INTRODUCTION

The Family Law Council

The Family Law Council is a statutory authority established by section 115 of the Family Law Act 1975. Under sub-section 115(3) of the Act, the functions of Council are to advise and make recommendations to the Minister concerning:

• the working of the Family Law Act 1975 and other legislation relating to family law;
• the working of legal aid in relation to family law; and
• any other matter relating to family law.

Council’s advice and recommendations to the Attorney-General may be “either of its own motion or upon request made to it by the Attorney-General”.

Council members

Members of the Family Law Council at the time of this submission are:

Professor John Dewar Chairperson
Ms Josephine Akee
Mr Kym Duggan
Ms Tara Gupta
Ms Susan Holmes
Ms Kate Hughes
Mr Mark McArdle
Professor Patrick Parkinson
Federal Magistrate Judith Ryan
The Council currently has the following observers:

Ms Sheila Bird  
Ms Lani Blackman  
Ms Jennie Cooke  
Ms Margaret Harrison  
Ms Anne Rees  
Mr Stephen Thackray  
Ms Ruth Weston  

Child Support Agency  
Australian Law Reform Commission  
Family Court of Australia  
Senior Legal Adviser to the Chief Justice of the Family Court of Australia  
Law Council of Australia  
Family Court of Western Australia  
Australian Institute of Family Studies

Observers take part in Council’s discussions on issues but do not participate in Council’s decision making.

Consideration of the Discussion Paper: Chapter 31 - DNA Parentage Testing

The Family Law Council has limited its consideration of the Discussion Paper to Chapter 31 - DNA Parentage Testing.

Council has been considerably assisted in its deliberations by the guidance and advice provided by Ms Lani Blackman, a Council Observer representing the ALRC. The Council examined a confidential draft chapter at its Perth meeting in May 2002 and a revised chapter at its Rockhampton meeting in August 2002. At the latter meeting it was agreed Council should, subject to the approval of the Attorney-General, draft a submission. The draft was circulated to Council, discussed and finalised at its Canberra meeting on 21-22 November 2002.

Council was impressed with the thoroughness of the analysis presented on the complex issues under examination. Unless stated to the contrary Council endorses the Proposals set out in this chapter.

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Council’s Submission: Chapter 31- DNA Parentage Testing

In its submission the Family Law Council has restricted its comments to Chapter 31, DNA Parentage Testing, as it considered the issues raised in this chapter of the Discussion Paper are relevant to its area of special interest.

Proposal 31-8: Consent in Relation to Testing of Children

2. Council understands that the proposed process for seeking the consent of the donor of genetic information, with respect to child-donors, has two elements:

(a) Decision making by mature children, that is children who have attained 12 years of age are, subject to an assessment procedure able to provide or withhold consent; and

(b) Decision making by immature children, that is children who, for reasons either of immaturity – they have not attained 12 years of age - or incapacity, are unable to provide or withhold consent on their own behalf.

3. A threshold issue is whether the decision to have a child undergo parentage testing is of such a type that it should be removed from the normal sphere of parental decision-making. The Discussion Paper notes that as the law stands there is no provision for children to consent to or refuse parentage testing. The regulatory framework is cognisant only of the consent of the parent (or the person responsible for the long term care, welfare and development of the child). But is a decision to have a child undergo parentage testing one that should be left with the parent(s)?

4. The prime example of where parental capacity to make decisions with respect to children has been judicially limited is the case of sterilization. Hence, in the case of sterilization for non-therapeutic purposes the parents’ normal power to authorise medical procedures is circumscribed by having the decision-making power vested in the Court. Also important in this context is the notion of parental powers diminishing or ‘dwindling’ as the child matures: as Lord Denning aptly says ‘[i]t starts with a right of control and ends with little more than advice’.

5. As the Discussion Paper makes clear the results of such testing are particularly sensitive, and may be disclosed in a highly emotionally charged atmosphere. The outcome of such a test may mean that ‘In the case of a paternity dispute, the life of a child will undoubtedly be fundamentally changed by the results’. These consequences are forcefully spelt out in the Discussion Paper at paragraph 31.69. What the Discussion Paper proposes is a statutory limitation of parental powers where children attain 12 years of age such that a parent will no longer be able to submit a genetic sample from his or her child for parentage testing without the consent of the child.

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1 See section 69Z(2), Family Law Act 1975 (Cth)
2 Secretary, Department of Health and Community Services V JWB and SMB (‘Marion’s case) (1992) 175 C.L.R. 218
6. The Discussion Paper notes that Council has previously taken a position supporting the removal of just such an arbitrary statutory ‘age of maturity’ from the *Family Law Act*. Then the age was 14 and, under what was then section 64(1)(b) of the *Family Law Act*, a Court was prevented from making a parenting order contrary to the wishes of the child unless ‘special circumstances’ could be demonstrated. As Council’s Working Paper examining this issue noted:

This means that it is the child’s wishes, and not the Court’s concept of what the welfare of the child requires, which is the determinative factor in the first instance.6

7. The Discussion Paper’s proposal 31-8 differs from the matter previously examined by Council in several respects. But there are common issues that make a fuller consideration of the Working Paper’s analysis worthwhile. A key difference between the two matters is that the Discussion Paper’s proposal would see no role for a Court to either balance competing interests or determine the child’s best interests; there is no formal process for considering best interests as such. Rather, what is proposed is that a range of appropriately qualified professionals with previous associations with the child in question would have a two-fold function, both to:

i. assess the child’s capacity to make an informed decision (but this inquiry is not envisaged as trespassing into the realm of whether the decision itself is in the child’s best interests); and

ii. guard against parental coercion.

8. With respect to (ii) Council’s earlier Working Paper noted that undue influence is ‘often accomplished by subtle pressure’.7 Thus it may in practice prove difficult for at least some of the professionals to make such a judgement based on their particular experience and expertise dealing with these sorts of forensic issues.

9. In addition, several of the reasons for the recommendation to repeal the statutory age of maturity (14) in Council’s Working Paper may be usefully considered in light of the Discussion Paper’s proposal. The Working Paper argued that setting the age of 14 in section 64(1)(b):

- was peremptory and attached too much significance and weight to the wishes of the child;
- often resulted in parents exerting undue influence on the child;8
- placed the responsibility and burden of an ‘adult’s decision’ onto the shoulders of a child; and
- legislated for an age of maturity when ‘there appears to be considerable divergence of opinion on the part of psychiatrists, social workers and psychologists as to the age at when (sic) a child has the capacity to make a decision as to which parent is to be his custodian’.9

7 ibid.22
8 ibid. 10
9 ibid 27-29; this is acknowledged in the Discussion Paper at para 31.95, and 31.107.

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10. There have been many changes in social attitudes, and in legal frameworks, concerning children’s involvement in decision-making affecting them. So what may have been seen as giving undue weight to a child’s view or over-involvement in decision-making may no longer be seen as such. Likewise the category of ‘adult decisions’ may also not be as clear-cut as it once was.

11. Finally the Working Paper has some useful observations on ascertaining a child’s wishes, which again, may usefully be considered to the extent that they may be applicable to proposal 31-8. The strong preference expressed in the Working Paper to ascertain the child’s wishes was for the use of a welfare report prepared by a Family Court Counsellor. The rationale for this was that lawyers, including judges, ‘do not have the necessary expertise to undertake such a sensitive role’. The Working Paper also urges that steps be taken to ensure that a child, prior to expressing a wish, should understand the meaning and significance of the decision. And this function is seen as being the preserve of lawyers, and complementary to the role of the Court Counsellor.

12. In contrast, the proposed procedure has no mechanism to ensure that a child is informed about the meaning and significance of the decision. It might be argued that a professional attesting to the child’s capacity to make a free and informed decision is different from the decision in fact being either free or informed. Moreover, while the discussion preceding proposal 31-8 refers to the nature of consent, proposal 31-8 itself is silent as to ascertaining the voluntariness or otherwise of the consent involved. Council supports an assessment of the quality of consent being undertaken in appropriate cases.

**Decision making by mature children**

13. Council suggests that the proposal for assessing the maturity of a child aged 12 or older need not be universal. Rather, the procedure for evidencing a child’s maturity should only be triggered where:

   (a) the parents disagree; or
   (b) the child and a parent disagree

14. The Council is concerned that there are too many hurdles proposed for a mature child to override parental consent. Under the current procedures, even where all parties agree on testing the proposal would never-the-less require an elaborate procedure. Notwithstanding this, as noted above, the procedure is of itself not an assurance of the child’s voluntary consent, as coercion may still have occurred.

15. Council suggests that the issue of consent could be resolved in a less formal and legalistic way. For example, it is not apparent from the material in the Chapter that where all parties agree there is a need for the process to involve a professional assessment of the donor child.

16. Council is also concerned that the proposed procedure requires disclosure of extremely sensitive material to a professional who must have known the child for at least two years (teacher, social worker, doctor, or minister) and who will, it is presumed, have an on-going relationship with the child. This is seen as inappropriate precisely because of the on-going

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10 For example the consequences of Australia becoming a party to the *Convention on the Rights of the Child.*

11 ibid 30
relationship with the child. Hence, while a familiarity with the child may bring with it advantages it may also have drawbacks. Council also proposes a narrowing of the proposed qualifications required of the professionals. This is justified given the diminution in the number of children who would be required to be assessed under its alternative proposal, see below.

17. Council notes that the recommended process for checking whether a child's consent was made under duress or voluntarily is very loose. It suggests that perhaps, at the assessment stage, some effort might be invested in looking at the questions of maturity and genuineness of consent.

**Alternative Procedure: Mature children and their consent to parentage testing**

18. As noted above, Council considers that proving capacity for all mature children is too onerous - instead an alternative scheme may be that:

i. a consent form has to be signed by every child aged 12 and over;

ii. where the samples and consent forms of both parents accompanied the child's sample and consent form, there is no need for proof of the child's capacity and understanding;

iii. where only one parent's sample and consent form is sent with the child's sample and consent, the child's consent form would have to be accompanied by an assessment of maturity and informed consent completed by either a family and child counsellor, a social worker or a psychologist. The limited number of expected cases combined with the importance of the situation justifies a higher level of intervention than the general capacity monitoring suggested by the Discussion Paper;

iv. if the child refused to consent, the parent or parents would need to seek a court order that a test was in the best interests of the child – given the availability (and it is assumed, the stipulated use) of non-invasive means of collecting a sample for testing this would allow parentage testing to be conducted – the court order taking the place of the child’s consent form;

v. in the case of a single parent and child sample, that is where one parent refused to consent, and if the child was found not to have capacity, then the procedure would revert to the Discussion Paper’s proposal that two parents’ samples and consent are required (i.e. testing cannot proceed with one parent and immature child). An application could be made to the Court for an order that parentage testing be carried out.

**The ‘best interests of the child’**

19. Council is currently working on a project which examines the application of section 65E of the Family Law Act. Section 65E provides that ‘In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.’ A parenting order is defined in section 64B as an order made under Part VII of the Act and dealing with either:

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12 As defined in section 4 of the Family Law Act 1975.
13 For a description see Discussion Paper para 31.88
(a) the person or persons with whom a child is to live;
(b) contact between a child and another person or other persons;
(c) maintenance of a child; or
(d) any other aspect of parental responsibility for a child.

20. Section 61B defines *parental responsibility*, in relation to a child, as meaning all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

21. Section 68F sets out how a court determines what is in a child’s best interests, and includes ‘the need to protect the child from physical or psychological harm…’: section 68F(2)(g).

22. Orders for carrying out of parentage testing procedures may be made under section 69W. It is clear that the best interests or so-called paramountcy principle only applies to those decisions which it is expressed to apply, including the making of parenting orders. However while not the paramount consideration the child’s best interests will still be an important consideration.

23. Council would raise the question whether, or in what circumstances parentage testing can be considered to be in the ‘best interests of the child’. Adopting the Discussion Paper’s categories this may raise different considerations in the case of children who have attained 12 years of age and those who have not (see item 4 in the Alternative Procedure set out above). In making such a decision, a Court would need to apply particular criteria, such as those in section 68F. Given the particular issues involved in parentage testing, do these criteria adequately reflect the factors that should be taken into account?

**Drawing of inferences**

24. In the case of refusals to consent to testing by a parent, Council notes that sections 69Y(2) and 69Z(3) are specific provisions providing for an ability to draw negative inferences in appropriate cases of failure to comply with a court order or refusal to consent.

**Counselling**

25. While conscious of the cost implications, Council recommends that counselling for the child should be required whenever parentage testing is done and the test results are different from the child’s current understanding of paternity.

26. The Council endorses Proposal 31-12. In particular, the results of Court ordered tests should not be released to the parties but to a suitable intermediary who has the experience and expertise to deal with the complex issues that arise with parentage testing. Council understands

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16 See Discussion Paper para 31.125
that currently in some instances parties find out the results before the Court that ordered the test does.  

27. Council recommends that resources be developed to accompany test results. This could include a brochure containing information and advice on disclosing the results and listing referral services that could assist.

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17 See also Discussion Paper para 31.133