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Mr KL v State of
NSW (Department
of Education)



Report into discrimination in employment on
the basis of criminal record

[2010] AusHRC 42



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Human Rights
Commission**

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Human Rights
Commission**

everyone, everywhere, everyday

May 2010

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

Dear Attorney

Pursuant to s 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth), I attach my report of an inquiry into the complaint made by Mr KL of discrimination in employment on the basis of criminal record by the NSW Department of Education.

I have found that the act complained of constitutes discrimination in employment on the basis of criminal record.

By letter dated 15 April 2010 the Department provided the following response to my notice of recommendations:

The Department does not propose to take any action with respect to the recommendations of the President. Notwithstanding the President's findings, the Department, with respect, maintains its view that the refusal of Mr KL's application for employment in 2007 was not conduct that amounted to discrimination within the meaning of s 3 of the *Australian Human Rights Commission Act 1986*.

The Department notes that the President accepted the Department's characterisation of the relevant inherent requirements of the job of a teacher in NSW Government Schools and maintains its view that, at the relevant time, after careful consideration the nature and extent of Mr KL's criminal record was regarded as inconsistent with those inherent requirements.

Notwithstanding the above, the Department is prepared, in this case, to take into account the President's findings and to extend to Mr KL casual approval to teach in NSW Government Schools for an initial period of 12 months. Mr KL will nevertheless be required to undertake some administrative processes, which all applicants must satisfy, before the casual approval can take effect.

Yours sincerely

The Hon Catherine Branson QC
President
Australian Human Rights Commission

Human Rights and Equal Opportunity Commission

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Introduction

1. This is a notice 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 (now the Australian Human Rights Commission) by Mr KL. The complaint is made against the State of New South Wales, Department of Education and Training (DET).
2. As a result of my inquiry, I have found that Mr KL was discriminated against on the basis of his criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the Act).
4. I have directed that the complainant's identity be protected in accordance with s 14(2) of the Act.

Part A:

Summary

5. The complainant's criminal record records convictions for offences from 1983 to 1992. In 1983, when Mr KL was 21 years of age, he was convicted of the offence of smoking Indian hemp. In 1986, he was convicted of a number of offences including the possession of illegal drugs (marijuana and amphetamines), illegal use of a motor vehicle, attempting to break, enter and steal, driving in a dangerous manner and resisting arrest. He was sentenced to terms of imprisonment for many of those offences. The maximum individual sentence was for two years in relation to a break and enter offence and attempting to steal a motor vehicle. Mr KL served a total of eight months imprisonment. In 1991 Mr KL was convicted of larceny (shoplifting) and failing to appear for which he received fines. In 1992, Mr KL was convicted of further offences involving self administering of a prohibited drug, dishonesty and stealing. Mr KL has no convictions recorded after 31 March 1992.
6. In 2003 the complainant completed a Bachelor of Music Education. He completed a Graduate Diploma in Education in 2006. Later that year he applied for a position as a secondary teacher with DET through its graduate recruitment program. A criminal record check conducted by DET revealed the complainant's criminal record and DET advised Mr KL that he would not be offered a position as a teacher based on a review of his application and record of convictions.
7. The complainant sought a review of this decision. An independent reviewer engaged by DET recommended that Mr KL be given limited casual teacher approval for 12 months subject to review and that his application be reviewed, on request, for an extension of casual teacher approval or permanent teacher approval after a period of 12 months providing significant periods of casual teaching had been undertaken. DET subsequently confirmed the original decision not to offer employment to Mr KL.
8. DET has submitted that it is an inherent requirement of the job of a teacher that that a person espouses the highest standards of conduct and integrity, demonstrates a commitment to upholding the standards expected by the community of teachers in NSW public schools and enhances and protects the reputation of DET as an employer and of public education. I do not disagree.
9. At first blush, it may appear difficult to see how a person with the criminal record held by Mr KL could meet those requirements. The respondent has given this issue careful consideration and has decided that he cannot. After carefully considering all of the evidence before me, however, I have arrived at a different view to that of the respondent.

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10. In my view, the fact that the circumstances that led to the complainant's period of offending no longer exist, the changes that he has made to his life since that period of offending, the steps he has taken to become an effective member of the community and the length of the period of not offending further (approximately 15 years between the time of his last conviction and the respondent's decision not to offer him employment) are highly persuasive factors in my consideration of this issue. It is difficult to imagine what additional steps Mr KL could have taken over this period of time that would strengthen the evidence of his rehabilitation, his commitment to making a contribution to society and to the education system. It is also difficult to accept that the evidence of Mr KL's rehabilitation would be appreciably strengthened were the period of time since his last offence to be, say, 20 or 25 years rather than 15 years. I do not accept that a person with Mr KL's criminal record is necessarily rendered incapable forever of fulfilling the inherent requirements of the job of a teacher.
11. I have recommended that the State of New South Wales, or DET, pay the complainant \$38 500 in compensation. I have arrived at this figure as follows:
 - \$12 000 for hurt, humiliation and distress;
 - \$19 000 for loss of earnings and
 - \$7500 for loss of opportunity.

PART B:

Outline of complaint

12. Mr KL made his complaint to the Commission on 18 July 2007. DET provided a detailed response to that complaint.
13. On the basis of Mr KL's complaint and the response from DET, it appears that the factual matters in this complaint are not in dispute. Those facts may be summarised as follows.
14. The complainant completed a Bachelor of Music Education in 2003 and a Graduate Diploma in Education in 2006. In July 2006, he applied for a position as a secondary music teacher with DET through its graduate recruitment program.
15. DET carries out criminal record checks for all prospective employees who are seeking a teaching position. Mr KL's criminal record revealed that he was convicted of a number of offences from October 1983 to February 1992. In 1986, Mr KL was sentenced to terms of imprisonment ranging from nine months to two years and served a term of imprisonment of eight months.
16. On 29 September 2006, DET advised Mr KL that he was unsuccessful in obtaining employment and that this decision was reached after a review of his application and record of convictions.
17. Mr KL sought review of this decision by letter dated 20 December 2006 and his application for employment was reviewed by Mr Warren Fahey, an independent reviewer engaged by DET.
18. In a report dated 15 February 2007 (the independent reviewer's report), the independent reviewer recommended that Mr KL be given limited casual teacher approval for 12 months subject to review and that his application be reviewed, on request, for an extension of casual teacher approval or permanent teacher approval after a period of 12 months providing significant periods of casual teaching had been undertaken.
19. The independent reviewer's recommendation was not accepted by DET and by letter dated 26 February 2007, the Director of Staffing Services confirmed the original decision not to employ Mr KL as a teacher. In that letter the Director of Staffing Services states:

I have considered the information provided by Mr Fahey along with your criminal history and documentation provided by you in support of your appeal.

I wish to advise I have endorsed the original decision to decline your application for employment as a teacher. This decision is made in view of the Department's obligations to protect the reputation of the NSW government school system and the expectations that people employed in that system meet the high standards of professional and ethical behaviour.

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20. In a further letter dated 5 July 2007 the Director of Staffing Services confirmed the original decision not to employ Mr KL as a teacher. In that letter, the Director of Staffing Services states:

I must confirm previous written advice provided to you on 26 February 2007 that your application for employment has been declined as a result of your extensive criminal history.

Your application has been exhaustively reviewed via an independent process and by a number of the Department's senior officers, therefore I must also advise that no further correspondence will be entered into regarding this matter.

21. DET does not dispute that Mr KL was not offered employment because of his criminal record.

22. DET does dispute, however, that this decision amounts to discrimination on the basis that Mr KL, in light of his criminal record, is unable to perform the inherent requirements of the position as a teacher.

23. DET describe the inherent requirements of the job as a teacher as follows:

- to espouse the highest standards of conduct and integrity;
- to demonstrate a commitment to upholding the standards expected by the community of teachers in NSW public schools and
- to enhance and protect the reputation of DET as an employer, and of public education.¹

PART C:

Conciliation

24. The Commission endeavoured without success to conciliate a settlement of the complaint.

PART D:

Relevant legal framework

25. Part II, Division 4 of the Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO 111).
26. 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.
27. Section 3(1) of the 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.
28. Australia has declared criminal record as a ground of discrimination for the purposes of the Act.²

PART E:

Findings

Relevant questions to be considered

29. In deciding whether an act or practice complained of constitutes discrimination for the purposes of s 31(b) of the 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 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.
30. The first three questions may be dealt with briefly as follows.
31. I consider that DET's refusal to offer employment to Mr KL on 29 September 2006 and 26 February 2007 were acts within the meaning of s 30(1) of the Act.
32. I also consider that these acts involved distinctions, exclusions or preferences that were made on the basis of Mr KL's criminal record.
33. The decision to not offer employment to Mr KL because of his criminal record constitutes an impairment of his equality of opportunity in employment.
34. The central dispute between the parties is whether Mr KL can perform the inherent requirements of the job.

Relevant legal principles

(a) International jurisprudence

35. As outlined earlier, a distinction, exclusion or preference in respect of a particular job will not amount to 'discrimination' under s 3(1) of the Act if the distinction etc is based on the inherent requirements of the job. This exclusion reproduced, in substance, art 1(2) of ILO 111. The Act was 'introduced to be the vehicle by which Australia's obligations under [ILO 111] are implemented'.³ As such, paragraph (c) should be construed in accordance with the construction given in international law to art 1(2) of ILO 111.⁴
36. The Governing Body of the International Labour Organisation (ILO) created a committee known as the Committee of Experts on the Application of Conventions and Recommendations (the Committee

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of Experts). It is 'orthodox' to rely upon the expressions of opinion of the Committee of Experts for the purposes of interpreting ILO 111.⁵

37. The meaning of art 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.

38. 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.⁶

(b) Identifying inherent requirements

39. In *Qantas Airways v Christie*,⁷ 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.⁸

40. 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.⁹

41. Justice Gummow noted that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.¹⁰

42. Similarly, in *X v The Commonwealth*,¹¹ 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'.¹²

(c) 'Based on'

43. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,¹³ 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.¹⁴

44. The Full Court affirmed that approach in *Commonwealth v Bradley*¹⁵ (*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.¹⁶

45. 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:

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 nebulosity of notions of ‘logic’ in this area makes it an inappropriate test for discrimination.¹⁷

46. 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.¹⁸

47. I also note the decision of the Northern Territory Anti-Discrimination Commission in *Wall v Northern Territory Police*.¹⁹ Northern Territory legislation prohibits discrimination on the basis of ‘irrelevant criminal record’.

48. 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. 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’

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between the purported inherent integrity requirement and the Complainant's spent criminal record.²⁰ (original emphasis, references omitted)

49. 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).²¹

(d) Onus

50. Finally, I note that it is for the respondent to satisfy me that the distinction, exclusion or preference was based on the inherent requirements of the job.²²

51. Accordingly, DET must satisfy me that there is a sufficiently tight connection between the inherent requirements of the job and the exclusion of the complainant in the circumstances of this case.

Application of principles to the complaint

(a) Inherent requirements

52. As noted earlier, DET asserted that the inherent requirements of the teaching position that Mr KL applied for are:

- to espouse the highest standards of conduct and integrity;
- to demonstrate a commitment to upholding the standards expected by the community of teachers in NSW public schools and
- to enhance and protect the reputation of DET as an employer, and of public education.

53. I accept that these do amount to inherent requirements of the job of a teacher given the role and responsibilities of teachers particularly in relation to the students under their care.

(b) Was the exclusion based on the inherent requirements of the job?

54. DET formed the view that, having regard to the nature and history of the complainant's convictions, he is not able to meet the inherent requirements as outlined above. The submission made by DET states:

Mr KL has an extensive criminal history involving offences committed between 1983 and 1992 relating to illegal drugs, theft and misuse of motor vehicle and matters involving fraudulent misrepresentation.

Mr KL's application for employment was declined by the Department because, in the Department's view, the nature and number of offences and the court outcomes call into question Mr KL's capacity to meet the relevant inherent requirements of the position.²³

55. In accordance with *Bradley*, the issue for consideration is whether there is a tight or close connection between the inherent requirements of the job of a teacher as set out above and the refusal to offer Mr KL employment. The respondent agrees that this is the correct analysis.²⁴

56. The following matters are relevant to this issue.

(i) Nature of criminal record including custodial sentence

57. Mr KL's criminal record records convictions for offences from 1983 to 1992.

58. In summary:

- Mr KL was convicted of one offence in 1983 (smoking Indian hemp) when he was 21 years of age.
- He was then convicted of a number of offences in 1986 including the possession of illegal drugs (marijuana and amphetamines), illegal use of a motor vehicle, attempting to break, enter and steal, driving in a dangerous manner and resisting arrest. He was sentenced to terms of imprisonment for many of those offences. The maximum individual sentence was two years for a break and enter offence and attempting to steal a motor vehicle. According to Mr KL, he served a total of eight months imprisonment for these offences.
- Mr KL was then convicted of two more offences in 1991 (larceny (shoplifting) and failing to appear) for which he received fines. He was then convicted of further offences in 1992 involving self administering of a prohibited drug, dishonesty and stealing. The last convictions are dated 31 March 1992.

59. In relation to his criminal record, DET state as follows:

His application for employment as a teacher was declined following consideration of the nature and number of offences, the penalties imposed by the court, including the terms of imprisonment imposed and served. An additional factor in the assessment of Mr KL's particular criminal record is that following his release from prison in 1986/87 he was charged and convicted of 7 further offences involving larceny (shoplifting), illegal drugs (marijuana and amphetamines), dishonesty matters and stealing. In the Department's view, the above matters mean that Mr KL is unable to perform the inherent requirements of the position of teacher.²⁵

(ii) Circumstances surrounding offending

60. The background to the period of Mr KL's offending is set out in a letter from him to the Coordinator of Teacher Recruitment Programs and in the independent reviewer's report. This includes Mr KL's abuse of alcohol and drugs at that time and his involvement with other people who shared these pastimes at his then place of employment.

(iii) Time since convictions

61. No convictions are recorded for Mr KL since 1992. Approximately 15 years had therefore elapsed between the time of his last conviction and the respondent's refusal to offer him employment as a teacher.

(iv) Conduct since period of offending

62. The complainant claims that he stopped consuming alcohol in 1990 and was determined to turn his life around. He became self-employed and worked part time whilst completing his tertiary education. He claims that he is now a responsible adult and single parent and attends his local Baptist church every Sunday.

63. According to the information provided by Mr KL to the independent assessor:

- His period of imprisonment in 1986/1987 helped him 'find out who he was'.
- In 1988 Mr KL underwent a detoxification program at a specialised Clinic for four months.

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- It was not until he stopped drinking that Mr KL realised he had a future. Mr KL said that he had seen a future when first employed at the State Rail Authority (SRA) but that this was shattered when he was released from prison in 1987 and was not re-employed by SRA.
 - He attends AA meetings and has not consumed alcohol since 1990.
 - Up until around 1991 Mr KL received unemployment benefits.
 - In 1992 he regained his driver's licence, purchased a vehicle and, until April 2006, was self-employed as a courier driver.
 - From 2000–2003 he studied at the Australian Institute of Music and graduated with a Bachelor of Music Education.
 - In 2006 Mr KL obtained a Graduate Diploma in Education from the University of New England.
 - During all of his tertiary study Mr KL worked part-time as a courier in order to meet his mortgage and other living expenses.
 - Mr KL now has sole parental responsibility for his young daughter.²⁶
64. This description of the changes that Mr KL has made to his life is also supported by a number of people who provided character references for Mr KL, including:
- The Senior Pastor of Mr KL's local Baptist Church. The Senior Pastor has known the complainant since 2006 and describes Mr KL's active involvement in church activities.
 - The Manager of a therapeutic community for drug affected men. The Manager has known Mr KL since 1993 and became his sponsor/ teacher in 1995 in relation to his recovery from alcohol abuse. The Manager states that Mr KL has been sober and drug free since he has known him and leads a completely different life to that which preceded his recovery.
 - A member of the local Salvation Army. She has known Mr KL for over 16 years and attests to his change from a young man with self-esteem and other problems into an exemplary person.
 - A family friend. He has known Mr KL for 12 months and is a fellow church attendee at the local Baptist Church.
 - A Drug and Alcohol Counselor for the South Western Area Health Service. She has known Mr KL for 16 years and notes that she has watched him grow and develop his character. She also states that he has been attending Alcoholics Anonymous on a regular basis and has been sober for many years.

(v) *Recommendation of independent reviewer*

65. In his report dated 15 February 2007 prepared for DET, Mr Fahey set out in detail his review of Mr KL's application for employment and the matters that he took into account. He concluded that:
- Mr KL is possessed of the requisite knowledge, skills and experience to satisfactorily perform the full range of duties as a teacher with assistance during his probationary year.
 - Mr KL's explanations for his past participation and involvement in criminal activity were very credible. His referees attest to his

positive life as a Christian, to his generosity in helping others, to his long term sobriety and his dedication to and support of his family.

- Based on Mr KL's conduct of the past 15 years, as evidenced by a clear criminal record and positive written character references, he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited as a government school teacher in a casual capacity.
- Mr KL should be deemed a fit and proper person to be employed in a limited casual teaching capacity in the Education Teaching Service.
- Mr KL deserves a chance to demonstrate that he would be a fit and proper person to be employed in a permanent capacity in the Education Teaching Service following at least a 12 month period of work as a casual teacher.

Respondent's submissions

66. DET submitted that, in arriving at its decision to refuse to offer employment to Mr KL, it had considered the length of time since the applicant's last conviction. It had also taken into account the evidence concerning the changes the applicant has made to his life since that time including the references that attested to these changes.²⁷
67. In DET's view, however, those matters had to be considered and weighed against the following factors:
- Concern about community expectations being met by approving the applicant for employment as a teacher with such a serious criminal record and the limited capacity such a criminal record has to protect and enhance the integrity and reputation of DET as an employer.
 - The fact that the applicant re-offended subsequent to serving a term of imprisonment.
 - Concern as to the applicant's capacity to meet the standards of conduct prescribed by DET's Code of Conduct in the event that he were to be employed in the teaching service.
 - That, in DET's opinion, the applicant's 15 year crime-free record did not mitigate the totality of his criminal history and this warranted continued concerns about the behaviour that led to these offences being committed.²⁸
68. DET submitted that the exclusion of the applicant with his particular circumstances, including the nature of his criminal record (convictions involving dishonesty and fraudulent misrepresentation, resisting arrest and drug related matters) and the extent of his criminal record (including the number of convictions and the re-offending after a period of imprisonment), was necessary in order to fulfil the inherent requirements of the job.²⁹
69. DET was of the view that it had demonstrated a sufficiently close or tight connection between the inherent requirements of the job of a teacher and the exclusion, distinction or preference applied to the applicant on the basis of his criminal record.³⁰

Conclusion

70. There is no doubt that the offences committed by the complainant were serious, some attracting terms of imprisonment. I have examined Mr KL's criminal record and, as observed by the respondent, he was convicted over a number of years of a range of offences that include the possession and use of amphetamines, illegal use of a motor vehicle, break and enter offences, dishonesty offences and stealing. It is also the case that a number of offences were committed after the complainant had already served a term of imprisonment.
71. Mr KL has provided an explanation of his life circumstances at the time of the offending. Evidence has also been placed before me of the steps Mr KL has taken to rehabilitate himself. I have also been provided with evidence of the lengthy period of time since Mr KL last offended. His referees attest, as the independent reviewer noted, to 'his positive attitude to life as a Christian, to his generosity in helping others, to his long term sobriety and his dedication and support of his family'.³¹
72. I have accepted that the inherent requirements of the job of a teacher are those as articulated by the respondent. At first blush, it may appear difficult to see how a person with the criminal record held by Mr KL could meet those requirements. The respondent has given this issue careful consideration and has decided that he cannot.
73. After carefully considering all of the evidence before me, however, I have arrived at a different view to that of the respondent. In my view, the fact that the circumstances that led to Mr KL's offending no longer exist, the changes that Mr KL has made to his life in the time since his period of offending, the steps he has taken to become an effective member of the community and the length of the period of not offending further are highly persuasive factors in my consideration of this issue. It is difficult to imagine what additional steps Mr KL could have taken over this period of time that would strengthen the evidence of his rehabilitation and his commitment to making a contribution to society and to the education system. It is also difficult to accept that the evidence of Mr KL's rehabilitation would be appreciably strengthened were the period of time since his last offence to be, say, 20 or 25 years rather than 15 years. I do not accept that a person with Mr KL's criminal record is necessarily rendered incapable forever of fulfilling the inherent requirements of the job of a teacher.
74. On the basis of all of the evidence and submissions provided to me, I am satisfied that there is no reason to conclude that Mr KL will not be able, if employed by the respondent, to
- espouse the highest standards of conduct and integrity;
 - demonstrate a commitment to upholding the standards expected by the community of teachers in NSW public schools and
 - enhance and protect the reputation of DET as an employer, and of public education.
75. In my view, DET has failed to demonstrate a sufficiently 'tight correlation' between the decision not to offer Mr KL employment and the inherent requirements of the job.

PART F:

Recommendations

Power to make recommendations

76. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.³² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.³³
77. The Commission 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.³⁴

General recommendations

78. The complainant proposed three general recommendations.
79. In my view, the respondent makes persuasive arguments about why the proposed recommendations should not be made.

(a) Proposed recommendation 1

80. The complainant submits that the respondent should not take into account offences older than 10 years, with the exception of offences against children as well as offences involving violence or dishonesty.
81. The respondent notes that this proposed recommendation appears to relate to the notion of spent convictions which are dealt with under the *Criminal Records Act 1991* (NSW). The respondent draws attention to s 15(1) of that Act which excludes from the protection offered by the Act people seeking employment in a number of different professions. Teachers and teachers' aides are specifically included in this list of professions.
82. The respondent submits that given that the usual consequences of a spent conviction specifically do not apply in relation to an application for appointment or employment as a teacher, the Commission should not make the recommendation sought by the complainant or any similar recommendation.
83. I agree with the respondent's submission and have decided not to make the recommendation sought by the complainant.

(b) Proposed recommendation 2

84. The complainant submits that the respondent should be compelled to take into account the character and behaviour of the individual subsequent to the offending behaviour.
85. The respondent submits that DET's 'Guidelines for the assessment of information revealed when conducting probity checks for applicants and prospective employees in schools' already require DET to consider the matters referred to by the complainant in this proposed recommendation.
86. The respondent referred to the relevant part of those guidelines as follows:
- Relevant considerations for the assessment of information revealed by criminal records checks include:
- ...
- The period of time which has elapsed since the offence/s was/were committed;
- ...
- Evidence about general character and lifestyle, including changes;
- Referee comments[.]
87. Given this, the respondent submits that the Commission should not make the recommendation sought by the complainant.
88. I agree with the respondent's submission and have decided not to make the recommendation sought by the complainant.

(c) Proposed recommendation 3

89. The complainant submits that once the respondent has complied with proposed recommendation 2 above, it should give detailed reasons in writing explaining why a person's application has been rejected.
90. The respondent submits that the guidelines referred to above already require that a person is provided with written reasons for decision if 'the person is rejected for employment/appointment as a result of the risk assessment outcome of the information recorded in their criminal history'.
91. The respondent therefore submits that as it already has in place a procedure by which unsuccessful applicants are advised, in detail, of the reasons for the decision to reject an application and that procedure is followed in all cases, the Commission should not make the recommendation sought by the complainant.
92. I agree with the respondent's submission and have decided not to make the recommendation sought by the complainant.

Compensation

93. I am satisfied that Mr KL suffered loss and damage and should be compensated. I recommend payment to him of a sum of \$38 500 as appropriate compensation. In assessing the sum recommended, I have taken into account the matters discussed below.
94. 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.³⁵ I am of the view that this is the appropriate approach to take in 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.³⁶

(a) Hurt humiliation and distress

95. I am satisfied that Mr KL experienced feelings of hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record.
96. Compensation for Mr KL'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.³⁷
97. In reaching an appropriate figure, I have taken into account the following factors:
- Mr KL provides evidence concerning the effect that the act of the respondent has had on him. He describes feeling of 'frustration and anger' as well as feelings of 'hurt, anger and humiliation'. A statutory declaration sworn by Mr KL's mother in which she described her observations of the difficulties Mr KL experienced from November 2007 to at least May 2008 is consistent with Mr KL's evidence about this issue. Mr KL's mother described her son as being 'negative, sad and angry gradually to the point of suffering panic and anxiety attacks'.
 - Mr KL sought counselling to help deal with these feelings. Mr KL attributes the need for counselling to the actions of the respondent. There is, however, no professional evidence to support this. Nor is there any other evidence to indicate that Mr KL suffers from an ongoing psychological condition.
 - Mr KL invested time and energy in seeking to rehabilitate himself in the years since his imprisonment and also undertook a degree that he had hoped would allow him to engage in a career that he is passionate about and that would allow him to contribute to society. Whilst the respondent has noted that it is not the only employer of teachers in NSW, it is clearly the largest employer of teachers in the State. Mr KL experienced disappointment and frustration on learning that he would not be considered for employment by the most significant employer of teachers in NSW. Mr KL has not been successful in obtaining employment as a teacher by another employer.
 - In reaching an appropriate figure, I have had regard to awards for general damages in federal discrimination cases in relation to hurt, humiliation and distress.³⁸
98. I consider that the global sum for compensation should include an amount in the order of \$12 000 for hurt, humiliation and distress.

(b) Loss of earnings

99. Mr KL seeks a recommendation for the payment of compensation for economic loss for the period 15 February 2007 to 27 March 2008. The commencement date is based on the date that the independent reviewer, Mr Warren Fahey, provided his report to the respondent recommending, amongst other things, that Mr KL should be deemed a fit and proper person to be employed in a limited casual teaching capacity.

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100. I am of the view that the period of time over which Mr KL may appropriately seek to be compensated for economic loss is the 2007 school year. This is based on the recommendation made on 15 January 2007 by the independent reviewer that Mr KL be given limited casual teacher approval for 12 months subject to review and that his application be reviewed, on request, for an extension of casual teacher approval or permanent teacher approval after a period of 12 months providing significant periods of casual teaching had been undertaken.
101. Mr KL also made his claim on the basis that he would have received three days per week of casual work each week during the relevant period had he been given approval to undertake casual teaching. I accept the respondent's evidence, however, that in the 2007 school year, there were only 145 requests from schools for casual teachers of secondary music. According to the respondent, this figure relates to State wide secondary schools for which day to day relief was sought through the respondent's casual direct staffing service. The respondent has not provided any further particularity in relation to this figure. I am nonetheless obliged to do the best I can with the information available to me.
102. On the basis of the evidence available to me, that number of teaching days is the maximum that could have been available to Mr KL in 2007. It is necessary to reduce that number to reflect the likelihood that the complainant would not have been offered all of those days of casual work or could not have accepted them all because of their location or for some other reason. It seems to me reasonable to assume that many of those days were likely to have been in metropolitan schools. It also seems to me reasonable to assume that Mr KL could have accepted most jobs in or near the metropolitan area had they been offered to him. There was no evidence before me that there were other casual music teachers with whom Mr KL would have been in competition for casual work. I am of the view that a figure of 55% of the 145 days is appropriate, based on the assumption that somewhat more than half of the 145 days would have been in or near the metropolitan area and allowing a small contingency for Mr KL not being able to accept every day that might have been offered to him.
103. The respondent provided evidence that the correct rate of pay claimed by Mr KL for the 2007 school year, including relevant loadings, is \$253.70 per day. I accept this evidence.
104. On this basis, the sum of \$19 000 represents a guide to the loss of earnings that it is likely that Mr KL suffered.
105. The respondent also raised the issue of mitigation. The duty to mitigate appears to be accepted as applicable to awards of compensation under Australian discrimination legislation.³⁹ The respondent, however, bears the burden of persuasion in any controversy as to whether the complainant has mitigated his loss.⁴⁰
106. The respondent submits that the information provided by Mr KL concerning the efforts he has made to obtain employment as a teacher in the non-government sector were outside (either before or after) the period in which Mr KL is claiming loss. However, the correspondence provided by Mr KL suggests that he applied for positions at two different schools at some time prior to or within the 2007 school year given that the letters advising him that his applications were unsuccessful were dated 18 January 2007 and 4 April 2007 respectively.

107. I also accept Mr KL's evidence that during the period in question, he was not employed and was in receipt of a single parent payment from Centrelink as he had sole responsibility for the care of his young daughter.
108. On balance, I am not satisfied the respondent has discharged the onus placed upon it and I am unable to be satisfied that Mr KL has failed in his duty to mitigate his loss.
109. I therefore recommend an allowance in the order of \$19 000 should be included for this head of loss.

(c) Loss of opportunity

110. As noted previously, the independent reviewer recommended that Mr KL be given limited casual teacher approval for 12 months subject to review and that his application be reviewed, on request, for an extension of casual teacher approval or permanent teacher approval after a period of 12 months providing significant periods of casual teaching have been undertaken.
111. Mr KL was denied the opportunity to work as a casual teacher for the initial 12 months recommended by the assessor. This also meant that he was denied the chance to be considered for longer term employment with DET depending on how the initial 12 months transpired. This chance was not, in my view, negligible. For that reason, I consider that the lost opportunity legitimately attracts compensation. That compensation is to be assessed on a conservative basis given the conditional nature of the independent reviewer's recommendation and the many contingencies impacting on the nature and duration of any extended employment that Mr KL may have obtained.⁴¹ It also seems to me appropriate to proceed on the basis that should Mr KL choose to make a fresh application for employment with DET, that application will be assessed having regard to my finding that the respondent has failed to demonstrate that Mr KL is unable to meet the inherent requirements of the job of a teacher.
112. I consider it appropriate to include a further allowance in the order of \$7500 to compensate for this loss of opportunity.

DET's Response to the Recommendations

113. By letter dated 5 March 2010, DET was requested to advise the Commission by 22 March 2010 whether it had taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action. An extension was subsequently granted to 16 April 2010.
114. By letter dated 15 April 2010 DET provided the following response to my notice of recommendations:

The Department does not propose to take any action with respect to the recommendations of the President. Notwithstanding the President's findings, the Department, with respect, maintains its view that the refusal of Mr KL's application for employment in 2007 was not conduct that amounted to discrimination within the meaning of s 3 of the Australian Human Rights Commission Act 1986.

The Department notes that the President accepted the Department's characterisation of the relevant inherent requirements of the job of a teacher in NSW Government Schools and maintains its view that, at the relevant time, after careful consideration the nature and extent of Mr KL's criminal record was regarded as inconsistent with those inherent requirements.

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Notwithstanding the above, the Department is prepared, in this case, to take into account the President's findings and to extend to the Complainant casual approval to teach in NSW Government Schools for an initial period of 12 months. Mr KL will nevertheless be required to undertake some administrative processes, which all applicants must satisfy, before the casual approval can take effect.

115. I report accordingly to the Attorney-General.



The Hon Catherine Branson QC
President
Australian Human Rights Commission
May 2010

1 Letter from Crown Solicitor's Office to the Commission dated 19 October 2007, 6.
2 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
3 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 [35] (Black CJ).
4 *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635,
5 642 [31] and following.
6 *Ibid*, 644 [36].
7 (1987) 70 ILO Official Bulletin, Ser B, Supp 1.
8 (1998) 193 CLR 280.
9 *Qantas Airways v Christie* (1998) 193 CLR 280, 284.
10 *Ibid*, 295.
11 *Ibid*, 316.
12 (1999) 200 CLR 177.
13 *Ibid*, 208.
14 (1998) 158 ALR 468.
15 *Ibid*, 482.
16 (1999) 95 FCR 218.
17 *Commonwealth v Bradley* (1999) 95 FCR 235, [36].
18 *Ibid*, 235–6 [37].
19 *Ibid*, 237 [40].
20 Unreported, Northern Territory Anti-Discrimination Commission, Commissioner Fitzgerald, 22 April 2005.
21 *Ibid* [5.3.5].
22 *Ibid* [5.3.8].
23 *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635,
24 652 [61].
25 Letter from Crown Solicitor's Office to Karen Toohey dated 19 October 2007, 6.
26 Supplementary submission of the Department of Education and Training dated 30 January 2009, [4].
27 Letter from Crown Solicitor's Office to Karen Toohey dated 19 October 2007, 3.
28 At 7.
29 Supplementary submission of the Department of Education and Training dated 30 January 2009, [13].
30 *Ibid*.
31 *Ibid* [19].
32 *Ibid* [14].
33 Independent reviewer's report [58].
34 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
35 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
36 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
37 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
38 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
39 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
40 See Australian Human Rights Commission, *Federal Discrimination Law* (2009), 7.2 <<http://www.austlii.edu.au/au/other/HRLRes/2009/1/7.html#Heading118>>.
41 See, for example, *Cummaudo v Aerospace Technologies of Australia Pty Limited and Anor* (1990) EOC 92–316.
42 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. In the area of discrimination law, see *Everett v Copperart* (1997) QADT 14.
43 *Sellars v Adelaide Petroleum* (1994) 179 CLR 332.

Further Information

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