridged 'child-friendly' version that is appropriate for the age and developmental stage of the child who is the subject of the proceedings.[66]

1 *Centralising the Child in the Judgment's Narrative*

Storytelling is a powerful 'tool of persuasion' for social and legal reform.[67] A children's rights approach is by no means naïve about the subtle ways in which the law stifles children's stories in developing its narrative. As I explained in chapters 1 and 2, various substantive and procedural provisions of the Family Law Act frame the extent of children's participation and the terms of that (very limited) participation. The result, as Woodhouse has recognised, is that 'the stories framed by the legal rules bear little relation to children's reality'.[68] The facts of a case – which are subjective, in the sense that they are the product of judicial selectivity and filtering[69] – embody the official (legal) story of the parties' experiences. A children's rights

[60] Hollingsworth and Stalford (n 1) 79. See also Dawn Watkins, 'Recovering the Lost Human Stories of Law: Finding Mrs Burns' (2013) 7 *Law and Humanities* 68.
[61] Peter Brooks, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 14, 17.
[62] See *Family Law Act 1975* (Cth) s 121, which prohibits the publication of identifying details of family law proceedings.
[63] Dawn Watkins, 'The Shaping and Misshaping of Identity through Legal Practice and Process: (Re)discovering Mr Kernott' (2014) 8(2) *Law and Humanities* 192, 192-93.
[64] See Hollingsworth and Stalford (n 1) 79-81.
[65] See ibid 82-84.
[66] Ibid 54.
[67] Steven L Winter, 'The Cognitive Dimension of the Agony between Legal Power and Narrative Meaning' (1989) 87 *Michigan Law Review* 2225, 2228.
[68] Woodhouse, 'Hatching the Egg' (n 8) 1835-36.
[69] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1949) 55; Graeme Austin, *Children: Stories the Law Tells* (Victoria University Press, 1994) 9.

judgment uses facts to contextualise the child's life and to provide a more complete account of the child's experiences, thereby recognising that the child's involvement in family law proceedings is but one life experience. A children's rights judgment can also use narrative to tell *the child's* story, and to highlight the impacts of the decision on the child.[70] This feature is an important antidote to the potentially adverse influence of a published judgment on the child's fragile and still-forming identity.

In gender dysphoria proceedings, the means by which the judge presents an account of the facts can develop a narrative that centralises the experiences of transgender children and young people.[71] The judgments of the Full Court in *Re Jamie* and *Re Kelvin* expose the core narratives that Australian family law shares about transgender children and their (lack of) rights. But it is through children's own voices in the narrative of a judgment – rather than adult interpretations of those voices – that conceptual and normative understandings of children, childhood and children's rights, can be shaped, and in turn, influence, beyond the judicial sphere. A narrative that has as its foundation and reflects children's experiences offers scope to expose adult-centred constructions of legal concepts and principles, such as the notions of 'welfare' and 'best interests' in the Family Law Act. Judicial constructions of 'the child' as uniquely vulnerable, dependent, and in need of protection from harm or the risk of harm, mask the individual experiences, capacities and desires of each child, which are in turn shaped by the child's upbringing and identity.[72] Judgments that position the child as the focal point can draw attention to the reality that the category of 'child' is diverse and complex – which bears particular significance for transgender children, who experience heightened discrimination, violence, harassment and victimisation due to their status as transgender.[73]

The use of language to humanise the child is also a critical feature of a children's rights judgment.[74] Descriptions and labels are political, in that they imbue things with meaning, and

[70] Hollingsworth and Stalford (n 1) 80.
[71] Ibid 79. See also Woodhouse, 'Hatching the Egg' (n 8) 1829-37; Gemma Edgar, 'Re Alex / Real Alex: Transsexual Narratives and their Possibilities for Resistance' (2005) 23 *Australian Feminist Law Journal* 79.
[72] Hollingsworth and Stalford (n 1) 80.
[73] See, e.g., Department of Health (Victoria), *Transgender and Gender Diverse Health and Wellbeing: Background Paper* (2014) 21, 24; Holly V Franson, 'The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies' (2013) 84 *University of Colorado Law Review* 497; Amanda Kennedy, 'Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transitions' (2008) 19 *Hastings Women's Law Journal* 281; Sonja Shield, 'The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment' (2007) 31 *New York University Review of Law & Social Change* 361.
[74] Hollingsworth and Stalford (n 1) 81.

enable them to be acknowledged, addressed and recognised.[75] In gender dysphoria proceedings, referring to the child consistently throughout the judgment by his or her first name, and the pronoun of his or her chosen gender, encourages readers to form an understanding of that child as a unique individual with various complex social relationships. This language device also enables the judge to invoke experiences from the child's life to highlight the challenges that the child has faced in attempting to validate his or her identity. The opening quotation of this thesis – an excerpt from the letter of Georgie Stone, who was the subject of the *Re Jamie* proceedings, to the Family Court – served as a reminder to both the court and readers of the judgment that 'it is the life of a real child at stake'.[76] In *Re Alex*, the Family Court was sensitive to issues of terminology, and made conscious and well-considered choices of language in its judgment. These choices included respect for Alex's preference to be referred to as a male, and reference to Alex as a 'young person' rather than a 'child', having regard to his age and maturity.[77]

The extent to which the judge in each case can produce a child-focused narrative will be influenced by the material tendered by the parties from, and about, the child. I discussed in the final part of chapter 2 the constraints on judges' willingness and ability to adopt a children's rights approach to decisional privacy in their decision-making. Two major constraints, in my view, are how the case is presented by the parties, and the extent to which the child himself or herself is able to participate in the proceedings. In *Harrison v Woollard*,[78] the Full Court of the Family Court stated that '[a] child's wishes must not only be considered, but must be shown to have been considered, in the reasons for judgment'.[79] The judicial construction of narrative, and the judge's choice of language, tone and style, should enliven the child's experiences, and strive to persuade readers from the *child's* perspective. The effect of how the judgment is written, in addition to what is decided and how the court reached its decision, therefore shapes the extent to which children are recognised as active legal subjects with rights, whose voices are heard, and more importantly, listened to.

[75] Austin (n 69) 168. See also Glanville Williams, 'Language and the Law' (1945) *Law Quarterly Review* 71, 71.
[76] Hollingsworth and Stalford (n 1) 81.
[77] See *Re Alex* (2004) 31 Fam LR 503, 507 [16]-[18].
[78] (1995) 18 Fam LR 788.
[79] Ibid 825.

2 *Recognising Children as an Audience of the Judgment: Child-Friendly Writing*

The second element of communicating a children's rights judgment is ensuring that the judgment is conveyed effectively to children themselves.[80] 'Child-friendly' judgments should capture the features of a well-written judgment, in that they should be 'concise, clear, interesting and accessible'.[81] Yet each judge has an 'audience' in mind when writing a judgment, and this audience might differ depending on the jurisdiction, the nature of the proceedings, and where the court is situated in the court hierarchy.[82] A children's rights judgment must be mindful of children as one of its audiences, and tailor its structure, language and narrative to enable children – during their childhood – to access and understand the court's reasoning and decision.[83]

The nature of the family law jurisdiction, being 'an area which really intrudes into people's lives',[84] imposes a great responsibility on judges to explain the reasons for their decisions in a clear, sensitive and cogent manner. If ascertaining a child's views in proceedings is a 'two way street', as a Family Court judge has described it, then 'children should be accorded the respect of having the outcome notified to them in an appropriate manner'.[85] When understood from a children's rights (as opposed to a welfarist) perspective, the best interests principle that is the 'cornerstone'[86] of decision-making under Part VII of the Family Law Act requires 'not just the elevation and consideration of children's best interests, but also a *process* by which such decisions may be justified and effectively communicated to children'.[87] This process is an integral feature of children's ability to effectively enjoy their right under article 12 of the UNCRC to express their views freely and to have those views taken into account. A children's right judgment should advise the child, in an age-appropriate manner, about how his or her

[80] Hollingsworth and Stalford (n 1) 79.
[81] Rackley (n 56) 48. However, Rackley has also noted that '[e]ven the most unpersuasive and poorly written judgment still has material power. It still carries the authority of law, binds the parties and acts as precedent. A badly written judgment is still a judgment': at 53.
[82] Hollingsworth and Stalford (n 1) 82.
[83] Ibid. See also Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice* (Council of Europe, 2011) 28 [49] ('Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed').
[84] Diana Bryant, as quoted in 'Retiring Chief Justice reflects on thirteen years in the Family Court', *The Law Report*, Australian Broadcasting Corporation Radio National, 19 September 2017 <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>.
[85] *Karamalis & Karamalis* (2018) 57 Fam LR 588, 591 [16].
[86] Stalford and Hollingsworth (n 26) 33.
[87] Eekelaar and Tobin (n 22) 97.

views have been taken into account in the determination of the child's best interests, and if the decision does not align with the child's views, the reasons for the judge deciding contrary to those views.[88]

Just one judgment in proceedings under the Family Law Act to date, to my knowledge, has endeavoured to embrace this element of a children's rights judgment, through a letter written by the judge to the children.[89] The judge in this case explained that enabling the children to find out the reasons for the orders made about them might be 'the final and ultimate manifestation of their participation' in the proceedings.[90] Significantly, the judge acknowledged that:

> traditional reasons for judgment are not usually written with the audience of the children in mind. The language and format of reasons are, more often than not, styled for an audience consisting of the parents, the lawyers involved in the case, and an appellate court.[91]

In the United Kingdom, Baroness Hale of Richmond, writing extra-curially, remarked that 'we judges could make a start by producing a version of our decision which makes sense to the person most closely affected by it', that is, the child.[92] An assessment of how persuasive a

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[88] Lundy, Tobin and Parkes (n 25) 413; Mary Donnelly and Ursula Kilkelly, 'Child-Friendly Healthcare: Delivering on the Right to Be Heard' (2011) 19 *Medical Law Review* 27, 31.

[89] See *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012). An excellent, and rare, example of active judicial recognition of children as a (if not the) key audience is the judgment of Justice Jackson in the UK High Court (Family Division) case of *A (Letter to a Young Person)* [2017] EWFC 48 (26 July 2017). Mr Justice Peter Jackson delivered and published his decision in the form of a letter to the 14-year-old young person, Sam, rather than in the form of a 'conventional judgment'. The letter explained to Sam that Justice Jackson was writing to him because '[t]his case is about you and your future'. The letter employed age-appropriate explanations of the law, and of Justice Jackson's reasoning. Importantly, from a children's rights perspective, it explicitly acknowledged the young person's evolving capacities. Justice Jackson noted that the order was not what Sam had sought, but that as Sam matured, he would increasingly 'work things out for [him]self'. Helen Stalford and Kathryn Hollingsworth have observed that '[t]here is nothing particularly remarkable about this decision in substance … but the presentation of the judgment has been applauded by the legal community and children's rights advocates alike as a model of how to communicate with children': Helen Stalford and Kathryn Hollingsworth, '"This Case is about You and Your Future": Towards Judgments for Children' (2020) 83(5) *Modern Law Review* 1030, 1031. In the case of *Lancashire County Council v Mr A, Mr B, The Children* [2016] EWFC 9, Justice Jackson wrote the primary judgment for the children, noting that '[t]his judgment is as short as possible so that the mother and the older children can follow it'.

[90] *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012) [84]. See also [86]: 'If [the children's] right to be heard in proceedings relating to them is conceptualised into the perhaps more general right to participate in these proceedings, arguably the final act of participation will not occur until they have read and understood these reasons'.

[91] Ibid [87].

[92] Hale (n 42) 119.

judicial narrative is, however, is (almost) always made according to adult standards. Notwithstanding shifts in developmental understandings of children and their capacities, and how we think about children's rights, there remains a tendency for adults to 'underestimate children's capacities'.[93] This includes misjudging children's capacity to understand decisions in Family Court proceedings that have been made about them and their lives. A children's rights judgment – one that is accessible to and written for (or at least readily comprehensible by) children – is also a means by which children can exercise their right to freedom of expression in article 13 of the UNCRC, which includes the freedom to *seek* and *receive* information. In chapter 6, I produce a child-friendly version of the Full Court's judgment in *Re Kelvin*, and in the process, rewrite it from a children's rights perspective.

III CONCLUSION

This chapter has built on the previous chapter, which presented four salient features of a children's rights approach to decisional privacy. Drawing on examples from the case study of gender dysphoria proceedings before the Family Court, it has illuminated four stages of the adjudicatory process: conceptualising the issues for determination from the child's perspective; court procedures that enable the child to participate meaningfully in the decision-making process; judicial reasoning and analysis of the issues that balance competing rights and interests; and a judgment that has the child as the focal point and is written with the child (or children generally) as its audience. Together, these features of a children's rights judgment strive to make children's rights a 'way of thinking' for judges in proceedings under Part VII of the Family Law Act – and to suggest ways that judges might embrace a children's rights approach in their decision-making.[94] They simultaneously serve to enable children involved in Part VII proceedings to exercise their decisional privacy rights. This is because, I argue, for children's substantive right to decisional privacy to be effective, children need procedural rights to enable them to participate actively and meaningfully in decision-making processes

[93] Parkinson and Cashmore (n 12) 4, 197. See also Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 22; John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 166; Chisholm (n 12) 217.

[94] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 4) 31-32. See also Fortin, 'Accommodating Children's Rights' (n 54); Stephen Gilmore, 'Use of the UNCRC in Family Law Cases in England and Wales' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 224.

about matters that affect them. Meaningful participation is vital to children's experience of autonomy.

This chapter concludes Part A of this thesis. With the theoretical foundations of privacy and children's rights now set, Part B turns to the implementation and operation of children's decisional privacy rights in practice. Chapter 4 introduces the case study. It begins with an overview of the Family Court's welfare jurisdiction, and how that jurisdiction has developed and has been exercised in special medical procedure cases, I argue, to deny transgender children their decisional privacy rights.

PART B

CHILDREN'S RIGHT TO DECISIONAL PRIVACY IN PRACTICE

4

THE WELFARE JURISDICTION OF THE FAMILY COURT AND ITS EXERCISE IN SPECIAL MEDICAL PROCEDURE CASES

I INTRODUCTION

Part A of this thesis laid the theoretical groundwork. It explained the notions of privacy, autonomy and children's rights, which form the conceptual foundation of my argument. It also articulated a children's rights approach to decisional privacy and to re-reading judgments from a children's rights perspective. Part B applies the theory developed in Part A to a case study: the Family Court of Australia's exercise of its welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Cth) (Family Law Act) in special medical procedure applications for children diagnosed with gender dysphoria. In this chapter, I explain the nexus between childhood gender dysphoria proceedings, children's identity and autonomy, and children's right to decisional privacy.

Part II of this chapter presents an overview of the welfare jurisdiction under section 67ZC of the Family Law Act, which provides the legislative basis for the Family Court to grant or refuse permission for special medical procedures for children. Part III articulates some decisional privacy issues unique to special medical procedure applications before the Family Court. These include the current and future capacity of the child to give informed consent to the medical procedure – or the question of the child's *Gillick* competence;[1] the agreement of the child and the child's parents to the medical procedure, which raises the spectre of intra-familial conflict; and the Family Court's validation of transgender children's identity. Through the analysis of

[1] Deriving from the decision of the House of Lords in *Gillick West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (*Gillick*).

these issues, I show that gender dysphoria proceedings serve as a paradigm example of transgender children's decisional privacy rights, self-presentation and their right to preservation of identity under article 8 of the *United Nations Convention on the Rights of the Child* (UNCRC).[2]

Part IV then provides the socio-historical context of the case study, through an overview of three significant special medical procedure cases. The first is the decision of the High Court of Australia in *Secretary, Department of Health & Community Services v JWB & SMB* (*Marion's case*),[3] which established the categories of 'special medical procedure' that are presumptively beyond the scope of parental responsibility and for which parents must seek court authorisation. The second is the decision of *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (*Re Alex*),[4] referred to in the previous chapter. *Re Alex* broadened the scope of special medical procedures, as established in *Marion's case*, to applications for medical treatment for childhood gender dysphoria. The third is *Re Bernadette*,[5] in which the parents of a child diagnosed with gender dysphoria unsuccessfully argued that *Re Alex* had been wrongly decided. These cases reflect an uneasy calibration of the respective responsibilities and duties of parents and the state in the context of medical decision-making for and on behalf of children, with children largely excluded – in both conceptual and practical terms – from the decision-making process. The evolution of the Family Court's welfare jurisdiction in special medical procedure cases exposes assumptions about children's incapacity and vulnerability, which purportedly justify the court's protective intervention. The development of this jurisdiction also highlights judicial concerns about the potential for conflicts between the child and his or her child's parents in determining the child's best interests.

This chapter provides the essential backdrop for the argument, advanced in the next two chapters, that as the Family Court has increasingly encroached upon decision-making in relation to children's medical treatment, it has denied the decisional privacy rights of children diagnosed with gender dysphoria.

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[2] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).
[3] (1992) 175 CLR 218 (*Marion's case*).
[4] (2004) 31 Fam LR 503 (*Re Alex*).
[5] (2010) 244 FLR 242.

II THE WELFARE JURISDICTION UNDER SECTION 67ZC OF THE FAMILY LAW ACT

Section 67ZC of the Family Law Act is the statutory basis for the Family Court's jurisdiction to grant or refuse permission for special medical procedures for children. It provides that, in addition to the jurisdiction under Part VII in relation to children, a court has jurisdiction to make orders relating to the welfare of children.[6] In deciding whether to make such an order, the court must regard the best interests of the child as the paramount consideration.[7] The Family Court's assessment of the child's best interests in exercising its welfare jurisdiction underscores the relevance and significance of children's right to decisional privacy in this context. As I explained in chapter 2, the best interests principle enables judges to consider children's right to decisional privacy in their assessment of the child's best interests – even in circumstances where judges are not legislatively mandated to take the child's rights, or the child's privacy, into account in that assessment.

The welfare jurisdiction has been concerned with identifying risks, preventing harm, and protecting the child from his or her parents' decision-making.[8] Akin (but not confined) to the historical *parens patriae* jurisdiction,[9] the welfare jurisdiction under section 67ZC has developed within a 'narrative of protection'[10] and within the evolving dynamics of the parent-child relationship. The two factual issues that determine the Family Court's capacity to exercise the jurisdiction granted by section 67ZC are: whether the child is competent to consent; and whether the subject matter of the application is a 'special medical procedure' to which a parent

[6] *Family Law Act 1975* (Cth) s 67ZC(1).
[7] *Family Law Act 1975* (Cth) s 67ZC(2).
[8] Michael King and Christine Piper, *How the Law Thinks About Children* (Arena, 2nd ed, 1995) 65.
[9] The Explanatory Memorandum to the Family Law Reform Bill 1994 (Cth), which introduced section 67ZC into the *Family Law Act 1975* (Cth), noted that it 'provides the court with jurisdiction relating to the welfare of children in addition to the jurisdiction that the court has under Part VII in relation to children', and that '[t]his jurisdiction is the *parens patriae* jurisdiction explained by the High Court in [Marion's case]' (at [319]). In *Jacks & Samson* (2008) 221 FLR 307, 353 [220], the Full Court (Coleman, Boland and Stevenson JJ) said that it was 'not in doubt that s 67ZC is regarded, subject to constitutional limitations, as devolving jurisdiction under the Act akin to the *parens patriae* jurisdiction'. Cf. *Re Z* (1996) 134 FLR 40, 45 (Nicholson CJ, Fogarty and Frederico JJ): 'The enactment of s 67ZC gives a more specific legislative recognition of this jurisdiction as a separate jurisdiction than was previously the case, and we see no reason to necessary limit its operation to the *parens patriae* jurisdiction' (at [323] (Nicholson CJ and Frederico J)).
[10] Zach Meyers, 'Protecting "Innocence"? Deconstructing Legal Regulation of Child Sexuality' (2007) 27 Australian Feminist Law Journal 51, 56.

or guardian cannot consent.[11] It is important to explain these two factual issues in further detail, as they bear upon the nature of the relationship between children, their parents and the state, and the scope of state intervention in the family. The first issue – the child's capacity to consent to the medical procedure – bears directly upon the child's decisional privacy rights and hence the child's ability to exercise autonomy in relation to his or her body and identity.

The second factual issue determining whether section 67ZC of the Family Law Act will be invoked concerns the subject matter of the application before the Family Court. As I explained in chapters 1 and 2, the Family Law Act bestows parents with 'parental responsibility',[12] or decision-making authority in relation to, and on behalf of, their children. The state abstains from interference with the day-to-day parental tasks of child-rearing,[13] save for circumstances such as family breakdown, neglect and abuse.[14] As I discussed in chapter 1, an object of Part VII of the Family Law Act is to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.[15] Consistently with the hierarchical relationship that the Family Law Act sustains between parents and children, the 'default position' is that parents have a right and responsibility to decide upon medical treatment for their child who is not yet able to consent, reflected through the prism of the child's best interests.[16]

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[11] In *Re Alex* (2004) 31 Fam LR 503, 529 [151], Nicholson CJ noted that an additional factual issue is whether the child or young person is currently under a care order. The High Court has held that the welfare jurisdiction conferred on the Family Court by section 67ZC of the Family Law Act is not at large; rather, it depends on another provision in Part VII of the Act creating a 'matter' to which the jurisdiction conferred by section 67ZC can attach: *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 383-4.

[12] See *Family Law Act 1975* (Cth) ss 61B-61D.

[13] David Archard, *Children: Rights and Childhood* (Routledge, 3rd ed, 2015) 189-90.

[14] *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 428 [56].

[15] *Family Law Act 1975* (Cth) s 60B(1)(d). Section 69H of the Family Law Act vests the Family Court with jurisdiction in relation to matters arising under Part VII, including the power to make parenting orders pursuant to section 65D and in accordance with section 64B. Section 64B(2)(i) provides that a parenting order may deal with 'any aspect of the care, welfare or development of the child or any other aspect of parental responsibility', including 'major long-term issues' relating to the child's health. Section 4 of the Family Law Act defines 'major long-term issues' as 'issues about the care, welfare and development of the child of a long-term nature and includes … issues of that nature about: … (c) the child's health'. There is no clear authority on whether an order made under section 67ZC is a parenting order as described in section 64B(2)(i) of the Family Law Act: see *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210, 226 [103] (orders that 'seek to define or clarify the limits of parental responsibility' – such as those made in special medical procedure cases – are orders that can be classified as about 'any other aspect of parental responsibility'); cf. *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 430 [70] ('within the narrow band of special medical procedures as delineated by *Marion's* case, 'the Court's jurisdiction and power to make the relevant order is not to be found by reference to Part VII's provisions relating to "parenting orders", including, in particular, parenting orders dealing specifically with aspects of the parental responsibility for a child (ss 64B(1) and (2)(i))'); In *Re Bernadette* (2011) 249 FLR 294, 304-05 [56], Bryant CJ and Strickland J raised but expressed no concluded view on the question, as it was not satisfactorily argued before the Full Court.

[16] *Re Kelvin* (2017) 57 Fam LR 503, 521-22 [123]. See also *Marion's case* (1992) 175 CLR 218, 239-40; *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210, 224 [84].

While it is generally within the bounds of parents' responsibility to be able to consent to medical treatment for and on behalf of their child, there are 'special medical procedures' which fall beyond that responsibility and require determination by the Family Court pursuant to its welfare jurisdiction under section 67ZC of the Family Law Act. The jurisdiction granted by section 67ZC has been described by judges variously as 'designed to protect against risk' and not 'to supervise parents and guardians in the exercise of their rights and responsibilities';[17] yet also as 'essentially supervisory of parental responsibility'.[18] The Family Court has also observed that the welfare power bestowed on it is very wide, and allows for orders to be made requiring a parent to do any act necessary for the child's welfare.[19] In *Re Alex,* which I discuss below, the Family Court labelled the welfare jurisdiction 'protective' and 'paternalistic', and cautioned that 'in modern thinking about children and young people [it] must be understood with regard to their rights'.[20]

The exercise of the welfare jurisdiction, as it has evolved and expanded, has challenged the protective role of the Family Court in relation to children's medical treatment. That role has swung the pendulum of decision-making authority away from parents, and has denied children decisional privacy in relation to their own bodies, identities and lives. With an understanding of the scope of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act, the next Part of this chapter addresses three decisional privacy issues that are liable to arise in the context of special medical procedure applications before the Family Court.

III DECISIONAL PRIVACY ISSUES ARISING IN SPECIAL MEDICAL PROCEDURE APPLICATIONS

A 'medical procedure application' is defined in the *Family Law Rules 2004* (Cth) (Family Law Rules) as an application 'seeking an order authorising a major medical procedure for a child

[17] *AMS v AIF; AIF v AMS* (1999) 199 CLR 160, 189 [87] (Gaudron J).
[18] *Re Bernadette* (2010) 244 FLR 242, 304 [55].
[19] *W and G (No 1)* (2005) FLC ¶93-247, 80,050 [59], citing *In the Marriage of L and T* (1999) FLC 92-875, 86,392. See also *Re Kelvin* (2017) 57 Fam LR 503, 532-33 [190] (the Court's power under section 67ZC is 'broader than that of a parent or guardian', given that 'the Court is able to authorise action … which is beyond the scope of parental authority').
[20] *Re Alex* (2004) 31 Fam LR 503, 529 [154].

that is not for the purpose of treating a bodily malfunction or disease'.[21] In such an application before the Family Court, evidence must be given, including from a medical, psychological or other relevant expert witness, to satisfy the court that the proposed medical procedure is in the best interests of the child.[22] Rule 4.09(2) of the Family Law Rules lists nine matters that must be established by this expert evidence to satisfy the court that the procedure is in the child's best interests.[23] The list includes matters that directly bear upon the child's decisional privacy: an assessment of the child's capacity to make an informed decision about the medical procedure;[24] whether the child is likely to develop sufficiently to be able to make such a decision;[25] and whether the child (who is considered capable of making an informed decision) and the child's parents agree to the procedure.[26] I discuss each of these issues in turn below.

A *The Child's Current and Future Capacity to Make an Informed Decision*

The question of the child's capacity is fundamental to the conceptualisation of children's decisional privacy rights. As I explained in chapter 1, on a will or choice theory of rights, children are denied rights on the basis of their inability to exercise those rights: so incapacity for rational decision-making would justify denying children their right to decisional privacy. In the context of medical treatment, the law has approached this question of capacity in its favoured fashion as a 'binary choice':[27] either a child has the capacity to make an informed decision concerning his or her medical treatment, or the child does not have such capacity. This assessment is commonly referred to as '*Gillick* competence', from the 1986 decision of the

[21] *Family Law Rules 2004* (Cth) Dictionary (r 1.16) (definition of 'Medical Procedure Application').
[22] *Family Law Rules 2004* (Cth) r 4.09(1).
[23] These matters are in large part a codification of the matters listed by the Family Court in *In re Marion (No 2)* (1994) FLC ¶ 92-448 to be considered when the Court is faced with a special medical procedure application. In rule 4.09(2), these matters are: (a) the exact nature and purpose of the proposed medical procedure; (b) the particular condition of the child for which the procedure is required; (c) the likely long-term physical, social and psychological effects on the child: (i) if the procedure is carried out; and (ii) if the procedure is not carried out; (d) the nature and degree of any risk to the child from the procedure; (e) if alternative and less invasive treatment is available—the reason the procedure is recommended instead of the alternative treatments; (f) that the procedure is necessary for the welfare of the child; (g) if the child is capable of making an informed decision about the procedure—whether the child agrees to the procedure; (h) if the child is incapable of making an informed decision about the procedure—that the child: (i) is currently incapable of making an informed decision; and (ii) is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future; and (i) whether the child's parents or carer agree to the procedure: *Family Law Rules 2004* (Cth) r 4.09(2).
[24] *Family Law Rules 2004* (Cth) r 4.09(2)(g).
[25] *Family Law Rules 2004* (Cth) r 4.09(2)(h).
[26] *Family Law Rules 2004* (Cth) r 4.09(2)(i).
[27] Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 3.

House of Lords.[28] The *Gillick* case established the principle that a child will be found to be competent to consent to his or her own medical treatment if the child has achieved 'a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.[29] Thus, parental rights will yield to the child's right to make his or her own decisions, which is consistent with the second feature of a children's rights approach to decisional privacy set out in chapter 2. Or as the Family Court has said: 'parental authority over a child wanes as he or she grows older and marches inexorably towards majority'.[30] The notion of *Gillick* competence has been pivotal to all cases involving authorisation of medical treatment for gender dysphoria under section 67ZC of the Family Law Act. The principle that emerged from the House of Lords' decision in *Gillick* was expressly approved by the High Court of Australia in *Marion's case*, discussed below.[31]

The Family Court has forged a nexus between *Gillick* competence and a child's autonomy, noting that '[w]hen a child of *Gillick* competency makes a decision in relation to himself or herself, that child acts autonomously'.[32] A declaration of *Gillick* competence has been said to signify the child's 'attainment of autonomy in relation to medical treatment'.[33] As I explained in chapter 2, such an all-or-nothing approach to capacity and autonomy is problematic. Understanding autonomy as a gradual, evolving concept, as I articulated in that chapter, enables children to be recognised as having the capacity for autonomy and in some circumstances, actual autonomy. Worthy of scrutiny from a children's rights perspective is *how* the court decides whether a child is *Gillick* competent – including who assesses the child's ability to consent to medical treatment; the standard of competence required; and whether children diagnosed with gender dysphoria can be said to have a 'choice' at all.

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[28] *Gillick* [1986] AC 112. Although this case was decided several years before the text of the UNCRC was finalised, *Gillick* has been described as 'a landmark in children's rights jurisprudence': see Michael Freeman, 'Rethinking Gillick' (2005) 13 *International Journal of Children's Rights* 201, 201. Tobin has argued that the values that shaped the House of Lords' decision are consistent with the conceptualisation of children's rights embraced by the UNCRC: see John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 600.

[29] *Gillick* [1986] AC 112, 188-89 (Lord Scarman). See also *Marion's case* (1992) 175 CLR 218, 237-8.

[30] *W and G (No 1)* (2005) FLC ¶93-247, 80,054 [112].

[31] See *Marion's case* (1992) 175 CLR 218, 237-8 (holding that '[t]his approach, though lacking the certainty of a fixed age rule accords with experience and with psychology. It should be followed in this country as part of the common law' (citations omitted)).

[32] *Re Tahlia* [2017] FamCA 715 (8 September 2017) [35]. See also *Re Harley* [2016] FamCA 334 (22 April 2016) [45].

[33] *Re Tahlia* [2017] FamCA 715 (8 September 2017) [37].

1 *Who Assesses the Child's Capacity for Independent Decision-Making?*

'Almost inevitably' in gender dysphoria cases, the evidence before the Court demonstrated the child's *Gillick* competence.[34] In the minority of cases where the child was found not to be *Gillick* competent, the Family Court held that the child's parents could consent to medical treatment on the child's behalf.[35] The determination of whether a child passes the *Gillick* competence test bears the potential for misuse by adult decision-makers, because the child's capacity is a matter of adult value judgments,[36] which transfers agency from children to adults.[37] As I explained in chapter 2, in assessing the weight to be given to the child's views (article 12(1) UNCRC), the child's age and maturity must be considered. The CRC Committee has said that the notion of 'maturity' refers to the child's ability to understand the matter that is the subject of decision-making and the child's capacity to express his or her views on issues in relation to that matter.[38]

The Family Court might deem a child to be incompetent, and thus unable to give consent, simply because the child's views differ from what the judge, or other adults involved in the decision-making process (such as the child's parents or treating medical practitioners) consider to be in the child's best interests.[39] As Freeman has submitted, '[i]t is much easier to assume abilities and capacities are absent than to take cognisance of children's choices'.[40] It is here

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[34] *Re Lucas* [2016] FamCA 1129 (22 December 2016) [68], citing as an exception *Re Darryl* [2016] FamCA 720 (26 August 2016), in which the child's treating psychologist and medical practitioner were of the view that the child, Darryl, was *Gillick* competent, but at first blush, the child's psychiatrist did not share that view. However, the trial judge found that upon closer analysis, there was no controversy about *Gillick* competence as between the child's treating medical professionals (at [11]-[15], [21]).

[35] See the discussion of this point in *Re Kelvin* (2017) 57 Fam LR 503, 509 [51]-[52].

[36] Priscilla Alderson, 'Giving Children's Voices "Due Weight" in Medical Law' (2018) 26 *International Journal of Children's Rights* 16, 21; Lothar Krappman, 'The Weight of the Child's View (Article 12 of the UN Convention on the Rights of the Child)' (2012) 18 *International Journal of Children's Rights* 501, 505; Phil Scraton, 'Whose "Childhood"? What "Crisis"?' in Phil Scraton (ed), *'Childhood' in 'Crisis'?* (UCL Press, 1997) 163, 183; Vicki Coppock, '"Families" in "Crisis"?' in Phil Scraton (ed), *'Childhood' in 'Crisis'?* (UCL Press, 1997) 58, 72; David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children s Rights* 1, 10; Jane Fortin, 'Accommodating Children's Rights in a in a Post Human Rights Act Era (2006) 69 *Modern Law Review* 299, 318; Nigel Thomas and Claire O'Kane, 'When Children's Wishes and Feelings Clash with their "Best Interests"' (1998) 6 *International Journal of Children's Rights* 137, 150-51.

[37] Alderson (n 36) 21.

[38] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [30].

[39] John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016) 105; Archard and Skivenes (n 36) 10; Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 403.

[40] Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Kluwer Law International, 1997) 37.

that judges must be cautious to distinguish between an assessment of the child's maturity, and an evaluation of the child's views. To conflate the two – capacity and opinion – might result in a finding that the child lacks capacity to make an informed decision, on the basis that the judge disagrees with the sagacity of the child's views and wishes.[41] The issue then becomes whether a child has 'any real rights if she must rely on others in this way to determine when she can make rights claims'.[42]

2 *The Standard of Competence*

The standard of competence against which a child is assessed enlivens the notion of the child's evolving capacities, which I explained in chapter 2 as a salient feature of a children's rights approach to decisional privacy. Children's various capacities (cognitive, emotional, social, cultural and physical) develop, not necessarily in a linear fashion, as children mature with age.[43] As these capacities evolve, so do children's 'knowledge, competencies and understanding' of their rights and how to make decisions for themselves.[44] The CRC Committee has explained that various factors affecting decision-making must be considered in determining the balance between respect for a child's evolving capacities and the appropriate level of protection for that child, including:

> the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.[45]

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[41] Archard and Skivenes (n 36) 10.

[42] Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177, 192. See also John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) 158 (observing that 'not to allow a child who meets the constraints on competence to make such a decision is to withhold from the child a right he or she is claiming, for if the right claimed is not socially recognised, the child does not have it').

[43] See Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Studies, 2005) 9-13; John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 172.

[44] CRC Committee, *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [17].

[45] CRC Committee, *General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [20]. See also *Re Isaac* [2014] FamCA 1134 (17 December 2014) [32].

The perpetual challenge, from a children's rights perspective, lies in determining when, how and by whom, this balance should be achieved. The Family Court has held that an 'integral part' of its role is to protect the child's *future* autonomy and decision-making capacity, or 'a child's right to later make for themselves important decisions including, crucially, the broader right to become the adult that he or she wishes'.[46] At a practical level, there is a tension between the emphasis on protecting children's future autonomy, and listening to children's views and wishes in the present. This tension bears the potential to skew the assessment of a child's *Gillick* competence, by holding children to adult standards of capacity, or by ignoring children's evolving capacity for autonomy.

A higher threshold of capacity and understanding than adults is often required of children to afford them decision-making autonomy.[47] Some scholars have attempted to justify this differential treatment on the basis of children's 'autonomous trajectory' and 'stage of life', arguing that children have 'not yet reached the time in their life cycle when they are expected to make crucial choices that will define their identities'.[48] Adults are presumed to have the capacity to appreciate the consequences of their actions and decisions, and so they are free to act and make decisions that might nonetheless pose a risk to their interests.[49] On the other hand, it is presumed that 'often children do not choose well or wisely',[50] and that in light of children's capacities that evolve with age, adults must act on behalf of children to protect their best interests.

In determining the standard of competence required, other scholars consider that society should adopt 'a sceptical approach to autonomy' in the context of children's decision-making, such that courts can, and should, override children's decisions where those decisions are considered

[46] *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 429 [60].
[47] Freeman, 'Rethinking Gillick' (n 28) 211. See also Andrew Franlkin-Hall, 'On Becoming an Adult: Autonomy and the Moral Relevance of Life's Stages' (2013) 63 *The Philosophical Quarterly* 223, 242; Lundy, Tobin and Parkes (n 39) 410; Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 39; Tobin and Varadan (n 43) 174.
[48] Franklin-Hall (n 47) 240-41, 243 (citation omitted).
[49] John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 165; Ronald Dworkin. *Taking Rights Seriously* (Bloomsbury, rev ed, 1997) 228-29.
[50] Carol Brennan, 'Children's Choices or Children's Interests: Which Do Their Rights Protect?' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 53, 59. See also Parkinson and Cashmore (n 27) 84, 96.

by the judge to be rash or unwise, according to adult standards,[51] or to protect children from making 'life-threatening mistakes'.[52] These observations suggest that, even when children reach the *Gillick* threshold, judges may be loath to decide contrary to the opinions and advice of the adults in the proceedings, particularly the child's treating medical practitioners and parents.[53]

Yet such views are contrary to a children's rights approach to decisional privacy, which as I explained in chapter 2, embraces children's evolving capacities and an understanding of autonomy as a gradual, evolving concept. This approach requires adults to facilitate – rather than deny, on the basis of life stage alone – the effective enjoyment by children of their decisional privacy rights, including the right to participate in decision-making that undeniably impacts on their bodies and identities. As the CRC Committee has explained, the child need not have 'comprehensive knowledge of all aspects of the matter affecting him or her', to be able to express his or her views and to have those views taken into account in the decision-making process.[54] The protective role of the child's parents or the state, Tobin and Field have argued, cannot justify restricting or interfering with the child's bodily autonomy when the child has reached a level of maturity to understand and appreciate the consequences of his or her proposed medical treatment.[55] This is because 'there can be no legal or moral justification for adopting a paternalistic approach with respect to the treatment of that child's views'.[56] Those views must be taken to be determinative of the child's best interests in these circumstances. I elaborate on this argument in chapter 7, in explaining the scope of children's decisional privacy rights.

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[51] Margaret Brazier and Caroline Bridge, 'Coercion or Caring: Analysing Adolescent Autonomy' (1996) 16 *Legal Studies* 84, 109. See also *Re Alex* (2004) 31 Fam LR 503, 531 [168] (the Court distinguishing between a child or young person having a 'general understanding' of what is proposed and its effect, and 'sufficient maturity to fully understand the grave nature and effects of the proposed treatment').

[52] Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 29.

[53] Fortin, 'Accommodating Children's Rights' (n 36) 323. See also Jane Fortin 'Children's Rights: Are the Courts Now Taking Them More Seriously?' (2004) 15 *King's Law Journal* 253, 260-61; Stalford and Hollingsworth (n 47) 31; Sara Fovargue and Suzanne Ost, 'Does the Theoretical Framework Change the Legal End Result for Mature Minors Refusing Medical Treatment or Creating Self-generated Pornography?' (2013) 13 *Medical Law International* 6, 8.

[54] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 38) [21].

[55] John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 567. See also Fortin, 'Accommodating Children's Rights' (n 36) 318.

[56] Tobin and Field (n 55) 567. See also John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 428-9, 431-2; John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 87; David Archard, 'Philosophical Perspectives on Childhood' in Julia Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001) 43, 47.

The evolving capacities principle under article 5 of the UNCRC allows for situations where the views of children who have sufficient understanding of a matter about which a decision is to be made must be respected, even where those views might conflict with the views of parents or other adult decision-makers.[57] This potential for conflicting views is a live one in the context of decisions about children's medical treatment. The Family Court's intervention in medical treatment for gender dysphoria has been justified by its purportedly protective role 'in safeguarding children including … where decisions are sought to be made by loving and caring parents'.[58] In this way, adults have been said to 'reify [children's] incapacity'[59] in their assessment of *Gillick* competence, by failing to recognise that children's capacities evolve as they mature and develop, or by (unfairly) holding children to adult standards of capacity. In doing so, adults (including judges) excuse their reluctance to respect children's decisional privacy rights, and to discount children's experiences, needs and wishes.

3 *Do Children Diagnosed with Gender Dysphoria Actually Have a 'Choice' at All?*

Gender dysphoria involves a person experiencing a conflict or dissonance between their self-perception of being female or male, and their natal or phenotypical body (their 'birth sex').[60] In simpler terms, children with gender dysphoria express 'an intense, persistent urge to switch genders'[61] and feel 'trapped' inside the wrong body.[62] At the time of writing, diagnosis of gender dysphoria is governed by the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5).[63] To be diagnosed, a person must experience a 'marked incongruence' between their experienced gender and their expected gender based on their birth sex, that persists for more than six months, and that causes clinically significant distress or impairment in social, occupational or other important areas of

[57] Tobin, 'Understanding Children's Rights' (n 49) 165.
[58] *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 428 [59].
[59] Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14 *Cardozo Law Review* 1747, 1829.
[60] Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28 *Australian Journal of Family Law* 83, 83.
[61] Kate Legge, 'Making the Switch', *The Weekend Australian Magazine* (Sydney, 18 July 2005) 12.
[62] See, e.g., *Re Alex* (2004) 31 Fam LR 503, 518-19 [97]; *Re Alex (No 2)* (2009) 42 Fam LR 645, 649 [14]; *Re: O (Special medical procedure)* [2010] FamCA 1153 (2 December 2010) [62].
[63] American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013).

functioning.[64] Gender dysphoria in children manifests itself in various ways, including 'a strong desire to be of the other gender or an insistence that one is the other gender', 'a strong dislike of one's sexual anatomy' and 'a strong desire for the physical sex characteristics that match one's experienced gender'.[65] The accepted medical treatment for gender dysphoria in children occurs in two stages.[66] The first stage involves the administration of puberty-suppressant hormones (known as 'blockers'). The second stage, which occurs when the child is approximately 16 years of age, involves the administration of either testosterone or oestrogen. Family Court judges have acknowledged that the diagnosis of children with gender dysphoria in Australia has grown significantly over the past 15 years.[67] Not all individuals who identify as transgender will exhibit gender dysphoria.[68]

A complex decisional privacy question arising from the Australian special medical procedure jurisprudence to date is whether children who are diagnosed with gender dysphoria do indeed have a *choice* about whether to undergo medical treatment. Decisional privacy gives individuals the freedom to act, behave and to make decisions about how they live their lives, without unwarranted interference from other individuals or the state. These actions, behaviours, decisions and choices contribute to enabling individuals to pursue their own conceptions of the good life and to defining their identity. Until the Full Court's decision in *Re Kelvin*, the requirement for Family Court authorisation of medical treatment for gender dysphoria disappeared upon the child reaching the age of 18.[69] In these circumstances, one might ask why a child diagnosed with gender dysphoria could not simply wait until he or she reached adulthood to 'make a choice' about his or her gender.

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[64] Ibid. See also Timothy F Murphy, 'Adolescents and Body Modification for Gender Identity Expression' (2019) 27 *Medical Law Review* 623, 625-26; Fiona Kelly, 'Explainer: What Treatment Do Young Children Receive for Gender Dysphoria and is it Irreversible?', *The Conversation* (online), 2 September 2016 <http://theconversation.com/explainer-what-treatment-do-young-children-receive-for-gender-dysphoria-and-is-it-irreversible-64759>.

[65] APA, 'What is Gender Dysphoria?' <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

[66] World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender-nonconforming People, 7th version* (WPATH, 7th version, 2007) 18 <https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf>.

[67] See, e.g., *Re Lucas* [2016] FamCA 1129 (22 December 2016) [3]; *Re Jamie* (2013) 50 Fam LR 369, 391 [99]; *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 (15 May 2008) [230].

[68] Murphy (n 64) 624.

[69] For examples of how the child/adult dualism has manifested in gender dysphoria proceedings before the Family Court, see *Re Darryl* [2016] FamCA 720 (26 August 2016) [11]-[20]; *Re Pat* [2017] FamCA 418 (15 June 2017) [20]; *Re Tahlia* [2017] FamCA 715 (8 September 2017) [24]-[25].

Beyond the problems for the child's physical and psychological health and well-being that could potentially arise from delaying treatment,[70] lies a challenging, perhaps unanswerable, question. Is medical treatment for gender dysphoria something that a child diagnosed *wants*? Or is it something that he or she *needs*, in the sense that the disconnect between bodily characteristics and self-identity eliminates any notion of choice?[71] This question of 'need' versus 'want' in relation to medical treatment for gender dysphoria need not be resolved here. The answer in part depends on the construction of people diagnosed with gender dysphoria as having a diagnosable 'condition' at all, and of the medical treatment for gender dysphoria as 'therapeutic' (being 'to treat some malfunction or disease') or 'non-therapeutic', on the distinction drawn by the High Court in *Marion's case*, which I explain below. Whether a child is characterised as having chosen to undergo medical treatment for gender dysphoria, or as having a 'psychological imperative' to do so,[72] the Family Court considered whether the child had 'the capacity to make an intelligent choice, involving the ability to consider different options and their consequences'.[73] The relevance of choice, for the child in these circumstances, lay in having the ability to decide for himself or herself whether and when to commence treatment – and so answering the 'practical question' of how he or she would like to live and what kind of person he or she would like to be, and living accordingly.

[70] Delays in medical treatment have in some gender dysphoria cases resulted in the child's development of secondary sexual characteristics later requiring surgery: see *Re Alex (No 2)* (2009) 42 Fam LR 645. See also *Re Sean and Russell (Special medical procedures)* (2010) 44 Fam LR 210, 224 [86] (consideration of no treatment was very important where the procedure could 'reasonably await the acquisition of *Gillick* competence'); *Re A* (1993) 16 FLR 715, 721 (evidence that if the Court made the young person, A, wait until he turned 18 years of age to have gender re-assignment surgery, there was a 'very high probability that vast irrevocable damage will already have been done, thereby causing the delay to work against his best interests'); *Re Jamie* [2011] FamCA 248 (6 April 2011) [53], [5], [112]; Fiona Kelly, '"The Court Process is Slow but Biology is Fast": Assessing the Impact of the Family Court Approval Process on Transgender Children and their Families (2016) 30 *Australian Journal of Family Law* 112, 123-25.

[71] See, e.g., 'Families with Transgender Children Gather in Canberra to Lobby for Hormone Treatment Law Changes', *Australian Broadcasting Corporation Radio* (Canberra), 22 February 2016 <www.abc.net.au/news/2016-02-22/parents-of-trangender-children-meet-with-politicians-in-canberra/7189454> (the mother of a 12-year-old transgender girl seeking medical treatment said that 'when we say it's a choice, it kind of suggests that it's nice to have. This is not something they want, this is something they need. ... it is less of a choice, and more of a lifesaving treatment'). See also Paul Chai, 'Just a Girl, in the World', *Sydney Morning Herald* (online), 9 September 2012 <https://www.smh.com.au/lifestyle/just-a-girl-in-the-world-20120904-25c80.html> (transgender young person quoted as saying that being transgender 'is not a lifestyle choice').

[72] See the discussion of this point in *Re Jamie* (Full Court 2013) at [66]-[69].

[73] *Re Darryl* [2016] FamCA 720 (26 August 2016) [13].

B *Agreement of the Child and the Child's Parents to the Procedure*

A second decisional privacy issue that arises in special medical procedure cases is whether the child, who is found to be *Gillick* competent, agrees to the procedure, and whether the child's parents agree to the procedure. These are listed as separate matters in rule 4.09(2) of the Family Law Rules that must be established by expert evidence, to satisfy the court that the procedure is in the child's best interests. In Part IV, I offer an overview of *Marion's case* and its subsequent application in Family Court proceedings for the authorisation of medical treatment for childhood gender dysphoria. These cases show that the courts in cases invoking the welfare jurisdiction under section 67ZC of the Family Law Act have been alive to the potential for intra-familial conflict. Gender dysphoria proceedings have been said to be characterised by a conflict between 'the right to bodily integrity and self-determination versus parents' right to ensure that children are protected from harm and from making impetuous decisions inimical to their best interests'.[74] The Family Court has illuminated a temporal dimension to the potential for conflicting interests between the child and his or her parents, noting the possibility that 'immediate' interests and wishes of parents, and a 'longer' view of the child's best interests, might not align.[75] I engage with these issues of agreement and conflict between children and their parents in chapter 7. At this point, it suffices to identify them as live issues that shape the Family Court's recognition of and respect for the child's decisional privacy rights in the medical treatment context.

C *Gender Identity Validation by the Family Court*

The final decisional privacy issue that I discuss in this chapter is the Family Court's role in moderating the relationship between a child's decisional privacy, identity and self-presentation. This relationship lies in an individual's ability, or power,[76] to exercise autonomy in choosing

[74] Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 195. See also Marie Fox and Michael Thompson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice' (2017) 44(4) *Journal of Law and Society* 501 (advancing an 'embodied integrity' approach to reconceptualise non-therapeutic interventions on children, to counter what they describe as 'the excessive decision-making power that law currently accords to parents' and to 'carve[] out a space for children's rights').

[75] *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 437 [103]. See also *Re Sean and Russell (Special medical procedures)* (2010) 44 Fam LR 210, 224 [85]; Tobin and Varadan (n 43) 174.

[76] See Lisa Austin, 'Enough About Me: Why Privacy is about Power, Not Consent (Or Harm)' in Austin Sarat (ed), *A World Without Privacy: What Law Can and Should Do?* (Cambridge University Press, 2015) 131, 178, 182.

what to conceal or reveal about himself or herself to others. This in turn enables the individual to develop and maintain his or her identity in different social contexts, and to influence others' impressions of him or her. Gavison has called it the 'control over ''editing'' one's self'.[77] The child's right to preserve his or her identity, as a 'foundational right for all human beings',[78] is expressed in article 8 of the UNCRC. While the CRC Committee has not provided a definition of the term 'identity' in article 8,[79] and so the term remains 'inherently fluid and ambiguous',[80] Masson and Harrison have observed that '[m]any accounts of identity describe a complex constellation of inter-related aspects of identity which contribute to a sense of self, self-knowledge and self-awareness'.[81] Tobin and Todres have described identity as a 'constellation of historical and evolving characteristics' that offer children an understanding of 'where they have come from, who they are, and the right to decide who they will become'.[82] The European Court of Human Rights (ECtHR) has forged a nexus between privacy and identity, recognising elements of identity as falling within the scope of article 8 of the *European Convention on Human Rights* (ECHR),[83] which provides for the right to respect for private and family life. The ECtHR has endorsed the view that 'the right to an identity … is an integral part of the notion of private life'.[84] It has also observed that gender identification is an 'important element[] … of the personal sphere' protected by article 8 of the ECHR.[85]

Children's self-conception is a work-in-progress: their sense of identity is still forming, intertwined as it is with the decisions of their parents and other family members.[86] On the relational, gradual and evolving conception of autonomy that I presented in chapter 1, which enables children to be recognised as having the capacity for autonomy and in some circumstances, actual autonomy, children's identity traits provide 'a compass for finding the

[77] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 450. See also Hyman Gross, 'Privacy and Autonomy' in Joel Feinberg and Hyman Gross (eds), *Philosophy of Law* (Wadsworth, 1991) 340, 341; David Velleman, *How We Get Along* (Cambridge University Press, 2009) 67; Juha Raikka, 'Privacy and Self-Presentation' (2017) 23 *Res Publica* 213, 214.
[78] John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 281; Michael Freeman, 'The New Birth Right? Identity and the Child of the Reproduction Revolution' (1996) 4 *International Journal of Children's Rights* 273, 283.
[79] Tobin and Todres (n 78) 292; Judith Masson and Christine Harrison, 'Identity: Mapping the Frontiers' in Nigel Lowe and Gillian Douglas (eds), *Families Across Frontiers* (Martinus Nijhoff, 1996) 277.
[80] Alice Hearst, *Children and the Politics of Cultural Belonging* (Cambridge University Press, 2012) 19.
[81] Masson and Harrison (n 79) 278.
[82] Tobin and Todres (n 78) 285.
[83] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
[84] *Jaggi v Switzerland* (Application No 58757/00, 2006) [37].
[85] *Bensaid v United Kingdom* (2001) 33 EHRR 10, [47].
[86] Tobin and Todres (n 78) 292.

direction of action' that best aligns with their living an authentic life,[87] and having the ability to make meaningful choices. A child's answer to the 'practical question' – 'how do I want to live, what sort of person do I want to be, and how I should best strive for my own good in my own way?'[88] – inevitably derives from the child's identity traits, including his or her birth sex and gender identification.

The right to preservation of identity in article 8 of the UNCRC was invoked in the case of *Re Alex*, which I discuss further below. In that case, the Family Court agreed as a matter of general principle with submission of the Human Rights and Equal Opportunity Commission (an intervener in the proceedings) that a child has a right to live with a transgender identity, free from discrimination; that it is in the child's best interests to have that right respected; and that a child's right to live with a transgender identity includes a right to choose how that identity is expressed, and should not be limited by a narrow definition of 'transgender identity' that relies on medical or surgical intervention.[89] The nature of a state's obligation to respect a child's right to preserve his or her identity intersects with the child's right to decisional privacy, in that this obligation requires the state 'to take reasonable measures to enable children not simply to preserve their identity in a historical sense, but to enable them to discover and develop their identity'.[90] The state's obligation, then, extends to supporting and protecting the dynamic, evolving elements of a child's identity; which ultimately bears on the child's capacity for autonomy or actual autonomy, by enabling the child to enjoy his or her right to define 'who he or she will become in the future'.[91]

As I explained in chapter 1, to claim that an individual is autonomous and lives autonomously, he or she must be allowed to be himself or herself (and not someone else), and he or she must be identifiable within society as the individual that he or she wants to be. The negative feelings that children who have been diagnosed with gender dysphoria experience tend to emanate from a need to be 'validated' in their gender identity.[92] The Family Court has explained,

[87] Marina A L Oshana, 'Autonomy and Self-identity' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005) 77, 85.
[88] Beate Rossler, *The Value of Privacy* (Polity, 2005) 43, 50-51.
[89] *Re Alex* (2004) 31 Fam LR 503, 540-41 [220]-[224].
[90] Tobin and Todres (n 78) 285.
[91] Ibid 293, 295.
[92] *Re Alex* (2004) 31 Fam LR 503, 519-20 [99].

summarising expert evidence in proceedings for the determination of a child's *Gillick* competence to consent to medical treatment for gender dysphoria, that with such treatment:[93]

> The child … comes to feel much more at ease with his body in terms of its appearance and functioning, as well as with his social identity. Other people will be much more likely to perceive him to be male, and will automatically treat him as such. This social validation further validates the child's sense of core gender identity …

This view supports the understanding of identity as having both an 'external' aspect (bodily appearance and functioning), as well as an 'internal' aspect (the features unique to the child's own sense of identity).[94] For transgender children to exercise their decisional privacy rights in this context involves having the freedom to eschew their birth sex, and the associated predetermined gender practices and roles imposed by society and law, including by participating meaningfully in decision-making about their desired medical treatment.

The Family Court has described the 'fundamental task' of the law, in a socio-legal context premised upon a male/female gender binary, as being 'to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one or other sex'.[95] Western cultural norms – which have both influenced, and been influenced by, the law's gender dualism of male and female – for a long time made it generally unacceptable for people who did not fit neatly into those categories to 'come out' publicly as transgender.[96] The right to preservation of identity under article 8 of the UNCRC requires states to adopt effective measures to ensure that a child does not need to hide or suppress elements of his or her identity.[97] For individuals with gender dysphoria who do not seek medical treatment and 'just suffer out there',[98] this 'survival method' known as 'stealth' involves them living a public life

[93] *Re Desi* [2017] FamCA 203 (13 March 2017) [29]. See also *Re Anita* [2016] FamCA 1137 (19 December 2016) [30].
[94] Tobin and Todres (n 78) 294.
[95] *Kevin v Attorney-General (Commonwealth)* (2001) 165 FLR 404, 473 [315]. See also Laura Grenfell and Anne Hewitt, 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761; Abigail W Lloyd, 'Defining the Human: Are Transgender People Strangers to the Law?' (2005) 20 *Berkeley Journal of Gender, Law & Justice* 150; Andrew Alston, 'Transgender Rights as Legal Rights' (1999) 7 *Canterbury Law Review* 329.
[96] Murphy (n 64) 624; P L Chau and Jonathan Herring, 'Defining, Assigning and Designing Sex' (2002) 16 *International Journal of Law, Policy and the Family* 327, 358.
[97] Tobin and Todres (n 78) 295-6.
[98] *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 (15 May 2008) [230]-[231].

in denial of their experience of transsexualism.[99] In *Re Alex (No 2)*, for instance, the Family Court noted that Alex was 'forced to resort to a degree of subterfuge to avoid having his biological gender revealed'.[100] Such 'stealth' and 'subterfuge' clearly result in a violation of transgender people's decisional privacy rights, because those who 'choos[e] to live a false and secret existence in order to live free of physical harm and/or prejudice',[101] do not live an authentic life. Rather, their decisions, behaviour and choices, which contribute to defining their identity, are subject to interference (whether direct or indirect) by other individuals and the state. However, over time, the Family Court has come to recognise the various manifestations of gender, beyond the male/female duality, as 'entirely valid, lived experiences of individuals'.[102]

Until the Full Court's decision in *Re Kelvin*, the requirement that the Family Court authorise stage two medical treatment for gender dysphoria, or determine the child's *Gillick* competence to consent to that treatment, triggered both a literal and figurative 'identity crisis' for transgender children. The critical question for these children was whether they could reconcile the person they took themselves to be, with the law's (and society's) expectations of who they were (and who they ought to be).[103] The children's rights analysis of the Full Court's judgment in *Re Jamie*, in the next chapter, illuminates the real impact on the life, identity and bodily autonomy of a young person, Georgie Stone, in her quest to commence stage two treatment for gender dysphoria.

The final Part of this chapter traces the development of the welfare jurisdiction under section 67ZC of the Family Law Act through three key judgments, which illustrate the Family Court's growing involvement in children's medical treatment. The judgments reveal a judicial scepticism of 'unbridled parental autonomy',[104] but also an inability to embrace a paradigm that acknowledges and respects children as rights-holders with distinct rights and interests.

[99] Rachael Wallbank, '*Re Kevin* in Perspective' (2004) 9 *Deakin Law Review* 461, 463.
[100] *Re Alex (No 2)* (2009) 42 Fam LR 645, 684 [174].
[101] Wallbank (n 99) 463.
[102] *Oldham & Avis* (2017) 321 FLR 265, 270 [19]-[20].
[103] Oshana (n 87) 90.
[104] Tobin and Varadan (n 43) 26. See also Lansdown (n 43) 4.

IV THE FAMILY COURT'S INCREASING INVOLVEMENT IN MEDICAL TREATMENT DECISION-MAKING FOR CHILDREN

Courts in Australia and overseas have become increasingly involved in decision-making about children's medical treatment, on a diverse range of matters, including access to contraceptives,[105] pregnancy termination,[106] treatment for anorexia nervosa,[107] blood transfusions,[108] gender re-assignment,[109] and especially sterilisation, usually of young women with intellectual disabilities.[110] In the 1990s, the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act was invoked with growing frequency to decide the complex questions of a child's competence to consent to medical treatment, and whether the proposed treatment was in the child's best interests. Around the same time, the children's rights movement began to gain momentum, most notably through the UNCRC, which came into force on 2 September 1990.[111] In this Part, I discuss three seminal cases that have shaped the exercise of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act in relation to medical treatment decision-making for children, and in particular, its extension to treatment for childhood gender dysphoria

[105] The seminal case being *Gillick* [1986] AC 112.
[106] See, e.g., *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311.
[107] See, e.g., *Re W (A Minor)* [1993] 1 FLR 1 (English Court of Appeal).
[108] See. e.g., *Elliott Birkett v Director General of Family and Community Services* (unpublished, Supreme Court of New South Wales, 1993, 3161/91); *Re E (a minor) (wardship: medical treatment*) [1993] 1 FLR 386.
[109] See, e.g., *Re A (A Child)* (1993) FLC 92-402; *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210.
[110] *Marion's case* (1992) 175 CLR 218, discussed below.
[111] The UNCRC was a response in international law to the 'paradigm shift' in thinking about children, driven by the new sociology of childhood of the 1970s and 1980s: Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 10, 19; Parkinson and Cashmore (n 27) 7-8; Fortin, *Children's Rights and the Developing Law* (n 52) 234. For examples of the literature of this new sociology of childhood, see Chris Jenks, *Sociology of Childhood* (Batsford, 1982); Allison James and Alan Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, 1990); Jens Qvortrup, William A Corsaro and Michael-Sebastian Honig (eds), *The Palgrave Handbook of Childhood Studies* (Palgrave Macmillan, 2009); Virginia Morrow, 'Perspectives on Children's Agency Within Families: A View from the Sociology of Childhood' in Leon Kuczynski (ed), *Handbook of Dynamics in Parent-Child Relations* (Sage Publications, 2003) 109.

A Marion's case: *Delimiting the Scope of the Family Court's Welfare Jurisdiction in Special Medical Procedure Cases*

Secretary, Department of Health & Community Services v JWB & SMB (*Marion's case*)[112] remains the seminal Australian authority in relation to the scope of the welfare jurisdiction under section 67ZC of the Family Law Act. The proceedings involved an application by the parents of a 14-year-old girl with severe intellectual disabilities for her sterilisation. Prior to *Marion's case*, major medical and surgical procedures for children generally had been consented to by the child's parents or guardians and/or the child themselves (where the child was deemed competent to decide), in consultation with the child's treating medical professionals. A number of applications had been made to the Family Court to authorise the sterilisation of young women with disabilities.[113] The Family Court had adopted a divergent approach, some cases finding that parental consent sufficed,[114] and others endorsing the need for court authorisation.[115] The issue proceeded to the Full Court of the Family Court,[116] and subsequently to the High Court.[117]

The High Court in *Marion's case* subverted the decision-making autonomy of families, and held that neither the child, nor the child's parents, could consent to what have come to be known as 'special medical procedures'.[118] The crux of the High Court's decision was that a child must either be competent to give consent to the medical procedure (that is, the child must be *Gillick* competent); or if the child is not *Gillick* competent, the court, rather than the child's parents, should grant authorisation for the procedure where the proposed medical intervention invoked the factors or features identified by the High Court. The High Court held that court authorisation was necessary, essentially as a 'procedural safeguard',[119] in cases where the proposed medical treatment was invasive, permanent and irreversible, and non-therapeutic.[120]

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[112] (1992) 175 CLR 218.
[113] These pre-*Marion's case* cases are *Re a Teenager* (1988) 13 Fam LR 85; *Re Jane* (1988) 12 Fam LR 662; *Re Elizabeth* (1989) 13 Fam LR 47; *In Re S* (1989) 13 Fam LR 660.
[114] See *Re a Teenager* (1988) 13 Fam LR 85; *In Re S* (1989) 13 Fam LR 660.
[115] See *Re Jane* (1988) 12 Fam LR 662; *Re Elizabeth* (1989) 13 Fam LR 47.
[116] *Re Marion* (1990) 14 Fam LR 427.
[117] *Marion's case* (1992) 175 CLR 218.
[118] The term 'special medical procedure' does not have a settled meaning or legislative definition. That term was not used in the judgment of the High Court in *Marion's case*, and it is not a term used in the Family Law Act. In *Re Jamie* (2013) 50 Fam LR 369, 400 [153], Finn J expressed reservations about 'the usefulness of the expression "special medical procedure"', and considered it preferable to refer to a 'medical procedure which requires court authorisation'. See also Bryant (n 74) 198.
[119] *Marion's case* (1992) 175 CLR 218, 249.
[120] Ibid 250.

The High Court's distinction between treatment that was 'therapeutic', and treatment that was 'non-therapeutic' (that is, not 'appropriately carried out to treat some malfunction or disease'),[121] was critical to the Full Court's reasoning in *Re Jamie*, and that of the Full Court minority in *Re Kelvin*.

The High Court in *Marion's case* set out two further factors to justify its decision to categorise sterilisation as a special case requiring the court's involvement. The first factor was the 'significant risk of making the wrong decision', either as to a child's present or future capacity to consent, or about the best interests of a child who cannot consent.[122] The second factor was the 'particularly grave' consequences of a wrong decision being made.[123] The majority considered that the complexity of the question of consent; the medical profession's key role in the decision to perform the medical procedure, and in the procedure itself; and the potentially conflicting interests of the child, the child's parents and other family members; were factors contributing to the significant risk of a wrong decision being made.[124] In balancing the child's best interests with parental decision-making autonomy, a majority of the High Court in *Marion's case* considered that there was 'less likelihood of (intentional or unintentional) abuse of the rights of children if an application to a court is mandatory, than if the decision in all cases could be made by a guardian alone'.[125] The conceptualisation of those 'rights of children' was through a patently welfarist lens.

B *Gender Dysphoria as a 'Special Medical Procedure': The Case of* Re Alex

The decision of the Family Court in *Re Alex* extended the definition of special medical procedures requiring court authorisation, as established by the High Court in *Marion's case*, to applications for medical treatment for children diagnosed with gender dysphoria. *Re Alex* was the first case in which the Family Court was asked to authorise treatment for a child diagnosed with gender dysphoria (then known as gender identity disorder) as a special medical procedure. *Re Alex* involved an application by the legal guardian (a government department) of a 13-year-old young person, Alex, pursuant to section 67ZC of the Family Law Act, for the authorisation of medical treatment that would precipitate Alex's transition from a female to a male. It was

[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid 250-252.
[125] Ibid 253.

common ground that Alex had 'a long-standing, unwavering and present identification as a male'.[126] The application before the Family Court was novel, in that the Court was not referred by the parties to any Australian or overseas authority with similar facts.[127] The evidence before the Court did not establish that Alex had the capacity to consent to the proposed treatment.[128] However, there was 'uncontroverted' evidence that the proposed treatment was entirely consistent with Alex's wishes, and that his best interests accorded with those wishes.[129]

The legal principle upon which the Family Court's decision in *Re Alex* was based was that a child who has been diagnosed with gender dysphoria requires the Family Court's authorisation to commence stage one or stage two treatment.[130] The Court was satisfied that the medical treatment plan proposed for Alex fell within the category of 'special medical procedures' requiring court authorisation, as developed in *Marion's case*. The Family Court in *Re Alex* referred to 'significant risks' that attached to 'embarking on a process that will alter a child or young person who presents as physically of one sex in the direction of the opposite sex, even where the court is not asked to authorise surgery', and held that on the evidence, it could not be said that treatment for childhood gender dysphoria was 'to cure a disease or correct some malfunction'.[131] Prior to *Re Alex*, decisions regarding medical treatment for childhood gender dysphoria were made by parents after a diagnosis by the child's treating medical practitioners, under state child welfare legislation. In concluding that Alex could not, and did not, have the capacity to consent to treatment, and that the medical treatment itself amounted to a special medical procedure to which Alex's guardian could not consent, the Family Court placed the medical treatment of childhood gender dysphoria into the same class as sterilisation of children with intellectual disabilities (*Marion's case*), and other similar 'non-therapeutic' procedures that posed the risk of a conflict of interests between the child and his or her parents.[132]

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[126] *Re Alex* (2004) 31 Fam LR 503, 516 [80].
[127] Ibid 534 [180]. Cf. Wallbank (n 99) 489.
[128] *Re Alex* (2004) 31 Fam LR 503, 531 [168].
[129] Ibid [169].
[130] Pursuant to a liberty reserved to all parties in those orders made by the Family Court, the Secretary of the Department (Alex's legal guardian) sought a declaration from the Court in 2009 that the Secretary have permission to consent to Alex undergoing a double mastectomy before Alex was 18 years of age. The Family Court found that it was in Alex's best interests to have the surgery and made the declaration: see *Re Alex (No 2)* (2009) 42 Fam LR 645.
[131] *Re Alex* (2004) 31 Fam LR 503, 537 [196].
[132] Wallbank (n 99) 488.

Re Alex, whilst not immune to criticism,[133] became the seminal judgment concerning the medical treatment of children diagnosed with gender dysphoria in Australia. The Family Court's decision in this case shifted the power dynamics between children, their parents and the state. Its practical consequence was to require parents of transgender children to cede their responsibility for medical treatment decision-making on behalf of their children to the Family Court. However, it is important to acknowledge that the Family Court in *Re Alex* made a concerted effort to recognise and promote children's rights. As I explained in chapter 3, the 'child-centric' process that the Court in this case adopted is consistent with a substantive children's rights approach, and with the values underlying children's rights in the UNCRC.[134] While the Family Court in *Re Alex* was nevertheless constrained by the precedent established in *Marion's case*, it was prepared to move beyond the confines of the 'protective' and 'paternalistic' exercise of the welfare jurisdiction, accepting that 'in modern thinking about children and young people', that jurisdiction 'must be understood with regard to their rights'.[135]

C Re Bernadette: *An Unsuccessful Attempt to Reclaim Decisional Privacy for Transgender Children*

Up until *Re Bernadette*,[136] applications to the Family Court for authorisation of medical treatment for childhood gender dysphoria had followed the approach in *Re Alex*. *Re Bernadette* was the first in which the Family Court was asked to re-consider the issue of whether court authorisation was in fact necessary for a child diagnosed with gender dysphoria to commence medical treatment. At the time of the first instance hearing, Bernadette was 15 years of age. There was no dispute between the parties that Bernadette was not *Gillick* competent to authorise the treatment herself. There was also no dispute about the proposed treatment or its appropriateness. Orders were made by consent, pursuant to section 67ZC of the Family Law Act, enabling Bernadette to commence stage one and later, stage two, treatment. However, Bernadette's parents also sought that the Family Court determine a number of questions of law, which would apply to all *future* childhood gender dysphoria cases. One of these questions concerned, relevantly, whether the parent of a transgender young person has the authority to

[133] See, e.g., Wallbank (n 99) 487-93; *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 433-34 [81]-[85].
[134] Tobin, 'Judging the Judges' (n 28) 608-09.
[135] *Re Alex* (2004) 31 Fam LR 503, 529 [154].
[136] (2010) 44 FLR 242.

lawfully authorise stage one and/or stage two medical treatment for gender dysphoria without a court order.[137]

Bernadette's parents argued that *Re Alex* had been wrongly decided. They submitted that, had the Family Court in *Re Alex* had the benefit of evidence and submissions that were now available to the trial judge, then the judgment may have been different, 'and the necessity for proceedings of this type … may have been avoided, and may in future be avoided'.[138] However, the trial judge in *Re Bernadette* was not satisfied that the evidence established that there had been 'such a change in the state of medical knowledge' that would enable him to disregard the views of the High Court in *Marion's case* and of the Family Court in *Re Alex*.[139] The evident concern of the judge was the risk of making the 'wrong decision', as referred to in both of those earlier authorities.[140]

Bernadette had turned 18 years of age by the time the Family Court's final orders and reasons were published. The reasons for judgment exposed the immense anxiety of the trial judge at the prospect of making a decision that would impact on transgender young people beyond Bernadette.[141] The judge repeated 'to the point of boredom' that Bernadette's parents, who displayed their 'genuine concern and interest' in the difficulties experienced by other transgender young people, sought findings that would have a general application.[142] The judge considered that it would be 'unsafe' to determine the questions raised as matters of general or theoretical application,[143] because the evidence that had been tendered was particular to the case of Bernadette. The judge emphasised that 'it is not … the function of the single judge to make what might be called "findings of general application for future use"'.[144] To do so in this

[137] Ibid 243-5 [3]-[4]. As the parties were unable to settle terms of a stated case for referral to the Full Court for determination, pursuant to section 94A(1) of the Family Law Act, it remained for the trial judge to determine the issues. It would take another five years for a case stated to be referred to the Full Court on the issue of the Family Court's involvement in the medical treatment decision-making process for gender dysphoria: see the analysis of *Re Kelvin* (2017) 57 Fam LR 503 in chapter 6. The trial judge in *Re Bernadette* was satisfied that he could deal with the issues raised by virtue of Part 10.3 of the *Family Law Rules 2004* (Cth), which enables a party to apply for a decision on any issue, if the decision may: (a) dispose of all or part of the case; (b) make a trial unnecessary; (c) make a trial substantially shorter; or (d) save substantial costs.
[138] *Re Bernadette* (2010) 44 FLR 242, 245-6 [11].
[139] Ibid 260 [123].
[140] Ibid.
[141] See ibid 243 [1], 253 [63]-[65]; 260 [124]. Cf. the concession of Georgie's parents in *Re Jamie* that ground 3 of the appeal – namely, that the trial judge should have ordered stage 1 and stage 2 treatment at the same time – was only relevant to Georgie's case. Counsel for Georgie's parents submitted that '[w]e don't want to argue that all parents everywhere should be in that position': *Re Jamie* (2012) 46 Fam LR 439, 451 [65].
[142] *Re Bernadette* (2010) 44 FLR 242, 253 [63]-[64].
[143] Ibid [65].
[144] Ibid [67].

case, it was said, could expose children the subject of parental authorisation for medical treatment for gender dysphoria to 'unwarranted risks'.[145] On this issue, the trial judge explained:

> To find as an apparent matter of general application that it was or was not a matter for parental responsibility could be to do a disservice to other persons contemplating treatment. To say as a rule of general application that parents could or could not authorise such treatment could mean that parents without the full understanding, that the parents in this case clearly have, could make a decision which was ill informed and may well have a disastrous long term affect [sic] on a child, either by permitting or denying the child access to treatment.[146]

The judge in *Re Bernadette* was effectively tasked with resolving the patent tension between the right of Bernadette's parents (and the parents of other children and young people diagnosed with gender dysphoria) to authorise medical treatment on behalf of their children, and the obligation of the Family Court, in the exercise of its welfare jurisdiction under section 67ZC, to protect these children and young people from harm, their best interests being the paramount consideration. The judge held that it would not be in the best interests of every child diagnosed with gender dysphoria to enable parents or guardians to authorise medical treatment on their behalf. In reaching this conclusion, the trial judge recognised the potential danger of relationships marked by a power imbalance, as that between parent and child. The judge was satisfied that 'in the best interests of children' (collectively), the Family Court must retain the power to authorise medical treatment in respect of a particular transgendered child, and to determine on a case-by-case basis whether or not the child's parents could authorise that treatment.[147] An appeal by Bernadette's parents against the decision was dismissed by the Full Court.[148]

Some commonalities between the three cases – *Marion's case*, *Re Alex* and *Re Bernadette* – emerge from the above overview. The most obvious is judicial assumptions about children's perceived lack of capacity for rational decision-making, and children's vulnerability to harm

[145] Ibid 260 [126].
[146] *Re Bernadette* (2010) 44 FLR 242, 253 [68].
[147] Ibid 260 [126].
[148] See *Re Bernadette* (2011) 249 FLR 294.

at the hands of those adults (usually parents) tasked with acting in their best interests, which are used to justify the court's purportedly protective intervention. Another common feature is judicial cognisance of conflicts that are ripe to arise in some cases between the child's best interests, and the interests of the child's parents, in the decision-making process. The next two chapters of this thesis demonstrate that these features of judicial decision-making have persisted in gender dysphoria proceedings before the Family Court, albeit with growing discontent.

V CONCLUSION

In this chapter, I have traced the development of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act, which serves to protect vulnerable children whose interests might otherwise be eroded by the conventional liberal notion of family privacy. In doing so, I have sought to show that the role of the Family Court in special medical procedure cases reflects a construction of childhood as 'essentially a protectionist experience'.[149] The Family Court in *Re Alex* extended the definition of special medical procedures requiring court authorisation, as established by the High Court in *Marion's case*, to applications for medical treatment of childhood gender dysphoria. In *Re Bernadette*, the Family Court rejected the argument that *Re Alex* had been wrongly decided, the Court being especially anxious at the prospect of making a decision of general application.

This chapter has also highlighted three decisional privacy issues that arise in special medical procedure applications, which I engage with in subsequent chapters of this thesis. One is the child's current and future capacity to make an informed decision concerning his or her medical treatment, with the attendant questions of who assesses the child's capacity, the standard of competence required, and whether children diagnosed with gender dysphoria can even be said to have a 'choice' about whether to commence treatment. Another issue is the spectre of intra-familial conflict arising from the recognition of and respect for children's decisional privacy rights – which manifests in this context in the extent of agreement of the child, and the child's parents, to the special medical procedure. The third issue that I have canvassed is that of gender identity validation by the Family Court, through the Court's authorisation of medical treatment.

[149] Freeman, *The Moral Status of Children* (n 40) 9.

The need for that validation has implications for transgender children's self-presentation and identity formation, which are both vital elements of decisional privacy.

The purpose of this chapter has been to contextualise the two judgments that I subject to a children's rights analysis in the next two chapters – *Re Jamie* (chapter 5) and *Re Kelvin* (chapter 6). An explanation of the protectionist rationale for the welfare jurisdiction under section 67ZC of the Family Law Act and its invocation to authorise medical treatment for childhood gender dysphoria, has offered important grounding for my argument that the Family Court's increasing encroachment upon the seemingly 'private' family domain of children's medical treatment, has denied children diagnosed with gender dysphoria their decisional privacy rights.

5

'HARSH' BUT 'BOUND': RE-READING THE FULL COURT'S JUDGMENT IN *RE JAMIE*

I INTRODUCTION

In the previous chapter, I traced the development of the Family Court's welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Cth), in the context of special medical procedure applications, from the perspective of the child's decisional privacy. For children seeking medical treatment for gender dysphoria, the Family Court's justification for its ongoing involvement in the decision-making process was subject to increasing opposition, as being contrary to both the decisional privacy rights and the best interests of those children.

This chapter develops the concept of children's right to decisional privacy through an analysis of the judgment of the Full Court of the Family Court in the case of *Re Jamie*.[1] The *Re Jamie* proceedings concerned authorisation for special medical procedures for a child, Georgie Stone (anonymised in the judgments as 'Jamie'),[2] who had been diagnosed with 'gender identity disorder'.[3] Part II presents a brief history of the *Re Jamie* proceedings. In Part III, I apply the children's rights approach, the salient features of which I presented in chapters 2 and 3, to analyse the judgment of the Full Court from the perspective of Georgie's decisional privacy. I examine how the Full Court reached its conclusions, in particular, the Court's framing of the issues for determination; its reasoning in determining those issues; court procedures that afforded or denied Georgie the opportunity to participate in the decision-making process; and how the Court communicated, and enabled Georgie to communicate, a decision that the Full

[1] [2011] FamCA 248 (6 April 2011); (2012) 46 Fam LR 439; (2013) 50 Fam LR 369; [2015] FamCA 455 (16 June 2015).
[2] Throughout this chapter, I refer to the young person the subject of the *Re Jamie* proceedings by her real name, 'Georgie', rather than her pseudonym, 'Jamie'.
[3] Now known as 'gender dysphoria': see American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013).

Court itself acknowledged had 'potential relevance for a much wider range of children' than just Georgie.[4]

This children's rights analysis of the Full Court's judgment supports my argument that, through its conclusion that the Family Court must remain involved in medical treatment for gender dysphoria by determining the issue of *Gillick* competence, the Full Court denied decisional privacy to Georgie and to other transgender young people in relation to their own bodies and identities. It did so by impairing Georgie's ability to determine, consistently with her evolving capacities and with the direction and guidance of her parents, what she wanted to do to her own body, which adversely impacted Georgie's identity formation, self-esteem and sense of worth. The Full Court's reasoning and conclusions, and procedural aspects of the proceedings – as conveyed by the judgment – perpetuated the paternalistic conceptualisation of children as passive participants who might be seen and to a very limited extent heard in proceedings, but not listened to by adult decision-makers.

II THE *RE JAMIE* PROCEEDINGS: A BRIEF HISTORY

A *The Initial Family Court Proceedings*

Georgie was almost 11 years old at the time of the initial Family Court proceedings.[5] She had been diagnosed by medical experts with 'gender identity disorder'. Georgie's parents applied to the Family Court for stage one medical treatment for Georgie, which would involve special medical procedures to suppress male puberty through the administration of puberty suppressant hormones (or 'puberty blockers') and additional treatment of oestrogen. The judge at first instance held that stage one treatment was in Georgie's best interests, and made an order authorising Georgie's parents to consent to that treatment.[6] In relation to stage two treatment, the judge concluded that the two stages of treatment could be viewed as a single treatment plan; but that the Family Court could not determine, when Georgie was only 10 years old, what would be in Georgie's best interests in six years' time.[7] Authorisation of stage two treatment would thus require a further application to the Family Court. The trial judge acknowledged the

[4] *Re Jamie* (2013) 50 Fam LR 369, 372 [5].
[5] *Re Jamie (Special medical procedure)* [2011] FamCA 248 (6 April 2011) (*Re Jamie*).
[6] Ibid [7].
[7] Ibid [123]-[124], [130].

decisional privacy implications of this decision for Georgie's parents, who were likely to view court proceedings as a 'constraint on their freedom to determine, with [Georgie], issues about which there has been a great deal of thinking, advice and soul-searching'.[8] The judge also noted the 'risk of uncertainty for [Georgie] at an age and stage when it may be beneficial for her to feel empowered to participate in these decisions outside the shadow of the court'.[9]

B *The Full Court Appeal*

Georgie's parents appealed against the decision to the Full Court of the Family Court. They argued that treatment of gender dysphoria was not a 'special medical procedure' which displaced their parental responsibility to decide upon the appropriate treatment for their child (ground 1); and that the trial judge erred in concluding that stage two treatment should be the subject of a further application to the Family Court (ground 2).[10] Georgie's parents sought to distinguish cases of childhood gender dysphoria from the facts in *Secretary, Department of Health & Community Services v JWB & SMB* (*Marion's case*).[11] As outlined in the previous chapter, the High Court in *Marion's case* held that sterilisation was a special medical procedure that displaced parental responsibility and required court authorisation, because it was invasive, permanent and irreversible and 'non-therapeutic' (that is, not carried out 'to treat some malfunction or disease').[12] Other factors that contributed to its classification as a special medical procedure were the 'significant risk of making the wrong decision', either as to a child's present or future capacity to consent, or about the best interests of a child who cannot consent, and the 'particularly grave' consequences of a wrong decision being made.[13]

Georgie's parents argued that the medical procedure for childhood gender dysphoria was not a special medical procedure like sterilisation, because it was reversible; it was for therapeutic purposes, being a medically-recognised, diagnosed psychiatric condition with well-recognised treatment strategies; and no one other than the child stood to benefit directly from the treatment being undertaken.[14] Georgie's parents also argued that the need to apply to the court in a case where there was 'no controversy' between the parents, medical practitioners and the child,

[8] Ibid [129].
[9] Ibid [129].
[10] *Re Jamie* (2013) 50 Fam LR 369, 374-5 [12]-[14].
[11] (1992) 175 CLR 218.
[12] Ibid 250.
[13] Ibid.
[14] *Re Jamie* (2013) 50 Fam LR 369, 377 [23]-[27].

caused undue anxiety, delay and expense.[15] The matters raised on appeal were not the subject of dispute at trial,[16] and they could only be agitated before the Full Court because they raised a point of law.[17] The Full Court granted leave to a public authority (identified in the reasons of the trial judge as the Office of the Public Advocate (OPA)) to intervene in the appeal.[18]

The primary question for the Full Court was whether the treatment that Georgie sought (proceeding in two stages, stage one having already commenced by the time of the appeal) was a 'special medical procedure' for which consent was beyond the bounds of parental authority conferred by section 61C of the Family Law Act, and which required the Court's authorisation under section 67ZC of the Act.[19] The Full Court (Chief Justice Bryant and Justice Finn in separate judgments, Justice Strickland agreeing) held that stage one treatment for gender dysphoria was not a special medical procedure that attracted the Family Court's welfare jurisdiction.[20] Chief Justice Bryant found that stage one treatment did not involve a condition requiring the court's authorisation, due to the evolving state of medical knowledge;[21] and that, in childhood gender dysphoria cases, it was unlikely that the parental interests 'would be anything other than the welfare of the child (as opposed to having a collateral interest in having the treatment carried out)'.[22] Chief Justice Bryant concluded that stage one treatment fell within the 'wide ambit of parental responsibility' that parents held when a child was not yet able to make his or her own decisions about medical treatment.[23]

The Full Court distinguished stage one and stage two treatment, focusing on issues of the reversibility and side effects of each stage, as well as the child's capacity to consent.[24] Chief Justice Bryant found that court authorisation was appropriate for stage two treatment, unless the child was *Gillick* competent.[25] Her Honour held that if the child was found to be *Gillick* competent, there was no role for the court at all.[26] On the more 'vexing' question of who should

[15] Ibid 377-8 [28].
[16] See *Re Jamie* [2011] FamCA 248 (6 April 2011) [33].
[17] *Re Jamie* (2013) 50 Fam LR 369, 372 [4].
[18] Leave was granted pursuant to section 92 of the Family Law Act, upon the conditions that the public authority was not permitted to call or tender any evidence in relation to the appeal; and was confined to making written and oral submissions in relation to the first ground of appeal: see *Re Jamie* (2012) 46 Fam LR 439.
[19] *Re Jamie* (2013) 50 Fam LR 369, 372 [5]; 403 [170].
[20] Ibid 392 [106]-[108] (Bryant CJ), 405 [179] (Finn J).
[21] Ibid 392 [106].
[22] Ibid [107].
[23] Ibid [108].
[24] Ibid 393 [111], [114].
[25] Ibid 398-9 [140].
[26] Ibid 396-7 [129].

determine the question of *Gillick* competence – the child's medical practitioners, or the Family Court – the Full Court concluded 'with some reluctance' that the nature of the stage two treatment for gender dysphoria required the Family Court to determine that question.[27] The Full Court conceded that the court's ongoing involvement was 'harsh', but considered itself 'bound by what the High Court said in *Marion's case*'.[28]

C *Family Court Authorisation of Stage Two Treatment*

In light of the Full Court's decision, Georgie's parents applied to the Family Court for a determination of the question of whether Georgie, who was now 15 years of age, was able to consent to stage two treatment. The judge observed that there was no controversy about Georgie's diagnosis, her wishes, or her competence to provide informed consent to the proposed medical treatment. Georgie's parents and her treating medical professionals supported the application. In holding that Georgie was *Gillick* competent, the judge found that Georgie had demonstrated the 'intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences'.[29] The judge also noted that Georgie's clear and steadfast views were illustrated by a letter she had written to the Court and her scrutiny of the evidence in support of the application.[30] I opened this thesis with an excerpt from Georgie's letter.

In this Part, I have offered a precis of *what* the Family Court in the various *Re Jamie* proceedings decided. My focus now turns to *how* the Full Court in particular reached its conclusions. In the next Part, I analyse the Full Court's judgment from the perspective of Georgie's decisional privacy, applying the children's rights approach articulated in chapters 2 and 3. I will show that the Full Court's substantive decision-making, and procedural aspects of the proceedings, undermined Georgie's decision-making autonomy in relation to her her own body and identity. I will also highlight the 'general intellectual environment' that emerged from the Full Court's judgment of framing issues concerning transgender children and young people in terms of their rights.[31]

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[27] Ibid 398 [136]-[137] (Bryant CJ), 406 [182], [186], [188] (Finn J), 407 [192]-[196] (Strickland J).
[28] Ibid 398 [138].
[29] *Re Jamie* [2015] FamCA 455 (16 June 2015) [81].
[30] Ibid [81]-[83].
[31] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 88; John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 583.

III A CHILDREN'S RIGHTS ANALYSIS OF THE FULL COURT'S JUDGMENT IN *RE JAMIE*

The Full Court's judgment in *Re Jamie* arguably perpetuated the paternalistic conceptualisation of children as vulnerable 'becomings' in need of protection, who might be seen and to a very limited extent heard in proceedings, but not listened to by adult decision-makers. This is notwithstanding the Full Court's efforts to engage with children's rights, through its discussion of the submissions of the Australian Human Rights Commission (AHRC), as intervener in the appeal, which invoked various provisions of the *United Nations Convention on the Rights of the Child* (UNCRC).[32] In this section, I articulate this argument through an analysis of four features of the Full Court's judgment that I consider undermined Georgie's decisional privacy rights: first, how the Full Court pathologised Georgie in its selection and framing of the issues for determination; secondly, the Full Court's 'selective rights' approach[33] in how it informed and justified its resolution of the issues; thirdly, how Georgie's views were put before Court; and finally, Georgie's objectification in the judgment and the evident tension between Georgie's right to selectively share information about her court experience, and the stringent informational privacy protection for the proceedings.

A *Selecting and Framing the 'Potentially Far Reaching' Issues*

The Full Court's framing of the issues in *Re Jamie* recognised the broader implications of the decision for other transgender children and young people, but emphasised the rights of Georgie's parents, the responsibilities of medical practitioners, and the importance of maintaining court involvement, over the rights of Georgie herself. For Georgie's proposed medical treatment to be considered 'therapeutic' (on the distinction between therapeutic and non-therapeutic treatment drawn in *Marion's case*, explained in the previous chapter),[34] and so within the bounds of parental authority to consent, Georgie's parents had to establish that Georgie suffered from a 'bodily malfunction or disease'. The Full Court thus assigned Georgie the various identities of a child under a disability, who had a mental disorder and a

[32] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).
[33] Tobin, 'Judging the Judges' (n 31) 597-98.
[34] *Marion's case* (1992) 175 CLR 218, 250.

psychological condition. The discursive power of such terms was to construct Georgie as having something 'wrong' with her, which had the potential to adversely impact Georgie's identity formation.

1 *Recognising the Potential Impacts on Transgender Children and Young People Beyond Georgie*

The scope of state intervention, through Family Court authorisation of special medical procedures for children, ultimately depends on what is considered to be the appropriate degree of paternalism required to promote children's rights. Freeman has argued that the rhetoric of children's rights has been 'couched predominantly in child-saving language, in terms of salvation'.[35] The Family Court's concern in gender dysphoria proceedings has been to protect the individual child the subject of the proceedings, with reservations expressed about expounding principles of general application to transgender children more broadly. In *Re Bernadette*,[36] discussed in the previous chapter, the Family Court steadfastly refused to make a finding of 'general application for future use' that medical treatment for gender dysphoria fell within the bounds of parental responsibility to consent.[37] The Full Court in *Re Kelvin*, which is the focus of the next chapter, stressed that the decision in each case before the Family Court concerns 'the specific circumstances of the individual child the subject of the proceedings', such that the proceedings 'are neither prescriptive nor permissive of broader issues that may be raised in public debate'.[38]

In *Re Jamie*, however, Chief Justice Bryant recognised the significance of the appeal for not only Georgie, but for transgender children in Australia more broadly. The Full Court's decision had the potential to affect other children who had been diagnosed with gender dysphoria and sought medical treatment, by eliminating the need to apply to the Family Court for consent to commence that treatment. For this reason, three parties in addition to Georgie's parents (the appellants) were involved in the hearing: an independent children's lawyer (ICL) appointed to represent Georgie's interests, and two interveners, being the OPA, and the AHRC.[39] The Full

[35] Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Kluwer Law International, 1997) 84.
[36] (2010) 44 FLR 242.
[37] Ibid 253 [67].
[38] *Re Kelvin* (2017) 57 Fam LR 503, 520 [117].
[39] *Re Jamie* (2013) 50 Fam LR 369, 372 [6]-[7].

Court said that the 'potentially far reaching' issue agitated on appeal, regarding the characterisation of childhood gender dysphoria as a special medical procedure, raised the possibility of a 'significant change in the law' and the 'overturning of many cases', including *Re Alex* and *Re Bernadette*.[40] The Full Court's acknowledgement of the public policy ramifications of its decision raised the broader question for Georgie herself, and for the law, about how Georgie's identity should be defined and managed.[41] The Court's perception of Georgie's predicament, and that of other transgender young people, was necessarily influenced by how it constructed Georgie.

2 *Justifying the Full Court's Protective Intervention through Georgie's Construction as a Child with a Disability or Mental Illness*

(a) Georgie: A 'Child' or a 'Young Person'?

Georgie was almost 12 years of age at the time of the Full Court hearing and 13 years of age when the Full Court delivered its judgment. Throughout the judgment, the various judges of the Full Court referred to Georgie as a 'child'. The only references to 'young person' were in the context of the Court's discussion of the submissions of the AHRC. Chief Justice Bryant considered Georgie's age relevant to the child/young person nomenclature distinction, and noted that, while every case must be considered according to the level of maturity and understanding of the particular child, 16 is 'an age at which children are regarded, for some purposes, as persons capable of autonomous decision-making'.[42] As I proposed in the previous chapter, an all-or-nothing approach to children's autonomy is problematic from a children's rights perspective, for it overlooks the importance of the child's evolving capacities. I explained in chapter 2 that assumptions cannot be made about a child's capacity solely on the basis of the child's biological age, given that various factors influence the development of children's capacities to form their own views.[43]

[40] *Re Jamie* (2012) 46 Fam LR 439, 448 [44]-[45].
[41] *Kevin v Attorney-General (Commonwealth)* (2001) 165 FLR 404, 425 [109].
[42] *Re Jamie* (2013) 50 Fam LR 369, 397 [130].
[43] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [29]. See also Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 216.

At first blush, the Full Court's choice of descriptor for Georgie – 'child' – might appear trivial to the proceedings. However, the judgment in *Re Alex*,[44] discussed in the previous chapter, provides a useful comparator. Alex was 13 years of age at the time of the initial application to the Family Court. Chief Justice Nicholson made it clear that, while the Family Law Act and the relevant case law referred to 'a child', his Honour preferred to use the expression 'young person' when referring to Alex in the judgment, having regard to Alex's age and maturity.[45] Chief Justice Nicholson subsequently used the phrase 'child or young person' throughout the judgment in *Re Alex*, to emphasise what he considered to be an important distinction. Following the Full Court's decision in *Re Jamie*, the matter returned to the Family Court for an assessment of Georgie's *Gillick* competence. The judge described Georgie (who was 15 at the time of this hearing) as 'a young person in the transition phase from childhood to adulthood referred to in the *Gillick* case'.[46] Just as the judge's conscious choice in *Re Alex* to refer to Alex as a 'young person' recognised the importance of the Family Court treating young people as subjects with rights, the Full Court's terminology in *Re Jamie* reflected the ingrained conceptualisation of children as vulnerable objects of adult intervention. As did the way in which the Full Court pathologised Georgie.

(b) Pathologising Georgie: Gender Dysphoria as a Disorder, Disability, Mental Illness

For Georgie's proposed medical treatment to be considered 'therapeutic', on the distinction drawn in *Marion's case* between 'therapeutic' and 'non-therapeutic' treatment, and hence within the bounds of parental authority to consent, Georgie's parents had to establish that Georgie suffered from a 'bodily malfunction or disease'. This argument advanced on appeal 'contradicted the popular claim that transgender orientation was merely a point in rainbow normality'.[47] The Full Court was asked to relate Georgie's condition to the criteria devised by the High Court in *Marion's case*, so that her parents could succeed in their claim. Georgie was, as a result, given a label that had the potential to adversely impact her identity formation,

[44] (2004) 31 Fam LR 503.
[45] Ibid 507 [18]. See also Family Law Council, *Involving and Representing Children in Family Law* (Discussion Paper, May 1995) 31 ('the word "child" is not entirely appropriate when applied to young persons approaching adulthood'); *Duffy & Gomes (No 2)* [2015] FCCA 1757 (21 May 2015) [72] (in relation to young people aged 13 and 15 years: 'These young people – "children" being a somewhat erroneous term at their ages').
[46] *Re Jamie* [2015] FamCA 455 (16 June 2015) [82].
[47] John Whithall, 'Childhood Gender Dysphoria and the Responsibility of the Courts', *Quadrant* (online), 10 May 2017 <https://quadrant.org.au/magazine/2017/05/childhood-gender-dysphoria-responsibility-courts/>.

as well as the extent to which she could control her self-presentation. As I explained in the previous chapter, gender identity is a 'dynamic' attribute of the child's identity, which Tobin and Todres have observed 'has the potential to evolve and develop over time', shaped by the child's own life experiences.[48] By virtue of her diagnosis, the Full Court placed Georgie in a 'group of persons generally referred to in current literature as … transgendered'.[49] The court authorisation requirement meant that Georgie relied on the Family Court to validate her identity. The Full Court itself acknowledged that affixing the term 'disorder' to individuals who identify as transgender aroused 'discomfort'.[50] Chief Justice Bryant did not need to determine the correctness of that characterisation, and remarked that:

> It may be that in time to come, transsexualism will no longer be described as a disorder, but for the time being, and for the foreseeable future, the weight of professional opinion is that it represents a particular category of pathology or mental illness.[51]

Chief Justice Bryant framed the issue concerning the definition of 'gender identity disorder' in terms of the congruence between an individual's self-identity and his or her physical self-representation, and society's expectations of 'normal' characteristics of each gender category. Her Honour's view was that medical treatment for gender dysphoria 'is not … the alteration of an otherwise healthy body to accommodate a psychological imperative, but rather it is the alignment of the body with the person's self-identity'.[52] An effect of drawing a distinction between an individual's view of himself or herself, and society's expectations of how a person 'should' be is that a self-identity which departs from the 'normative' (that is, the expected physical characteristics of a particular gender) is considered abnormal. Chief Justice Bryant added that, '[o]nce it is accepted that there is no normative state, at least not in every person,

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[48] John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 285, 292-3.
[49] *Re Jamie* (2013) 50 Fam LR 369, 372 [8]. Bryant CJ affirmed Georgie as belonging to this group by citing the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) and the *Australian Government Guidelines on the Recognition of Sex and Gender* (July 2013), which were said to indicate that transgendered people are an 'identifiable group in our society' whose 'right to live as a member of the sex with which they feel compatible' should be respected: at 373 [9]-[10].
[50] See also *Re Alex* (2004) 31 Fam LR 503, in which Nicholson CJ acknowledged that Alex and others who sought transition to the opposite sex 'may find it offensive to find the incompatibility between their sense of self and the sex of their body being categorised as a "disease"' or a "malfunction"': at 537 [197]. His Honour also questioned whether the condition with which Alex had been diagnosed was properly described as a 'disorder', and preferred to use the 'more accurate' expression 'dysphoria' throughout the judgment: at 506 [2].
[51] *Re Jamie* (2013) 50 Fam LR 369, 385 [69].
[52] Ibid 384 [67].

then the absolute necessity of aligning the self-identity and the physical characteristics becomes apparent'.[53]

While there have been shifts over time in judicial language used to describe transgenderism, the semantic effect of such labels as disorder, dysphoria and mental illness, is to continue to pathologise the child who has been diagnosed.[54] The discursive power of such terms is to construct the child as having something 'wrong' with him or her, which subsequently justifies both medical and state intervention. In this way, the law not only reflects the child's identity, but also contributes to its (re)production. In a media interview following the decision in *Re Alex (No 2)*,[55] Chief Justice Bryant said that describing the medical action over Alex as 'treatment' when there was no physical illness or injury was 'just semantics', and that it was 'overwhelming that these children feel they are in the wrong body'.[56] A children's rights approach to decisional privacy does not gloss over judicial terminology selection as 'just semantics'. The significance of pathologising children who are the subject of gender dysphoria proceedings is its contribution to violating their decisional privacy. This is because these children must either incorporate the label (suffering from a mental illness, a disorder, a psychological condition, and so on), with its negative connotations, into their self-presentation, or they must change their self-presentation to reflect or refute that label, with obvious adverse consequences for their ability to forge their identity and to live autonomously.

Decisional privacy, I have argued, is valuable because it provides the conditions or environment that enable individuals to live autonomously.[57] In the case of children diagnosed with gender dysphoria, a right to decisional privacy enables those children to ask and answer the 'practical question'[58] of how they would like to live and what sort of person they would like to be. It offers them the ability to determine, consistently with their evolving capacities and with the direction and guidance of their parents, who they are and who they want to be in the future. How the Full Court constructed Georgie had a 'constitutive' impact on Georgie herself, in the sense that Georgie became 'in the eyes of the law, and in the eyes of society, and perhaps

[53] Ibid 384-5 [68].
[54] Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28 *Australian Journal of Family Law* 83, 83 n 3. See also Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 209-10.
[55] (2009) 42 Fam LR 645.
[56] Diana Bryant, as quoted in Karen Kissane, 'Young People, Big Decisions', *The Age* (online), 4 May 2009 <https://www.smh.com.au/national/young-people-big-decisions-20090504-arxc.html>.
[57] See the discussion of privacy's value in chapter 1.
[58] Beate Rossler, *The Value of Privacy* (Polity, 2005) 43.

even in her own eyes, "disabled"'.[59] In granting leave to the OPA to intervene in the *Re Jamie* appeal, the Full Court agreed with the OPA's submission that Georgie was a person under a 'disability', as defined in the relevant state legislation.[60] The OPA submitted that it had a series of statutory responsibilities regarding 'the welfare and interests, not just of children, not just of persons who are incompetent, but of, in this instance, children with a disability'.[61]

There is a marked and uncomfortable incongruence between the Full Court's acceptance in *Re Jamie* that Georgie had a 'mental disorder' and was therefore a person under a 'disability', and the remarks of Chief Justice Nicholson in *Re Alex*. In the latter case, while Chief Justice Nicholson permitted a representative of the OPA to observe the proceedings, his Honour explicitly noted that his approval 'was not because any of the parties or I construed that Alex has a disability'.[62] By contrast, the Full Court in *Re Jamie* held that there was scope for gender identity disorder to be categorised as a mental disorder within the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-4) and so to constitute a 'disability'.[63] The fifth edition of the DSM was published two months before the Full Court delivered its reasons for judgment in *Re Jamie*. Chief Justice Bryant in the judgment observed that the term 'gender identity disorder' in DSM-4 had been replaced with the term 'gender dysphoria'. The latter term is intended to focus on 'dysphoria as the clinical problem, not identity per se', and to emphasise the distress for individuals that might accompany the incongruence between their experienced or expressed gender and their assigned gender.[64] However, for the individual diagnosed, 'dysphoria' might still be an inapt descriptor.[65] In *Re Jamie*, Georgie had no unease about, or dissatisfaction with, her identity. She was not 'conflicted about her gender. As far as she is concerned, she is female. She does not want to have to continue living in a male body'.[66]

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[59] Eric Mitnick, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006) 114.

[60] Section 3 of the *Guardianship and Administration Act 1986* (Vic), in force at the time of the appeal, defined 'disability' in relation to a person as 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.

[61] *Re Jamie* (2012) 46 Fam LR 439, 444-5 [23]-[24].

[62] *Re Alex* (2004) 31 Fam LR 503, 507 [14]-[15]. Rather, his Honour justified the involvement of the OPA in the proceedings on the basis that the OPA was also concerned with 'matters of this nature, particularly as they affect children and young people', such that his Honour considered it to be in the interests of the broader community for such an office to have the benefit of observing the proceedings in circumstances where Alex's privacy was safeguarded.

[63] *Re Jamie* (2012) 46 Fam LR 439, 449 [49]-[50].

[64] *Re Jamie* (2013) 50 Fam LR 369, 385 [69] n 4.

[65] Rachael Wallbank, '*Re Kevin* in Perspective' (2004) 9 *Deakin Law Review* 461, 476.

[66] See *Re Jamie* [2011] FamCA 248 (6 April 2011) [81]. Georgie's endocrinologist gave evidence that 'this patient is in no way uncertain': at [85].

What the Full Court's judgment in *Re Jamie* shows is that, from a children's rights perspective, judicial choice of language to refer to children reflects society's values, such that 'changes in language, like changes in law, can also motivate changes in attitudes and behaviour'.[67] Word choice and language are telling of broader constructions and perceptions of children in society, of children's relationships with their parents and other adults, and the judicial and political willingness to view children as rights-bearers with distinct interests and views. In this way, as Mitnick has observed, 'law indeed may be seen as constitutive of social identity'.[68] The choice of terminology in the Full Court's judgment in *Re Jamie* – labelling Georgie as a child (rather than a young person) under a disability and suffering from a mental disorder – enabled the Full Court to sustain the justification for the exercise of its welfare jurisdiction, being to protect a seemingly 'vulnerable' child from harm.[69] The way that the Full Court constructed Georgie enabled it to believe that it was acting in her best interests by retaining its oversight role in the assessment of *Gillick* competence – notwithstanding the Court's acknowledgement of Georgie's anguish at feeling that she was in the 'wrong' body.

As I explained in chapter 4, the term 'identity' in the child's right to preservation of identity under article 8 of the UNCRC, can be understood as 'a constellation of historical and evolving characteristics' that 'provide children with an understanding of where they have come from, who they are, and the right to decide who they will become'.[70] By pathologising Georgie as it did throughout its judgment, the Full Court impaired Georgie's ability to exercise, consistently with her evolving capacities, and with the guidance and direction of her parents, her right to

[67] Bernadette J Saunders, 'Words Matter: Textual Abuse of Childhood in the English-Speaking World, and the Role of Language in the Continuing Denial of Children's Rights' (2017) 25 *International Journal of Children's Rights* 519, 522, 526.
[68] Mitnick (n 59) 81.
[69] It might be argued that Georgie's construction as a child under a disability and with a mental illness also impaired her ability to participate in the proceedings because, as Martin and Franklin have argued, '[r]egarding children as "becomings" has an even more profound impact on disabled children's realisation of their right to participate, in that not only do they have this perception to contend with, but in addition, historical medical notions individualised disability and equated it to suffering, dependency, passivity and vulnerability': Kate Martin and Anita Franklin, 'Disabled Children and Participation in the UK: Reality or Rhetoric?' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 97, 101. However, it could not be said, from the judgments alone, that Georgie's 'labels' prevented her from participating in the Family Court proceedings, any more than simply being a child did.
[70] Tobin and Todres (n 48) 285, 293.

decisional privacy in asserting who she was and who she wanted to become. As Georgie herself said, '[i]t's about letting people be who they were born to be'.[71]

3 *Relegating Georgie's Rights: The Emphasis on the Scope of Parental Rights and Responsibilities*

Family law proceedings that invoke children's rights usually arise in the context of disputes between adults.[72] Most commonly, the dispute relates to whom a child should live with, and spend time with, following parental separation. Another kind of dispute arises in medical treatment cases involving conflicts between parents and the child's treating doctors.[73] Notwithstanding that these proceedings clearly affect various rights of children, most arguments are either framed in terms of adults' rights, or they are constructed in a paternalistic way, focusing on children's vulnerability and their need to be protected from harm.[74] As a result, the interests of the child are obfuscated by, or subsumed into, a discussion of the interests of adults.[75] The first salient feature of a children's rights approach, presented in chapter 2, aims to address this tendency, by requiring that children are understood as having rights and interests distinct from those of their parents and other caregivers. Children must be treated as active subjects, not merely as objects of concern and protective intervention.

While the Full Court in *Re Jamie* recognised that the interests of Georgie, and of other transgender young people, were at stake, as I noted earlier in this chapter, it pursued the claims in relation to Georgie's best interests on adult terms. The Full Court did so because the appeal centred on the scope of *parental* authority and the ambit of the Family Court's welfare jurisdiction. The primary issue was whether it lay within the bounds of parental responsibility for parents to be able to consent to medical treatment for gender dysphoria on behalf of their

[71] Georgie Stone, as quoted in Jordy Atkinson, 'Transgender Teen Georgie Stone Lobbying for Fairer Access to Cross-sex Hormone Therapy', *Caulfield Glen Eira Leader* (online), 25 November 2016 <https://www.heraldsun.com.au/leader/inner-south/transgender-teen-georgie-stone-lobbying-for-fairer-access-to-crosssex-hormone-therapy/news-story/5ae6939f2c734e711994edbaac00663c>.
[72] Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 1, 5.
[73] See, e.g., *Director Clinical Services, Child & Adolescent Health Services & Kiszko* [2016] FCWA 75 (1 September 2016) (dispute between the parents and treating medical practitioners of a six-year-old child with a brain tumour about ongoing treatment for the child).
[74] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 5. Cf. Tobin, 'Judging the Judges' (n 31) 605 (offering examples, from refugee law, custody disputes, and sentencing decisions, where courts have conceptualised the issues in terms of the impact on a child's rights).
[75] Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 72) 10.

child, or whether court authorisation of the treatment was required under section 67ZC of the Family Law Act.[76] That the Full Court adopted an adult-centric approach is also evident from the way in which Chief Justice Bryant framed the impacts of gender dysphoria proceedings:

> It seems harsh to require *parents* to be subject to the expense of making an application to the court with the attendant expense, stress and possible delay when the doctors and parents are in agreement …[77]

Absent from Chief Justice Bryant's statement was an express acknowledgement of the impacts of the proceedings on the child or young person. Justice Finn was equally unwilling to impose the costs and stress of further court proceedings, but did make reference to the impact of those proceedings upon 'the child', Georgie:

> I am extremely reluctant to impose upon *the child* and her parents the costs and stress of further court proceedings, particularly when the court may ultimately reach the same decision which the child and her parents had already reached with the child's doctors.[78]

The issues in *Re Jamie* were framed as being between the scope of parental rights and responsibilities, and the state's duty to protect the best interests of the child, through the Family Court's exercise of its welfare jurisdiction. That the issues were conceptualised in this way is unsurprising, and characteristic of most gender dysphoria judgments up to and including the Full Court's decision in *Re Jamie*. A notable exception is the judgment of Chief Justice Nicholson in *Re Alex*, to which I have previously referred as an excellent example of a substantive approach to children's rights.[79]

Even if one were to accept the Full Court's conclusion in *Re Jamie* as sound – that is, agreeing that ongoing court involvement in the medical treatment decision-making process, through an assessment of *Gillick* competence, was warranted in all gender dysphoria cases – a children's rights approach would nonetheless have had an important bearing on the proceedings. Georgie

[76] *Re Jamie* (2013) 50 Fam LR 369, 403 [170].
[77] Ibid 398 [138] (emphasis added).
[78] Ibid 406 [185].
[79] See also *Re Sean and Russell* (2010) 44 Fam LR 210, 214 [25]-[26] (identifying the principle that 'children have rights, including, in specific circumstances, the right to determine for themselves whether a medical procedure can be carried out' as the first restriction on the 'rights and duties' of parents giving authority and consent to medical treatment).

herself would have featured as the focal point of the Full Court's decision, as a subject with distinct rights and interests that warranted recognition and protection.. This was more than simply a dispute about the appropriate balance of power between parents and the state in relation to the determination of a child's best interests. Further, as I discuss in the next section, the Full Court might have conceptualised articles 5 and 12 of the UNCRC, which Chief Justice Bryant considered to be 'apposite to the question of *Gillick* competence',[80] in a way that would have enabled Georgie to participate actively and meaningfully in the proceedings, consistently with her evolving capacities. Meaningful participation, as I explained in chapter 2, is critical to children's ability to exercise their decisional privacy rights.

B *Recognising Georgie as a Rights-Holder? A 'Selective Rights' Approach*

The Full Court in *Re Jamie* recognised the relevance and significance of articles 5 and 12 of the UNCRC to the question of whether Georgie was *Gillick* competent – that is, whether she was competent to give informed consent to the proposed medical treatment. Article 5 requires states to respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to the child in the child's exercise of his or her rights, in a manner consistent with the child's evolving capacities. Article 12(1) gives the child who is capable of forming a view the right to express his or her views freely in all matters affecting the child, with those views being given due weight in accordance with the child's age and maturity. Article 12(2) gives the child the opportunity to be heard in judicial proceedings affecting the child, either directly, or through a representative or an appropriate body.

The use of the UNCRC in judicial decision-making, according to Tobin, provides 'a very strong indication' of the extent to which this international convention has been 'internalised and brought to life' within Australia's legal system.[81] The Full Court in *Re Jamie* discussed at some length the submissions of the AHRC, which argued that a number of rights under the UNCRC and the *Convention on the Rights of Persons with Disabilities*[82] were engaged by the proceedings.[83] The AHRC submitted that the UNCRC should be an 'interpretive aid' when

[80] *Re Jamie* (2013) 50 Fam LR 369, 395 [121].
[81] Tobin, 'Judging the Judges' (n 31) 580.
[82] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[83] See *Re Jamie* (2013) 50 Fam LR 369, 380-84 [46]-[65], 395-6 [120]-[122]. Cf. Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review* 299, 303.

considering Part VII of the Family Law Act. Its submissions drew on three key principles emanating from articles 5 and 12 of the UNCRC, which are consistent with a children's rights approach to decisional privacy, namely: the importance of children having input into decisions that affect them, including decisions about medical treatment; giving children's views due weight in accordance with their age and maturity; and the special responsibility that parents have to provide direction and guidance to their children in making decisions.[84] Citing the additional object in section 60B(4) of the Family Law Act that the UNCRC be taken into account, the AHRC submitted that this international convention should be an interpretive aid for the Court when considering the meaning of provisions in Part VII of the Family Law Act.

The Full Court in *Re Jamie* recognised articles 5 and 12 of the UNCRC as being relevant to the question of *Gillick* competence 'in addition to the best interests test'.[85] The Court agreed that the UNCRC 'makes it clear that it is important that children have input into decisions that affect them and that parents have special responsibility for assisting their children in making these decisions'.[86] Chief Justice Bryant cited articles 5 and 12 to support her conclusion that, if the child is *Gillick* competent, there is no role for the court in medical treatment for gender dysphoria.[87] Conceding that there was no obligation to do so, her Honour did not take the analysis a step further and did not engage in any substantive discussion of how those rights applied to Georgie, or to children diagnosed with gender dysphoria more broadly. Chief Justice Bryant held that:

> it would be contrary to the Convention on the Rights of the Child, and to the autonomous decision-making to which a *Gillick* competent child is entitled, to hold that there is a particular class of treatment, namely stage two treatment for childhood gender identity disorder, that disentitles autonomous decision-making by the child, whereas no other medical procedure does.[88]

As scholars have previously observed, the 'rhetoric of rights' in the application of the *Gillick* competence test can be used to obfuscate paternalistic decisions made about children's medical

[84] *Re Jamie* (2013) 50 Fam LR 369, 381[48], 383-4 [64]-[65].
[85] Ibid 395 [121].
[86] Ibid 395-6 [121]-[122].
[87] Ibid 396-7 [129].
[88] Ibid 397-8 [134].

treatment.[89] Judicial assessments of a child's capacity to consent in many cases appear to embrace the language of rights – that is, statements that the court will respect the child's autonomy – yet the judge ultimately applies a welfarist approach,[90] which denies the child decisional privacy. The Full Court's judgment in *Re Jamie* is an excellent example of this 'rhetorical rights' approach.[91] The Full Court described medical treatment for 'something as personal and essential as the perception of one's gender and sexuality' as 'the very exemplar of when the rights of the *Gillick*-competent child should be given full effect'.[92] Yet the conclusion that the Family Court must remain involved in medical treatment process, by determining the question of *Gillick* competence, denied not only Georgie, but also other transgender young people seeking treatment, the ability to exercise their decisional privacy rights in relation to their own bodies and identities. This is where, as Stalford and Hollingsworth have noted, one may '[s]cratch beneath the surface' of judges' explicit reference to children's rights to 'find that it impacts only superficially on the reasoning and outcome'.[93]

Upon closer analysis, then, the Full Court's approach in *Re Jamie* falls within what Tobin has labelled a 'selective rights' approach.[94] The Full Court informed and justified its resolution of the issues through 'significant rather than incidental' references to children's rights under articles 5 and 12 of the UNCRC.[95] In this way, the Court did at least make an effort to engage with children's rights, through its discussion of the AHRC's submissions. Its efforts stand in stark contrast to the approach of the Full Court in *Re Kelvin*, which I analyse in the next chapter. However, the Full Court's analysis of the rights under articles 5 and 12 lacked an 'internally coherent' application of the UNCRC and the children's rights model that it embodies.[96] The Full Court in *Re Jamie* was able to identify some, although not all, provisions of the UNCRC that are relevant to medical treatment for children diagnosed with gender dysphoria. Yet the Court did not demonstrate an astute conceptualisation of those rights and their operation in

[89] Tobin, 'Judging the Judges' (n 31) 600, citing Michael Freeman, 'Rethinking Gillick' (2005) 13 *International Journal of Children's Rights* 201, 206-8, 211-12; Melinda T Derish and Kathleen Vanden Heuvel, 'Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment' (2000) 28 *Journal of Law, Medicine and Ethics* 109, 112-13.
[90] See, e.g., Jamie Potter, 'Rewriting the Competency Rules for Children: Full Recognition of the Young Person as Rights-Bearer' (2006) 14 *Journal of Law and Medicine* 64, 67.
[91] Tobin, 'Judging the Judges' (n 31) 599-601.
[92] *Re Jamie* (2013) 50 Fam LR 369, 398 [135].
[93] Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 33.
[94] Tobin, 'Judging the Judges' (n 31) 597-98.
[95] Ibid 597.
[96] Ibid.

practice. This is particularly evident in how the Full Court understood Georgie's right under article 12 to express her views and to be heard in the proceedings.

C *Georgie's Right to Make Decisions about Her Own Body 'Taken Completely Out of My Hands'*[97] *through Adult Filtering and Interpretation*

Georgie was persistent in her desire to be involved in the proceedings, given that they bore so fundamentally on her bodily autonomy and control over her own identity. She sought that her views and preferences in relation to her proposed medical treatment be put before the Court. The judgments of the Full Court, as well as those of the trial judge in the proceedings before and after the Full Court's decision, demonstrate that Georgie was denied that opportunity. Georgie's voice was subject to interpretation by various experts, and her views were proffered only through the evidence of adults: her parents, the ICL appointed to represent Georgie's best interests; the family report; and her treating medical practitioners.

At the first instance hearing, the Family Court took into account Georgie's 'strong and consistent views' that she wanted to commence treatment, finding that Georgie was 'sufficiently mature, intelligent and informed' for considerable weight to be attached to her wishes.[98] An ICL was appointed for Georgie pursuant to section 68L of the Family Law Act.[99] The appointment of an ICL for a child must 'ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court'.[100] However, the lawyer 'is not the child's legal representative' and 'is not obliged to act on the child's instructions'.[101] Rather, the ICL is 'a "best interests" advocate' for the child.[102] The ICL supported the desire of Georgie, her parents and treating doctors for stage one treatment to start immediately.[103] However, the ICL argued that the second stage treatment, which would not

[97] Georgie Stone, letter to the Family Court of Australia, as quoted in *Re Jamie* [2015] FamCA 455 (16 June 2015) [65].
[98] *Re Jamie* [2011] FamCA 248 (6 April 2011) [117].
[99] On 6 April 2011, Dessau J made an order discharging the ICL.
[100] *Family Law Act 1975* (Cth) s 68LA(5)(b).
[101] *Family Law Act 1975* (Cth) ss 68LA(5)(b), 68LA(4)(a)-(b).See e.g., *In the Marriage of Wotherspoon & Cooper* (1980) 7 FamLR 71, 78 (holding that it was 'proper for counsel for the child, notwithstanding his expressed wish to the contrary, to submit that it is not in his best interests that his wishes be acceded to by the court'); See also *In the Marriage of Bennett* (1990) 14 FamLR 397, 398; *Kingley & Arndale (No 2)* (2010) 44 Fam LR 492, 498-500; *Bondai & Bretton (No 2)* [2010] FamCA 1237 (6 December 2010) [43].
[102] Kaspiew et al, *Independent Children's Lawyers Study: Final Report* (Australian Institute of Family Studies, 2nd ed, 2014) ix.
[103] *Re Jamie* [2011] FamCA 248 (6 April 2011) [7].

occur for another five to six years, should be considered by the Family Court closer to that time, to take into account unanticipated 'prevailing or intervening circumstances'.[104] The divergent stance of Georgie's parents and the ICL on this issue – notably, Georgie's views were not apparent from the Family Court's judgment – reveal a limitation of the ICL as a means of facilitating the expression of the child's voice in family law proceedings. That is, the child's wishes and preferences (as expressed by the child and subsequently interpreted and advanced to the court by the ICL), and what is in the child's best interests (as assessed by the ICL and determined by the judge in the proceedings), might not always align.

A further limitation of the ICL is the conflict between the ICL attempting to establish a relationship of trust with the child and encouraging the child to voice his or her wishes and views, and the ICL's ability to argue against those views and wishes if the ICL considers it to be in the child's best interests. This may result, as research has found, in the child feeling disempowered and even betrayed.[105] Children themselves have expressed negative experiences of their interactions with ICLs appointed to represent their best interests, including feeling that they had not been listened to adequately or in a respectful manner;[106] and having minimal (and in some cases, no) contact with the ICL.[107] The UNCRC does not specify whether a best interests model or a direct instructions model of representation is required under article 12(2).[108] While the use of ICLs in proceedings under the Family Law Act is intended to advance children's right to express their views in judicial proceedings that affect them,[109] the extent to

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[104] Ibid [10].

[105] Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) 52; Kaspiew et al (n 102) xii, 135-6, 139; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 152-54; Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 429; William J Keough, *Child Representation in Family Law* (LBC Information Services, 2000) 50-53, 61-2.

[106] Parkinson and Cashmore (n 105) 152-4; Kaspiew et al (n 102) 132, 135-36, 144; Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy & the Family* 225, 226; Carson et al (n 105) 3-4, 47, 51-2; Nicola Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26 *Australian Journal of Family Law* 214, 215.

[107] Kaspiew et al (n 102) xii, 133-34, 142, 144; Carson et al (n 105) viii, 4, 51; Australian Law Reform Commission (ALRC), *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) 374 [12.59].

[108] Lundy, Tobin and Parkes (n 105) 426-7. For views about the appropriate ICL model in Australian family law, see Ross, 'ICLs' (n 106) 217; Nicola Ross, 'Images of Children: Agency, Article 12 and Models for Legal Representation of Children' (2005) 19 *Australian Journal of Family Law* 92; ALRC (n 107) 371-5.

[109] Jennifer McIntosh, Diana Bryant and Kristen Murray, 'Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46 *Family Court Review* 125, 128; Kaspiew et al (n 102) ix. It is worth noting that the reference to 'the procedural rules of national law' in article 12(2) of the UNCRC gives states a degree of discretion in relation to the rules that they adopt to give effect to the child's right to be heard in judicial or administrative proceedings affecting the child; subject to the requirement

which the current ICL model actually satisfies Australia's obligations under the UNCRC has been, and continues to be, challenged.[110] For instance, in its 2019 concluding observations on Australia, the CRC Committee recommended the provision of training and support to ICLs, 'to ensure that such lawyers have direct contact with the children they represent in the family courts'.[111] A more detailed discussion of the ICL's role in enabling children to express their views and to be heard in Part VII proceedings is complex and beyond the scope of this thesis. It suffices to observe that the debate about the purpose and function of independent children's representation – to represent the child's best interests (a concern for the child's welfare), or to advocate the child's own wishes (thereby promoting the child's autonomy) – remains a live one.[112]

On appeal in *Re Jamie*, Chief Justice Bryant agreed with the submission of the AHRC, noted above, that article 12 of the UNCRC stressed the significance of children having input into decisions that affect them.[113] Article 12 highlights a critical distinction between opportunity and obligation, and between the rhetoric and reality of children's participation in judicial proceedings affecting them.[114] In practice, the right in article 12 does not impose an *obligation* on the court to *seek* the child's views; rather, it requires that states assure the child the right to freely express his or her views, by giving the child an *opportunity* to be heard in judicial proceedings affecting him or her, either directly or through a representative or appropriate body. The Full Court in *Re Jamie* used article 12 of the UNCRC to inform its conclusion that a *Gillick* competent child is capable of exercising decision-making autonomy in relation to stage two medical treatment for gender dysphoria. However, it merely quoted verbatim from the AHRC's submissions, and did not engage in a detailed or nuanced analysis of the nature and content of Georgie's right to express her views and to be heard in the proceedings. As I

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that the rules adopted by the state are effective in enabling the child to enjoy that right, and do not violate any other rights under the UNCRC: Lundy, Tobin and Parkes (n 105) 431.

[110] Kaspiew et al (n 102) ix; Carson et al (n 105) 3.

[111] CRC Committee, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia', UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) 5 [22(c)].

[112] Lundy, Tobin and Parkes (n 105) 428-9; Parkinson and Cashmore (n 105) 49-53; Linda Elrod, 'Client Directed Lawyers for Children: It is the Right Thing to Do' (2007) 27 *Pace Law Review* 869; Barbara Atwood, 'Representing Children Who Can't or Won't Direct Counsel: Best Interests Lawyering or No Lawyer At All?' (2011) 53 *Arizona Law Review* 381; Donald Duquette, 'Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required' (2000) 34 *Family Law Quarterly* 441; Geoff Monahan, 'Autonomy vs Beneficence: Ethics and Representation of Children and Young People in Legal Proceedings' (2008) 8 *Queensland University of Technology Law and Justice Journal* 392.

[113] *Re Jamie* (2013) 50 Fam LR 369, 395-6 [121]-[122].

[114] Liam Cairns, 'Participation with Purpose' in E Kay M Tisdall, John M Davis, Alan Prout and Malcolm Hill (eds), *Children, Young People and Social Inclusion: Participation for What?* (Polity Press, 2006) 217, 217-18.

explained earlier, the references to articles 5 and 12 of the UNCRC, as they were raised in the submissions of the AHRC before the Full Court, remained abstracted, and the Full Court used those provisions selectively in its reasoning and conclusions. This triggers a concern about the symbolic and normative appeal of participation, and the danger that participatory procedures might play a role that is 'more ideological and symbolic than real',[115] or what Smart has called 'a kind of token process, a box that needs to be ticked rather than a genuine consultation'.[116]

At the hearing to determine Georgie's *Gillick* competence to consent to stage two treatment, which was necessitated by the Full Court's conclusion, the judge, on application by Georgie's parents, made an order permitting Georgie to be present in court during the hearing.[117] The judge justified this order on the basis of the legislatively mandated need to protect Georgie's rights and to promote her welfare,[118] and taking into account, relevantly, Georgie's entitlement to be heard and to know what was happening in relation to a very significant aspect of her life.[119] On the issue of Georgie's *Gillick* competence, the judge noted that Georgie's views had been 'very clearly expressed' through her parents and treating professionals.[120] There was no formal evidence tendered in from Georgie herself. While nothing in Part VII permits the court or any person to require the child to express his or her views in relation to any matter,[121] Georgie had written a letter to the Family Court in which she expressed her clear desire for stage two treatment. This letter was included as an exhibit to her parents' summary of argument. The letter was not evidence, because there was no application for Georgie to give evidence and the judge considered it unnecessary for Georgie to adopt the letter in oral evidence before the Court. However, the judge recognised that the letter was important because it articulated Georgie's views.[122] Georgie's letter relevantly read:[123]

> I am a normal, cheerful, confident girl and I know who I am. It's just that my exterior, doesn't mirror my interior. I want my body to develop alongside my peers, and I want

[115] Denis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) 161.
[116] Carol Smart, 'From Children's Shoes to Children's Voices' (2002) 40 *Family Court Review* 307, 307.
[117] This order was made pursuant to section 100B(2) of the Family Law Act, which provides, relevantly, that a child must not be present during proceedings in the Family Court unless the court makes an order allowing the child to be present.
[118] *Family Law Act 1975* (Cth) s 43(1)(c).
[119] *Re Jamie* [2015] FamCA 455 (16 June 2015) [43]-[44].
[120] Ibid [42].
[121] *Family Law Act 1975* (Cth) s 60CE.
[122] Ibid [64].
[123] Ibid [65].

> my body to match who I really am; a girl. … It shouldn't be the court's decision. It is my body, and only I have the right to decide what goes into it. … However, this right has been taken completely out of my hands. … I implore you to let me start stage 2 treatment. Then, I can be who I am, without this worry hanging over me.

Georgie's letter, in which she expressed her immense frustration at having to 'endure' legal proceedings to 'be who I am', and at having the right to make decisions about her own body 'taken completely out of my hands', reflects transgender young people's loss of faith in the Family Court to protect and determine their best interests. Georgie's sentiments endorse the view of former Family Court Chief Justice, Alastair Nicholson, that 'many children – and particularly older children – feel disempowered by Court proceedings'.[124] The CRC Committee has described children's article 12 right to express their views freely and to have those views duly taken into account as 'fundamental' to realising adolescents' right to heath and development.[125] According to the CRC Committee, to enable adolescents to 'safely and properly' exercise this right, 'public authorities, parents and other adults working with or for children need to create an environment based on trust, information-sharing, the capacity to listen and sound guidance that is conducive for adolescents' participation equally including in decision-making processes'.[126] Georgie's views were put before the Family Court in the various proceedings exclusively by adults: through the ICL appointed for Georgie, through the family report, and the evidence of her parents and treating doctors. The CRC Committee has recommended that 'wherever possible, the child must be given the opportunity to be *directly* heard in any proceedings'.[127] Without any actual evidence from Georgie herself,[128] she lost control over how she, and her experiences, were presented to the court: which again infringed Georgie's right to decisional privacy. As a result, the judge's capacity to listen to, hear, and reflect in the judgment on Georgie's lived experiences was shaped and coloured by the

[124] Alastair Nicholson, 'Children and Children's Rights in the Context of Family Law' (Speech delivered at the LawAsia Conference, Brisbane, 21 June 2003) 6.
[125] CRC Committee, *General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) [8].
[126] Ibid.
[127] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 43) [35] (emphasis added).
[128] Although acknowledging that article 12(2) UNCRC, which provides for the child's right to be heard in judicial and administrative proceedings affecting the child, is not proscriptive as to as to how the child's views are put before the court. Thus the child's views can be conveyed directly by the child himself or herself, or indirectly 'through a representative or appropriate body', such as an ICL or a family report: see Lundy, Tobin and Parkes (n 105) 402.

evidence presented by adults, who were the ultimate definers and articulators of Georgie's best interests.

D *Communicating and Enabling a Decision with 'Potential Relevance for a Much Wider Range of Children than Just [Georgie]'*[129]

The structure, language and tone of the Full Court's judgment in *Re Jamie* sustained a construction of Georgie as a vulnerable object of concern. In circumstances where Georgie was capable of expressing her tenacious views in a matter that fundamentally affected her identity and well-being, and indeed where she sought to do so, stringent informational privacy protection for the proceedings simultaneously stifled Georgie's decisional privacy, by impairing her ability to selectively share information about her court experience.

1 *Georgie's Objectification as 'The Child Concerned'*

The *Re Jamie* proceedings, by the time they had reached the Full Court, were less about Georgie as they were about the scope of parental rights versus the state's protective duties in relation to transgender children's medical treatment. I discussed this emphasis on parental rights earlier in this chapter. The choice of language in the judgment of Chief Justice Bryant appeared to contradict her Honour's agreement with the submission of the AHRC that, under the children's rights model of the UNCRC, '[c]hildren are rights bearers and not merely objects of protection'.[130] The judgment referred to Georgie as '[t]he child concerned',[131] and the language used reflects a conceptualisation of Georgie as an object of concern, rather than as an active subject with rights. The judgment conveyed the sentiment that the proceedings were not about what Georgie *herself* should be able to do in the exercise of her decisional privacy rights (accepting that those rights were not recognised by the Court), but about what should be able to be *done to* Georgie, or by others on her behalf. For instance, Chief Justice Bryant noted that Georgie's parents 'were asking the court to authorise them to consent to treatment on behalf of [Georgie]'.[132] The Full Court's reasons for judgment in an earlier hearing were also framed in terms of Georgie having something done to her: '[Georgie] was diagnosed by the medical

[129] *Re Jamie* (2013) 50 Fam LR 369, 372 [5].
[130] Ibid 395-6 [122].
[131] Ibid 371 [1]. See also 400 [149] (Finn J).
[132] Ibid 371 [1].

experts involved in the case with childhood gender identity disorder'.[133] Characteristic of many judgments in children's cases at the appellate level, Georgie's voice was absent from the judgment, reflecting Rackley's observation that 'the parties can often … disappear from view by the time a case reaches the upper echelons of the legal hierarchy'.[134] Georgie's objectification through language choices in the judgment is consistent with her being pathologised by the Full Court as a child suffering from a mental illness, disorder and disability, discussed earlier. This welfarist approach and its reinforcement through judicial semantic selection, is contrary to the features of a children's rights judgment that I set out in chapter 3, which centralise and humanise the child and construct a child-focused narrative. Publication restrictions imposed on proceedings by section 121 of the Family Law Act also prevented Georgie from sharing her own court experience.

2 *Tension Between Georgie's Right to Share Her Family Court Experience and Informational Privacy Protection for 'Vulnerable' Children*

Section 121 of the Family Law Act prohibits the publication or dissemination of accounts of family law proceedings that could identify a party, witness, or other person associated with the proceedings.[135] In gender dysphoria proceedings, stringent informational privacy norms have been imposed, with the intention of protecting the child from the perceived harms of publicity and public identification, and the attendant loss of autonomy that would result from a sense of unwelcome exposure. These norms have included orders closing the proceedings to the public and the anonymisation of judgments. Orders further suppressing information that could otherwise be published in the judgment, as permitted by section 121 of the Family Law Act, have been 'made almost universally in cases of this type'.[136] The Family Court's justification in making these orders has centred on protecting the transgender child's identity, given that the substance of the proceedings is, according to the Family Court, 'at the most sensitive end of matters' concerning the child's welfare,[137] and in some cases, the issue of the child's gender

[133] *Re Jamie* (2012) 46 Fam LR 439, 441 [4], quoted in *Re Jamie* (2013) 50 Fam LR 369, 373-4 [11].
[134] Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgment Project' in Rosemary Hunter, Clare McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 44, 47.
[135] *Family Law Act 1975* (Cth) s 121(1).
[136] *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013) [125].
[137] *Re Rosie (Special medical procedure)* [2011] FamCA 63 (28 January 2011) [44]. See also *Re O (Special medical procedure)* [2010] FamCA 1153 (2 December 2010) [38]; *Re Sarah* [2014] FamCA 208 (28 March 2014) [47].

identity may not have been 'divulged to the world at large'.[138] These judicial statements reflect concerns for 'negative self-presentation', or not giving any, or any particular, impression of the child to a wide audience.[139] The Family Court has been concerned to ensure that outsiders will not gain any impressions of the child's *transgender* identity. However, in doing so, the Court has ignored the importance, for that child, of recognising and affirming his or her identity through public validation. A decisional privacy issue unique to gender dysphoria proceedings that I raised in the previous chapter is the Family Court's validation of a transgender child's identity, though its authorisation function (of the special medical procedure itself, or following *Re Jamie*, through its assessment of the child's *Gillick* competence to consent to stage two treatment).

The *Re Jamie* proceedings were conducted in camera, having regard to their 'sensitivity'.[140] Restrictions were imposed on identification and publication of the proceedings in addition to those imposed by section 121 of the Family Law Act. The reasons for judgment of the Family Court at first instance in *Re Jamie* described the publication restriction and anonymisation orders made as 'deliberately detailed and restrictive, to ensure privacy for [Georgie] and her family, and protection from these sensitive personal issues being widely circulated'.[141] The potential impacts of media publicity were articulated in terms of categorical harm to Georgie, with the Family Court stating that '[i]t could only be damaging for [Georgie] to be identified'.[142] However, from a decisional privacy perspective, such sweeping publication restrictions 'coerc[e] privacy',[143] as they ignore the element of control that some participants in Family Court proceedings might want to exercise over disclosure of information about their court experience through self-publication.[144] 'Coercing privacy' is a phrase coined by Allen to describe the problem of the law imposing privacy norms to ensure that individuals live according to a particular understanding of privacy as a 'foundation' or 'precondition' of a liberal society.[145] As Inness has explained, 'privacy might not necessarily be opposed to publicity; its function might be to provide the individual with control over certain aspects of

[138] *Re Rosie (Special medical procedure)* [2011] FamCA 63 (28 January 2011) [44].
[139] Juha Raikka, 'Privacy and Self-Presentation' (2017) 23 *Res Publica* 213, 224.
[140] *Re Jamie* [2015] FamCA 455 (16 June 2015) [45].
[141] *Re Jamie* [2011] FamCA 248 (6 April 2011) [132].
[142] Ibid.
[143] Anita Allen, 'Coercing Privacy' (1999) 40 *William and Mary Law Review* 723, 740, 756.
[144] Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 6.
[145] Allen (n 143) 728. See also Anita Allen, 'Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm' (2000) 32 *Connecticut Law Review* 861, 871-72.

her life'.'[146] This more nuanced understanding of privacy, which focuses on its decisional dimension, and understands privacy's value as inhering in autonomy, recognises that information disclosure and publicity might support, rather than undermine, a child's autonomy and identity development.

The notion of control over information as enabling decision-making autonomy is reflected in article 13(1) of the UNCRC, which provides for the child's right to freedom of expression. This right includes 'freedom to seek, receive and impart information and ideas of all kinds', through any media of the child's choice, subject to the restrictions in article 13(2).[147] Article 13 is important not only for its content and the rights that it bestows on children, but also for its recognition of the child as an autonomous being, capable of participating fully in society.[148] The CRC Committee has identified the child's right to seek, receive and impart information as one of two 'crucial prerequisites for the effective exercise of the right to be heard'[149] in article 12.[150] In *Re Jamie,* stringent informational privacy protection for the proceedings simultaneously stifled Georgie's decisional privacy, by impairing her ability to selectively share information about her Family Court proceedings. That this was Georgie's experience is illustrated by a television program that aired several months after the Full Court's decision in *Re Jamie*, but prior to the proceedings to assess Georgie's *Gillick* competence. In that program, Georgie said, 'I don't want to be pixelated cause that would kind of be like I'm ashamed and I'm not ashamed. … [J]ust my identity is private for the moment'.[151]

In the proceedings following the Full Court's decision, the judge made an order enabling Georgie to identify and reveal herself as the young person the subject of the *Re Jamie* proceedings. This order, which the judge considered to be in Georgie's best interests, was the first of its kind in gender dysphoria proceedings. Given the finding that Georgie was competent to consent to stage two treatment, the judge accepted the submission of her parents that it was

[146] Allen (n 143) 728.
[147] Art 13(2) of the UNCRC provides that these restrictions shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or morals.
[148] Freeman, *The Moral Status of Children* (n 35) 56. Cf. Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin Macleod (eds) *The Moral and Political Status of Children* (Oxford University Press, 2002) 31, 50.
[149] CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 43) [80].
[150] The other being the child's right to access information in article 17 of the UNCRC.
[151] Georgie Stone, as quoted in 'Being Me', *Four Corners* (Australian Broadcasting Corporation), 17 November 2014 <https://www.abc.net.au/4corners/being-me/5899244>.

not in Georgie's best interests to compel her to maintain secrecy if she desired to reveal her circumstances to people of her choosing.[152] The order provided a compromise between protecting Georgie's informational privacy in the face of widespread media publicity that such proceedings would most likely generate, and enabling Georgie to exercise her rights to freedom of expression (article 13 UNCRC) and to preserve and forge her own identity (article 8 UNCRC). This order also reflected an acceptance that children themselves have the right to play an active role in constructing and discovering their own identities, consistently with their evolving capacities;[153] and that selective, self-controlled information disclosure facilitates social relations of varying degrees of intimacy, which is vital to the experience of decisional privacy. Facilitated by the order, Georgie became a prominent activist for transgender children and young people.[154]

IV CONCLUSION

In this chapter, I have applied the children's rights approach to decisional privacy developed in chapters 2 and 3, and contextualised in relation to the Family Court's welfare jurisdiction and special medical procedures in chapter 4, to analyse the Full Court's judgment in *Re Jamie*. The analysis has served to support my argument that, through its conclusion, 'with some reluctance',[155] that the Family Court must remain involved in medical treatment for gender dysphoria by determining the issue of *Gillick* competence, and its reasoning in support of that conclusion, the Full Court denied decisional privacy to Georgie and to other transgender children and young people seeking medical treatment.

This chapter has raised the fundamental question of whether, and to what extent, adults are prepared to encourage children to participate meaningfully and actively in decision-making about their medical treatment for a condition that so deeply affects their bodily autonomy and identity. Gerald Dworkin has observed that '[o]ur self-esteem and sense of worth are bound up

[152] *Re Jamie* [2015] FamCA 455 (16 June 2015) [46].
[153] Tobin and Todres (n 48) 293-4.
[154] Georgie Stone has won numerous awards for her activism for the rights of transgender children and young people, including the title of Gay and Lesbian Organisation of Business and Enterprise (GLOBE)'s Person of the Year in 2016, 2018 Victorian Young Australian of the Year and 2019 Hero of the Year in the Australian LGBTI Awards.
[155] *Re Jamie* (2013) 50 Fam LR 369, 398 [137].

with the right to determine what shall be done to and with our bodies and minds'.[156] The Full Court's decision, I have argued, violated the right of Georgie, and other transgender young people seeking treatment for gender dysphoria, to determine, consistently with their evolving capacities and with the direction and guidance of their parents, what would be done with their own bodies, with adverse implications for their identity, self-esteem and sense of worth. The *Re Jamie* proceedings bring into sharp focus the construction of children under the Family Law Act as objects of concern, rather than as active participatory subjects. The proceedings also highlight how the ongoing process of identity formation, and children's role in creating and preserving their own identities, can be judicially muted. In the next chapter, I apply the children's rights approach to decisional privacy once again to analyse the judgment of the Full Court of the Family Court in *Re Kelvin*.

[156] Gerald Dworkin, 'Consent, Representation, and Proxy Consent' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 191, 203.

6

THE 'GREATEST ADVANCEMENT IN TRANSGENDER RIGHTS' FOR AUSTRALIAN CHILDREN? RE-READING THE FULL COURT'S JUDGMENT IN *RE KELVIN*

I INTRODUCTION

This chapter further develops the concept of children's right to decisional privacy through an analysis of the judgment of the Full Court of the Family Court in the case of *Re Kelvin*.[1] Decided four years after the Full Court's decision in *Re Jamie*,[2] *Re Kelvin* provides a strong point of comparison and contrast of judicial approaches to children's decisional privacy rights in the context of medical treatment for childhood gender dysphoria. The proceedings arose from an application by the father of a 16-year-old young person, anonymised in the judgments as 'Kelvin', for the Family Court's authorisation of stage two treatment for Kelvin's gender dysphoria. The matter came before the Full Court in the form of a special case stated by the trial judge. The questions for the Full Court's opinion concerned the effect of the Full Court's decision in *Re Jamie*, and the role of the Family Court more broadly in relation to stage two medical treatment for gender dysphoria and the determination of *Gillick* competence. A special bench of the Full Court did not follow its decision in *Re Jamie*. It held that where the child consents to stage two treatment, the child's treating medical practitioners agree that the child is *Gillick* competent, and the child's parents do not object to the treatment, then the Family Court need not determine the child's *Gillick* competence.[3]

The *Re Kelvin* decision was touted, as the title of this chapter indicates, 'the greatest advancement in transgender rights for children and adolescents in Australia'.[4] It swung the

[1] (2017) 57 Fam LR 503.
[2] (2013) 50 Fam LR 369.
[3] Ibid 531-2 [177]-[184], 540 [226].
[4] See '"Kelvin" Family Court Announcement', *Royal Children's Hospital Melbourne* (Blog Post, 30 November 2017) <https://blogs.rch.org.au/news/2017/11/30/kelvin-family-court-announcement/>; @RCHMelbourne

pendulum of decision-making authority for transgender children's medical treatment from the Family Court back to the child, the child's parents and the child's treating doctors, making it once again a 'private', family issue. This chapter challenges the alleged strides that the Full Court made in championing the decisional privacy of children diagnosed with gender dysphoria. I argue that, when analysed using a children's rights approach, the Full Court's decision was not concerned with children's decisional privacy rights at all; rather, it was about the extent to which the Family Court should encroach on parents' ability (and responsibility) to make medical treatment decisions for and on behalf of their children.

In Part II of this chapter, I contextualise the Full Court's decision in *Re Kelvin*, by articulating the growing dissatisfaction with the Full Court's decision in *Re Jamie*. In Part III, I present a brief history of the *Re Kelvin* proceedings. In Part IV, I apply the children's rights approach to analyse the Full Court's judgment from a decisional privacy perspective. First, I identify the 'invisible' rights approach that the Full Court adopted, through its emphasis on parental rights and the noteworthy absence of any consideration of the rights of Kelvin or transgender children more broadly. I then show that the judgment in *Re Kelvin* was one written by adults, for adults. The Full Court did not embrace the potential to advance the decisional privacy rights of transgender children by writing a judgment *for* them, to explain the significance of the decision. I attempt to do just that: I produce a child-friendly version of the Full Court's judgment and in doing so, re-write it from a children's rights perspective. I also explain why, in light of the ultimate outcome of *Re Kelvin,* the approach that the Full Court adopted matters. Thirdly, I scrutinise the Full Court's statement regarding the need for court authorisation in circumstances of a 'genuine dispute or controversy' about whether medical treatment should be administered.[5]

(Royal Children's Hospital Melbourne) (Twitter, 30 November 2017, 2.38pm AEST) <https://mobile.twitter.com/rchmelbourne/status/936077045376753665>. In support of the view that the Full Court's decision in *Re Kelvin* was a victory for transgender children's rights, see also 'Commission Welcomes *Re Kelvin* Decision', *Australian Human Rights Commission* (Web Page, 30 November 2017) <https://humanrights.gov.au/about/news/commission-welcomes-re-kelvin-decision>; Kym Fraser and Matt Condello, 'Victory for Transgender Children in Recent Family Court Decision', *Clayton Utz* (Web Page, 7 December 2017) <https://www.claytonutz.com/knowledge/2017/december/victory-for-transgender-children-in-recent-family-court-decision>; Sharon Feldman and Tom Dreyfus, 'Whose Consent Is it Anyway? A Transgender Child's Right to Transition' (2017) 3 *Voices in Bioethics* <http://www.voicesinbioethics.net/voices-in-bioethics/2017/12/20/whose-consent-is-it-anyway-a-transgender-childs-right-to-transition>; Greg McAllister, 'Gender Dysphoria in Australia: The Judicial Response in *Re Kelvin*' (2018) 145 *Precedent* 40, 43; Michelle Telfer et al, 'Transgender Adolescents and Legal Reform: How Improved Access to Healthcare was Achieved through Medical, Legal and Community Collaboration' (2018) 54 *Journal of Paediatrics and Child Health* 1096. Cf Stuart Lindsay, 'The Family Court has Failed Gender-Dysphoric Children' (2018) 62(5) *Quadrant* 32.

[5] *Re Kelvin* (2017) 57 Fam LR 503, 529 [167].

The potential for conflict between children and their parents in respecting a child's decisional privacy rights, is the focus of the next, and final substantive, chapter of this thesis.

II GROWING DISSATISFACTION AND AN 'URGENT NEED … TO UNDO THE CONSEQUENCES'[6] OF *RE JAMIE*

Former Chief Justice of the Family Court, Diana Bryant, made the extra-curial observation, notably a few months after *Re Alex*[7] was decided in 2004, that:

> The courts exercising jurisdiction in family law are required to confront social change like it or not, and to make decisions which have far reaching effects on families. It is not surprising therefore that these decisions should be the subject of public debate and divergent views in the community.[8]

The Full Court's judgment in *Re Jamie*, of which Chief Justice Bryant was the lead author, was itself such a decision, subject to much public debate almost a decade after her Honour's remarks. *Re Jamie* continued the line of judicial authority in medical treatment cases that showed little ambivalence in the exercise of state power – through the Family Court's welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Cth) (Family Law Act) – to 'protect' children. These cases displayed 'a confident willingness to intervene in the private world of the family'.[9] The Full Court's decision in *Re Jamie* sustained the assumption of transgender children's vulnerability and incapacity for rational decision-making, as members of a 'class of children'[10] who required the Family Court's ongoing protection, even if only in the form of an assessment of *Gillick* competence. Justice Strickland, one of the judges who heard and decided both the *Re Jamie* appeal and the *Re Kelvin* appeal (and notably the only judge to do so), made the extra-curial prediction that *Re Jamie* was 'likely to act as a spur for

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[6] *Re Lucas* [2016] FamCA 1129 (22 December 2016) [71], [73].
[7] (2004) 31 Fam LR 503.
[8] Diana Bryant, 'Beyond the Horizon' (Opening address delivered at the Law Council of Australia, Family Law Section 11th National Family Law Conference, 27 September 2004) <http://www.austlii.edu.au/au/journals/FedJSchol/2004/25.html>.
[9] John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016) 138.
[10] Sarah Elliston, 'If You Know What's Good For You: Refusal of Consent to Medical Treatment by Children' in Sheila A M McLean (ed), *Contemporary Issues in Law, Medicine and Ethics* (Dartmouth Publishing, 1996) 29, 52.

further proceedings being initiated which challenge the boundaries of the current state of the law governing young people and medical treatment', such that there was 'every reason for confidence that the jurisprudence will develop further, and develop rapidly, following *Re Jamie*'.[11]

Justice Strickland's prediction of jurisprudential development manifested initially in the form of dissatisfaction with the Full Court's decision in *Re Jamie*, including amongst Family Court judges,[12] legal academics,[13] and the medical profession.[14] Criticism was directed to two features of the Full Court's reasoning that resulted in children diagnosed with gender dysphoria continuing to endure 'unnecessary judicial oversight' of their medical treatment.[15] The first, technical legal critique, was the correctness of the Full Court's analysis and application of the distinction made in *Secretary, Department of Health & Community Services v JWB & SMB* (*Marion's case*) between therapeutic and non-therapeutic treatment,[16] which I explained in chapter 4. The second challenge was to the justification of the Family Court's ongoing role in assessing a child's *Gillick* competence, and the attendant financial and psychological burden that the court process imposed on transgender children and their families.[17]

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[11] Steven Strickland, 'To Treat or Not to Treat: Legal Responses to Transgender Young People' (Paper presented at the Association of Family and Conciliation Courts 51st Annual Conference, Toronto, Canada, 28-31 May 2014) 73.

[12] See, e.g., *Re Martin* [2015] FamCA 1189 (23 December 2015) [27], [36], [38]; *Re Harley* [2016] FamCA 334 (22 April 2016) [42]; *Re Tahlia* [2017] FamCA 715 (8 September 2017) [4]; *Re Lucas* [2016] FamCA 1129 (22 December 2016) [10], [53], [71], [73].

[13] See, e.g., Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28 *Australian Journal of Family Law* 83, 83-84, 91; Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38 *University of New South Wales Law Journal* 426, 430; Lisa Young, 'Gender Identity Dysphoria Update and Developments in Property Settlement Law' (2014) *International Survey of Family Law* 1, 5-7; Fiona Kelly, 'Australian Children Living with Gender Dysphoria: Does the Family Court Have a Role to Play?' (2014) 22 *Journal of Law and Medicine* 105, 105-20; Katherine France, 'Let Me Be Me: Parental Responsibility, Gillick Competence, and Transgender Minors' Access to Hormone Treatments' (2014) 4 *Family Law Review* 227; Malcolm Smith, 'The Boundaries of Parental Decision-Making and the Requirement to Obtain Court Approval for "Special Medical Procedures": The Recent Decision of *Re Jamie* [2013] FAMCAFC 110' (2013) 33 *Queensland Lawyer* 182, 186.

[14] See, e.g., Jacqueline K Hewitt et al, 'Hormone Treatment of Gender Identity Dysphoria in a Cohort of Children and Adolescents' (2012) 196 *Medical Journal of Australia* 578, 580; Michelle Telfer, Michelle Tollit and Debi Feldman, 'Transformation of Health-care and Legal Systems for the Transgender Population: The Need for Change in Australia' (2015) 51 *Journal of Paediatrics and Child Health* 1051.

[15] Kelly, 'Treating the Transgendered Child' (n 13) 94.

[16] *Marion's case* (1992) 175 CLR 218, 250.

[17] See, e.g., Fiona Kelly, '"The Court Process is Slow but Biology is Fast": Assessing the Impact of the Family Court Approval Process on Transgender Children and their Families (2016) 30 *Australian Journal of Family Law* 112, 114; Bell (n 13) 451; France (n 13) 245-6; Hewitt et al (n 14) 580; Senthorun Raj, 'Alleviating Anxiety and Cultivating Care: Young Trans People in the Family Court of Australia' (2019) 45(1) *Australian Feminist Law Journal* 111.

The strong opposition to the Full Court's decision in *Re Jamie* suggests that the dominant '"rescue" ideology'[18] in discourses relating to medical treatment for children, which had since *Marion's case* justified the Family Court's incursion into what was previously a private, family decision, had fallen out of favour. Shortly before the Full Court handed down its decision in *Re Kelvin*, the UN Human Rights Committee (UNHRC) expressed concern about the requirement for Family Court authorisation for stage two treatment for gender dysphoria, particularly that 'the delays and costs associated with obtaining court authorisation may compromise the success of such hormonal treatment … and cause … psychological harm'.[19] The UNHRC recommended that Australia consider ways to expedite access to stage two treatment, including by 'removing the need for court authorisation in cases featuring uncontested agreement among parents or guardians, the child concerned and the medical team'.[20] In the absence of any legislative reform – despite calls by the Family Court for 'an urgent need for statutory intervention … to undo the consequences of *Re Jamie*',[21] as well as the ardent activism of Georgie Stone, the task befell the Full Court in the case of *Re Kelvin* to consider whether court authorisation was still an essential component of medical treatment for childhood gender dysphoria. The next Part of this chapter presents a brief history of the *Re Kelvin* proceedings.

III THE *RE KELVIN* PROCEEDINGS: A BRIEF HISTORY

A *The Initial Family Court Proceedings*

The *Re Kelvin* proceedings arose by way of an application to the Family Court by the father of a 16-year-old young person, anonymised in the judgments as 'Kelvin', who wanted to commence stage two treatment for gender dysphoria. Kelvin's father sought a declaration or order that Kelvin was *Gillick* competent to consent to the administration of that treatment; and in the alternative, that the court authorise the administration of stage two treatment under section 67ZC of the Family Law Act, on the basis that it was in Kelvin's best interests.[22] As explained in chapter 4, section 67ZC enables the Family Court to make orders relating to the

[18] Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 249.
[19] United Nations Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) [27].
[20] Ibid.
[21] *Re Lucas* [2016] FamCA 1129 (22 December 2016) [71], [73].
[22] *Re Kelvin* [2017] FamCA 78 (16 February 2017) [3].

welfare of children, having regard to the best interests of the child as the paramount consideration.

Kelvin's treating medical practitioners shared the view that Kelvin was *Gillick* competent: their evidence was that Kelvin felt that 'his decision-making [was] clear';[23] he was 'ostensibly free of any pressure, pain or other factors that might influence his decision-making capability';[24] and he was 'able to comprehend the nature of the treatment such that he is able to provide informed consent, according to the *Gillick* standard'.[25] On the basis of this expert medical evidence, the trial judge was satisfied of Kelvin's *Gillick* competence, and made a finding to that effect. This might have been the end of the matter; for the Family Court had found that Kelvin was *Gillick* competent to consent to stage two treatment, which enabled Kelvin to commence that treatment immediately. Yet Kelvin's father agreed for a special case to be stated for the Full Court's opinion. In light of the case stated, the trial judge adjourned the application for a declaration or order authorising Kelvin's treatment pending determination by the Full Court.[26]

B *The Case Stated before the Full Court*

Unlike *Re Jamie*, which came before the Full Court following an appeal by Georgie's parents against the decision at first instance, *Re Kelvin* came before the Full Court by way of a case stated by the trial judge, pursuant to section 94A(1) of the Family Law Act. That section enables the Full Court to hear and determine a question of law arising in proceedings before those proceedings are dealt with further. The six questions stated for the Full Court's opinion, in essence, concerned the effect of the Full Court's decision in *Re Jamie* and the role of the Family Court more generally in relation to stage two treatment for gender dysphoria and the determination of *Gillick* competence.[27] The fundamental issue for determination was whether gender dysphoria should continue to be treated differently from other medical conditions, such as to require the ongoing 'filter' of court authorisation for medical treatment to commence.[28]

[23] Ibid [41].
[24] Ibid [42].
[25] Ibid [43].
[26] Ibid [57].
[27] *Re Kelvin* (2017) 57 Fam LR 503, 504-5 [1], [3].
[28] Ibid 521 [119].

A special bench of the Full Court departed from its earlier decision in *Re Jamie*, to the effect that stage two treatment for gender dysphoria requires the Family Court's authorisation pursuant to its welfare jurisdiction under section 67ZC of the Family Law Act, unless the child is *Gillick* competent to give informed consent; and that the Family Court must determine the issue of the child's *Gillick* competence. While the majority and minority reached the same conclusion, they diverged on the issue of whether *Re Jamie* was 'plainly wrong' in its application of *Marion's case*. A majority of the Full Court (Justices Thackray, Strickland and Murphy) justified its departure from *Re Jamie* on the basis of the evolution of the state of medical knowledge and 'the development in the treatment of and the understanding of [g]ender [d]ysphoria'.[29] The minority (Justices Ainslie-Wallace and Ryan), by contrast, found the decision in *Re Jamie* to be 'plainly wrong' in its application of *Marion's case*.[30] The minority held that the statements of principle made in *Re Jamie* that were attributed to *Marion's case* were 'erroneous'.[31] The minority considered that the Full Court in *Re Jamie*, having determined that stage two treatment was 'therapeutic', should not have applied the principles in *Marion's* case regarding authorisation of a particularly grave 'non-therapeutic' procedure (sterilisation) for a child who was not, and would never become, *Gillick* competent.[32] The minority was therefore adamant to eliminate the risk that 'in the future *Re Jamie* might be interpreted as providing a basis for court involvement in therapeutic procedures which on a proper application of *Marion's case* come within the scope of parental authority or the capacity of a legally competent child'.[33]

The Full Court in *Re Kelvin* held that, in circumstances where the child consents to stage two treatment, the child's treating medical practitioners agree that the child is *Gillick* competent to give that consent, and the parents do not object to the treatment, it was no longer mandatory to apply to the Family Court for a determination of the child's *Gillick* competence.[34] The Full Court thus concluded that stage two treatment for gender dysphoria can no longer be considered a 'special medical procedure' for which consent lies outside the bounds of parental authority and requires the imprimatur of the Court.[35] In light of the Full Court's answers to the questions in the case stated, the trial judge dismissed the initiating application, and made orders giving

[29] Ibid 529 [162].
[30] Ibid 537 [208]-[209], 540 [225].
[31] Ibid 537 [209].
[32] Ibid 532 [188]-[189].
[33] Ibid 537 [209]. See also 532 [188]-[189].
[34] Ibid 531-2 [177]-[184], 540 [226].
[35] Ibid 529 [164].

Kelvin the liberty to identify himself as the subject of the proceedings both at first instance and before the Full Court.[36]

Having traced the history of the *Re Kelvin* proceedings, including the mounting discontent with the Full Court's decision in *Re Jamie*, and the departure from that decision, this chapter now turns to examine *how* the Full Court reached its conclusion in *Re Kelvin*. The ensuing children's rights analysis will serve to support my argument that, despite being heralded as championing the rights of transgender children and young people, the Full Court's approach to determining the questions put before it rendered children and their rights invisible. This was not, I argue, a judgment about children or their decisional privacy rights at all.

IV A CHILDREN'S RIGHTS ANALYSIS OF THE FULL COURT'S JUDGMENT IN *RE KELVIN*

On a superficial reading of the Full Court's decision in *Re Kelvin*, based on the procedural overview just provided, this case is a significant example of the judiciary's activist role in developing the law, and in doing so, advancing children's right to decisional privacy. The Full Court in *Re Kelvin* was critical of the legislature's inaction, remarking that it was 'disappointing that the call for legislative intervention following *Re Jamie* went unheeded'.[37] The absence of legislative reform was also surprising, given the extent of vocal opposition described above, and the 'widespread media attention' that gender dysphoria cases tend to attract – which the Full Court itself recognised in its contextual prelude to addressing the questions stated.[38] The effect of the Full Court's decision in *Re Kelvin* supports the view that the state's protective function, through the Family Court's exercise of its welfare jurisdiction under section 67ZC of the Family Law Act, can no longer justify restrictions on a child's bodily autonomy and identity, through a denial of the child's decisional privacy rights.

The ensuing children's rights analysis focuses on the decisional privacy dimension of the judgment, and argues that the Full Court in *Re Kelvin* did not embrace respect for transgender children's decisional privacy rights, either in its conclusion or its approach. Rather, I argue, the

[36] See *Re Kelvin (No 2)* [2017] FamCA 1000 (4 December 2017).
[37] *Re Kelvin* (2017) 57 Fam LR 503, 518 [104].
[38] Ibid 519 [115].

judgment was about the extent to which the Family Court should encroach on parents' ability (and responsibility) to make medical treatment decisions for and on behalf of their children. As I explain below, transgender children benefit only incidentally from the Full Court's decision: respect for their decisional privacy rights is contingent upon agreement between their parents and treating medical professionals to the proposed medical treatment.

A *The Full Court's 'Invisible Rights' Approach and a Judgment (Still) All about Parental Rights and Responsibilities*

The Full Court's judgment in *Re Kelvin* falls squarely within what Tobin has labelled an 'invisible' rights approach, the defining feature of which is 'the failure to identify that the rights of children are relevant to the dispute before the court'.[39] There is not a single reference to the rights of the child in the judgment, yet there are nine references to the rights of parents.[40] This cursory quantitative assessment is supported by a qualitative one. There is an underlying tension in all gender dysphoria proceedings between, on the one hand, protecting children, and on the other, affording children autonomy and independence in decision-making.[41] This distinction – between protecting children, and protecting children's rights – is, however, false or at least deceptive,[42] because the protectionist rationale for decision-making for and on behalf of children does not change children's status. Rather, it involves 'substituting one adult decision-maker for another, rather than giving children the choice of deciding whether they like the conditions in which they find themselves'.[43] This 'substitution' of adult decision-makers is illustrated by the emphasis that the Full Court in *Re Kelvin* placed upon the rights of parents to make decisions about their children's medical treatment.

[39] John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 594.
[40] Acknowledging the obvious differences in judgment length, issues to be determined by the court in each case, and the context in which the term 'right' or 'rights' is used, a very rudimentary comparison of references to the rights of the child and the rights of parents in the judgment of the Family Court in *Re Alex* (2004) 31 Fam LR 503 and in the judgment of the Full Court of the Family Court in *Re Jamie* (2013) 50 Fam LR 369 is also telling. In *Re Alex*, there are 16 references to children's rights (at [154], [155], [170], [171], [179], [217], [218], [220] and [222]) and no references to the rights of parents. In *Re Jamie*, there are 27 references to children's rights (at [48], [64], [65], [120], [121], [122], [129], [134], [135]) and four references to parents' rights (at [115], [121], [129]).
[41] Freeman, *The Rights and Wrongs of Children* (n 18) 44.
[42] Ibid 60.
[43] Michael Wald, 'Children's Rights: A Framework for Analysis' (1979) 12 *University College Dublin Law Review* 255, 263.

1 *The 'Right and Responsibility' of Parents to Determine Their Children's Medical Treatment*

A preliminary issue that warrants some discussion is whether it can be said that parents have 'rights', as opposed to duties or responsibilities, under the Family Law Act. The definition of 'parental responsibility' in section 61B of the Family Law Act, as I noted in chapter 2, refers to 'duties' and 'responsibilities', but also to 'authority' and 'powers'; yet the definition does not refer to 'rights'.[44] Whilst a deliberate and 'understandable' omission, the Full Court has noted that the practical effect of having no reference to parental 'rights' is negligible, 'other than to make it clear that there are no possessory rights to children'.[45] As I explained in chapter 1 in justifying privacy as a unique right or interest, parental rights are said to derive from parental duties and 'exist only so long as they are needed for the protection … of the child'.[46] The Full Court in *Re Kelvin* observed that:

> The *right* and responsibility of parents to decide upon medical treatment for their non-*Gillick* competent children, *reflected through the prism of the children's best interests*, is the default position, not the exception.[47]

The Full Court made repeated reference to the 'right and responsibility' of parents,[48] without acknowledging the differences between the two notions, particularly in terms of the dynamics of the parent-child relationship. In discussing the scope of the welfare jurisdiction under section 67ZC of the Family Law Act, the Full Court noted that '[i]n deciding to control or ignore the parental right the Court should do so only when judicially satisfied that the welfare of the child

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[44] See *Longford & Byrne* [2017] FCCA 762 (21 April 2017) [60] n 11 (there is 'no controversy' that the Family Law Act 'does not contain or provide for the rights of parents', and '[p]arents have duties and responsibilities rather than rights').

[45] *Re B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 729-30 [9.23]-[9.25]. See also Seymour (n 9) 102.

[46] *Gillick West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 183-84. Cf. *Dean & Deluca* [2008] FamCA 1193 (10 December 2008) [25] ('I have made it quite clear on many times in this Court over a period of some 33 years that parents have no rights, they only have duties insofar as the children are concerned'); and *Warwick & Warwick* [2008] FamCA 388 (22 May 2008) [27] ('I am directed by our political masters to ensure that it is the children's right that I have to emphasise. Parents do not have any rights, they only have duties. It always has been so in my Court, notwithstanding the view of the politicians which as expounded what, two or three years ago.' See also *Harrow & Eton* [2007] FamCA 812 (30 July 2007) [6]; *Lovine & Connor* [2011] FamCA 432 (10 June 2011) [35].

[47] *Re Kelvin* (2017) 57 Fam LR 503, 521 [123] (emphasis added). See also *Re Jamie* (2013) 50 Fam LR 369, 393-4 [115].

[48] *Re Kelvin* (2017) 57 Fam LR 503, 521-2 [123]-[125].

requires that the parental right should be suspended or superseded'.[49] The Full Court also quoted from the High Court's judgment in *Marion's case* regarding the 'parental power' to authorise medical treatment for a non-*Gillick* competent child. The Full Court's endorsement of this statement, which was said to involve the 'parent speaking for the child',[50] bears remnants of the historical *patria potestas* (parental possession) doctrine, referred to in chapter 1.[51] In making these observations, the Full Court conflated the child's rights and best interests with parental 'rights' and responsibilities, and conceptualised children as a mere extension of their parents.[52] And in so failing to identify that children have rights and interests that are discrete from those of their parents – the first salient feature of a children's rights approach to decisional privacy – the Full Court undermined both the promotion of children's best interests, and children's ability to realise their autonomy through the exercise of their decisional privacy rights.

Under a children's rights approach to decisional privacy, judicial deference to parental rights and responsibilities must be subject to the child's evolving capacities. The Full Court in *Re Kelvin* made no reference to article 5 of the *United Nations Convention on the Rights of the Child* (UNCRC),[53] which requires the child's parents to provide appropriate direction and guidance to their child, consistently with the child's evolving capacities, to enable the child to exercise his or her rights. That is, parental rights must be exercised 'so as to *guide and assist* children in the realisation of' their right to decisional privacy,[54] rather than to uphold or promote the hierarchical (liberal) conception of the family, in which parents exercise exclusive authority and control over that right.[55] The Full Court's use of 'rights talk' for parents in *Re*

[49] *Re Kelvin* (2017) 57 Fam LR 503, 533 [191].
[50] *Secretary, Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218, 239-40 (*Marion's case*), cited in *Re Kelvin* (2017) 57 Fam LR 503, 521-2 [123].
[51] Tobin, 'Judging the Judges' (n 39) 593.
[52] Ibid 594; David Archard and Colin Macleod, 'Introduction' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 1, 1.
[53] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).
[54] John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 53, 65 (emphasis in original). See also Jonathan Montgomery, 'Children as Property?' (1988) 51 *Modern Law Review* 323, 341; John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 554; John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 167.
[55] Tobin and Field (n 54) 554 (noting that the evolving capacities principle in article 5 of the UNCRC 'does not provide parents … with the right to exercise complete control over a child's right to privacy').

Kelvin, particularly in light of the omission of any such discourse in relation to children, exemplifies Fortin's observation that judges 'not uncommonly analyse the rights that *adults* have, but fail to articulate those of the children'.[56]

An aim of a children's rights perspective is to encourage adults to conceive of their role as 'facilitators and advocates rather than controllers' of children.[57] The emphasis must be on the *child's* right to demand appropriate guidance and assistance from his or parents in the enjoyment of his or her right to decisional privacy, not on *parents'* right to non-interference by the state in the exercise of their parental rights, responsibilities and duties to provide that direction and guidance.[58] As Baroness Hale of Richmond observed in the case of *Williamson*:[59]

> This is, and always has been, a case about children, their rights and the rights of their parents … . Yet there has been no one here … to speak on behalf of the children. … The battle has been fought on ground selected by the adults.

This observation applies equally, in my view, to the Full Court's judgment in *Re Kelvin*. To focus on the rights of parents to make decisions for and on behalf of their child sustains the conceptualisation of the passive, vulnerable, silent child: as occurred in *Re Kelvin* through the Full Court's failure to acknowledge the child's role in the decision-making process.

2 *A Judgment Telling in Its Omission: The Silent and Absent Child*

The Full Court's judgment in *Re Kelvin* is telling for what it does *not* say about children, arguably more than what it does. The Court's construction of the relationship between parents,

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[56] Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 96 (emphasis in original). See also Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review* 299, 302-3.

[57] Barry Percy-Smith and Nigel Thomas, 'Conclusion: Emerging Themes and New Directions' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives From Theory and Practice* (Routledge, 2009) 356, 365. See also Tobin and Varadan (n 54) 171.

[58] Tobin and Varadan (n 54) 160. Cf. Ann Quennerstedt, 'Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child' (2009) 8 *Journal of Human Rights* 162, 172.

[59] *R (on the Application of Williamson) v Secretary of State for Education and Employment* [2005] 2 FLR 374, 395 [71]. This was a case brought by Christian fundamentalist parents and teachers to challenge a ban on corporal punishment in schools, and was framed as a question of whether the state could legitimately violate the religious rights of parents. See also *Re E (A Child)* [2008] UKHL 66, [6] ('With the best will in the world, there is a tendency to see confrontations ... through adult eyes, and to forget these are not the eyes of children, who are simply the innocent victims of other people's quarrels'); *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [49] ('This is another case which has been presented to us largely as a case about adults' rights when in reality it is a case about children's rights').

children and the state in the context of medical treatment for childhood gender dysphoria rendered children all but invisible. This invisibility emerges from the Full Court's articulation of the stakeholders involved in the decision-making process. The Court emphasised that it was concerned to examine:

> whether there is any role for the Family Court in cases where there is no dispute between *parents* of a child who has been diagnosed with [g]ender [d]ysphoria, and where there is also no dispute between the *parents* and the *medical experts* who propose the child undertake treatment for that dysphoria.[60]

On the Full Court's formulation, the medical treatment decision-making process was one defined and regulated exclusively by adults, namely, the child's parents and treating medical practitioners, and Family Court judges. There was no appreciation of the *child's* role in the process, or conceptualisation of the child as having rights, interests and views that might conflict with those adults, and so trigger a dispute about the proposed medical treatment. I elaborate on this point below, in the context of critiquing the Full Court's statement about 'the need for court authorisation where there is a genuine dispute or controversy as to whether the treatment should be administered'.[61]

The Full Court also referred to special medical procedure cases as requiring court authorisation 'irrespective of unanimity on the part of parents and the medical experts' – notably no reference to the child's involvement in the decision-making process.[62] The Court said that in these '"special cases", the usual parental right and responsibility for deciding upon their child's care is abrogated in favour of court determination'[63] – the child again absent from the picture. The Full Court also noted that in 'each and every case' in which court authorisation had been sought for a child's treatment for gender dysphoria, the decision had been informed by 'comprehensive evidence from a miscellany of medical specialists from different disciplines (for example, psychiatry, psychology, paediatrics, and endocrinology) and by evidence from parents, or those otherwise charged directly with the care, welfare and development of the child concerned'.[64] Starkly absent from the Full Court's list of sources by which Family Court decisions in gender

[60] *Re Kelvin* (2017) 57 Fam LR 503, 520 [116] (emphasis added).
[61] Ibid 529 [167].
[62] Ibid 522 [125].
[63] Ibid.
[64] Ibid 520 [118].

dysphoria cases have been informed, is any reference to the child. This omission reinforces my argument that, in denying children diagnosed with gender dysphoria the opportunity to participate in decision-making about their own bodily autonomy and identity, the Family Court has simultaneously denied those children their decisional privacy rights: for without such procedural rights, any substantive right is rendered ineffective.

Had the Full Court adopted a children's rights perspective in *Re Kelvin*, then its attention would have been not on the 'attendant stress and expense' of court proceedings on parents (an argument advanced by some of the parties in *Re Kelvin*),[65] or even on the scope of parental rights in the medical treatment context (the predominant focus of the judgment). Rather, the Full Court's attention would have been on whether removing the requirement for court authorisation to enable a child diagnosed with gender dysphoria to commence stage two treatment, and/or removing the Family Court from the assessment of a child's *Gillick* competence, would be in the best interests of the child (Kelvin), or transgender children as a collective, taking into account the child's rights under the UNCRC. The interests of the child's parents would have been relevant, but the Full Court's attention would have been directed to parents' primary responsibility for the upbringing and development of their child, having their child's best interests as their basic concern.[66]

My children's rights analysis of the *Re Kelvin* judgment now shifts focus from the Full Court's framing of the issues, which rendered children invisible in the decision-making process, to the way in which the Full Court drafted its judgment. This analysis further supports my argument that *Re Kelvin* cannot be understood as 'the greatest advancement in transgender rights' for Australian children, either in substance or in form.

B *A Judgment by Adults, for Adults: Another Missed Opportunity to Advance Children's Decisional Privacy Rights*

While the Full Court's decision was exalted as championing the rights of transgender children,[67] those very children were, as I have just argued, largely invisible in the *Re Kelvin* judgment. This is, at least in part, because the matter came before the Full Court in the form of

[65] Ibid 521 [119].
[66] UNCRC, art 18(1).
[67] See above n 4.

a special case stated (rather than an appeal), such that the Court's focus was on questions of law for its opinion. Kelvin thus served an instrumental purpose in reforming the law in relation to medical treatment for childhood gender dysphoria, in that his case was a vehicle for the Full Court to reconsider its decision in *Re Jamie*. By virtue of how the case came before the Full Court, Kelvin himself was not the focus of the Court's judgment – nor, however, were transgender children and young people as a collective. As I discussed in chapter 3, the use of language to humanise the child is a key feature of a children's rights judgment. Even a pseudonym – rather than a mere reference to 'the child' or 'the subject child' – provides validation of a child's lived experiences. This is especially important in proceedings that are effectively 'test cases' exploring general legal principles, as *Re Kelvin* was. In such cases, the court, and the readers of the court's judgment, are liable to overlook the tangible, real impact that the decision will have on the child the subject of the proceedings, and on other children whose rights will be impacted.[68]

How a judgment is written, in addition to what the court decided and how it reached its decision, shapes the extent to which transgender children and young people are recognised as active legal subjects with rights. As I explained in Part II above, the 'political potential'[69] of judgments in gender dysphoria proceedings to raise awareness of the perceived unjust incursion into transgender children's decisional privacy reached a pinnacle following the Full Court's decision in *Re Jamie*. Activism, academic critique and evident judicial discontent with the Full Court's decision and reasoning in *Re Jamie*, prompted the Full Court in *Re Kelvin* to 're-shape … the official "story"'.[70]

However, the Full Court omitted any reference to the rights of children, instead displaying a predictable preference for the language of children's 'welfare'[71] and parental rights and responsibilities. What is most telling about the Full Court's judgment, in my view, is the central narrative that it conveyed: this was not a judgment *about* children or their rights, but about the extent of state incursion into 'private' family (parental) decision-making, and ensuring that the

[68] Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 81.
[69] Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgment Project' in Rosemary Hunter, Clare McGlynn and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 44, 45.
[70] Ibid 46.
[71] See Fortin, 'Accommodating Children's Rights' (n 56) 303-4, 306.

law kept pace with medical science. According to the majority, the Family Court had 'always recognised … an appropriate concern about intruding into the lives of parents' in gender dysphoria cases,[72] and it was 'readily apparent that the judicial understanding of gender dysphoria and its treatment have fallen behind the advances in medical science'.[73] This led to the majority's observation that '[i]t would not be heresy to suggest that, in relation to stage 2 treatment, *Re Jamie* would be decided differently today', that case having been decided 'at a particular point in time, and at a particular stage in the development of legal principle, and even more importantly of medical science'.[74] The minority judgment perhaps showed implicit respect for children's decision-making autonomy, through a clearly stated concern to ensure that *Re Jamie* was not in future interpreted as justifying court involvement in therapeutic procedures that fell within the bounds of parental responsibility or a *Gillick* competent child's decision-making capacity.[75] Yet the narrative through which the minority conveyed this sentiment was still one of correct application of legal principle, rather than one of children's rights. The Full Court's judgment in *Re Kelvin* was thus about the development of the law and legal principle in line with medical science, rather than about the decisional privacy rights of children and young people diagnosed with gender dysphoria.

However, it might be argued that the UNCRC generally, and the decisional privacy rights of transgender children and young people in particular, were not within the Full Court's mandate. As such, their absence from the Full Court's judgment is understandable, because the Full Court was not obliged to take those rights or the Convention into consideration in its decision-making. I articulated in chapter 2 the relevance and importance of children's right to decisional privacy in proceedings under Part VII of the Family Law Act, which includes the welfare jurisdiction under section 67ZC. Furthermore, had the moral reasoning of the judges in *Re Kelvin* been informed by the values underpinning the UNCRC, then there would have been scope for the Full Court to frame the issues in the case as being about transgender children and

[72] *Re Kelvin* (2017) 57 Fam LR 503, 520 [117].
[73] Ibid 527 [152].
[74] Ibid 529 [165]. This observation is phrased in almost identical terms to the observation made by Justice Strickland in a paper presented at a 2014 oration: '*Re Jamie* is … a decision that was made at a particular point in time and at a particular stage in the development of legal principle and medical science': Steven Strickland, 'To Treat or Not to Treat: Legal Responses to Transgender Young People' (Paper presented at the Association of Family and Conciliation Courts 51st Annual Conference, Toronto, Canada, 28-31 May 2014) 73.
[75] *Re Kelvin* (2017) 57 Fam LR 503, 537 [209].

their rights, and to determine the questions for its opinion in a manner consistent with a children's rights approach.[76]

The Full Court in *Re Kelvin* also missed the opportunity to advance the rights of transgender children by writing a judgment that was *for* them, to explain the significance of the decision. Given that the Full Court's judgment determined legal questions that directly implicated the rights of transgender children, a children's rights approach to decisional privacy would require that the judgment and reasons be available, and more importantly, accessible, to those children. In light of the Full Court's 'invisible rights' approach, discussed above, it is unsurprising that children were not contemplated as an audience of the judgment. The Full Court's inability to conceptualise the issues in the case stated in terms of children's rights meant, as a logical extension, that children's rights would not have been at the fore of the minds of the judges when drafting their judgments in *Re Kelvin*. As such, the Full Court did not strive to accommodate and embrace children's rights through a 'child-friendly' version of its judgment. The opportunity nonetheless existed, I argue, for the Full Court to do so: such as by adding a few paragraphs to its judgment, articulating in clear, age-appropriate[77] language, what the Court decided and why. Alternatively, the Court could have written a letter to Kelvin, or to young people diagnosed with gender dysphoria more broadly, explaining the decision. In the next section, I produce a child-friendly summary of the *Re Kelvin* judgment. In doing so, I 'rewrite' the judgment in a way that situates it within the decision-making framework of the Family Law Act, but is consistent with a children's rights approach to decisional privacy.

1 *A Child-Friendly Version of the* Re Kelvin *Judgment*

A vital element of communicating a children's rights judgment, as I explained in chapter 3, is ensuring that children, during their childhood,[78] are able to access and understand the court's reasoning and decision. This is a 'child-friendly' judgment: one that is 'concise, clear, interesting and accessible';[79] and which has tailored its language, narrative and structure to cater for children as one of its key audiences. Communication of a decision about a child's best

[76] See Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2, 12; Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 238-58.
[77] See Nigel Thomas, *Children, Family and the State: Decision Making and Child Participation* (MacMillan, 2000) 69.
[78] Hollingsworth and Stalford (n 68) 82.
[79] Rackley (n 69) 48.

interests in this manner is a process integral to children's ability to enjoy and exercise their substantive right to decisional privacy.[80] A child-friendly judgment also centralises and humanises the child who is the subject of proceedings. It uses narrative to tell the child's story, and to highlight the impacts of the decision on the child.[81]

An important point to consider in producing a child-friendly version of the Full Court's judgment in *Re Kelvin* is its legal status. As Hollingsworth and Stalford have explained, a child-friendly judgment is not akin to a language translation, so it would not be an exact replica of the original decision. Indeed, its purpose is to use age-appropriate language to communicate the decision to children, which will necessitate the use of different words in the same language.[82] In the event of a contradiction between the child-friendly version and the main version of the judgment, I agree with Hollingsworth and Stalford that it is 'highly unlikely' that a child-friendly judgment produced in addition to the original judgment would be binding in law.[83] Rather, the child-friendly version would sit above the Court's main reasons for judgment.

Below is my attempt to write a child-friendly version of the Full Court's judgment in *Re Kelvin*. I have chosen to write the judgment in the form of a short summary. While Kelvin was 17 years old when the Full Court published its reasons for judgment, my child-friendly version is pitched to young people around 12 years of age, to make it accessible to a broader range of children and young people diagnosed with gender dysphoria, who may be contemplating stage two treatment or may have begun that treatment.[84] A practical challenge for Family Court judges in producing a child-friendly version of their judgments is the diversity that exists within the concept of 'children', not only in terms of their age, but also their various capacities (emotional, cognitive, social). Writing a judgment for a five-year-old is not the same as writing a judgment for a 15-year-old (or both, in proceedings involving or affecting children of various ages). In some cases, particularly post-separation parenting proceedings, judges will also need to be attune to the 'ethical considerations' of 'what to tell the child and when'.[85]

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[80] John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 97.
[81] Hollingsworth and Stalford (n 68) 80.
[82] Ibid 83.
[83] Ibid.
[84] See Royal Children's Hospital, 'Gender Dysphoria' (Fact sheet, September 2018) <https://www.rch.org.au/kidsinfo/fact_sheets/Gender_dysphoria/>.
[85] Ibid 84. This dilemma arose in *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012) [86]-[99].

In re-writing the Full Court's judgment, I have focused on the impact of the decision on the decisional privacy rights of Kelvin and other children and young people diagnosed with gender dysphoria. Unlike the Full Court in *Re Kelvin*, I have not justified the decision on the basis of advances in medical science, or (in)correct application of legal principle. Nor have I focused on the recalibration of parental responsibilities and state duties in relation to transgender children's medical treatment. I have endeavoured to make it clear that this is a case about *children* and their *rights*: the ability of children and young people diagnosed with gender dysphoria to make decisions and choices about their own bodies and identities.

Child-friendly summary of the judgment of the Full Court of the Family Court of Australia in *Re Kelvin*

This case is about a young person's right to decide who he is and who he wants to be. That young person's name is Kelvin.

Kelvin was born a girl, but he felt like a boy and wanted to be a boy. He felt like he was trapped in the wrong body. Doctors call this 'gender dysphoria'.

When Kelvin was 16 years old, his father asked the Family Court to allow Kelvin to start medical treatment. This treatment would help Kelvin's body match up with who he was: a boy.

The Family Court asked us to answer an important question:

Who should decide whether Kelvin can start medical treatment? Should it be the Family Court? Or should Kelvin be able to make the decision, together with his parents and doctors?

Usually, parents can make decisions about their child's medical treatment.

But for the medical treatment that Kelvin wants, the Family Court for a long time has had to make the decision. This is because of the type of treatment, what might happen if a wrong decision is made, and the chance that Kelvin and his parents might not agree.

We have decided that Kelvin, and other young people like him, should be able to make the decision to start medical treatment themselves, with help from their parents and advice from their doctors. They should not have to go to the Family Court to be who they are.

But if a young person, their parents, or their doctors, do not agree, then we think that the Family Court should still make the decision.

The child-friendly version of the Full Court's judgment that I have produced above would be 'an innovation in judicial writing'.[86] However, from a practical perspective, the production of a child-friendly version of a judgment – perhaps in the form of a letter to the child(ren),[87] or a short summary of the court's decision[88] – would not be an onerous or resource-intensive task for Family Court judges. The issue would be largely one of conceptualisation: of judges turning their minds to *children* as a primary audience of their judgments, such that those judgments 'speak to' children.[89] As Hollingsworth and Stalford have observed, child-friendly judgments are not merely a way to communicate more effectively to children affected by a judicial decision. Such judgments have 'a broader communicative value': they show and tell children and adults alike that 'the law recognises and treats [children] as rights-holders who are worthy of respect'.[90]

This is particularly important in cases where the court's substantive determination as to the child's best interests is at odds with the child's views of his or her own best interests.[91] From a decisional privacy perspective, in these circumstances the court 'curtails the child's autonomy' and conveys 'a message that [the child's] version of the "good life" is not one to be respected'.[92] However, a child-friendly version of the judgment develops – or at least does not impair – the child's capacity for autonomy. It does so by explaining the decision to the child, in a way that he or she can understand: including why the court made a decision contrary to the child's views. The child-friendly version helps to develop or preserve the child's 'self-authorisation'[93] or 'self-esteem'[94] – the child's ability to see his or her life, choices and values as 'meaningful, worthwhile and valuable'.[95] This is even where the court's decision might have limited the

[86] Hollingsworth and Stalford (n 68) 83.
[87] See, e.g. *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012); *A (Letter to a Young Person)* [2017] EWFC 48 (26 July 2017).
[88] See, e.g., the abridged, child-friendly versions of some of the rewritten judgments in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017): Michael Freeman, '*Re T (A Minor) (Wardship: Medical Treatment*): Judgment' at 256; Jo Bridgeman, '*Re X and Y (Foreign Surrogacy)*: Judgment' at 104; Anashri Pillay, '*The Government of the Republic of South Africa & Rs v Grootboom & Ors*: Judgment' at 327-8; Laura Lundy, '*Valsamis v Greece*: Judgment' at 344.
[89] Hollingsworth and Stalford (n 68) 83.
[90] Ibid.
[91] A pertinent example being *A (Letter to a Young Person)* [2017] EWFC 48 (26 July 2017).
[92] Hollingsworth and Stalford (n 68) 83.
[93] Ibid 84.
[94] Joel Anderson and Axel Honneth, 'Autonomy, Vulnerability, Recognition, and Justice' in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism* (Cambridge University Press, 2005) 127, 135.
[95] Catriona MacKenzie, 'Three Dimensions of Autonomy: A Relational Analysis' in Andrea Veltman and Mark Piper (eds), *Autonomy, Oppression and Gender* (Oxford University Press, 2014) 15, 37.

child's decisional privacy, in the sense of impairing the child's ability to pursue his or her own life plan.

In the only case in the Australian family law jurisdiction, to my knowledge, to have produced a child-friendly version of a judgment, in the form of a letter to the children, the judge observed that 'the letter is a means of facilitating the children's participation in this case in the sense that its outcome is explained to them'.[96] Indeed, as Eekelaar and Tobin have argued, conceptualising the best interests principle under Part VII of the Family Law Act from a children's rights perspective demands 'a *process* by which … decisions [about a child's best interests] may be justified and effectively communicated to children'.[97] A child-friendly version of judgments in proceedings under Part VII of the Family Law Act, then, would serve as a significant means of empowering children, and demonstrating respect for their right to express their views and be heard in legal proceedings affecting them (article 12 UNCRC); and their right to freedom of expression, which includes the 'freedom to seek, *receive* and impart information and ideas of all kinds' (article 13(1) UNCRC).

2 *Why Does the Full Court's Approach Matter?*

From the above analysis of the Full Court's judgment in *Re Kelvin*, and the re-written, child-friendly version of that judgment, germinates a perfectly valid question: given that the Full Court's decision removed the Family Court from the decision-making process for gender dysphoria treatment, does it even matter that the Full Court adopted an invisible rights approach and did not engage at all with children's rights? It could reasonably be argued that the outcome would have been the same, even if the Full Court had taken a substantive children's rights approach. But it does matter: not for the outcome in *Re Kelvin* (which might have been identical, irrespective of the approach), but for what the Full Court's approach says about 'the status and vision of children within society'.[98] The fact that the Full Court's judgment in *Re Kelvin* arose from a special case stated by the trial judge, rather than from an appeal, I say cannot justify the Full Court's invisible rights approach. The failure to recognise the relevance and significance of children's rights rendered transgender children unseen in the Full Court's judgment.

[96] *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012) [98].
[97] Eekelaar and Tobin (n 80) 97.
[98] Tobin, 'Judging the Judges' (n 39) 595.

As I explained in chapter 1, children's marginal participation in, or even exclusion from, family law proceedings about matters affecting their lives has been driven by the emphasis on children's status as the binary opposite to adults. Children's perceived vulnerability, incapacity and irrationality have overshadowed conceptualisations of children as 'present beings capable of agency and choice'.[99] Yet children and young people themselves have emphasised the importance of 'having "someone" listen to their views and then communicate those views so that they could inform the decision making in their case'.[100] The Full Court in *Re Kelvin* was presented with a prime opportunity to unsettle the status quo, not only by deciding that childhood gender dysphoria was no longer a 'special medical procedure' that justified the exercise of the Family Court's welfare jurisdiction under section 67ZC of the Family Law Act, but more importantly, by transforming the status of transgender children and young people in society. My analysis has served to show that the Full Court, through its judgment in *Re Kelvin*, did not embrace this opportunity. Rather, the Full Court's judgment kept children at the periphery of law and society: absent, silent, invisible.

C *The Need for Family Court Authorisation in Circumstances of 'Genuine Dispute or Controversy' about a Child's Medical Treatment*

In concluding that the Full Court did not confirm its decision in *Re Jamie*, the majority in *Re Kelvin* inserted an important caveat:

> we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a *genuine dispute or controversy as to whether the treatment should be administered; e.g., if the parents, or the medical professionals are unable to agree*. There is no doubt that the Court has the jurisdiction and the power to address issues such as those.[101]

[99] John M Davis and Malcolm Hill, 'Introduction' in E Kay M Tisdall, John M Davis, Alan Prout and Malcolm Hill (eds), *Children, Young People and Social Inclusion: Participation for What?* (The Policy Press, 2006) 1, 5.
[100] Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018) 44.
[101] *Re Kelvin* (2017) 57 Fam LR 503, 529 [167] (emphasis added).

This paragraph of the Full Court's judgment is noteworthy from the perspective of children's decisional privacy rights, in terms of how it overlooks the role of the child in circumstances of potential conflict; how the genuineness of a dispute or controversy that would justify Family Court intervention is to be assessed; and the qualifications that it has imposed upon transgender children's decisional privacy rights. I discuss each of these issues in turn below.

1 *Overlooking the Child's Role in the Decision-Making Process*

First, in canvassing the possibility of a 'genuine dispute or controversy', the Full Court was silent on the relevance of the child's views and wishes. This judicial silence downplays the impact and importance of children's participation in family law decision-making. It also reflects resistance to the notion that children can and should influence decisions that affect their lives.[102] The Full Court gave no credence to the *child's* role in the decision-making process in relation to his or her own medical treatment, as I explained above. Rather, it offered the example of disagreement between the child's parents, or the child's treating medical professionals. The practical effect of the Full Court's statement, in my view, is that children diagnosed with gender dysphoria benefit only incidentally from the decision in *Re Kelvin*. Their ability to access stage two treatment without the Family Court's involvement is contingent upon alignment between the views of their parents and their treating medical practitioners. Indeed, assuming that children's views and interests align with those of their parents is contrary to the first salient feature of a children's rights approach to decisional privacy: that children are subjects with distinct rights and interests, or in the words of Baroness Hale of Richmond, that they 'have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right'.[103]

Rewriting the Full Court's statement from a children's rights perspective, I suggest that it would read as follows:

> … Nor, are we saying anything about the need for court authorisation where there is a *genuine dispute or controversy as to whether the treatment should be administered,*

[102] Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 398.
[103] *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, 641 [57]. See also Berry Mayall, *Towards A Sociology of Childhood* (Maidenhead, 2000) 21.

> *such as if* ***the child****, the child's parents, and the child's treating medical professionals, or any of them, are unable to agree*. There is no doubt that the Court has the jurisdiction and the power to address issues such as those.

This re-written statement explicitly identifies *the child* as having distinct rights and interests in the decision-making process, which may very well conflict with those of the child's parents and/or treating medical professionals. It serves to highlight that the process is about more than simply adult control over, and regulation of, children's bodies and identities.

The approach of the Full Court in *Re Jamie* to parties with potentially conflicting interests in gender dysphoria proceedings provides a neat point of comparison with the Full Court's statement in *Re Kelvin*. Chief Justice Bryant, in summarising the Full Court's decision, stated:

> If there is a dispute between the parents, child and treating medical practitioners, or any of them, regarding the treatment and/or whether or not the child is *Gillick* competent, the court should make an assessment about whether to authorise stage two having regard to the best interests of the child as the paramount consideration. In making this assessment, the court should give significant weight to the views of the child in accordance with his or her age or maturity.[104]

The Full Court in *Re Jamie* expressly identified the *child* as having distinct and potentially conflicting interests to those of his or her parents and treating doctors in the decision-making process. That the Full Court in *Re Kelvin* omitted the child from its example of circumstances of 'genuine dispute or controversy' might at first blush appear a minor semantic lapse. Yet its implications – both conceptual and practical – for children's decisional privacy rights are more significant. The Court's formulation of circumstances of potential conflict suggests that the Full Court in *Re Kelvin* had not conceptualised the transgender child as an active participant in the determination of his or her best interests. The Court overlooked the child's right to express his or her views on the proposed medical treatment, and indeed, overlooked the child as a subject with distinct rights and interests. A more redeeming interpretation is that the Full Court was simply acknowledging that conflicts may more commonly arise between parents and the

[104] *Re Jamie* (2013) 50 Fam LR 369, 398-9 [140(f)]. See also 405 [179] and 407 [194], and the submissions of the Australian Human Rights Commission (AHRC) on this point at 380 [46] and 382 [56].

child's treating medical professionals in relation to whether a proposed course of action is in the child's best interests.[105]

2 *Determining the 'Genuineness' of a Dispute or Controversy that would Justify Family Court Intervention*

The Full Court's statement in *Re Kelvin* regarding the Family Court's ongoing role in the medical treatment process for gender dysphoria in circumstances of 'genuine dispute or controversy' also generates unease, from the perspective of children's decisional privacy, for the opacity with which it articulates the scope for Family Court intervention. The Full Court considered *who* might generate the dispute or controversy (parents, medical professionals), but was silent on what would make such a dispute or controversy a 'genuine' one that would necessitate the Family Court's involvement.

A 'grey zone' for assessing the genuineness of a dispute or controversy in this context might arise where a child clearly expresses a view that conflicts with the wishes of his or her parents, yet the child does not have sufficient maturity and understanding to enable his or her views to be conclusive on the issue.[106] A children's rights approach to decisional privacy would require the Family Court to articulate, consider and balance the (seemingly) competing rights and interests of various parties, including those of the child, the child's parents and the child's treating medical practitioners. The primary interest of the child's treating doctors is not always obvious from the judgments in gender dysphoria proceedings: that interest is to be protected against the possibility of future litigation, through a declaration by the Family Court that the child is *Gillick* competent to consent to the proposed medical treatment. As Chief Justice Nicholson in *Re Alex* explained: '[t]here is a significant onus upon the treating professional's

[105] See Robert Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests' (2012) 20 *Medical Law Review* 29. This notion of conflicting interests, articulated as a 'genuine dispute or controversy' in *Re Kelvin*, was considered by the Family Court in *Re Matthew* [2018] FamCA 161 (16 March 2018). The issue was whether it was necessary for the Family Court to make a finding that a child is *Gillick* competent before stage three treatment (surgical intervention) for gender dysphoria can proceed. The judge in *Re Matthew* reinstated in this formulation of the controversy or disagreement, the role of the child as an active participant in the decision-making process, holding that: 'It is clear that, where there is controversy about the proposed treatment, or where there is disagreement about the manner in which treatment should proceed, either between the parents, between the medical professionals or *between the parents, child and medical professionals*, it is the role of the Family Court to hear and determine that controversy: at [40] (emphasis added). The judge held that the Family Court does not need to determine the child's *Gillick* competence before stage three treatment can proceed, provided that the child's medical professionals are satisfied that the child is *Gillick* competent, and the treatment is therapeutic, and there is no controversy: at [46].

[106] Tobin, 'Judging the Judges' (n 39) 614.

assessment of the child or young person. Unless legislation provides otherwise, … the professional risks liability unless satisfied that the child or young person has "a sufficient understanding and intelligence to enable him or her to understand fully what is imposed"'.[107] The Court's finding of *Gillick* competence transfers the responsibility for risk from the doctors to the patient, and so refutes any challenge to the doctors who administer medical treatment that they had not obtained the child's effective consent.[108] The Family Court has noted that it would be 'sad' and potentially an abuse of court process, if a third party sought a decision from the court regarding proposed medical treatment that was clearly within the bounds of parental responsibility. The Court offered as an example of such a case, 'where the sole purpose of such an application was as a protection against the prospect of future litigation'.[109]

Issues of potential conflict and controversy in gender dysphoria proceedings, however, should not be overstated or inflated. Applications to the Family Court seeking authorisation of medical treatment for gender dysphoria prior to *Re Kelvin* rarely involved a dispute. In one case, the child's treating doctors disagreed on the issue of whether the child was *Gillick* competent.[110] In another, the child's own evidence made clear to the Family Court that the child's parents were opposed to the course of action that the child sought to follow in seeking treatment for gender dysphoria.[111] A different conflictual dynamic involved intra-parental conflict: the child's mother brought proceedings for the authorisation of stage one treatment for the child's gender dysphoria, while the father opposed the application.[112] As the Full Court in *Re Kelvin* noted, in no stage two gender dysphoria case had contradictory evidence been forthcoming, including from the independent children's lawyer, to challenge the desirability of the relevant medical treatment.[113] Although the Full Court also acknowledged that the requirement for court

[107] *Re Alex* (2004) 31 Fam LR 503, 529 [155], quoting from the High Court in *Marion's case* (1992) 175 CLR 218, 237-38.
[108] Seymour (n 9) 160; Priscilla Alderson, 'Younger Children's Individual Participation in "All Matters Affecting the Child"' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 88, 94. See also *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210, 225 [93].
[109] *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210, 225 [93].
[110] See, e.g. *Re Darryl* [2016] FamCA 720 (26 August 2016) [11]-[20].
[111] See *Re Isaac* [2014] FamCA 1134 (17 December 2014). In the US state of Minnesota, a mother sued her transgender child, as well as health boards, a school district and local health care non-profit organisations, when gender dysphoria treatment was offered to her child without notifying her. See Mary Emily O'Hara, 'Minnesota Mom Sues Her Trans Child Over Gender Reassignment', *NBC News* (online), 18 November 2016 <https://www.nbcnews.com/feature/nbc-out/minnesota-mom-sues-her-trans-childover-gender-reassignment-n685266>.
[112] See *Re Brodie (Special Medical Procedure: Jurisdiction)* [2007] FamCA 776 (24 July 2007) and *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 (15 May 2008).
[113] *Re Kelvin* (2017) 57 Fam LR 503, 521 [119]. See also *Re Lucas* [2016] FamCA 1129 (22 December 2016) [68].

involvement might have itself served as a 'filter' for the cases in which stage two treatment was recommended and undertaken.[114]

At the time of writing, there have been two judgments published, to my knowledge, following *Re Kelvin* that have involved the Family Court's jurisdiction to authorise medical treatment for a child because of a 'genuine dispute or controversy' between the child's parents.[115] One of these cases concerned stage three treatment, involving surgical intervention, for a child diagnosed with gender dysphoria. The Family Court in this case noted that there was a controversy between the parents 'over letting Ryan make his own decision'.[116] Ryan's father opposed the mother's application, effectively because Ryan – who was almost 17 at the time – 'in 12 months … will be an adult free to make his own decisions'.[117] Ryan had been previously declared by the Family Court (before the Full Court's decision in *Re Kelvin* was handed down) to be *Gillick* competent to consent to stage one and stage two treatment. The Court in this case had before it a statement from Ryan himself which satisfied the judge of Ryan's *Gillick* competence.[118] Further, the judge implicitly acknowledged Ryan's evolving capacities and his parents' need to cede their decision-making authority, noting that '[i]n this, Ryan, is like many young people, separating himself from both of his parents in anticipation of an independent life'.[119] Whether more such cases come before the Family Court, and if so, the nature of the disputes or controversies that arise, should be followed with interest.

3 *Qualifying Transgender Children's Decisional Privacy Rights – or Protecting Them from the Perils of Family Privacy?*

In requiring the Family Court to retain its grasp through the 'genuine dispute or controversy' caveat, the Full Court in *Re Kelvin* recognised – as a necessary corrective to the perils of family privacy – the real potential for opposing interests, views and wishes within families. However, as I explained above, the Full Court failed to identify children as having distinct views, rights and interests that might trigger such a dispute or controversy. The power disparities between and amongst family members add layers of complexity to the analysis of whether proposed

[114] *Re Kelvin* (2017) 57 Fam LR 503, 521 [119].
[115] See *Re Ryan* [2019] FamCA 112 (16 January 2019) and *Boreham & Dawkins* [2019] FamCA 229 (12 March 2019).
[116] *Re Ryan* [2019] FamCA 112 (16 January 2019) [26], [31].
[117] Ibid [6].
[118] This statement was annexed to the mother's written submissions. See ibid [7(i)], [40].
[119] Ibid [37].

medical treatment for a child diagnosed with gender dysphoria is in that child's best interests in any particular case. The potential conflicts are not confined to the dynamics of the parent-child relationship, but as my analysis of *Re Jamie* and *Re Kelvin* has sought to show, they extend to the scope of institutional encroachment into the lives of transgender children and their families. The Full Court's statement suggests that the Court was unable to 'let go' completely of its role in the process for transgender children's medical treatment.[120] The issue is how to protect and promote children's decisional privacy rights within what Nedelsky has called 'the (many) spheres of state power'.[121] These questions of conflict and power dynamics are the focus of the final substantive chapter of this thesis.

V CONCLUSION

Until the decision of the Full Court of the Family Court in *Re Kelvin*, Australia was the only country in the world in which court authorisation was required for the medical treatment of children and young people diagnosed with gender dysphoria.[122] The Full Court itself noted that its decision in *Re Kelvin* was 'not unexpected'.[123] It is also not surprising that the practical effect of the Full Court's decision reverberated with positivity throughout the Australian transgender community. However, this chapter has argued that various features of the Full Court's judgment are problematic when examined from the perspective of children's decisional privacy rights. That the Full Court adopted an 'invisible' rights approach is evident from the absence of any reference to, or acknowledgement of, transgender children's rights. The Full Court conceded the intrusion on family decision-making that the court authorisation requirement for stage two treatment imposed; yet it focused exclusively on parental rights and responsibilities. In doing so, the Full Court conflated children's and parents' interests, and failed to recognise children as active rights-bearing subjects who can, and indeed must, participate in decision-making processes concerning their own medical treatment. The judgment itself – its structure, style and narrative – also reflects a missed opportunity to embrace and advance transgender children's decisional privacy rights, by enabling those

[120] See Barry Percy-Smith and Nigel Thomas, 'Conclusion: Emerging Themes and New Directions' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 356, 361.
[121] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, 2011) 118.
[122] Hewitt et al (n 14) 578.
[123] *Re Kelvin* (2017) 57 Fam LR 503, 529 [165].

children to read, comprehend and appreciate the decision through a child-friendly version. This chapter has argued that, ultimately, *Re Kelvin* was a judgment about the extent to which the Family Court should intervene in 'private' family (parental) decision-making about children's medical treatment, consistently with the latest developments in medical science. *Re Kelvin* was not a judgment *about* children or their decisional privacy rights; nor was it written *for* them.

In the final part of this chapter, I critiqued the Full Court's statement in *Re Kelvin* about the need for court authorisation in circumstances of 'genuine dispute or controversy' about whether medical treatment should be administered. I highlighted that the Full Court omitted children from its formulation of the circumstances of potential conflict. I also rewrote that statement to identify *the child* as having potentially conflicting, yet distinct, rights and interests in the decision-making process. The concluding chapter takes the analysis of potential conflicts further, by responding to concerns about the perceived conflictual consequences of recognising and respecting children's decisional privacy rights. It also suggests three interrelated processes by which my model of children's right to decisional privacy might be translated from theory into practice.

7

RECOGNISING AND RESPECTING CHILDREN'S RIGHT TO DECISIONAL PRIVACY: POTENTIAL CONFLICTS AND COMPLEXITIES

I INTRODUCTION

In the previous chapter, I analysed the judgment of the Full Court of the Family Court in *Re Kelvin*[1] using a children's rights approach to decisional privacy. In the final part of that chapter, I critiqued, and rewrote from a children's rights perspective, the Full Court's statement that there is 'no doubt' that the Family Court has jurisdiction and power to address questions about the need for court authorisation where there is a 'genuine dispute or controversy' between the child's parents and treating medical practitioners about whether medical treatment for gender dysphoria should be administered.[2] The aim of this chapter is to take the Full Court's statement further, and to address the potential for intra-familial conflicts when children's decisional privacy rights are recognised and respected. A children's rights approach to decisional privacy anticipates the potential for such conflicts, given that it acknowledges children as subjects with rights and interests that are distinct from those of their parents. The Full Court in *Re Kelvin*, as I explained in the previous chapter, did not, given its focus on parental rights and responsibilities.

In Part II, I respond to concerns expressed by those uneasy with the notion of children as rights-bearers that recognising children's right to decisional privacy will incite conflict between children and their parents, fracture family relationships, and undermine parental authority, thereby justifying violations of family privacy by the state. The first aspect of my response conceptualises the notion of 'conflict' in the family context using a relational approach to

[1] (2017) 57 Fam LR 503.
[2] Ibid 529 [167].

autonomy. It emphasises the influence of children's relationships with their parents and family members in children's ability to exercise and enjoy their decisional privacy rights. In practice, this means that acknowledging children's right to decisional privacy does not necessarily construct an adversarial relationship between children and their parents. However, a rights-based approach does anticipate and accommodate for conflict between children and their parents, through the principle of evolving capacities in article 5 of the *United Nations Convention on the Rights of the Child* (UNCRC).[3] The second aspect of my response concerns the scope of children's decisional privacy rights. It addresses the myth that respecting children's decisional privacy will grant children a licence to do whatever they choose, in relation to any and all matters concerning them.

In Part III, I shift the focus from defending my theory of children's decisional privacy, to propose three interrelated processes for translating that theory into Australian family law policy and practice. The first process is conceptual: to challenge and deconstruct how children have been conceptualised by and under the *Family Law Act 1975* (Cth) (Family Law Act). The second process is educational: to promote greater awareness of the impacts on the rights of children – as distinct from their parents and the family as an entity – of family law and policy. The third is institutional: processes and procedures to enable children's more meaningful, active participation in family law decision-making. In Part IV, I articulate the social value of children having, and exercising, their decisional privacy rights.

II A RESPONSE TO CONCERNS ABOUT ACKNOWLEDGING AND RESPECTING CHILDREN'S DECISIONAL PRIVACY RIGHTS

A primary concern of detractors of the notion of children as rights-bearers is that giving rights to children will diminish parental authority, incite conflict between children and their parents, and ultimately, justify violations of family privacy by the state.[4] Macleod has referred to this

[3] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (UNCRC).

[4] Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14 *Cardozo Law Review* 1747, 1839. See also Michael Freeman, 'Review Essay: What's Right with Rights for Children' (2006) 2 *International Journal of Law in Context* 89, 89-90; John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 53, 53; Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 50; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge

as the 'discourse anxiety' of 'corrosion', which 'focuses on the threat to family values posed by rights talk'.[5] On this view, rights are 'divisive', as they 'reflect an egoistic, atomistic situation' and 'teach[] us to think of "I" and "I versus you" instead of "we"'.[6]

In this Part, I respond to these anxieties about the perceived conflictual consequences of recognising and respecting children's decisional privacy rights. The first aspect of my response emphasises the relationality of rights, and the influence of children's relationships with their parents, in children's ability to exercise and enjoy their decisional privacy rights. It focuses on the concept of children's evolving capacities and the unique role of parents in their children's lives. The second aspect considers the 'snowball' argument, that bestowing children with decisional privacy rights will automatically give children complete decision-making autonomy in relation to all matters affecting them. This concern enables me to address the boundaries or scope of my theory of children's decisional privacy.

A *Child Versus Parents? Constructing a False Dichotomy of Interests*

In chapter 1, I explained that my theory of children's decisional privacy is premised upon an interest theory of rights, which enables children to have rights irrespective of their capacity to exercise those rights. Under this theory, the child's right to decisional privacy involves the protection of a sufficiently important interest – which I have posited as being the child's evolving autonomy – and the imposition of duties on others – usually parents – the performance of which ensures that the child, as rights-holder, can enjoy that interest.[7] The competing theory

University Press, 3rd ed, 2009) 5, 8-9; Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the child' (2009) 16 *Childhood* 518, 524-5; Clare Huntington, 'Rights Myopia in Child Welfare' (2005-06) 53 *UCLA Law. Review* 637, 639-40. For alarmist examples of such a perspective, see Patrick Fagan, William Saunders and Michael Fragoso, 'How UN Conventions on Women's and Children's Rights Undermine Family, Religion and Sovereignty', *Insight* (Family Research Council, 2009) 13 (arguing that, through the UNCRC, the United Nations 'is attempting to put in place, in policy and law, structures that foster … rebellion' of children against their parents, and 'undermine the authority of parents'); John Rosemond, *A Family of Value* (Andrews McMeel Publishing, 1995) 116 (the UNCRC is 'the most dangerous attack on parents' rights in the history of the United States'); Ingrid J Guzman, *Parent Police: The UN Wants Your Children* (Huntington House, 1995) 3 (the UNCRC is a 'blank cheque for government intervention in the home').

[5] Colin Macleod, 'Are Children's Rights Important?' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 191, 204. See, in particular, Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005) (expressing deep anxiety about the impact of children's rights on the family structure).

[6] John Hardwig, 'Should Women Think in Terms of Rights?' (1984) 94 *Ethics* 441, 448. See also Ferdinand Schoeman, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family' (1980) 91 *Ethics* 6, 9; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1991) 173.

[7] See the discussion in chapter 1.

of rights is the will or choice theory, which denies children the status of rights-bearers, owing to their perceived inability to exercise rational choice. Understanding this distinction between theories of rights is important to my rebuttal of the 'conflict of rights' argument. This is the argument, noted earlier, that giving children decisional privacy rights will provoke conflict between children and their parents in relation to matters that parents conventionally may have decided on their children's behalf.

If one ascribes to the will or choice theory of rights, recognising a child's right to decisional privacy would only enliven the conflict of rights argument if the child were able to overcome the hurdle of capacity or competence. The initial focus would be on whether the child had the capacity to presently assert his or her right of decisional privacy. Alternatively, under the interest theory of rights, granting a child decisional privacy rights *does* spark the potential for conflict between child and parents, because both are understood as distinct rights-holders. The child's evolving autonomy, as the interest protected by the child's right to decisional privacy, and the performance of parental duties to ensure that the child can enjoy his or her autonomy, therefore demand scrutiny.

1 *Embracing a Relational Approach to Autonomy*

I have advanced the view in this thesis that the value of privacy inheres in securing the liberal ideal of autonomy. However, as I explained in chapter 1, this does not presuppose *fully* autonomous individuals. As members of a family unit, children do not, and cannot, enjoy complete autonomy over their lives. Adults and children alike exercise autonomy 'within the shadow of the possibility of conflict' of individual interests.[8] Former Family Court Chief Justice, Diana Bryant, identified a 'tension of rights' inherent in the *Family Law Act 1975* (Cth) (Family Law Act), and said that 'clashes' between parental rights and children's rights 'should be resolved with principle and transparency'.[9] However, it would be 'obviously awkward', as Nedelsky has noted, to conceptualise the parent-child relationship in circumstances of conflict or controversy as '*essentially* one of competing interests to be mediated by rights'.[10] The rights

[8] Jo Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (Cambridge University Press, 2007) 11. See also Samuel M Davis, *Children's Rights under the Law* (Oxford University Press, 2011) 88.
[9] Diana Bryant, 'It's my Body, Isn't it? Children, Medical Treatment and Human Rights' (2009) 35 *Monash University Law Review* 193, 207.
[10] Jennifer Nedelsky, 'Reconceiving Rights and Constitutionalism' (2008) 7 *Journal of Human Rights* 139, 145 (emphasis in original). See also Mary Ann Glendon, *The Transformation of Family Law* (Chicago University

and interests of the child and the rights and interests of his or her parents will invariably be intermingled, as a child's autonomy and identity are forged and developed through his or her family relationships.

The theory of children's right to decisional privacy developed in this thesis seeks to overcome the objection that rights-based approaches have tended 'to see familial rights as protections for individual freedom, rather than as rights that create, foster, and protect valued relationships'.[11] It does so through a relational approach to autonomy, which I explained in chapter 1.[12] That is, children learn to become, and to be, autonomous in and through their relationships with their parents and other family members. Child is not to be pitted against parents. Such a focus on interconnectedness, rather than individualism, enables children to be recognised as having the evolving capacity for autonomy, and in some circumstances, actual autonomy. It also reflects a view that '[p]eople do not understand their personal lives as involving clashes of individual rights or interests, but rather as a working through of relationships'.[13] As Herring has described:

> The muddled give and take of everyday family life where sacrifices are made and benefits gained, without them being totted up on some giant familial star chart, chimes more with everyday family life than the image of independent interests and rights.[14]

On a relational approach to autonomy, the rights and interests of children, and the rights and interests of their parents, are inextricably interlinked.[15] The onus is on a child's parents to

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Press, 1989) 308; Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4, 6.

[11] Martha Minow and Mary Lyndon Shanley, 'Revisioning the Family: Relational Rights and Responsibilities' in Mary Lyndon Shanley and Uma Narayan (eds), *Reconstructing Political Theory: Feminist Perspectives* (Polity Press, 1997) 84, 85.

[12] On relational approaches, see Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford University Press, 2011); Minow and Shanley, 'Relational Rights and Responsibilities' (n 10). See also John Eekelaar, 'Family Law and Legal Theory' in in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 41, 52.

[13] Jonathan Herring, 'Forging a Relational Approach: Best Interests or Human Rights?' (2013) 13 *Medical Law International* 32, 35. See also Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 69; Virginia Morrow, 'Dilemmas in Children's Participation in England' in Antonella Invernizzi and Jane Williams (eds), *Children and Citizenship* (Sage, 2008) 120, 128.

[14] Jonathan Herring, *Relational Autonomy and Family Law* (Springer, 2014) 20.

[15] Jonathan Herring, 'The Welfare Principle and the Rights of Parents' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a Parent: A Socio-Legal Analysis (*Hart Publishing, 1999) 89; cf. Maxine Eichner, 'Principles of the Law of Relationships Among Adults' (2007) 41 *Family Law Quarterly* 433.

provide, consistently with article 5 of the UNCRC, appropriate direction and guidance to their child to enable the child to exercise his or her rights. According to Tobin and Varadan, article 5 'clearly anticipates that parents must play an intimate and ongoing role in enabling children to enjoy their rights'.[16] As I explained in chapter 2, the focus must remain on the *child's* right to receive parental direction and guidance, rather than on parents' right to state non-interference with their parenting.[17] The corollary is that children's decision-making capacities are heavily shaped by what Parkinson and Cashmore have called the 'scaffolding' – the structure and support – given to them by parents and other caregivers.[18]

Given that article 5 of the UNCRC is chiefly a 'scaffolding' provision that aims to protect children's (not parents') rights,[19] it requires parents to provide direction and guidance to their children 'in a child-centred way, through dialogue and example'.[20] The model envisaged is a 'participatory and inclusive' one, premised upon mutual respect between child and parents.[21] Significantly, the child's right under article 12 to express his or her views freely and to be heard in all matters affecting the child requires new understandings of participation: understandings that are more inclusive, presenting as they do 'a radical re-conceptualization of the adult-child decision-making relationship'.[22]

Children's right to decisional privacy, then, is buttressed by an expectation that children's attainment and enjoyment of this right will be interconnected and interdependent with the exercise of parental rights and responsibilities.[23] A children's rights approach to decisional privacy undermines the traditional family unit, insofar as it demands that children are not only seen, but also heard and listened to.[24] It does not allow for parenting models that fail to respect children's evolving capacities, and which endorse the outdated mantra that 'children should be

[16] John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 175.
[17] Ibid 160. Cf. Ann Quennerstedt, 'Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child' (2009) 8 *Journal of Human Rights* 162, 172.
[18] Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 8.
[19] Tobin and Varadan (n 16) 175.
[20] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 7: Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) [17].
[21] Tobin and Varadan (n 16) 175, 183. See also Nigel Thomas, 'Towards a Theory of Children's Participation' (2007) 15 *International Journal of Children's Rights* 199, 206-7.
[22] Gerison Lansdown, *Promoting Children's Participation in Democratic Decision Making* (UNICEF, 2001) 1.
[23] John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 424.
[24] Ibid 429.

seen and not heard' within the family.[25] In this way, as Tobin and Varadan have observed, a rights-based approach 'is a remarkable and radical departure from historical models of parenting'.[26] A children's rights approach to decisional privacy imposes an obligation on parents to guide and enable children to gradually exercise and enjoy their rights independently, and it also requires that parental rights and responsibilities, where exercised appropriately, be respected.[27] As a conceptual model, it thus reconfigures the relationships between children and their parents, children and the state, and parents and the state.

2 *Relationality under the UNCRC and the Family Law Act*

This relational approach to children's decisional privacy is indeed supported by the text of the UNCRC, as well as the principles to be applied by courts in their exercise of jurisdiction under the Family Law Act. The preamble to the UNCRC provides that 'children should grow up in a family environment' and that 'the family is the fundamental group of society and the natural environment for the growth and well-being of all its members'.[28] To this end, the family is to be 'afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. Furthermore, children 'should grow up in a family environment'. These preambular statements in the UNCRC refute the suggestion that granting children decisional privacy rights will necessarily invite conflict between children and their parents and, taken to its extreme, will undermine the family unit. Rather, these provisions demonstrate a 'normative commitment to the family and parents'.[29]

The significance of a child's family is reinforced by a number of substantive provisions of the UNCRC, including the obligation on states to respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to their children (article 5); deference to parents as having primary responsibility for their children's upbringing and development, and the requirement that states assist parents in performing this responsibility (articles 18 and 27); a child's right to preserve his or her family relations (article 8); protection against unlawful or arbitrary interference with a child's privacy, family or home (article 16); and the child's right to not be separated from his or her parents unless separation is necessary for the child's best

[25] Tobin and Varadan (n 16) 183.
[26] Ibid.
[27] Ibid.
[28] UNCRC, Preamble [5]-[6].
[29] Tobin, 'Justifying Children's Rights' (n 23) 423, 425.

interests (article 9(1)). Therefore, the conception of rights under the UNCRC is relational, rather than individualistic.[30] Tobin has observed that:

> far from seeking to drive a wedge between children and their parents, the CRC makes it clear that children's interests are best served when they enjoy a strong and supportive relationship with their parents.[31]

Similarly, the objects and underlying principles of Part VII of the Family Law Act emphasise children benefitting from the 'meaningful involvement' of both parents in their lives and the importance of children receiving 'adequate and proper parenting to help them achieve their full potential'.[32] The Family Law Act requires courts exercising family law jurisdiction to have regard to 'the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children'.[33] Both the UNCRC and the Family Law Act thus provide a 'collaborative or cooperative' understanding of the relationship between the state and the family in relation to children's upbringing.[34] On this approach, parents bear the primary responsibility for their children's welfare and development, but the state has an important role to play in helping parents to fulfil their duties and responsibilities.[35] Children's right to decisional privacy – entailing children's meaningful participation in decision-making about matters that affect them, consistently with their evolving capacities and appropriately guided and assisted by their parents – must be understood within the context of these provisions of the Family Law Act and the UNCRC.

The relational approach to autonomy, which is reinforced by provisions of the UNCRC and the Family Law Act, explains why a perceived 'conflict' between a child and his or her parents in relation to a decision to be made may not, on a children's rights approach to decisional privacy, amount to a 'genuine' conflict that would justify state intervention. When the concept of 'conflict' in the family is understood through the perspective of relational autonomy,

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[30] Katherine Hunt Federle, 'Rights Flow Downhill' in Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Koninklijke Brill, 2011) 447, 460-62; John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 105-06.
[31] Tobin, 'Fixed Concepts' (n 4) 58.
[32] *Family Law Act 1975* (Cth) s 60B(1)(a), (c).
[33] *Family Law Act 1975* (Cth) s 43(1)(b).
[34] Tobin, 'Fixed Concepts' (n 4) 59.
[35] Tobin and Varadan (n 16) 163-65.

constructing parents and children as being in 'conflict' when children's decisional privacy rights are recognised and respected is exaggerated and misunderstood.

B *Beware a Child Mutiny! Delimiting the Boundaries of Children's Decisional Privacy Rights*

The other concern that I set out earlier in this chapter is that bestowing children with decisional privacy rights requires that children be granted *complete* decision-making autonomy in relation to *all* matters affecting them. This is a concern that children will be 'abandoned' to their autonomy.[36] The fear is that recognising and respecting children's decisional privacy rights will grant children a licence to do whatever they choose, in relation to any and all matters concerning them. The result, so the argument goes, is disrupted family dynamics and a chaotic inversion of the parent-child relationship. In the context of judicial decision-making, as Fortin has noted, the conclusion that 'sympathy' with the notion of children as rights-bearers 'dictates an inability to override children's wishes, because doing so thereby undermines their rights', might translate to an implication that 'the judiciary cannot respect children's rights and ignore their choices at one and the same time'.[37] This implication triggers debate about the scope or boundaries of children's decisional privacy rights.

A children's rights approach to decisional privacy seeks to foster a child's current and future potential as a rights-bearing subject. To do so, it recognises that a child's decision-making autonomy might need to be limited if the child's exercise of that autonomy would irreparably impair his or her 'right to an open future'[38] or ability to live an autonomous life. Yet in focusing on the child's future potential, this approach does not overlook the child's current needs, attitudes, feelings and preferences.[39] Indeed, under a children's rights approach to decisional

[36] Bruce C Hafen and Jonathan O Hafen, 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 *Harvard International Law Journal* 449.
[37] Fortin (n 4) 24.
[38] Joel Feinberg, 'The Child's Right to an Open Future' in William Aitken and Hugh La Follette (eds), *Whose Child? Children's Rights, Parental Authority, and State Power* (Rowman and Littlefield, 1980) 124. See also Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Kluwer Law International, 1997) 39, 98; Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 25; Lucinda Ferguson, 'An Argument for Treating Children as a "Special Case"' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 227, 240; Alicia Ouellette, 'Shaping Parental Authority over Children's Bodies' (2010) 85 *Indiana Law Journal* 955. Cf Claudia Mills, 'The Child's Right to an Open Future' (2003) 34 *Journal of Social Philosophy* 499.
[39] Fortin (n 4) 22.

privacy, children are simultaneously recognised as beings *and* becomings.[40] Children's present status as human beings under international law, as I have explained, entitles children to rights irrespective of their capacity and their vulnerability.[41] To recognise and respect a child's right to decisional privacy is to simultaneously distinguish the child's rights, interests, views and wishes from those of his or her parents and other family members. This manifests through the child who is capable of forming a view, having the opportunity to express his or her views, with those views being given due weight in accordance with the child's age and maturity (article 12 UNCRC). The tension, as I outlined in chapter 4, lies in listening to the child's current views and wishes, and balancing those views and wishes with protecting the child's future decision-making autonomy.

Children's right to decisional privacy is evolving in nature – it recognises and respects children's evolving capacities for autonomy. This evolving nature, as Macloed has observed, 'can make practical interpretation … very complex'.[42] I consider that no boundary should be drawn on when children should possess and be able to exercise their decisional privacy rights. However, this does not mean, in a practical sense, that children can and must make all decisions in all matters affecting them.[43] The theory that I have developed in this thesis contains two important qualifications. The first relates to the practicality of enabling children to meaningfully and actively participate in the making of any decision about or affecting their interests. The second concerns what it means for the child's views to be determinative of the child's best interests.

1 *Consultation with the Child on All Matters Affecting Him or Her*

I have argued that children's substantive right to decisional privacy requires procedural rights to enable children's meaningful participation in decision-making about their best interests. Children's right to so participate manifests in article 12(1) of the UNCRC, which gives children who are capable of forming a view the right to express their views freely in all matters affecting

[40] Freeman, 'The Human Rights of Children' (n 38) 13, 15, 19-20.
[41] John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 160.
[42] Macleod (n 5) 199.
[43] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law & the Family* 42, 53 (arguing that the concept of 'dynamic self-determinism' is 'far from a recommendation that decision-making concerning children should simply be delegated to children themselves').

them. According to Lundy, Tobin and Parkes, the only boundary that the text of article 12 imposes is that the matter 'affect' a child.[44] The CRC Committee has said that the phrase 'in all matters affecting the child' in article 12(1) should be construed 'broadly'.[45] This means, in practical terms, that the child's right to participate meaningfully in decision-making processes is not limited to matters that affect an individual child (such as medical treatment for gender dysphoria) or children as a collective. Rather, it captures *all* matters that 'do or will have a real impact on children's lives' – regardless of whether that impact is 'direct, indirect, specific, or incidental'.[46] Importantly, there must be some nexus or connection between the matter and the child;[47] and children must play an active role in discussions and debates about what these matters 'affecting' them are.[48]

However, children's meaningful and active participation in the making of *any* decision about or affecting their interests would, as Eekelaar and Tobin have suggested, be 'impractical'.[49] While a welfare approach would have adult preferences and assumptions take the place of the child's own views, a children's rights approach to decisional privacy requires that the decision be deferred, if possible, until the child is competent to decide what is in his or her best interests.[50] Obviously, this will not be possible where a decision is urgent, such as one affecting the child's health, life or well-being. Medical treatment for gender dysphoria is a pertinent example, with potential problems arising for the child's physical and psychological health and well-being where a treatment decision is delayed due to the child's lack of competence to give informed consent to the treatment.[51] In such cases, where a determination of the child's best interests is urgent, or where consultation with the child is unfeasible due to time constraints, lack of resources or logistical obstacles, Eekelaar and Tobin have proposed that the decision-makers 'take all reasonable measures, in light of available resources, to ascertain a child's

[44] Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 401, 406-08.
[45] CRC Committee, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [26].
[46] Lundy, Tobin and Parkes (n 44) 400-401.
[47] Ibid 406-08.
[48] Ibid 401.
[49] Eekelaar and Tobin (n 30) 85 (offering as an example young children, who will often not have the capacity to express their views about their interests, 'irrespective of the measures taken to enable them to do so').
[50] Eekelaar, 'Role of Dynamic Self-Determinism' (n 43) 47-8; Eekelaar and Tobin (n 30) 85-6.
[51] See, e.g., *Re Alex (No 2)* (2009) 42 Fam LR 645*;Re Sean and Russell (Special medical procedures)* (2010) 44 Fam LR 210, 224 [86]-[87] *Re A* (1993) 16 FLR 715, 721; *Re Jamie* [2011] FamCA 248 (6 April 2011) [53], [5], [112]; Fiona Kelly, '"The Court Process is Slow but Biology is Fast": Assessing the Impact of the Family Court Approval Process on Transgender Children and their Families (2016) 30 *Australian Journal of Family Law* 112, 123-25.

views' when assessing the child's best interests.[52] Related to children's ability to exercise their right under article 12 of the UNCRC to express their views and be heard, is whether those views can have determinative force.

2 *Scope for the Child's Views to be Determinative of the Child's Best Interests*

A question that remains the subject of debate, and impacts on concerns about children having and exercising decisional privacy rights, is whether a child's views can ever be determinative of the child's best interests in relation to an issue affecting him or her.[53] Article 12(1) of the UNCRC gives a child who is capable of forming his or her own views the right to express those views, and those views are to be given 'due weight' in accordance with the child's age and maturity. Fortin has argued that the child's right under article 12 'is about consultation and participation, not about self-determination'.[54] The High Court of Australia in *Bondelmonte v Bondelmonte*[55] stated that the views of children and young people 'are but one consideration of a number to be taken into account in the overall assessment of a child's best interests', such that they are not determinative or decisive in and of themselves.[56] The High Court added that '[i]n some cases, it may be right, in the exercise of a primary judge's discretion, to accord the views expressed by a child such weight'.[57]

Indeed, article 12(1) does not *necessarily* require that children's views be given 'determinative force'.[58] Children's right to decisional privacy is not the same as giving children the ultimate authority to decide, in relation to each and every matter affecting them, what is in their best interests. As Baroness Hale of Richmond has observed: 'As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he [sic] wants'.[59] The child's right under article 5 of the UNCRC

[52] Eekelaar and Tobin (n 30) 86.
[53] See Lundy, Tobin and Parkes (n 44) 410-22 and references cited therein; Eekelaar and Tobin (n 30) 85-7; Parkinson and Cashmore (n 18) 116-17; David Archard, *Children: Rights and Childhood* (Routledge, 3rd ed, 2015) 58; Tobin, 'Justifying Children's Rights' (n 23) 428-9, 431-2; Harry Brighouse, 'How Should Children Be Heard?' (2003) *Arizona Law Review* 691; John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 567.
[54] Fortin (n 4) 236.
[55] (2017) 259 CLR 662.
[56] Ibid 673 [34].
[57] Ibid.
[58] Eekelaar and Tobin (n 30) 86. See also Parkinson and Cashmore (n 18) 199.
[59] *Re D (A Child) (Abduction: Rights of Custody)* (2007) 1 AC 619, [57].

to receive appropriate parental direction and guidance, consistent with the child's evolving capacities, anticipates that in practice, given children's lack of capacity to determine their best interests in relation to various matters, parents will regularly make decisions on behalf of their children.

However, to say that 'children have a voice, not a choice'[60] is, in my view, to misconstrue children's right to decisional privacy. This statement reflects an important distinction between participation and determination: between children having a right to *participate* in decision-making processes, and having a right to *make* decisions. My view, supported by the text of the UNCRC, as well as scholars including Tobin,[61] Eekelaar,[62] and Lundy,[63] is that a child's views will, in circumstances where the child is of sufficient understanding and maturity in relation to the matter affecting him or her, be determinative of the child's best interests.[64] That is, once children have developed the capacity to effectively claim and enjoy their right to decisional privacy independently of their parents, then they no longer require their article 5 right to parental direction and guidance.

The principle of evolving capacities in article 5 of the UNCRC anticipates that, where a child demonstrates competency in relation to a particular issue, the assessment of the child's best interests will be determined by, and will accord with, the child's own views.[65] The Full Court in *Re Jamie*[66] accepted this view, holding that 'it would be contrary to the Convention on the Rights of the Child, and to the autonomous decision-making to which a *Gillick* competent child is entitled', to hold that stage two treatment for gender dysphoria 'disentitles autonomous decision-making by the child, whereas no other medical procedure does'.[67] Article 5 of the UNCRC demands 'a transfer of responsibility for decision-making from responsible adults to

[60] *Duffy & Gomes (No 2)* [2015] FCCA 1757 (21 May 2015) [71]. See also Parkinson and Cashmore (n 18) 20, 89-90, 198-99; Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy & the Family* 225, 226.
[61] Tobin, 'Understanding Children's Rights' (n 41) 180; Tobin, 'Justifying Children's Rights' (n 23) 428, 432.
[62] Eekelaar, 'Role of Dynamic Self-Determinism' (n 43) 55.
[63] Laura Lundy, '"Voice" is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927; Lundy, Tobin and Parkes (n 44) 403.
[64] Cf. the alternative argument that a child's capacity cannot be determinative in relation to matters that are within the scope of parental direction and guidance, because article 5 of the UNCRC, when read together with article 3 (best interests principle), bestows ultimate responsibility for the determination of a child's best interests upon the child's parent as adult decision-maker: see Archard (n 53) 58.
[65] Tobin, 'Justifying Children's Rights' (n 23) 428. See also Tobin and Varadan (n 16) 174.
[66] (2013) 50 Fam LR 369.
[67] Ibid 397-98 [134]. See also *C v Finland*, App No 18249/02 (9 May 2006) [57] (the European Court of Human Rights observing that there comes 'a stage where it becomes pointless, if not counter-productive and harmful to attempt to force a child to conform to a situation, which for whatever reasons, he or she resists').

children, as the child acquires the competence and … willingness to do so'.[68] The principle of evolving capacities, as the CRC Committee has explained, 'should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression'.[69] Indeed, it would be neither legally nor morally justifiable for adults to engage in 'best interest-based intervention' and effectively override the child's views of his or her best interests, where it had been found that the child had reached a degree of maturity or competency on a matter equivalent to that expected of an adult.[70]

Accepting children's views as determinative, of course, means that conflict is liable to arise between a child and his or her parents. This is indeed the difference between the Full Court's approach in *Re Kelvin*, in how it conceptualised circumstances of 'genuine dispute and controversy' (that is, between the child's parents and treating medical professionals, with no role for the child), and a children's rights approach to decisional privacy (children have rights and interests that can, and sometimes do, conflict with those of their parents and other caregivers). However, accepting a child's views as determinative of the child's best interests does not automatically make the child's views determinative in relation to what *measures* will be taken to address the matter.[71] In other words, *making* the decision and *implementing* the decision made are two discrete processes. The latter involves a balancing exercise, whereby the impact of the matter on the child must be weighed against the impact on other children and adults involved, and against any other legitimate considerations.[72]

In this Part, I have articulated the nexus between a child's substantive right to decisional privacy, and procedural rights to participate in the decision-making process, within an understanding of children's evolving capacities and the parental role to guide and assist children to exercise their rights. I have considered how potential conflicts in the parent-child relationship might be mediated when children's decisional privacy rights are recognised and respected. The resolution of such conflict, I have argued, is that the child's views should be determinative of the child's best interests if the child has reached a sufficient level of maturity

[68] Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Studies, 2005) 4; CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 20) [17].
[69] CRC Committee, *General Comment No 7*, UN Doc CRC/C/GC/7/Rev.1 (n 20) [17]. CRC Committee, *General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [18].
[70] Lundy, Tobin and Parkes (n 44) 411; Tobin, Justifying Children's Rights' (n 23) 429.
[71] Lundy, Tobin and Parkes (n 44) 411.
[72] Ibid.

and understanding in relation to the matter affecting him or her.[73] Put differently, where a child is competent and capable of making an informed decision about his or her own best interests, then there is no longer a role for parents to play in offering appropriate direction and guidance to the child in the exercise of his or her rights. This approach might not sit comfortably with parents' perceptions of their 'proper' role in relation to matters where they feel that they know what is 'best' for (and know better than) their child. But this approach 'ultimately … demands that parents concede that they are not always the sole arbiters of a child's best interests'.[74]

The case study used in this thesis to illuminate the operation of a theory of children's right to decisional privacy is the Family Court of Australia's exercise of its welfare jurisdiction in gender dysphoria proceedings.[75] However, it is important to reiterate that very few disputes reach the Family Court for a final determination – whether in relation to post-separation parenting arrangements or conflicts about medical treatment for childhood gender dysphoria. What I have offered in this Part is a principled approach, guided by articles 5 and 12 of the UNCRC, to offer suggestions to parents as to how *families* might accommodate a child's right to decisional privacy in intra-familial relationships. The model of children's decisional privacy appreciates that, in light of children's evolving capacities, there is no 'one-size-fits-all' approach. In some circumstances, parents will be solely responsible for making decisions about their children's best interests; in others, parents and children will collaborate to make such decisions; and perhaps most unnervingly, there will be circumstances where parents must cede decision-making authority to their children.[76] And all of these actions and interactions between children and their parents will be bounded and regulated by the diversity of social norms that operate within families, or what Eekelaar has called the 'internal morality' of family life.[77]

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[73] See nn 61-63 above.
[74] Tobin, 'Fixed Concepts' (n 4) 64. See also Tobin and Varadan (n 16) 184; Tobin, 'Justifying Children's Rights' (n 23) 425-6. Cf. Matias Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights' (2012) 20 *International Journal of Children's Rights* 365 (querying the extent to which article 12 of the UNCRC recognises children's evolving autonomy).
[75] See chapters 4 to 6 of this thesis.
[76] Lundy, Tobin and Parkes (n 44) 431-2. See also Parkinson and Cashmore (n 18) 19-20; Harry Shier, 'Pathways to Participation: Opening, Opportunities and Obligations' (2001) 15 *Children and Society* 107; Phil Treseder, *Empowering Children and Young People: Training Manual: Promoting Involvement in Decision-Making* (Save the Children, 1997).
[77] John Eekelaar, 'Self-Restraint: Social Norms, Individualism and the Family' (2012) 13 *Theoretical Inquiries in Law* 75, 94.

In circumstances of actual conflict that cannot be resolved within the family (or without state intervention),[78] the 'smorgasbord of ways' that children can participate in decision-making, by expressing their views and having those views heard, listened to and taken seriously by decision-makers, will be influenced heavily by the resources available for this purpose, as well as the amenability of governments and professionals to facilitating the various means of children's effective participation.[79] Children's participation in decision-making is bound up in a web of power dynamics, discourses and relations between family members, and between parents, children and the state. Children's expression of their views and preferences, whether those views are determinative of children's best interests, and how those best interests are to be implemented, must be understood within this web.

III TRANSLATING THEORY INTO PRACTICE: RECONCEPTUALISING CHILDREN, RECONFIGURING INSTITUTIONAL STRUCTURES

In this Part, I move beyond the family unit, to canvass the implications of recognising and respecting children's decisional privacy rights for Australian family law policy and practice. I do so by proposing three interrelated processes for translating my new conceptual model for enabling and listening to children's voices in Australian family law from theory into practice.

A *Reconceptualising Children and Childhood: The 'Democratisation' of Decision-Making and Debate*

The first process, which this thesis has endeavoured to do, is conceptual: it is to challenge and deconstruct how children have been conceptualised by and under the Family Law Act. In reconceptualising the meaning and value of privacy in Australian family law proceedings, it is worth reciting Parkinson and Cashmore's observation that '[t]he way we see children and construe their competence has considerable implications for the way society, the law and other institutions treat them'.[80] My analysis of the judgments of the Full Court of the Family Court

[78] See the discussion in chapter 6 of the 'genuine dispute or controversy' requirement set out by the Full Court of the Family Court in *Re Kelvin*.
[79] Parkinson and Cashmore (n 18) 40.
[80] Ibid 8.

in *Re Jamie* and *Re Kelvin* has shown how the child's role in the family, and in society more broadly, is (re)constructed and framed by judicial decision-making. It has also shown that children are 'the *object* but rarely the *subject* of family law decision-making':[81] their voices are marginalised, interpreted and filtered by adults.

A children's rights approach to decisional privacy has a 'transformative' nature.[82] It strives to *change* existing power relations, to enhance recognition of and respect for children's decisional privacy rights, and children's ability to exercise those rights effectively. This approach requires that children are 'seen, heard *and* taken seriously' in decision-making under Part VII of the Family Law Act.[83] The process of 'democratisation'[84] of decision-making and debate in Australian family law and policy necessitates that we re-think the role that children themselves can and should play in making decisions about their best interests. As Oswell has remarked, 'it is impossible now when talking about children not also to talk about their stake in the decision-making process and their role in shaping the institutions and organisations that shape them'.[85] Yet there remains a deep-seated anxiety about the notion of children's rights, and how those rights might undermine parental rights and authority and the institution of the family.[86] In Part II of this chapter, I explained that fears of a child 'revolution' emanating from children having and exercising decisional privacy rights are misconceived.

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[81] Robyn Fitzgerald and Anne Graham, 'The Changing Status of Children Within Family Law: From Vision to Reality?' (2011) 20 *Griffith Law Review* 421, 421.

[82] Didier Reynaert and Rudi Roose, 'Children's Rights: A Framework to Eliminate Social Exclusion? Critical Discussions and Tensions' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 36, 47-8; Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 408, 417; Matias Cordero Arce, 'Towards an Emancipatory Discourse of Children's Rights' (2012) 20 *International Journal of Children's Rights* 365, 367; Tobin, 'Understanding Children's Rights' (n 41) 159-60; Anthony Chase, 'Legitimizing Human Rights: Beyond Mythical Foundations into Everyday Resonances' (2012) 11 *Journal of Human Rights* 505, 515.

[83] Lundy, Tobin and Parkes (n 44) 430. See also Parkinson and Cashmore (n 18) 199.

[84] Minow and Shanley, 'Relational Rights and Responsibilities' (n 10) 6.

[85] David Oswell, *The Agency of Children: From Family to Global Human Rights* (Cambridge University Press, 2013) 4. See also E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362, 362.

[86] Tobin, 'Fixed Concepts' (n 4) 53; Scott Altman, 'Parental Control Rights' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 209, 209.

B *Promoting Awareness of the Impacts of Family Law and Policy on Children's Decisional Privacy Rights*

The second process involved in embracing children's right to decisional privacy in Australian family law decision-making is educational: to promote greater awareness of the impacts on the *rights* of children – as distinct from their parents and the family as an entity – of family law and policy. The case study of this thesis has illuminated the adverse impacts on transgender children's identity, autonomy, self-esteem and self-worth, that the requirement of Family Court authorisation had on them. Georgie Stone, the young person the subject of the *Re Jamie* proceedings, explained that 'a very important decision about my body'[87] was 'completely out of my hands, I had to ask a complete stranger for permission to take something I know I need'.[88] Until the *Re Jamie* litigation, and the activism of Georgie Stone herself, these impacts of the exercise of the Family Court's welfare jurisdiction on transgender children were given inadequate critical attention to provide the impetus for change. And even then, in light of legislative inaction, it was left to the Full Court in *Re Kelvin* to remove the Family Court from the medical treatment process for childhood gender dysphoria.

The Australian Law Reform Commission (ALRC), in its final report upon its inquiry into Australia's family law system, endorsed children's participation in 'oversight and reform' of the family law system.[89] It recommended the establishment of a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.[90] The Board would enable children to participate beyond individual family law matters in the (limited) manner provided for by the Family Law Act, in the 'governance', 'development and oversight' of the family law system more broadly, to contribute to more child-centred family law policy and practice.[91] Such a body, provided that it enabled children to meaningfully participate and influence as per its

[87] Georgie Stone, as quoted in Gary Nunn, 'The Transgender Teenager who Helped Change Australia', *BBC News* (online), 15 February 2018 <https://www.bbc.com/news/world-australia-42940411>.
[88] Georgie Stone, as quoted in Jo Lauder, 'Transgender Young People Won't Need Court Order for Hormone Treatment', *Triple J Hack,* Australian Broadcasting Corporation (online), 30 November 2017 <www.abc.net.au/triplej/programs/hack/transgender-young-people-not-need-court-order-hormone-treatment/9212876>.
[89] Australian Law Reform Commission (ALRC), *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) 395 [13.36].
[90] Ibid 395 (recommendation 50).
[91] Ibid 395-6 [13.36], [13.41].

mandate, would go some way towards encouraging adult decision-makers to conceptualise issues from children's own diverse perspectives.

This second process of understanding the impact of family law and policy on children and their rights, including through research with and by children,[92] is tied integrally to the first – how Australian family law conceptualises children – and to the third – how children can more meaningfully participate in family law decision-making.

C *Children Must be Seen, Heard* and *Listened To: Institutional Structures to Enable Children's Meaningful Participation in Family Law Decision-Making Processes*

My thesis has exposed what I argue is an unhelpful dichotomy in debates about children's rights in the context of family law decision-making about children's best interests – that of protection versus participation.[93] A children's rights approach to decisional privacy involves, as Parkinson and Cashmore have suggested, moving away from 'protection from participation' to 'protecting [children] in participation'.[94] That is, a child's best interests *can* be served by enabling the child to participate in the determination of those best interests, by encouraging the child's understanding of citizenship and promoting his or her self-esteem.[95] Indeed, I have argued that the principle of the best interests of the child as the paramount consideration in decision-making under Part VII of the Family Law Act enables judges to take the child's decisional privacy rights into account, even in the absence of an explicit legislative requirement to do so. The third process, therefore, is the development of institutional structures that more effectively enable children's meaningful participation in decision-making processes regarding all matters that affect them. This aspect of the process invokes article 12 of the UNCRC (the child's right to express views freely and to have an opportunity to be heard in legal proceedings) and article 13(1) (the child's right to freedom of expression). It requires that children not only be seen and heard, but most importantly, listened to. As Eekelaar has argued:

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[92] See discussion of this issue in Tobin, 'Understanding Children's Rights' (n 41) 178-9; Tobin, 'Justifying Children's Rights' (n 23) 416; See also Laura Lundy and Lesley McEvoy, 'Children's Rights and Research Processes: Assisting Children to (in)Formed Views' (2011) 19 *Childhood* 129; Mary Kelly, 'Empowering Children and Young People as Researchers: Overcoming Barriers and Building Capacity' (2011) 4 *Child Indicators Research* 205.
[93] See ALRC, *Family Law for the Future* (n 89) 362-3 [12.23].
[94] Parkinson and Cashmore (n 18) 219.
[95] Tobin, 'Justifying Children's Rights' (n 23) 431. See also Parkinson and Cashmore (n 18) 9-13.

> [n]o society will have begun to perceive its children as rights holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views and towards addressing them with respect.[96]

The form of a child's participation must fit within the decision-making framework of the Family Law Act. As I have noted at various points in this thesis, research concerning children's experiences of participation in family law decision-making exposes a gap between principle and policy on the one hand, and practice on the other.[97] Ongoing review of the effectiveness of child-inclusive and child-focused mechanisms, which purportedly facilitate children's participation in Family Court proceedings and ameliorate the adverse impacts on that participation, would offer some insights into whether children's decisional privacy rights are being upheld, at least from a procedural perspective.[98]

The ALRC, in its discussion paper as part of the inquiry into Australia's family law system, made a number of proposals 'aimed at embedding children's participation across the family law system and making the family law system more child centred'.[99] One such proposal was that the Family Law Act be amended to create an explicit right for children to be heard both in court proceedings relating to the child and in family dispute resolution, subject to ongoing

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[96] John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6 *International Journal of Family Law* 221, 228.

[97] See, e.g., Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies, 2018); Rae Kaspiew et al, *Independent Children's Lawyers Study: Final Report* (Australian Institute of Family Studies, 2nd ed, 2014); Parkinson and Cashmore (n 18) 4, 196-7.

[98] As part of the extensive 2006 reforms to the *Family Law act 1975* (Cth), a less adversarial structure for the determination of family disputes involving children was legislatively mandated through the introduction of Division 12A into Part VII. Within a therapeutic jurisprudence framework, the Child Responsive Program, a more child-focused approach to the resolution of family disputes involving children, supports the Less Adversarial Trial in the pre-trial phase. Both initiatives strive to reduce the adverse impacts of the litigation process upon children through a more intensive, judicially-directed case management model, and modified rules of evidence. Child-inclusive and child-focused family law practice, which such initiatives represent, both focus on the child's needs, with child-inclusive practice also actively involving the child through developmental consultation and therapeutic conversation. See Jennifer McIntosh, Diana Bryant and Kristen Murray, 'Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46 *Family Court Review* 125; Diana Bryant, 'The Role of the Family Court in Promoting Child-centred Practice' (2006) 20 *Australian Journal of Family Law* 127; Lawrie Moloney and Jennifer McIntosh, 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10 *Journal of Family Studies* 71, 72; Nola Webb and Lawrie Moloney, 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9 *Journal of Family Studies* 23; Jennifer McIntosh, Yvonne Wells and Caroline Long, 'Child-focused and Child-inclusive Family Law Dispute Resolution: One Year Findings from a Prospective Study of Outcomes' (2007) 13 *Journal of Family Studies* 8.

[99] ALRC, *Review of the Family Law System* (Discussion Paper No 86, October 2018) 151 [7.1].

assessment and management of risk.[100] The ALRC discussion paper also proposed that a 'children's advocate' be created as a professional role to support children's participation in family law proceedings and their right to be heard.[101] It further suggested that children 'should be able to communicate their views to decision makers in a range of ways, including through direct participation' and meeting with the decision-maker.[102] In its final report, however, the ALRC decided against recommending the introduction of the children's advocate role, partly in response to concerns about the 'filtering' or distortion of children's views.[103] However, given that most family law issues are resolved without the Family Court making a final decision, it is important to consider the nature of children's participation in decision-making processes beyond those in a litigation setting.[104] The recommendation for a Children and Young People's Advisory Board, noted above, appears to be the only means by which the ALRC has encouraged children's more direct, active participation in family law decision-making processes beyond the courtroom. This is arguably a sign that Australian family law and policy have not yet warmed to the idea of children having and being able to exercise decisional privacy rights.

The significance of children's participation as a feature of a wider social inclusion agenda has been recognised by government at both the federal and state levels in Australia, with the *National Framework for Protecting Australia's Children 2009–2020* underpinned by the guiding principle, amongst others, that '[c]hildren and their families have a right to participate in decisions affecting them'.[105] Significantly, this National Framework recognises that '[u]pholding children's right to participate in decisions that affect them is a key signal of valuing and supporting children',[106] and notes that this is particularly relevant in Family Court matters in the context of child welfare. Such a policy statement embraces an appreciation of the salient features of a children's rights approach to decisional privacy; how it is implemented in practice, however, may be coloured by the protectionist perspective through which the

[100] Ibid 159-63.
[101] Ibid 170-73.
[102] Ibid 175-77.
[103] ALRC, *Family Law for the Future* (n 89) 375-6 [12.63]-[12.66].See also Parkinson and Cashmore (n 18) 60-61, 154-7.
[104] Parkinson and Cashmore (n 18) 216-17. One such mechanism is child-inclusive mediation. See, e.g. Jennifer McIntosh, 'Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study' (2000) 18 *Mediation Quarterly* 55; Anthony Grimes and Jennifer McIntosh, 'Emerging Practice in Child-Inclusive Divorce Mediation' (2004) 10 *Journal of Family Studies* 113.
[105] Commonwealth Attorney-General's Department, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (Commonwealth of Australia, 2009) 12.
[106] Ibid 15.

statement has been developed. In its concluding observations on Australia in relation to the child's right to be heard under article 12 of the UNCRC, the CRC Committee recommended that Australia '[e]nhance children's meaningful and empowered participation in the family, in the community and in schools'.[107] The National Framework offers a good example of how government can promote children's participation in decision-making processes relating to their welfare, by recognising and respecting children as rights-bearers. It also reflects Smart's view that transforming understandings of children from 'the objects of law's benevolence' to 'the speaking subjects of law' remains a 'quiet, incomplete revolution'.[108] In the final Part of this chapter, I elaborate on the significance of children's participation in family law decision-making as an element of a broader social inclusion agenda, by articulating the social value of children's right to decisional privacy.

IV THE SOCIAL VALUE OF CHILDREN'S DECISIONAL PRIVACY RIGHTS

The value of rights for children in general lies both in engendering respect for children as active beings, and in the rhetorical potency of rights to persuade and trigger change. Enabling children to exercise effectively their right to decisional privacy – most notably, through their active, meaningful participation in decision-making processes about matters that affect them, consistently with their evolving capacities and with the receipt of appropriate guidance and direction from their parents – involves transforming children's status from 'passive recipients to … active agents'.[109] Privacy's value in this context thus also inheres in enhancing children's participation in community and public life: returning to the social value of children's decisional privacy that I explained in chapter 2, as justifying the relevance and importance of children's

[107] CRC Committee, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia', UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) 5 [22(d)].

[108] Carol Smart, 'Children and the Transformation of Family Law' in John Dewar and Stephen Parker (eds), *Family Law: Processes, Practices and Pressures* (Hart Publishing, 2003) 223, 224. See also Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity Press, 2001) 18.

[109] Gerison Lansdown, 'The Realisation of Children's Participation Rights' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 11, 13.

decisional privacy rights to Australian family law. This is a call for children to be viewed as members of society with valuable and legitimate views, perspectives and voices.[110]

Social recognition of children's contributions, through respect for their decisional privacy rights, goes some way towards overcoming children's social exclusion.[111] To challenge the policies, structures and practices that have excluded children from society[112] has indeed been the thrust of the children's rights movement from its inception – and has been a key aim of this thesis. Below I explain the social value of children having and exercising decisional privacy rights from the perspective of children's social inclusion, and the potential that respect for those rights bears to enrich Australian family law policy, research and practice.

A *Fostering Children's Inclusion, Social Participation and Power to Influence*

Participation is the pivotal concept in debates about children's social inclusion and exclusion. By 'exclusion', I mean the ways in which children are marginalised or omitted from decision-making processes about matters that affect them, such that their views, wishes and preferences are not taken into account, or are not taken seriously, by adults. Children's social exclusion involves a denial of, or lack of access to, rights,[113] including those procedural rights that facilitate children's attainment and enjoyment of their substantive rights. Children might be afforded an opportunity to express their views (not necessarily via child-friendly procedures), but those views might by ignored or sidelined by adult decision-makers, a concern related to the dominant perception of children as irrational, dependent and vulnerable. On a children's rights approach to decisional privacy, children must be active participants in decision-making processes to be able to exercise power and influence social structures.[114] But the notion of 'participation' lends itself to an almost infinite number of interpretations, and there is an important socio-political dimension to any notion of children's participation, however defined. Bestowing children with greater authority to shape their own lives also necessitates a reconfiguration of the power dynamics between parents, children and the state.

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[110] Jeremy Roche, 'Children: Rights, Participation and Citizenship' (1999) 6 *Childhood* 475, 479; Marc Jans, 'Children as Citizens: Towards a Contemporary Notion of Child Participation' (2004) 11 *Childhood* 27; Ruth Lister, 'Why Citizenship: Where, When and How Children?' (2007) 8 *Theoretical Inquiries in Law* 693.
[111] Reynaert and Roose (n 82) 36; John M Davis, 'Analysing Participation and Social Exclusion with Children and Young People: Lessons from Practice' (2007) 15 *International Journal of Children's Rights* 121.
[112] Reynaert and Roose (n 82) 36.
[113] Ibid 37.
[114] Ibid 38.

My primary aim in this thesis has been to a develop and present a new conceptual model for re-thinking how children's rights are accommodated, recognised and respected in decision-making under the Family Law Act – and how children can speak for themselves and more importantly, be listened to and heard by adults. Children are socially excluded from family law decision-making processes, owing to the structure of the Family Law Act, as a legislative disabler of children's participation, as well as by judges' interpretation and application of that legislation to perpetuate children's exclusion.[115] The *Re Jamie* proceedings are a pertinent example of a young person, so fervent in her desire to participate in the Family Court's decision-making about her own medical treatment, having her views, wishes and voice filtered and interpreted by adults. Georgie Stone, the subject of those proceedings, lost her ability to control the self that she sought to present to others.

A purpose of children's participation is therefore to empower children to challenge the status quo,[116] insofar as existing power structures and institutions deny children their rights or fail to protect and respect those rights. Georgie Stone became a prominent activist for transgender children. Facilitated by a court order that she be able to identify herself as the young person the subject of the *Re Jamie* proceedings,[117] Georgie developed a strong media profile, which provided her with a solid platform from which to campaign for transgender children's decisional privacy rights. Georgie was adamant that '[t]he only people who should be part of this decision are the medical specialists, the parents and most importantly the teenager themselves'.[118] Her activism occurred outside 'formal' politico-legal processes and governance, and sought to influence law reform 'from the outside, through lobbying, campaigning and mobilising'.[119] In her online petition that gained almost 16,000 signatures, Georgie championed the rights of 'trans teens', which she argued were 'not being protected or

[115] See the discussion in chapter 1 regarding the welfarist approach to decision-making under Part VII of the Family Law Act.
[116] Gerison Lansdown, 'International Developments in Children's Participation: Lessons and Challenges' in E Kay M Tisdall, John M Davis, Alan Prout and Malcolm Hill (eds), *Children, Young People and Social Inclusion: Participation for What?* (The Policy Press, 2006) 139, 144.
[117] See chapter 5.
[118] 'Remove Family Court of Australia from Medical Decisions for Trans Teens. Legislate Now!', *change.org* (petition) <https://www.change.org/p/parliament-of-australia-remove-family-court-of-australia-from-medical-decisions-for-trans-teens-legislate-now> .
[119] Joachim Theis, 'Children as Active Citizens: An Agenda for Children's Civil Rights and Civic eengagement' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2009) 343, 351.

upheld'.[120] Georgie's ability to tell her story, in her own words, was especially significant, given that adults are often 'not very good at identifying those issues that are actually important to children'[121] – particularly children who are members of a marginalised and ill-understood group in society. However, in and of themselves, Georgie's high-profile activism and public statements proved ineffective in influencing the federal government to change the law, as I discussed in the previous chapter. That task remained for the Full Court in *Re Kelvin*.

B *The Value of Children's Views and Perspectives to Australian Family Law Research, Policy and Practice*

The value of children's decisional privacy rights in the context of Australian family law also lies, I argue, in the opportunity for children's perspectives and views to shape research, policy and practice. Warshak has said that 'children have something important to tell us that may change the decisions we make on their behalf and the way in which we make them'.[122] Obtaining, listening to, and taking into account, children's views demonstrates respect for children as active subjects whose views are important, and also enables children's engagement in legal policy development and political activism.[123] Here children's right to express their views freely and to be heard bears an instrumental role in children's development of autonomy.[124] Research has shown that providing children with opportunities to shape decisions that impact them and to make choices improves children's capacity for independent decision-making.[125]

Listening to and respecting children's views in the decision-making process can also produce more well-informed and relevant decisions.[126] Thus, as I explained in chapter 2, respecting

[120] 'Remove Family Court of Australia from Medical Decisions for Trans Teens' (n 118).
[121] Martin D Ruck, Michele Peterson-Badali, Isabelle M Elisha and Harriet R Tenenbaum, 'Children's Voices about Children's Rights: Thoughts from Developmental Psychology' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2016) 597, 598.
[122] Richard Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52 *Family Relations* 373, 374.
[123] Lundy, Tobin and Parkes (n 44) 400-01; E Kay M Tisdall and John Davis, 'Making a Difference? Bringing Children's and Young People's Views into Policy-Making' (2004) 18 *Children and Society* 131; Christine Hallett and Alan Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (Routledge, 2003).
[124] Lundy, Tobin and Parkes (n 44) 397, 399.
[125] See, e.g., Leon Mann, Ros Harmoni and Colin Power, 'Adolescent Decision-Making: The Development of Competence' (1986) 12 *Journal of Adolescence* 265; Parkinson and Cashmore (n 18) 193-94.
[126] Parkinson & Cashmore (n 18) 191-92; Joan B Kelly, 'Children's Living Arrangements Following Separation and Divorce: Insights From Empirical and Clinical Research' (2007) 46 *Family Process* 35; Sally Holland and Sean O'Neill, '"We Had to Be There to Make Sure It Was What We Wanted": Enabling Children's Participation

children's views consistently with their right under article 12 of the UNCRC bears value for society, in addition to value for children themselves. Lundy, Tobin and Parkes have summarised this broader societal value as 'encouraging more efficient and effective policy making in matters concerning children *and* enabling them to assume more active and effective roles as members of their communities'.[127]

A real challenge, however, lies in listening and responding to children's voices in the decision-making process: engaging with their views, wishes, preferences and experiences. The key message of a study by the Australian Institute of Family Studies (AIFS) into the experiences of children and young people whose parents had separated and had accessed the family law system, was 'the loud and clear calls from participating children and young people to "give children a bigger voice, more of the time"'.[128] A noteworthy feature of this AIFS study is that the resultant report made extensive use of direct quotations from participating children and young people, to give them a 'direct voice' and 'to ensure that, as far as possible, their perspectives are made available in their own words'.[129] This feature of the AIFS study reflects a critical element of a children's rights approach to decisional privacy: that adults actively seek out children's views and take those views seriously; listening to children is not enough.[130]

There exists a 'gap between the principle and practice of children's participation', which 'cannot merely be attributed to resistance or uncertainty around the place of children in family law, policy and research'.[131] The ALRC in its review of the family law system identified a 'tension between protection and participation [which] is sometimes framed as a contest between competing principles or rights'.[132] That contest is between children's welfare or best interests on the one hand, and children's right to be heard on the other. As I have explained at various points in this thesis, the practices and procedures of the Family Court remain by and

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in Family Decision-Making Through the Family Group Conference' (2006) 13 *Childhood* 91; Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 214-15.

[127] Lundy, Tobin and Parkes (n 44) 399 (emphasis in original). See also Jeremy Roche, 'Children: Rights, Participation and Citizenship' (1999) 6 *Childhood* 475; Ranjan Poudyal, *Children and Young People as Citizens: Partners for Social Change* (Save the Children, 2003) 6; CRC Committee, *General Comment No 20*, UN Doc CRC/C/GC/20 (n 69) [24].

[128] Carson et al (n 97) ix.

[129] Ibid vi.

[130] Tobin, 'Understanding Children's Rights' (n 41) 179; CRC Committee, *General Comment No 12*, UN Doc CRC/C/GC/12 (n 45) [28] (article 12 of the UNCRC requires that 'the views of the child have to be seriously considered when the child is capable of forming his or her own views').

[131] Fitzgerald and Graham (n 81) 441.

[132] ALRC, *Family Law for the Future* (n 89) 362-3 [12.23].

large exclusionary of children and their capabilities, underpinned by the protectionist rationale and an implicit 'adults know best' mantra.[133]

The Family Court in *Karamalis & Karamalis*[134] said that the requirement to take into consideration the child's views in determining what is in the child's best interests[135] contributes to the soundness of the Court's determinations.[136] However, according to the Family Court, considering children's views 'imposes certain responsibilities on decision makers' and 'is a two way street'.[137] These responsibilities relate to the respect afforded to children as participants in the process, including by notifying them 'in an appropriate manner' of the outcome of proceedings.[138] It is worth repeating the Family Court's views in *Karamalis*, for they illustrate a sound appreciation of two of the salient features of a children's rights approach to decisional privacy, being a recognition of children as active rights-bearing subjects, and ensuring children's meaningful participation in decision-making about their lives:

> Children should know that such views as they express will be considered and that their perspectives will not be subsumed and lost in the argument between their parents. Children should be accorded the respect which they will be expected to show to others throughout their lives. This includes taking account of their views and opinions in a dynamic sense, not only when convenient and certainly not to just tick the box next to the numerous additional considerations which we are required to take into account.[139]

A major challenge in fostering children's participation in Family Court decision-making, as well as family law debates more broadly, derives from the paucity of evidence about how children's rights operate in family law policy and practice. Addressing the challenge lies in adults being willing and able to '[a]sk … the child question',[140] and in embedding children's

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[133] Parkinson and Cashmore (n 18) 2-3; Robyn Fitzgerald, 'How are Children Heard in Family Law Proceedings in Australia?' (2002) 6 *Southern Cross University Law Review* 177; Judy Cashmore, 'Children's Participation in Family Law Matters' in Christine Hallett and Alan Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century, The Future of Childhood* (Routledge, 2003) 158.
[134] (2018) 57 Fam LR 588.
[135] This is the first of the additional considerations in section 60CC(3)(a) of the Family Law Act, qualified by the requirement that the Court also take into account 'any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.
[136] *Karamalis & Karamalis* (2018) 57 Fam LR 588, 591 [16] ('Within our system of family law, determinations are sound in part because there is an obligation for children's views to be considered.')
[137] Ibid.
[138] Ibid.
[139] Ibid [17].
[140] Woodhouse, 'Hatching the Egg' (n 4) 1838 (citation omitted).

meaningful, direct participation – obtaining children's views and wishes not merely through the evidence of adults – within the institutional culture and structures of the Family Court.[141] How this might be done would make for a fruitful area of further research.

V CONCLUSION

In this chapter, I have rebutted the argument that granting decisional privacy rights to children abstracts the child who is seeking to enforce his or her rights from the child's social and family context, thereby encouraging intra-familial conflict.[142] I have also explained that respecting children's right to decisional privacy does not necessitate giving children the ultimate authority to decide what is in their best interests in relation to each and every matter that affects them. Rather, the principle of evolving capacities, coupled with the child's right to receive appropriate parental guidance and direction in the exercise of his or her decisional privacy rights, and the practical limitations on the child's right to freely express his or her views, have served to alleviate concerns that granting children decisional privacy rights will undermine the family unit, and justify state interference in the family. I have suggested that in circumstances of conflict between children and their parents, children's views can be determinative of their best interests if children have sufficient maturity and understanding in relation to the matter. Although this does not mean that children's views will always be determinative in relation to how the decision will be implemented.

I then mapped out three processes – conceptual, educational and institutional – for translating a theory of children's decisional privacy into practice in Australian family law, this being the context in which the theory has been developed. I advanced the view that the recognition of, and respect for, children's decisional privacy rights as a policy goal of family law is valuable not only for children as individuals, but also for society. It promotes major moral changes within families: even where state intervention is absent, acknowledging that children have a right to participate in decision-making about issues that fundamentally affect them, transforms the hierarchical parent-child relationship to a more egalitarian one. It also transforms children's status under the law, from passive objects of concern and adult intervention, to active subjects with distinct rights and interests. Children's participation in decision-making about their lives

[141] Ruth Sinclair, 'Participation in Practice: Making it Meaningful, Effective and Sustainable' (2004) 18 *Children and Society* 106, 116.
[142] Smart (n 108) 238.

demands that they are actively and meaningfully included and engaged in the process, and that children's views are listened to and heard, and given due weight in accordance with their age and maturity. The final chapter of this thesis presents the key conclusions of my research and offers suggestions for further research and analysis.

CONCLUSION

I was powerless - I was 15, and there was someone up there making a very important decision about my body. It was out of my hands, but I knew this was really wrong. … Through telling our stories, we got this out into the open. It'd been an issue not many knew or cared about, and we changed that … Knowing no kids will have to experience that ever again was massive.[1]

I CHILDREN'S VOICES FOR CHANGE: RESPECTING CHILDREN'S DECISIONAL PRIVACY RIGHTS IN AUSTRALIAN FAMILY LAW

This thesis concludes as it began: with the voice of Georgie Stone, the young person who was the subject of the *Re Jamie* proceedings and became a prominent advocate for the rights of transgender children and young people.[2] Reflecting on her own experience in requiring the Family Court of Australia's authorisation to undergo medical treatment for gender dysphoria, Georgie's quote encapsulates the argument of this thesis: that the Family Court's involvement in medical decision-making for transgender children and young people denied them the ability to ask the 'practical question' and live accordingly: 'how do I want to live, what sort of person do I want to be, and how I should best strive for my own good in my own way?'[3] To have their decisional privacy rights in this context overlooked, rejected, manipulated, or politicised rendered these children, in Georgie's words, 'powerless'.

Georgie's quote also, most importantly, illustrates the value of 'telling our stories' – the stories of transgender children and young people – to illuminate matters of concern for children, and

[1] Georgie Stone, as quoted in Gary Nunn, 'The Transgender Teenager who Helped Change Australia', *BBC News* (online), 15 February 2018 <https://www.bbc.com/news/world-australia-42940411>.
[2] See Michelle Telfer et al, 'Transgender Adolescents and Legal Reform: How Improved Access to Healthcare was Achieved through Medical, Legal and Community Collaboration' (2018) 54 *Journal of Paediatrics and Child Health* 1096.
[3] Beate Rossler, *The Value of Privacy* (Polity, 2005) 43, 50-51.

to instigate change. Former Chief Justice of the Family Court, Alastair Nicholson, has described children as a 'segment of the community who in the main have little political clout and rely on the moral integrity of adults for respect of their rights and protection of their interests'.[4] My aim in this thesis has been to enhance children's voices in Australian family law, and to improve the willingness and ability of adult decision-makers to listen to and hear those voices, by reconceptualising the meaning and value of privacy in proceedings under the *Family Law Act 1975* (Cth) (Family Law Act) from a children's rights perspective. I have done so by presenting a theory of children's right to decisional privacy: a right which enables children to 'make their own lives, rather than having their lives made for them'.[5]

A *Reconceptualising the Meaning and Value of Privacy in Proceedings under the Family Law Act*

Decisional privacy, as I have defined it in this thesis, protects an individual's ability to make decisions which contribute to defining his or her identity, free from the unjustifiable interference of other individuals or the state.[6] It creates an area for choices, and the development of 'plans of life'[7] and a sense of self, and invokes questions of to whom, and how, an individual should justify his or her decisions, actions or way of life. I have justified the value of privacy as inhering in the value placed on autonomy in liberal societies. That is, privacy is a necessary condition for enabling individuals to live autonomously. I have conceptualised autonomy as embracing both negative freedom (the absence of intervention by the state and others) and positive freedom (personal self-determination and reflection about how an individual wishes to live his or her life).

Yet the notion of autonomy in relation to children and their lives has never sat comfortably, driven by the dominant conception of children in Western liberal societies as vulnerable,

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[4] Alastair Nicholson, 'Advancing Children's Rights and Interests: The Need for Better Inter-governmental Collaboration' (1996) 26 *Western Australian Law Review* 249, 249-50. See also Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 44; John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 76; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 13.

[5] Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 17.

[6] Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 77-8.

[7] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 407-15, §63.

dependent on adults and incapable of rational decision-making. I have articulated a relational, gradual and evolving understanding of autonomy, rather than a static and individualistic one, which enables children to be conceptualised as having the capacity for autonomy, and in some circumstances, in fact possessing autonomy. Understanding autonomy as a relational, socialised value recognises that a child's autonomy is both enabled and constrained by his or her social context, including the role of the family in society, and the complex nature of a child's family relationships.

The children's rights approach to decisional privacy that I have developed in this thesis consists of four salient features: (i) children are subjects with distinct rights and interests; (ii) children exercise autonomy consistent with their evolving capacities; (iii) children require appropriate direction and guidance in the exercise of their decisional privacy rights; and (iv) children must meaningfully participate in decision-making about their lives. Children's ability to exercise decisional privacy is vital for offering children the independence to forge their identities and to make choices that help to define them and their values. I have emphasised the unique and significant role of parents in supporting and enabling children to enjoy their decisional privacy rights. The nature of parental direction and guidance shifts and its degree diminishes as children mature and develop, thereby enabling children to experience increasing agency, autonomy and responsibility in the enjoyment and exercise of their rights.[8]

A children's rights approach balances the child's rights and best interests (which are not necessarily opposed) against the rights and interests of other individuals and groups affected by the decision (such as the child's parents, other family members and the child's treating medical practitioners), through an 'inclusive and nuanced'[9] process that moves beyond the shallow rhetoric that 'we are all doing what we think is best for the child'.[10] My framework can thus respond to criticisms that recognising and respecting children's decisional privacy rights in the determination of children's best interests under Part VII of the Family Law Act would threaten 'the rights of the family',[11] or would be unworkable in practice because it would

[8] John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 178.
[9] John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33 *Melbourne University Law Review* 579, 589.
[10] John Eekelaar, 'Deciding for Children' (2006) 7 *Australian Journal of Professional and Applied Ethics* 66, 77.
[11] See Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005) 17.

challenge the foundations of the Family Law Act. Put simply, 'children's rights' rhetoric is not a trump card in all matters requiring determination of a child's best interests.

B *Exposing the Tensions Between Children's Rights, Parental Responsibilities and the Family Court's Duty to 'Protect the Rights of Children and to Promote Their Welfare'*[12]

Tensions remain in Australian family law between recognising and upholding children's rights, respecting parental responsibilities, and maintaining the Family Court's duty to 'protect the rights of children and to promote their welfare'.[13] The case study of this thesis reflects Freeman's observation that '[t]he law is the cultural and institutional underpinning of autonomy. It gives and it takes away. Families … have as much autonomy as the law allows them'.[14] My thesis has assessed the (re)calibration of the uneasy relationship between parents and the state, or how the law 'gives and … takes away' family privacy, in the context of the Family Court of Australia's exercise of its welfare jurisdiction under section 67ZC of the Family Law Act to authorise medical treatment for children diagnosed with gender dysphoria. In both conceptual and practical terms, children have been overlooked or largely excluded from the decision-making process. Protectionism and paternalism have loomed large in the exercise of the welfare jurisdiction, shaped by the dominant welfare model buttressing decision-making for, on behalf of, and about – but not by – children, whose best interests might not be adequately protected (or might even be harmed) by their parents' decision-making

Appreciating children's unique vulnerability relative to adults is not misplaced. However, defining children exclusively by their vulnerabilities is liable to result in 'overly protectionist agendas', which bear the potential to harm children's development by cementing assumptions about children's lack of capacity to protect their own interests.[15] A children's rights approach to decisional privacy sees children's vulnerability as variable or 'episodic', as well as socially constructed and fluid, rather than an 'inevitable and inherent feature of childhood'.[16] Children can be both vulnerable and possess evolving autonomy or the capacity for autonomy: these are

[12] *Family Law Act 1975* (Cth) s 43(1)(c).
[13] *Family Law Act 1975* (Cth) s 43(1)(c).
[14] Michael Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 248.
[15] John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 167, 169.
[16] Ibid 169, 182.

not binary characteristics. The case study of gender dysphoria proceedings before the Family Court has also shown that the issue of *who* decides what medical treatment or procedures are appropriate for a child evokes society's normative beliefs about children's capacity and autonomy. Acknowledging that *how* such decisions are made – according to what criteria and in what manner – differs as between the 'public' and 'private' regulation of children's lives, and raises the challenge of how the law can, and should, protect children's rights.[17] This thesis has highlighted that challenge in the context of medical treatment for children diagnosed with gender dysphoria, although it would be an equally valid concern in relation to a plethora of other issues concerning children. My aim has been to make children not only present and visible in decision-making processes about matters that affect them (where they have previously been absent and invisible), but most importantly, to make children's own, unfiltered voices audible to adults. The next, and greater, challenge lies in translating my conceptual model for enabling and listening to children's voices in Australian family law from theory into practice.

II FUTURE PROMISE: CHILDREN AS 'ACTIVE SHAPERS OF THEIR OWN LIVES'[18]

The Family Law Act, as a primary piece of legislation affecting children's lives in Australia, contains assumptions and community aspirations that are imbued with stories about children's role in the state and society. Georgie Stone's advocacy for the rights of transgender children and young people shows that children's rights 'offer a way in: they open doors' for those who have been excluded or marginalised; they also offer 'fora for action'.[19] At a policy level, the challenge inherent in *respecting* children's decisional privacy rights lies in progressing children's status under Australian family law – most critically, by ensuring that children have a meaningful opportunity to express their views and to be heard in all matters affecting them – in such a way that the notion of 'children's rights' does not become a rhetorical proxy for the interests of adult decision-makers.[20] According to the CRC Committee, overcoming this challenge requires 'dismantling the legal, political, economic, social and cultural barriers that

[17] Graeme Austin, *Children: Stories the Law Tells* (Victoria University Press, 1994) 147.
[18] *W and G (No 1)* (2005) FLC ¶93-247, 80,053 [108].
[19] Freeman, 'The Human Rights of Children' (n 5) 18.
[20] See Katherine Hunt Federle, 'Do Rights Still Flow Downhill?' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 13; Katherine Hunt Federle, 'Review Essay: Rights, Not Wrongs' (2009) 17 *International Journal of Children's Rights* 321, 324; Tobin, 'Understanding Children's Rights' (n 15) 177.

currently impede children's opportunity to be heard and their access to participation in all matters that affect them'.[21] Dismantling these barriers may prove a formidable task, requiring as it will countering the prevailing assumptions about children's incapacity, vulnerability and dependence. Most vitally, the CRC Committee has said that 'making reality of the human rights of children … needs to engage all sectors of society and, of course, children themselves'.[22]

By developing a sound conceptual framework within which children's rights are located, my thesis serves to engender a stronger commitment from those (adults) who are key to upholding and giving effect to children's rights.[23] Without such a 'secure conceptual foundation', as Tobin has cautioned, 'children's rights risk becoming invisible to, or rejected by, those for whom they are not self-evident', and also vulnerable to manipulation as a 'rhetorical device' for 'subjective preferences or political agendas'.[24] I envision that the conceptual model of children's right to decisional privacy developed in this thesis could apply in a range of contexts beyond family law, including child protection and child safety, youth justice and education. The ensuing task is to bring the theoretical and conceptual understanding of decisional privacy and the methodology of children's rights 'to bear on real life decision-making' in these contexts.[25]

The Family Court, in a judgment delivered in 2004, fervently stated that:

> The law relating to children in this country now unequivocally and unapologetically treats children as active shapers of their own lives and able to make decisions independently of adults.[26]

Over fifteen years on, it would be optimistic, even naïve, to claim that this currently is, or has ever been, the case in Australian family law. But my humble hope is that it might be one day – and that this thesis is embraced by Family Court judges, legislators and policy-makers as an

[21] UN Committee on the Rights of the Child (CRC Committee), *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [135].
[22] CRC Committee, *General Comment No 5: General Measures of Implementation for the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 (27 November 2003) [1].
[23] David Archard and Colin Macleod, 'Introduction' in David Archard and Colin Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 1, 15; Fortin (n 4) 3; Stalford and Hollingsworth (n 4) 21.
[24] John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 398. See also Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy and Public Affairs* 315, 317.
[25] Stalford and Hollingsworth (n 4) 21.
[26] *W and G (No 1)* (2005) FLC ¶93-247, 80,053 [108].

opportunity to reflect on *how* they make decisions for and about children, and how children can become more 'active shapers of their own lives' by playing a meaningful role in those decision-making processes.

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