QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*PIM v Director-General, Department of Justice and Attorney-General* [2020] QCAT 188
PARTIES:	**PIM** (applicant) **v** **DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
APPLICATION NO/S:	CML232-19
MATTER TYPE:	Children's matters
DELIVERED ON:	22 May 2020
HEARING DATE:	2 April 2020
HEARD AT:	Cairns
DECISION OF:	Member Stepniak
ORDERS:	**1. The decision of the Director-General, Department of Justice and Attorney-General that the applicant's case is "exceptional" within the meaning of s 221(2) of the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* is set aside and replaced with the Tribunal's decision that there is no exceptional case.** 2. **Pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009*, the publication of any statements, documents or other materials relating to these proceedings is prohibited to that extent that such could identify or lead to the identification of the applicant, witness, or third party in these proceedings**.
CATCHWORDS:	CHILDREN'S MATTER – BLUE CARD – where convicted of an offence other than a serious offence – where offence recent – where victim of offence an adult – where issued a negative notice – whether an 'exceptional case'
LEGISLATION:	*Charter of Rights and Responsibilities Act 2006* (Vic) *Child Protection Act 1999* (Qld) s 9.

Criminal Code 1899 (Qld) s 227A(1), 227B(1).
Human Rights Act 2019 (Qld) ss 3, 4, 8, 9, 13, 31, 34, 48, 58, 59, Part 2 Divisions 2 and 3.
Queensland Civil and Administrative Tribunal Act 2009 (Qld), ss 17, 18, 19, 20, 21, 24, 28, 66, 90.
Working with Children (Risk Management and Screening) Act 2000 (Qld), Long Title, ss 4, 5, 6, 8, 11, 167, 168, 221, 226, 229, 231, 317, 318, 319, 335, 337, 338, 353, 361. Chapter 8 Part 4 Division 3, 4 and 7, Schedule 1 Part 1, ss 1, 2, 4, 4A, 6, 8, 11, 14; Schedule 4 s Schedules 2 , 3 and 7.

CASES:

Briginshaw v Briginshaw & Anor [1938] HCA 34.
Chief Executive Officer of Child Protection v Grindrod (No2) (2008) WASCA 28.
Chief Executive Officer of Child Protection v Scott (No2) [2008] WASCA 171.
Commissioner for Children and Young People and Child Guardian v FGC [2011] QCATA 291.
Commissioner for Children and Young People and Child Guardian v Maher and Anor [2004] QCA 492.
CW v Chief Executive, Public Safety Business Agency [2015] QCAT 219
GP v Commissioner for Children and Young People [2013] QCAT 324.
Kent v Wilson [2000] VSC 98.
LCA v Director-General, Department of Justice and Attorney-General [2017] QCAT 244.
Luong v Director-General, Department of Justice and Attorney-General [2019] QCAT 302.
PJB v Melbourne Health & Anor (Patrick's Case) [2011] VCS 32.
R v Cotic [2003] QCA 435.
Re FAA [2006] QCST 15.
Re Kracke and Mental Health Review Board (2009) 29 VAR 1
RPG v Chief Executive Officer, Public Business Agency [2016] QCAT 331
TNC Chief Executive Officer, and Public Safety Business Agency [2015] QCAT 489.
Volkers v Commission for Children and Young People and Child Guardian [2010] QCAT 243.

APPEARANCES & REPRESENTATION

Applicant:

PIM, self represented

Respondent:

Director-General, Department of Justice and Attorney-General, represented by Ms A. Medrana , Government

Legal Officer.

REASONS FOR DECISION

INTRODUCTION AND BACKGROUND

[1] Since 2012 PIM (the Applicant) has worked for the Mamu Health Service, first, briefly as a medical receptionist then as an Aboriginal and Torres Strait Islander Health worker. In this role he soon completed his Certificate III in Aboriginal and Torres Strait Islander Primary Health care.

[2] In 2016 he joined the Chronic Diseases Team in the Integrated Team Care program and completed his certificate IV in Aboriginal and Torres Strait Islander Primary health care. In 2018 he commenced working with the Deadly Choices program.

[3] In this role, the Applicant says, 'I was able to perform the duties which I so long wanted to perform – that is preventaive primary health care via education to schools.'[1]

[4] *The Working with Children (Risk Management and Screening) Act 2000* (Qld) (Working with Children Act) stipulates that anyone proposing to undertake regulated employment[2] must have a positive notice and blue card issued by Blue Card Services, Department of Justice and Attorney-General (the Respondent).[3]

[5] 'Regulated Employment' encompasses paid and volunteer employees in a wide range of employment involving children. It includes, care of children under the *Child Protection Act 1999*,[4] Educational and Care Services,[5] Child Care,[6] Residential Facilities,[7] Schools Boarding Facilities,[8] Child Accommodation Services,[9] Sports and Recreation,[10] Education Programs Conducted Outside of School,[11] and Health Counselling and Support Services[12]

[6] Consequently, the Applicant was issued a positive notice and blue card on three occasions – 23 August 2012, 13 August 2015 and 8 August 2018. His positive notice and blue card needed to be reissued as they only remains current for up to 3 years.[13]

[7] He describes his work as his 'calling in life'and described the nature of his work in the following words—

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[1] The Applicant's submission to Blue card Services, 13 May 2019, Materials produced by Respondent BCS-24.
[2] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, Part 1.
[3] *Working with Children (Risk Management and Screening) Act 2000*, Part 4, Divisions 3 and 4.
[4] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 14.
[5] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 4.
[6] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 4A.
[7] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 1.
[8] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 2.
[9] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 9.
[10] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 11.
[11] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 8.
[12] *Working with Children (Risk Management and Screening) Act 2000*, Schedule 1, s 6.
[13] *Working with Children (Risk Management and Screening) Act 2000,* s 231(2),(3).

> As part of my role I regularly present at schools, am involved with local sporting groups and community groups and am an active member of the local Men's Group – a support group for males…which sees a lot of participants attend as a result of a court order to get support and education they need to better their own lives.[14]

[8] He has also taken up a number of volunteer roles in community orgnisations, including the local basketball organisation and with the Diamonds in the Sky Suicide Intervention Carnival.

[9] On 30 April 2019 he was charged with 'Observations or recordings in breach of Privacy',[15]and 'Distribute prohibited visual recordings'[16] On 27 June 2019 he was convicted, and while no conviction was recorded, he was fined one thousand dollars, with five hundred dollars moiety.

[10] On 1 May 2019, as authorised by the Working with Children Act,[17] the Queensland Police Service notified Blue Card Services that the Applicant's police information had changed in that the Applicant had been charged with an offence.

[11] On 3 May 2019 Blue Card Services invited the Applicant to make submissions as to why he should not be issued a negative notice and specifically, whether his case was an 'exceptional case'.[18] In response, on 13 May 2019, the Applicant tendered a personal submission and supporting references.[19] Nevertheless, he was issued a negative notice on 29 May 2019.

[12] On 18 June 2019 the Applicant filed an application with the Queensland Civil and Administrative Tribunal (the Tribunal) seeking a review of the Respondent's 29 May 2019 decision that the Applicant's case was 'an exceptional case' in the context of the Working with Children Act.

THE NATURE OF THIS REVIEW

The Working with Children Act and the QCAT Act

[13] This Tribunal has jurisdiction to review a 'reviewable decision',[20] defined in s 353 of the Working with Children Act as including decisions by the Respondent,

> as to whether or not there is an exceptional case for the person, if because of the decision … [the Respondent] issued a negative notice…, or refused to cancel a negative notice …issued to the person.

[14] As noted above, it is the Respondent's decision to cancel the Applicant's positive notice and issue him a negative notice that led the Applicant to lodge an application, pursuant to s 18 of the Queensland Civil and Administrative Act 2009 (QCAT Act). In

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[14] The Applicant's submission to Blue card Services, 13 May 2019, Materials produced by Respondent BCS-24.
[15] *Criminal Code Act 1899,* s 227A(1).
[16] *Criminal Code Act 1899,* s 227B(1).
[17] *Working with Children Act,(Risk Management and Screening) Act 2000,*s 317(2)
[18] Request for Submissions letter to Applicant from Blue Card Services dated 3 May 2019, Documents produced by the Respondent, BCS-23-26, BCS-18.
[19] Documents produced by the Respondent, BCS-23-26.
[20] *Queensland Civil and Administrative Tribunal Act 2009*, s 17.

his application he asks the Tribunal to review the Respondent's decision that his case is an 'exceptional case' in which it would not be in the best interest of children for him to be issued with a positive notice and blue card.

[15] As to how the Tribunal is to undertake such a review, the QCAT Act states that—

> In exercising its review jurisdiction, the tribunal...(a) must decide the review in accordance with this [the QCAT] Act and the enabling Act under which the reviewable decision being reviewed was made [the Working with Children Act].[21]

[16] In such a review, the Tribunal 'has all the functions of the decision-maker for the decision being reviewed',[22] and 'must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits'.[23]

[17] Consequently, the Tribunal's review is not a review in the sense of passing judgment on an earlier decision. Instead, the Tribunal takes on the role of the earlier decision maker 'to produce the correct and preferable decision'.[24]

[18] As the Tribunal's review of the Respondent's decision, is by way of a fresh hearing, the Tribunal is required to consider not only the materials before the Respondent at the time of the decision under review, but also any new materials presented by the parties at the review hearing.[25] Additionally, materials may also be secured by the Tribunal, as the QCAT Act provides that the Tribunal, 'May inform itself in any way it considers appropriate'.[26]

[19] Following its review of a 'reviewable decision' the Tribunal may—

> (a) confirm or amend the decision; or
> set aside the decision and substitute its own decision; or
> (c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate.[27]

The Human Rights Act

[20] The *Human Rights Act 2019* (Qld) (the Human Rights Act) requires the Tribunal to give 'proper consideration to a human right relevant to the decision'.[28]

[21] The Human Rights Act states that its 'main objects'[29] are to be achieved by (amongst other means) —

> (b) requiring public entities to act and make decisions in a way compatible with human rights, and….

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[21] *Queensland Civil and Administrative Tribunal Act 2009*, s 19(a).
[22] *Queensland Civil and Administrative Tribunal Act 2009*, s 19(c).
[23] *Queensland Civil and Administrative Tribunal Act 2009,* s 20(2).
[24] *Queensland Civil and Administrative Tribunal Act 2009,* s 20(1).
[25] *Queensland Civil and Administrative Tribunal Act 2009,* s 21(2)(b), (3).
[26] *Queensland Civil and Administrative Tribunal Act 2009,* s 28(3)(c).
[27] *Queensland Civil and Administrative Tribunal Act 2009* s 24(1).
[28] *Human Rights Act 2019* s 58.
[29] *Human Rights Act 2019* s 3.

> (f) requiring courts and tribunals to interpret statutory provisions, to the extent that is consistent with their purpose, in a way compatible with human rights.[30]

[22] Many of the Act's provisions relate to public entities. The Human Rights Act states that 'a public entity does not include…a court or tribunal except when acting in an administrative capacity'.[31] Consequently, whether for the purposes of the Human Rights Act, the Tribunal is a 'public entity' depends on whether it can be said to be acting in an 'administrative capacity'.

[23] Queensland's relatively new Human Rights Act is based on Victoria's *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Consequently, Victorian courts' consideration of the Charter's provisions provides valuable guidance to the interpretation and application of the Queensland Human Rights Act.

[24] In Patrick's case[32] Justice Bell drew on his judgment in *Kracke*[33] to set out a rationale and test for determining whether a Tribunal is acting as a judicial or a public entity. Justice Bell observed that 'quasi judicial' tribunals act in both judicial and administrative capacities' and that 'an administrative decision made by a decision-maker, and who is required to act judicially, remains administrative in character'.[34]

[25] On this basis his Honour went on to hold that when acting in an administrative capacity in its original and review jurisdictions the tribunal is a [public entity].[35] This led Justice Bell to conclude that to determine the capacity on which a Tribunal is acting in a particular case, calls for an examination of the jurisdiction and the powers being exercised.[36]

[26] Adopting Justice Bell's approach, whether the Human Rights Act's provisions relating to public entities also apply to the Tribunal acting in its merits review jurisdiction, appears dependent on whether the Tribunal is acting in an administrative capacity when exercising its jurisdiction with respect to the Working with Children Act.

[27] As noted above, in reviewing the Respondent's decision, the Tribunal undertakes a fresh review on the merits and in accordance with the enabling Act. In so doing, it exercises all the functions of the Respondent as decision maker.

[28] On this basis, it is my view that, for the purposes of the Human Rights Act, when reviewing the Respondent's decision, regarding screening for child related employment, the Tribunal is acting in an administrative capacity, and therefore is a 'public entity' for the purposes of the Human Rights Act.

[29] Consequently, the Tribunal is required to comply with the Human Rights Act's provisions directed at public entities, including those requiring public entities 'to act and make decisions in a way that is compatible with human rights',[37] to give proper

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[30] *Human Rights Act 2019* s 4.
[31] *Human Rights Act 2019* s 9(4)(b).
[32] *PJB v Melbourne Health and Anor* (Patrick's case) [2011] VCS 327.
[33] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at para [279].
[34] *PJB v Melbourne Health and Anor* (Patrick's case) [2011] VCS 327 at para [117].
[35] *PJB v Melbourne Health and Anor* (Patrick's case) [2011] VCS 327 at para [123].
[36] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, at para [279].
[37] *Human Rights Act 2019,* ss 4(b), 58(1)(a).

consideration to a human right relevant to the decision',[38] and to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights.[39]

[30] Compliance with the Human Rights Act, and giving proper consideration to relevant human rights requires the Tribunal to take specific steps in this review.

[31] **First**, in order to comply with relevant requirements of the Human Rights Act, the Tribunal must identify the protected human rights that may be affected by statutory provisions and their interpretation, and also by the Tribunal's decisions and other actions.

[32] The Human Rights Act sets out a number of key Civil and Political Rights[40] as well as some Economic, Social and Cultural Rights.[41] With respect to other human rights, the Human Rights Act states in section 12 of the Act that—

[33] A right or freedom not included or only partly included in this Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included or is only partly included

[34] **Secondly,** having identified relevant rights and freedoms, the Tribunal must determine whether relevant statutory provisions, their interpretation as well as the Tribunal's actions and decisions are compatible with human rights.

[35] As already noted, the Human Rights Act specifically requires 'courts and tribunals to interpret statutory provisions to the extent that is consistent with their purpose, in a way compatible with human rights.'[42]'Section 48(1) repeats this requirement and adds a qualification in s 48(2)

> Section 48.
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> (2) If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

[36] Thus, the Act recognises that some statutory provisions are not capable of being interpreted so as to make them entirely compatible with human rights. In such a case they should be interpreted in a way that is most compatible with human rights.'[43]

[37] **Thirdly**, even where a limit or interference with a human right is identified, it may nevertheless be deemed compatible with human rights, as long as it only 'limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13'.[44] Section 13(1)(a) the Act states—

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[38] *Human Rights Act 2019,* s 59(1)(b).
[39] *Human Rights Act 2019,* ss 4(b) and (f); 58(1).
[40] *Human Rights Act 2019,* Part 2 Division 2.
[41] *Human Rights Act 2019,* Part 2 Division 3.
[42] *Human Rights Act 2019,* s 4(f).
[43] *Human Rights Act 2019,* s 48(2).
[44] *Human Rights Act 2019,* s 8(b).

> A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

[38] Human rights that may be affected will be identified, and the compatibility of specific statutory provisions, acts and decisions with such human rights will be addressed as I consider and make findings about individual statutory criteria for determining whether the Applicant's case is an exceptional case.

[39] In determining whether a limit imposed on a human right by an act, decision or statutory provision is justified and reasonable, the Tribunal considers the list of factors set out in section 13(2) of the Act that 'may be relevant' to the determination. They are—

> (a) The nature of the human right;
> (b) The nature and purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.
> (c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
> (d) Whether there are any less restrictive and reasonable available ways to achieve the purpose;
> (e) The importance of the purpose of the limitation;
> (f) The importance of preserving the human right, taking into account the nature and extent of the limitation of the human right;
> (g) The balance between the matters mentioned in paragraphs (e) and (f).

WHAT CONSTITUTES AN 'EXCEPTIONAL CASE'?

[40] A review of the Respondent's decision that the Applicant's case constitutes an 'exceptional case', must commence with a clear determination of the meaning of 'exceptional case'.

[41] As the Working with Children Act does not define 'exceptional case' the meaning is to be determined by giving the words their ordinary meaning in the context of the Act, and taking into account the intention of the legislation.

[42] To determine the ordinary meaning of 'exceptional', dictionary definitions are of assistance. According to The Macquarie Dictionary exceptional means, 'beyond what is ordinary' while the Oxford Dictionary defines 'exceptional' as 'forming an exception, unusual, or not typical'.

[43] In addition, as Justice Hedigan has held, determining the meaning of 'exceptional case' calls not only for a consideration of 'the context of the legislation [but also] the intent and purpose of the legislation and the interests of the persons who it is designed to protect'.[45]

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[45] *Kent v Wilson* [2000] VSC 98 at [22], cited with approval by the QCAT in *Commissioner for Children and Young People v FGC* [2011] QCATA 291 at [31].

[44] The meaning of 'exceptional case' is determined in the context of the Act as a whole to ensure that the meaning adopted is consistent with the express, or implied intention of the legislation. Such an approach calls for consideration of the Act's stated object[46] the term's location in the Act, its employment elsewhere in the Act, the context of the specific sections in which it is employed, and, as in this case, it is in the context of a review, of the purpose of the review.

[45] The stated object of the Working with Children Act is, 'to promote and protect the rights, interests and wellbeing of children and young people in Queensland through a scheme requiring…the screening of persons employed in particular employment or carrying on particular business.'[47]

[46] The principles for administering the Act state that, 'the welfare and best interests of a child are paramount' and that 'every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing'.[48]

[47] Consequently, what is clear is that the Act seeks to benefit the interests of children by protecting them from harm through the screening of those who work with, or intend to work with children. For that reason, in order, for the Tribunal to find that the Applicant's case is an exceptional case, the Tribunal is required to find that even though the Applicant's case is one in which the Respondent would otherwise be obliged to issue a positive notice, it is exceptional in that issuing a positive notice would not be in the best interests of children.

[48] What makes a case exceptional will undoubtedly vary from case to case, as different factors may lead to a conclusion that a case is, or is not, an 'exceptional case'. For that reason, what constitutes an exceptional case needs to be decided on its own facts and has been described as, 'a question of fact and degree in the whole of the circumstances of each particular case'.[49]

[49] Ultimately, whether the Applicant's case is an 'exceptional case' is for the Tribunal to determine, weighing the evidence presented by the parties, and reaching a decision on the balance of probability, while bearing in mind the gravity of the consequences involved.[50]

[50] While such determinations have also been described as 'matters of discretion',[51] the decision maker's discretion is not unfettered. The Working with Children Act provides the decision maker with a detailed and mandatory guide and check list with the aid of which to determine whether a particular case is exceptional.

Mandatory Considerations

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[46] *Working with Children (Risk Management and Screening) Act 2000*, s 5.
[47] *Working with Children (Risk Management and Screening) Act 2000,* s 5.
[48] *Working with Children (Risk Management and Screening) Act 2000,* s 6.
[49] *LCA v Director-General, Department of Justice and Attorney-General* [2017] QCAT 244 citing Re *FAA* [2006] QCST 15, [22].
[50] *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492 at paragraph [30] citing test in *Briginshaw v Briginshaw & Anor* [1938] HCA 34 as authority.
[51] *Re Imperial Chemical Industries Ltd's Patent Extension Petitions* [1983] VR 1.

[51] Section 226 of the Working with Children Act lists specific factors to which the decision maker must have regard when deciding whether or not the Applicant's case is an 'exceptional case.' The section also requires the decision maker to have regard to,

> anything else relating to the commission, or alleged commission of the offence that the chief executive reasonably considers to be relevant to the assessment of the person.[52]

[52] I turn to consider evidence presented to the Tribunal, as it relates to each of the mandatory considerations set out in s 226(2)(a) to which the decision-maker must have regard in relation to the alleged commission of the offence by the Applicant.

***First, Whether The Case Concerns a Conviction or a Charge.*[53]**

[53] On 30 April 2019, the Applicant was charged with two criminal offences. The offences, alleged to have been committed on 7 February 2019, were: Observations or recordings in breach of Privacy;[54]and Distribute prohibited visual recordings.[55] In the Inisfail Magistrates Court on 30 May he was found guilty of both charges. No convictions were recorded and the Applicant was fined one thousand dollars with moiety of five hundred dollars.

[54] The Working with Children Act defines a 'conviction' as, a 'finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded'.[56] Consequently, even though the Applicant pleaded guilty and no conviction was recorded, for the purposes of the Working with Children Act, the Applicant's case concerns a conviction.

[55] The Application has no other known offences or charges. His traffic record reveals six prior driving offences, six for exceeding the speed limit and one for using a mobile phone whilst driving.

Is the Applicant being Tried and Punished Again?

[56] It may appear that considering the offence for which the Applicant was convicted amounts to a retrial and punishment. I propose to briefly address this perception as it questions the provisions' compliance with human rights - the issue of human rights that is central to this review.

[57] If this process was in fact a retrial or a punishment for an offence for which the Applicant was acquitted, then it would be incompatible with section 34 of the Human Rights Act, which states that—

> A person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.

[58] In the course of parliamentary debates of the Working with Children Bill, a simple, yet significant explanation was given for why the Working with Children Act appears to impose additional punishment or place again on trial those convicted or acquitted.

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[52] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226 (2)(e).
[53] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(a)(i).
[54] *Criminal Code Act 1899,* s 227A(1).
[55] *Criminal Code Act 1899,* s 227B(1).
[56] *Working with Children Act,(Risk Management and Screening) Act 2000,* Schedule 7.

> It is about putting gates around employment to protect children. It is not about punishing people twice; it is about protecting children from future abuse. [57]

[59] However, a refusal to issue a positive notice does not constitute a retrial as the Tribunal's role is not to determine whether the Applicant is guilty of the charge. The Tribunal's function is to undertake an analysis and evaluation of risk that would be posed to children if a positive notice was issued. It is not concerned with proving or disproving the commission of the offence which the Applicant may have committed previously, but with the prevention of future potential harm.[58]

[60] Referring to the Western Australian Court of Appeal decision in *Grindrod*[59] the Tribunal held that—

> It is not this Tribunal's function to adjudicate upon whether the applicant is, in fact and at law, guilty or not guilty of the non conviction charges in question. The relevant function involves an analysis and evaluation of risk. It is not concerned with the proof of offences which the applicant may have committed previously, but with the prevention of future potential harm.[60]

[61] In the matter of *TNC*[61], the Tribunal held that it is not a matter for the Tribunal to be satisfied on a balance of probabilities that the offence occurred. But rather it was sufficient for the decision maker to be satisfied 'that the circumstances raise the possibility of a risk to children.'[62] Consequently, in focusing on the risk to children and young people, rather than on the evidence regarding the commission of the offence, the Tribunal held that 'in making that assessment of risk the totality of the evidence was to be considered, not merely the charges'[63]

[62] Clearly, the Tribunal's finding that an exceptional case exists must be based on the best interests of any children that the Applicant would be able to work with if issued a positive notice. In that sense, the decision to be made by the Tribunal is unrelated to any findings as to the Applicants criminal culpability.

[63] On that basis I find that this review by the Tribunal does not constitute a retrial of the Applicant for the offence for which he had been tried and found guilty.

[64] However, parliament has conceded that screening for the purposes of the Working with Children Act may have the unintended effect of punishing a person in the Applicant's position. With respect to prejudice or hardship to an applicant, (especially when charged but not convicted of an offence), Justice Buss has stated:

> The Act does not have a punitive or disciplinary purpose even though, in its application or implementation, the civil rights of applicants who are issued with a negative notice will be affected adversely and, in some circumstances, those applicants with, for

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[57] *Commission for Children and Young People Bill*, Second Reading Speech, Queensland Parliament Hansard, 14 November 2000, 4391. Ms Bligh, cited by Member McConnell in *Luong v Director-General, Department of Justice and Attorney-General* [2019] QCAT 302 at [9].
[58] *Volkers v Commission for Children and Young People and Child Guardian* [2010] QCAT 243 referring to *Chief Executive Officer, Department for Child Protection v Grindrod* (No 2) (2008) WASCA 28 at para 84.
[59] *Chief Executive Officer, Department for Child Protection v Grindrod* (No 2) (2008) WASCA 28 at para 84.
[60] *Volkers v Commission for Children and Young People and Child Guardian* [2010] QCAT 243 para 58.
[61] *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489.
[62] *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489 at para 89.
[63] *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489 at para 90.

> example, non-conviction charges may suffer serious or even irretrievable damages to their reputations or a significant diminution in their earning capacity. That the issue of a negative notice may have an adverse impact on the applicant is not, however, a factor which the CEO is obliged or entitled to take into account.[64]

[65] Yet any punishment of the Applicant must now take into account the limit any decision may impose on an Applicant's human rights and must justify any such infringement by reference to the criterion that with the coming into force of the Human Rights Act it is encumbent on the decision maker to ensure that such impingement on the rights of an Applicant are reasonable and justifiable.

[66] Thus, any punishment or retrial for an offence for which the Applicant has already been punished and convicted is restricted by the Human Rights Act. For this reason, earlier judicial pronouncement such as that above, need to be qualified by reference to the statutory obligation of the Human Rights Act provisions which only came into force in 2020.

[67] Consequently, as the limitation or interference with the right cannot be avoided through statutory interpretation, the Human Rights Act obliges the Tribunal to consider whether the provision can nevertheless be compatible with human rights by finding that the limit is reasonable and justifiable.

[68] Applying the factors that the Act states 'may be relevant' to determining whether a limit is reasonable and justifiable, I note that the purpose of the limitation as expressed by the object of the Working with Children Act is to promote and protect the rights, interests and wellbeing of children and young people.[65]

[69] The importance of the purpose of this limitation may justify a limitation of the right not to be punished more than once for an offence for which they have already been punished by law. However, to be reasonable the limit must be demonstrably proportionate, needed and least restrictive of the human right not to be punished twice.[66]

[70] In effect for a decision maker to make decisions likely to impinge on the Applicant's right not to be punished twice, decisions need to be made in a way compatible with the Applicant's human right.

[71] The statutory provisions govern how and the extent to which the chief executive and in this case the Tribunal may make a decision which has the effect of putting the Applicant on trial or punishing him. If applied to the process and any decision made, any impingement on the right of the Applicant not to be tried or punished more than once will be restricted to that able to be deemed reasonable and justifiable.

***Second, Whether the offence is a serious offence, and if it is, whether it is a disqualifying offence.*[67]**

[72] Section 167, of the Working with Children Act defines 'serious offence' by reference to schedules 2 or 3 of the Act. Schedule 2 lists Current Serious Offences, A 'disqualifying

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[64] Per Buss J in *Chief Executive Officer, Department for Child Protection v Scott [No 2]* WASCA 171, at [109].
[65] *Working with Children (Risk Management and Screening) Act 2000*, s 5.
[66] *Human Rights Act 2019,* s 13(2).
[67] *Working with Children Act,(Risk Management and Screening) Act 2000,* s 226(2)(a)(ii).

offence' is defined in section 168 of the Working with Children Act by reference to schedule 4 or 5 of the Act. Schedule 4 lists current disqualifying offences,

[73] As the offence committed by the Applicant does not appear on either list. Consequently, for the purposes of the Working with Children Act, the Applicant's offences are not serious or disqualifying offences.

[74] The significance of this classification is that when aware of a conviction for an offence other than a serious offence the chief executive is required to issue a positive notice to a person applying for a positive notice and blue card.[68] The exception to this requirement is when the chief executive is satisfied that the case 'is an exceptional case in which it would not be in the best interests of children for the chief executive to issue a positive notice' – in which case, 'the chief executive must issue a negative notic to the person.'[69]

***Third, When the offence was committed.*[70]**

[75] The offence was committed on 7 February 2017.

[76] The Applicant was 26 years of age at the time of the offence,. Consequently, I agree with the Respondent, that his actions at the time cannot be dismissed as having been committted before he acquired the judgment and maturity to know better.

[77] As the offence was committed a little over a year ago, arguably any risks associated with the alleged offence or conduct leading to the charge may in the relatively brief subsequent period be less likely to have dissipated or been adequately addressed.

[78] However, I am conscious of the need to assess the implications of the relatively short period of time in the light of evidence relating to the Applicant, rather than what is presumed about people's behviour in such a position..[71]

[79] As discussed elsewhere, in this case, evidence suggests that the Applicant has taken full responsibility for his actions, appears to be remorseful for the impact of his actions on his life and that of the victim. He also appears to have insight into the significance and relevance of his offence to being issued a blue card.

***Fourth, The nature of the offence and its relevance to employment, or carrying on a business, that involves, or may involve children.* [72]**

[80] In 2015, A, a female cousin of the Applicant joined him in working with Mamu Health Service. They developed a close friendship and according to the Applicant comforted and became confidants for each other.[73] Although their relationship became very close, the Applicant told the Tribunal that it remained platonic. The Applicant helped A through a life threatening experience and invited her to move in and share his rental flat in 2016.

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[68] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 221(1)(c).
[69] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 221(2).
[70] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(a)(iii).
[71] Drawing on the general principle set out in *R v Cotic* [2003] QCA 43, 5-6.
[72] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(a)(iv).
[73] Applicant's Life Story, 17 July 2019.

[81] On 7 April 2019, the Applicant and A went out drinking with friends. The Applicant accepts the police account of subsequent events that led him to be charged.

[82] Both the Applicant and A were intoxicated when they returned to their flat that night. After A retired to her room, the Applicant says he decided to play a prank on her. According to the Applicant, he and A had played pranks on each other, by surprising each other video recording the fright or surprised caused. On the evening in question, the Applicant says, he went outside, intending to frighten A through the window to her room, and record her reaction using his mobile phone.

[83] He says he started recording even before he looked in through the window, at which time he saw that she was masturbating. In spite of what he saw, he continued to record for the rest of the 10 second Snapchat video. He then sent the video to someone who was a friend to both him and A. He has maintained that while he deleted the video, a backup copy remained on his phone, which he forgot to delete and only deleted the video at a later time when A demanded that he do so.

[84] On 29 April 2017 the friend to whom the Applicant had sent the recording, told A about the the video the Applicant had sent him. She confronted the Applicant who sent her the video and deleted the back up from his phone. He offered to go to the police and to confess to what he had done, and did so the following day.

[85] The offence with which the applicant was ultimately charged were, Obsrvations or recording in breach of privacy, and Distribute prohibited visual recordings. Both offences are Offences against Morality listed in Chapter 22 of the Criminal Code.[74] Both of the offences are classified as Misdemeanours and impose a maximum penalty of 2 years imprisonment.

[86] In assessing whether the Applicant's commission of these offences discloses a risk to children if he were granted a positive notice, it is important to be reminded of what is recognised as constituting harm to children and young people.

[87] The nature of the offence and its direct relevance justifies a protective approach that emphasises the Act's principles that 'the welfare and best interests of a child are paramount'[75] that 'every child is entitled to be cared for in a way that 'protects the child from harm and promotes the child's well being'[76].

[88] The Working with Children Act[77] adopts the meaning of 'harm' as defined in section 9 of the *Child Protection Act 1999* (Qld).

> (1) Harm, to a child is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.
>
> (2) It is immaterial how the harm is caused.
>
> .
>
> (3) Harm can be caused by—
> (a) physical, psychological or emotional abuse or neglect; or
> (b) sexual abuse or exploitation.

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[74] *Criminal Code 1899* (Qld), ss 227A(1) and s 227B(1).
[75] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 6(a).
[76] *Working with Children Act,(Risk Management and Screening) Act 2000,* s 6(b).
[77] *Working with Children Act,(Risk Management and Screening) Act 2000,* Schedule 7, Dictionary.

(4) Harm can be caused by—
(c) a single act, omission or circumstances; or
(d) a series or combination of acts, omissions or circumstances.

[89] One relevance of the Applicant being convicted of these offences may be the risk that the Applicant commits similar offences against children. I consider it significant that the evidence contains no suggestion that the Applicant committed the offences for reasons of personal sexual gratification, as such would have disclosed a predisposition to reoffend through an offence of sexual exploitation.

[90] More broadly, the meaning of harm states that, 'It is immaterial how the harm is caused'. Consequently what must be considered is whether there is a any kind of real and appreciable risk of harm caused in any way to children and young people' in issuing the Applicant with a positive notice.

[91] The Respondent submits that the nature of the offences involved an intrusion into, and lack of respect for, another person's privacy, a disregard for their fragile emotional state, a breach of trust of a person who confided in the Applicant.[78] There is no doubt that what the Applicant did was harmful.

[92] As section 221(1)(b) requires the chief executive to consider any offence, an offence committed against an adult is just as relevant as an offence committed against a child. I note the absence of specific evidence as to why and how the Applicant may pose a risk of harm to children. Nevertheless, it has been suggested that the evidence suggests that certain aspects of this offence suggest that the Applicant may pose a risk to others including children.

[93] The little evidence available regarding the effect of the Applicant's actions on A, a young adult, suggest that psychologically and emotionally the impact on her of the offences was devastating. The harm was exacerbated by occurring in a small country town, where as the Applicant told the Tribunal, the offence became public knowledge.

[94] The Act requires the chief executive to determine, not merely whether the Applicant committed offences that caused harm, but whether by doing so he exhibited behaviours and attitudes which if repeated or acted upon would pose a risk to the safety and welfare of children.

[95] However, when taking into account the nature of the offences, the decision maker needs to keep in mind that by reason of not being classified as serious offences, the relevant statutory provisions create a presumption that the offence committed by the Applicant does not ordinarily lead to a finding that that it would not be in the best interests of children for the Applicant to be permitted to engage in regulated employment, including teaching and child care.

[96] Consequently, it follows that an exceptional case cannot be found to exist purely on the basis that the Applicant was convicted of an offence that is not classified as a serious or disqualifying offence and the risks generally evidenced by the offence. My reason for this suggestion is that in determining which offences should not be classified as serious

[78] Respondent's Outline of Submissions, 1 April 2020, p7.

or disqualifying, parliament must be presumed to have also considered the nature of the offences and the risks ordinarily associated with them.

[97] I wish to stress that I have found many grounds on which to condemn the Applicant's actions. However, I have not been presented with any evidence establishing that there is anything of sufficient gravity about the offence that makes it relevant 'to employment, or carrying on a business that involves or may involve children' apart from the fact that the offences were committed.

[98] Rather than indicate that the circumstances surrounding the offences are exceptional and evidence real and appreciable risks to children, the evidence suggests that the nature and harm caused by the offences is recognised by the Applicant and that any associated risks relate to a one off incident that witnesses unanimously deem to have been out of character for him.

[99] While it may be appropriate for a decision maker to err on the side of caution in view of the protective nature of this jurisdiction, the desirability and justifiability of such a conservative approach has tended to be recognised in cases of clear and proven risk to children from offences against children or offences of a sexual nature.[79] In addition, following the enactment of the Human Rights Act such an overly cautious approach has to also take into account the impact of acting to protect the rights of children on the rights of those seeking to work with children.

Fifth, Information about the person received by the chief executive under sections 318, 319, 335, 337 and 338 of the Act[80]

[100] No relevant information about the Applicant was given to the chief executive by the Director of Public Prosecutions or by the Corrective Services under section 318 or 319.[81] No report about the Applicant's mental health was given to the chief executive under section 335,[82] and no information about the Applicant was given to the chief executive under sections 337 or 338 by the Mental Health Court or the Mental Health Review Tribunal.[83]

[101] Sixth - The final mandatory consideration - Anything else relating to the commission of the offence that the [decision-maker] reasonably considers to be relevant to the assessment of the person.[84]

[102] A number of matters that both relate to the commission of the offence and are relevant to the assessment of the Applicant have been identified and considered and are further considered below.

[103] The most significant of these appear to be: the extent and nature of the Applicant's insight, assumption of responsibility and remorse, his identification and addressing of

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[79] Cases where the gravity of consequences and the nature of the offences suggested a cautionary approach need to be adopted. See geeral principle in *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492.

[80] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(b),(c) and (d).

[81] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(b).

[82] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 226(2)(c).

[83] *Working with Children Act,(Risk Management and Screening) Act 2000,* s 226(2)(d).

[84] *Working with Children Act,(Risk Management and Screening) Act 2000,* s 226(2)(d).

triggers of his behaviours including his consumption of alcohol, and his breach of the victim's trust, confidentiality and privacy.

RISK AND PROTECTIVE FACTORS

[104] The Tribunal's practice of identifying and weighing-up risk factors against protective factors when deciding whether a particular case is an exceptional case, was approved by the Court of Appeal in *Maher.*[85]

[105] When identifying risk factors, the Tribunal in *GP v Commissioner for Children and Young People*[86] adopted the approach of New South Wales courts in corresponding cases by defining 'risk' in this context to mean, 'real and appreciable risk'.[87] The Tribunal held that when identifying risks,

> as part of its consideration of whether an exceptional case exists ... the tribunal is not concerned with what may be mere possibilities but rather will require foundation in fact. The Tribunal is looking at whether in all the circumstances there is a real and appreciable risk'

[106] Regarding protective factors, Courts have held that in order for a factor to be a relevant protective factor, it must be protective of children or must lessen risks to children. Thus, in *Scott*[88] Buss J held that, 'The Act is only intended to benefit children in so far as it is intended to protect them.[89]

Protective Factors

One: The Offence as a One-off, Out of Character Incident

[107] As the Respondent suggests, the single incident nature of the offences may be seen to suggest that what occurred was not an ongoing pattern of behaviour.[90]

[108] I agree, and note that no evidence was presented suggesting that the undesirable behaviours and attitudes in evidence at the time of the offences are in any way reflective of behaviours, attitudes and treatment of others exhibited by the Applicant at any other time.

[109] This amounts to a strong indication of how unlikely it is that the Applicant would pose a risk to children and young people if issued a positive notice.

[110] In identifying future real and appreciable risks by considering past conduct as a guide, an out of character single incident would appear to pale in significance and relevance compared to the Applicant's behaviour other than this exception.

[111] The Tribunal is engaged in the assessment of evidence to identify the presence of any real and appreciable risks pointing to a finding that this is an exceptional case. A finding that the offences are reflective of the Applicant's behaviours, while not a protective factor , serve to counter any risk factors deemed to flow from the commission of the offences. In this respect this factor is most significant.

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[85] *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492.
[86] *GP v Commissioner for Children and Young People* [2013] QCAT 324.
[87] *GP v Commissioner for Children and Young People* [2013] QCAT 324 at [14].
[88] *Chief Executive Officer of Child Protection v Scott (No 2)* 2008 WASCA 171.
[89] *Chief Executive Officer of Child Protection v Scott (No 2)* 2008 WASCA 171, [109].
[90] Respondent's Outline of Submissions, 1 April 2020, p6.

Two - The Applicant's Assumption of Responsibility and Expressed Remorse For His Offending

[112] It had been suggested that the Applicant had not assumed full responsibility and had been preoccupied with the negative effect of his actions on himself rather than on the victim.

[113] These suggestions, I find, were rebutted at the hearing, through further questioning of the Applicant and his witness BA.

[114] The Applicant has assumed total responsibility for the offence. He does not blame the victim, nor the friend who further distributed the video. He has not questioned the police account of what occurred and has been unequivocal in condemning his own actions.

[115] He has describbed his actions as 'highly inappropriate' and as 'the most regrettable action' in his life.

[116] While he has expressed remorse for how the offences have changed his life, he has also been clear about his appreciation of the harm he has caused, and regret at doing so.

[117] Three - The Witness Statements Attest to the Applicant's Character, and His Work in the Community and Interactions with YoungPpeople

[118] In her letter of support dated 18 June 2019, SW writes on behalf of Innisfail Basketball Incorporation, a local not for profit organisation 'committed…to providing community-based basketball events as a medium to reach out, encourage, and promote healthy living'.

[119] She observes that, 'One of the organisation's biggest events is the 'Diamonds in the Sky' Suicide Intervention Carnival – 'initiated to provide education, awareness and intervention strategies to eliminate suicide in the region.' She reports that for the Applicant, a member of the committee 'suicide holds a very special place in [his] heart'.

[120] She describes the Applicant as being very able to communicate his values. His– approachable personality, she states, has helped to promote openness and discussion about suicide in the local region. His passion and dedication to give back to the community is very evident in the many years he has devoted to volunteering.

[121] As to why she supports his attempt to regain his blue card, SW suggests that, 'By obtaining his Working with Children blue card [the Applicant] can continue the great work he does for the community.

[122] In his letter of support EK a Family Support Officer writes on behalf of the local Men's Group, 'to show our support and gratitude towards [the Applicant]. He observes that the Applicant has been 'a great asset within our Men's Group' and notes that the Applicant has continued to support and encourage men within the community to attend. EK concludes by stating that the Applicant has ,'helped facilitate, sharing his knowledge and helping the men and youth who attend our men's group to live better lifestyles'.

[123] FI an Aboriginal Health Practitioner wrote on 7 May 2019 that she has known the Applicant as a work colleague and later as friend of the family. She describes him as being an honest, caring and upstanding person in his role as an Aboriginal Health Worker and a member of the local community.

[124] JGS coordinator of the local community justice group wrote in her letter of support, dated 10 May 2019, that the Applicant works with the Mamu Health Service with the Deadly Choices Healthy Living Program which, 'encourages the prevention and diversion for youth offending and encourages healthy lifestyles'. She observes that she had found the Applicant to be courteous, professional and passionate when delivering the program.

[125] In support of the Applicant she notes that the Applicant's offence does not involve any offence against children, that he has absolutely no history of offending. She underlined that he voluntarily attended the police station to make a statement, and is very remorseful and ashamed of his misguided action.

[126] She also suggests that while being intoxicated is not an excuse it is a mitigating factor in his lack of judgment at the time of the offence. She further observes that the incident has had a devastating effect on him in that he realizes that his actions have put his livelihood in jeopardy and may have a serious impact on future job opportunities should he lose his blue card. In closing, she states that the Justice Group fully supports and endorses [the Applicant] retaining his blue card.

[127] I do not agree with the Respondent's submission that JGO's statement shows only partial knowledge of the offences and tends to minimise the impact of the Applicant's offence. I do so, taking into account that in a small community it is safe to assume that virtually everyone knows what has occurred. Rather than seeing JGO's statement as minimizing the Applicant's culpability, I view her letter of support as one emphasizing that the offences were out of character.

[128] In a character reference dated 17 June 2019, CW, the Applicant's supervisor at Mamu Health Service observed the Applicant's ability to deliver 'services to children and young people'. In this respect he stated that the Applicant, 'understands what the needs of children are, and he is looked upon as a role model to our younger community.' CW also refers to the Applicant's, 'passion for helping his community' noting that to do so he has been willing to take a pay cut, and had stated that 'he wasn't doing it for the money but for the love of what the program is aimed towards.'

[129] CW also states that he had sat down with the Applicant to discuss the situation following his offence. This he says, revealed that the Applicant was remorseful and that 'he already put strategies in place to prevent any further incidents, and that he 'expressed cutting out alcohol which was a contributing factor to the incident.'

[130] CW stated that the Applicant has always been a generous, kind and respectful person who would always put other people's needs before his own.'

[131] BA, described by the Applicant as his life coach, was the only witness to participate in the hearing and be examined. In his statement dated 2 April 2020, the prominent member of the community states that he has known the Applicant in a personal and professional capacity for over 15 years. BA notes that throughout this time he 'has

always conducted himself in a respectful manner, and made good life style choices which have allowed him to interact with people from all walks of life'.

[132] BA further observed that the Applicant has grown into a work role through which he ensures indigenous people in the community are best able to gain access to medicine and education. He states, 'I would go so far to say that [the Applicant] would be considered a community champion in the Indigenous Health Sector of our community with inexhaustable energy and knowledge'.

[133] Regarding the offence, BA observed that, 'In light of his knowledged and understanding of the Applicant his history and growth and of the offence, the Applicant's action were inexcusable'.

[134] Commenting on the nature of the Applicant's offence, he observed that however inexcusable they were 'not calculated, but one off, mindless and [have] seen his world turned upside down'.

[135] Observing that the Applicant is 'very remorseful' he noted that the Applicant was an 'advocate to the whole community especially our indigenous men and male youth regarding his behaviour'.

[136] Asked to elaborate on steps the Applicant has taken, BA noted that the Applicant has scaled back his socialising. He also observed that the Applicant understands 'why we are here today'. Understanding the repercusions on another person has left him with a whole different view – 'that such an action can be a drop in the pond with the potential to be life destroying'. The Applicant knows a mindless act has changed his life.

[137] Expanding on the Applicant's remorse BA indicated that initially the Applicant had withdrawn from life – then realised that he is responsible for his actions. He has subsequently talked to the young people about the pitfalls of social media usage and breach of privacy.

[138] BA also observed that the Applicant has scaled back his alcohol consumption to 'a glass or two' with a meal. He nominated October or November 2019 as the last time the Applicant drank alcohol.

[139] Illustrating the Applicant's sense of responsibility, BA told the Tribunal about a troubled 12 year old nephew who was staying with the Applicant.

[140] BA also observed that the Applicant has sought spiritual guidance through one of the churches.

[141] Asked about self development undertaken by the Applicant, BA reiterated the Applicant's healthy lifestyle. He observed that by speaking about his mistake, especially with the males in the community the Applicant ,'will make them think twice about video usage. He also emphasised the Applicant's positive interactions with young people.

[142] BA also mentioned that in his suicide awreness, due to his IT and social media skills, the Applicant was instrumental in the Diamonds in the Sky media releases.

[143] I note that the support expressed for the Applicant is unqualified, and further evidences the offences to have been out of character. Also, importantly, the statements in support underline the nature of the Applicant's contribution to the community. Importantly, it is clear that the issue of a positive notice to the Applicant is not being viewed as something from which he would benefit, but rather something that would enable him to promote awareness of, and prevention of, risks facing young people and children in the community.

Four – The Nature of the Applicant's Work with Children and Young people

[144] The Applicant's submissions and supporting statement refer to the Applicant's previous work with children, young people, the men's group and with the suicide awareness program. The consequent submission is that the community and vulnerable young people and children would benefit if he was reissued with a positive notice.

[145] However judicial authority suggests that the benefits to children of having a committed and popular teacher are not to be taken into account as a protective factor. Justice Buuss (referring to the equivalent Act in Western Australia) stated that, 'The Act is only intended to benefit children in so far as it is intended to protect them,' and that 'any benefit that might be thought to flow to children by having access to the Applicant's knowledge, experience or flair in working with children is of no relevance if there exists an unacceptable risk to children in future contact.' [91]

[146] Nevertheless, in my view, this does not make the Applicant's teaching proficiency and skills irrelevant, if they are shown to be protective of, or lessens risks to children and young people. Presented evidence establishes that if issued a positive notice, the Applicant would almost certainly return to working with children and young people promoting suicide awareness, and utilising his offence to promote awareness and warn of the dangers of misusing social media and the need to promote respect and privacy.

[147] In my opinion, the benefits of such work are that risks to young people are likely to be reduced, not as a possible incidental benefit of having the Applicant work with them, but as a direct purpose of work that seeks to promote an awareness others of risks and their reduction.

[148] On this basis I would be inclined to find a protective benefit of having the Applicant return to his work because in so doing, the Applicant would be striving to protect young people and children and furthering the object of the Working with Children Act '…to promote and protect the rights, interests and wellbeing of children and young people'.[92]

Five - The Applicant has identified alcohol as a trigger to his offending behavior and submits that he has abstained from alcohol consumption since his offending.

[149] The Applicant has not cited his consumption of alcohol on the night in question as an excuse or factor exonerating him of responsibility. His evidence regarding alcohol is his explanation for why he acted in a way that was contrary to his values. This is also the view of his witnesses.

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[91] *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 2008 WASCA 171 at [109].
[92] *Working with Children (Risk Management and Screening) Act 2000*, Long title.

[150] Recognising the link between his excessive consumption of alcohol and his offence, the Applicant has taken steps to abstain from alcohol, which he has done for the past six months (supported by witness). He does not submit that in the absence of abstinence he is at risk of reoffending.

[151] In my view in the absence of any evidence suggesting that alcohol use has been a problem I do not see that he needs to take any further steps in response to his recognition of this trigger. His community supports and desires to retain the respect of those with whom he works appear to provide sufficient support.

[152] I also note that the Applicant has identified alcohol as a trigger to his offending behavior and submits that he has abstained from alcohol consumption since his offending. BA's observations regarding the Applicant's drinking, I find, provided the verification of the Applicance abstinence from alcohol that the Responsent had earlier submitted was missing.

[153] Importantly, the Applicant has not cited his consumption of alcohol on the night in question as an excuse or factor exonerating him of responsibility. His evidence regarding alcohol is his explanation for why he acted in a way that was contrary to his values.

[154] Recognising the link between his excessive consumption of alcohol and his offences, the Applicant has taken steps to abstain from alcohol, which he has done for the past six months (supported by witness). He does not submit that in the absence of abstinence he is at risk of reoffending.

Risks Present

[155] The Respondent submitted the following as risk elements.

One - The nature of the offence

[156] The Applicant's offending involved filming the complainant while she was masturbating in her room and distributing the video footage to another person.

[157] The Respondent submits that for the Applicant to deliberately commit the offences constituted a 'breach of the complainant's privacy and raises concerns regarding his ability to exercise self control and respect the personal boundaries of others'.[93]

[158] In this respect, the Respondent observed that 'such skills [respecting the boundaries of others and exercising self contro)l are are particularly important when working in areas of regulated employment and business as they contribute to the creation of a safe and protective environment for children and young people'.[94]

[159] However, to describe this act as deliberate, may appear to suggest premeditation involving an ulterior or even criminal motive. On the other hand, the unchallenged evidence of the Applicant is that he intended to play a prank and record his flatmate being frightened.[95] Seeing her masturbating, he continued to record the video and sent it

[93] Respondent's Outline of Submissions, 1 April 2020, p7.
[94] Respondent's Outline of Submissions, 1 April 2020, p7.
[95] Applicant's Life Story, 17 July 2019, and evidence presented under examination at hearing.

to another person. This explanation gains credibility in the light of references to a history of such 'pranking' between the flat mates.

[160] While accepting the Applicant's account of why he found himself in the position of being able to film something that was private, I do not consider it a justification for the filming or continuation of the filming and especially not of the online sharing of the footage. Significantly, I note, neither does the Applicant.

[161] The incident does entail everything that the Respondent submits it does. However, in order to be an accurate reflection on the Applicant, such conclusions need to be qualified by the observation that all available evidence suggests that this was a one-off occurence and in sharp contrast to the Applicant's behaviour. This, the Respondent appears to concede is a protective factor.

[162] The Respondent also notes that the 'Material indicates that complainant was the Applicant's cousin and that she previously confided in the Applicant about her mental health issues. This the Respondent suggests, indicates that the Applicant's behaviour constituted a gross breach of trust. His offending behavior demonstrated a disregard for the emotional and psychological wellbeing of the complainant who likely felt embarrassement and distress by the Applicant's behavior'.

[163] The severity of the impact of the Applicant's actions is not contested. This may be seen as relevant to regulated employment as children are entitled to be cared for by adults who have the ability to recognise risk, promote and protect their interests, and be able to provide a protective environment.

[164] I accept the submission that respecting the boundaries of others is important in work involving children. However, I cannot see any evidence supporting the inferences flowing from an occurence, that was out of character for the Applicant and occurred in very specific, if not unique circumstances, should be a determinant of actions in a very different setting and pose a real and significant risk to children. In this respect, care needs to be taken not to extrapolate from an event that evidence suggest is out of character. It is equally unjustified to relocate the events of the offence to a child related employment setting without establishing the basis for such transfer.

Two – The Applicant's Partial Assumption of Responsibility and Remorse

[165] The Respondent points to some factors that appear to question the extent to which the Applicant has assumed Responsibility and shown remorse. In particular the Respondent notes that the Applicant blamed his inebriation, and only assumed responsibility when confronted by the victim and that the focus of remorse, at least initially, appeared to be the effect on him rather than on the victim.

[166] In my view, the Applicant's references to alcohol constitute an attempt to explain why he may have committed such an act. Ultimately, I do not see accepting that excessive consumption of alcohol lead him to commit the act, as an attempt to avoid responsibility. I see it primarily as the Applicant's acceptance of a trigger to be avoided in the future.

[167] The Respondent submits that,

> while expressed remorse for the incident and its adverse impact on his life he does not appear to demonstrate though his material insight into the impact of his offending on the complainant His lack of insight reflects adversely on his ability to be entrusted with the care of children and highlights his risk of re-offending.[96]

[168] Consequently, I view the Applicant as accepting full responsibility for his offending and expressing remorse not only for acting as he did and the impact on his life, but also unequivocaly about the impact that his behavior has had on the victim of his actions.

[169] I find his dismay at losing his closest friend, his 'dream job'and the respect in the community o be understandable, especially, as all evidence suggests that his offending actions were so out of character for him.

Three - Recent Offences

[170] The Respondent points out that the Applicant's convictions for 'observations or recordings in breach of privacy' and 'distribute prohibited visual recordings' which occurred recently - in February 2019.

[171] The offences and convictions are indeed recent. This as the Respondent suggests, may mean that the Applicant has not had time to take steps, and that there has been little time to be satisfied that he has taken steps, to ensure that he will not reoffend or otherwise not be in the best interests of children due to factors related to the offence.

[172] However, any infrences to be drawn from the convictions being recent has to be determined with reference to actual evidence rather than what the time frame may suggests is the case. As previously stated, I view evidence of what the Applicant has achieved in the short time to be a reassuring factor.

Four – Alcohol

[173] The Respondent notes that as the Applicant submits that his intoxication was a 'primary contributing factor' to his offending behavior 'alcohol 'was therefore a trigger for the Applicant's offending behaviour and highlights the Applicant's risk of reoffending should a similar situation arise'

[174] The Respondent submits that Tribunal can only rely on Applicant's self reporting and suggests that there is an absence ny independent evidence addressing his alcohol consumption and abstinence

[175] I do not accept that this is still the case, and note in particular the evidence of BA, who testified that the Applicant has abstained from alcohol consumption and no longer attends the nightlife scene.

[176] Thee Respondent also submits that as the Applicant's bstinence from alcohol is recent, insufficient time has passed to test the Applicant's ability to maintain abstinence and that he has fully addressed the triggers that contributed to his offending behavior such that he is no longer at risk of re-offending. However, in the absence of evidence suggesting why this may occur, I accept the evidence as establishing a high likelihood

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[96] Respondent's Outline of Submissions, 1 April 2020, p8.

that the Applicant will not abuse alcohol in amanner likely to pose a risk to children and young people.

Five - The Applicant Should Have known Better

[177] As the Respondent pointes out, the Applicant was 27 years of age at the time of the offences. Consequently he was sufficiently mature to understand that his offending behaviour was 'indecent and criminal in nature' and that the distribution of such footage would cause significant embarrassment and distress to the complainant.

[178] The Respondent has also observed that the Applicant, 'Provided submissions regarding his experience in health care amd volunteering in areas surrounding mental health. Despite his knowledge he engaged in offending behaviour which demonstrated a disregard for the complainant's mental health and wellbeing

[179] I accept that the Applicant was old enough and should have known better and that this factor adds to his culpability. However, the evidence as a whole suggests that despite what he knew, in the circumstances it was triggers such as excessive alcohol consumption that led him to act in a manner at odds with his usual behaviours and his knowledge.

Six – The Dangers of Using His Own Experiences

[180] The Respondent also submits that the Applicants intention to use his experience in his presentations to children and young people may have an adverse effect on his ability to present himself as a positive role model for children and young people. The Respondent cites an observation by the tribunal that,

> [i]t can be harmful for children to become aware that people they respect don't obey the law, because it can create confusion for them as they try to develop a sense of right and wrong[97]

[181] I accept that in some cases this may be the effect. However, I note that care must be taken not to infer that because something may or can be the effect, it will be so in all or even most cases. The evidence of witnesses, and particularly those familiar with the Aboriginal community, was that this was a proven and effective strategy. I prefer to leave it for those who oversee the Applicant's work to decide if or how the Applicant uses his experiences in his presentations to children and young people.

[182] The Respondent suggests that for the Applicant to use his experiences 'to learn and teach people that a single poor decision can cost you so much[98] would constitute using the blue card as a rehabilitative tool.[99]

Seven - Transferability of Blue Card

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[97] Respondent's Outline of Submissions, 1 April 2020 citing *CW v Chief Executive, Public Safety Business Agency* [2015] QCAT 219 at [61] and [67].
[98] Applicant's Life story, 17 July 2019.
[99] Respondent's Outline of Submissions, 1 April 2020, 9.

[183] The Respondent notes that once issued a blue card the Applicant is able to work in any area of child related employment. The Respondent observes that the Tribunal has no power to issue a conditional blue card[100]

[184] I accept that the Applicant would be able to undertake any child related employment. However, I do not see how this is a risk factor. I am not aware of any evidence suggesting that the Applicant's employment would create risks or greater risks in some forms of regulated employment.

[185] It has not been suggested or established that children or young people in a particular setting would be particularly at risk in view of unique circumstances that triggered the offences and inferences that may be drawn from them.

On that bases I do not accept that transferability is a risk factor unless such additional risk is established on the facts of the case.

Weighing Up Risks and Protective Factors

[186] My consideration and weighing up of risks and protective factors has revealed an absence of 'real and appreciable' risks. The evidence presented is dominated by protective factors and clearly establishes that the offence was an out of character, one off incident triggered by a set of unique circumstances. Consequently, while reprehensible in itself it does not establish any 'real and appreciable' risks for any setting in which the Applicant may choose to work with children and young people.

[187] Although the Applicant's offences are quite recent, he has demonstrated a level of remorse, understanding and insight reinforced by the Applicant taking appropriate steps to ensure that he does not reoffend or act due to the triggers identified as the causes of his offences.

NON-PUBLICATION ORDER

[188] These proceedings have raised the question of whether the closed hearings and the non disclosure of the identities of the child, parties, witnesses and third parties to these proceedings is compatible with human rights.

[189] The Human Rights Act clearly states that a party to civil proceedings has a right to have their proceeding decided after a public hearing. It also states that judgments and decisions made by a tribunal in a proceeding must be publicly available.

[190] The relevant section of the Human Rights Act that lists the right to a fair hearing as a human right is Section 31. It provides (with my emphasis) that—

> (1) A person charged with a criminal offence or ***a party to a civil proceeding has the right to have the*** charge or ***proceeding decided by a*** competent, independent and impartial court or ***tribunal after a*** fair and ***public hearing***.

[100] *RPG v Chief Executive Officer, Public Business Agency* [2016] QCAT 331 at [27].

(2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or in the interests of justice.

(3) ***All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.***

[191] The two aspects of this right that may appear to be limited by statutory provisions and the decision of this Tribunal, relate to the hearings of these proceedings being closed to members of the media and general public, and secondly, to the non publication order that I propose to make restricting the information regarding this decision and reasons for this decision that will be made publicly available.

Closed Hearing

[192] Turning firstly to the matter of the proceedings being closed to members of the media and the public in general, I note the relevant statutory provisions governing this Tribunal's process.

[193] Section 90(1) of the QCAT Act provides that 'Unless an enabling Act, that is an Act, provides otherwise, a hearing of a proceeding must be held in public'.

[194] The qualification in s 90(1) relates to the provisions of enabling Acts. In this case the enabling Act is the Working with Children Act, which in s 361(1) states that, 'A hearing of a proceeding for a QCAT child-related employment review must be held in private.'

[195] In addition, the QCAT Act provides that a tribunal may direct a hearing to be closed if the tribunal 'considers it necessary—

(a) to avoid interfering with the proper administration of justice; or
(b) to avoid endangering the physical or mental health or safety of a person; or
(c) to avoid offending public decency or morality; or
(d) to avoid the publication of confidential information or information whose publication would be contrary to the public interest; or
(e) for another reason in the interests of justice.[101]

[196] The exclusion of the media and public from hearings in these proceedings, permitted under the provisions of the QCAT Act and the Working with Children Act, I find to be compatible with human rights as set out in section 31(1) and qualified in section 31(2) of the Human Rights Act.

[197] However, even in the unlikely event that these provisions were found to limit the right to a public hearing, then they would be deemed to be reasonable and justified limits of the right, as provided in s 13(1) and (2) of the Human Rights Act.

Limits on Publication

[198] The interests of justice that require proceedings to be closed may also require restraints on the publication of decisions and reasons for decisions such as these.

[199] As set out above, section 31(3) of the Human Rights Act requires all tribunal decisions to be publicly available. The Act does not list any exceptions to this requirement.

[200] The QCAT Act in section 66(1)(c) permits a tribunal to make a non publication order prohibiting the publication of information that may enable a person who has appeared before the Tribunal, or is affected by a proceeding, to be identified.

[201] However, the Tribunal may only make such an order if it considers the order necessary for a number of specific reasons[102] including 'to avoid the publication of confidential

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[101] *Queensland Civil and Administrative Tribunal Act 2009,* s 90 (2).
[102] *Queensland Civil and Administrative Tribunal Act 2009,* s 66(2).

information or information whose publication would be contrary to the public interest'[103], and 'for any other reason in the interests of justice'.[104]

[202] I consider it necessary to prohibit the publication, as part of the decision and reasons for the decision, the names or anything that would otherwise identify the Applicant, the victim, witnesses or any third party to these proceedings. I consider this necessary to avoid endangering the physical or mental health of A, the 21 year old woman whose emotional and psychological wellbeing has already been severely affected. As these proceedings involve residents of a small community, the identification of the Applicant, or any witnesses or third parties may well prove sufficient to identify A.

[203] As to the compatibility of such an order with the right enshrined in s 31(3) of the Human Rights Act, I find that the provisions permitting non publication orders and the actions of this Tribunal in issuing directions regarding non publication, do limit this right.

[204] This requires me to consider whether the limit imposed on the right is compatible with the human right, by being reasonable and justifiable.[105] In determining this, I note the factors that 'may be relevant' in accordance with section 13(2) of the Act. In particular I rely on 'the importance of the purpose of the limitation',[106] 'the importance of preserving the human right, taking into account the nature and extent of the limitation on the right'[107], 'the balance between the [last two factors]'[108] and 'whether there are any less restrictive and reasonably available ways to achieve the purpose'.[109]

[205] I note that the limit on the human right imposed by the QCAT Act is only exercisable if shown to be necessary. I also note that a non publication order that does not disclose names does not significantly impact the benefits and importance of public accountability through the publication of decisions and reasons, as decisions and reasons are still published, with only the identity of certain persons disguised.

[206] On this basis, I consider it appropriate and necessary to make a non-publication order prohibiting the publication of statements, documents and any other information in these proceedings that may be capable of identifying the Applicant, the victim, any witness or third party in these proceedings.

[207] For the reasons already outlined, I also find that the limit imposed is reasonable and justifiable for the purposes of s 13 of the Human Rights Act.

CONCLUSION REGARDING COMPATIBILITY WITH HUMAN RIGHTS

[208] I have considered the relevant human rights as set out in the Human Rights Act and other laws. In this review the Tribunal has acted in an administrative capacity and consequently, is 'a public entity' for the purposes of the Human Rights Act.

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[103] *Queensland Civil and Administrative Tribunal Act 2009,* s 66(2)(d).
[104] *Queensland Civil and Administrative Tribunal Act 2009,* s 66(e).
[105] *Human Rights Act 2019,* s 13(1).
[106] *Human Rights Act 2019*, s 13(2)(e).
[107] *Human Rights Act 2019*, s 13(2)(f).
[108] *Human Rights Act 2019*, s 13(2)(g).
[109] *Human Rights Act 2019*, s 13(2)(d).

[209] Acting as a public entity the Tribunal is required to state 'the human rights Parliament specifically seeks to protect and promote'[110] and to act and make decisions in a way compatible with human rights'.[111] The Tribunal must also interpret statutory provisions 'to the extent possible that is consistent with their purpose in a way that is compatible with human rights'.[112]

[210] On the basis of—

b) my specific findings above about the applicant's:
   (a) right to not be tried or punished more than once for an offence in relation to which he has been finally convicted or acquitted in accordance with law, and
   (b) Right to a public hearing and to have the decision publicly available

c) relevant provisions of the Working with Children Act, and

d) the QCAT Act, as well as

e) the actions and decisions of this Tribunal,

I am satisfied that in this matter, the Tribunal has—

a) given proper consideration to human rights relevant to the decision,[113]
b) acted and made this decision in a way compatible with human rights,[114] and
c) interpreted statutory provisions 'to the extent that is consistent with their purpose, in a way compatible with human rights'.[115]

[211] I am also satisfied that where the Tribunal identified limits on rights, the Tribunal has determined whether any limits imposed are reasonable and justifiable in accordance with s 13 of the Human Rights Act.

OVERALL FINDINGS

[212] I have considered all the materials before the Respondent at the time the reviewable decision was made, the additional materials submitted for the review hearing and the sworn evidence given at that hearing. I did so against the statutory factors listed in s 226(2), to which the Tribunal, as decision maker, must have regard, the Act's objectives and principles, and other evidence relevant to the assessment of the Applicant. I have also weighed the identified risks against the protective factors.

[213] In reaching my decision I am mindful that I need to be 'satisfied on balance of probabilities, bearing in mind the gravity of the consequences involved, that there was

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[110] *Human Rights Act 2019*, s 4(a).
[111] *Human Rights Act 2019,* s 4(b).
[112] *Human Rights Act 2019*, s 48(1).
[113] *Human Rights Act 2019*, s 58(1)(b).
[114] *Human Rights Act 2019*, s 58(1)(a).
[115] *Human Rights Act 2019*, s 4(f).

an exceptional case, in which it would not harm the best interest of children for a positive notice to be issued'[116]

[214] With that in mind, and on that basis of my earlier consideration and findings I am not atisfied that the Applicant's case is, in the terms of s 221(2), 'an exceptional case in which it would not be in the best interest of children for the chief executive to issue a positive notice.'[117]

DECISION

1. The decision of the Director-General, Department of Justice and Attorney-General that the applicant's case is "exceptional" within the meaning of s 221(2) of the *Working with Children (Risk Management and Screening) Act 2000 (Qld)* is set aside and replaced with the Tribunal's decision that there is no exceptional case.

2. Pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009*, the publication of any statements, documents or other materials relating to these proceedings is prohibited to that extent that such could identify or lead to the identification of the applicant, witness, or third party in these proceedings.

[116] *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 492 at [30].
[117] *Working with Children Act,(Risk Management and Screening) Act 2000*, s 221(2).