Implications of Genetic Testing for Australian Employment Law and Practice

Associate Professor Margaret Otlowski

Centre for Law and Genetics
Occasional Paper No 2

Centre for Law and Genetics
# Table of Contents

Table of Contents ................................................................. iii  
Chapter One: Introduction ....................................................... 1  
1.1 About this Report ......................................................... 1  
1.2 The Nature of Genetic Disorders ........................................ 2  
1.3 The Human Genome Project ............................................. 5  
1.4 Benefits and Burdens .................................................... 5  
Chapter Two: The Current Position: Australian Law and  
Practice in Relation to the Use of Genetic  
Information in the Workplace .................................................. 8  
2.1 The Practical Context of Genetic Testing in the  
Workplace ............................................................................. 8  
2.2 Extent of the Practice in Australia? ................................. 10  
2.3 No Specific Legal Regulation .......................................... 11  
2.4 Requirement of Consent to Testing ................................. 12  
2.5 Is the Consent of an Applicant/Employee Really  
Voluntary? ........................................................................... 13  
2.6 Potential for Genetic Discrimination and  
Protection Under Anti-Discrimination  
Legislation ............................................................................ 13  
2.7 Limitations on the Operation of Anti-  
Discrimination Legislation .................................................... 18  
2.7.1 Material Differentiation and ‘Justified’  
Differential Treatment ....................................................... 18  
2.7.2 Exemptions Under Anti-Discrimination  
Legislation ............................................................................ 20  
2.8 Employers’ Duty to Protect Workers from Harm  
to Themselves .................................................................... 26  
2.9 Employers’ Obligation to Protect Third Parties .............. 29  
2.10 Scope of Protection under Anti-Discrimination  
Legislation and Issue of Onus of Proof .............................. 32  
2.10.1 Enforcement Issues .................................................. 33  
2.11 Conclusions Regarding Legal Regulation of Use  
of Genetic Test Information in the Workplace .................... 33  
Chapter Three: Is There a Need for Change? ....................... 34  
3.1 Arguments in Favour of the Use of Genetic Test  
Information by Employers .................................................. 34  
3.1.1 Protection of Employers’ Interests .............................. 34  
3.1.2 Protection of Third Parties ....................................... 36  
3.1.3 Potential Benefits for Applicants ............................... 37
3.1.4 Public Interest Considerations..........................38
3.2 Arguments Against the Use of Genetic Test
   Information by Employers.................................38
   3.2.1 Potential Prejudice to Applicants..................38
   3.2.2 Public Interest Objections..........................45
3.3 Evaluation of Arguments For and Against the Use
   of Genetic Test Information by Employers............46
Chapter Four: Approaches to Reform..........................48
   4.1 Retention of the Status Quo...........................48
   4.1.1 Indications that Some Change is Required.......49
   4.2 Absolute Prohibition on the Use of Genetic Test
       Information by Employers..............................51
   4.3 Restricted Use of Genetic Test Information by
       Employers..............................................54
       4.3.1 Allowing Access to Existing Genetic Test
           Information but Prohibiting Genetic Testing
           as a Precondition for Employment...............54
       4.3.2 Strengthening Protection Against Genetic
           Discrimination......................................55
       4.3.3 A Policy Against Allowing the Use of Genetic
           Test Information with Some Specified
           Exceptions........................................56
   4.4 Privacy Issues: Regulation of the Use of Genetic
       Information by Employers............................76
       4.4.1 Background.......................................76
       4.4.2 Privacy Amendments: Privacy Amendment
           (Private Sector) Act 2000 (Cth)..................80
       4.4.3 Review and Critique of the Privacy
           Amendment (Private Sector) Act 2000 (Cth).....81
Chapter Five: Findings........................................88
Chapter Six: Recommendations..................................90
Appendix 1..................................................94
Implications of Genetic Testing for
Australian Employment Law and
Practice*

Chapter One: Introduction

1.1 About this Report

This paper is in the form of a report prepared on behalf of our research team (Professor Don Chalmers, Professor Loane Skene, Associate Professor Margaret Otlowski and Dr Dianne Nicol) as part of a project, funded by the Australian Research Council, to investigate the legal and ethical implications of the human genome project from an Australian perspective. The focus of this report is an examination of the implications of the human genome project for Australian employment law and practice. A separate report, exploring the impact of genetics developments in the area of insurance law and practice has also been published.

This report follows on from a discussion paper, which was sent to organisations and individuals having an interest in the area for their comment - our group taking the view that this research should be informed by consultation with the key stakeholders. Those consulted included prominent geneticists and other health care professionals working in the field of genetics, organisations representing people with genetic disabilities, the presiding officers of the Commonwealth, State and Territory Anti-Discrimination Tribunals, and organisations representing employers and employees. As a result of this targeted consultation process, in

---

*This paper is current as at December 2000.

1 The introductory parts of this report (1.1-1.4) have been substantially reproduced from the Insurance Report by the same author - see below n 3.

2 We also wish to acknowledge the valuable research assistance from Ms Catherine Hughes. Sincere thanks also to Tristan Taylor and Imogen Goold for their assistance with the formatting and presentation of this report.

3 Implications of Genetic Testing for Australian Insurance Law and Practice (Occasional Paper No 1, Centre for Law and Human Genetics, University of Tasmania and University of Melbourne, 2001).