



**Report of an inquiry into a  
complaint by Mr Frank Ottaviano  
of discrimination in employment  
on the basis of criminal record  
against South Australia Police  
(State of South Australia)**

**Complainant:**

Mr Frank Ottaviano

**Respondent:**

South Australia Police (State of South Australia)

**HREOC REPORT NO. 38 (2007)**



**Human Rights and Equal  
Opportunity Commission**  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

**President**  
**The Hon. John von Doussa, QC**

4 December 2007

The Hon Robert McClelland MP  
Attorney-General  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Dear Attorney

Pursuant to section 31(b)(ii) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) I attach a report of my inquiry into a complaint by Mr Frank Ottaviano of discrimination in employment on the basis of criminal record by the State of South Australia (South Australia Police). I have found that the act and practice complained of constitutes discrimination in employment on the basis of criminal record.

Yours sincerely

John von Doussa QC  
President

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**Human Rights and Equal Opportunity Commission**

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## **INTRODUCTION**

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1. This is a report of my inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Human Rights and Equal Opportunity Commission ('HREOC') by Mr Frank Ottaviano. The complaint is made against South Australia Police (State of South Australia) ('SA Police').
2. As a result of my inquiry, I have found that Mr Ottaviano was discriminated against on the basis of his criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the HREOC Act').

## SUMMARY OF REPORT

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4. Mr Ottaviano was convicted in 1991 for receiving stolen goods. He was ordered to complete 200 hours of community service, which he completed at the Fort Largs Police Academy ('the Academy'), a division of SA Police. Following completion of that community service, he was employed by SA Police as a groundsperson at the Academy, subsequently promoted to a supervisory groundsperson position.
5. In 2001, Mr Ottaviano's position was made redundant. He was placed with the Police Security Services Branch ('the PSSB'), another division of SA Police, as a security guard. He obtained the necessary TAFE certification for the position and worked in a security guard role for three months. However, prior to being formally employed in the role, SA Police undertook a criminal record check, as part of its standard employment procedures. This check revealed his conviction in 1991 for receiving stolen goods. He was advised that he would not be offered a position as a security guard because of that criminal record.
6. SA Police defends its actions on the basis that it is an inherent requirement of the position of a security guard that a person demonstrates a high level of integrity and character. I do not disagree. However, I have found that there was sufficient evidence available to SA Police to demonstrate that Mr Ottaviano possessed the requisite level of integrity and character, notwithstanding his criminal record. In particular, Mr Ottaviano had provided approximately 10 years of service to SA Police, during which time his employment and integrity had been praised highly by his supervisors. It is also relevant to note that:
  - There is no evidence of dishonest conduct by Mr Ottaviano in the 10 year period since the relevant offence.
  - Mr Ottaviano's conviction was for an isolated incident and did not involve a custodial sentence.
  - In all other Australian jurisdictions (except Victoria), Mr Ottaviano's conviction would have been disregarded as a 'spent conviction' due to the 10 year passage of time.
7. I have recommended that SA Police (or the State of South Australia):
  - Pay Mr Ottaviano \$20,000.00 in compensation;
  - Provide Mr Ottaviano with an apology for having rejected his application in 2001 to be a security guard with the PSSB because of his criminal record; and
  - Not further exclude Mr Ottaviano, on the basis of his criminal record in 1991 for receiving stolen goods, from being considered for the position of security guard with the PSSB.

## OUTLINE OF COMPLAINT

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### Facts

8. Mr Ottaviano lodged his complaint with HREOC on 2 February 2006. SA Police subsequently provided a detailed response to that complaint.
9. On the basis of Mr Ottaviano's complaint and SA Police's response, it is clear that the factual matters in this complaint are essentially not in dispute. Those facts may be summarised as follows:
  - Mr Ottaviano has a criminal record for an offence committed in 1991 for receiving stolen goods. On 26 November 1991 he was sentenced to a good behaviour bond for two years and ordered to complete 200 hours of community service. He completed that community service at the Academy.
  - Following his completion of community service, Mr Ottaviano was offered full-time employment with SA Police as a groundsman at the Academy. He commenced employment in this position on 3 December 1992. In 1995 he was promoted to the position of Senior Groundsperson at the Academy, a supervisory position.
  - In early 2001, Mr Ottaviano's position was made redundant. He was relocated to Thebarton Barracks, another division of SA Police, where he performed basic security detail. He was then placed with the PSSB.
  - Mr Ottaviano's initial placement with the PSSB was essentially a work experience placement, as he did not meet any of the essential requirements for the position of security guard. A more detailed description of the PSSB and the responsibilities of a PSSB security guard appears below.
  - To provide Mr Ottaviano with the necessary training to be employed in an established security guard position, SA Police funded Mr Ottaviano's participation in a course at the Adelaide Institute of TAFE ('TAFE') to obtain a Certificate in Security III.
  - Mr Ottaviano successfully completed the TAFE course in mid 2001. From 18 June 2001 - 24 August 2001 he worked as a security guard with the PSSB, initially under supervision for the first week and thereafter without supervision.
  - Prior to Mr Ottaviano being officially employed in an established security guard position, a criminal record check was undertaken by SA Police as part of its standard employment procedure. Upon review of Mr Ottaviano's criminal record, SA Police advised him that he would not be employed as a security guard because of his conviction for receiving stolen goods.
  - Mr Ottaviano applied to the South Australian Attorney-General for an exemption from s 9(1)(b) of the *Security and Investigation Agents Act 1995* (SA). This section prevents a person from being granted a security or investigation agent's licence if convicted of certain classes of offences. The exemption was granted on 28 January 2003, although was limited, in that it

only permitted Mr Ottaviano to be employed by SA Police.

- Notwithstanding the exemption, SA Police maintained its refusal to employ Mr Ottaviano as a security guard. He was moved around several positions within SA Police and eventually resigned due to stress and frustration. The correct date of Mr Ottaviano's resignation is unclear. In his complaint, Mr Ottaviano said that he resigned in August 2004. However, SA Police's response asserted that he resigned 14 November 2003. For the reasons discussed below under the heading 'Worker's compensation claim', I have accepted that Mr Ottaviano in fact resigned on or about 14 November 2003.
- On 5 July 2005, Mr Ottaviano applied for an externally advertised security guard position with the PSSB. He made this application through a recruitment agency, Clements Industrial Recruiting ('Clements'). In support of his application, he attached a number of references (outlined below). His application was again rejected by SA Police on account of his criminal record for receiving stolen goods.

## **Worker's compensation claim**

10. Another factual matter relevant to this complaint is that Mr Ottaviano submitted a worker's compensation claim in or around 2000 following a knee injury at work.
11. According to SA Police, as part of this compensation claim, Mr Ottaviano entered a Redemption Agreement with the State of South Australia under s 42 of the *Workers Rehabilitation and Compensation Act 1986* (SA) ('the Redemption Agreement'). The Redemption Agreement provided for a lump sum payment in full satisfaction of all future weekly payments plus a sum for compensation upon his resignation.
12. SA Police further advised that as part of the Redemption Agreement, Mr Ottaviano agreed not to seek, accept or engage in any form of employment with SA Police for three years from 14 November 2003, which SA Police state was the date of his resignation. Whilst HREOC has not been provided with a complete copy of the Redemption Agreement, SA Police provided a copy of the relevant three year non-employment clause. This clause has not been disputed by Mr Ottaviano.
13. I accept that the Redemption Agreement was made and that it reflected the correct date of Mr Ottaviano's resignation. I note that SA Police has informed HREOC that the Redemption Agreement was ultimately not executed until July 2004, which may have influenced Mr Ottaviano's recollection as to his date of resignation.



## **Mr Ottaviano's references**

14. Mr Ottaviano provided a number of references in support of his complaint. It appears that these references were provided by Mr Ottaviano to SA Police in connection with his 2005 application.
15. The first reference, undated, was from a Senior Sergeant with SA Police. The reference stated that he had known Mr Ottaviano for 10 years whilst the referee had worked at the Academy, and he had also taught Mr Ottaviano at TAFE. The following excerpt is indicative of the reference:

I personally assessed Frank's performance over a given period to qualify him in the security profession. ... Since knowing Frank he has always demonstrated to have a responsible attitude. He has always been honest in his dealings with situations. In my personal dealings with him he has always been reliable and performed his duties without any dispute.

16. The second reference, dated 23 January 2005, was from a lecturer at TAFE, who had also personally known Mr Ottaviano for six years through the referee's employment with SA Police. The reference was again in very favourable terms stating, for example:

Frank is very loyal, committed and motivated which makes him a very good role model for others around him. As a supervisor at the academy his enthusiasm is evident and influenced others in a positive way. He is honest and reliable and his friendliness and good nature has the ability to motivate others.

I would have no hesitation in recommending Frank to any employer or organization that has him under consideration for a position.

17. The third reference, dated 7 July 2005, was from an employee of SA Police (rank not identified). It stated that he had known Mr Ottaviano for approximately five years from when Mr Ottaviano commenced work in Thebarton Barracks, including when he worked with the PSSB. The reference praised Mr Ottaviano's exemplary manner, high level of maturity and management skills, reliability, outlook and disposition. In closing, the reference stated:

I am of the opinion Frank is a very honest person with a high level of integrity, which I know could be put to good use in a variety of occupations. He is very self-directed and requires little or no supervision. I welcome any communication from a prospective employer on any aspect of his potential work ability and good character.

18. The fourth reference, dated 27 August 1997, was from the Officer in Charge of Professional Development at the Academy, who had known Mr Ottaviano for two years. The reference described Mr Ottaviano as being highly competent, possessing a stable and reliable personality and a well balanced outlook. It closed by stating:

Mr. Ottaviano is a highly trusted and well respected member of the staff and I am sure he would present himself as a valuable employee to anyone.

19. The fifth reference, dated 8 July 2005, was from a personal friend, who had known Mr Ottaviano for 25 years. The reference described him as sincere, honest and hard-working.
20. Finally, Mr Ottaviano provided a letter from the PSSB which confirmed that during the period of 18 June 2001 - 24 August 2001 he performed various duties on behalf of the PSSB in Static Guards as well as Patrols, at various locations. This included such duties as protecting property from theft, issuing of access cards to buildings, Parliament House security duties, operating a security vehicle, preventing unauthorised access to properties, 'special duties protection of a crime scene', providing crowd control, investigating security breaches and preparing reports.

## **Outline of security guard position**

### ***Overview of the PSSB***

21. SA Police advised HREOC that the PSSB is:
  - a comprehensive security service, consisting of patrols, alarm monitoring, installation and maintenance of security systems and a general security consultancy to Government agencies, public funded organisations and statutory authorities.
22. SA Police further advised that the PSSB provides services to government agencies to protect high risk sites, such as Parliament House and Government House, as well as protecting sensitive information and public officials. In addition, the PSSB provides support to police in protecting visiting dignitaries and it monitors over 1200 government alarms from, for example, ministerial offices, metropolitan bus and rail networks and electoral offices.
23. SA Police also advised that PSSB security guards have access to an extensive database of security information and hold access cards, codes and keys for many PSSB protected sites.

### ***Responsibilities of a PSSB security guard***

24. SA Police provided to HREOC the Position Information Document for the relevant position of security guard with the PSSB. This summarises the position as follows:
  - Provide security for nominated clients, advise on the basic operation of security systems and liaise with and provide advice on general security procedures.
25. The responsibilities of the position are summarised in the Statement of Key Outcomes and Associated Activities, which forms part of the Position Information Document, as follows (in order of importance):

- To protect the property of clients against theft both from inside and outside the premises.
- To protect clients' buildings and their contents from damage or loss.
- Check water, gas and electrical installations to detect breakdowns and wastage, and to take action in accordance with current instructions.
- To take charge of keys and issue them to authorised persons, in accordance with current instructions.
- To see that all fire-fighting equipment is in designated locations and not treated in such a manner as to affect its immediate and efficient use.
- To assist with emergency response procedures.
- To ensure that no unauthorised person or vehicle enters a clients' property and to ensure that all persons seeking admission are courteously received and assisted. Record as directed the entry and exit of all motor vehicles.
- To ensure that no employee or any vehicle leaves the premises in an irregular manner.
- Check authorisations for the removal of clients' property from premises.
- To operate, test and respond to electronic monitoring equipment.
- Liaise with clients and provide information on basic security matters pertaining to the setting of alarms and lockup and opening procedures.
- Provide a follow up service to clients in relation to alarms, break-ins, acts of vandalism and other criminal matters pertaining to the client's buildings.
- In emergency situations, be capable of providing basic first aid treatment.
- Ensure that issued equipment is well maintained and is available for use.
- Assist with violent clients.

## **Allegations of discrimination**

26. On the basis of the above facts, Mr Ottaviano alleged that he had been discriminated against:
- by SA Police on the basis of his criminal record in relation to its refusal to offer him employment as a security guard with the PSSB in both 2001 and 2005;
  - by SA Police on the basis of his worker's compensation claim and/or injury; and
  - by Clements on the basis of his criminal record in relation to its handling of his application in 2005.

## SA Police response

27. SA Police do not dispute that Mr Ottaviano was not offered employment as a security guard because of his criminal record. However, it defended its actions on the basis that it is an inherent requirement of the position of security guard with the PSSB that the person demonstrates a high level of personal integrity and credibility. It stressed that Mr Ottaviano's offence was a dishonesty offence which would bring discredit to the PSSB and SA Police.
28. SA Police further emphasised that a security guard with the PSSB:
  - is required to protect personnel and property, prevent criminal activity at sites under the person's guard, as well as liaise with clients on matters such as alarms and locks;
  - needs the respect, trust and confidence of clients and the public;
  - is at times called as a witness to offences and a defendant would no doubt seek to discredit Mr Ottaviano by raising his past convictions; and
  - requires a higher level of integrity than a security guard in the private sector, given that he or she is employed by, and seen to represent, SA Police.
29. SA Police also made the following additional comments:
  - It was not aware why a criminal record check was not undertaken when Mr Ottaviano was initially employed as a groundsperson, although there is no specific requirement for such high integrity for this position.
  - The *Security and Investigation Agents Act 1995* (SA) does not apply to the Crown or to Crown officers. It therefore does not apply to security guards in the PSSB, which is a branch of SA Police. Accordingly, Mr Ottaviano's exemption granted by the Attorney-General did not assist his case (notwithstanding that it expressly stated that the exemption was limited to allowing Mr Ottaviano to be employed only with SA Police).
  - In relation to Mr Ottaviano's application in 2005, his criminal record again prevented him from being offered employment. However, he was precluded from seeking employment with SA Police due to the three year non-employment clause under the Redemption Agreement. Accordingly, he would not have been eligible for employment with SA Police even if he did not have a criminal record.
  - It denied that Mr Ottaviano's worker's compensation claim or injury was in any way relevant to its decision, except to the extent that, as noted above, Mr Ottaviano would have been precluded from being offered employment in 2005 due to the Redemption Agreement.

30. SA Police also asserted that the *Discrimination (Employment and Occupation) Convention 1958* ('ILO 111'), which is scheduled to the HREOC Act, does not bind the Crown in the right of the States.
31. Finally, SA Police submitted that Mr Ottaviano's complaint in relation to the 2001 application was made to HREOC more than 12 months since the relevant incident. SA Police urged that I exercise my discretion to terminate the complaint on the basis that it was lodged out of time.

### **Clements response**

32. Clements provided a very brief response to the complaint. It asserted that it put Mr Ottaviano's name forward for the position but the decision not to offer employment was made by SA Police, not Clements.

### **Mr Ottaviano's comments on the responses**

33. Following receipt of the responses, Mr Ottaviano advised HREOC that he agreed to withdraw the complaint against SA Police in relation to its refusal to offer him employment in 2005 and in relation to his claim of discrimination on the basis of his workplace injury. He also agreed to discontinue his complaint against Clements.
34. On 20 September 2006 the inquiry was discontinued in relation to those aspects of the complaint withdrawn by Mr Ottaviano, on the basis that I was satisfied that Mr Ottaviano no longer wished those aspects of the inquiry to continue.<sup>1</sup>
35. However, Mr Ottaviano persisted with his complaint against SA Police in relation to its refusal to offer him employment as a security guard in 2001.

### **Conciliation**

36. HREOC endeavoured without success to conciliate a settlement of the complaint.

## RELEVANT LEGAL FRAMEWORK

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### Functions in relation to equal opportunity in employment

37. A detailed outline of the functions of HREOC in relation to equal opportunity in employment is contained in **Annexure One**.
38. In short, Part II, Division 4 of the HREOC Act confers functions on HREOC in relation to equal opportunity in employment in pursuance of Australia's international obligations under ILO 111.
39. ILO 111 prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin and other grounds specified by ratifying States.
40. Section 3(1) of the HREOC 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 HREOC 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.
41. Australia has declared criminal record as a ground of discrimination for the purposes of the HREOC Act.<sup>2</sup>

### Does ILO 111 bind the Crown in the right of a State?

42. As noted earlier, SA Police have asserted that ILO 111 does not bind the Crown in the right of the State. This assertion is misconceived.
43. In support of its argument, SA Police referred to the South Australian Supreme Court decision of *Collins v The State of South Australia*.<sup>3</sup> In that case, the Court

affirmed the well-settled principle that an international convention, relevantly in that case the *International Covenant on Civil and Political Rights* ('ICCPR'), is not directly enforceable in Australia unless it has been expressly incorporated into domestic law by legislation. Accordingly, the ICCPR does not give rise to an enforceable remedy under Australian law, notwithstanding that it is scheduled to the HREOC Act.<sup>4</sup>

44. It is correct that ILO 111, like the ICCPR, is not directly enforceable under Australian law. However, as noted above it is Part II, Division 4 of the HREOC Act, not ILO 111, that confers the function on HREOC of carrying out an inquiry into equal opportunity in employment, such as the present inquiry. This Division is expressly stated to bind the Crown in the right of the State.<sup>5</sup>

## **Time limits**

45. Pursuant to s 32(3)(c)(i) of the HREOC Act, I may decide to not continue an inquiry into an act or practice if the complaint was made more than 12 months after the relevant act was done.
46. On 11 December 2006, the parties were advised that I would not exercise my discretion pursuant to s 32(3)(c)(i) to discontinue my inquiry. The reasons were as follows:
- There was an arguable case in support of Mr Ottaviano's complaint.
  - The detriment to Mr Ottaviano if I did not continue with my inquiry would be great, given that he would have no further legal avenue of redress in respect of his complaint. This detriment was not outweighed by any detriment to SA Police in my continuing the inquiry.
  - The lapse of time had not prevented HREOC from being able to adequately conduct its investigation.

## FINDINGS

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### Relevant questions to be considered

47. In deciding whether an act or practice complained of constitutes discrimination for the purposes of s 31(b) of the HREOC Act, I am required to consider the following four questions:

- (a) Is there an act or practice within the meaning of s 30(1) of the HREOC Act?
- (b) Does that act or practice involve a distinction, exclusion or preference on the basis of the complainant's criminal record?
- (c) Does that distinction, exclusion or preference have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?
- (d) Is that distinction, exclusion or preference based on the inherent requirements of the job?

48. The first three questions may be dealt with briefly, as follows:

- (a) I consider that SA Police's decision in 2001 to refuse to offer Mr Ottaviano a position of security guard with the PSSB is an 'act' within the meaning of s 30(1) of the HREOC Act.  
I also consider that the requirement by SA Police to not employ any person for the position of security guard if he or she has a criminal record for receiving stolen goods constitutes a 'practice' within the meaning of s 30(1) of the HREOC Act.
- (b) The response from SA Police shows that Mr Ottaviano's criminal record was the only factor relied upon by SA Police when deciding not to offer him employment in 2001 as a security guard with the PSSB. I am therefore satisfied that this constitutes a distinction, exclusion or preference on the basis of Mr Ottaviano's criminal record.
- (c) The decision to not offer employment to Mr Ottaviano as a security guard because of his criminal record clearly constitutes an impairment of his equality of opportunity in employment.

49. The fourth question is the critical issue in this complaint: Is the distinction, exclusion or preference based on the inherent requirements of the position?

### Discussion of the relevant legal principles

#### *Construction of the HREOC Act generally*

50. In *IW v City of Perth*,<sup>6</sup> in the context of the Equal Opportunity Act 1984 (WA), Brennan CJ and McHugh J discussed 'the rule of construction that beneficial and remedial legislation ... is to be given a liberal construction'. Their Honours said:

It is to be given 'a fair, large and liberal' interpretation rather than one which



is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.<sup>7</sup>

51. In that matter Kirby J noted:

The purpose of anti-discrimination legislation, such as the Act, is to ensure that, within the areas prescribed by Parliament, equals are treated equally and human rights are not violated by reference to inappropriate or irrelevant distinctions. Especially where important human rights are concerned, protective and remedial legislation should not be construed narrowly lest courts become the undoers and destroyers of the benefits and remedies provided by such legislation. Courts will not unduly stretch the language of such legislation. But they will be very slow to find that the effect of something which is discriminatory falls outside the ambit of the legislation, given its purpose. This is especially so where a complainant, who can establish unequal treatment, falls within the category of persons for whom anti-discrimination legislation has apparently been enacted. It is legitimate in giving effect to such legislation, to keep in mind its broad purposes and, to the full extent that the text permits, to ensure that the Act achieves its objectives and is not held to have misfired.<sup>8</sup>

52. In line with the above comments, I consider that it is appropriate to interpret the HREOC Act beneficially and liberally.

### ***Construction of exemptions / exceptions***

53. It is a corollary of the approach to remedial legislation outlined above that exemptions and other provisions which restrict rights conferred by beneficial or remedial legislation be strictly construed.<sup>9</sup>

### ***International jurisprudence***

54. As outlined earlier, the definition of discrimination in s 3 of the HREOC Act excludes a distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job. This exclusion reproduces, in substance, article 1(2) of ILO 111. The HREOC Act was 'introduced to be the vehicle by which Australia's obligations under [ILO 111] are implemented'.<sup>10</sup> As such, paragraph (c) should be construed in accordance with the construction given in international law to article 1(2) of ILO 111.<sup>11</sup>

55. The Governing Body of the International Labour Organisation (ILO) has created a committee known as the Committee of Experts on the Application of Conventions and Recommendations ('the Committee of Experts'). It is 'orthodox' to rely upon the expressions of opinion of the Committee of Experts for the purposes of interpreting ILO 111.<sup>12</sup>

56. The meaning of article 1(2) was discussed in Chapter 3 of the Committee of Experts' *Special Survey on Equality in Employment and Occupation 1996*:

A qualification may be brought to bear as an inherent requirement without coming into conflict with the principle of equality of opportunity and treatment. In no circumstances, however, may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more grounds of discrimination envisaged by Convention 111 is inadmissible; careful examination of each individual case is required.

57. Similarly, in an ILO Commission of Inquiry regarding a complaint made against the Federal Republic of Germany, it was stated:

It needs to be borne in mind that Article 2, para 1, [of the Convention] is an exception clause. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide.<sup>13</sup>

### ***'Inherent requirements'***

58. In *Qantas Airways v Christie*,<sup>14</sup> the High Court considered the meaning of the term 'inherent requirements of the particular position' in s 170DF(2) of the Industrial Relations Act 1988 (Cth). Brennan CJ stated:

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>15</sup>

59. In addition, Gaudron J stated:

It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done.<sup>16</sup>

60. Justice Gummow said that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.<sup>17</sup>

61. Similarly, in *X v The Commonwealth*,<sup>18</sup> Gummow and Hayne JJ stated that the inherent requirements of employment are those which are 'characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral'.<sup>19</sup> In that same case, McHugh J stated:

The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment. Thus, in *Christie*, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment.<sup>20</sup>

***'Based on'***

62. Once the inherent requirements of the particular job have been identified, I must decide whether the relevant exclusion, distinction or preference is 'based on' those inherent requirements.
63. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,<sup>21</sup> 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 stereo-typed; 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 stereo-type, 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>22</sup>

64. The Full Court affirmed that approach in *Commonwealth v Bradley* ('Bradley's case').<sup>23</sup> 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>24</sup>

65. His Honour 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:

It is for this reason that I would reject the appellant's argument regarding the expression 'based on' in par (c) of the definition of 'discrimination'. The essence of that argument is that 'based on' requires no more than a logical link, with the result that the exclusion of a category of persons from a

particular job will not be discriminatory under the Act if a logical link can be shown between that exclusion and the inherent requirements of the job. In my view, to interpret par (c) in this way would be to defeat the Act's object of promoting equality of opportunity in employment by, in effect, permitting the assessment of persons' suitability for a particular job on grounds other than their individual merit. The nebulousness of notions of 'logic' in this area makes it an inappropriate test for discrimination.<sup>25</sup>

66. And further:

In my view, the definition adopted by Wilcox J - that is, as requiring a connection that is 'tight' or 'close' - sits easily with the language of par (c) and promotes the objects of the Act by closing a path by which consideration of individual merit may be avoided.<sup>26</sup>

67. I also note the decision of the Northern Territory Anti-Discrimination Commission in *Wall v Northern Territory Police*.<sup>27</sup> Whilst a less authoritative decision, Northern Territory legislation prohibits discrimination on the basis of 'irrelevant criminal record' and the facts and issues in that case bear many similarities to the present.

68. The Complainant, Mr Wall, was convicted for 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 ('NT Police'). His application was rejected. One of the arguments raised by NT Police was that Mr Wall was unable to meet a 'genuine occupational qualification' of the position that all police recruits maintain the integrity of NT 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 s 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.<sup>28</sup> (emphasis in original, references omitted)

69. And further:

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>29</sup>

***Onus***

70. Finally, I note that the respondent bears the burden of persuasion in respect of whether the distinction, exclusion or preference was based on the inherent requirements of the job.<sup>30</sup>
71. Accordingly, SA Police carries the burden of showing that there is a sufficiently tight connection between the inherent requirements of the position and the exclusion of Mr Ottaviano in the circumstances of this case.

**Application of these principles to Mr Ottaviano's case**

***Inherent requirements***

72. As noted earlier, SA Police has asserted that an inherent requirement of being a security guard with the PSSB is that the person possesses a high level of integrity and is of good character and reputation. I consider that this is an appropriate approach to the question of inherent requirements in this case. And, having regard to the responsibilities of the position outlined earlier, I would agree that a high level of integrity and good character and reputation are inherent requirements of the position.
73. To the extent that SA Police's submission could be taken to mean that there was an inherent requirement of the position that the person not have a criminal record for receiving stolen goods, I would disagree that this is an inherent requirement of the position. Such a blanket requirement would place the bar too high, by excluding people on the basis of perceived characteristics because of their criminal record, without allowing for a consideration of individual merit.

***Was the exclusion based on the inherent requirements of the job?***

74. SA Police formed the view that, having regard to the nature of Mr Ottaviano's conviction (a dishonesty offence), he is not able to meet the inherent requirement of the position of possessing a high level of integrity, character and reputation. The submission made by SA Police stated:

He could not therefore effectively carry out the duties of Police Security Services Security Guard with a conviction for such an offence as it would undermine the trust, respect and confidence in the position if a person with a dishonesty offence was purporting to protect property against theft, break ins (sic) and other criminal activity.

75. In accordance with *Bradley's* case, discussed above, the issue for consideration is whether there is a tight or close connection between the inherent requirements of the position of security guard and the relevant distinction, exclusion or preference on the basis of Mr Ottaviano's criminal record. In my view, the connection is not sufficiently close. There was sufficient information available to SA Police to demonstrate that Mr Ottaviano possessed the requisite

level of integrity, character and reputation, notwithstanding his criminal record. In reaching this view, I wish to emphasise a number of matters, discussed below.

### ***Isolated offence and non-custodial sentence***

76. It is relevant that Mr Ottaviano's conviction for receiving stolen goods was in respect of an isolated offence, rather than, for instance, a conviction relating to a pattern of criminal conduct over a protracted period.
77. In addition, the conviction did not involve a custodial sentence. This reflects the attitude of the court at the time of sentencing as to such matters as the seriousness of the offence, prior conduct, relevant extenuating circumstances and evidence of good character.

### ***Time since conviction***

78. The relevant offence was committed by Mr Ottaviano in November 1991, almost 10 years prior to the relevant decision to not offer him employment as a security guard.
79. In all Australian jurisdictions, except Victoria and South Australia, there exists legislation that renders convictions 'spent' after 10 years (subject to certain exceptions).<sup>31</sup> Generally speaking, this legislation deems that a person's criminal history does not include spent convictions and/or the person is not required to disclose spent convictions for any purpose. Some jurisdictions also make it unlawful to discriminate against a person on the basis of his or her spent convictions.<sup>32</sup>
80. The aim of spent convictions legislation is essentially to 'wipe the slate clean' in respect of a person's criminal record after the expiration of 10 years. I note, for example, the Northern Territory Attorney-General's second reading speech on the *Criminal Records (Spent Convictions) Bill*:

After an appropriate period, an old criminal record loses validity as a reliable indicator that a person may re-offend and, therefore, should not have any prejudicial effect. The discrimination which often follows a revelation of an old criminal record impedes the successful rehabilitation of offenders at a time when they have proved they represent no risk to society.<sup>33</sup>

81. SA Police advised HREOC that SA Police 'has a policy that is generally in line with the *Crimes Act 1914* (Cth)'. SA Police referred to s 85ZZH(1)(a) of that Act, which provides that a law enforcement agency may take into account spent convictions for assessing prospective employees or members of the agency.
82. I note here that SA Police has adopted a policy that reflects the widest exception permitted under any spent conviction legislation in Australia. In most other Australian jurisdictions, this exception is limited to employment of a police officer or cadet,<sup>34</sup> which would not, in my view, extend to employment as a security guard.

83. In any event, I consider that SA Police's policy of taking into account a prospective employee's criminal record must still be applied proportionately in the circumstances. That is, it is clear from the legal principles discussed above that it is incumbent on an employer to consider a prospective employee on the basis of his or her individual merits in light of all relevant circumstances. It would not be appropriate, for example, for an employer to simply impose a blanket exclusion against all persons with a criminal record for all types of employment.
84. A similar issue arose in HREOC's *Report of an inquiry into a complaint by Tracey Gordon of discrimination in employment on the basis of criminal record*.<sup>35</sup> In that case the complainant, who had been convicted of a drink driving offence, was excluded from being considered for employment as a communications officer in a call-centre which provided emergency and dispatch services to various agencies, including Victoria Police. This was due to a policy that such communications officers must meet the selection criteria of a police recruit. HREOC found that this constituted discrimination on the basis of criminal record, as it was disproportionately harsh in the circumstances to assess a prospective communications officer on the basis of the same standard of integrity required of a police officer.
85. It follows from the above that, irrespective of the fact that there is no spent convictions legislation in South Australia, the requirement of proportionality remains. It was therefore incumbent on SA Police to take into consideration the considerable lapse of time since the relevant offence in assessing whether, and if so to what extent, that conviction provided a reliable indicator of his integrity, character and reputation.

### ***Conduct since offence***

86. There is no evidence of any dishonest conduct by Mr Ottaviano since the relevant offence. While there is evidence before me that Mr Ottaviano was convicted of four driving offences, SA Police did not claim that these were relevant considerations in its decision and they do not, in my view, bear upon Mr Ottaviano's honesty.
87. Furthermore, as outlined in detail above, Mr Ottaviano has provided several references which are in glowing terms. I note that some of these references post-date the 2001 application and appear to have been prepared in relation to the 2005 application. Nevertheless, it is clear that these references relate to Mr Ottaviano's period of employment prior to 2001. I am therefore satisfied that similar references would have been available in support of Mr Ottaviano's application in 2001, had SA Police requested such references or taken steps to speak with Mr Ottaviano's supervisors or co-workers.
88. Under different circumstances, SA Police might be justifiably unconvinced by, or circumspect of, glowing references from unknown sources. However, the situation here is markedly different. SA Police, through its senior employees and supervisors, had directly observed and monitored Mr Ottaviano's work

performance over a considerable period. It supervised his 200 hours of community service in 1991 - 1992. It then offered him full-time employment in December 1992, promoting him to a supervisory position in 1995. After he became redundant in 2001 he was then observed in a variety of positions within SA Police until his resignation in 2004. Indeed, he worked for three months in the relevant position of security guard with the PSSB. Mr Ottaviano's performance during this lengthy period of employment with SA Police is praised highly by his colleagues and superiors. It is also telling that all of his references specifically commented on his level of honesty.

89. It is also worth emphasising that Mr Ottaviano was put forward for the relevant position by SA Police. In this regard, I note that Mr Ottaviano did not possess the relevant qualifications or experience for the position. In being put forward for the position, as well as being funded to complete the necessary training, Mr Ottaviano was presumably assessed by SA Police as satisfying the inherent requirements of honesty and integrity on the basis of his history of work performance.

## Conclusions

90. It is clear, in my view, that Mr Ottaviano's criminal record for receiving stolen goods was considered determinative by SA Police that he lacked the necessary level of honesty and integrity for the position. This was despite the fact that:
- his conviction was for an isolated offence;
  - the conviction did not involve a custodial sentence;
  - the conviction was almost 10 years old and, in any other State or Territory (except Victoria), would have been disregarded as a spent conviction (at least once the full 10 years had expired); and
  - Mr Ottaviano had provided ten years of exemplary performance in various positions in SA Police, including in the relevant position of security guard, gaining the respect and trust of his co-workers and superiors.
91. The assessment by SA Police in this case reflects, in my view, a prejudicial assessment based on stereotype rather than individual merit. This is precisely what anti-discrimination legislation seeks to prevent.
92. For the above reasons, I consider that whilst it is an inherent requirement for the position of security guard with the PSSB that an applicant possesses a high level of integrity, character and reputation, SA Police has failed to demonstrate a sufficiently tight connection between Mr Ottaviano's criminal record and his inability to comply with this requirement.



## RECOMMENDATIONS

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### Power to make recommendations

93. Where, after conducting an inquiry, HREOC finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, HREOC is required to serve notice on the respondent setting out its findings and reasons for those findings.<sup>36</sup> HREOC may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.<sup>37</sup>
94. HREOC may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
  - the taking of other action to remedy or reduce the loss or damage suffered by a person.<sup>38</sup>

### Compensation

95. I am satisfied that Mr Ottaviano suffered loss and damage that should be compensated. I recommend the payment to him of a global sum of \$20,000.00 as appropriate compensation. In assessing the sum recommended, I have taken into account a number of matters discussed below.
96. 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>39</sup> I am of the view that this is the appropriate approach to take to the present matter. As such, so far as is possible by a payment of compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.<sup>40</sup>

### *Hurt, humiliation and distress*

97. I am satisfied that Mr Ottaviano experienced feelings of hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record.
98. Compensation for Mr Ottaviano'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>41</sup>
99. In reaching an appropriate figure, I have taken into consideration the following factors:
- Mr Ottaviano invested a considerable amount of time and energy, at the encouragement of SA Police, in obtaining the necessary qualifications for the

security guard position. He had also provided many years of faithful and exemplary service to SA Police in a variety of capacities, demonstrating himself to be a trustworthy and capable employee. However, once his criminal record became known, these facts were effectively ignored and he was refused the security guard position in circumstances that were patently unfair.

- There is no evidence of any psychological or physical injury.
- There is no evidence to suggest a claim for out of pocket expenses, subject to my comments about loss of earnings below.
- In reaching an appropriate figure I have had regard to awards for general damages in discrimination cases in relation to hurt, humiliation and distress.<sup>42</sup>

100. I consider that the global sum for compensation should include an amount in the order of \$8,000.00 for hurt, humiliation and distress.

### ***Loss of earnings***

101. Mr Ottaviano was employed as a security guard by SA Police between 18 June 2001 and 24 August 2001, after which time he was refused employment as a security guard on account of his criminal record. However, he remained employed by SA Police in various capacities until his resignation. As noted earlier, I have accepted that Mr Ottaviano resigned from SA Police effective 14 November 2003.

102. I have been advised by SA Police that, if Mr Ottaviano had remained employed as a security guard following 24 August 2001, his base rate of pay would have been lower than the base rate he in fact received during the relevant period. However, if employed as a security guard, he would have been entitled to receive additional penalty rates depending on the shifts he worked. It is therefore not possible to calculate with precision the wage differential between Mr Ottaviano's actual pay during the relevant period compared with the pay he would have received as a security guard.

103. However, SA Police have advised that, based on average shift allowances, Mr Ottaviano would most likely have been paid an additional \$10,710.00 in gross wages as a security guard above the amount he was actually paid during the relevant period.

104. This sum provides a guide to the loss of earnings that it is likely Mr Ottaviano suffered in the period until he resigned. In assessing the amount to be included in a global sum for compensation for this part of the loss, I consider I should make a deduction for the tax which would have been payable at Mr Ottaviano's marginal tax rate had he actually received earnings over and above what he actually continued to receive from SA Police. I consider that any lump sum compensation now paid to him in respect of his complaint of unlawful discrimination would not be taxable. I consider an allowance in the order of \$6,000.00 should be included for this head of loss.

***Loss of opportunity***

105. In addition to the above, it is also relevant that the actions of SA Police may have contributed to Mr Ottaviano suffering a loss of the opportunity to continue earning as a security guard more than he would earn in other employment for which he would be suited outside the SA Police. On the information before me, at the very least, his non-appointment as a security guard made his ability to exercise his earning capacity to the same degree less certain. That lessening of opportunity is one that I consider legitimately attracts compensation. However, in assessing such compensation, it is necessary to be conservative, as many other factors could in all likelihood influence Mr Ottaviano's choices and opportunities for work in the future.
106. In assessing an appropriate figure for Mr Ottaviano's loss of opportunity I note that Mr Ottaviano says he has not worked since leaving SA Police. However, the information before me is not sufficient to support a finding that the conduct of SA Police has been causative of such a prolonged period of unemployment. Mr Ottaviano has not produced any evidence, such as psychiatric reports, to suggest a link between his ongoing unemployment and the discrimination he experienced.
107. Whilst Mr Ottaviano may have desired to gain employment as a security guard somewhere other than with SA Police, he was precluded from doing so by the limited exemption granted by the Attorney-General. There is no evidence to suggest that this limitation can be attributed to SA Police. Mr Ottaviano has also not provided evidence to explain why he could not have obtained other employment of a similar nature to the work he had previously performed at SA Police.
108. I do not overlook the possibility that the actions of SA Police in discriminating against Mr Ottaviano may have contributed to his decision to resign. However, I note that there was a significant delay between the particular refusal to employ him as a security guard in 2001 and his ultimate decision to resign on 14 November 2003. In light of this delay, I am not satisfied that Mr Ottaviano's resignation could be characterised as a constructive dismissal, which might otherwise have entitled him to a more comprehensive claim for future loss of earning capacity.<sup>43</sup> Further, I consider the possible link between what happened in 2001 and Mr Ottaviano's resignation to be too tenuous to otherwise treat his unemployment thereafter as caused by the unlawful discrimination.
109. I consider that it is appropriate to include a further allowance in the order of \$6,000.00 to compensate for loss of opportunity identified above. I consider that I should also recommend, in addition to monetary compensation, that SA Police make an apology to Mr Ottaviano, and do not further exclude him on the basis of the 1991 conviction for receiving stolen goods from being considered for the position of a security guard with the PSSB. Assuming that these recommendations are implemented, that fact must be taken into account when looking to the future, and I have done so.

### ***Conclusions***

110. The amounts I have assessed for non-economic loss, loss of earnings and lost opportunity point to a lump sum assessment in the order of \$20,000.00. Looked at globally, I think a payment of that amount would be appropriate compensation, and I so recommend.

111. I also recommend that SA Police (or the State of South Australia):

- Provide Mr Ottaviano with an apology for having rejected his application in 2001 to be a security guard with the PSSB because of his criminal record; and
- Not further exclude Mr Ottaviano, on the basis of his criminal record in 1991 for receiving stolen goods, from being considered for the position of security guard with the PSSB.

## RESPONSE TO HREOC'S FINDINGS AND RECOMMENDATIONS

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112. Pursuant to s 35(2)(e) of the HREOC Act, HREOC shall include in its report whether, to the knowledge of HREOC, the respondent has taken or is taking any action as a result of HREOC's findings and recommendations and, if so, the nature of that action.

113. Accordingly, on 17 August 2007, a copy of my findings and recommendations above was forwarded to SA Police, which was invited to advise what action it (or the State of South Australia) has taken or is taking as a result of my findings and recommendations.

114. On 14 September 2007, SA Police provided the following response:

I refer to your letter dated 17 August 2007 enclosing the Notice under section 35 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

South Australia Police acknowledges the findings and recommendations of the President as detailed in the Notice.

South Australia Police does not make any further comment in relation to the findings and recommendations.

115. HREOC sought to clarify from the above response whether or not SA Police was in fact taking (or intended to take) any action in response to the findings and recommendations in this report. In response to that request for clarification, SA Police provided the following further response:

I understand that the Commission is obliged under section 35(2)(e) to state whether the entity has taken or is taking any action as a result of the Commission's findings and recommendations *if such information is within the Commission's knowledge*. SAPOL appears not to be obliged by the statute to make such disclosures.

Given the nature of the function that this organisation is vested with and the peculiarities of Mr Ottaviano's case, beyond providing the assurance that SAPOL will continue to comply with our equal opportunity obligations and, in particular, the Commission's findings regarding the "inherent requirements" test, SAPOL chooses not to make public statement as to the detail of actions that it may or may not be undertaking in response to the Commission's findings and recommendations in Mr Ottaviano's matter.

To that end, we would invite the Commission to indicate that such information is not within the Commission's knowledge.

Again, thank you for the opportunity to clarify SAPOL's response.

I report accordingly to the Attorney-General.

A handwritten signature in black ink, reading "John von Doussa". The signature is written in a cursive style with a large, looping initial "J".

John von Doussa QC

President

December 2007

## ENDNOTES

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- <sup>1</sup> See HREOC Act s 32(3)(b) and s 46PG.
- <sup>2</sup> *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth), reg 4(a)(iii).
- <sup>3</sup> (1999) 74 SASR 200.
- <sup>4</sup> See also, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
- <sup>5</sup> HREOC Act s 30(2).
- <sup>6</sup> (1997) 191 CLR 1.
- <sup>7</sup> *Ibid* 12.
- <sup>8</sup> *Ibid* 48.
- <sup>9</sup> *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the SDA in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, [89] (Wilcox J).
- <sup>10</sup> *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 [35] (Black CJ).
- <sup>11</sup> *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635, 642 [31] and following.
- <sup>12</sup> *Ibid* 644 [36].
- <sup>13</sup> (1987) 70 ILO Official Bulletin, Ser B, Supp. 1.
- <sup>14</sup> (1998) 193 CLR 280.
- <sup>15</sup> *Ibid* 284.
- <sup>16</sup> *Ibid* 295.
- <sup>17</sup> *Ibid* 316.
- <sup>18</sup> (1999) 200 CLR 177.
- <sup>19</sup> *Ibid* 208.
- <sup>20</sup> *Ibid* 189-90.
- <sup>21</sup> (1998) 158 ALR 468.

- <sup>22</sup> Ibid 482.
- <sup>23</sup> (1999) 95 FCR 218.
- <sup>24</sup> Ibid 235 [36].
- <sup>25</sup> Ibid 235-6 [37].
- <sup>26</sup> Ibid 237 [40].
- <sup>27</sup> Unreported, Northern Territory Anti-Discrimination Commission, Commissioner Fitzgerald, 22 April 2005.
- <sup>28</sup> Ibid [5.3.5].
- <sup>29</sup> Ibid [5.3.8].
- <sup>30</sup> *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635, 652 [61].
- <sup>31</sup> *Crimes Act 1914* (Cth), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Spent Convictions Act 1988* (WA), *Criminal Records Act 1991* (NSW), *Criminal Records (Spent Convictions) Act 1992* (NT), *Spent Convictions Act 2000* (ACT), *Annulled Convictions Act 2003* (Tas). For a comparative analysis of spent conviction schemes in Australia see <[http://www.hreoc.gov.au/Human\\_Rights/criminalrecord/legislationtable.html](http://www.hreoc.gov.au/Human_Rights/criminalrecord/legislationtable.html)>
- <sup>32</sup> See *Criminal Records (Spent Convictions) Act 1992* (NT) s 13; *Anti-Discrimination Act* (NT) s 19(1)(q); *Annulled Convictions Act 2003* (Tas) s 9; *Anti-Discrimination Act 1998* (Tas) s 16(q); *Spent Convictions Act 1988* (WA) ss 18 - 23; *Discrimination Act 1991* (ACT) s7(1)(o); *Spent Convictions Act 2000* (ACT) s 16.
- <sup>33</sup> Northern Territory, Parliamentary Debates, Legislative Assembly, 13 August 1992, 5357 (Mr Manzie, Attorney-General).
- <sup>34</sup> See *Spent Convictions Act 1988* (WA) Schedule 3, *Criminal Records Act 1991* (NSW) s 15(1), *Criminal Records (Spent Convictions) Act 1992* (NT) s 15(a), *Spent Convictions Act 2000* (ACT) s 19(1)(a).
- <sup>35</sup> (2006) HREOC Report No 33. Copy available at: [http://www.humanrights.gov.au/human\\_rights/human\\_rights\\_reports/hrc\\_report\\_33.html](http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_33.html)
- <sup>36</sup> HREOC Act s 35(2)(a).
- <sup>37</sup> HREOC Act s 35(2)(b).
- <sup>38</sup> HREOC Act s 35(2)(c).
- <sup>39</sup> *Peacock v The Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).



<sup>40</sup> See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).

<sup>41</sup> *Sbarman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

<sup>42</sup> See *Federal Discrimination Law 2005* (HREOC, 2005), pp 276-294.

<sup>43</sup> See, generally, *Western Excavating Ltd v Sharp* (1978) 1 QB 761, 769 (Ld Denning): 'But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.' Applied by Einfeld J in *Librizzi v Flower Power Pty Ltd* (2000) 100 IR 39, 49. See also LexisNexis, *Halsbury's Laws of Australia* (current as at 22 May 2006) 165 Employment, 'Lawful Termination' [165-235].