ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY

LOCATION: DARWIN

TRIBUNAL: TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER

DATE OF HEARING: 14 MARCH 2005

HEARING NO: 1 of 2005

BETWEEN: NEVILLE KENNETH WALL
Complainant

and

NORTHERN TERRITORY POLICE
Respondent

COUNSEL: Peter Barr QC for the Complainant

Sally Gearin for the Respondent

DATE OF DECISION: Written Decision given on 22 April 2005

REASONS FOR DECISION

1. BACKGROUND

1.1 By Application dated 23/9/03 (Exhibit 3) ("the Application") Complainant Neville Kenneth Wall sought appointment as a member of the Northern Territory Police (the Respondent).

1.2 By letters dated 19 December 2003 and 31 March 2004 (Exhibits 5 and 6 respectively) the Application was rejected by the Respondent because the Complainant possesses a spent criminal record.

1.3 The letters of rejection described in paragraph 1.2 refer to the deliberations of an "Integrity Committee", presided over by the Respondent, which "... considers and makes determinations on the merit of applicants for employment in the police force ..." (Exhibit 5).

1.4 The Integrity Committee is allowed "some leeway" (Exhibit 6) in the consideration of an Applicant's criminal history, however "... that leeway does not apply in circumstances relating to offences of dishonesty where the offence was committed as an adult ..." (Exhibit 6).

1.5 On 3 July 1978, at East Perth Court of Petty Sessions in Western Australia, the Complainant was convicted of stealing ("the conviction") and sentenced to a six month good behaviour bond in the sum of $100. The Complainant was 19 years old at the time of the conviction.

1.6 At the time of the Application the conviction was 25 (twenty-five) years old.

1.7 By operation of the Northern Territory *Criminal Records (Spent Convictions) Act 2004* ("SCA") (infra, paragraph 3.2) the conviction and the Complainant's criminal record had become "spent" for the purposes of the SCA and the Northern Territory *Anti-Discrimination Act 2004* ("ADA") at the time of the Application.

2. SUMMARY OF COMPLAINT

2.1 By written complaint dated 27 May 2004 the Complainant alleged that:

- his criminal record was a spent record within the meaning of the SCA and the ADA;
- his criminal record was therefore an "irrelevant criminal record" within the meaning of the ADA;
- his rejection from appointment to the police force as a police officer by the Respondent was on account of his irrelevant criminal record;
- "irrelevant criminal record" is one of fifteen attributes listed under Part 3 Division 1 of the ADA;
- it is unlawful to discriminate against a person on the ground of an attribute listed under the ADA.

2.2 Accordingly the Complainant alleged that the Respondent's decision to reject his application to join the NT Police on account of his irrelevant criminal record amounted to unlawful discrimination under the ADA.

2.3 By way of remedy the Complainant sought reinstatement of his application for employment "... for consideration along with other applicants ..." (Points of Claim 11 January 2005).

2.4 The Respondent (Defence filed 28 February 2005) denies that discrimination has taken place in that the Complainant's criminal history is not an irrelevant criminal record under the ADA. In the alternative the Respondent says that if the Complainant was discriminated against (which it denies), such discrimination is exempted under the ADA because it is based on a genuine occupational qualification.

2.5 The Respondent seeks dismissal of the complaint, and, unusually for this jurisdiction, costs.

3. STATUTORY PROVISIONS

The complaint involves sections 4, 19, 20, 28, 31, 35, 53 and 88 of the ADA, and sections 3, 5, 6, 11, 13, 15 and 16 of the SCA. These sections are set out below.

3.1 NT *Anti-Discrimination Act 2004*

"...

4. Interpretation (extract of relevant definitions)

(1) In this Act, unless the contrary intention appears –

...

"attribute" means an attribute referred to in section 19;

...

"irrelevant criminal record", in relation to a person, means –

(a) a spent record within the meaning of the *Criminal Records (Spent Convictions) Act*; or

(b) a record relating to arrest, interrogation or criminal proceedings where –

(i) no further action was taken in relation to the arrest, interrogation or charge of the person;

(ii) no charge has been laid;

(iii) the charge was dismissed;

(iv) the prosecution was withdrawn;

(v) the person was discharged, whether or not on conviction;

(vi) the person was found not guilty;

(vii) the person's finding of guilt was quashed or set aside;

(viii) the person was granted a pardon; or

(ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises;

...

19. Prohibition of discrimination

(1) Subject to subsection (2), a person shall not discriminate against another person on the ground of any of the following attributes:

...

(q) irrelevant criminal record;

...

(2) It is not unlawful for a person to discriminate against another person on any of the attributes referred to in subsection (1) if an exemption under Part 4 or 5 applies.

20. Discrimination

(1) For the purposes of this Act, discrimination includes –

(a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and

(b) harassment on the basis of an attribute,

in an area of activity referred to in Part 4.

(2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –

(a) an attribute;

(b) a characteristic imputed to appertain to an attribute; or

(c) a characteristic imputed to appertain generally to persons with an attribute,

less favourably than a person who has not, or is believed not to have, such an attribute.

(3) For discrimination to take place, it is not necessary that –

(a) the attribute is the sole or dominant ground for the less favourable treatment; or

(b) the person who discriminates regards the treatment as less favourable.

(4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

...

28. Areas of activities

This Act applies to prohibited conduct in the areas of –

(a) education;

(b) work;

(c) accommodation;

(d) goods, services and facilities;

(e) clubs; and

(f) insurance and superannuation.

...

31. Discrimination in work area

(1) A person shall not discriminate –

(a) in deciding who should be offered work;

(b) in the terms and conditions of work that is offered;

(c) in failing or refusing to offer work;

(d) by failing or refusing to grant a person seeking work access to a guidance program, vocational training program or other occupational training or retraining program; or

(e) in developing the scope or range of a program referred to in paragraph (d).

(2) A person shall not discriminate –

(a) in any variation of the terms and conditions of work;

(b) in failing or refusing to grant, or limiting, access to opportunities for promotion, transfer, training or other benefit to a worker;

(c) in dismissing a worker; or

(d) by treating a worker less favourably in any way in connection with work.

(3) A person shall not discriminate against a worker on the grounds of the worker's religious belief or activity by refusing the worker permission to carry out a religious activity during working hours being an activity –

(a) of a kind recognized as necessary or desirable by persons of the same religious belief as that of the worker;

(b) the performance of which during working hours is reasonable having regard to the circumstances of the work; and

(c) that does not subject the employer to any detriment.

...

35. Exemptions – work

(1) A person may discriminate against another person in the area of work –

(a) by fixing reasonable terms and conditions if that other person, because of age or impairment, has a restricted capacity to do the work; or

(b) if the discrimination is based –

(i) on a genuine occupational qualification which the other person is required to fill; or

(ii) on the other person's inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated.

(2) A person may discriminate in offering work where the work is to be performed in the person's home.

...

53. Acts done in compliance with legislation, &c.

Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by –

(a) an Act or regulation of the Territory;

(b) an Act or regulation of the Commonwealth;

(c) an order of a court or tribunal;

(d) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment;

(e) an industrial agreement in existence at the commencement of this Act;

(f) an order of the Commissioner under this Act;

(g) a guideline or code of practice prepared and published by the Commissioner under this Act; or

(h) advice given by the Commissioner under this Act.

..."

88. Orders after Hearing

(1) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is substantiated, the Commissioner may make one or more of the following orders:

(a) an order requiring the respondent not to repeat or continue the prohibited conduct;

(b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount, being an amount not more than that prescribed, that the Commissioner considers appropriate as compensation for loss or damage caused by the prohibited conduct;

(c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant or any other person because of the prohibited conduct;

(d) an order declaring void all or part of an agreement made in connection with the prohibited conduct, either from the time the agreement was made or subsequently.

(2) In this section, the specified things a respondent may be required to do, include, but are not limited to the following:

(a) employing, reinstating or re-employing a person;

(b) promoting a person;

(c) moving a person to a specified position within a specified time.

(3) In this section, "damage", in relation to a person, includes the offence, embarrassment, humiliation, and intimidation suffered by the person.

(4) If, after the hearing of a complaint, the Commissioner finds the prohibited conduct alleged in the complaint is not substantiated the Commissioner shall make an order dismissing the complaint.

3.2 *Criminal Records (Spent Convictions) Act 2004*

"...

3. Interpretation (extract of relevant definitions)

(1) In this Act, unless the contrary intention appears –

"...

"criminal record" means a record of –

(a) a conviction;

(b) a finding that an offence is proved (and any order in relation to the finding) without the court proceeding to conviction;

(c) a conviction and the making of an order under section 5 of the *Criminal Law (Conditional Release of Offenders) Act*;

(d) a finding or order made under section 53 of the *Juvenile Justice Act*;

(e) a quashed conviction;

(f) a pardon, including a conditional pardon;

(g) a charge in respect of which a finding or order referred to in paragraphs (a) to (f), inclusive, is made by a court;

(h) action taken in respect of a breach of prison discipline committed during a period of imprisonment; or

(j) disciplinary action taken while a juvenile offender is in a detention centre,

and includes such a record of a conviction, finding, order, quashed conviction, pardon, charge or action in a State or another Territory of the Commonwealth;

...

"spent conviction" means a criminal record which is spent in accordance with Part 2 – Spent Convictions;

"spent record" means –

(a) a spent conviction;

(b) a criminal record in respect of –

(i) a quashed conviction; or

(ii) an offence in respect of which an unconditional pardon has been given;

(c) a charge not proceeded with; or

(d) a charge that has been withdrawn;

...

Part 2 – Spent Convictions

5. Interpretation

In this Part "criminal record" does not include a criminal record of –

(a) a sexual offence;

(b) an offence by a body corporate; or

(c) a prescribed offence.

6. Convictions may be spent

(1) In this section "criminal record" does not include a record of a conviction of an offence in respect of which a sentence of imprisonment for more than 6 months was imposed, whether or not the sentence was suspended.

(2) Subject to this Part, a criminal record is a spent conviction on the expiration of a period, immediately after the date of conviction of the offence, of –

(a) where the offender was convicted in the Juvenile Court within the meaning of the *Juvenile Justice Act* – 5 years; and

(b) in any other case – 10 years,

during which period the offender has not –

(c) been convicted of an offence punishable by imprisonment; or

(d) served all or any part of a sentence of imprisonment.

(2A) If the offender was convicted in a court other than the Juvenile Court (within the meaning of the *Juvenile Justice Act*) for an offence that the offender committed before attaining 18 years of age, his or her criminal record is, subject to this section and section 6A, a spent conviction on the expiration of the period specified in subsection (2)(b).

(3) A conviction for a subsequent traffic offence and any period of imprisonment served in respect of the offence shall be taken into account in calculating a period referred to in subsection (2) only in respect of a conviction relating to a traffic offence.

(4) A conviction for a subsequent non-traffic offence and any period of imprisonment served in respect of the offence shall be taken into account in calculating a period referred to in subsection (2) only in respect of a conviction relating to a non-traffic offence.

...

11. Person not required to disclose spent record

Subject to this Part, where a record is a spent record –

(a) the person to whom it relates is not required to disclose to another person that spent record;

(b) a question concerning a person's convictions, criminal history or criminal record or a record of a similar kind shall be taken to refer only to a record which is not a spent record; and

(c) in the application to a person of a provision of an Act or instrument of a legislative or administrative character –

(i) a reference to a conviction, criminal history or criminal record or record of a similar kind shall be taken to be a reference only to a record which is not a spent record; and

(ii) a reference to a person's character or fitness shall not be taken as permitting or requiring a spent record to be taken into account.

...

13. Spent records not to be taken into account for unauthorised purpose

A person who takes into account a spent record for a purpose not authorised by or under an Act is guilty of an offence.

Penalty: $5,000.

...

15. Exclusions in relation to spent convictions

Sections 11 and 13 do not apply in respect of a spent conviction –

(a) in relation to an application for appointment to or employment as a Judge, magistrate, justice of the peace, member of the Police Force, prison officer, parole officer, probation officer, supervising officer or surveillance officer;

...

16. Act does not authorise contravention of other laws

Nothing in this Act authorises a person to disclose a charge, finding, order or conviction, or to take a charge, finding, order or conviction into account, if to do so would contravene any other law in force in the Territory.

..."

4. THE HEARING

4.1 The Complaint was heard in Darwin on 14 March 2005 and argument concluded on that day. Both parties were represented by legal counsel. Save for the formal tender of various documents by the Respondent there was no evidence called at hearing and no cross examination.

4.2 Argument in this case was largely confined to an analysis of the construction of various provisions of the statutes (described in paragraph 3) in the context of the agreed facts.

4.3 An outline of the Complainant's case is contained in paragraphs 2.1 to 2.3 herein. The Complainant contends that the Respondent's rejection of his application for employment is discrimination because it amounts to a "... distinction, restriction, exclusion, or preference made on the basis of an attribute ..." [s.20(1) ADA], and that the discrimination is unlawful because the Respondent's decision was based on the Complainant's "irrelevant criminal record" – which is an attribute against which discrimination is prohibited under s.19(1)(9) of the ADA.

4.4 The Complainant also points out that s.31 of the ADA describes what may amount to prohibited discrimination in the area of work and includes "... deciding who should be offered work" [s.31(1)(a)].

4.5 The Complainant says that his criminal record is an "irrelevant criminal record" because that term, as defined under s.4 of the ADA, includes a "spent record" within the meaning of the SCA. S.3 of the SCA says that a spent record includes a "spent conviction" which is defined under s.3 as a criminal record which is spent in accordance with Part 2 of the SCA. Part 2 of the SCA contains s.6(2) which provides that a criminal record is "spent" in the adult jurisdiction upon the expiration of 10 years after the date of conviction provided the offender has not been sentenced to, or served, a term of imprisonment during that time.

4.6 Therefore, as the Complainant's criminal record was acquired in 1978 – some 25 years prior to the Application (supra paragraph 1.5) – and the Complainant otherwise meets the requirements of s.6(2), the Complainant's criminal record is "spent" for the purposes of the SCA and accordingly "irrelevant" for the purposes of the ADA.

4.7 The effect of s.15 SCA

4.7.1 A significant issue in the determination of this case is the interpretation of s.15 of the SCA.

S.15 sets out circumstances in which the operation of s.11 and s.13 of the SCA is excluded in respect of a spent conviction. One of the circumstances [s.15(a)] is relevant to this case in that it relates to "... an application for appointment to or employment as a ... member of the police force ...".

S.11 says in summary that where a record is "spent" the person to whom it relates is not required to disclose that spent record to another person, and that questions concerning a person's "criminal record" shall be taken to refer only to that part of the record which is not a spent record. S.13 says that spent records are not to be taken into account for an unauthorised purpose and provides penalties for doing so.

The effect of s.15 is to remove the exclusion in s.11 so that applicants for certain types of employment, including applicants for appointment to the police force, are required to disclose their full criminal record including any spent record, in order to give full and proper disclosure. The effect of s.15 is to remove the operation of s.13 so as to allow employers to take spent records into account without penalty.

4.8 After hearing argument from the parties I am convinced that I must consider the purpose of s.15 of the SCA before I can decide whether or not the Complainant has succeeded in discharging his onus of proof in this claim.

4.9 Complainant's Submissions

4.9.1 In the Complainant's submission the "exclusions" contained in s.15 of the SCA do not weaken the Complainant's case. The Complainant argues that all s.15 allows a decision maker to do is consider material (that is, a spent conviction and/or a spent record for the purposes of this case) which the decision maker would not ordinarily be entitled to consider. For example, according to the Complainant, this means that a member of the class of prospective employers contemplated by s.15 can check to see if an applicant for appointment has correctly and fully and properly disclosed the full criminal record – including any spent conviction or spent record.

Counsel for the Complainant offered this example on the basis that it may not necessarily be clear to a layman applicant for appointment that a criminal record has become spent and s.15 allows the decision maker to carry out a "check". Of additional importance is that s.15 provides the decision maker with an opportunity to consider whether the applicant has been honest in disclosing the full criminal record.

The Complainant submits that the foregoing is as far as s.15 goes. He submits that s.15 does not in some way make a "spent conviction" "unspent", and that s.15 does not make lawful discrimination which is otherwise prohibited under the ADA.

4.9.2 In order to assist in determining the construction of the SCA and the purpose of s.15 therein, Counsel for the Complainant drew my attention to the Hansard record of the second reading speech on *The Criminal Records (Spent Convictions) Bill* on 13 August 1992. At p.5359 the then Attorney General Mr Manzie says:

> "It is acknowledged that, in some particularly sensitive occupations, such as child-care, teaching and the police force, it will be necessary for employers to have all of the available information about certain types of offences. It is therefore proposed that a disclosure of spent convictions is required and the taking into account of the spent convictions is allowed in relation to applications for appointment or employment of police, prison officers, and other specified correctional services staff, the judiciary and appointment on a jury. The same principles apply in relation to teachers, teacher's aides or child-care workers but only in relation to violent or other specified offences. Therefore, it is not shutting off entirely the concerns that the community has expressed in this area."

From this extract ('the Hansard Extract') it is fairly clear that the government of the day intended the SCA to include a mechanism (undoubtedly s.15) for providing employers within "sensitive occupations" (including police) with information about spent convictions so that the employers could take "into account" spent convictions when considering applications for employment. What is not clear however is the extent to which the legislature intended employers to take this information into account. Some guidance however is given by the former Attorney General where he says (Hansard Extract at pages 5357-9) that:

> "Punishment for minor offences, obviously, should not be indefinite", and "After an appropriate period, an old criminal record loses validity as a reliable indicator that a person may reoffend and, therefore, should not have any prejudicial effect, The discrimination which often follows a revelation of an old criminal record impedes the successful rehabilitation of offenders at a time when they have proved they represent no risk to society."

4.9.3 In the Complainant's submission the legislature did not intend the exclusion of s.11 and s.13 of the SCA by s.15 of the SCA to enable employers to discriminate within the meaning of the ADA when "taking into account" spent convictions. In other words whilst it might affect the manner in which spent convictions are considered, s.15 does not specifically authorise discrimination on the basis of irrelevant criminal record.

4.9.4 The critical question then is:

> Does the learned former Attorney General's stated aim of "... not shutting off *entirely* (my italics) the concerns that the community has expressed in this area." (see final line of above Hansard extract) mean that government wanted 'sensitive-occupation' employers to have power to conclusively reject an employment application solely on account of a spent conviction, or; does it mean that government wanted to enable this class of employer to have the ability to consider an applicant's spent conviction(s) in conjunction with other factors (such as merit, experience, personal circumstances, references etc) when considering an application for employment?

4.10 The Complainant also argues that the existence of s.16 of the SCA (supra paragraph 3.2) assists his case. S.16 stipulates that the SCA does not operate so as to authorise the contravention of any other NT Legislation. According to the Complainant the effect of s.16 is to ensure:

> firstly, that nothing in the SCA authorises contravention of the ADA when taking a conviction into account,
>
> secondly, that the SCA and the later enacted ADA may be read together with consistency, and
>
> thirdly, s.15 SCA by virtue of s.16 SCA is subject to other NT Legislation including the ADA.

The Complainant concludes that whilst s.16 may not prevent disclosure of a spent criminal record under s.15, it certainly prevents discrimination in breach of the ADA.

4.11 Respondent's Submissions

4.11.1 The Respondent argues that the exclusions under s.15 SCA have the clear purpose and effect of excluding a spent record as defined under the SCA from exemption under s.11 and s.13 of the SCA in applications for employment as a police officer and the other members of the class of job recruits named under s.15(a) of the SCA.

According to the Respondent this means that an employer of the class of recruits listed under s.15(a) is at liberty to consider an applicant's full criminal record, including any spent record, after disclosure by the applicant.

Moreover, the Respondent submits that a prospective employer contemplated by s.15 SCA may, because of the operation of that section, not only lawfully account for spent convictions but may also lawfully discriminate against an applicant on the basis of irrelevant criminal record – a type of discrimination prohibited under the ADA.

It is the Respondent's contention that once the prospective employer takes the spent record into account it is no longer "spent" for the purposes of the SCA. This is turn means that the spent portion of an Applicant's full criminal record is no longer an irrelevant criminal record for the purposes of the ADA so that accounting for spent convictions cannot amount to unlawful discrimination as defined by the ADA.

4.11.2 In other words the Respondent's position is that s.15 SCA operates to make the full criminal record, including all spent convictions, of an applicant to join the police force "relevant" for the purposes of the ADA. Once the full criminal record is lawfully available to be taken into account then the Respondent says that the weight given to the spent portion of that criminal record is a matter entirely in the discretion of the prospective employer. According to the Respondent this means that if the discretion miscarries – so that too little or too much weight is attached to the criminal record – then the remedy of an aggrieved recruit is via prerogative writ for administrative error and not (because there has been no discrimination) via discrimination law.

4.11.3 In the Respondent's view a plain reading of s.15 of the SCA reveals that its clear purpose is to allow a prospective employer in the "listed" occupations to consider and account for spent convictions even to the extent of discriminating against a recruit in a manner ordinarily prohibited under the ADA. The Respondent also favours a plain reading of the Hansard extract to conclude that the purpose of the s.15 exclusions is to provide a prospective employer with an unfettered discretion to reject a job applicant solely after "**...** the taking into account **...**" of a spent conviction.

4.11.4 Counsel for the Respondent concludes this part of her argument by posing the rhetorical question –

> "What point is there in having a provision such as s.15 SCA which excludes a spent record from exemption if a prospective employer does not have an unfettered discretion to take the spent record into account?"

The Respondent submits that it would be an absurd consequence if a prospective employer was permitted to access a spent record but not possessed of sufficient discretion to take the spent record into account.

4.11.5 The Respondent did not offer a submission on the purpose and effect of s.16 ADA.

4.11.6 The Respondent's final submission is that if the Complainant is found to be the subject of unlawful discrimination by the Respondent (which is not admitted), then the Respondent is exempted pursuant to s.35(1)(b)(i) of the ADA. This section (supra paragraph 3.1) permits discrimination in the area of work if the discrimination is based "on a genuine occupational qualification" which an employee or recruit is required to possess.

The essence of this submission is that:-

- to maintain the integrity of the NT Police Force, a "genuine occupational qualification" required of all police recruits is that they are free of any adult criminal conviction.
- the above "genuine occupational qualification" is contained in the "Integrity Assessment of Police Recruit Applications Policy and Procedures" ("the Integrity Policy") which was operating at the time of the Complainant's application for employment.
- in its determination dated 19 December 2003 (Exhibit 5) a Police "Integrity Committee" ruled that the Complainant's adult criminal conviction meant that he failed to meet the standard set by the Integrity Policy.
- the Respondent is both entitled to introduce the Integrity Policy to assess recruits, and; entitled to the protection of the exemption from unlawful discrimination offered by s.35(1)(b)(i) of the ADA because the Complainant's criminal record means that he is unable to meet a genuine occupational qualification.

4.11.7 The Complainant's response to the Respondent's final submission is that the s.35(1)(b)(i) exemption does not apply to the Respondent because:

4.11.7.1 The occupational qualification demanded by the Integrity Policy of the Respondent is not "genuine", as required by s.35(10(b)(i), in that it is not universally applied. The Integrity Policy appears to be a relatively recent innovation (see Exhibit 5) and applies only to recruits and not serving members of the police force.

4.11.7.2 The Complainant's allegation of unlawful discrimination is not answered by the Respondent's assertion that the requirement for no adult criminal conviction is in the Integrity Policy. In the Complainant's view this answer begs the question because the Integrity Policy itself, or aspects thereof, may be unlawfully discriminatory.

5. FINDINGS

5.1 The parties agree on the mechanism by which a criminal record becomes "spent" under the SCA so as to fall within the definition of "irrelevant criminal record" under the ADA except in circumstances where the sensitive occupations covered by s.15 SCA are involved. The mechanism is described at paragraphs 4.5 and 4.6.

5.2 The parties are unable to agree on the purpose of exclusions under s.15 of the SCA and the effect of that section on the mechanism referred to in paragraph 5.1. The Respondent (paragraphs 4.11.1 to 4.11.3) says that the purpose of s.15 SCA is to exclude a spent record from exemption under s.11 and s.13 SCA so that a sensitive-occupation employer may lawfully account for the spent record to lawfully discriminate against a recruit on the basis of the recruit's criminal record. The Complainant (paragraph 4.9.1) says that s.15 only allows an employer to consider material which the employer would not normally be entitled to consider – it does not make lawful discrimination which is otherwise prohibited under the ADA.

5.3 After careful consideration of the thoughtful submissions of Counsel I find for the Complainant for the following reasons:-

5.3.1 Part of the Respondent's argument (paragraph 4.11.1) is that the effect of s.15 SCA is to in some way change the character of a spent record so that once it is taken into account by the prospective employer it is no longer spent for the purposes of the SCA. According to the Respondent this in turn means that within the sensitive occupations contemplated by s.15, the spent portion of a criminal record is no longer 'irrelevant' for the purposes of the ADA so that discrimination on the basis of the spent record does not infringe the ADA.

This is an ingenious argument, but in my opinion it is not supported by a plain reading of sections.15, 11 and 13 SCA. There is nothing in the SCA to explicitly suggest a spent record in some way becomes "unspent" by reason of its disclosure. A plain reading of the SCA dictates that a spent record remains a spent record at all times; the SCA does not contain a process for converting a spent record into something else.

In the absence of any specific legislative provision authorising a change in the very nature of a spent conviction after it has been accounted for by a prospective employer I am unable to accept the Respondent's submission in that regard. In other words I am unable to accept that s.15 SCA exerts by mere implication the effect contended by the Respondent.

This means that the Complainant's criminal record is a spent record and therefore an irrelevant criminal record under the ADA.

5.3.2 The purported change in character of a spent record effected by the s.15 SCA exclusion has another effect according to the Respondent (supra paragraph 4.11.2). Should an unsuccessful recruit seek to review a decision not to employ that recruit, then the review is by way of prerogative writ for administrative error rather than by way of discrimination law. Administrative review is necessitated because in the Respondent's submission accounting for a spent record does not breach discrimination law.

I am not persuaded by this argument. I have already found (paragraph 5.3.1) that s.15 SCA does not effect a change in character of a spent record so the argument is of no consequence. Also, whether or not another remedy is available to the Complainant is not the point. The Complainant seeks redress under the ADA.

5.3.3 S.16 SCA is a major stumbling block for the Respondent. A plain reading of the heading and content of s.16 indicates that its purpose and effect is to ensure that nothing in the SCA authorises contravention of any other law in the NT, including the ADA.

S.16 would appear to ensure that the SCA and the ADA do not contradict one another, and that in the event of any conflict between the two the ADA is paramount.

Accordingly I am persuaded by the Complainant's argument at paragraph 4.10 that s.16 prevents discrimination in breach of the ADA.

5.3.4 Unfortunately consideration of the Hansard Extract does not conclusively assist me in ascertaining the extent to which sections 11, 13 and 15 SCA combine to enable the Respondent to take into account spent convictions. (See discussion at paragraph 4.9)

I have no doubt that Parliament intended spent records and convictions to be taken into account in the case of sensitive occupations'. It is not clear from Hansard whether spent records and convictions were intended to be taken into account to the extent of permitting discrimination under the ADA, or only to provide prospective employers with more information about recruits (see discussion at paragraph 4.9).

In my view it is more likely that Parliament intended the latter. Such an intention accords with my foregoing findings, and sits more comfortably with the following excerpts from the Hansard Extract:

- the former Attorney General indicated (p.5359.5) his aim of "... not shutting of *entirely* ..." (my emphasis) community concerns (Hansard Extract p.5359.5). If the Attorney General was minded to completely eliminate community concerns he could have explicitly done so.

- the former Attorney General also indicated (p.5357.9) that "Punishment for minor offences, obviously should not be indefinite" and that (also p.5357.9) "After an appropriate period, an old criminal record loses validity as a reliable indicator that a person may re-offend and, therefore, should not have any prejudicial effects. The discrimination which often follows a revelation of an old criminal record impedes the successful rehabilitation of offenders at a time when they have proved they represent no risk to society."

Neither of these excerpts appear to indicate an intention to allow prospective employers to account for spent convictions to the extent of discriminating by refusing an application for employment.

5.3.5 The Respondent's "fallback" argument is that, if it unlawfully discriminated under the ADA, it is exempted from compliance under s.35(1)(b)(i) of the ADA because the discrimination only arises due to a genuine occupational qualification which recruits are required to fulfil to maintain the integrity of the police force (paragraph 4.11.6).

In my view a genuine occupational qualification equates to an 'inherent requirement' of a position. An inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental (See for example *X v The Commonwealth* [1999] HCA 63 (2 December 1999) (X's Case), *Qantas Airways v Christie* (1998) 193 CLR 280 (Christie's Case) or Mark Hall v NSW Thoroughbred Racing Board, HREOC Report No 19 p32, 34). 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 (Hall's Case p 36, *Zraika v Commissioner of Police, NSW Police* [2004] NSWADT 67). 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 (Hall's case p35-36). The inherent requirements exception should be interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions (Hall's case p 34-35).

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.

Also, as noted by the Complainant (paragraph 4.11.7), the genuine occupational qualification is not universally applied. A 'genuine'

occupational qualification would apply to all members of the police force – not just recruits. There is no evidence before me of an "integrity audit" carried out by police to ascertain whether existing members are free of any adult criminal conviction which would fall foul of the Integrity Policy.

The uneven application of the Integrity Policy is another reason I am unable to conclude that the requirement to have no adult convictions for dishonesty is 'essential' to the position and/or that there is a 'tight correlation' between the criminal record requirement and the inherent duties of a Northern Territory Police officer.

Furthermore, as suggested by the Complainant, I find that simply implementing an 'adult-criminal-conviction-free rule' in the Integrity Policy (the full version of which the Respondent has not put in evidence) does not of itself create a genuine occupational qualification, especially as the policy itself is in breach of the prohibition against discrimination under s.19 of the ADA because it permits discrimination on the basis of (irrelevant) criminal records.

5.3.6 In view of the foregoing, I formally find that the Respondent's decision to reject the Complainant's application to join the NT Police Force on the basis of his irrelevant criminal record, amounts to unlawful discrimination under the ADA.

I also formally find that the Complainant has satisfactorily discharged his onus of substantiating the complaint (supra paragraphs 2.1 and 2.2 for summary of complaint).

Accordingly I propose to order that the Complainant be reinstated into the recruitment process for consideration alongside other applicants for appointment to the NT Police, but for the precise form of the proposed order see discussion at paragraph 6.4.

5.3.7 In finding for the Complainant I am mindful that my finding should accord with the aims and objectives of the ADA. Object (a) of the ADA is reproduced below:

"...

3. Objects

The objects of this Act are –

(a) to promote recognition and acceptance within the community of the principle of the right to equality of opportunity of persons regardless of an attribute;..."

At times I have been urged by the Respondent to accept a construction of the SCA which may be at odds with what the former Attorney General said in his second reading speech is the purpose of the Criminal Records (Spent Convictions) Bill (Hansard p5357 on 13/8/92, lines 2 and 3):

> "The purpose of the Criminal Records (Spent Convictions) Bill and the Juvenile Justice Amendment Bill is to facilitate the more effective rehabilitation of certain offenders by providing that, in certain circumstances, their criminal records relating to relatively minor offences may be spent and not form part of their criminal history. ...".

I have endeavoured to prefer a construction that promotes the purpose and objectives of the SCA – namely to facilitate rehabilitation by "spending" certain convictions.

5.3.8 I am also mindful that my finding should accord with what I believe to be the actual aim and objective of the Integrity Policy.

From what we know about the Integrity Policy (supra paragraph 4.11.6) it is designed to maintain the "integrity" of the NT Police Force and its members at an acceptable level. It follows that the focus of such a policy should be upon whether employees and recruits meet pre-determined standards of integrity and honesty.

In the case at hand the employment record of the Complainant for 20 years prior to this application for employment (see Exhibit 3 – prison officer 5 years, police officer 5 years, RAAF technician 10 years) is evidence that the Complainant is possessed of an appropriate level of honesty and integrity. The Respondent rejected the Complainant's application for employment because of a conviction for dishonesty 25 years earlier (Exhibit 5 – Letter of Rejection dated 19/12/03). The Letter of Rejection reveals that an Integrity Committee "makes determinations" when the integrity of an applicant is "called into question", but makes no mention of any allowance for the "integrity and honesty" of an applicant.

Also, and unfortunately, the Respondent's rigid application of the Integrity Policy in this case through focus on spent criminal history, is not only discriminatory, but increases the possibility that worthy candidates may be overlooked because the Integrity Committee does not have the ability to consider their positive characteristics.

It is not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate for employment without considering a

whole range of factors and characteristics – some of which are discussed above at paragraphs 4.9.1 and 4.9.4 – not just criminal history (spent or otherwise).

The Respondent's task of enhancing the integrity of the force is not assisted by an Integrity Policy which must be rigidly applied to exclude recruits on the basis of irrelevant criminal record. The Respondent would be better served in my view by an Integrity Policy which may, in the discretion of the employer, be applied with sufficient flexibility to enable thorough assessment of each member or recruit on merit.

6. CONCLUDING REMARKS

6.1 Intent of the Legislature

Notwithstanding my finding that the actions of the Respondent towards the Complainant amount to unlawful discrimination, I am troubled by the rhetorical question posed by Counsel for the Respondent (at paragraph 4.11.4).

The Respondent's concern is that the effect of the combined operation of s.16 SCA and the relevant provisions of the ADA may be to prevent police from ever taking spent records into account in the manner contemplated by s.15 SCA.

I accept the Respondent's submission that in some instances it may be unsafe to disregard spent records. For example where there is concern about the integrity of a recruit or serving member because the spent record reveals convictions for lesser offences due to lack of evidence, or where, as discussed at paragraph 4.9.1, a check reveals that a spent record has been deliberately concealed.

Also, as discussed at paragraph 4.9.1, it may be of importance to check that a criminal record has been correctly disclosed.

This complaint arose because of the rigid application by the Integrity Committee of an Integrity Policy which provides that adult convictions for dishonesty automatically disqualify job applicants. I have already indicated (paragraphs 4.9, 5.3.4) that in my view it is unlikely that Parliament intended s.15 SCA to allow sensitive-occupation employers to reject recruits solely on account of a spent conviction. If this situation occurs, as has happened in the Complainant's case, then in my view an employer (the Respondent in this case) has:

- exceeded the object of the SCA which is:

> "An Act to facilitate that more effective rehabilitation of certain offenders by providing that, in certain circumstances, their criminal records relating to relatively minor offences may be spent and not form part of their criminal history"; and

- has breached s.16 SCA which prohibits the taking into account of a conviction if to do so contravenes any other law in force in the NT (in this case the ADA).

6.2 Exemptions and Advices Available Under the ADA

In this case I believe that if the Respondent had sought and taken into account the Complainant's spent record, as is its right under s.15 SCA, and then had the ability and flexibility under its Integrity Policy to consider whether or not that record was 'irrelevant' under the ADA and whether or not that record was relevant for its (the Respondent's) purposes, I would have been less certain that the Respondent had breached the SCA and the ADA.

I raise this point because the ADA gives me power (s.59 ADA) to grant exemptions for conduct which would otherwise be discriminatory under the ADA, and to provide advices which have the effect of an exemption under the ADA (s.53 ADA).

Bearing in mind the Respondent's foregoing concerns (paragraph 6.1), I presume that it wishes in the future to operate its Integrity Policy as described immediately above. If it does so, and discriminates on the basis of irrelevant criminal record then it will breach the ADA. If however the Respondent develops a new, more flexible, policy which allows spent convictions to be taken into account but also gives discretion to the Integrity Committee to consider individual applicants on their merits and provides for disqualification of an applicant only where it is legitimately necessary to protect police integrity, then the ADA provides a way to alleviate the Respondent's concerns.

That is to say, if such an Integrity Policy was developed and submitted to me I may be inclined under the ADA to grant an exemption or provide an appropriate advice which would permit the Respondent to lawfully discriminate on the basis of spent records where it is reasonable to do so.

6.3 Costs

Pursuant to s.96 ADA each party to a complaint shall pay his or her own costs in respect of proceedings under the ADA. Although the section does give me the power to make an order as to costs, it is generally understood that the Commission is a 'no-costs' forum, and that I would only make an order as to costs in exceptional circumstances.

I find that there are no exceptional circumstances in this case and accordingly I propose to make no order as to costs.

6.4 Proposed Orders

I have given careful thought to the final form of the orders I should make.

The Complainant seeks that his "application for employment be reinstated forthwith and be included for consideration ... under the merit based system ...". While this appears to be fair and reasonable, I am concerned that an order to this effect may not return the Complainant to the same position he would have enjoyed had he not been discriminated against in his first application in September 2003.

I raise this concern because I am informed by my staff that in September 2003 the Respondent was engaged in a recruitment drive with a view to significantly increasing the numbers of Northern Territory Police. At that time of high demand, the Complainant, even though he was already a mature applicant, would nevertheless have been justifiably entitled to be very confident about his chances of selection on merit – especially in view of his experience as a police officer in another state, and his other related work history.

My staff also inform me that the recruitment drive was successful, so that there will not be another intake of recruits until early 2006. My information is that a standard number of recruits for each intake is approximately 25 persons.

My concern is that the Complainant, who is now two years older and competing in a field that may be inflated in number due to the reduction in intakes, may no longer be in the same position on merit that he would have been when he initially applied.

Having found that the Respondent engaged in unlawful discrimination, I must endeavour to return the Complainant as nearly as possible to the position he would have been in had he not suffered the discrimination. For this reason I am minded to order that the Complainant's application to join the Police be accepted, and: that he be permitted to participate in the initial phase of the recruitment process, which according to my information is physical, psychological and aptitude testing, and: that if the Complainant attains the standard set for these tests at the level required for his age, he be accepted into the Police in the next intake.

Pursuant to s.90 ADA I am not bound by the rules of evidence and entitled to inform myself as I see fit. However I invite further submissions from the parties as to the accuracy of the "information" I have received from my staff, because my proposed orders are based thereon. Also I invite submissions from counsel as to why I should not make the proposed orders, and the form that such orders should take.

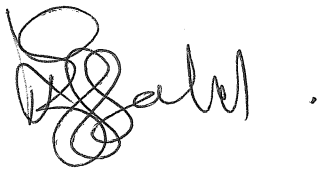
6.5 Final Orders

As a consequence of my finding in paragraph 5.3.6 that the Complainant's complaint is substantiated, I make the following orders:

6.5.1 The Respondent shall not repeat or continue the prohibited conduct, namely discriminate against the Complainant on the ground of his "irrelevant criminal record".

6.5.2 The Respondent shall allow the Complainant to participate in the recruitment process in the manner proposed under paragraph 6.4.

6.5.3 In accordance with the usual practice of the Commission I make no order as to costs.



TONY FITZGERALD
ANTI-DISCRIMINATION COMMISSIONER

22 April 2005