



Australian
Human Rights
Commission

BE v

Suncorp Group Ltd

[2018] AusHRC 121

© Australian Human Rights Commission 2018.

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication and endorses the use of the **Australian Governments Open Access and Licensing Framework** (AusGOAL).

All material presented in this publication is licensed under the **Creative Commons Attribution 4.0 International Licence**, with the exception of:

- the Commission's logo, any branding or trademarks; and
- where otherwise indicated.

To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/legalcode>.

In essence, you are free to copy, communicate and adapt the publication, as long as you attribute the Australian Human Rights Commission and abide by the other licence terms.

Please give attribution to: © Australian Human Rights Commission 2018.

ISSN 1837-1183

Further information

For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Email: communications@humanrights.gov.au.

Design and layout Dancinggirl Designs

Printing Masterprint Pty Limited

BE v Suncorp Group Ltd

[2018] AusHRC 121

Report into discrimination in employment on the basis of criminal record

Australian Human Rights Commission 2018

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

Dear Attorney

I have completed my report pursuant to section 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of discrimination in employment on the basis of criminal record made by Mr BE against Suncorp Group Ltd (Suncorp).

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

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

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

I have also recommended that Suncorp pay Mr BE an amount in compensation reflecting the hurt, humiliation and distress experienced by him as a result of Suncorp's conduct.

Suncorp provided its response to my findings and recommendations on 6 December 2017. I have set out Suncorp's response in Part 8 of this report.

I enclose a copy of my report.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

March 2018

Contents

- 1 Introduction to this inquiry 6**
- 2 Summary of findings and recommendations 6**
- 3 Background to complaint..... 7**
 - 3.1 Suncorp’s response..... 9**
- 4 Relevant legal framework..... 10**
- 5 Issues for consideration 11**
 - 5.1 Is there an act or practice?..... 11**
 - 5.2 Does the act involve a distinction, exclusion or preference on the basis of criminal record?..... 11**
 - 5.3 Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?..... 12**
 - 5.4 Was the exclusion on the basis of the inherent requirements of the role? 13**
 - (a) Identifying the ‘inherent requirements’ 13**
 - (b) Suncorp’s submission on ‘inherent requirements’ 17**
 - (c) The law on good character and trustworthiness 18**
 - 5.5 ‘based on’ 19**
 - (a) The role involves dealing with confidential customer information .. 20**
 - (b) The role involves working with technology and the internet; the role is unsupervised as it is based at home 21**
 - (c) The role involves working to promote Suncorp’s corporate responsibility 23**
 - (d) Non-disclosure of criminal record 24**
- 6 Summary of Findings 25**
- 7 Recommendations..... 25**
 - 7.1 Consideration of compensation..... 27**
 - 7.2 Suncorp’s policies and training 28**
- 8 Suncorp’s response 30**

1 Introduction to this inquiry

1. This Report sets out the Australian Human Rights Commission's findings and recommendations following an inquiry into a complaint by Mr BE against Suncorp Group Limited (Suncorp) alleging discrimination in employment on the basis of criminal record.
2. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Mr BE has requested that his name not be published in connection with this inquiry. I consider that the preservation of his anonymity is necessary to protect his privacy and security of employment. Accordingly, I have given a direction under s 14(2) of the AHRC Act and refer to him by the pseudonym 'BE' in this document.

2 Summary of findings and recommendations

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

3 Background to complaint

6. Mr BE made a written complaint to the Commission alleging that Suncorp excluded him from employment by rescinding a conditional offer of employment and excluding him from the role of 'Work@Home Consultant' (Consultant) on the basis of his criminal record. Suncorp is a financial services company providing banking, insurance and superannuation services. The Consultant role was part of its insurance business.
7. Based on the information provided by the parties, the relevant facts appear to be as follows:
 - a) On or about 26 November 2015 Mr BE applied online for the role of "Work@Home" Claims Assist Consultant – Melbourne'.
 - b) Mr BE was selected by the Hays NZ Recruitment team to progress into the next stage of the recruitment process.
 - c) On 30 November 2015, Mr BE attended Suncorp's Melbourne assessment centre to complete a group interview and pre-employment checks.
 - d) On 30 November 2015, Mr BE received an email of an offer of employment, conditional upon a satisfactory background check including a criminal history check. On the same day, Mr BE completed a consent form, allowing Suncorp to perform a criminal history check.
 - e) Suncorp conducted a criminal history check on or about 1 December 2015, which recovered Mr BE's criminal record. The check identified the following convictions:

16 October 2015	Failure to comply with reporting obligations Order: fined \$1000
4 March 2008	Use of a carriage service to access child pornography material

	Order: Imprisonment for 12 months. Released on recognizance \$10,000 to be of good behaviour for 2 years. Pay \$5000 to charity
4 March 2008	Possession of child pornography Order: fined \$5000

- f) In line with its usual practice, Suncorp contacted Mr BE to discuss his criminal record.
 - g) On 10 December 2015, Mr BE was notified that the conditional offer of employment was rescinded as an internal candidate had been appointed to the role.
 - h) At the time of this notification, Suncorp did not inform Mr BE that his criminal record was a reason for the rescission of its conditional offer of employment.
8. In connection with his complaint Mr BE makes the following submissions:
- a) Prior to the group interview in Melbourne on 30 November 2015, Mr BE, by telephone, disclosed his criminal record to the principal interviewer.
 - b) On 23 December 2015, upon Mr BE's inquiry, the principal interviewer advised Mr BE that he had missed out on the role by two places and would automatically be considered as part of the next recruitment process in February 2016. However, he was not contacted in relation to the February 2016 recruitment process.
 - c) When Mr BE followed up the February 2016 recruitment in March 2016 with the principal interviewer, Mr BE was informed via email that he was not considered in that intake as the recruiter in charge of the February recruitment had changed from that in charge of the November 2015 recruitment. In the same email, the principal interviewer encouraged Mr BE to apply for further roles with Suncorp as advertised from time to time on their website. At no time during this correspondence was Mr BE's criminal record raised as a barrier to employment with Suncorp.

9. On 17 July 2017, after having made a complaint to the Commission, Mr BE received an invitation from a member of Suncorp's Recruitment Team to apply for a position at Suncorp as a 'Customer Value Specialist – Gisborne'. On 19 July 2017, upon inquiry, a Suncorp officer informed the Commission that this email was a bulk email sent to a range of people who had previously applied for a job with Suncorp. It had been sent without considering Mr BE's complaint or the fact that he had previously been refused a similar job based on his criminal record.
10. The Commission's inquiry into Mr BE's complaint of criminal record discrimination relates only to the initial recruitment process for the Consultant role in November 2015. However, Suncorp's subsequent conduct has relevance to the issue of whether Mr BE satisfies the inherent requirements of the role.

3.1 Suncorp's response

11. On 8 June 2016, Suncorp provided a response to Mr BE's complaint. The response is as follows:

Suncorp denies that the decision not to make an unconditional offer of employment to Mr BE constitutes unlawful discrimination in employment.

Rather:

- a. On the first occasion that Mr BE applied for employment with Suncorp, in November 2015, he was not made an unconditional offer of employment because:
 - (i) Suncorp had concerns about Mr BE's ability to undertake the inherent requirements of the position, based on his criminal convictions; and
 - (ii) Preference was given to an internal candidate who applied for the role, late in the recruitment process.
12. In a further response dated 9 September 2016, Suncorp reiterated that it was of the view that Mr BE's criminal record was relevant to his capacity to fulfil the inherent requirements of the role of a Consultant, stating:

We have previously made submissions that Suncorp's Values are inherent requirements of the job. Due to the serious nature of Mr BE's criminal record, we have serious concerns about whether he can demonstrate and fulfil our values including respect, honesty and trust. Our Values also underpin Suncorp's Code of Conduct.

It is integral for a person who performs the W@H job to embody Suncorp's Values. Embodying Suncorp's Values is an inherent requirement of the W@H job rather than a peripheral requirement.

4 Relevant legal framework

13. Part II, Division 4 of the AHRC Act is concerned with the Commission's functions relating to equal opportunity in employment.
14. Section 31(b) of the AHRC Act confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) requires that the function of the Commission under s 31(b) be performed by the President.
15. Section 3(1) of the AHRC Act defines discrimination for the purposes of s 31(b) as:
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;but does not include any distinction, exclusion or preference:
 - (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.
16. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

5 Issues for consideration

17. In deciding whether there has been discrimination within the terms of s 31(b) of the AHRC Act, I am required to consider the following questions:
- whether there was an act or practice within the meaning of s 30(1) of the AHRC Act
 - whether that act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record
 - whether that distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and
 - whether that distinction, exclusion, or preference was based on the inherent requirements of the job.

5.1 *Is there an act or practice?*

18. 'Act' and 'practice' are defined at s 30(1) of the AHRC Act. 'Act' and 'practice' have their ordinary meanings. An 'act' is a thing done and a 'practice' is a course of repeated conduct.
19. I am satisfied that Suncorp's decision on or about 10 December 2015 to rescind Mr BE's conditional offer of employment was an 'act' within the meaning of s 30(1) of the AHRC Act.

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

20. I consider that Suncorp's decision to rescind Mr BE's offer of employment and to exclude him from performing the role constitutes an 'exclusion' within the scope of the definition of 'discrimination' in the AHRC Act.
21. For a case of discrimination to be found in Suncorp's decision to rescind Mr BE's conditional offer of employment, it would need to be shown that the relevant exclusion was made 'on the basis' of his criminal record. In considering the expression 'based on', in a similar definition of discrimination under s 9(1) of the *Racial Discrimination Act 1975* (Cth), the Federal Court held that the words were to be equated with the phrase 'by reference to', rather than the more limited 'by reason of' or 'on the ground of' which have been interpreted elsewhere to require some sort of causal connection.² It does not need to be the sole reason.

22. There is no dispute between the parties that Mr BE's record was at least one reason for Suncorp's decision to rescind the conditional offer of employment. In its response dated 9 September 2016 Suncorp states:

After careful consideration, Suncorp formed the view that it would not proceed with an offer of employment due to the nature of his criminal convictions as well as the existence of an internal candidate.

23. It is clear from this statement that, in conjunction with the subsequent application of an internal candidate, Mr BE's criminal record was *a reason* for the exclusion. On this basis, I am satisfied that Suncorp's decision to rescind the offer of employment constituted an exclusion on the basis of Mr BE's criminal record.

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

24. I consider that Suncorp's decision to rescind the conditional offer of employment constitutes an impairment of Mr BE's equality of opportunity in employment.
25. 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. It is 'orthodox' to rely upon the expressions of opinion of the Committee for the purposes of interpreting the ILO 111 Convention.³
26. Article 1(3) of the ILO 111 defines 'employment' and 'occupation' as including access to employment and to particular occupations, and terms and conditions of employment.
27. Had Suncorp not made the decision to rescind Mr BE's conditional offer of employment it is likely Mr BE would have accepted the offer and proceeded to work as a Consultant. In this role he would have:
- worked on a flexi-part time basis, working a minimum of 20 hours a week from home, and
 - received a salary in Suncorp's Base Pay A3 Band.
28. Notwithstanding the very serious nature of Mr BE's convictions, I find that Suncorp's decision to deny Mr BE the opportunity to access employment with Suncorp constituted an exclusion which impaired Mr BE's equality of opportunity and treatment in employment.

5.4 Was the exclusion on the basis of the inherent requirements of the role?

29. The definition of 'discrimination' in s 3(1) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job that is based on the inherent requirements of the job'. In light of my preliminary view that Suncorp's decision not to engage Mr BE in the role was an exclusion on the basis of criminal record, I must consider whether the exclusion was based on the inherent requirements of the job.
30. Paragraph (c) of the definition is an 'exception' to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.⁴

(a) Identifying the 'inherent requirements'

31. Appropriate identification of the inherent requirements of the job is a pre-condition to proving that the complainant is unable to perform those inherent requirements.
32. An 'inherent requirement' is something that is 'essential to the position'⁵ and not 'peripheral'.⁶ It is an 'essential feature' or 'defining characteristic'.⁷
33. Further, the inherent requirements must be in respect of 'a particular job'. The term 'a particular job' in Article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its 'inherent requirements' are those required by the characteristics of the particular job.⁸
34. The fact that certain statements appear in the position description document is not sufficient to establish that they are 'inherent requirements' of this particular job. In *Qantas Airways v Christie*, Brennan J stated that:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.⁹

35. For this reason, as discussed in the Commission's *Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*:

Broad general statements about a job's requirements are not clear enough to allow for an assessment of inherent requirements.¹⁰

36. In its response dated 8 June 2016, Suncorp provided the Commission with the following documentation relevant to the complaint:

- Suncorp's advertisement for the W@H Consultant position from November 2015
- a position description for a W@H Consultant, and
- Mr BE's application form for the November 2015 recruitment of W@H Consultants.

37. For the purposes of assessing this complaint, it is not necessary for me to consider each item listed in the position description or advertisement and form a view as to which items constitute inherent requirements and which do not. However, I am required to identify and form a view in relation to the inherent requirements which Suncorp has assessed Mr BE as not being able to perform. Key aspects of the position description are extracted below:

Key accountabilities (Key activities, tasks and outcomes to be achieved)

- Contribute to the efficient and effective functioning of the team in order to meet organisational objectives
- Demonstrate appropriate and professional workplace behaviours, providing assistance to team members if required and undertaking other key responsibilities or activities as directed
- Perform responsibilities in a manner which reflects and responds to continuous improvement
- Participate in Annual Performance Review process in conjunction with direct manager
- Take responsibility for own personal development plan and professional learning goals
- Complete immediate fulfilment of claims, in line with Centre criteria and guidelines
- Maintain accurate records for customers, and complete appropriate and timely follow up when required
- Provide superior customer service experience in every interaction with customers
- Lodge new insurance claims for customers
- Handle customer enquiries regarding existing insurance claims

- Maintain clear and concise communication with customers, demonstrating empathy and understanding towards all customers
- Resolve conflict and customer dispute situations professionally, providing appropriate solutions and outcomes, balancing the customer and business positions.

Key job requirements

Qualifications (indicate whether mandatory or desired)

- Computer literacy and navigational skills using multiple systems simultaneously - including DOS based applications and the Microsoft suite (Mandatory)

Experience (minimum type and level of experience required to perform the role)

- Experience working within a customer service environment

Technical capabilities (skills, knowledge, technical or specialist capabilities)

- Ability to develop courses of action based on logic and fact, and within delegated level of authority and legislation
- Committed to enhancing customer experience and delivering high quality solutions within required timeframes
- Strong communication skills, demonstrated through active listening, and ability to tailor communication to customers. Ability to convey and explain information, coherently and confidently in both oral and written communication
- Proven ability to resolve conflict and customer disputes in a professional and solution based manner
- Actively seeks feedback on own performance and takes responsibility for self development
- Ability to make effective judgment about priorities and establish process to accomplish goals utilising appropriate resources
- Ability to manage workload in a professional and prepared manner including appropriate adherence to schedule
- Ability to explore negotiation opportunities with a view to mutual support and acceptance
- Effective decision-making in a timely and informed manner with minimal supervision
- Ability to work effectively in team environments, encouraging others to participate
- Appropriate demonstration and support of Suncorp Values in all interactions relevant to positional requirements
- Adaptability to change, be an advocate of change and remain positive about the benefits and opportunities

- Sound understanding of overall business strategies and plans, and identifies links between individual contribution and organisation goals.

Additional requirements

- Actively demonstrates Suncorp Values - Courage, Honesty, Respect, Fairness, Caring, Trust
- Demonstrates confidentiality and professionalism in all interactions
- Positive, confident, decisive, empathetic, good presentation
- Supports and adapts easily to change
- Approachable and flexible
- Genuine desire to gain an understanding of the key business issues
- Willingness to provide additional support and assistance to PI Claims Assist teams.

38. In its submission, Suncorp states that the inherent requirements of the role are those set out in the position description. It does not suggest that Mr BE is unable to meet the 'Key accountabilities', 'Key job requirements' or the 'Technical capabilities' required for the role. Indeed, Mr BE appears to have relevant skills and experience for the role, having worked for 7 years as a caseworker at the Telecommunications Industry Ombudsman (TIO) between 2008–2015, and having obtained an Advanced Diploma in E-Business from TAFE in 2009.
39. Instead, Suncorp says that Mr BE is unable to meet two of the matters in the list of 'Additional requirements', namely:
- Actively demonstrates Suncorp Values which are: Courage, Honesty, Respect, Fairness, Caring, Trust
 - Positive, confident, decisive and empathetic, good presentation
(emphasis in Suncorp's submission)
40. Suncorp has also identified a number of duties associated with the role which it believes Mr BE will not be able to perform on the basis that his criminal record evinces an incapacity to demonstrate these values. Those duties are described in more detail below.

41. I note that while the holding of certain values and personal attributes is desirable to employers, such broad, abstract qualities may be insufficiently linked¹¹ to the particular role of a work from home insurance consultant to be considered 'inherent requirements' of that role. I am prepared, however, to consider these values against the standard of good character and trustworthiness, considered by the Commission in a number of other criminal record complaints. This is consistent with the way in which Suncorp put its position in its initial response to the Commission, when it said that Suncorp 'is not confident that an applicant with the serious convictions that Mr BE has could meet the standards of trust and good character that the Group expects of its employees'. I will therefore proceed on the basis that the inherent requirement, which Mr BE is said not to satisfy on the basis of his criminal record, is the requirement to be trustworthy and of good character.

(b) *Suncorp's submission on 'inherent requirements'*

42. On 5 May 2016, Suncorp provided the Commission with a summary of Mr BE's recruitment experience with Suncorp. In this summary Suncorp identified the maintenance of 'standards of trust and good character' as a key issue for the Suncorp Group. Suncorp expressed concern about Mr BE's criminal record and the role, stating that, 'by their very nature, Mr BE's convictions may impair his ability to embody these values'. This view was reiterated in its submissions to the Commission dated 8 June 2016, with particular reference to the limited passage of time between when Mr BE was convicted for a failure to comply with reporting obligations in October 2015 and when he applied for the role in November 2015, as well as the extent to which Mr BE disclosed his criminal convictions during the application process.

43. Based on its submissions from 8 June 2016, 9 September 2016, and 26 September 2016, it appears that there are several aspects of the role that Suncorp believes Mr BE cannot perform as a result of his alleged inability to satisfy the inherent requirement of being trustworthy and of good character. These aspects of the role are as follows:

- a. the role involves dealing with confidential customer information
- b. the role is 'largely unsupervised' as it is based at home
- c. the role involves working with technology and the internet, and
- d. the role involves working to promote Suncorp's corporate responsibility.

44. These particular aspects of the role are each considered in more detail below.

(c) *The law on good character and trustworthiness*

45. It is a far more challenging task at the recruitment stage to determine a prospective employee's capacity to adhere to a set of values, and so be 'trustworthy and of good character', than it is to measure their satisfaction of a role's technical qualifications and skills. In previous reports into discrimination in employment on the basis of criminal record, the Commission has found good character to be an inherent requirement of particular roles.¹² Nonetheless, a criminal record alone cannot be a basis upon which to impute bad character.¹³ For this reason, it is necessary to carefully scrutinise any assessment of a person that pre-emptively makes such a judgement on the basis of a person's criminal record.
46. It may be assumed that virtually all employers will wish to have trust and confidence in their employees. However, by declaring criminal record as a prohibited ground of discrimination for the purposes of the AHRC Act, Australia has made it plain that the mere fact of having a criminal record should not ordinarily disqualify a person from employment. It would defeat the purpose of the prohibition if it could be argued that, in effect, a clean criminal record is an inherent requirement of a job. I note Suncorp's submission that they consider applications from, and employ, people with some criminal records such as driving-related offences. However, the application of broad value statements as a basis to disqualify people who have committed other offences may result in people being improperly excluded from employment on the basis of assumptions about their character without a proper assessment of their character or how their criminal record relates to the particular role.
47. The Northern Territory Anti-Discrimination Tribunal case of *Wall v Northern Territory Police*¹⁴ provides some guidance on the requirement of 'good character'. Northern Territory legislation prohibited discrimination on the basis of 'irrelevant criminal record'. The complainant, Mr Wall, was convicted of theft when he was 19 years old and sentenced to a six-month good behaviour bond. Twenty-five years later, he applied for a position as a police officer with Northern Territory Police. His application was rejected. One of the arguments raised by Northern Territory Police was that Mr Wall was unable to meet a 'genuine occupational qualification' of the position that all police recruits maintain the integrity of Northern Territory Police by being free of any adult criminal conviction. The Anti-Discrimination Tribunal rejected this submission, stating:

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

...

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

It is not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics ... – not just criminal history (spent or otherwise).¹⁵

48. Where a job applicant or employee has a criminal record, the nature of that record, the context in which it came into existence and relevant aspects of the personal circumstances of the applicant should all be considered before a conclusion is reached as to whether an individual is trustworthy and of good character.¹⁶

5.5 'based on'

49. As noted above, s 3(1) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'.
50. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,¹⁷ Wilcox J interpreted the phrase 'based on' as follows:

In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant 'distinction', 'exclusion' or 'preference'. Otherwise, as Mr O'Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.¹⁸

51. The Full Court affirmed that approach in *Commonwealth v Bradley*.¹⁹ 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.²⁰

52. The Chief Justice then held that there must be more than a ‘logical’ link between the inherent requirements of the position and the exclusion of the applicant. Rather, his Honour held that there must be a ‘tight’ or ‘close’ connection.²¹
53. Accordingly, in considering the complaint by Mr BE, I must determine whether there is a sufficiently close or tight connection between the claimed inherent requirements of the job and the exclusion of Mr BE in the circumstances of this case.
54. I will now consider the aspects of the role which Suncorp submits Mr BE cannot perform based on his alleged inability to satisfy the requirement to be trustworthy and of good character.

(a) *The role involves dealing with confidential customer information*

55. Suncorp submits that, as a Consultant, Mr BE must be able to be trusted with customers’ private information. It submits that Consultants have access to ‘extensive sensitive, personal and confidential information about our customers’ and as such a Consultant must ‘demonstrate that they can be trusted’ to respect the privacy of Suncorp’s customers.
56. Although Mr BE’s offences are very serious, his offences from 2008 were not offences of dishonesty. I understand that at the time Mr BE applied for the role he was seeking to appeal against his 2015 conviction. In light of this, I am not persuaded that the nature of his offences alone gives rise to legitimate inferences about his trustworthiness. There is not a sufficiently tight connection between his criminal record and the requirement to treat personal information with confidentiality.

57. Moreover, as noted above, Mr BE has extensive experience in client-facing roles, including 7 years as a caseworker at the TIO, where he conciliated industry-related complaints and had access to the personal information of complainants and respondents. Mr BE submits that the TIO employed him notwithstanding its knowledge of his criminal record. It does not appear from the material before the Commission that Mr BE's criminal record affected his employment or responsibilities at the TIO.

58. I also note that on 17 July 2017, while Mr BE's complaint was being considered by the Commission, Mr BE received an email from a member of Suncorp's Recruitment Team inviting him to apply for the position of 'Customer Value Specialist – Gisborne'. The Commission understands that this was a bulk email sent to individuals with recruitment profiles uploaded on the Suncorp system, within geographical proximity to where the role is based. In this invitation the Suncorp officer states:

I wanted to make contact with you around a role that I feel is in line with your current career goals and experience.

59. This invitation from Suncorp suggests, on its face, that Mr BE's work experience was identified as appropriate to other similar roles within Suncorp.

60. I consider that the material before the Commission does not suggest that Mr BE's criminal record means that he is unable to properly deal with confidential customer information.

(b) *The role involves working with technology and the internet; the role is unsupervised as it is based at home*

61. Suncorp is concerned that Mr BE's criminal record means he cannot be trusted to perform a role that involves working with technology and the internet lawfully, in an environment that is not directly supervised.

62. Suncorp submits that:

Mr [BE]'s criminal record relates to the serious misuse of technology in that child pornography was downloaded and viewed.

...

The nature of his criminal record raises serious concerns about whether he can work in a home environment to responsibly use technology to process insurance claims ... the W@H role requires an employee to work at home and does not have the same level of day to day supervision as an office based role.

63. Suncorp submits that a Consultant's duties are all completed and managed through online databases and systems. As Consultants work from home, they have access to Suncorp systems through software called Citrix, which connects non-office based (remote) staff to the Suncorp network, including the intranet.

64. In response to further questions regarding its remote operations and internet policies, on 10 July 2017, Suncorp stated:

Internet usage and browsing while connected to Suncorp systems (whether from Suncorp offices/computers or remotely through Citrix on a personal computer) is monitored by Suncorp's IT team. Cyber security is a high priority for Suncorp. Specific websites that are potential threats are blocked, for example Hotmail, yahoo.

However, Suncorp has no ability to monitor internet usage or browsing through a Work@Home consultant's own personal internet browser, which may be accessed at the same time as being remotely connected to Suncorp systems through Citrix.

65. It is clear from this statement that remote staff, in the same way as office-based workers, have their internet usage monitored by Suncorp's IT team while accessing the internet through the Suncorp system. Suncorp also has the capacity to restrict an employee's access to inappropriate websites. This means that Suncorp could prevent Mr BE, while using the Suncorp systems, from engaging in the kind of conduct that led to his 2008 criminal offences. This suggests that there is no reasonable prospect of Mr BE being able to use those systems in the way that led to his conviction.

66. The distinction made by Suncorp between its office-based employees and its remote employees is, in my view, irrelevant to the issue of Mr BE's capacity to use the internet in a lawful manner and so perform the duties required of this role. The fact that a remote employee has access to a personal computer and the internet at home is, in my view, no different from an office-based employee who has access to their personal computer and the internet when they return home from work. Both are personal devices, and both are separate from Suncorp's IT system and so outside Suncorp's control.

67. While I recognise that Mr BE's 2008 conviction relates to serious misuse of the internet, he has not been convicted of any similar offences in the past 9 years. Moreover he has worked since 2008 in roles, most notably that with the TIO, where, Mr BE submits, he had 'no close supervision' and was entrusted to use internal customer relations management software not dissimilar to that used in the Consultant role. The fact that Mr BE can access both Suncorp's system and his personal, unmonitored, computer at the same time have, in my view, no relevance to his capacity to work lawfully with technology and the internet when logged into the Suncorp system.
68. Based on the material before the Commission, I find that Mr BE's criminal record does not mean that he is unable to perform duties that involve the use of technology and the internet, unsupervised, through Suncorp's systems.

(c) *The role involves working to promote Suncorp's corporate responsibility*

69. Suncorp submits that:

It is imperative for all our employees to promote Suncorp's corporate responsibility.

Suncorp encourages its employees to support and participate in community events and activities. Suncorp asks our employees to be caring, respectful and active members of the community.

Suncorp is a foundation partner of Youngcare, which is a community organisation promoting the wellbeing of young people.

...

Mr [BE]'s criminal record does not align with Suncorp's community partnerships and initiatives. Mr [BE]'s criminal record relates to offences involving children and this is not consistent with Suncorp's Values and activities within the community. His criminal record poses a reputational risk for Suncorp and the charities and community initiatives which we support.

70. I am of the view that Suncorp's community partnerships do not bear a sufficiently tight correlation to the role Mr BE would be required to perform. There is no statement in the 'Position description' to the effect that it is a requirement of the role to support or participate in Suncorp's community partnerships. The absence of such a requirement suggests that it is, at best, a peripheral, rather than inherent, requirement of the role.

71. There is no material before the Commission to support a view that Mr BE's criminal record would, or could, become well known beyond those people engaged in the recruitment process. Suncorp's Privacy Policy, contained in its Code of Conduct, outlines an obligation to adhere to privacy laws and to use information only for the purposes it was obtained.²² As such, Mr BE's criminal record is personal and confidential. In light of the limited risk that Mr BE's criminal record could become well known, I do not consider that the employment of Mr BE poses a real threat to Suncorp's reputation.

(d) *Non-disclosure of criminal record*

72. In addition to those aspects of the role said to be of concern, Suncorp also submitted that Mr BE's non-disclosure of his criminal record in his initial online application 'raises concerns about whether he can demonstrate and fulfil our Values'. It is apparent from the online application provided to the Commission by Suncorp, that Mr BE did not fully disclose his criminal record at the time of his initial application. The questions and answers in the online application completed on or about 26 November 2015 are as follows:

Have you been found guilty or convicted of an offence as an adult (excluding spent convictions)?

No

Have you been the subject of any criminal charges still pending before a Court?

- Yes

Please provide some detail

Appeal in February 2016.

73. Mr BE submits that prior to the group interview in Melbourne on 30 November 2015, he had a telephone discussion with the principal interviewer in which he disclosed his criminal record.
74. I accept that Mr BE did not disclose, in its entirety, the extent and severity of his criminal record in his initial online application and that this may raise issues as to his trustworthiness. However, this must be balanced against his willingness to provide full disclosure of his criminal history to Suncorp at the interview for the position and later upon request for consent to perform a criminal history check. In these circumstances, I find that a failure to disclose fully the convictions in the online application does not mean that Mr BE is unable to comply with a requirement to be trustworthy and of good character.

6 Summary of Findings

75. I find that Suncorp discriminated against Mr BE on the basis of his criminal record by excluding him from the role of Work@Home Consultant.
76. Mr BE's convictions are undoubtedly very serious. The law and the community appropriately respond to such offences with censure. Further, aspects of the role require a Work@Home Consultant to be trustworthy and of good character: in particular, the requirement that a Consultant be able to deal appropriately with confidential information. Notwithstanding this, I consider that based on the material before the Commission, including Mr BE's work experience and training, it is not apparent that he is unable to fulfil the requirement to be trustworthy and of good character.
77. In particular, I do not consider that Mr BE's criminal record alone suggests that he:
- is unable to deal appropriately with confidential customer information, or
 - is unable to perform duties that involve the use of technology and the internet, unsupervised, through Suncorp's systems.
78. Further, I am not satisfied that Suncorp's corporate social responsibility programs are sufficiently connected to the particular job of Consultant for this to be a relevant factor in assessing Mr BE's suitability for employment in that role.

7 Recommendations

79. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination, the Commission is required to serve notice on the respondent setting out its findings and the reasons for those findings.²³ The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.²⁴
80. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.²⁵

81. The Commission sought submissions from Mr BE about the recommendations that he was seeking. In response to my preliminary view, on 4 September 2017 Mr BE made the following submissions:

I would be very pleased to have this case made public in Commission reporting to the Federal Parliament.

This publicity may assist:

- In regulatory scrutiny of Suncorp's apparent non-compliance by discriminating against me in employment
- Identify Suncorp's indifferent attitude to protection of my private and sensitive information, and
- To better inform consumers and investors of the actions and activities of Suncorp Group and its associated companies.

82. In regard to the email Mr BE received in error from Suncorp on 17 July 2017 inviting him to apply for a different role, he stated:

Receiving unsolicited offers to apply for jobs at Suncorp causes great distress and loss of self-esteem.

83. On 27 September 2017 Suncorp notified the Commission that it would not be making any submissions in response to my preliminary view, stating:

We respectfully maintain that Mr [BE]'s criminal record is of a serious nature and impacts on his ability to perform the inherent requirements of the Work@Home Consultant role. We repeat and rely on the significant submissions we have already made in this regard.

In particular, Suncorp considers whether a job applicant's criminal record is relevant to the inherent requirements of the job on a case by case basis.

84. In light of my findings, I recommend that Suncorp:

- pay Mr BE an amount in compensation reflecting the hurt, humiliation and distress experienced by him as a result of Suncorp's conduct
- revise its policies in regard to recruitment of people with criminal records in line with the Commission's publication, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record (Guidelines)*²⁶

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

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

7.1 Consideration of compensation

86. 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.²⁷ I am of the view that this is the appropriate approach to take in relation to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.²⁸
87. Mr BE has not made a claim for economic loss.
88. Compensation for Mr BE'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.²⁹
89. I am satisfied on the basis of his submissions that Mr BE suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I accept that having a conditional offer of employment extended to him, and then rescinded on the basis of a criminal record that does not adequately relate to the inherent requirements of the role has caused him personal distress, as has the subsequent conduct of Suncorp in erroneously sending him an invitation to apply for another role with Suncorp.
90. In all the circumstances, and in line with previous recommendations for compensation made by the Commission in criminal record complaints,³⁰ I consider an award of monetary compensation for hurt, humiliation and distress in the amount of \$2,500 is appropriate. I therefore recommend that Suncorp pay him that amount.

7.2 Suncorp's policies and training

91. On 27 September 2017 Suncorp affirmed that it:

Has developed comprehensive procedures and provides on-going training to employees to ensure we can fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular role.

92. I welcome Suncorp's development of such procedures. Nevertheless, in light of my findings, I recommend that Suncorp reassess its policies in relation to prevention of discrimination on the basis of criminal record. The Commission's Guidelines are a particularly useful resource for employers and I draw Suncorp's attention to them.³¹

93. The Guidelines state:

9. A written policy and procedure

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

Ideally, a policy and procedure would include:

- a statement about the employer's commitment to treating people with a criminal record fairly and in accordance with anti-discrimination, spent conviction and privacy laws
- a brief summary of employee and employer rights and responsibilities under these laws, or inclusion of up-to-date literature which provides this information
- an outline of other relevant legal requirements for the workplace, such as the employer's responsibilities under licensing and registration laws, or working with children laws
- the procedure for assessing the inherent requirements of the position, requesting criminal record information if necessary and assessing individual job applications or employee histories
- information on internal or external complaint or grievance procedures if someone thinks they have been unfairly treated
- designated officers with responsibility for different elements of the procedure.

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

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

94. I also recommend that Suncorp conduct training for its recruitment (including external recruiters), human resources and management staff involved in employment decisions. Suncorp's submissions suggest that it already conducts such training for at least some of its employees. In light of this, I recommend that Suncorp ensure that the training is of such a standard to be capable of assisting staff to assess fairly whether an individual with a criminal record can perform the inherent requirements of a particular job. Again, I draw Suncorp's attention to the Guidelines, which state as follows:

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

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

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

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

...

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

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

- whether the applicant has a pattern of offences
 - the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context
 - whether the applicant's circumstances have changed since the offence was committed ...
 - whether the offence was decriminalised by Parliament ...
 - the attitude of the job applicant to their previous offending behaviour
 - references from people who know about the offending history.³²
95. I also draw Suncorp's attention to Part 4 of the Guidelines, which discusses (among other matters) how an employer should determine whether a criminal record is relevant to the inherent requirements of a job and key principles in case law for assessing the inherent requirements.

8 Suncorp's response

96. On 14 November 2017 I provided Suncorp with a Notice of my findings and recommendations in respect of Mr BE's complaint.
97. By letter dated 6 December 2017, Suncorp provided the following response to my findings and recommendations:

We have carefully considered your findings and recommendations. In particular, we note your finding that Mr [BE] was discriminated against on the basis of his criminal record. We respectfully maintain that Mr [BE]'s criminal record is of a serious nature and impacts on his ability to perform the inherent requirements of the Work@Home Consultant role. For this reason, Suncorp declines to pay any compensation to Mr [BE].

Notwithstanding the above, Suncorp has developed comprehensive recruitment procedures and provides on-going training to employees, including in relation to anti-discrimination and equal opportunity. These procedures and training assist with ensuring we can fairly assess whether a prospective employee with a criminal record can perform the inherent requirements of a particular role, on a case by case basis.

We will also consider the Commission's publication, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, as part of our ongoing review of procedures and training. We are committed to ensuring fair and non-discriminatory methods of assessing a prospective employee's criminal record against the inherent requirements of the role.

98. I report accordingly to the Attorney-General.

Emeritus Professor Rosalind Croucher AM
President
Australian Human Rights Commission

March 2018

¹ *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).

² *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47.

³ *Commonwealth v Human Rights and Equal Opportunity Commission* (2000) 108 FCR 378, 385.

⁴ *X v Commonwealth* (1999) 200 CLR 177, 222-223 [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333 [152] and footnotes 168–169 (Kirby J). This approach has been applied to Part II, Division 4 of the *Sex Discrimination Act 1984* in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, 32-33 [19], 24], [26] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, 757 [89] (Wilcox J).

⁵ *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).

⁶ *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).

⁷ *X v Commonwealth* (1999) 200 CLR 177, 191 [43] (McHugh J).

⁸ International Labour Organisation, *General Survey by the Committee of Experts on the Application of Conventions and Recommendations: Equality in Employment and Occupation* (1998) (75th sess, Report III, International Labour Conference) [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 304 [72] (McHugh J).

⁹ *Qantas Airways v Christie* (1998) 193 CLR 280, 284 [1].

¹⁰ Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012), 16

<https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.

¹¹ *Qantas Airways v Christie* (1998) 193 CLR 280, 284.

¹² *Ms Renai Christensen v Adelaide Casino Pty Ltd* [2002] AusHRC 20.

¹³ *Z v Director General, Department of Transport* [2002] NSWADT 67 [30]–[32]; *Saadieh v Director General, Department of Transport* [1999] NSWADT 68 [14]–[15].

¹⁴ *Wall v Northern Territory Police* [2005] NTADC No. 1 (22 April 2005) (Commissioner Fitzgerald).

¹⁵ *Ibid* [5.3.5].

¹⁶ *Ibid*.

¹⁷ (1998) 158 ALR 468.

¹⁸ *Ibid* 482.

¹⁹ (1999) 95 FCR 218.

²⁰ *Ibid* 235–236.

²¹ *Commonwealth v Bradley* (1999) 95 FCR 218, 237 [39]–[40].

-
- ²² Suncorp Group, 'Code of Conduct' (February 2015)
<<http://www.suncorpgroup.com.au/sites/default/files/fm/4.01%20Code%20of%20Conduct.pdf>>
- ²³ *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(a).
- ²⁴ *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(b).
- ²⁵ *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(c).
- ²⁶ Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012), 16
<https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.
- ²⁷ *Commonwealth v Peacock* (2000) 104 FCR 464, 483 [55] (Wilcox J).
- ²⁸ See: *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- ²⁹ *Sharman v Evans* (1977) 138 CLR 563, 585 (Gibbs and Stephen JJ).
- ³⁰ *Gentleman v Linfox Australia Ltd* [2017] AusHRC 113, 15 [57]–[59]
- ³¹ Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012), 34
<www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.
- ³² *Ibid* 27.