

CITATION: *Nash v Chief Executive, Public Safety Business Agency* [2016] QCAT 126

PARTIES: Peter Phillip Nash
(Applicant)
v
Chief Executive Officer, Public Safety Business Agency
(Respondent)

APPLICATION NUMBER: CML022-16

MATTER TYPE: Childrens matters

HEARING DATE: 25 May 2016

HEARD AT: Brisbane

DECISION OF: **Member Howard**

DELIVERED ON: 7 June 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision to cancel the positive notice and to issue a negative notice to Peter Phillip Nash is set aside.**
- 2. The following decision is substituted:**

A positive notice and a blue card are issued to Peter Phillip Nash.

CATCHWORDS: BLUE CARD – where serious offence – whether exceptional case

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 19, 20
Working with Children (Risk Management and Screening) Act 2000 (Qld) ss 6, 167, 225, 237, 360, Schedule 2

Ax v Commissioner for Children and Young People and Child Guardian (No 2) [2012] QCATA 248
Commissioner for Children and Young People and Child Guardian v Maher & Anor [2004] QCA 492
Commissioner for Children and Young People

and Child Guardian v Ram [2014] QCATA 27
In the marriage of Sandrk (1991) 104 FLR 394
Kent v Wilson [2000] VSC 98
Re: Imperial Chemical Industries Ltd's patent extension petitions [1983] VR 1
Schwerin v Equal Opportunity Board (1994) VR 279

APPEARANCES:

- APPLICANT:** Mr Peter Phillip Nash appeared on his own behalf
- RESPONDENT:** Ms N Taylor, Senior Legal Officer for Public Safety Business Agency, represented the Chief Executive Officer, Public safety Business Agency

REASONS FOR DECISION

- [1] Mr Peter Phillip Nash held a positive notice (and a blue card) issued on 20 November 2015. On 14 December 2015, the Chief Executive, Public Safety Business Agency ('the PSBA') notified him that it was issued based on wrong or incomplete information. His eligibility was reassessed because it was based on wrong or incomplete information by a delegate of the PSBA under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) ('WWC Act'). PSBA made a decision to cancel his positive notice and to issue a negative notice.
- [2] Mr Nash has applied to the Tribunal for review of the PSBA's decision. He seeks orders that the Tribunal set aside the PSBA's decision and that he be issued with a positive notice.

The review process

- [3] In conducting its review in accordance with the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), the Tribunal has all of the functions of the decision-maker (in this case, the PSBA) for the review of the reviewable decision.¹ The purpose of the review is to produce the '*correct and preferable decision*.'² The Tribunal must hear and decide the review by way of a fresh hearing on the merits of the application.³ Effectively, the Tribunal stands in the shoes of the original decision-maker and makes its own decision, based on the evidence before it and the applicable law.

¹ QCAT Act s 19(c).

² *Ibid* s 20(1).

³ *Ibid* s 20(2).

- [4] The paramount consideration in employment screening decisions under the WWC Act is a child's entitlement to be cared for in a manner that protects the child from harm and promotes the child's wellbeing.⁴
- [5] The PSBA may cancel a positive notice and substitute a negative notice if satisfied that it was based on wrong or incomplete information and is satisfied that a negative notice should be issued to the person.⁵ In making the decision, the PSBA (and on review the Tribunal) must effectively make the decision as if it was a decision about an application for a positive notice.⁶
- [6] It is uncontroversial that Mr Nash has been convicted of a serious (but not disqualifying) offence.⁷ Accordingly, under the WWC Act the PSBA must issue a negative notice to the person,⁸ unless it is satisfied it is an *exceptional case* in which the best interests of children would not be harmed if a positive notice was issued.⁹ If the PSBA is satisfied that it is an exceptional case, then the PSBA (and on appeal the Tribunal) must issue a positive notice to the person.¹⁰
- [7] '*Exceptional case*' is not defined in the WWC Act. As the Appeal Tribunal held in *Commissioner for Children and Young People and Child Guardian v Ram*,¹¹ the legislation creates a barrier to persons with convictions for a serious offence from working with children. Noting that not all serious offences are inherently offences against children, it considered the proper inference from the legislative scheme must be that it would harm the best interests of children for persons with convictions for serious offences to hold a positive notice, unless there is an exceptional case.
- [8] What constitutes an exceptional case is a matter of fact and degree.¹² It is settled law that it is a broad discretion considering the merits in each case.¹³ Hardship or prejudice suffered by an applicant is irrelevant.¹⁴ What amounts to an exceptional case must '*take it out and beyond the ordinary circumstances reasonably expected to occur*.'¹⁵ It must be '*of the nature of or forming an exception; out of the ordinary course, unusual, special*'.¹⁶ The passage of time alone is not determinative of whether or not a case is an exceptional case. Allegations and convictions may relate to events a

⁴ WWC Act ss 6, 360.

⁵ Ibid s 237(1).

⁶ Ibid s 237(2).

⁷ Ibid s 167 and Schedule 2.

⁸ Ibid s 225(1).

⁹ Ibid s 225(2).

¹⁰ Ibid.

¹¹ [2014] QCATA 27 at [46].

¹² *Re: Imperial Chemical Industries Ltd's patent extension petitions* [1983] VR 1; *Kent v Wilson* [2000] VSC 98; and *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492.

¹³ *Commissioner for Children & Young People v Ram* [2014] QCATA 27.

¹⁴ *Ax v Commissioner for Children and Young People and Child Guardian (No 2)* [2012] QCATA 248.

¹⁵ *In the marriage of Sandrk* (1991) 104 FLR 394 at 399-400.

¹⁶ *Schwerin v Equal Opportunity Board* (1994) VR 279 at 287-288.

number of years ago, but the passage of time alone does not detract from their seriousness. The decision-maker may consider relevant risk and protective factors.¹⁷

- [9] Section 226 of the WWC Act sets out a non-exclusive list of matters which must be considered in deciding whether an exceptional case exists in circumstances of a conviction or charge for an offence. Relevantly, consideration must be given to whether it is a conviction or a charge; whether the offence is a serious offence and if it is, whether it is a disqualifying offence; when the offence was committed; the nature of the offence and its relevance to employment that may involve children; and in the case of a conviction, the penalty imposed by the court and the court's reasons for its decision.¹⁸ Further, consideration must be given to anything else relating to the commission of the offence that is reasonably relevant to the assessment.¹⁹

The serious offence

- [10] The charges arose in an unusual way.
- [11] On 20 December 2013, Mr Nash was charged with conspiracy to distribute narcotics. He was held in custody at Arthur Gorrie Correctional Centre in Brisbane, until he was extradited, by consent, to the United States to face charges, where he was held in the Metropolitan Corrections Centre (MCC) in New York. In an amended indictment he was charged with conspiracy to commit narcotics trafficking, money laundering and computer hacking.
- [12] He entered a plea of guilty to conspiracy to commit narcotics trafficking and money laundering, but not computer hacking conspiracy. The charge of conspiracy to traffic narcotics usually carries a lengthy minimum sentence of some 10 years imprisonment and 5 years supervised release term as well as potentially significant fines. The basis for Mr Nash's pleas were that he became involved with a website on the dark web, Silk Road, when his work became very challenging and isolating, to buy illicit controlled substances for his own use and for social connection.
- [13] He was asked by the person/s behind Silk Road (whom he did not personally know other than online) to moderate a chat forum on an associated website (which contained discussions about Silk Road and other issues, but through which drugs were not sold). He agreed and did so for some 10 months. He was paid (in bitcoins) as an employee to moderate the forum. He used the money he earned (equivalent to about \$25,000) to purchase illicit drugs for his own consumption from Silk Road. He agreed that he knew the proceeds were from narcotics trafficking and that it was being processed in a way to hide the moneys from law enforcement. This is the basis for his guilty plea. He was aware that significant quantities of drugs were distributed through Silk Road. The

¹⁷ *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492.

¹⁸ WWC Act s 226(2)(a).

¹⁹ *Ibid* s 226(2)(e).

prosecution told the Court that in all about \$200 million worth of narcotics sales were conducted at the site, although there is no suggestion that Mr Nash knew the volume was so large.

- [14] Mr Nash's Counsel in the US prosecution submitted that Mr Nash took full responsibility for his criminal conduct. However, Counsel submitted that Mr Nash himself had '*a very minor role*'²⁰ and he had not sold drugs and had not been part of the hierarchy of the people who ran Silk Road, nor was he involved in the transactions and he did not profit from them. His Counsel further submitted that while in the United States, Mr Nash cooperated fully with the authorities and gave them all the information he knew. The authorities found him to be truthful. It was accepted that his role was minor. He was paid the equivalent of about \$25,000 for moderating the website. He used it to buy drugs from Silk Road, but did not otherwise profit from his involvement.²¹ He was a model prisoner, who assisted other inmates both in Australia and the MCC. Prosecution Counsel did not suggest that any of these submissions were incorrect.
- [15] With the agreement of the Prosecution, the Court granted a motion for safety valve relief. The computer hacking conspiracy charge was dismissed. Mr Nash was sentenced on 26 May 2015, to time served (of some 17 months) and a special assessment of \$200 (\$100 for each count), and released from custody.

Mr Nash's Life History

- [16] Mr Nash prepared written statements and gave oral evidence which contain his account of his life history.
- [17] Mr Nash was raised by caring parents. He gained qualifications in nursing and psychology. He has worked primarily in roles supporting people with intellectual disabilities and severe challenging behaviours. He is passionate about his chosen field.
- [18] Mr Nash admits a history of illicit drug use and alcohol use prior to 2011. In particular, he admits having taken ecstasy (in his early twenties), '*once every month or two*', before attending dance parties. This pattern continued until he was 24 or 25. He says it then became less frequent. Then between about ages 30 and 35, he used cocaine a couple of times per month when he was socialising with friends. At that stage, he was concerned that it was becoming a regular part of a night out, and so he stopped doing that. However, very occasionally, he still used it.
- [19] He moved to Australia in 2007. He did not use illicit drugs at all for some years, having decided he did not want it to be a part of having '*a night out.*' In 2011, he moved to Brisbane to take up a position as a senior manager at a new facility being established for forensic disability services ('FDS') for adults who have been placed on forensic orders (after being charged with

²⁰ Exhibit 2 PSBA-04.

²¹ Ibid PSBA 99 to 107.

criminal offences and who have intellectual disability and who exhibit more severely challenging behaviours). He was in the role from 2011 until 2013. Once the service was up and running, in due course, he had some 50 staff to manage. He was under significant pressure to achieve goals in the short-term. He reports that at the time he used illicit drugs and alcohol to self-medicate when not at work. At that time, he did not have a strong support network in Brisbane. He did not reach out to others for help, except belatedly to Claire Ryan, his girlfriend, a clinical psychologist who was at the time completing the final 2 years of her PhD. He explained that he had always been the person who coped well, who looked after other people. His friends regard him as a '*mother hen*' personality.

- [20] He used cocaine on one occasion in 2011. In 2012, he started to use it regularly on weekends, and occasionally during the evening at home, but never when working. He describes using drugs (including cocaine, MDMA and cannabis) as a maladaptive strategy to cope with the stress of his workplace. He obtained the drugs from Silk Road. He hid his drug-taking from Ms Ryan. He was able to do this because they did not live together at that time and she was pre-occupied with completing a PhD.
- [21] He does not believe the use of substances affected his performance when he was at work. He used substances to briefly elevate his mood. That said, he acknowledges its cumulative effect in dulling his senses. His relationships suffered. He did not exercise regularly or eat well.
- [22] Over the course of his adult life, Mr Nash has consumed alcohol, although generally not to excess. During the period that he felt under a great deal of stress in the workplace, he admits that he drank too much and was drinking at least half a bottle of wine each day.
- [23] In the course of purchasing illicit drugs through Silk Road, he was asked to act as a moderator for a site and chat forums associated with the site. He personally was not involved in the sale of drugs.
- [24] Until the events of 2012-2013, Mr Nash did not see his drug-taking as problematic. Rather as a young person, he had considered it was part of the affluent lifestyle of a young professional. He admits now that he naively thought other users of Silk Road were like him.
- [25] However, in the weeks before his arrest in 2013, he did tell Ms Ryan about his drug-taking and that he believed he had a problem. He sought her support and assistance. She had also told him that he was drinking to excess. She suggested psychological or medical assistance be obtained. Mr Nash saw his general medical practitioner, and took some tentative steps towards addressing his issues.
- [26] Then in December 2013, he was then arrested and incarcerated as discussed earlier. Since his arrest, he has recognised the dark side of illicit drug use. He considers it has destroyed his life. He recognises now how his drug-taking has impacted the lives of others. He also recognised the cost addiction has had in the lives of other prison inmates (and their

families) through poverty, criminal activity and potentially death. He accepted that he is an addict while in prison. In hindsight, he is devastated and remorseful about his actions.

- [27] Mr Nash describes his time in prison as the most difficult thing that has happened to him. He describes the prison environment as brutal, '*coercive and uncompromising*.'²² He was beaten on one occasion. He explained that losing everything made him realise what was important: his relationships. Although drugs were readily available in prison, he did not take them and did not want to. He has not used illicit drugs since before he was arrested.
- [28] While in prison, he did the available courses about drug abuse education (for 30 hours), drug treatment and rehabilitation (which involved group sessions with a psychologist over a period of months), as well as courses about stress management and relationships. He was a model prisoner. He observed first-hand the devastating effect drugs had on his life and the lives of other prisoners. He accepts that he was naive in believing that he could use drugs socially and they were not harmful when used in that way, and seeing other users as being similar to him.
- [29] Shortly after his release from prison, Mr Nash travelled to the UK, as his father was terminally ill. He remained there until after his father's passing and assisted his mother in dealing with the necessary arrangements.
- [30] He has otherwise resided in Australia since his release from US prison. He is engaged to marry Ms Ryan. He reports a very supportive and loving relationship with her. Although he was involved with her before his arrest, he considers their relationship is now deeply intimate (he says 10 out of 10 on a scale of 1 to 10), whereas previously, he considers it was more akin to 3 out of 10 on an intimacy scale. He explains that before his incarceration he was less open with her. Now, he is open with her about everything. He has no secrets from her. They plan to marry later this year.
- [31] Mr Nash has also deepened his relationships with others in his support network. Again, he is more open and intimate in those relationships. His supportive friends are fully aware of his past. He has also re-joined and regularly attends a men's group in which he participated prior to his incarceration for support in dealing with issues about his concern that he was like his father, in some ways he preferred not to be. He is also open with the group about the issues which have beset him. He saw a psychologist a number of times and could access him again, but explains that it is expensive.
- [32] Mr Nash is currently not working. He had obtained work, but a blue card was required. Once his blue card was cancelled, he ceased that employment. He wishes to return to his career in the support of people with intellectual disability and challenging behaviour. In the past, he has rarely worked with children, but occasionally his employment has involved

²² Exhibit 3 page 1.

them. Generally, he has worked with adults with intellectual disabilities and challenging behaviour.

- [33] He explains that his offending behaviour was an aberration due to the extreme stress he felt at the time. Also, he does not believe that he will relapse into drug taking and excessive alcohol use because of the lessons he has learned from his experience. He has now been clean for over two and a half years. He considers that although deplorable, his experiences in prison have improved his coping skills. He survived prison without resorting the use of substances. He considers that the difficulty which other stressors have and can potentially generate pale into insignificance by comparison, including workplace stressors which resulted in his resorting to substance use.
- [34] While he does not dismiss or minimise the risk of relapse, he considers it most unlikely, because his life is now entirely different. He considers he has been through significantly more stressful events as a result of his arrest and prison than the work stress that led to the offending behaviour. He considers it would not happen again as he now has better boundaries around what are reasonable demands for an employer to place on him. Also, he explains that drugs were available in prison and in society, but he sees his involvement in them as destroying everything he has worked for. He reports that he has no urge to use them. He is determined that his life will not come undone again.
- [35] He does have a glass of wine if he is out for dinner, but that is all. He says he has now '*grown out of getting drunk.*'

Mr Nash's psychologist report

- [36] Dr Paul Bowden is a clinical psychologist. He prepared a medico-legal report about Mr Nash and gave oral evidence.
- [37] He was briefed by a lawyer acting for Mr Nash, who outlined the scope of the assessment, and provided copies of character references for Mr Nash and a document '*known as "an exceptional case tool."*'²³ Dr Bowden's oral evidence was to the effect that the exceptional case tool was a copy of a conference paper delivered by two QCAT Members. He did not have the Chief Executive's statement of reasons: his report was prepared before the decision was made.
- [38] Dr Bowden had an appointment of several hours with Mr Nash. He interviewed Mr Nash and also administered psychological testing (the Minnesota Multiphasic Personality Inventory or MMPI). His evidence is that the MMPI was to assist in providing information about Mr Nash's personality, psychological functioning and any behavioural dysfunction. Dr Bowden explained the MMPI as useful to check the validity of the self-

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Exhibit 5 at [3].

report. The testing indicated that Mr Nash is ‘a very well adjusted individual.’²⁴ It did not reveal indicators of substance abuse.²⁵

- [39] Dr Bowden did not identify issues in Mr Nash’s background that make him vulnerable to psychological issues or substance abuse. He opined that the drivers for Mr Nash’s offending behaviour were severe workplace stress and social isolation. In his opinion, the stress caused Mr Nash’s mental health to deteriorate and he became sleep disturbed. With this deterioration, his capacity to make good decisions was impaired and his drug and alcohol use increased.²⁶
- [40] Dr Bowden opines that Mr Nash was fully rehabilitated in prison. He considers that he takes full responsibility for his actions, has excellent insight and can articulate how he would prevent such factors from arising again. He concluded that Mr Nash’s risk of reoffending is low, having considered risk and protective factors. He includes in the many protective factors identified by him, an improved and (in his view, exceptional) ability to cope with stress (as demonstrated by his ability to navigate prison, which is more stressful than the work stress that caused him to self-medicate);²⁷ insight into the resilience skills that he used to cope;²⁸ no course of offending behaviour (rather, a usually successful professional person of integrity); he has rehabilitated successfully; excellent social support; and a loving and supportive partner. Further, he considers Mr Nash’s intelligence and drive are protective. A high level of conscientiousness and discipline make a person more likely to develop self-control, and avoid the impulsivity which is associated with drug-taking. He explained that a person needs discipline to give it up and avoid urges to use.
- [41] As risk factors, he identifies social isolation; damage to reputation which may cause ongoing employment difficulties; and he identifies as a risk factor, that Mr Nash’s ability to handle stress has not been tested in the work environment. He identifies the greatest risk of reoffending for Mr Nash as stress resulting in relapse to drug-taking.
- [42] While acknowledging the serious nature of the offending, Dr Bowden considers, having regard to risk and protective factors identified in his report, that Mr Nash represents a low risk to children. He further considers that he was not at any time a direct threat, relevantly, to children.

Referee statements in support of Mr Nash

- [43] A number of Mr Nash’s friends and former colleagues at the FDS gave written statements to support Mr Nash and gave oral evidence at the hearing. They are all professional persons qualified in psychology or social work. It is clear from their evidence that they each hold Mr Nash in the

²⁴ Ibid at [66].

²⁵ Oral evidence given at hearing.

²⁶ Exhibit 5 at [60]-[62].

²⁷ Ibid at [81]-[83].

²⁸ Ibid at [81].

highest professional and personal regard. Those who worked for him report that he was an excellent and supportive manager.

- [44] Their evidence confirms the aim of the FDS to implement positive behaviour support for care and rehabilitation of offenders with intellectual disabilities. It also confirms that Mr Nash had a leading role in setting the service up and getting it underway. It was a first in Australia. The adults in the FDS are extremely vulnerable. While vulnerable persons, they have fallen within the criminal justice system, typically for violent behaviours. They have been placed on forensic orders and are to reside in the FDS. They have very complex and challenging needs and issues.
- [45] The referees had all read the PSBA's statement of reasons for decision.
- [46] Dr Jon Mason, a clinical psychologist, was Mr Nash's line manager from 2011 until he left the FDS. He did not see any signs of drug or alcohol abuse. He saw Mr Nash working at a high level in the workplace. That said, he understood from Mr Nash that the workplace became more difficult after he (Dr Mason) left. He considers Mr Nash is very psychologically minded, reflective and resilient. From his discussions/contact with Mr Nash, he believes he has, as a result of his incarceration, gained insight into the impact of drug use and now recognises it as unhelpful. He also reports his observations that Mr Nash now openly seeks support and has greater intimacy in his relationships. He also spoke of Mr Nash having positively integrated his prison experience into his identity, rather than trying to avoid it. He considers these are positive signs of his resilience and ability to move forward in a positive way. He also remarked upon his excellent self-discipline.
- [47] Paul Oxnam is a clinical psychologist. Mr Nash was his line manager for 12 months. He returned to New Zealand at the end of 2012 (as a result of his wife's ill health), but he had become friends with Mr Nash. They have remained in contact. He attests to the clients in the forensic disability service as liking, respecting and trusting Mr Nash. They considered that he was a person who always protected their rights. He has never seen or heard Mr Nash behave in a way which would put the wellbeing of vulnerable persons at risk. He observed that Mr Nash was passionate about his role. Mr Nash was a good source of support to him in difficult times and was an excellent clinician and advocate for positive behaviour support. Mr Oxnam says he would have been concerned if he had seen any evidence of intoxication from drugs or alcohol in Mr Nash, but he did not. He did see signs of exhaustion.
- [48] Mr Oxnam describes the forensic service as the most stressful and complex environment that he has worked in. He describes increasing difficulties after the replacement of Mr Nash's manager (Dr Mason) in the second half of 2012, with a person who responded very emotionally to situations and placed increasingly greater demands on Mr Nash (and also Mr Oxnam, to a lesser degree). At about the same time, a new and very high profile client was admitted. Staff were assaulted by the client. As a consequence, external stakeholders placed increasing pressure on the

service. A team leader left, resulting in more work for Mr Nash and others. By November 2012, it felt to Mr Oxnam like a perfect storm of stress. He reports that the lives of the four key managers were all significantly changed by the experience. Mr Nash was one. The marriage of another broke down. Another died. The other team leader left the service.

- [49] Another of Mr Nash's staff from the FDS is Ms Sidney, a social worker, who has formed a friendship with him. She considers Mr Nash's experiences have deepened him as a person, referring to his great capacity for self-reflection. She also says that when she worked for him, despite the stressful environment, he was very professional and did not act in a manner which passed his stress on to others. She says he is very motivated to move forward and she has no concerns that he will relapse into drug use. She says he does not want to let down the people in his life. She considers the involvement in the website was out of character. In her view, he was internalising his stress and self-medicating. However, he is now linked to services, very open about his issues with his partner, and has many other protective factors in his life.
- [50] Another former colleague from the FDS, Ms Wong, a social worker, describes him as a role model and teacher for staff at the FDS, ensuring respect for all ethical and human rights principles, safeguarding the vulnerable and challenging clients from mistreatment and discrimination.²⁹ She spoke of his remarkable ability to relate to and calm adults with intellectual disability and severely challenging behaviour. She considers Mr Nash could achieve what others could not, in a respectful and non-coercive manner, implementing positive strategies to diffuse extremely difficult behaviours and situations. The adults concerned liked him, related well with him, and competed to spend time with him first whenever he was in their area of the facility. Although she had previously worked as a drug and alcohol counsellor, she did not see any signs of drug or alcohol abuse in Mr Nash. Mr Nash was unusual in her experience as a drug and alcohol counsellor. Other persons she has dealt with often want to relapse. However, in Mr Nash's case, she has heard only '*total remorse*' and a desire to contribute. She considers he has been strong and conquered his substance use issues.
- [51] Ms Ryan, Mr Nash's fiancé, an organisational psychologist, also gave a statement and evidence at the hearing. She has known Mr Nash for 5 years. She describes him as having spent most of his life working with marginalised, vulnerable people. She was in the final years of her PhD study in 2012-2013 and describes herself then as '*more of a weekend girlfriend*'. She believes that in 2013, Mr Nash was close to depression and she encouraged him to see someone. She described him as severely burnt out, and getting calls from work even in the middle of the night. She had told him she thought alcohol was a problem for him. She only became aware of his drug use in October 2013, when he told her and sought her help. She explains that he went cold turkey immediately, and went to a general practitioner. However, shortly after that he was arrested.

²⁹

Exhibit 8.

- [52] She says that the criminal justice system worked for Mr Nash. She is confident that he will not offend again. She spoke of the changes she has seen in Mr Nash following his incarceration and the greater intimacy in their relationship. She was struck by the maturity and remorse he displayed during his imprisonment, and the exceptional self-regulation skills employed by him to cope with the '*deeply testing environment*.'³⁰ She also described significant post-release stressors, including Mr Nash's father's terminal illness and passing; employment issues he has experienced and the blue card cancellation and review proceedings.
- [53] They live together now and she has not observed any signs that Mr Nash has any urge to take drugs or drink alcohol to excess. She describes him as choosing healthy coping mechanisms including meditation; the much closer level of intimacy and support he has in his relationship with her and others; his participation in a men's group; his willingness to reach out to others for support; and his commitment to exercise and a healthy lifestyle. Together, they developed a written plan for him. She describes him as calmer; better self-regulated; reflective; and even more supportive than he was; and grateful for life. He learnt a great deal about the destructive impact of drugs in society. He also has access to psychological treatment.
- [54] She has seen him with many children of mutual friends. She considers that he is responsible and thoughtful to their needs. She describes him as having a strong commitment to client empowerment and as an advocate for the wellbeing of others.³¹

Is Mr Nash's case an exceptional case in which it would not harm the best interests of children for a positive notice to issue?

- [55] The PSBA submits that Mr Nash's case is not an exceptional case in which the best interest of children would not be harmed if a positive notice was issued. It submits that the WWC Act requires precautionary action, even if the history or offending is not directly child-related.
- [56] The PSBA does acknowledge that Mr Nash has protective factors including a strong desire and willingness to be drug-free, increased insight, and the identification of the causal factors. Also, it acknowledges that his long-term relationship with Ms Ryan offers a new level of openness and support. It acknowledges too that his character witnesses speak highly of him, even in the face of enormous pressure, suggesting that he remained highly functioning during the tumultuous time of his life, despite his substance use. Also, PSBA acknowledged that he completed drug-related courses in prison; had some sessions with a psychologist; reengaged with the men's group; and strengthened his support network generally. That said, it argues that living a law-abiding life is not exceptional.

³⁰ Exhibit 7.

³¹ Exhibit 7.

- [57] However, PSBA submits that Mr Nash's sobriety of two and a half years is brief and that it is yet to be tested in a stressful workplace scenario. It identifies as other risk factors, Mr Nash's conviction for a serious offence; his history over an extended period of drug use and alcohol use; and the recency of his incarceration (which PSBA says suggests he may still be forming new untested life skills). It says he has had insufficient and brief rehabilitation: time and intense treatment is usually necessary.
- [58] Although it did not submit that Mr Nash is not an honest witness, it submitted that because his evidence that he did not take drugs in jail is uncorroborated, I should give it little weight. I reject that argument and accept his evidence. The material from the US proceedings suggests that he was a model prisoner, which would not be so if drug use was evidenced. Further, Mr Nash impressed me generally as an honest witness of integrity. He said he was open about his history. He made admissions against himself, such as his history of drug-use dating back to his twenties. His evidence was consistent with that of the evidence of his supporting witnesses and the independent expert evidence of Dr Bowden. I am satisfied that Mr Nash's evidence is truthful and I accept it.
- [59] The PSBA submits I should treat Dr Bowden's opinion with caution and give it limited weight. It submits that the content of his briefing documents are unknown; he had not read the statement of reasons; he has only seen Mr Nash once; and he did not consider Mr Nash's history of drug use when giving his opinion about Mr Nash's risk of reoffending (which, although it has not resulted directly in other criminal charges, could have, and has been ongoing over much of his adult life).
- [60] Dr Bowden is an independent expert. That is why he has not had ongoing contact with Mr Nash. Although I accept that he did not consider Mr Nash's history of substance use in considering the risk of his reoffending, Dr Bowden was aware of it and gave evidence about it. The risk and protective factors he identified for reoffending are relevant to the consideration of whether Mr Nash's case is an exceptional case. I do not have his briefing documents, other than character statements. However, the 'tool' he was given was a conference paper. Other than that, he had a letter from instructing lawyers. Having heard Dr Bowden's thoughtful answers to questions at the oral hearing and his reticence to express views in an uninformed way, I accept his evidence as given, while accepting that he did not specifically consider risk and protective factors for relapse to drug-use by Mr Nash.
- [61] In relation to his supporting witnesses, the PSBA submits that although they seemed fully-informed about his life history, their observations are generally not in the context of children, and are limited to the private environment. I accept that many of their observations were not in the context of Mr Nash's involvement with children. I accept that their observations are limited to the private environment since Mr Nash's release from jail. However, all but Ms Ryan had previously observed his manner of relating to other vulnerable persons, that is, adults in the FDS, before and during the period of his substance abuse.

- [62] For reasons to be explained, I am satisfied that Mr Nash's case is an exceptional case, in which it would not harm the best interests of children for a positive notice to issue. I have considered the matters set out in s 226 of the WWC Act in exercising my discretion.
- [63] It is uncontroversial that the offences of which Mr Nash was convicted are serious offences. The charge of computer hacking conspiracy was not pursued. The circumstances of the charges and convictions all arise out of his involvement as a moderator for the forum on the website associated with Silk Road. The US Court accepted that his involvement was, however, limited. He was not directly involved in drug trafficking or money laundering. Rather, he was employed to perform a limited role to moderate a website by persons who were involved in those activities, with whom he became acquainted online through his own purchase of drugs from Silk Road.
- [64] He accepts that he was, and pleaded, guilty of the charges (because of the manner in which the offences are drawn) under US criminal law. However, his minor role was recognised by the US courts in granting him safety value relief. Otherwise, it seems he would have many years of imprisonment yet to serve. I also accept that his participation was relatively minor. He paid dearly for it, through his arrest, extradition and isolation in very challenging prison environments.
- [65] Mr Nash's history of an extended period of illicit drug use is a risk factor to the extent that past behaviour is often a predictor of future behaviour. Of course, illicit drug use alone can result in charges. Mr Nash escaped charges for drug use, despite an extended number of years of drug-taking, to a greater or lesser degree.
- [66] Although it may be trite, I observe that exposure to illicit drugs has the potential to severely and negatively impact children through their becoming addicted and through their carers acting in harmful ways towards them while under the influence of illicit drugs. There is no doubt that Mr Nash's self-deception about the harmlessness of his own '*social*' drug use over the years and beliefs about the demographics of and limited effects of drug use was, as he now accepts, naïve.
- [67] The period of two and half years of Mr Nash's abstinence from illicit drug use is not particularly lengthy in the scheme of Mr Nash's history of illicit drug use over the course of his adult life. However, I am satisfied that the two and half-year period has been an extraordinarily difficult and life-changing time for Mr Nash. I accept that he has experienced significantly greater stressors during that time, than the workplace stressors that led to his drug reliance, increased alcohol use, and the offending behaviour in 2012-2013.
- [68] Having said that, I accept that Mr Nash has been a high achieving, caring, intelligent and successful person over the years who, prior to the events of 2011-2013, who had coped with whatever life threw at him. Therefore, seeking help was foreign to him, when things became extremely difficult

for him. His sense of isolation at that time was exacerbated by his recent move to Brisbane where he had few supports. That is not to excuse his behaviour in any way, but to put it in its context.

- [69] He had just begun to make tentative steps to begin to deal with his substance abuse in late 2013. What happened next was well beyond his sphere of experience and expectations of life. He was charged with very serious offences, as a consequence of his involvement in drug taking. He was imprisoned. He was beaten. His life was, in his words, destroyed. He hurt the people he loves immensely. He is deeply contrite for the pain he has caused them.
- [70] He has not taken drugs since late 2013. That means he has lived through the most stressful events in his life without the assistance of illicit substances, despite their ready availability in prison and, if he sought them, in the community, after his release. The evidence does not suggest that Mr Nash's now minimal alcohol use is of concern. I accept that it is not.
- [71] Since his release from prison, Mr Nash has not had an easy time. He has dealt with his father's illness and death. He is trying to build a new life. He obtained work, but soon afterwards found his blue card was cancelled. He has had the stress of these proceedings. He has accepted the support of his partner and close friends. With the support and involvement of his partner, he has developed a written plan. He has engaged with men's group and sought some psychological treatment. Although it is not ongoing, if required he will access independent psychological treatment again.
- [72] The evidence of Mr Nash's supportive witnesses about their observations after his release is consistent with his evidence. While acknowledging the potential for relapse, Mr Nash says he has no desire or urge to take drugs. In this regard, it is useful to note that many of his witnesses, although they are Mr Nash's friends, have qualifications and experience which tend to lend more weight to their observations. Ms Wong, formerly a drug and alcohol counsellor, does not see the same desire/potential for relapse in Mr Nash that she generally saw in her clients. She is better equipped to see the signs than a person who has not had that experience. She has seen only total remorse and no evidence of any desire to abuse substances again. Similarly, Ms Sidney has seen no signs of relapse, nor Ms Ryan.
- [73] I am satisfied that it is a demonstration of his resilience and insight that instead of becoming hardened, embittered or minimising his responsibility for the events or turning again to substance to cope, Mr Nash accepts full responsibility with considerable humility and determination to see the positive side to his situation and to make something positive from his experience. He used his time in prison to do helpful courses and group therapy. He did not revert to drug use. He has come to appreciate the most important things in life. He has deepened his connection to his

supportive partner and friends. He is totally honest with them now, on his own account and theirs.

- [74] Mr Nash wants to make a contribution to society, to make something positive of the situation that has occurred, to provide for his partner and to build a new life. His desires and any prejudice to him by not holding a blue card are irrelevant to my consideration. It is the welfare and best interests of children which are paramount in this application.
- [75] That said, I accept Dr Bowden's evidence that his conscientiousness and drive to achieve is a protective factor in that he is more likely to have the self-discipline required not to relapse in order to achieve his goals. He considers Mr Nash's self-discipline excellent.
- [76] Further, I accept the descriptions of the witnesses of Mr Nash's ability to relate positively to and champion the human rights of marginalised, vulnerable adults with intellectual disability who have found themselves in the criminal justice systems for violent acts. It is reasonable to infer that even at his darkest moments (when he was personally feeling overwhelmed by the stress of his work situation and was self-medicating with drugs and alcohol outside of work hours), when he was at work, Mr Nash contained and suppressed his personal feelings.
- [77] Rather than representing a risk to these very vulnerable adults, all of the evidence is that he treated them with the highest degree of dignity and respect at all times. He was also a role model, mentor and source of support for his staff at the very time when he experienced the stress upon himself as overwhelming. According to Ms Sidney, he did not act in a manner which passed his stress on to his staff. The other witnesses did not specifically comment on this, but indicate consistently how supportive he was. It is reasonable to infer that even at this time, Mr Nash showed a remarkable degree of self-control in the workplace. He remained a positive, supportive, calming influence. Further, I am satisfied on the basis of Dr Bowden's evidence, and the accounts given by Mr Nash's support witnesses, that he has further honed his self-discipline skills significantly since then.
- [78] Further, this evidence is consistent with his actions as a prisoner in assisting other prisoners: despite his own devastation as a result of his situation, he was supportive of others. Also, I accept that Ms Ryan has observed him relating appropriately and well with children.
- [79] I am satisfied that there are numerous protective factors in Mr Nash's case, including those identified by the PSBA and Dr Bowden. The matters identified by Dr Bowden are generally protective factors. His history of high-functioning, drive and personal achievement, his unusually high level of self-discipline and self-control, well-developed insight, and resilience are protective. In the context of his deeply held remorse and full acceptance of responsibility for his actions, I consider these are highly protective. I am satisfied that he does not want let down his loved ones again and he has the self-discipline to achieve his goals. He also has a

strong support network in his partner, Ms Ryan, his friends, the men's group and the availability of further psychological treatment if required.

- [80] I do not discount the treatment he has had in the manner submitted to be appropriate by the PSBA. In the most testing of circumstances, his focus since his arrest has been positive, and on abstinence. His resolve has been, on all of the evidence, unwavering. There is no evidence to suggest he experienced, even briefly, weak moments when he felt tempted to relapse into drug-use. Every person is different. Although usually a more intensive treatment phase may be required in order to overcome addiction, I am satisfied that the treatment Mr Nash has had (in prison and since) and the ongoing plans and supportive arrangements Mr Nash has in place, have been successful and are appropriate for him.
- [81] Of course, he also has risk factors. Once again, these have been identified generally by the PSBA and Dr Bowden. There is a risk he will relapse into illicit drug use. It has been only a little over two and half years since Mr Nash ceased using drugs. However, I am satisfied that in Mr Nash's case, the risk is very low in light of his protective factors as discussed. He has convictions for serious charges. I consider the risk of his reoffending to be very low, for both similar charges or drug-taking. The PSBA submits that the recency of his incarceration is a risk factor, because he may still be forming new life skills which have not been tested. In particular, the PSBA and Dr Bowden say he has not been tested in the work environment. However, I am satisfied that his new skills have been tested in prison and through the various hardships he has encountered since his release. I am satisfied that he has, on every occasion, passed those tests in an impressive manner and that the stresses he has endured in prison far exceed any he is likely to encounter in the workforce.
- [82] Although the persons Mr Nash supported in the FDS were adults, they were very marginalised, vulnerable adults, whose disabilities and challenging behaviours likely make them as vulnerable as many children, and more so than some children. I am also satisfied that he has treated children thoughtfully and with respect, as he has done with other vulnerable persons he has supported and his staff and generally with other persons in the workplace.
- [83] I am satisfied that it is an exceptional case in which it would not harm the best interests of children for Mr Nash to hold a positive notice. Therefore, I am satisfied that a positive notice must issue.

Orders

- [84] In light of my conclusions, the correct and preferable decision is to make orders setting aside the PSBA's decision, and substituting a decision that a positive notice and a blue card issue to Mr Nash.
- [85] I make orders accordingly.