

The Commission for Children and Young People and Child Guardian

promoting and protecting the rights, interests and wellbeing of all Queenslanders under 18

Advice to: Department of Justice and Attorney-General
Topic: Non-Consensual Genetic Testing Discussion Paper
Date due: 31 January 2009

Thank you for providing the Commission for Children and Young People and Child Guardian (the Commission) with the opportunity to comment on the *Non-Consensual Genetic Testing Discussion Paper* (the Discussion Paper).

The Commission will limit its comments to the area of genetic testing relating to parentage, particularly paternity testing. Although the Discussion Paper does not specify how consent for parentage testing on behalf of a child is to be given, the Commission is aware of the recommendation made in the Australian Law Reform Commission Report 96¹ (the Report) that all persons with parental responsibility for the child must provide consent to such testing. The Commission has concerns that this recommendation may be accepted with a result that men could be barred from using genetic testing to prove or disprove their paternity of a child and consequently be forced to pay ongoing child support for a child who is not their own, and with this unjust situation validated in the name of the best interests of the child principle.

Summary of Commission's position:

The Commission does not support a requirement that all persons with parental responsibility for a child must consent to a parentage test on the basis that it could:

1. facilitate the misapplication of the 'best interests of the child' principle to perpetrate fraudulent behaviour or facilitate injustice, and
2. be used to deny a child the right to know his or her true identity and have a relationship with his/her biological father.

1. Misapplication of the 'best interests of the child' principle to support injustice

If all persons with parental responsibility for a child are to be required to consent to parentage testing of the child, men could be blocked from finding out for certain if they are the father of a child if the child's mother does not agree to genetic testing. This is more likely to occur if there is uncertainty around a child's paternity. This could result in men being forced to pay child support for many years for children who are not theirs, or conversely, denied access to children who are.

The Commission recognises that a man who had previously played a fathering role in a child's life could withdraw his love and support of the child on finding out that he is not the biological father, and that this would not be good for a child, but the Commission is also concerned that using the best interests of the child principle to systematically deny men the evidence they need to disprove paternity is contrary to all notions of justice.

Policies that prevent men from disproving paternity, combined with policies of mandatory child support payments by the person identified by the mother to be the child's biological father, have the potential to create a great injustice in the name of the child's best interests.

The Commission is strongly opposed to having the child's best interest argument used to justify such injustice and perpetuate what amounts to fraudulent behaviour. The justice system does

¹ *Essentially Yours: The Protection of Human Genetic Information in Australia*

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not support, in any other context, the systematic restriction of access to crucial evidence that would otherwise enable a person to rebut a presumption imposed upon them, prove their innocence or abate liability, on the basis that it is in the interests of another person for this evidence not to be obtained or disclosed.

The Commission is concerned that enabling the 'best interests of the child' principle to create such unjust outcomes would devalue this principle and create an active hostility towards it in the general public. The Commission is very supportive of the best interests of the child principle and is of the opinion that to continue to maintain its integrity and respect for it, it must not be manipulated to create unfair or dishonest advantages or disadvantages for others.

2. A child's right to know his or her true identity

A child's entitlement to know the truth about his or her personal identity is enshrined in the *United Nations Convention on the Rights of the Child*² which the Commission considers should be the minimum standard to be applied in matters relating to children. Article 7 provides that a child shall have "*as far as possible, the right to know and be cared for by his or her parents*". Article 8 requires parties to respect the right of the child to "*preserve his or her identity, including nationality, name and family relations as recognised by law without lawful interference*".

The Commission is of the view the proposition of requiring all persons with parental responsibility for the child to consent to parentage testing could result in the denial of the child's right to know his or her true identity including, any associated medical issues. This, in the Commission's view, cannot be imposed unilaterally and be determined as being 'in the child's best interest'.

Accordingly, the Commission does not support any change to the legislation to require that all persons with parental responsibility for a child consent to a parentage test.

Please do not hesitate to contact Helena Kolenbet, Senior Policy Officer, Strategic Policy and Research (ph: 3405 5228; e-mail: helena.kolenbet@ccypcg.qld.gov.au) should any aspects of this advice require clarification.

² which was ratified by the Commonwealth of Australia on 17 December 1990