

# 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?

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**ABSTRACT:** Privacy and family law are both dynamic, subjects of passionate debate, and constantly changing with developments in society, policy and technology. This paper develops a normative understanding of the meaning and value of privacy in the context of proceedings under the *Family Law Act 1975 (Cth)* (Family Law Act) that embraces children’s decision-making autonomy. The focus is privacy’s decisional dimension, which has received scant scholarly attention in the Australian family law context. Recognising and respecting children’s (as distinct from their parents’) decision-making autonomy, and children’s right to make decisions that might conflict with their parents’ (and the state’s) wishes, remain significant, and unresolved, challenges for the Australian family courts. This paper explores these issues using court authorisation of special medical procedures for children diagnosed with gender dysphoria as a case study. This paper argues that the construction of children as vulnerable to harm and the hierarchical nature of the parent-child relationship under the Family Law Act, coupled with judicial approaches to determining the ‘best interests of the child’ as the paramount consideration, have inhibited the Family Court of Australia from embracing children’s decisional privacy. This paper addresses concerns about the perceived conflictual consequences of doing so. It emphasises the relationality of children’s rights, the significance of the family unit, and the public interest in promoting children as active participants in proceedings as a policy goal of family law.

**KEYWORDS:** privacy, family law, autonomy, decision-making, children, best interests, welfare, children’s rights, family courts, gender dysphoria, medical treatment, Australia

## Introduction

Privacy and family law are both dynamic, subjects of passionate debate, and constantly changing with developments in society, policy and technology. Observations made about the concept of privacy apply with equal force to family law: they are ‘incoherent’ and subsist in a state of ‘chaos’ (Inness 1992, 3; Dewar 2000, 61; Diduck 2011). The focus of this paper is on decisional privacy in Australian family law. This paper adopts a children’s rights approach to develop a normative understanding of the meaning and value of privacy in proceedings under the *Family Law Act 1975 (Cth)* (Family Law Act) involving children. It first presents an overview of competing conceptions of privacy, and explains how privacy serves the liberal ideal of autonomy through its three dimensions: spatial, decisional and informational. The focus then narrows to privacy’s decisional dimension, which has received little scholarly attention in the Australian family law context. Decisional privacy protects the individual’s ability to make decisions which contribute to defining the individual’s identity, free from the interference of other individuals or the state (DeCew 1997, 77-8). Also known as ‘expressive privacy’, it creates an area for choices, and the development of a ‘life plan’ and a sense of self.

Recognising and respecting children’s (as distinct from their parents’) decision-making autonomy, and children’s right to make decisions that might conflict with their parents’ (and the state’s) wishes, remain significant, and unresolved, challenges for the Family Court of Australia. The Family Court’s exercise of its welfare jurisdiction to authorise special medical procedures for children with gender dysphoria provides a prime illustration. This paper argues that the construction of transgender children as vulnerable to harm and the hierarchical nature of the parent-child relationship under the Family Law Act, coupled with judicial approaches to determining the ‘best interests of the child’ as the paramount consideration, have inhibited the Family Court from embracing children’s decisional privacy in gender dysphoria proceedings.

The final part of this paper addresses concerns about perceived conflicts between children and their parents that may arise from recognising and respecting children’s decisional privacy rights. It

presents three key features of a children's rights approach to rebut these concerns: the relationality of children's rights; the significance of the family unit; and the notion that children's participation in the decision-making process grants them 'a voice, not a choice' (*Duffy & Gomes (No 2) 2015*, [71]). This paper concludes with some observations about the social value of privacy in the family law context, and the public interest in promoting children as active participants in proceedings as a policy goal of family law.

### **Privacy: what does it mean and why is it valuable?**

Privacy is often labelled an 'umbrella term', capturing a broad range of interests and things (DeCew 1997, 1; Solove 2006, 486; Lever 2012, 4). 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 (Warren and Brandeis 1890); secrecy (Bok 1983; Jourard 1966); limited access to the self (Gavison 1980); control over information (Westin 1967; Kang 1998); intimacy (Inness 1992; Gerety 1977; Schoeman 1984); and personhood (Reiman 1976; Benn 1984; Bloustein 1964). Recent privacy law scholarship has emphasised theories which position social context as pivotal to understanding, defining and justifying privacy (Nissenbaum 2010; Solove 2002). A minority of scholars has argued against any definition of privacy or 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. Thomson's challenge is that privacy is 'derivative', and derives its value from other, more fundamental rights or interests, particularly property rights and rights over the person (Thomson 1975).

To 'reduce' the notion of privacy in the family law context to these 'more fundamental' rights would be to generate both conceptual and practical difficulties in the determination of children's matters under the Family Law Act. The contemporary justification for the rights of parenthood is that such rights exist so as, and only so far as, to protect and nurture children until they reach adulthood and independence (Barton and Douglas 1995, 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. 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' (Rachels 1975, 332) – are bound up with the notion of children's evolving autonomy. If, as is argued 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 (Reiman 1976, 43), and to be able to claim meaningfully personal and property rights.

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. This paper contends that privacy is valued as a prerequisite for the achievement of the liberal ideal of autonomy. Privacy is normatively important because it protects the diversity of personal choices, actions and ways of life; it operates to enable a freedom to act according to the individual's own independently and rationally derived understanding of what is valuable and good (Mitnick 2006, 21). 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. However, 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 (Herring 2014, 48-9). And fulfilment of this liberal ideal of being able to lead an autonomous, self-determined life depends on the conditions of privacy and on claims to privacy. A person is thus autonomous if he or she can ask what Beate Rossler (2005) has coined 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?' (Rossler 2005, 50-51). The answer to the practical

question lies simultaneously with the individual themselves (the subjective aspect), and in general social conditions external to the individual that facilitate the achievement of autonomy (the objective aspect). Privacy facilitates the autonomy of diverse social relationships – including family 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 (Gerety 1977; Inness 1992; Gavison 1980).

The liberal concept of privacy is premised upon an ideological separation of life into seemingly opposite spheres of ‘private’ and ‘public’ responsibilities and activities. The ‘private’ has historically been equated with the domestic sphere, comprising intimate, familial and sexual relationships, while the ‘public’ has been used to denote a realm of politics, market and power. The three domains around which privacy is constructed are predicated on this normative distinction between ‘public’ and ‘private’. The first domain is personal space and relationships, which covers seclusion and selective access to certain areas, as well as the intimate and the family (‘spatial’ privacy). The second domain is information, which includes control of and access to information, and issues of confidentiality, anonymity, secrecy and disclosure (‘informational’ privacy). The third domain is decision-making, which involves an individual’s ability to make his or her own decisions and to act and behave without undesired interference from others (‘decisional’ privacy). The spatial, decisional and informational dimensions of privacy serve the ideal of autonomy in different ways, by regulating access to the individual; 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.

### ***Decisional privacy, the family and children as autonomous beings***

Decisional privacy, which is the chief focus of this paper, has been relied upon in United States constitutional law jurisprudence to describe the exercise of individual autonomy in decision-making on matters such as reproduction, contraception and abortion (Allen 1987, 466; Fineman 1999, 1211). Anita Allen (1988, 115-16) has described decisional family privacy as ‘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)’. Allen’s description duly recognises the power dynamics within families, and power disparities between family members, that the decisional dimension of family privacy embodies. Decisional privacy protects the right of individuals to make choices and decisions about their lives; yet the notion of ‘family’ or ‘entity’ privacy involves the right of the family as an entity to determine fundamental aspects of its own welfare. Those communal rights are only compatible with individual autonomy to the extent that the individuals within the family agree. By virtue of the power imbalance between parents and children, parents are both a source of, and a potential threat to, their children’s autonomy, such that attaching privacy to ‘the family’ as an entity is problematic for children (Nedelsky 1989, 235).

Decisional privacy in Australian family law has generally been understood from the perspective of adults, such that children are ‘relegated to the shadows’ of privacy discourse (Hearst 2012, 14). Difficulties persist in recognising and protecting children’s – as distinct from their parents’ – decisional privacy interests. These difficulties emanate from the assumption that families are best placed ‘to protect and advance children’s interests and children’s interests are ... congruent with those of the family’ (Hearst 2012, 14). They also stem from the view that children lack the capacity and rationality to exercise decision-making autonomy. In the famous words of Onora O’Neill (1988, 463), a child’s ‘main remedy is to grow up’.

The notion of autonomy, entailing as it does ‘a strong rejection of paternalism’ (Herring 2014, 48), sits uneasily with conceptions of children and childhood in Western liberal societies, which emphasise children’s vulnerability to justify the disparity in rights and responsibilities bestowed upon children and adults respectively. The key feature of childhood as a ‘legal’ status, according to John Eekelaar (1994, 43), is that ‘adults have a generalised legal power (exercisable either by parents or by legal authorities) to impose a course of action on minors on the basis of their

assessment of the minors' best interests'. 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. The notion of autonomy therefore 'rest[s] uneasily with the reality of children's lives' (Tobin 2017, 55).

When the realisation of autonomy is understood as a gradual process – that is, individuals learn to become, and to be, autonomous in and through social relations – then children can be understood as autonomous individuals, whose identities are a 'work in progress' and a 'process of becoming' (Rossler 2005, 62). The family provides a space for children to develop their identities, and socialisation within the family provides the conditions that enable children to develop an understanding of themselves as autonomous individuals, and as individuals who value autonomy (Rossler 2005, 167; Oswell 2013, 91-8). Conceiving of autonomy as an evolving, rather than absolute, concept enables children to be treated as active subjects with agency, consistent with their developing capacities.

So far, this paper has explained that privacy is a distinct right or interest, valuable because of the value placed on autonomy in contemporary liberal societies. And it has explained the notion of autonomy as a relational, gradual concept, which emphasises the importance of social relationships, and enables children to be recognised as autonomous beings. The next part of this paper examines the nexus between privacy and autonomy through the case study of transgender children seeking medical treatment for gender dysphoria. In doing so, it advances the contention that the construction of children and the parent-child relationship under the Family Law Act, and judicial approaches to determining the 'best interests of the child' as the paramount consideration under the Act, have inhibited the recognition of, and respect for, transgender children's decisional privacy rights.

### **The Family Court's welfare jurisdiction in special medical procedure cases: a case study of the privacy-autonomy nexus under the Family Law Act**

#### ***Parental responsibility and consent to children's medical treatment***

The Family Law Act is the primary piece of Australian legislation that deals with parental responsibility for children. 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 Act, which deals with children's matters (Chisholm 2002; Eekelaar 2002). The former Chief Justice of the Family Court of Australia, Diana Bryant AO QC, remarked that the 'best interests' test 'is at odds with a child's right to privacy, autonomy, self-determination and freedom of expression' (Bryant 2009, 199). Whether such values and rights do in fact conflict or co-exist depends to a large extent on how, and by whom, the 'best interests' test is defined. The best interests principle enshrined in the Family Law Act is drawn from the welfare model, the 'dark side' of which, according to John Eekelaar (2007, 13), is that the obligation to promote and protect the child's interests also involves adults exercising the power to determine the content and nature of those interests. As a result, there lies a risk that the best interests principle will become a 'proxy' for the interests of adults (van Krieken 2005, 39), including the child's parents, treating doctors, and even judicial officers.

The Family Law Act reflects the assumption that parents are best placed to protect the interests of their children, and recognises the primacy of the parental role in relation to the child's best interests. Subject to any court order in force, parents have a 'bundle of rights' 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' (Family Law Act, ss 61B, 61C; *Re Lucy (Gender Dysphoria)* 2013, [82]). However, the Family Court has acknowledged that 'parental responsibility is not absolute authority', 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, such as hospitals and schools, that parents are empowered at law to make decisions for the protection and benefit of the child' (*Re Tahlia* 2017, [35]).

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. Section 67ZC of the Family Law Act 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. In deciding whether to make such an order, the court must regard the best interests of the child as the paramount consideration. In the 1990s, the Family Court's welfare jurisdiction was increasingly invoked 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 United Nations *Convention on the Rights of the Child*, which came into force on 2 September 1990.

The decision of the High Court of Australia in *Secretary, Department of Health & Community Services v JWB & SMB* ('*Marion's Case*') 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 were generally 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. 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 therapeutic (that is, not carried out 'to treat some malfunction or disease') (*Marion's Case* 1992, 250). Other factors that made sterilisation a special medical procedure were the significant risk of a wrong decision being made, and the particularly grave consequences of such a decision (*Marion's Case* 1992, 250). The High Court also identified the potential for a conflict of interests between the child and the child's parents, which warranted court intervention to protect the child's best interests (*Marion's Case* 1992, 251-2). The crux of the High Court's decision was that a child must either be capable of giving informed consent to the medical treatment (commonly referred to as '*Gillick* competence' from the 1986 House of Lords decision in *Gillick v West Norfolk and Wisbech Area Health Authority*); or if the child is not *Gillick* competent, the Court, rather than the child's parents, should grant authorisation for the procedure. As a result of *Marion's Case*, the decision-making autonomy of families was subverted, and Family Court authorisation was necessary, as essentially a 'procedural safeguard' (*Marion's Case* 1992, 249), in medical treatment cases that invoked the factors or features identified by the High Court.

### ***Gender dysphoria as a 'special medical procedure': the decisional privacy implications***

*Marion's Case* clearly did not relate to, nor did it make any reference to, gender dysphoria, which involves a person experiencing a conflict or dissonance between their self-perception of being female or male, and their natal or phenotypical body (Kelly 2014, 83). Diagnosis of gender dysphoria is governed by the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), and the accepted medical treatment occurs in two stages. The first stage involves the administration of puberty-suppressant hormones. The second stage, which occurs when the child is approximately 16 years of age, involves the administration of either testosterone or oestrogen. The diagnosis of children with gender dysphoria in Australia has grown significantly over the past 15 years. The Family Court has remarked that '[n]ot so long ago, these sorts of applications were a rarity; now they are commonplace and the number of them being made rapidly increasing' (*Re Lucas* 2016, [3]). The Family Court has also recognised that the decision-making process in gender dysphoria cases is 'exquisitely difficult and, in many cases, likely to involve much pain and proper prevarication' (*Re Sean and Russell* 2010, [84]).

The decision of the Family Court in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* ('*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 childhood gender dysphoria. *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 common ground that Alex had ‘a long-standing, unwavering ... identification as a male’ (*Re Alex* 2004, [80]). Chief Justice Nicholson, as his Honour then was, held that a child who has been diagnosed with gender dysphoria requires the Family Court’s authorisation to commence stage one or stage two treatment. His Honour found that Alex could not, and did not, have the capacity to understand and consent to treatment for his diagnosed condition, and that the medical treatment itself amounted to a ‘special medical procedure’ to which Alex’s guardian could not consent. In reaching this conclusion, Nicholson CJ 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 (Wallbank 2004, 488). *Re Alex* thus extended the state’s purportedly protective intervention in family decision-making to children with gender dysphoria. In doing so, it restricted the ability of transgender children to exercise decision-making autonomy in relation to their fervently-sought medical treatment, and shifted the dynamics between transgender children, their parents and the state. However, Nicholson CJ observed that the ‘protective’ and ‘paternalistic’ welfare jurisdiction, ‘in modern thinking about children and young people ... must be understood with regard to their rights’ (*Re Alex* 2004, [154]).

Almost a decade after *Re Alex* was decided, the Full Court of the Family Court in the case of *Re Jamie* was asked to reconfigure the decisional privacy dynamics of the relationship between children seeking medical treatment for gender dysphoria, their parents, and the state. The child the subject of the proceedings, Jamie, was born with the anatomical features of a boy, but had identified as a girl from two-and-a-half years of age. On appeal, Jamie’s parents argued that gender dysphoria was not a ‘special medical procedure’ which displaced parental responsibility to decide the appropriate treatment for their child because, unlike sterilisation, it was reversible; it was for therapeutic purposes, as gender dysphoria is a diagnosed psychiatric condition that has been medically recognised with well-recognised treatment strategies; and no-one other than the child stood to benefit directly from the treatment. Jamie’s parents also appealed against the trial judge’s conclusion that stage two treatment for gender dysphoria should be the subject of a further application to the Court.

The Full Court in *Re Jamie* acknowledged the harshness of requiring ‘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’ (*Re Jamie* 2013, [138]). Nevertheless, the Full Court considered itself ‘bound’ by the decision in *Marion’s Case*, and held that stage two treatment for gender dysphoria required court authorisation pursuant to section 67ZC of the Family Law Act, unless the child was *Gillick* competent to give informed consent. Importantly, the Full Court concluded ‘with some reluctance’ that the nature of stage two treatment required the Family Court to determine the child’s *Gillick* competence (*Re Jamie* 2013, [136]-[137]). The Full Court’s construction of Jamie as vulnerable to harm, and as a child with a mental illness and under a disability, enabled it to justify its protective oversight role in the assessment of *Gillick* competence.

The Full Court’s decision in *Re Jamie* – which affirmed that transgender children, insofar as their bodies and identities were concerned, were far from active shapers of their own lives – generated considerable dissatisfaction, including amongst the Family Court judiciary, legal commentators, and the medical profession (Kelly 2014; Bell 2015; Telfer, Tollit and Feldman 2013). In the absence of legislative reform (despite the ardent activism of the child the subject of the *Re Jamie* proceedings herself), the task befell the Full Court in the case of *Re Kelvin* to recognise and uphold the decisional privacy rights of transgender children. The *Re Kelvin* proceedings arose from an application by the father of a 16-year-old transgender young person, ‘Kelvin’, for authorisation of the administration of stage two treatment. A special bench of the Full Court 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 medical developments in the intervening period, noting that ‘the judicial understanding of [g]ender [d]ysphoria and its treatment have fallen behind the advances in medical science’ (*Re Kelvin* 2017, [152]). 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.

*Re Kelvin* has been touted 'the greatest advancement in transgender rights for children and adolescents in Australia' (Perkins 2017). Until the Full Court's decision, Australia remained the only country in the world in which court authorisation was required for the medical treatment of childhood gender dysphoria (Hewitt et al 2012). Yet the Full Court left open the possibility of court involvement where there is a 'genuine dispute or controversy' (*Re Kelvin* 2017, [167]) about whether treatment should be administered – such as if the child, the child's parents or treating doctors are unable to agree. Such potential conflicts are not confined to the dynamics of the parent-child relationship, but extend to the scope of institutional encroachment into the lives of children and families. The issue is how to protect and promote children's decision-making autonomy within what Jennifer Nedelsky (2012, 118) has called 'the (many) spheres of state power', and in particular, the dynamics of family relationships. The next section of this paper responds to the perceived conflictual consequences of recognising and respecting children's decisional privacy in family law proceedings.

### **Bestowing children with decisional privacy rights: allaying the anxieties about potential conflict**

A primary anxiety 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 (Tobin 2017, 53). According to Barbara Bennett Woodhouse (1992, 1839), '[a]ny acknowledgement of the sometimes conflicting interests of children seems to trigger the fear that a revolution of children's rights will overthrow parental authority'. However, to recognise children's decisional privacy in the family law context does not 'abandon' (Hafen and Hafen 1996) children to their rights. Children's interests are intertwined with those of their parents, and indeed these entangled interests can on occasion conflict – which the Family Court itself noted in *Re Kelvin*. However, the relationality of privacy and autonomy is such that it would be 'obviously awkward', as Jennifer Nedelsky (2008, 145) has observed, to conceptualise the parent-child relationship in circumstances of conflict or controversy as 'essentially one of competing interests to be mediated by rights'. This emphasis on relationality also assuages the fear that respecting children's decisional privacy will grant children a licence to do whatever they choose, and will chaotically invert the parent-child relationship and disrupt family dynamics.

Further, a relational approach to decisional privacy rights in practice means that, first, a child's rights cannot simply be 'weighed' or 'balanced' against the rights and interests of the child's parents and other family members; and secondly, that any issue involving decision-making in relation to a child (whether it be about healthcare, education, parenting arrangements or something else) cannot be dichotomised to a choice between the child or the parent making the decision. Rather, a child's exercise of his or her right to decisional privacy will involve discussion between the child and his or her parents, and the exchange of ideas, views and aspirations. It will also involve the provision of direction and guidance by the child's parents, consistent with the child's evolving capacities. And these actions will be bounded and regulated by the diversity of social norms that operate within families, or what John Eekelaar (2012, 94) has labelled the 'internal morality' of family life. 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 – even as controversial as medical treatment – that is such as to obviate the need for parental guidance and direction. This unique role of parents – to support and enable, yet also to 'back off' (Seymour 2016, 101) as the child matures – explains why a perceived 'conflict' between a child and his or her parents in relation to a decision to be made would not always amount to a 'genuine' conflict that would justify state intervention.

### **The social value of privacy: children as rights-bearing subjects of family law**

The final part of this paper briefly considers the social value of acknowledging and embracing children's decisional privacy in family law proceedings. In contemplating both the theoretical and

practical implications of re-conceptualising the meaning and value of privacy in proceedings under the Family Law Act, it is worth reciting Parkinson and Cashmore's (2008, 8) 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.' The value of recognising and respecting the decisional privacy of an individual child in one family law proceeding, or a group of children – such as transgender children, following the Full Court's decision in *Re Kelvin* – should not overlook the importance 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 more broadly.

Supporting and enabling transgender children to exercise decisional privacy in relation to their medical treatment promotes the values of respect, tolerance, and equality. The Family Court's role in this process also promotes a particular conception of children as active rights-bearing subjects and autonomous beings with distinct rights and interests, who can – and indeed, must – actively participate in decision-making about matters that fundamentally affect them. Privacy's value in this context thus also inheres in enhancing children's participation in community and public life, making it a 'profound dimension of social structure' (Solove 2008, 93). Taking a less myopic view of the value of children's decisional privacy – that is, conceptualising it as valuable for not only the child as an individual – enables us to recognise its significance as a societal good. On this view, decisional privacy has what Priscilla Regan (1995) has identified as a 'common value': it promotes and enables the values of autonomy, freedom of expression and preservation of identity, which are vital for children's development, and by extension, the development of liberal societies. Children's decisional privacy is also valuable in the family law context because giving children a 'voice' does not only, or simply, involve affording children the opportunity to speak, but also presents an opportunity for adults – including policy-makers, judges and academics – to consider what children's views and perspectives can offer to inform the development of family law research, policy and practice.

## Conclusions

The decisional dimension of privacy in relation to children has been largely overlooked, or at best, treated as a peripheral, latent consideration in proceedings under the Family Law Act. The aim of this paper has been to articulate a conception of privacy in Australian family law which embraces children's decision-making autonomy. The significance of the privacy-autonomy nexus in this context is that understanding children's privacy through its decisional lens, and moving beyond an understanding of children as vulnerable objects of family law proceedings, does not merely impact on judicial interpretations of the 'best interests' principle. Questioning the status of children under Australian family law challenges fundamental values and beliefs 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. As David Oswell (2013, 4) 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'.

Childhood gender dysphoria proceedings before the Family Court illustrate the relationship between decisional privacy and autonomy, and tensions between children's rights, parental responsibilities and the duty of the state to protect children and to promote their welfare. A defining feature of the welfare jurisdiction is its regulation of decision-making *for* or *on behalf of* children, premised upon an assumption of children's vulnerability, dependence and passivity. To protect children from the harm that might be inflicted by the (even well-intentioned) decision-making of their parents, judicial decisions in the exercise of the welfare jurisdiction have been made according to the 'best interests' principle; although the assessment of what is 'best' for the child in each case is made by judges, relying on the evidence and expertise of other adults (including the child's treating medical professionals and parents). This paper has shown that 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 special medical procedure cases illustrates that this protectionist rationale has

been superseded by perceptions of incursion, oppression and denial of transgender children's decisional privacy rights. The issue of whether judges are best placed – above parents, medical professionals and children themselves – to make what are arguably value judgments about the desirability of medical treatment for children, has necessarily shifted over time in response to changing community attitudes, advancements in medical science, and developments in understandings of children's rights and privacy. Disputed normative perspectives about the boundaries of state intervention in the 'private' family, and the changing dynamics of the parent-child relationship, will continue to present difficult choices for family law policy-makers, legislators and judges, about the extent to which children are, can be, and should be, recognised as rights-bearing subjects before the law.

## References

- Allen, Anita. 1987. "Taking Liberties: Privacy, Private Choice, and Social Contract Theory." *University of Cincinnati Law Review* 56: 461-491.
- Allen, Anita. 1988. *Uneasy Access*. Totowa: Rowman & Littlefield.
- Barton, Chris and Gillian Douglas. 1995. *Law and Parenthood*. London: Butterworths.
- Bell, Felicity. 2015. "Children with Gender Dysphoria and the Jurisdiction of the Family Court." *University of New South Wales Law Journal* 38: 426-454.
- Benn, Stanley. 1984. "Privacy, Freedom and Respect for Persons." In *Philosophical Dimensions of Privacy: An Anthology*, edited by Ferdinand Schoeman, 223-244. New York: Cambridge University Press.
- Bloustein, Edward. 1964. "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser." *New York University Law Review* 39: 962-1007.
- Bok, Sissela. 1983. *Secrets: On the Ethics of Concealment and Revelation*. New York: Vintage Books.
- Bryant, Diana. 2009. "It's my body, isn't it? Children, medical treatment and human rights." *Monash University Law Review* 35: 193-211.
- Chisholm, Richard. 2002. "The Paramount Consideration": Children's Interests in Family Law." *Australian Journal of Family Law* 16: 87-115.
- DeCew, Judith Wagner. 1997. *In Pursuit of Privacy: Law, Ethics and the Rise of Technology*. London: Cornell University Press.
- Dewar, John. 2000. "Family law and its discontents." *International Journal of Law, Policy and the Family* 14: 59-85.
- Diduck, Alison. 2011. "What is Family Law for?" *Current Legal Problems* 64: 287-314.
- Duffy & Gomes (No 2)* [2015] FCCA 1757 (21 May 2015) (Harman J).
- Eekelaar, John. 1994. "The interests of the child and the child's wishes: the role of dynamic self-determinism." In *The Best Interests of the Child: Reconciling Culture and Human Rights*, edited by Philip Alston, 42-61. Oxford: Clarendon Press.
- Eekelaar, John. 2002. "Beyond the Welfare Principle." *Child and Family Law Quarterly* 14: 237-249.
- Eekelaar, John. 2007. *Family Law and Personal Life*. Oxford: Oxford University Press.
- Eekelaar, John. 2012. "Self-Restraint: Social Norms, Individualism and the Family." *Theoretical Inquiries in Law* 13: 75-95.
- Fineman, Martha Albertson. 1999. "What Place for Family Privacy?" *George Washington Law Review* 67: 1207-1224.
- Gerety, Tom. 1977. "Redefining Privacy." *Harvard Civil Rights – Civil Liberties Law Review* 12: 233
- Gavison, Ruth. 1980. "Privacy and the Limits of Law." *Yale Law Journal* 89: 421-471.
- Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
- Inness, Julie. 1992. *Privacy, Intimacy and Isolation*. New York: Oxford University Press.
- Hafen, Bruce C and Jonathan O Hafen. 1996. "Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child." *Harvard International Law Journal* 37: 449-491.
- Hearst, Alice. 2012. *Children and the Politics of Cultural Belonging*. Cambridge: Cambridge University Press.
- Herring, Jonathan. 2014. *Relational Autonomy and Family Law*. Cham: Springer.
- Hewitt, J, Paul, C, Kasiannan, P, Grover, S, Newman L and G Warne. 2012. "Hormone treatment of gender identity dysphoria in a cohort of children and adolescents." *Medical Journal of Australia* 196: 578-581.
- Jourard, Sidney M. 1966. "Some Psychological Aspects of Privacy." *Law and Contemporary Problems* 31: 307-318.
- Kang, Jerry. 1998. "Information Privacy in Cyberspace Transactions." *Stanford Law Review* 50: 1193-1294.
- Kelly, Fiona. 2014. "Treating the transgendered child: The Full Court's decision in *Re Jamie*." *Australian Journal of Family Law* 28: 83-94.
- Lever, Annabelle. 2012. *On Privacy*. New York: Routledge.
- Mitnick, Eric J. 2006. *Rights, Groups, and Self-invention: Group-differentiated Rights in Liberal Theory*. Aldershot: Ashgate.
- Nedelsky, Jennifer. 1989. "Reconceiving Autonomy: Sources, Thoughts and Possibilities". In *Law and the Community: The End of Individualism?*, edited by Allan Hutchinson and Leslie Green, 219-252. Toronto: Carswell.
- Nedelsky, Jennifer. 2008. "Reconceiving Rights and Constitutionalism." *Journal of Human Rights* 7: 139-173.
- Nedelsky, Jennifer. 2012. *Law's Relations: A Relational Theory of Self, Autonomy and Law*. Oxford: Oxford University Press.

- Nissenbaum, Helen, 2010. *Privacy in Context: Technology, Policy, and the Integrity of Social Life*. Stanford Law Books.
- O'Neill, Onora. 1988. "Children's Rights and Children's Lives." *Ethics* 98: 445-463.
- Oswell, David. 2013. *The Agency of Children: From Family to Global Human Rights*. Cambridge: Cambridge University Press.
- Parkinson, Patrick and Judy Cashmore. 2008. *The Voice of a Child in Family Law Disputes*. Oxford: Oxford University Press.
- Perkins, Miki. 2017. "'I want control over my body': Transgender kids in landmark court win." *The Age*, November 30. <https://www.theage.com.au/national/victoria/i-want-control-over-my-body-transgender-kids-in-landmark-court-win-20171130-gzw6z4.html>
- Rachels, James. 1975. "Why Privacy is Important." *Philosophy and Public Affairs* 4: 323-333.
- Re Alex: Hormonal Treatment for Gender Dysphoria* (2004) 31 Fam LR 503.
- Re Jamie* (2013) FLC 93-547.
- Re Kelvin* [2017] FamCA 78.
- Re Lucas* [2016] FamCA 1129 (22 December 2016).
- Re: Lucy (Gender Dysphoria)* [2013] FamCA 518 (12 July 2013).
- Re: Sean and Russell (Special Medical Procedures)* [2010] FamCA 948 (26 October 2010).
- Re Tahlia* [2017] FamCA 715 (8 September 2017).
- Regan, Priscilla. 1995. *Legislating Privacy: Technology, Social Values and Public Policy*. Chapel Hill: University of North Carolina Press.
- Reiman, Jeffrey. 1976. "Privacy, Intimacy & Personhood." *Philosophy and Public Affairs* 6: 26-44.
- Rossler, Beate. 2005. *The Value of Privacy*. Oxford: Polity.
- Schoeman, Ferdinand. 1984. "Privacy and Intimate Information." In *Philosophical Dimensions of Privacy: An Anthology*, edited by Ferdinand Schoeman, 403-418. New York: Cambridge University Press.
- Secretary, Department of Health & Community Services v JWB & SMB ('Marion's Case')* (1992) 175 CLR 218.
- Seymour, John. 2016. *Children, Parents and the Courts: Legal Intervention in Family Life*. Sydney: Federation Press.
- Solove, Daniel. 2002. "Conceptualizing Privacy." *California Law Review* 90: 1088-1155.
- Solove, Daniel. 2006. "A Taxonomy of Privacy." *University of Pennsylvania Law Review* 154: 477-564.
- Solove, Daniel. 2008. *Understanding Privacy*. Cambridge, Massachusetts: Harvard University Press.
- Telfer, Michelle, Tollit, Michelle and Debi Feldman. 2015. "Transformation of health-care and legal systems for the transgender population: The need for change in Australia." *Journal of Paediatrics and Child Health* 51: 1051-1053.
- Thomson, Judith Jarvis. 1975. "The Right to Privacy." *Philosophy and Public Affairs* 4: 295-314.
- Tobin, John. 2009. "Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?" *Melbourne University Law Review* 33: 579-625.
- Tobin, John. 2017. "Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC." In *Handbook of Children's Rights: Global and Multidisciplinary Perspectives*, edited by Martin D Ruck, Michele Peterson-Badali and Michael Freeman, 53-67. New York: Routledge.
- van Krieken, Robert. 2005. "The 'Best Interests of the Child' and Parental Separation: On the 'Civilizing of Parents'." *Modern Law Review* 68: 25-48.
- Wallbank, Rachel, 2004. "Re Kevin in perspective." *Deakin Law Review* 9: 461-502.
- Warren, Samuel D and Louis D Brandeis. 1890. "The Right to Privacy." *Harvard Law Review* 4: 193-220.
- Westin, Alan. 1967. *Privacy and Freedom*. New York: Atheneum.
- Woodhouse, Barbara Bennett. 1992. "Hatching the Egg: A Child-Centered Perspective on Parent's Rights." *Cardozo Law Review* 14: 1747-1865.