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**Ms Jessica Smith  
v Redflex Traffic  
Systems Pty Ltd**

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[2018] AusHRC 125

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**Ms Jessica Smith v  
Redflex Traffic Systems Pty Ltd**

[2018] AusHRC 125

Report into discrimination in  
employment on the basis of criminal  
record

Australian Human Rights Commission 2018



Australian  
Human Rights  
Commission

# Contents

1	Introduction to this inquiry	7
2	Summary of findings and recommendations	7
3	Background to complaint by Ms Smith	7
4	Ms Smith's criminal record	9
5	Submissions by Redflex	9
6	Relevant legal framework	11
7	Issues for consideration	12
7.1	Is there an act or practice?	12
7.2	Does the act involve a distinction, exclusion or preference on the basis of criminal record?	12
7.3	Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?	13
7.4	Was the exclusion made on the basis of the inherent requirements of the role?	13
(a)	Identifying the 'inherent requirements'	14
(b)	Redflex's submissions on inherent requirements	14
(c)	Redflex's contract with Roads and Maritime Services	15
(d)	Assessment of the 'inherent requirements'	16
8	'Based on'	20
8.1	Requirement one: that the person be trustworthy and of good character	20
(a)	Consideration	23
8.2	Requirement two: that the person be able to behave calmly and professionally in hostile or potentially volatile situations	24
8.3	Requirement three: that the person be able to appropriately handle proprietary information	24
8.4	Requirement four: that the person has a driving record that demonstrates a commitment to road safety.	24
9	Criminal record checks and context	25
10	Summary	26
11	Recommendations	26
12	Consideration of compensation	27
13	Redflex's policies and training	28
14	Redflex's response	30



Australian  
Human Rights  
Commission

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The Hon Christian Porter MP  
Attorney-General  
Parliament House  
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of discrimination in employment on the basis of criminal record made by Ms Jessica Smith against Redflex Traffic Systems Pty Ltd (Redflex).

I found that Redflex's decision to rescind Mrs Smith's offer of employment constituted an exclusion based on her criminal record. Such an exclusion had the effect of impairing Ms Smith's equality of opportunity or treatment in employment or occupation. I found that this exclusion was not based on the inherent requirements of the job. As a result, I found that Redflex discriminated against Ms Smith on the basis of her criminal record.

In light of my findings, I recommended that Redflex revise its policies regarding the recruitment of people with criminal records in line with the Commission's publication, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (Guidelines).

In addition, I recommended that Redflex conduct training for its recruitment, human resources and management staff involved in employment decisions, informing them of fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements of the role.

I also recommended that Redflex pay Ms Smith an amount in compensation reflecting the hurt, humiliation and distress experienced by her as a result of Redflex's conduct.

Redflex provided its response to my findings and recommendations on 11 April 2018. I have set out Redflex's response in Part 14 of this report.

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To its credit, I note that Redflex has adopted all of my recommendations and has since implemented its own anti-discrimination policy which specifically deals with discrimination in employment on the basis of criminal record. I commend Redflex for these actions and for its approach to my recommendations.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Rosalind Croucher".

Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

July 2018

# 1 Introduction to this inquiry

1. This is a notice setting out the findings of the Australian Human Rights Commission ('Commission') following an inquiry into a complaint by Ms Jessica Smith against Redflex Traffic Systems Pty Ltd ('Redflex') alleging discrimination in employment on the basis of her criminal record.
2. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act').

# 2 Summary of findings and recommendations

3. As a result of this inquiry, I have found that Ms Smith was discriminated against by Redflex on the basis of her criminal record.
4. In light of my findings, I recommend that Redflex:
  - pay Ms Smith an amount of \$2500 in compensation reflecting the hurt, humiliation and distress experienced by her as a result of Redflex's conduct
  - revise its policies with regards to the recruitment of people with criminal records in line with the Commission's publication, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, and
  - conduct training for its recruitment, human resources and management staff involved in employment decisions, informing them of fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements of the role.

# 3 Background to complaint by Ms Smith

5. Ms Smith made a complaint in writing to the Commission on 25 November 2016 alleging discrimination in employment on the basis of her criminal record.
6. In her complaint, Ms Smith stated that:
  - on 7 September 2016, she applied for the role of Mobile Speed Camera Operator ('MSCO'). This role was advertised by Redflex on the online job platform Seek ([www.seek.com.au](http://www.seek.com.au))
  - on 21 September 2016, Redflex invited her to interview for the position

### 3 Background to complaint by Ms Smith

- on 23 September 2016, Redflex contacted her to tell her that she had performed very well at the interview and offered her the position of MSCO. She was advised that she would be required to undergo a criminal history check and a medical assessment
- she responded by indicating that a National Police Check ('NPC') would likely return a record of disclosable offences. She requested that the NPC be conducted prior to her medical assessment so that resources would not be wasted if there were problems with her criminal history
- she did not hear back from Redflex the following week as anticipated
- she made repeated attempts to contact Redflex about the progress of her application
- on 18 October 2016, she was advised by Redflex via telephone that her application would not be progressed any further because of her criminal history. She was told that Redflex was withdrawing her offer of employment because certain regulatory bodies are strict about issuing licences to people who have a criminal history
- during this conversation, she requested a copy of the information relating to her criminal history that Redflex was relying upon so that she could verify its accuracy. She also asked if she would be given the opportunity to explain her past offences. Redflex indicated that she should send through a written request for information
- the following day, on 19 October 2016, she made a written request for information which included the following questions:
  - 1) Can you please advise which Accredited Organisation conducted the Police Check on behalf of Redflex?
  - 2) Can you please provide me with the results of the criminal history check? I would like to verify the accuracy of the information you have.
  - 3) Can you please confirm the reason the offer of employment was retracted at this stage in the recruitment process?
  - 4) Does my specific criminal record mean that I cannot fulfil the inherent requirements of this particular job?
  - 5) Can you please advise who makes these types of decisions regarding recruitment?
  - 6) Are you able to advise why I've not been given an opportunity to explain my circumstances or to provide further information in support of my application (character references for example)?
  - 7) You have mentioned that a licencing body may have certain criteria against which candidates are checked. Can you please advise which licencing body had access to my personal information for the purposes of this assessment?

- 8) For what exact purpose was the licencing body conducting an assessment (obtaining a specific type of security clearance for example)?
  - 9) Is there any avenue for me to appeal this decision?
- she did not receive any response to these questions, despite sending two follow-up emails on 7 November 2016 and 15 November 2016, and
  - on 25 November 2016, after no response from Redflex, she made a written complaint to the Commission.

## 4 Ms Smith's criminal record

7. Ms Smith has been convicted of two offences, as listed below:

Court date	Offence	Sentence
3 November 2004	Assault occasioning actual bodily harm	Community service order. 80 hours.
16 May 2007	Possess prohibited drug (marijuana)	Fined \$150 plus \$67 in court costs.

## 5 Submissions by Redflex

8. By letter dated 22 February 2017, Redflex responded to Ms Smith's complaint and submitted that:

- on 7 September 2016, it received an application from Ms Smith for employment in the role of MSCO. The MSCO position is an operational role that exists in the Mobile Speed Camera Program which is delivered by Redflex on behalf of its client, Roads and Maritime Services NSW ('RMS'). MSCOs are responsible for the deployment of car-mounted mobile speed cameras
- the text of the online job advertisement for the MSCO role clearly set out the requirement that a criminal record check be undertaken and passed to the satisfaction of Redflex
- it did not dispute that Ms Smith's application for employment as an MSCO was unsuccessful because of her criminal history

- it accepted that, subsequent to her interview, it made Ms Smith an informal offer of employment. However, the offer was explicitly made subject to probity checks. This was made clear to Ms Smith and her subsequent emails to Redflex reflected her understanding of this
- it did not formalise the offer of employment to Ms Smith because of her 'unsatisfactory' NPC
- this did not amount to discrimination because, given the results of Ms Smith's NPC, she was unable to perform the inherent requirements of the role of MSCO
- it was obliged by its contract with RMS to ensure that all employees engaged to work within the Mobile Speed Camera Program are subject to pre-employment probity checks, including an NPC
- this contractual obligation meant that a satisfactory outcome of probity checks is an inherent requirement of the role. The inherent requirement is an outcome of the context of the role, being the contract with RMS
- the nature of Ms Smith's criminal record led Redflex to reasonably make the judgement that RMS would not accept Ms Smith as a 'fit and proper person' and would require her removal from the project, and
- it made this judgment based on the high public profile of the project and the proprietary information to which all employees in the Mobile Speed Camera Program are given access to and responsibility for.

9. The Commission received further submissions from Redflex on 2 November 2017 in response to a preliminary view that I issued in this matter on 28 September 2017. Redflex accepted that it had 'discriminated when it determined that Ms Smith was not a suitable candidate' but submitted that this discrimination was not unlawful. Redflex summarised its further submissions as follows:

1. The 'Inherent Requirements of the job' is, at least in part, a subjective judgment and not all inputs into the decision-making process on 'Inherent Requirements of the Job' can or should be measured against mechanical or objective factors.
2. Redflex is entitled to exercise this subjective judgement on its own behalf and on behalf of RMS under the implied authority of RMS by necessity and for business efficacy (pursuant to the written contract between Redflex and RMS).
3. The decision of the New South Wales Office of the Children's Guardian in relation to a successful Working with Children Check for Ms Smith is not relevant to, and should be inadmissible, or little weight should be placed on such evidence in these proceedings.

...

10. I address these submissions below.

## 6 Relevant legal framework

11. Part II, Division 4 of the AHRC Act is concerned with the Commission's functions relating to equal opportunity in employment.
12. Section 31(b) of the AHRC Act confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) requires that the function of the Commission under s 31(b) be performed by the President.
13. Section 3(1) of the AHRC Act defines discrimination for the purposes of s 31(b) as:
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  - (b) any other distinction, exclusion or preference that:
    - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
    - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

  - (c) in respect of a particular job based on the inherent requirements of the job; or
  - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.
14. The Australian Human Rights Commission Regulations declare that a distinction, exclusion or preference made on the basis of criminal record may constitute discrimination under the AHRC Act.<sup>1</sup>

# 7 Issues for consideration

15. In deciding whether there has been discrimination within the terms of s 31(b) of the AHRC Act, I am required to consider the following questions:

- whether there was an act or practice within the meaning of s 30(1) of the AHRC Act
- whether that act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record
- whether that distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and
- whether that distinction, exclusion, or preference was based on the inherent requirements of the job.

## 7.1 Is there an act or practice?

16. 'Act' and 'practice' are defined in s 30(1) of the AHRC Act. 'Act' and 'practice' have their ordinary meanings. An act is a thing done and a practice is a course of repeated conduct.

17. In its response dated 22 February 2017, Redflex accepted that it made a decision not to 'formalise the offer of employment to Ms Smith because of an unsatisfactory NPC'.<sup>2</sup>

18. I am of the view that this decision constitutes a relevant 'act' for the purpose of s 30(1) of the AHRC Act.

## 7.2 Does the act involve a distinction, exclusion or preference on the basis of criminal record?

19. The act of not progressing Ms Smith's offer of employment prevented her from working at Redflex. This constitutes a relevant 'exclusion' within the definition of 'discrimination' in s 3(1) of the AHRC Act.

20. For this exclusion to be considered discriminatory under s 3(1) of the AHRC Act, it needs to be shown that the decision was made 'on the basis' of Ms Smith's criminal record. In considering the expression 'based on', in a similar definition of discrimination under s 9(1) of the *Racial Discrimination Act 1975* (Cth), the Federal Court held that the words were to be equated with the phrase 'by reference to', rather than the more limited 'by reason of' or 'on the ground of' which have been interpreted elsewhere to require some sort of causal connection.<sup>3</sup>

21. Ms Smith's criminal record is the only reason given by Redflex for its decision not to formalise her conditional offer of employment. I therefore consider that Redflex's decision amounted to an exclusion made 'on the basis' of Ms Smith's criminal record.

### 7.3 Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?

22. The AHRC Act implements Australia's obligations under the *Discrimination (Employment and Occupation) Convention 1958* (ILO 111 Convention).<sup>4</sup> For this reason, it is appropriate to construe the definition of 'discrimination' in s 3(1) of the AHRC Act in accordance with the construction given in international law to article 1 of the ILO 111 Convention.<sup>5</sup>
23. Article 1(3) of the ILO 111 Convention defines 'employment' and 'occupation' as including access to employment and to particular occupations, and terms and conditions of employment. Further, the background materials to the ILO 111 Convention reveal that the Convention was intended to protect all workers, in all fields.<sup>6</sup>
24. In its initial submissions to the Commission dated 22 February 2017, Redflex provided an outline of its regular recruitment process.<sup>7</sup> Probity checks are only conducted after a candidate has performed well at interview. It is not in dispute that Redflex made Ms Smith an offer of employment, albeit a conditional one.
25. I consider that the decision of Redflex not to formalise Ms Smith's conditional offer of employment because of her criminal record constitutes an impairment of her equality of opportunity and treatment in employment. This is because it deprived her of the opportunity to commence working as an MSCO.

### 7.4 Was the exclusion made on the basis of the inherent requirements of the role?

26. Section 3(1)(c) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'. In light of my finding that Redflex's decision not to engage Ms Smith in the role was an exclusion on the basis of her criminal record, I must now consider whether this exclusion was based on the inherent requirements of the job.
27. Paragraph (c) of the definition is an 'exception' to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.<sup>8</sup>

**(a) Identifying the ‘inherent requirements’**

28. It is necessary to first identify the inherent requirements of a particular role before considering whether a complainant is able to fulfil those inherent requirements, given their criminal record.
29. An ‘inherent requirement’ is something that is ‘essential to the position’<sup>9</sup> and not ‘peripheral’.<sup>10</sup> It is an ‘essential feature’ or ‘defining characteristic’<sup>11</sup> of the role.
30. Further, the inherent requirements must be in respect of ‘a particular job’. The term ‘a particular job’ in article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean ‘a specific and definable job, function or task’ and its ‘inherent requirements’ are those required by the characteristics of the particular job.<sup>12</sup>
31. The fact that certain statements appear in the position description document is not sufficient to establish that they are ‘inherent requirements’ of a particular job. In *Qantas Airways v Christie*, Brennan CJ stated that:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer’s undertaking and, except where the employer’s undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.<sup>13</sup>

32. In its response dated 22 February 2017, Redflex provided the Commission with the following documentation relevant to the complaint:
  - (a) a screenshot of Redflex’s standard online job advertisement for the MSCO role
  - (b) a position description for the role of MSCO
  - (c) Ms Smith’s job application and résumé
  - (d) an email exchange between Ms Smith and Redflex dated 23 September 2016 regarding the personal information needed to obtain an NPC
  - (e) an email exchange between Ms Smith and Redflex dated 17 October 2016 where Ms Smith identifies that she might have a relevant criminal history, and
  - (f) Ms Smith’s NPC Report.

**(b) Redflex’s submissions on inherent requirements**

33. In its initial response to the Commission dated 22 February 2017, Redflex sought to rely upon the defence of inherent requirements and submitted that Ms Smith was unable to perform the inherent requirements of the role of MSCO because of her NPC results.

34. It stated that:

Redflex has undertaken, as prescribed by the contract with RMS to deliver the Mobile Speed Camera Program in NSW, to ensure that employees engaged to work within the Mobile Speed Camera Program are subject to pre-employment probity checks, including a National Police Check, medical check, and a driver history check. This contractual obligation, and resultant practice, affirms that a satisfactory outcome of probity checks is an inherent requirement of the role. In this way, this inherent requirement is an outcome of the context of the role, being the contract with RMS.

35. In this manner, it identified a ‘satisfactory outcome of probity checks’ as an inherent requirement of the MSCO role. This is consistent with its submission that it did not formalise Ms Smith’s offer of employment because of an ‘unsatisfactory NPC’.
36. In my preliminary view, I considered that, based on the material before me, it appeared that Redflex had interpreted the requirement that potential employees return a ‘satisfactory NPC’ to mean a ‘clean’ NPC. I expressed the view that such an interpretation would be a breach of the prohibition against discrimination in employment under s 31(b) of the AHRC Act as it permits discrimination on the basis of a criminal record.
37. In its response to my preliminary view dated 2 November 2017, Redflex disputed that it required a ‘clean’ NPC and clarified that it had formed the view that Ms Smith’s NPC was unsatisfactory because of her conviction ‘for violent criminal behaviour’. It also asserted that it undertook a specific analysis where this conviction was assessed against the inherent requirements of the MSCO role. I accept this clarification.
38. I also note statements made in Redflex’s response regarding the determination of the inherent requirements of a particular job. Redflex submitted that an assessment of the inherent requirements of a job ‘is, in part, a subjective judgment’ to be made by the employer.
39. While I concur that the responsibility for deciding what the inherent requirements of a particular role are falls on the employer, these requirements must be able to be justified objectively.<sup>14</sup>

**(c) Redflex’s contract with Roads and Maritime Services**

40. Given the reliance that Redflex placed on its contract with RMS in its submissions about inherent requirements, discussed above, it is instructive to consider this contract in some detail.
41. The relevant sections of the contract are extracted below:

16.2 Project Personnel

The Contractor must:

- (2) prior to employing or contracting any person to carry out any part of the Services or to undertake any activities in relation to the Project:
  - (A) obtain in writing consent from the person for a Probity Investigation to be undertaken (such consent to include all matters required by Law or RMS) and provide those consents to RMS;

- (B) carry out a Probity Investigation with respect to the person; and
  - (C) provide details of that Probity Investigation to RMS for review;
  - (3) not employ or contract any person to carry out any part of the Services or to undertake any activities in relation to the Project without the prior written approval of RMS;
- ...
- (5) if RMS determines that:
    - (A) a Probity Investigation has identified that a person is not a fit and proper person to be involved in the Project; or
    - (B) any Project Personnel are not performing their role adequately or are engaging or have engaged in improper conduct or in a manner that may compromise the confidentiality of the Data or the Project;
- the Contractor must within 20 Business Days of receiving notice from RMS procure the removal of that person from the role, except in the case of any person RMS reasonably considers to be a security or probity risk, in which case the Contractor must procure the removal of the person immediately after receiving a notice from RMS, and ensure that that person is not engaged in any role that is part of Project without the prior written approval of RMS.

**(d) Assessment of the ‘inherent requirements’**

- (i) The contract with RMS and a ‘fit and proper person’ requirement
- 42. I am satisfied that Redflex’s contract with RMS obliged it to screen job applicants for their criminal record.
- 43. Clause 2A of the contract required Redflex to carry out probity investigations on potential employees and provide the details of these probity investigations to RMS for review. Pursuant to clause 5 of the contract, if RMS determined that the probity investigation had identified that a person was not a ‘fit and proper’ person to be involved in the project, it could request that Redflex remove the person from the Mobile Speed Camera project.
- 44. There is no suggestion in this matter that RMS requested that Ms Smith be excluded from the Mobile Speed Camera Program. In fact, it does not appear that Ms Smith was ever referred to RMS for consideration. Redflex’s submissions state that:

The nature of Ms Smith’s criminal record led Redflex Traffic Systems to reasonably make the judgement that RMS would not accept Ms Smith as a ‘fit and proper person’, and would require Redflex Traffic Systems to remove her from the [Mobile Speed Camera Program]. This judgment is based on the high public profile of the project, but also — and critically — on the basis of the proprietary information to which all employees in the [Mobile Speed Camera Program] are given access to and responsibility for.<sup>15</sup>

45. I note that in Redflex's submissions in response to my preliminary view, it stated:

Redflex is entitled to exercise its reasonable and subjective judgment based on its implied authority under the written contract between Redflex and RMS. This implied authority is based on necessity and for business efficacy.

Further, if Redflex exercises a reasonable and subjective judgment, acting in good faith and for a proper purpose, then it would be unfair to place significant weight on any failure to refer the matter directly to RMS as there is no evidence that the outcome for Ms Smith would have been different if Redflex did refer the matter directly to RMS.

46. In my preliminary view, I did not seek to dispute Redflex's arrangement with RMS under its contract, but to draw reference to RMS' own policy with respect to criminal record checks. On its public website, RMS states that:

For some positions Roads and Maritime requires that you undergo a criminal record check. Having a criminal record will not necessarily disqualify you from selection. You will be given a chance to discuss the matter before any final decision is made.<sup>16</sup>

47. This approach is consistent with the Commission's best practice policy guidelines about employing people with a criminal record<sup>17</sup> and provides due process in assessing if a specific criminal record means that an applicant is able to perform the inherent requirements of a particular role.

48. Given that anyone seeking to be an MSCO is subject to a 'fit and proper person' assessment by RMS or — as the arrangement appears to be — by Redflex, I am prepared to accept that a general standard of trustworthiness and good character is an inherent requirement of the MSCO role. The Commission has considered this standard in a number of other criminal record complaints<sup>18</sup> and it is discussed below.

- (ii) The requirement that a person be able to respond calmly and professionally in hostile or potentially volatile situations

49. In its response to my preliminary view dated 2 November 2017, Redflex submitted that in order to 'handle potentially highly volatile situations involving members of the general public' there is a requirement in the MSCO role 'for a character for peacefulness and a requirement for a personal attribute of calmness'. Redflex stated that MSCOs are frequently exposed to unwelcome interactions with the general public while carrying out their traffic law enforcement duties, including:

... verbal and physical abuse and threats, a member of the public physically banging hands in an intimidating and threatening way on the Redflex enforcement vehicle while the MSCO was sitting in the vehicle, various forms of physical intimidation at the roadside site, spitting towards the MSCO or on the Redflex enforcement vehicle ...

50. In light of Redflex's submissions, I am prepared to accept that it is an inherent requirement of the MSCO role that an individual be able to respond calmly and professionally in hostile or potentially volatile situations. This requirement is discussed further below.

(iii) Other potential inherent requirements

51. Redflex explicitly identified two inherent requirements of the MSCO role, being a ‘satisfactory NPR check’ and the capacity to behave calmly during hostile or potentially volatile interactions with the public. However, the nature of Redflex’s initial submissions — and the job advertisement and position description attached to them — allude to further potential inherent requirements. For the sake of completeness, I will briefly address these other inherent requirements.
52. Redflex submitted that it reasonably formed the view that RMS would not accept Ms Smith as a ‘fit and proper’ person because she would need to be given access to RMS’ proprietary information.<sup>19</sup> It is also clear from its submissions that employees who do not have contact with clients’ proprietary and sensitive information are generally not required to undergo NPR checks.<sup>20</sup> Viewed together, I am also prepared to accept that the ability to handle proprietary information properly is a further inherent requirement of the MSCO position.
53. The job advertisement provided further insight into the qualities and requirements that Redflex considered inherent to the MSCO role.
54. The body of the job advertisement for the MSCO role began with:
- Are you passionate about road safety?
  - Do you have availability to work a 24/7 roster?
  - Do you have a great driving record?
55. Under the heading ‘Work With Us’, the advertisement stated ‘Mobile Speed Camera Operators work to support the successful detection of drivers who exceed the speed limit and endanger both their lives and the lives of others’.
56. The advertisement listed the following duties under ‘Key Competencies’:
- Deployment of assigned speed detection unit to assigned deployment sites
  - Set up/take down speed detection equipment
  - Maintenance of logs
  - Ensuring quality of image capture by making adjustments to equipment as necessary
  - Communication with the Network Operation Centre, Lead Operators, Supervisors and other operators
  - Review of images and data associated with a potential infringement captured by the speed detection unit.

57. Under 'Additional Skills' it listed:

- Maintenance of a valid unrestricted Australian driver's licence
- A driving record that demonstrates a commitment to road safety
- Competency with software and the technical skills relating to the use of hardware
- Demonstrated experience in a field role with a high degree of autonomy.

58. Under 'Requirements' it stated:

***All successful applicants will be required to complete and pass a National Police Record Check and a Traffic Offences Check to the satisfaction of Redflex.*** [Emphasis and bolding in original]

59. As is evident, there is significant emphasis in the job advertisement that an applicant have a good driving record and a requirement that they undergo a traffic offences check.

60. MSCOs form part of a road safety initiative by the government and work to support the successful detection of drivers who exceed the speed limit. The images captured by MSCOs are used to bring penalties against non-compliant drivers. As the primary function of an MSCO is to attain evidence about individuals who fail to abide by road rules, I accept that it is an inherent requirement of the role that an MSCO has a driving record that demonstrates a commitment to road safety.

61. In summary, I consider the inherent requirements of the MSCO role to include:

- that the person be trustworthy and of good character
- that the person be able to behave calmly and professionally in hostile or potentially volatile situations
- that the person be able to properly handle proprietary information, and
- that the person has a driving record that demonstrates a commitment to road safety.

62. I discuss these requirements and their relationship to Ms Smith's criminal record in detail below.

## 8 ‘Based on’

63. Section 3(1) of the AHRC Act provides that discrimination ‘does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job’.
64. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*, Wilcox J interpreted the phrase ‘based on’ as follows:

In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant ‘distinction’, ‘exclusion’ or ‘preference’. Otherwise, as Mr O’Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words ‘based on’ are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.<sup>21</sup>

65. The Full Court affirmed this approach in *Commonwealth v Bradley*. In particular, Black CJ discussed the phrase ‘based on’ as follows:

Respect for human rights and the ideal of equality — including equality of opportunity in employment — requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group, whether that group be one of gender, race, nationality or age. These considerations must be reflected in any construction of the definition of ‘discrimination’ presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.<sup>22</sup>

66. The Chief Justice then held that there must be more than a ‘logical’ link between the inherent requirement of the position and the exclusion of the applicant. Rather, his Honour held that there must be a ‘tight’ or ‘close’ connection.<sup>23</sup>
67. Accordingly, in considering the complaint by Ms Smith, I must determine whether there is a sufficiently close or tight connection between the inherent requirements of the job and the act of excluding Ms Smith in the circumstances of this case.

### 8.1 Requirement one: that the person be trustworthy and of good character

68. In previous reports into discrimination in employment on the basis of a criminal record, the Commission has found that good character can be an inherent requirement of certain roles.<sup>24</sup> However, a criminal record alone cannot be a basis upon which to impute bad character.<sup>25</sup>

69. The Northern Territory Anti-Discrimination Tribunal case of *Wall v Northern Territory Police*<sup>26</sup> is illustrative of this point. Northern Territory legislation prohibited discrimination on the basis of ‘irrelevant criminal record’. The complainant, Mr Wall, was convicted of theft when he was 19 years old and sentenced to a six-month good behaviour bond. Twenty-five years later, he applied for a position as a police officer with Northern Territory Police. His application was rejected. One of the arguments raised by Northern Territory Police was that Mr Wall was unable to meet a ‘genuine occupational qualification’ of the position that all police recruits maintain the integrity of Northern Territory Police by being free of any adult criminal conviction. The Anti-Discrimination Tribunal rejected this submission, stating:

The burden is on the employer to identify the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked. There must be a ‘tight correlation’ between the inherent requirements of the particular job and an individual’s criminal record and there must be more than a ‘logical link’ between the job and a criminal record.

...

I am not satisfied however that the occupational qualification required of recruits by police is sufficiently ‘genuine’ to qualify as an exemption under section 35. This is because the respondent has not demonstrated a ‘tight correlation’ between the purported inherent integrity requirement and the Complainant’s spent criminal record.

It is not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics ... — not just criminal history (spent or otherwise).<sup>27</sup>

70. Where a job applicant or employee has a criminal record, the nature of that record, as well as the context in which it came into existence and relevant aspects of the personal circumstances of the applicant, should all be considered before a conclusion is reached as to whether an individual is trustworthy and of good character.<sup>28</sup>

71. Ms Smith has provided the Commission with documents relating to her successful application for a Working with Children Check with the NSW Office of the Children’s Guardian. Most relevantly, she submitted:

- a letter from the Department of Corrective Services dated 29 April 2005 confirming that she had fulfilled her obligations under her Community Service Order
- a reference from Redox Pty Ltd, her employer of nearly six years at the time, dated 7 November 2012
- an undated personal reference from Ms Candice O’Brien. Ms O’Brien stated that she had known Ms Smith for 15 years at the time and had provided the reference in the knowledge of Ms Smith’s criminal convictions
- two statutory declarations made by Ms Smith in 2012 setting out the circumstances of her criminal offences and why she did not consider herself to be a risk to children, and

- evidence that she had been granted a Working With Children Check, valid for paid and unpaid work, until 3 January 2019.

72. I note that Redflex has submitted that the Commission should give little weight to these documents, and Ms Smith's successful Working With Children Check, because the considerations relating to a decision to grant a Working With Children Check are different from determining whether a person is suitable to work within a chain of law enforcement.
73. The Commission is not a court and, pursuant to s 14(1) of the AHRC Act, it is not bound by the rules of evidence when conducting its inquiries. I accept Redflex's submission that there are differences between working with children and working within a chain of law enforcement. Ms Smith's grant of a Working With Children Check does not answer the question of whether she was discriminated against by Redflex because of her criminal record. However, I am of the view that the documents submitted in support of her Working With Children Check provide relevant information about her recent career and rehabilitative achievements which inform the analysis of whether there is a sufficiently tight correlation between the inherent requirements of the MSCO role and her exclusion by Redflex.
74. In the reference from Redox Pty Ltd, the Human Resources Manager states that:
- [Ms Smith's] position was initially Sample Coordinator and then she was promoted to Quality Assurance Clerk (Material Data Safety Sheets) in our Quality Assurance Department.
- Jessie has matured into a very responsible young lady and is very [sic] courteous person who has an excellent manner and is always very well dressed; she fits in well with other members of the staff.
- Jessie works in her current position mainly unsupervised...[s]he will request information from her manager only when required as she is fully conversant with her job requirements.
- It is a pleasure having such a dedicated young lady work for us.
75. For over 11 years, it appears that Ms Smith worked in a stable, permanent role at Redox Pty Ltd and was promoted on at least one occasion. The Human Resources Manager emphasised Ms Smith's courteousness, dedication and ability to work unsupervised in his positive reference.
76. The personal reference from Ms O'Brien provides that:

...

I have known Jessica for a period of 15 years. During that time, I have seen Jessica develop into what she is now, a mature, driven and professional young woman.

I am aware of the reasons that this reference has been requested. I can state that the issues that have arisen in Jessica's application are from her past, and are no way apart [sic] of her current life.

...

During her time at university, Jessica has been excelling in her degree. Jessica has been graded with a distinction or above for a number of units. She has already been approached about completing an Honours degree at the conclusion of her course, which is still approximately 18 months away. Her dedication and commitment to change her life and develop a career for herself is a testament to her determination and willingness to change and make better decisions for the future.

I have absolutely no hesitation in recommending Jessica for any future employment opportunities. Jessica would be an asset to any organisation.

77. Attached to its submission as Appendix 3, Redflex provided the Commission with a copy of the résumé that Ms Smith used to apply for the position of MSCO. The résumé provided that, in 2016, Ms Smith completed a Bachelor of Social Science at Western Sydney University and graduated with specialisations in ‘Criminology and Criminal Justice’ and ‘Peace and Development Studies’. The résumé also provided that Ms Smith graduated with a distinction average. This is consistent with the personal reference provided by Ms O’Brien who commended Ms Smith for her acceptance into university, despite not finishing high school, and for her commitment to changing her life and developing a new career for herself.

78. I understand that Ms Smith currently works as a youth justice worker.

**(a) Consideration**

79. Ms Smith was 19 years old when she committed the ‘assault occasioning actual bodily harm’ offence and 22 years old when she committed the ‘possess prohibited drug (marijuana)’ offence. She was 32 years old when she applied for the position with Redflex and, on the information before me, she had not committed any further disclosable offences in over 9 years.
80. The offence of ‘assault occasioning actual bodily harm’ can cover a range of conduct, from the infliction of temporary bruises and scratches, to more permanent injury. In November 2004, a conviction for ‘assault occasioning actual bodily harm’ was punishable by up to five years imprisonment. That Ms Smith was sentenced to community service, and not a custodial sentence, suggests that her offence was considered to fall at the lower end of the scale of objective seriousness. Similarly, her second offence of possession of marijuana was disposed of by the Local Court by way of a fine.
81. In my view, without more, the existence of a nearly 12 year old conviction for the offence of ‘assault occasioning actual bodily harm’ and a 9 year old offence for minor drug possession did not necessarily mean that Ms Smith was untrustworthy or of bad character in 2016. I am not satisfied that, simply because Ms Smith committed these two offences, it inevitably followed that she could not meet high standards of character and trustworthiness many years later.
82. This view is strengthened by the period that has passed without further criminal conviction, the apparent trust placed in Ms Smith by Redox Pty Ltd and the significant efforts that she has made in the intervening years to further her education and pursue a new career.

83. Consequently, I am not persuaded that there is a sufficiently tight correlation between Ms Smith's ability to fulfil the inherent requirements of trustworthiness and good character and Redflex's act of excluding her because of her criminal record.

## 8.2 Requirement two: that the person be able to behave calmly and professionally in hostile or potentially volatile situations

84. As stated above, I have interpreted Redflex's submission that there is a 'requirement for a character of peacefulness and a requirement for a personal attribute of calmness' as part of a general requirement of the MSCO role that a person be able to behave calmly and professionally in hostile or potentially volatile situations.
85. Based on Redflex's submission detailing the potential abuse and threats that an MSCO officer may receive in the field, set out above at paragraph 49, I have accepted that this is an inherent requirement of the role.
86. However, for the reasons set out above in paragraphs 79–83, I am not persuaded that there is a sufficiently tight correlation between this inherent requirement and Ms Smith's criminal record. In my view, the fact that Ms Smith once committed an 'assault occasioning actual bodily harm' offence as a teenager does not compel the conclusion that she cannot behave professionally and calmly in a hostile work situation 12 years later.

## 8.3 Requirement three: that the person be able to appropriately handle proprietary information

87. There is no obvious connection between the two disclosable offences on Ms Smith's criminal record and her ability to handle proprietary information in employment properly. Her criminal convictions do not relate to offences of dishonesty and they did not occur in a professional context.
88. In light of the passage of time, and given Ms Smith's lack of reoffending and her educational, career and rehabilitative achievements, I am also not satisfied that there is a sufficiently tight correlation between Ms Smith's criminal record and the inherent requirement of the MSCO role that she is able to handle proprietary information properly.

## 8.4 Requirement four: that the person has a driving record that demonstrates a commitment to road safety.

89. The two convictions that make up Ms Smith's criminal record do not appear to involve vehicles, driving or road safety. As there is no other evidence before the Commission regarding Ms Smith's driving history, I am not satisfied that there is a sufficiently close connection between Ms Smith's criminal history and the inherent requirement that she have a driving record that demonstrates a commitment to road safety.

## 9 Criminal record checks and context

90. A further aspect of Ms Smith's complaint to the Commission was that Redflex never gave her the opportunity to contextualise her criminal history.
91. She stated that, during the telephone conversation with Redflex on 18 October 2016, she asked specifically if she would be given the opportunity to explain the circumstances of her criminal record. She was told to put her request in writing. In her subsequent email to Redflex dated 19 October 2016, which has been provided to the Commission, she asked multiple questions, including:
- Can you please provide me with the results of the criminal history check? I would like to verify the accuracy of the information that you have.
  - Can you please advise who makes these types of decisions regarding recruitment?
  - Are you able to advise why I've not been given the opportunity to explain my circumstances or to provide further information in support of my application (character references for example)?
  - Is there any avenue for me to appeal this decision?
92. Ms Smith claimed that Redflex did not respond to this email, or to her subsequent emails of 7 November 2016 and 15 November 2016. Redflex has not contested the submission that it did not respond to her emails and there is no evidence before me to suggest that it did. Consequently, it does not appear that Redflex gave Ms Smith any opportunity to explain the circumstances of her criminal history or her recent academic and career achievements. The decision not to formalise her offer of employment appears to have been based solely on the fact that she had a criminal history that included an offence of violence and an offence of drug possession and Redflex's view that she would therefore not be accepted by RMS as a 'fit and proper' person.
93. In its response dated 2 November 2017, Redflex contended that:
- Ms Smith had a reasonable and adequate opportunity to be candid and proactive about the details of her "*relevant criminal history*" to Redflex and to explain why she thought that "*relevant criminal history*" should not be taken into account or given less weight by Redflex. [emphasis in original]
- In other words, even though Ms Smith had a chance to try and shape her future with Redflex, Ms Smith chose not to proactively attempt to influence Redflex's decision...
94. I am not satisfied that, beyond notifying Redflex about the existence of her criminal record and her willingness to discuss it, there was any obligation on Ms Smith to disclose any further information before the NPC check was completed. A different employer may not have considered her criminal history relevant and therefore any discussion would have been unnecessary. I do not accept Redflex's contention that Ms Smith should have been more 'proactive' in disclosing its content prior to the actual check occurring.

95. I also consider that, without first contacting Ms Smith to discuss her NPC, the circumstances of the offence and any subsequent rehabilitation that might have occurred over the past 12 years, Redflex did not have the information necessary to undertake a sufficiently comprehensive and individualised assessment of her circumstances. This will usually be a necessary step in properly determining whether a person can fulfil the inherent requirements of a particular role.

## 10 Summary

96. Having considered all the material before the Commission in this matter, I find that the distinction, exclusion or preference made by Redflex on the basis of Ms Smith's criminal record was not based on the inherent requirements of the particular role of MSCO. Consequently, the decision not to formalise Ms Smith's conditional offer of employment amounted to discriminatory conduct within the meaning of s 3(1) of the AHRC Act.

## 11 Recommendations

97. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination, the Commission is required to serve notice on the respondent setting out its findings and the reasons for those findings.<sup>29</sup> The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>30</sup>
98. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered damage<sup>31</sup>, and
  - the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>32</sup>
99. The Commission sought submissions from Ms Smith about the recommendations that she was seeking. Ms Smith indicated her views that discrimination on the basis of criminal record should be actionable under federal anti-discrimination law or, if this is not possible, that all relevant state laws should be amended to specifically prohibit discrimination on the basis of criminal record in Australia.
100. The Commission has previously emphasised the importance of the Australian Government continuing to support the obligations that it assumed in declaring criminal record as an additional ground for the purposes of the ILO 111 Convention.<sup>33</sup>

101. The Commission recommends that Redflex:

- pay Ms Smith an amount in compensation reflecting the hurt, humiliation and distress experienced by her as a result of Redflex's conduct
- revise its policies in regard to recruitment of people with criminal records in line with the Commission's publication, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record (Guidelines)*,<sup>34</sup> and
- conduct training for its recruitment, human resources and management staff involved in employment decisions, informing them of fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements of the role.

102. These recommendations are discussed in more detail in the following sections.

## 12 Consideration of compensation

103. In considering the assessment of a recommendation for compensation in cases of this type, the Federal Court has indicated that tort principles for the assessment of damages should be applied.<sup>35</sup> I am of the view that this is the appropriate approach to take in relation to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.<sup>36</sup>

104. Ms Smith has not made a claim for economic loss.

105. In her initial complaint to the Commission, Ms Smith stated:

This interaction with Redflex has damaged my confidence, and detracted from what I had achieved since making mistakes as an adolescent. Being unable to get back on track and being prevented from becoming a valued member of society, is extremely discouraging and generates feelings of failure and despair.

106. Compensation for Ms Smith's hurt, humiliation and distress would, in tort law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.<sup>37</sup>

107. I am satisfied on the basis of her submissions that Ms Smith suffered hurt, humiliation and distress as a result of being discriminated against on the basis of her criminal record. I accept that having a conditional offer of employment extended to her, and then rescinded on the basis of a criminal record that does not adequately relate to the inherent requirements of the role has caused her personal distress.
108. In all the circumstances, and in line with previous recommendations for compensation made by the Commission in criminal record complaints,<sup>38</sup> I consider an award of monetary compensation for hurt, humiliation and distress in the amount of \$2,500 is appropriate. I therefore recommend that Redflex pay her this amount.

## 13 Redflex's policies and training

109. I recommend that Redflex reassess its policies in relation to prevention of discrimination on the basis of criminal record. The Commission's Guidelines are a particularly useful resource for employers and I draw Redflex's attention to them.<sup>39</sup>
110. The Guidelines state:

### **9. A written policy and procedure**

If an employer decides that a criminal record is relevant to the positions of a workplace, a written policy can help ensure that all staff have an understanding of the organisation's requirements and the legal obligations of the organisation towards people with a criminal record. A policy and an outline of procedure can be incorporated into other workplace policy on equal opportunity and anti-discrimination if such policy exists.

Ideally, a policy and procedure would include:

- a statement about the employer's commitment to treating people with a criminal record fairly and in accordance with anti-discrimination, spent conviction and privacy laws
- a brief summary of employee and employer rights and responsibilities under these laws, or inclusion of up-to-date literature which provides this information
- an outline of other relevant legal requirements for the workplace, such as the employer's responsibilities under licensing and registration laws, or working with children laws
- the procedure for assessing the inherent requirements of the position, requesting criminal record information if necessary and assessing individual job applications or employee histories

- information on internal or external complaint or grievance procedures if someone thinks they have been unfairly treated
- designated officers with responsibility for different elements of the procedure,

In order for a policy to gain widespread acceptance, it is vital that staff, workplace representatives and management are involved in the development of the policy.

Developing appropriate policies and procedures does not have to be overly complex or long. However, any policy should be clear, informative and available to all staff and job applicants.

111. I also recommend that Redflex conduct training for its human resources and management staff involved in employment decisions. This training should assist staff to assess fairly whether an individual with a criminal record can perform the inherent requirements of a particular job. Again, I draw Redflex's attention to the Guidelines, which state as follows:

#### **5.10 Assessing a job applicant's criminal record against the inherent requirements of the job**

In some cases, the connection between the criminal record and the job will be clear enough for the employer to decide on the suitability of the applicant for the job...

However, *in most cases* it will be unclear to the employer simply on the basis of the results of a police check alone whether or not the conviction or offence is relevant to the inherent requirements of the job...

An employer will generally need to discuss the relevance of the criminal record with the job applicant, or invite them to provide further information, in order to assess whether the person can meet the inherent requirements of the job.

...

The type of information which an employer may need to consider when assessing the relevance of a person's criminal record includes:

- the seriousness of the conviction or offence and its relevance to the job in question
- whether in relation to the offence there was a finding of guilt without conviction, which indicates a less serious view of the offence by the courts
- the age of the applicant when the offence occurred
- the length of time since the offence occurred
- whether the applicant has a pattern of offences

## 13 Redflex's policies and training

- the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context
  - whether the applicant's circumstances have changed since the offence was committed...
  - whether the offence was decriminalised by Parliament ...
  - the attitude of the job applicant to their previous offending behaviour
  - references from people who know about the offending history.<sup>40</sup>
112. I also draw Redflex's attention to Part 4 of the Guidelines, which discusses (among other matters) how an employer should determine whether a criminal record is relevant to the inherent requirements of a job and key principles in case law for assessing the inherent requirements.

## 14 Redflex's response

113. On 16 March 2018, I provided Redflex with a Notice of my findings and recommendations in respect of Ms Smith's complaint.
114. By letter dated 11 April 2018, Redflex provided the following response to my findings and recommendations:

Further to your email of 11 April 2018, enclosed is the signed Conciliation Agreement (signed by Redflex).

Also enclosed is our cheque for the amount of \$2,500 made payable to "Jessica Smith", as requested. This is by way of the recommended compensation outlined by the Commission in its Notice under Section 35 of the *Australian Human Rights Commission Act 1986* (Cth) dated 16 March 2018.

Also, in terms of the Commission's other recommendations:

- Redflex will formally revise its policies in regard to recruitment of people with criminal records in line with the Commission's publication (which we have downloaded from the internet) entitled "*On the Record – Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record (2012)*"; and
- Redflex will conduct training for its recruitment, human resources and management staff involved in employment decisions, informing them of fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements for the role.

While Redflex is in the process of formally making these changes, I have requested that all employment decisions requiring an assessment of a prospective employee's criminal record against the inherent requirements for the role be referred to me prior to any decision being made.

115. On 24 April 2018, Redflex provided the Commission with its criminal record anti-discrimination policy which was disseminated to Redflex employees globally.
116. On 2 May 2018, Redflex provided the Commission with the following additional comments by email:

Overall, this has been a positive experience for the Company with important learnings not only in legal compliance but also in humanity, empathy and compassion.
117. I commend Redflex for their response to my recommendations and note that their revised anti-discrimination policy is comprehensive and addresses many of the recommendations made in the Guidelines. The broad dissemination of this policy to its employees is also to be commended.
118. I report accordingly to the Attorney-General.



Emeritus Professor Rosalind Croucher AM  
**President**  
Australian Human Rights Commission

July 2018

## Endnotes

- 1 Australian Human Rights Commission Regulations 1989 (Cth), reg 4(a)(iii).
- 2 Submissions of the Respondent to the Australian Human Rights Commission, 22 February 2017 [3].
- 3 *Victoria v Macedonian Teachers Association of Victoria Inc and Another* (1999) 56 ALD 333, 335 [5].
- 4 International Labour Organization Discrimination (Employment and Occupation) Convention C111, opened for signature 25 June 1958, C111 (entry into force 15 June 1960) in Australian Human Rights Commission Act 1986 (Cth), schedule 1.
- 5 *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* (2000) 108 FCR 378, 385.
- 6 International Labour Organisation, General Survey: Equality in Employment and Occupation (1988) ILC, (75<sup>th</sup> Session, Report III) [2].
- 7 Submissions of the Respondent to the Australian Human Rights Commission, 22 February 2017, [3].
- 8 X v Commonwealth (1999) 200 CLR 177, 222–223 [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333, [152] and footnotes 168–169 (Kirby J). This approach has been applied to Part II, Division 4 of the Sex Discrimination Act 1984 in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, 32–33 [19], [24], [26] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, 757 [89] (Wilcox J).
- 9 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
- 10 X v Commonwealth (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
- 11 X v Commonwealth (1999) 200 CLR 177, 191 [43] (McHugh J).
- 12 International Labour Organisation, General Survey: Equality in Employment and Occupation (1988) ILC, (75<sup>th</sup> Session, Report III) [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 304 [72] (McHugh J).
- 13 *Qantas Airways v Christie* (1998) 193 CLR 280, 284 [1].
- 14 Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 4 [www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf).
- 15 Submissions of the Respondent to the Australian Human Rights Commission, 22 February 2017, [5b].
- 16 NSW Department of Roads and Maritime Services, Careers (28 November 2016) [www.rms.nsw.gov.au/about/careers/frequently-asked-questions.html](http://www.rms.nsw.gov.au/about/careers/frequently-asked-questions.html).
- 17 Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 5 [www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf).
- 18 *Ms Renai Christensen v Adelaide Casino Pty Ltd* [2002] AusHRC 20.
- 19 Submissions of the Respondent to the Australian Human Rights Commission, 22 February 2017, [5b].
- 20 Submissions of the Respondent to the Australian Human Rights Commission, 22 February 2017, [5b].
- 21 *Commonwealth v Human Rights and Equal Opportunity Commission and Others* (1998) 158 ALR 468, 482.
- 22 *Commonwealth v Bradley and Another* (1999) 95 FCR 218, 235–236.
- 23 *Commonwealth v Bradley and Another* (1999) 95 FCR 218, 237 [39]–[40].
- 24 *Ms Renai Christensen v Adelaide Casino Pty Ltd* [2002] AusHRC 20.
- 25 Z v Director General, Department of Transport [2002] NSWADT 67 [30]–[32]; *Saadieh v Director General, Department of Transport* [1999] NSWADT 68 [14]–[15].
- 26 *Wall v Northern Territory Police* [2005] NTADC No. 1 (22 April 2005) (Commissioner Fitzgerald).
- 27 *Wall v Northern Territory Police* [2005] NTADC No. 1 (22 April 2005) [5.3.5] (Commissioner Fitzgerald).
- 28 *Wall v Northern Territory Police* [2005] NTADC No. 1 (22 April 2005) (Commissioner Fitzgerald).
- 29 Australian Human Rights Commission Act 1986 (Cth) s 35(2)(a).
- 30 Australian Human Rights Commission Act 1986 (Cth) s 35(2)(b).
- 31 Australian Human Rights Commission Act 1986 (Cth) s 35(2)(c)(i).
- 32 Australian Human Rights Commission Act 1986 (Cth) s 35(2)(c).
- 33 Australian Human Rights Commission, Submission to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Exposure draft Human Rights and Anti-Discrimination Bill 2012*, 6 December 2012, 7–8.
- 34 Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 16 [www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf).
- 35 *Commonwealth of Australia v Peacock and Another* (2000) 104 FCR 464, 483 [55] (Wilcox J).
- 36 See: *Hall and Others v A & A Sheiban Pty Ltd and Others* (1989) 20 FCR 217, 239 (Lockhart J).
- 37 *Sharman v Evans* (1977) 138 CLR 563, 585 (Gibbs and Stephen JJ).
- 38 *Gentleman v Linfox Australia Pty Ltd* [2017] AusHRC 113, 15 [57]–[59].
- 39 Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 34 [www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf).
- 40 Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 27 [www.humanrights.gov.au/sites/default/files/content/human\\_rights/criminalrecord/on\\_the\\_record/download/otr\\_guidelines.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf).





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