

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *LSR v Director-General, Department of Justice and Attorney-General* [2021] QCAT 380

PARTIES: **LR**
(applicant)
v
DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL
(respondent)

APPLICATION NO/S: CML 169-20

MATTER TYPE: Children's matters

DELIVERED ON: 5 October 2021

HEARING DATE: 11 May 2021

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 the extent that such could identify or lead to the identification of the applicant, any child, witness, or third party in these proceedings.**

CATCHWORDS: CHILDREN'S MATTER – BLUE CARD – where convicted of offences other than a 'serious offence' – where issued a negative notice – where offence committed recently and over a significant period of time – whether an 'exceptional case'

- LEGISLATION: 31, 34, 36 48, 58, 59, Part 2, Division 2 and 3.
International Covenant on Economic, Social and Cultural Rights, Articles 4, 6.
Queensland Civil and Administrative Tribunal Act 2009 (Qld), ss 17, 18, 19, 20, 21, 22, 24, 28, 66, 90.
Weapons Act 1990 (Qld) s 60(1)(c)(i).
Working with Children (Risk Management and Screening) Act 2000 (Qld), ss 2, 5, 6, 8, 156, 167, 168, 220, 221, 223, 225, 226, 227, 228, 311, 318, 319, 320, 335, 337, 338, 353, 360; Chapter 8, Part 4, Divisions 4 and 7, Part 6, Division 2; Chapter 9, Part 1 Division 9; Schedule 1; Schedules 2; Schedule 4; Schedule 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 Eales [2013] QCATA 303
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.
GP v Commissioner for Children and Young People [2013] QCAT 324.
HF [2020] QCAT 482
JF [20220] QCAT 419.
Kent v Wilson [2000] VSC 98.
LCA v Director-General, Department of Justice and Attorney-General [2017] QCAT 244.
Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20; 183 CLR 273.
PJB v Melbourne Health & Anor (Patrick's Case) [2011] VCS 32.
Re Imperial Chemical Industries Ltd's Patent Extension Petitions [1983] VR 1.
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: Self-represented
- Respondent: Ms G. Carrington, Legal Officer, representing Director General, Department of Justice and Attorney-General.

REASONS FOR DECISION

Introduction

- [1] LR (the Applicant) is a 45-year-old woman. She is a single parent who lives with her two daughters, aged 11 and 8. Her younger daughter has been diagnosed with Level 1 Autism.
- [2] The Applicant is separated from her former partner, the father of her children. The Tribunal heard that she asked him to leave because she was not prepared to expose their children to his binge drinking and alcohol fuelled aggression.¹
- [3] While they are no longer living together, they did resume living together for a period of approximately 18 weeks from January to May 2019, a time when the Applicant was in particular need of financial and emotional support.
- [4] The Applicant and her former partner are reported to be committed to ensuring that the children are supported and live as ‘normally’ as possible.² According to the Applicant, her former partner is very well off, spoils the children and has assisted with her rent and occasionally with other expenses.³ Their co-parenting and in some cases, her representations, have caused them to be regarded as a married couple by their children’s Catholic College and by some others.⁴
- [5] The Applicant’s family consists of her parents, a brother and two sisters, who while not living nearby, she says are supportive of her. The Applicant says that she is particularly close to her older sister.⁵
- [6] Prior to January 2019, the Applicant had worked as a bookkeeper and office manager. During the previous 10 years she had worked on a part-time basis in order to be able to look after her young children.
- [7] The Applicant states that after four years of parent-volunteering in her children’s school,⁶ she wanted to also volunteer in classes not attended by her children. Consequently, she considered applying for a blue card as the proposed voluntary employment constitutes ‘regulated employment’ for the purposes of the *Working with Children (Risk Management and Screening) 2000 (Qld)* (WWC Act)⁷, a blue card is required.⁸
- [8] The Applicant states that she was encouraged to undertake such work by those impressed by her previous volunteering work.⁹ She says that she was also motivated

¹ Applicant and JA in cross examination; 11 May 2021.

² Applicant, Submissions, 11 May 2021.

³ Applicant, in cross examination, 11 May 2021.

⁴ Ibid

⁵ Ibid

⁶ Applicant, Life Story, 24 June 2020.

⁷ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 156, Schedule 1.

⁸ Ibid), Chapter 8 Part 4, Div 4.

⁹ Applicant, Additional Information Submission 10 June 2019, BCS-29 (Referring to the page number of documents provided by the Respondent, consisting of reasons for the Respondent’s decision together with all materials relevant to the review, in the possession of Blue Card Services)

- by her desire to work with children, and her appreciation of the benefits of support, particularly for children such as her autistic daughter.¹⁰
- [9] Consequently, the Applicant lodged a blue card application with Blue Card Services of the Department of Justice and Attorney-General (the Respondent) on 5 February 2019. Her application form was co-signed by her children's school and listed the school as the child related employment organisation where she wished to undertake the regulated employment.¹¹
- [10] In applying for a blue card, the Applicant also required a Working with Children Clearance. For that reason, in her application she expressly consented to Blue Card Services obtaining certain information, including that relating to any criminal charges and circumstances surrounding any offences. She also consented to Blue Card Services discussing her Blue Card application with approved persons specified on the Consent to Discuss Information.¹²
- [11] In accordance with the WWC Act¹³ the Queensland Police Service provided the Respondent with information regarding the Applicant's criminal history. This disclosed two criminal convictions on 26 March 2019.¹⁴
- [12] The information received by the Respondent also revealed that on 28 January 2019, eight days before her blue card application, the Applicant was questioned by Police, and admitted to defrauding her employer, for whom, she had worked for 10 years. She confessed to using the company's credit card over a period of two years to make unauthorised personal purchases amounting to almost \$5300 for which she had not reimbursed her employer.¹⁵
- [13] In addition, police found several cannisters of Capsicum spray, which is classified as an 'unlawful weapon' in Queensland,¹⁶ in her place of residence and in the glovebox of her car. She told police that she had purchased the spray cannisters from Western Australia, where they are legal.
- [14] The Applicant was subsequently charged with two offences - Fraud – dishonestly gain benefit/advantage by employee, and with Unlawful Possession of Weapons Category D/H/R weapon.¹⁷
- [15] On 26 March 2019 she appeared in Cairns Magistrates Court and pleaded guilty to both offences. For the offence of fraud, she was convicted and sentenced to six months imprisonment wholly suspended for 12 months. No conviction was recorded and no further penalty was imposed for her unlawful possession of weapons.

¹⁰ Applicant, Life Story, 24 June 2020.

¹¹ Blue Card Application dated 5 February 2019, p 1, BCS-10.

¹² Ibid, p 2, BCS-10; Consent to Discuss Information, BCS-27.

¹³ *Working with Children (Risk Management and Screening) Act 2000* (Qld), Chapter 8, Part 6, Division 2.

¹⁴ National Police Check Results Report, 12 February 2019, BCS-13.

¹⁵ Court Brief, 5 March 2019, BCS 14-19.

¹⁶ *Weapons Act 1990* (Qld), s 60(1)(c)(i).

¹⁷ Verdict and Judgment Record, BCS-20

- [16] Blue Card Services advised the Applicant that her criminal record was of concern, and invited to make submissions and provide additional information including references in response to the information received.¹⁸
- [17] The Applicant tendered a personal submission on 10 June 2019, and an additional submission on 12 August 2019, supported by 3 references and other materials.¹⁹
- [18] On 2 April 2020, having considered all received information, the Respondent issued a negative notice to the Applicant, refusing her application for a blue card.²⁰ This notification was accompanied by a written statement of reasons and other information including the process of seeking a review of the Respondent's decision.
- [19] Also on 2 April 2020, Blue Card Services wrote to the school proposed as the Applicant's employer. The school was advised that as the Applicant had been issued a negative notice she was not to be employed in any form of regulated employment.²¹
- [20] On 6 May 2020, the Applicant lodged an application with the Queensland Civil and Administrative Tribunal (the Tribunal) seeking a review of the decision made on behalf of the Respondent by the Director, Screening Services Unit Blue Card Services, Department of Justice and Attorney-General, on 2 April 2020.²²
- [21] The criminal charges and convictions caused the Applicant to lose her employment and according to the Applicant any prospects of securing bookkeeping or similar work locally. As a result, the Applicant says she decided to reskill for a career in regulated employment, working with children and young people. For this reason, she enrolled at a College of TAFE to study for a Certificate 3 in Education Support'.²³ She commenced her studies on 16 July 2019.
- [22] However, as the last term of this TAFE course required the Applicant to undertake 100 hours of supervised work at a school, for which a blue card is required, she had to withdraw from the course.²⁴
- [23] Since losing her bookkeeping/office manager position, the Applicant has remained unemployed as she is effectively barred from obtaining work in bookkeeping related work, unable to work in regulated employment and restricted as to positions for which she can apply as she is caring for two young children.
- [24] Unsure as to whether she would in the future be able to gain permission to work in regulated employment, the Applicant has enrolled in an online course for a Certificate 3 in Business, in order to 'upskill'.²⁵

¹⁸ Request for Submissions letter to Applicant from Blue Card Services dated 27 May 2018 – BCS-21.

¹⁹ Applicant, Additional Information Submission (including several attachments) BCS-29-49.

²⁰ Letter (including reasons for decision and other information) to Applicant from Director, Blue Card Services (Screening Services), dated 2 April 2020, BCS-50-55.

²¹ Letter (including reasons for decision and other information) dated 2 April 2020 to Proposed Employer, from Director, Blue Card Services (screening Services), dated 2 April 2020, BCS-56.

²² Application to Review a Decision, received 6 May 2020

²³ Applicant, Life Story, 24 June 2020, in compliance with Tribunal Direction, 2 June 2020.

²⁴ Applicant, Submissions, 11 May 2021.

²⁵ Applicant in cross examination, 11 May 2021.

The Nature of this Review

As Prescribed by the Working with Children (Risk Management and Screening) Act 2000 (WWC Act) and the Queensland Civil and Administrative Tribunal Act 2019 (QCAT Act)

- [25] The Tribunal must undertake this review in accordance with the QCAT Act and the WWC Act²⁶ The latter is the enabling Act pursuant to which the decision being reviewed was made.
- [26] The Tribunal’s jurisdiction to review a ‘reviewable decision’ made under an Act, is conferred on the Tribunal by that enabling Act.²⁷ A ‘reviewable decision’ is defined in s 353 of the WWC Act as including a decision 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’.
- [27] The Applicant lodged an application pursuant to s 18 of the QCAT Act, asking that ‘the negative notice issued 02/04/20 be set aside; and a positive notice be issued’.
- [28] The Applicant’s stated reasons for asking the Tribunal to review the Respondent’s decision made on 2 April 2020, are that—

Having regard to all of the material submitted on behalf of the Applicant it was appropriate in all of the circumstances that a positive Notice be issued for the Applicant to enable the Applicant to be issued with a Blue Card; [and that]

While the Applicant acknowledges that her criminal conviction was a serious matter to be considered by the Respondent, the Applicant says that the Respondent gave undue weight to such criminal conviction and failed to consider all other relevant factors in favour of the Applicant.

- [29] As I discuss in some detail below, the WWC Act imposes an obligation on the Respondent to issue a positive notice (and hence a blue card) where the Respondent is aware of a conviction for an offence that (as in the Applicant’s case) is not classified by the Act as a ‘serious offence’ or a ‘disqualifying offence’.²⁸
- [30] The exception to this requirement is the situation where the Respondent is satisfied that even though the conviction does not fall into either category the case ‘is an exceptional case in which it would not be in the best interests of children for the Respondent to issue a positive notice’.²⁹ If the Respondent finds that the case is an exceptional case the Respondent ‘must issue a negative notice to the person’.³⁰
- [31] The application disputes the Respondent’s finding that the Applicant’s case is an ‘exceptional case’ in which it would not be in the best interest of children for her to be issued with a positive notice and blue card.

²⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19(a).

²⁷ *Ibid* s 17.

²⁸ *Ibid* s 22; ‘Serious Offences’ and ‘Disqualifying Offences’ are defined in *Working with Children (Risk Management and Screening) Act 2000* (Qld), ss 167 and 168 respectively.

²⁹ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 221(2).

³⁰ *Ibid*

- [32] In this review, the Tribunal ‘has all the functions of the decision-maker for the decision being reviewed’,³¹ and ‘must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.’³²
- [33] Consequently, this review is not an appeal of the earlier decision by Blue Card Services. Instead, it is a further review in which the Tribunal takes on the role of the earlier decision maker ‘to produce the correct and preferable decision’.³³
- [34] As the Tribunal’s review of the Respondent’s decision is by way of a ‘fresh hearing on the merits’, the Tribunal considers not only the evidence available to the Respondent at the time of the decision under review, but also any new evidence submitted by the parties.³⁴ and gathered by the Tribunal through its power to ‘inform itself in any way it considers appropriate’.³⁵
- [35] Following its review of the Respondent’s reviewable decision the Tribunal may—
- (a) confirm or amend the decision; or
 - (b) 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.³⁶

Compatible with Human Rights

- [36] In undertaking this review the Tribunal must also comply with applicable provisions of the *Human Rights Act 2019* (Qld) (the HR Act).
- [37] The HR Act imposes certain obligations on ‘public entities.’
- [38] The HR Act states that ‘a public entity does not include...a court or tribunal except when acting in an administrative capacity’.³⁷ However, when undertaking a review through a fresh hearing on the merits, the Tribunal has been held to be acting in its administrative capacity, and consequently to be a public entity for the purposes of the HR Act.³⁸
- [39] Consequently, the Tribunal is required to comply with the HR 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’,³⁹ and to give proper consideration to a human right relevant to the decision’.⁴⁰

³¹ Ibid s 19(c).

³² Ibid s 20(2).

³³ Ibid s 20(1).

³⁴ Ibid s 21(2)(b), (3).

³⁵ Ibid s 28(3)(c).

³⁶ Ibid s 24(1).

³⁷ *Human Rights Act 2019* (Qld) s 9(4)(b).

³⁸ See: *PJB v Melbourne Health and Anor* (Patrick’s case) [2011] VCS 327 at [123]; *HF* [2020] QCAT 482 and *JF* [20220] QCAT 419.

³⁹ *Human Rights Act 2019* (Qld), ss 4(b), 58(1)(a).

⁴⁰ Ibid s 59(1)(b).

- [40] The HR Act also requires ‘courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights.’⁴¹
- [41] Having identified any relevant rights and freedoms, the Tribunal must determine whether any applicable statutory provisions, their interpretation, as well as the Tribunal’s actions and decisions are compatible with such human rights.
- [42] Where a limitation or interference with a human right is identified, it may nevertheless be deemed compatible with human rights, as long as it ‘limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13’.⁴² Section 13(1)(a) the HR Act states—

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.

What is an ‘Exceptional Case’?

- [43] In this review the Tribunal is asked to determine whether it is satisfied that for the purposes of the WWC Act the Applicant’s case is *an exceptional case*.
- [44] While the WWC Act does not define the meaning of ‘exceptional case’ for the purposes of the Act, it provides guidance through provisions outlining the aims of the Act, and the principles governing the Act’s implementation, and specific factors that must be considered when determining whether a case is exceptional.
- [45] The literal or ordinary meaning of ‘exceptional’ is of something that is not ordinary that is unusual, not typical or an exception to the norm. Such ordinary meanings of exceptional must, however be considered in the context of the Act.
- [46] In accordance with fundamental rules of statutory interpretation Justice Hedigan notes, that the determination of the meaning of ‘exceptional case’ calls for a consideration of ‘the context of the legislation... the intent and purpose of the legislation and the interests of the persons whom it is designed to protect’.⁴³
- [47] Consequently, the term’s location in the Act, its employment elsewhere in the Act, the context of the specific sections in which it is employed, the intent and purpose of the Act, and the purpose for which the meaning is sought to be determined, must all be taken into account.
- [48] Division 9 of the WWC Act is concerned with deciding applications seeking a positive notice which is required for the issuing of a blue card. It’s provisions state that a positive notice must be issued where an application is approved, and a negative notice must be issued where an application is refused.⁴⁴

⁴¹ *Human Rights Act 2019* (Qld) s 4(f).

⁴² *Ibid* s 8(b).

⁴³ *Kent v Wilson* [2000] VSC 98 at [22], cited with approval in *Commissioner for Children and Young People v FGC* [2011] QCATA 291 at [31].

⁴⁴ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 220.

[49] The Act then goes on to specify the circumstances in which notices of approval or refusal are to be issued⁴⁵ and how in certain cases approval or refusal is to be decided.⁴⁶ In this Division of the WWC Act the term ‘exceptional case’ is used consistently to specify an exception to the mandatory issuing of a positive notice in some cases and a negative notice in others. The term is only used when referring to cases, in which a decision maker is satisfied that a case is an exceptional case calling for an issuing of a different notice to that mandated for other cases of that category.

[50] Thus, for cases described in s 223(3) of the WWC Act, ‘the chief executive must issue a negative notice’, unless –

the chief executive is satisfied that it would not harm the best interests of the children’ for the [decision maker] to issue a positive notice where a negative notice must otherwise be issued, [in which case] the decision maker must issue a positive notice.⁴⁷

[51] The present case falls under s 221(c) of the WWC Act. In this category of cases, ‘the chief executive must issue a positive notice.’⁴⁸ The exception to this requirement is where—

The chief executive is satisfied it is an exceptional case in which it would not be in the best interests of the children’ for the [decision maker] to issue a positive notice where a negative notice must otherwise be issued, [in which case] the decision maker must issue a negative notice.⁴⁹

[52] In each of the above situation the exceptional nature of the case rebuts the presumption, or forms an exception as to the notice that must be issued to an applicant of an unexceptional case of the same category.

[53] As noted earlier, what renders a case exceptional is assisted by the express object of the WWC Act –

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.⁵⁰

[54] Further assistance is gained from section 6 of the WWC Act sets out the principles for administering the Act—

- (a) the welfare and best interests of a child are paramount;
- (b) every child is entitled to be cared for in a way that protects the child from harm and promotes the child’s wellbeing.⁵¹

⁴⁵ Ibid ss 221, 222, 223, 225.

⁴⁶ Ibid s 226, 227, 228.

⁴⁷ Ibid s 223(4).

⁴⁸ Ibid), s 221(1).

⁴⁹ Ibid s 221(2).

⁵⁰ Ibid), s 5.

⁵¹ Ibid s 6.

- [55] Under the title, ‘QCAT Proceedings About Child Related Employment Review’,⁵² the Act reiterates the principles set out in section 6(a), ‘A child-related employment decision is to be reviewed under the principle that the welfare and best interests of a child are paramount’.⁵³
- [56] Consequently, in order for the Tribunal to conclude that the Applicant’s case is an exceptional case, the Tribunal needs to be satisfied that even though the Applicant’s case is one in which the Respondent would otherwise be required to issue a positive notice, it is an exceptional case in that the Tribunal is satisfied that the issuing of a positive notice permitting the Applicant to work with children would not be in the best interests of children.
- [57] What constitutes an exceptional case clearly needs to be decided on its own facts, or as a ‘question of fact and degree in the whole of the circumstances of each particular case’.⁵⁴
- [58] 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.⁵⁵
- [59] While such determinations have also been described as ‘matters of discretion’,⁵⁶ the decision maker’s discretion is not unfettered. The WWC Act provides the decision maker with a detailed and mandatory guide and check list with which to determine whether a particular case is exceptional.

Specific Factors that a Decision Maker Must Consider in Deciding Whether a Case is an ‘Exceptional Case’

- [60] Section 226(2) of the WWC Act lists the following specific factors to which the Tribunal ‘must have regards’ in deciding whether or not the Applicant’s case is an exceptional case.

*First: Whether the commission...of offences by the Applicant, relates to a conviction or a charge.*⁵⁷

- [61] On 26 March 2019 the Applicant appeared before Magistrate Brassington in the Cairns Magistrates Court and entered a plea of guilty to two criminal charges –

⁵² Ibid Chapter 9, Part 1.

⁵³ Ibid), s 360.

⁵⁴ *LCA v Director-General, Department of Justice and Attorney-General* [2017] QCAT 244 citing *Re FAA* [2006] QCST 15, at [22].

⁵⁵ *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [30] citing test in *Briginshaw v Briginshaw & Anor* [1938] HCA 34 as authority.

⁵⁶ *Re Imperial Chemical Industries Ltd’s Patent Extension Petitions* [1983] VR 1. See also: *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291, at [33] per President.

⁵⁷ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(i).

- (a) Fraud – dishonestly gain benefit/advantage by employee (between 7 March 2017 and 29 January 2019), for which the Applicant was sentenced to six months imprisonment, wholly suspended for 12 months. The conviction was recorded.
 - (b) Unlawful possession of weapons category D/H/R weapon (on 28 January 2019). No conviction was recorded, and no further penalty was imposed.
- [62] No other charges or convictions were identified in the National Police Check Results Report.⁵⁸
- [63] The WWC Act defines ‘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.’⁵⁹
- [64] Consequently, for the purposes of the WWC Act, the Applicant’s two convictions qualify as ‘convictions’ even though the Applicant pleaded guilty to both and a conviction was not recorded for unlawful possession.

*Second: Whether in relation to the commission...of offences by the Applicant, any offence is a ‘serious offence, and if it is, whether it is a disqualifying offence’.*⁶⁰

- [65] The WWC Act classifies offences as ‘disqualifying’, ‘serious’, ‘other offences’ and ‘alleged offences,’ and specifies how the Respondent, and the Tribunal on review, is to regard offences falling into these categories when considering whether to issue a positive or a negative notice.⁶¹
- [66] Neither of the Applicant’s offences is considered a ‘serious offence’ for the purposes of the WWC Act.⁶² Nor is either of the Applicant’s offences defined as a serious offence that is also a ‘disqualifying offence’.⁶³ Nevertheless, the WWC Act is clear in requiring offences falling outside of these categories to also be considered by the decision maker.
- [67] The Applicant’s offences fall into a category of matters described as ones in which ‘the chief executive is aware of a conviction of the person for an offence other than a serious offence’.⁶⁴
- [68] As already noted, one significance of a case falling into this category is that a positive notice must be issued unless the Respondent, or the Tribunal on review, is satisfied that the case is an ‘exceptional case’.⁶⁵

⁵⁸ National Police Check Results Report, as at 12 February 2019, BCS-13.

⁵⁹ Ibid Schedule 7.

⁶⁰ Ibid s 226(2)(a)(ii).

⁶¹ Ibid s 221; and Chapter 8 Part 4, Division 9 in general.

⁶² Ibid s 167; schedule 2.

⁶³ Ibid s 168, schedule 4.

⁶⁴ Ibid s 221(1)(c).

⁶⁵ Ibid s 221(1), (2).

*Third: When the offences and alleged offences were committed.*⁶⁶

- [69] The Applicant's fraud conviction relates to acts between 7 March 2017 and 20 January 2019. She was found in Unlawful Possession of Weapons (Capsicum Cannisters) on 28 January 2019.
- [70] In this case, the significance of the timing of the offences relates mainly to the commission of both offences being relatively recent, and to the fraud offence being committed repeatedly over a two-year period.

The Relevance of Recent Offending

- [71] The Respondent submits that for the purposes of the review, the 'recency of the Applicant's offending supports a finding that the Applicant's case is an exceptional one.'⁶⁷ This, the Respondent contends is particularly significant in view of the serious nature of the offences.
- [72] One arguable implication of the offences being recent is that they are less likely to be viewed as something the Applicant may have once done, but due to the passage would be unlikely to do again.
- [73] I note that at the time of offending the Applicant was 42-44 years of age. Consequently, her actions cannot be regarded as having been committed before she acquired the judgment and maturity to know better.
- [74] On the other hand, the specific circumstances at the time of offending, significant and relevant changes in circumstances, and insight acquired in the intervening, albeit relatively brief, period may also serve to establish that the likelihood of reoffending has been greatly reduced.
- [75] The short period of time since the offences also invites the Respondent's suggestion that the Applicant has not had time to take all the steps necessary to address the behaviours which led her to be charged with the offences and other underlying conditions.
- [76] While the Applicant says that she told her psychologist, FD that she suffered depression, distress and low esteem in relation to offence and consequences, FD states that the Applicant has experienced depression and anxiety for many years.⁶⁸
- [77] Consequently, the Respondent posits that the Applicant's mental health issues may be related to her offending behaviour. The Respondent further submits that as it is unclear from the evidence what triggers the Applicant's offending or how her mental health may relate to her fraudulent behaviour, there are continuing concerns as to how the applicant may manage any future triggers or risk factors to avoid engaging in fraudulent or criminal behaviour again.⁶⁹ I note the Applicant's statement that

⁶⁶ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(iii).

⁶⁷ Respondent's Outline of Submissions, 11 May 2021, para 40.

⁶⁸ FD, Letter of Support, 9 October 2020.

⁶⁹ Respondent's Outline of Submissions, 11 May 2021, para 74.

after what she has been through there are no triggers that would cause her to reoffend.⁷⁰

[78] As to the Applicant's recognition of underlying issues and her willingness to address them, the Respondent has drawn attention to the Applicant only commencing therapy after being advised of the Respondent's intention to issue a negative notice.

[79] The evidence of the Applicant's therapist is that the Applicant was referred to her by the Applicant's doctor 'for support to better manage her depression and anxiety which was negatively impacted by her fraud conviction'.⁷¹

[80] The Applicant has stated that she engaged in therapy in an endeavour to save a relationship that had been supportive to her immediately after she was charged with the criminal offences.⁷² In her Additional Information submission to Blue Card Services dated 10 June 2019, the Applicant provided the following account of commencing therapy—

I have spoke in depth with my Doctor about my conviction as I have had sleep issues caused by my guilt. I have an Appointment with him on 17 June 2019[9] (he is currently away on leave) to do a mental health plan so I can access a therapist through the public system as I have limited funds as I am currently unemployed.

[81] One year later, the Applicant also stated that she began seeing her Psychologist in July 2019 as she was suffering from depression and distress over what she had done and the subsequent fallout.⁷³

[82] While the timing of the Applicant's commencement of therapy appears to have coincided with the break down of her renewed relationship with her former partner, it does not necessarily suggest that she was not engaging in therapy due to her convictions.

[83] Noting that the Applicant has confessed her former aversion to engage in therapy and displayed more reluctance to discuss her relationship than her convictions, I accept that the Applicant was referred due to her depression and anxiety which she presented as being linked to her convictions, but which also coincided with the failure of her attempted reunion.

[84] The Applicant has stated that she had tried to re-establish her relationship with her former partner because he had been so supportive during the period immediately following her convictions. It is likely that in the absence of his support she would struggle to deal with both the relationship breakdown and her convictions. In many ways the two matters overlapped. Consequently, I accept the Applicant's written submissions on 11 May 2021, in which she writes, 'I first saw [FD] in June 2019. At the time I discussed in depth with her my relationship and charges against me'.

⁷⁰ Applicant in cross examination, 11 May 2021.

⁷¹ FD Letter of Support, 9 October 2020.

⁷² Applicant, Submissions, 11 May 2021.

⁷³ Applicant Life Story, 24 June 2020.

- [85] When the Respondent questioned the Applicant about precursors to what had occurred, the Applicant conceded that on reflection it may have been an ‘unresolved childhood trauma’.⁷⁴
- [86] Pointing out that the Applicant has stopped seeing her psychologist, while her psychologist suggests continuing therapy as a preventative strategy,⁷⁵ the Respondent submits, that the Applicant may have not yet fully addressed her past mental health issues and their relation to her offending behaviours.⁵⁹
- [87] More broadly, the Respondent submits that the psychologist’s report was mostly based on the Applicant’s self reporting rather than on the psychologist’s own assessment.⁷⁶
- [88] The Respondent also notes the absence of strategies as to how the Applicant intends to implement a commitment to maintaining health and wellbeing and improving self esteem
- [89] In response the Applicant testified that exercise is an effective means for her to handle stress. She also observed that after two and half years of therapy she had become a stable and calm person, recognises the benefits of therapy, acquired greater self esteem, gained a fresh understanding of what is in the best interests of her children, gained an understanding ‘that we are all not brought up in a loving home’, and ceased to be resentful towards her partner.⁷⁷
- [90] As outlined below, the Applicant’s witnesses testified that she had addressed the causes of her offences.
- [91] While the offences are relatively recent, each offender and the nature of their offences must be assessed individually to determine the relevance of the timing of their offences.
- [92] Some offenders may require significant time to accept responsibility, gain insight into the triggers of their behaviour, and put in place measures designed to ensure that they do not reoffend. On the other hand, others respond immediately and comprehensively in addressing behaviours associated with their offending.
- [93] While such issues can in some cases require protracted counselling and treatment, the psychological reports and other evidence presented in this case establishes to my satisfaction, that the Applicant understands that what he did was wrong, recognises the triggers of her actions and has addressed the key behaviours.
- [94] While the Applicant may have lifelong issues and mental issues in the form of depression and anxiety to continue working on, I find that she has addressed the key issues relevant to her potential employment with children, sufficiently for them not to pose a risk to children with whom she may work.

It is not necessary or justifiable, and an unreasonable interference with her human rights to exclude her from work with children purely on the basis that she has remaining mental health and psychological issues that she needs to continue

⁷⁴ Applicant in cross-examination on 11 May 2021.

⁷⁵ FD in cross-examination on 11 May 2021.

⁷⁶ Respondent’s Outline of Submissions, 11 May 2021, para 56.

⁷⁷ Applicant in cross examination, 11 May 2021.

addressing. Such issues would need to be such as would pose more than hypothetical risks to children and thus constitute or contribute to the establishment of an ‘exceptional case.

The Relevance of Offending Over a Significant Period of Time

- [95] It is also significant to note that in the case of the Fraud offence, the Applicant’s offending not only occurred over a two-year period but, as the Applicant conceded,⁷⁸ only stopped because she was charged.
- [96] The Respondent submits that inferences may be drawn from this repeated and protracted offending.
- [97] While the Applicant’s character witnesses testified that her fraud offence was out of character for her, the Respondent submits that even though the Applicant is considered to be an honest and respectful person ‘offending that has occurred over such a significant period of time cannot be considered out of character.’⁷⁹
- [98] Such repeated offending over a period of two years is clearly distinguishable from a one-off lapse of judgment, and could indeed be indicative of the Applicant being more likely to re-engage in dishonest criminal behaviour in the future.
- [99] The Applicant’s references to ‘getting away with’ shoplifting as a child⁸⁰ appears to add weight to the concern that the dishonesty demonstrated in the fraud offence was a lifelong trait.
- [100] The Respondent suggests that in her ‘Life Story’ the Applicant appears to justify her defrauding of her employer by referring to her resentment at having to work long hours for no extra pay. However, the Applicant’s qualification of this under cross examination satisfies me that she sees this as a partial explanation of her state of mind at the time rather than as a justification of her actions.
- [101] The Applicant is also reported to have told police that there was no malice in her acts of fraud, ‘just an activity that escalated through time’. This, the Respondent submits, ‘raises concerns as to how much control the Applicant had of her fraudulent offending behaviour’⁸¹
- [102] As Magistrate Brassington observed, ‘it wasn’t [a] particularly sophisticated fraud...’ but as it was committed over a significant period of time ‘it amounts to a significant breach of trust.’⁸²The repeated defrauding of her employer does suggest a consciously undertaken course of action motivated by at least in part by a sense of being underpaid and undervalued if not by a long-standing preparedness to engage in dishonest behaviour.

⁷⁸ Ibid.

⁷⁹ Respondent’s Outline of Submissions, 11 May 202, para 54.

⁸⁰ Applicant in cross examination, 11 May 2021; Applicant, Submissions dated 11 May 2021.

⁸¹ Respondent’s Outline of Submissions, 11 May 2021, para 53.

⁸² Transcript of Proceedings, Cairns Magistrates Court, 26 March 2019, per Magistrate Brassington, p 3, line 4, BCS-60.

[103] The Applicant's explanation of how the defrauding was an 'activity that simply escalated is examined under the next for 'the nature of the offence.' It, in my view also serves to place the two-year period of offending in some context.

*Fourth: The nature of the offences...and their relevance to employment, or carrying on a business, that involves or may involve children.*⁸³

[104] The circumstances that lead the Applicant to be charged with the two offences are not contested by the Applicant.

[105] For a period of approximately two years, the Applicant used a company credit card to purchase items mainly for her children but also for herself. She did not reimburse her employer for the purchase.

[106] As she had been entrusted with the business card as her employer's book keeper and unofficial office manager the Respondent submits, the Applicant's offending over this period of time suggests that she deliberately exploited her position of trust and responsibility. This the Respondent submits, 'raises concerns that she may engage in dishonest and criminal behaviour.'⁸⁴

[107] That the Applicant acted dishonestly, and in breach of trust was also recognised by the Applicant's sentencing Magistrate and is discussed further, below.

[108] However, the nature of the offence needs to also be considered in the light of a number of mitigating circumstances, including those taken into consideration by the sentencing Magistrate.

[109] The uncontested evidence of the Applicant is that prior to her offending she had used the company business card to make personal purchases for which she reimbursed the employer. The relevance of this evidence is not that it offers a justification for the Applicant's fraudulent actions. It would appear to provide an explanation for why the Applicant described the pattern of defrauding as an activity that simply escalated.⁸⁵

[110] The Applicant also stated that on occasion she used her own card to make purchases for the company for which she did not seek reimbursement. This, together with the above explanation paints a picture of the financial arrangements between the Applicant and her employer, that is far less clear cut than the charge would suggest. The Applicant's evidence as to her objections to being drawn into the employer's family issues and to being on call⁸⁶ appears to further blur that distinction.

[111] The Respondent also points to a number of issues in submitting that the Applicant is less than honest and consequently that it would not be in the best interests of children for her to be permitted to work with children.

[112] The respondent refers to the Applicant's—

⁸³ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(iv).

⁸⁴ Respondent's Outline of Submissions, 11 May 202, para 42.

⁸⁵ Court Brief, 5 March 2019, p 6, BCS-15; discussed in Respondent's Outline of Submissions, 11 May 2021, para 53.

⁸⁶ Applicant, Life Story, 24 June 2020.

- (a) Representation that she was married to her former partner when in fact she has not been married,
- (b) Orchestration of uniform witness statements
- (c) Inconsistencies in evidence, including that regarding
 - (i) staying away from employment involving money
 - (ii) therapy, and
 - (iii) the level of support received from her former partner, and
- (d) Incomplete, misleading or understated information given to the psychologist

[113] Most of these allegations are addressed elsewhere, and in my view on balance do not amount to a presentation of the Applicant as a person who is normally dishonest or acts in breach of trust.

[114] It is also uncontested that most of the purchases made using the card were to purchase educational and other items for her daughters, and especially for her younger autistic daughter. That the Applicant did not commit the fraud for personal gain was considered to be a mitigating factor by the sentencing Magistrate.⁸⁷ It is perhaps even more directly relevant to this review as most of the fraudulent acts were committed with the (albeit misguided) intention of benefitting the children.

[115] Both in her criminal proceedings and in testifying at this review, the Applicant has recognised that her actions were committed from a misguided sense that she was acting in the best interests of the children. That the children's father is reported to be well off and to 'spoil' the children provides a credible explanation of why she may have held the view that providing material goods for her children was in their best interests.

[116] On being charged with fraud the Applicant admitted the offence, accepted responsibility, immediately apologised to her employer, and with the assistance of her former partner repaid the sum of \$3500 that she stole from her employer plus \$700.

[117] With respect to the offence of possessing the capsicum spray, the Applicant also accepted responsibility and assisted police to locate all the cannisters

[118] In her 'Life Story' the Applicant states that she purchased the capsicum spray to protect herself during her early morning or late afternoon hike along tracks and beaches. This was instigated, she says by the widely publicised unsolved 2018 murder of a young woman walking her dog on a beach along which the Applicant also hiked.⁸⁸

[119] In passing, the Respondent has questioned the large number of cannisters in the Applicant's, possession, but presented no evidence or submissions regarding another purpose. I note that the Applicant has put forward a feasible explanation, namely

⁸⁷ Transcript of Proceedings, Cairns Magistrates Court, 26 March 2019, per Magistrate Brassington, p 3, line 12, BCS 60.

⁸⁸ Applicant Life Story, 24 June 2020.

that that the cannisters were to be ‘kept in various places and thus readily available’.⁸⁹

- [120] The Respondent points to an apparent inconsistency in the Applicant’s evidence as to the location of the cannisters, pointing out that in her Life Story the Applicant states that she ‘always kept cannisters locked in the glove box of car’,⁹⁰ while the police brief states that several cannisters were located inside the Applicant’s home.⁹¹
- [121] Any negative inferences to be drawn from the nature of this offence need to be assessed in the context of the Applicant’s immediate acceptance of responsibility for having knowingly acted in breach of the law and proactive assistance in locating the cannisters for the police – actions which would suggest that she was not concealing some cannisters or being dishonest about the number of cannisters in her possession.

The Relevance of the Offending to Working with Children

- [122] The Tribunal is required to consider the evidence as to the nature of the offences in terms of its relevance to the Applicant’s employment, or carrying on a business that involves, or may involve children⁹².
- [123] Perhaps the most directly relevant aspect of the nature of the Applicant’s offences relates to her possession of the capsicum cannisters. The Respondent suggests that the Applicant’s actions in leaving capsicum spray unsecured in the residence where her children (then 9 and 7) lived, posed a serious risk of injury to the children.
- [124] The conclusion that the Applicant’s unsecured placement of cannisters of capsicum in the home exposed her daughters to danger, was strenuously challenged by the Applicant.
- [125] At first glance, this scenario is one that would ordinarily be accepted as an act of an irresponsible parent who failed to protect their children. However, I note in particular, the Applicant’s unchallenged evidence as to the Applicant’s secure storage of some cannisters in her car and of the warning she issued to her children. I also note that when the perceived inadequacy of the warning was put to her, the Applicant replied that her perceptions of the adequacy of the warning was based on her knowledge of her children.
- [126] The adequacy and appropriateness of the steps the Applicant took to protect her children may be questioned. However, I note that the Applicant’s strenuously rejected the Respondent’s suggestion that her failure to secure the cannisters stored inside the house exposed her daughters to risk of significant harm was an act of an irresponsible parent. The Applicant stated that she knew her children, and on that basis, knew that her warning would be sufficient to keep them safe
- [127] That she told her children about the dangers of the cannisters, at the very least demonstrates her awareness of the potential danger and the need for her to take such

⁸⁹ Applicant in cross-examination, 11 May 2021.

⁹⁰ Applicant, Life Story, 24 June 2020.

⁹¹ Court Brief, 5 March 2019, p 6, BCS-15.

⁹² *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(iv).

steps that she, as a mother familiar with her children, considered appropriate and adequate to protect her children from the potential danger.

[128] In light of the Applicant's explanation and the unchallenged evidence of witnesses as to the Applicant's understanding of, and commitment to, the care of children with various levels of needs, I conclude that the relevance of this aspect of her possession of capsicum spray offence is not that she, if working with children, could expose children to danger through irresponsible behaviour in the face of danger. Instead, I find that the unsecured storage of the capsicum cannisters in the home was either an out of character action by the Applicant or that the precautions she took were indeed adequate in that situation.

[129] The Respondent submits that the serious nature of the Applicant's fraud offence 'Raises concerns that she may engage in dishonest and criminal behaviour' ⁹³ especially as the Offending occurred whilst the Applicant was in a position of trust and responsibility.

[130] The relevance of this to the best interest of children, the Respondent submits, are—

- (a) That the Applicant's 'justification for using this card to purchase items for her children through fraud raises concerns regarding her ability to present as an appropriate role model for her own children as well as others who may come into her care,' ⁹⁴ and
- (b) That the Applicant would not be 'an appropriate role model for safeguarding the best interests of children in her care ...entitled to have role modelled for them values such as honesty, integrity and respect for law.' ⁹⁵

[131] However, any inferences to be drawn from the nature of these offences for the Applicant's suitability to work with children needs to also take into account factors present in this case which suggest that in spite of the serious nature of this offence and inferences capable of being drawn, that she may well present as an appropriate role model to her own children and those with whom she may work.

[132] I have already addressed the Applicant's description of the Applicant's statement that her actions in defrauding her employer over a period of two years as an activity that just escalated. I concluded that the evidence suggested that the Applicant's statement was more likely to be an explanation rather than a justification of actions she has consistently condemned. I note that in her Life Story the Applicant stated that there was 'no excuse or justification for what [she] did.' ⁹⁶

[133] In this respect, I note that the Applicant demonstrated a comprehensive recognition of the potential risk her actions in committing the fraud posed to children who looked up to her. She has consistently condemned her action, showed remorse and sought and assumed responsibility.

[134] As to her awareness of the effect of her actions on others, the Applicant has stated, 'I had hurt so many people. I hated myself. I couldn't sleep.' ⁹⁷ As her therapist and

⁹³ Respondent's Outline of Submissions, 11 May 2021, para 43.

⁹⁴ Ibid, para 42.

⁹⁵ Ibid para 43.

⁹⁶ Applicant, Life Story, 24 June 2020.

⁹⁷ Applicant, Life Story, 24 June 2020.

witnesses attested, she was depressed and distressed over what she had done and the subsequent fallout.⁹⁸

[135] In particular, I note her Applicant's account of having to explain what she had done to her children. She says that she dreaded having to tell them, of the look in their eyes when they understood what she had told them.⁹⁹ She also told of her 'fear that she could lose her children if she went to jail.'¹⁰⁰ This is unlikely to be the account of a parent who is not concerned with how children in their care are affected by their actions.

[136] In rejecting the suggestion that she would be a poor role model to children, the Applicant argued that she was a good role model in demonstrating how to take responsibility, understand how her actions affect others and learn from mistakes.

[137] Any assessment of and the likelihood that the Applicant's work with children would subject the children to a risk that would make it not in the best interests of the children for her to be permitted to undertake such work, needs to take into account not only her relationship with her children, but also her volunteer work in the classroom,¹⁰¹ and her education studies.¹⁰²

[138] I find that no evidence that has been brought or that is able to be inferred from investigations and other oral or written evidence that would suggest that the Applicant's involvement in particular child related employment or business would not be in the best interests of the children.

[139] Instead, evidence has been presented suggesting that the Applicant shielded her children from the negative aspects of an abusive household and separated parents.¹⁰³ The Applicant also advised the Tribunal that any domestic abuse only occurred when the children were not present, and that she evicted her partner in order not to expose the children to their parents' abusive relationship.¹⁰⁴

[140] Asked to explain the resumption of her relationship with her abusive former partner, the Applicant observed that she began seeing her therapist in June 2019 when she was 'trying to re-establish the relationship as it had been so supportive when I was charged.

[141] Underlining how she and her former partner protect and support their children, the Applicant states that while she was in—

a tumultuous relationship with the father of my children, we are supportive co-parents, [perceived by some to be married] and committed to ensuring the children are supported to live as normally as possible.¹⁰⁵

Conclusion as to Relevance for Working with Children

⁹⁸ FD Letter of Support 9 August 2019, BCS-47.

⁹⁹ Applicant, Life Story, 24 June 2020.

¹⁰⁰ Applicant, Life Story, 24 June 2020.

¹⁰¹ Ibid

¹⁰² Ibid; KJ, Reference, 28 October 2020.

¹⁰³ Ibid; Applicant in cross-examination, 11 May 2021.

¹⁰⁴ Ibid

¹⁰⁵ Applicant's Submissions, 11 May 2021.

- [142] A person who relatively recently defrauded her employer over two years and who only stopped because she was caught, and who appeared to irresponsibly expose her children to unsecured cannister's of capsicum, would appear not to be a person who should be assessed as suitable for work with children.
- [143] The Applicant's prolonged serious acts of fraud while holding a position of trust could also suggest that the Applicant may commit further acts dishonestly or breach of trust.
- [144] However, the evidence does not necessarily support the conclusion that the Applicant is at risk of reoffending. In any event, the evidence in this case is assessed in order for the Tribunal to determine whether the evidence is 'sufficient for a decision maker to be satisfied that the circumstances raise the possibility of a risk to children'.¹⁰⁶
- [145] The relevance of the Applicant's acts of dishonesty and suggested evidence suggesting that her dishonesty extends beyond her conviction for fraud to any risks she would pose to children with whom she worked I find to be largely hypothetical
- [146] On balance, I am satisfied that the Applicant is aware of the impact of her actions on others and particularly her daughters, that she has accepted responsibility for her actions, that her remorse is genuine and that she is determined to set right the impact of her wrongdoing.
- [147] On that basis I find that the relevance of her serious offences for her 'employment, or carrying on a business that involves, or may involve children'.¹⁰⁷ is not such as would lead me to consider the Applicant's undertaking of such work would pose a risk to, or not to be in the best interests of, children.

*Fifth, the penalty imposed by the court and reasons for not imposing an imprisonment order and reasons for its decision.*¹⁰⁸

- [148] As already outlined above, the penalty imposed for the offence of Fraud, dishonestly gain benefit/advantage by the employee, was a recorded conviction and six-months imprisonment wholly suspended for 12 months.
- [149] For the offence of Unlawful Possession of Weapons Category D/H/R weapon, no conviction was recorded and no further punishment was imposed.
- [150] Her Honour, Magistrate Brassington gave the following reasons for her decision and the penalties imposed.
- [151] Her Honour noted the following mitigating factors:
- (a) The Applicant had cooperated with authorities, made admissions, paid back the money stolen, and pleaded guilty in a timely plea.

¹⁰⁶ *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489 at [89].

¹⁰⁷ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(iv).

¹⁰⁸ *Ibid* s 226(2)(1)(v).

- (b) The Applicant's immediate payment of reparations, demonstrated appropriate and 'genuine' remorse.
- (c) It was appropriate to wholly suspend the sentence of imprisonment due to the Applicant's immediate remorse and restitution.
- (d) The Applicant's lack of prior offences or convictions.
- (e) The offending was not for the Applicant's own benefit, but rather to benefit her children, but that in retrospect the Applicant should realise that her actions were of no real benefit to her children.
- (f) The Applicant's referees spoke positively of her and supported that she was very remorseful and a tireless mother, and
- (g) That the Applicant had already suffered the deficit of losing her employment.

[152] The Magistrate also drew attention to a number of factors underlining the seriousness of this offence, by:

- (a) Emphasising the Applicant's Breach of Trust, by noting that as the Applicant had been employed for a significant period of time, this 'indicates the trust reposed in you'.¹⁰⁹
- (b) Pointing out that stealing as a servant is regarded seriously because it undermines the trust that an employer places in an employee. It's a significant breach of trust.¹¹⁰
- (c) Noting that as the Applicant's offences were committed 'over significant period of times and not just one or two instances 'the trust reposed had, obviously been betrayed'.¹¹¹
- (d) Observing that even though the fraud was not particularly sophisticated, it was not detected for a period of time and therefore amounted to a 'significant breach of trust'¹¹²
- (e) That even though sentencing to imprisonment is a last resort 'there is simply no reasonable alternative to achieve general deterrence than the possession of a term of imprisonment'.¹¹³

[153] In contrast, the Magistrate accepted the Applicant's explanation regarding the capsicum spray offence and did not record a conviction or impose further punishment.

[154] In determining the relevance of the Magistrate's sentencing remarks to this review it is important to distinguish the purpose of this review from the Magistrate's Court's determination of criminal liability.

¹⁰⁹ Transcript of Proceedings, Cairns Magistrates Court, 26 March 2019, per Magistrate Brassington, p 2, line 38, BCS 59.

¹¹⁰ Ibid p 3, line 32, BCS 60.

¹¹¹ Ibid p 3, line 42, BCS 60.

¹¹² Ibid p 3, line 5, BCS 60.

¹¹³ Ibid p 4, line 28, BCS 61.

- [155] Thus, as this review is not concerned with determining the Applicant's culpability, it is able to consider any evidence it deems relevant. This means that the Tribunal's findings as to the existence of an exceptional case draw on all available evidence, and are not restricted to evidence tendered by parties or confined by rules of evidence.
- [156] In addition, this review seeks to determine on the balance of probabilities, not whether the Applicant committed the offences, but rather whether on the balance of probabilities there is a risk that the Applicant's working with children would not be in their interest.
- [157] However, a consideration of the Magistrates earlier listed remarks and reasons for significantly reducing the sentence are of significant assistance in this review. They highlight not only the serious nature of the fraud offence but also the factors adjudged to reduce the Applicant's culpability.

*Sixth, Information about the person received by the Respondent.*¹¹⁴

- [158] No relevant information about the person was provided to the Chief Executive by the Director of Public Prosecutions or by the Corrective Services under section 318 or 319.¹¹⁵ No report about the Applicant's mental health was given to the Chief Executive under section 335.¹¹⁶ 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.¹¹⁷

*Seventh, 'Anything else relating to the commission of the offence that the [decision maker] reasonably considers to be relevant to the assessment of the person.'*¹¹⁸

- [159] Of direct relevance to the Tribunal's assessment of the Applicant are the character references of witnesses, and particularly the following witnesses called to attend the hearing to give sworn evidence and be cross-examined.

Psychologist, FD

- [160] The first witness was FD, a psychologist who provided a written letter of support, dated 9 October 2020, as well as further information, dated 8 December 2020, requested by the Tribunal.
- [161] In her letter of support FD states that the Applicant had been attending her clinic since 17 June 2019, having been referred by the Applicant's doctor, 'for support to better manage her depression and anxiety which was negatively impacted by her fraud conviction'.¹¹⁹

¹¹⁴ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(b), (c) and (d).

¹¹⁵ *Ibid* s 226(2)(b).

¹¹⁶ *Ibid* s 226(2)(c).

¹¹⁷ *Ibid* s 226(2)(d).

¹¹⁸ *Ibid*

¹¹⁹ FD, Letter of Support, 9 October 2020, BCS-47.

[162] In that letter Ms FD also writes that the Applicant ‘is very embarrassed and remorseful over her behaviour which is totally out of character for her’.¹²⁰ In her later report, she states—

We believe she is a respectful, sincere and honest individual who made poor decisions at the time. She is confident she will never again allow fraudulent or criminal behaviour into her life.¹²¹

[163] On 8 December 2020, Ms FD wrote again addressing a number of specific issues itemised by the Tribunal.¹²² In this additional report, FD advises that the Applicant’s insight into her offending behaviours and the impact on society and on her children, ‘have been discussed at length’ with her, and that the Applicant ‘has acknowledged and regretted her indiscretions, made immediate financial retribution to the “victims” and apologised profoundly to them.’¹²³

[164] On the Applicant’s ability to control any future risk factors or triggers, FD states that the Applicant

...made the decision to no longer offer her services as a bookkeeper to any prospective clients as she does not wish to put herself in a similar situation where she would have total access to the clients’ financial accounts.¹²⁴

[165] FD was asked to explain why the Applicant had stated that she was unable to gain work as a bookkeeper as her offence was well known in her local area life, while she (FD) had stated that the Applicant did not want to put herself in the position where she could reoffend. FD’s explanation was that the Applicant ‘believes she would never be tempted to break the law again, yet she has taken these steps to ensure this situation is never repeated.’¹²⁵

[166] FD also writes that the Applicant’s—

Protective factors include taking a holistic approach to her health and well being and continuing to focus on the positives in life, such as building on her self-esteem so as to ensure she maintains her previous impeccable record of honesty and loyalty to her employers and the love and respect of her children, husband and community.¹²⁶

[167] As to preventative strategies, FD states that the Applicant had a ‘commitment to continuing in therapy for as long as is required’. FD suggests that this was because the Applicant ‘claims she feels heard, validated and supported in her endeavours to embrace strategies that suit her positive, caring and sincere lifestyle.’¹²⁷

[168] Finally, FD addresses enclosed psychometric assessments. Each, she notes, show that the Applicant ‘is doing very well emotionally and mentally, has a well-balanced self esteem and a positive outlook on life.’¹²⁸

¹²⁰ Ibid

¹²¹ Ibid

¹²² Tribunal Directions, Directions Hearing, 10 November 2020.

¹²³ FD, Additional Report, 8 December 2020.

¹²⁴ Ibid

¹²⁵ FD in cross-examination, 11 May 2021.

¹²⁶ FD, Additional Report, 8 December 2020.

¹²⁷ Ibid

¹²⁸ Ibid

- [169] Under cross examination at the hearing, FD testified that she had been treating the Applicant intermittently for 18 months. She observed that in the treatment, the Applicant was dealing with how to manage the negative impact of her offence and wants to move on.
- [170] When questioned as to the Applicant's criminal history and the nature and duration of the 2019 offences, FD's reply revealed an incomplete knowledge.
- [171] In answer to a question about the nature of FD's relationship with her children's father, FD indicated that she thought they were married.
- [172] As to further treatment, FD stated that further treatment was desirable in view of the Applicant's history of anxiety and depression and her response to the criminal conviction.

TAFE Teacher, KJ

- [173] KJ, one of the Applicant's TAFE Teachers in her Certificate III in Education Support also provided a reference dated 28 October 2020. In it she describes the Applicant as an 'exemplary student.' She observed that the Applicant 'is also a recognised and respected advocate in the Cairns Community for children with ASD (Autism Spectrum Disorder), being a parent of a child who lives with Autism.'
- [174] KJ also underlines that 'it is essential that [the Applicant] holds a positive Working with Children Check in order to successfully complete her qualification'.
- [175] Even though KJ described the Applicant's offending as 'an error of judgment', when cross examined KJ set out a clear understanding of the events responsible for the negative notice being issued.
- [176] Importantly having observed the Applicant interacting positively with children, KJ offers the opinion that the Applicant 'is of no threat to the wellbeing of children whom she would be supervising/caring in an Educational Facility.'
- [177] When giving sworn evidence at the hearing KJ expressed her surprise that the decision had been made to issue the Applicant with a negative notice.

Speech Pathologist, GB

- [178] GB, a Speech Pathologist, also provided a character reference, dated 26 October 2020, in which she indicated an awareness of the Applicant's offences that led to the issuing of the negative notice.
- [179] GB states that she has been working with the Applicant for over seven years, 'due to speech/language difficulties in both her children, one due to Autism diagnosis.' She notes that during that time the Applicant had been dedicated to improving her children's communication skills. GB describes the Applicant as a 'dedicated parent' for bringing her children in for fortnightly therapy and 'carrying out home practice activities to consolidate their skills.'

[180] In her character reference GB also notes that the Applicant supported other parents struggling with similar issues and had become passionate about wanting to help other children who need additional support.

[181] Under cross examination at the hearing GB indicated that she was aware that the Applicant was seeing a psychologist to understand the triggers of her behaviour and psychological issues.

- JA, a Senior Member of Ambulance Service Network

[182] A further personal character reference dated 28 October 2020 was provided by JA a senior member of an Ambulance Service Network for the past 17 years. He states that he has significant qualifications and work experience in mental health and child safety.

[183] He writes that he has known the Applicant and her family for over four years and that his two children are close friends with the Applicant's children.

[184] JA states that he has known the Applicant 'to be a loving mother and a parent actively involved in the school environment'. In this regard he also states, 'It goes without saying I have no doubts in regard to [the Applicant's] good intent and safety around children.'

[185] In his character reference JA also observed that having spoken to the Applicant about her offences he saw 'genuine remorse and insight'.

[186] JA stated his belief that the Applicant's offending behaviours were 'heavily affected by stress and disputes with her partner'. He further observed that the Applicant's difficulties with her partner included 'alcohol fuelled violence'.

Originality of Character References

[187] Two of the written references disclosed an anomaly. The character references, by JA and GB, list dot-point reasons as to why the negative notice 'should be appealed'. Their wording and list order is virtually identical.

[188] The reasons in question state that—

- (a) The Applicant was not convicted of a serious offence as defined by the Working with Children Act.
- (b) No punishment or conviction were recorded for Unlawful Possession.
- (c) The Applicant has already been punished 'appropriately'.
- (d) The Applicant is very remorseful and embarrassed and has apologised to the victim.
- (e) The Applicant is seeing a psychologist to manage her mental health issues and triggers that led to the offending behaviour
- (f) The Applicant's behaviours leading to the charges were out of character. JA added that the behaviours 'were heavily impacted by stress'.

- (g) The Applicant's behaviours are not directly child related. JA adds that he deems the Applicant safe around children'.
- (h) The Applicant has been a great support and role model for her children and a great support for parents of children with Autism and other special needs
- (i) As a teacher's Aid the Applicant would not be in a position of authority over any financial management, and that
- (j) The charges have no bearing on her ability to safely support children in the school system.

[189] The Applicant offered an explanation for why the referees submitted character references containing identical comments. She said that she thought she was 'doing the right thing by providing reference examples to [her] referees.'

[190] When cross examined as to the similarities, GB replied that she had written her reference, while JA answered that he had asked the Applicant for a guide as to what he should address in his reference.

[191] The Respondent submits that the similarity between these references 'raises concerns as to the veracity of the [witness] statements', and that 'in light of the Appellant's offending it raises concerns as to her credibility'.

[192] Having observed the witnesses under cross examination, noting the minor changes to the wording apparently to reflect personal perspectives, and in view of the consistent explanations provided by the witnesses under cross examination and by the Applicant in her final submissions, I accept that on balance the character references reflect the views of the individual witnesses.

Additional References

[193] When the Applicant provided Blue Card Services with additional information dated 10 June 2019, she enclosed two references. While the referees have appeared to be cross examined, I note their key comments in support of the Applicant.

[194] BW, a final year Business and Psychological Science student wrote a reference dated 7 June 2019. BW states that she had known the Applicant for 15 years. Indicating a familiarity with the fraud offence, she states that she believes this to be 'out of character for all the years I have known her.

[195] BW describes the Applicant as being 'tireless in her role as Mother to her children and has always put her family first. She also observed the Applicant to be 'carrying a heavy burden mentally with this charge as she has shown to me a great deal of remorse as she has always been conscious in wanting to set a role model for her children.'

[196] BP wrote a reference dated 5 June 2019. He stated that he had known the Applicant for 17 years and had been her employer. As a worker he described her as having 'utmost integrity. He mentioned discussing the fraud offence at length with the Applicant, stating that, 'It is obvious that [the Applicant] is carrying a great deal of shame and is extremely remorseful.'

Other Factors the Tribunal May Consider

- [197] The Tribunal is required to undertake a ‘review of a reviewable decision by way of a fresh hearing on the merits.’¹²⁹ As the review is not an appeal of the original decision, the Tribunal’s consideration is not confined to evidence before the original decision maker. Similarly, as the Tribunal is not a review of the Applicant’s convictions it is not confined to a consideration of factors present at the time of an offence.
- [198] Consequently, in conducting a review of a decision that a case is an ‘exceptional case’ for the purposes of section 221(2) of the WWC Act, any additional offences or charges, any additional investigative or disciplinary information or other relevant developments are also intended to be a part of by the Tribunal’s considerations.
- [199] Information relating to the commission of the offence and relevant to the assessment of the person is secured by or provided to the Tribunal as mandated or permitted by the WWC Act. The information may reveal factors of relevance to an Applicant’s suitability to be issued a positive notice which in themselves do not relate directly to a conviction or other event mandating in the absence of an exceptional case that the Applicant be issued a positive or negative notice.
- [200] In *Eales*¹³⁰, the Appeal Tribunal relied on the Court of Appeal decision in *Maher*,¹³¹ in holding that while the mandatory considerations are listed in the Act as factors to which the decision maker ‘*must* have regard’ when determining whether the case is an exceptional case, the factors prescribed under s 226 ... are not exhaustive and include factors ‘reasonably considered’ relevant to the ‘assessment of the person.’¹³²
- [201] Thus, the Appeal Tribunal noted that Philippides J even suggested that the list of mandatory considerations does not preclude the Tribunal from considering other matters deemed relevant to the assessment of the person ‘even if they fall outside the parameters of the provision.’¹³³
- [202] The Appeals Tribunal delineated the Tribunal’s discretion as to factors to take into account in the following terms—
- Correctly stated, the discretion to be exercised by the Tribunal, on review is unfettered by any general rule in considering the relevant factors to determine whether in all of the circumstances it is in the best interests of children for a positive notice to be issued.¹³⁴
- [203] Consequently, as long as a factor is relevant to the assessment of the Applicant’s suitability to be issued a positive notice, the Tribunal accepts that it may be considered either under a broad interpretation of the seventh mandatory factor, or as a factor in addition to the factors mandated in section 226(2) of the WWC Act.

¹²⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 20(b).

¹³⁰ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303.

¹³¹ *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492.

¹³² *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303 at [33].

¹³³ *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492, [40].

¹³⁴ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [42].

[204] In this case all information and evidence before the Tribunal and found to be relevant to the consideration of whether the issuing of a positive notice would not be in the best interests of children has been considered while addressing the mandatory factors.

Risk Factors and Protective Factors

[205] I have addressed the factors the WWC Act requires the Tribunal to consider in deciding whether this is an exceptional case in which it would not be in the best interest of children for the chief executive to issue a positive notice. In so doing I have addressed both risk factors and protective factors.

[206] The Respondent submits that while the Court of Appeal in *Maher*¹³⁵ is sometimes cited as authority for the weighing up of identified risk factors against protective factors when deciding whether a particular case is an exceptional case, the Court had in fact been held that such an approach was inappropriate.¹³⁶

[207] In *Eales*¹³⁷ the Appeal Tribunal considered this issue and found that the Court of Appeal in *Maher* ‘did not endorse the method of balancing identified protective factors against risk factors...to find whether an exceptional case existed.’ The Appeal Tribunal further observed that the weighing of risks and protective factors test ‘has been discredited by the Appeal Tribunal in *FGC*’.¹³⁸

[208] However, it is important to clearly delineate the practice that was held to be inappropriate and discredited. The Appeal Tribunal in *Eales* does so, stating that—

the Court of Appeal did not criticise or otherwise adversely comment on the method of identifying from the evidence in any case relevant protective factors and risk factors when considering whether an exceptional case exists such that it would not harm the best interests of children for a blue card to be issued to the person.¹³⁹

[209] According to the Appeal Tribunal in *Eales* what the Court of Appeal in *Maher* had not endorsed was the view that—

if the negative risk factors outweigh the protective factors that an unacceptable level of harm exists [and that] this unacceptable level of harm is then capable of constituting an exceptional case’.¹⁴⁰

[210] Rather than weighing risk factors against protective factors, the correct approach put forward by the Appeal Court in *Maher* is to determine whether any exceptional factors have been identified in the case that render the case an exceptional one ‘having regard to and being satisfied about the criterion specified by the Act’.¹⁴¹

¹³⁵ *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492.

¹³⁶ Respondent’s Outline of Submissions, 11 May 202, para 26.

¹³⁷ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303.
Commissioner for Children and Child Guardian v FGC [2011] QCATA 291

¹³⁹ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [7].

¹⁴⁰ *Ibid*, [5] citing *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492, [29].

¹⁴¹ *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [7] and *Ibid* [28].

- [211] As the Appeal Tribunal¹⁴² pointed out in *Eales*, the Appeal Tribunal in *FGC* rejected the argument that concept of unacceptable risk of harm should be used to interpret what is meant by ‘exceptional case’ and rejected the argument that phrase must be read and construed in a particular way, different from the ordinary meaning¹⁴³ but rather to ‘consider its application in each particular case, unhampered by any special meaning or interpretation’.¹⁴⁴
- [212] A consideration of protective and risk factors has the benefit of ensuring that the case is assessed in the light of all the evidence including not only factors suggesting risks to children but also of protective factors that may qualify risk factors and assist the determination of whether there 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’.
- [213] On the basis of the above, I accept that a consideration of protective and risk factors is capable of assisting the decision maker determine whether a case is an exceptional case, but is not to be employed to determine whether an exceptional case exists by weighing risk factors with protective factors. In this sense I have considered protective and risk factors in a qualified rather than quantified manner, as the Respondent submits is appropriate.¹⁴⁵
- [214] A consideration of authorities on risk and protective factors can also be of assistance to the determination of the relevance and irrelevance of certain factors, and the weight to be attributed to them.

Risks must be Real, Appreciable

- [215] When identifying risk factors, the Tribunal in *GP*¹⁴⁶ defined ‘risk’ in this context to mean, ‘real and appreciable risk’.¹⁴⁷ The Tribunal explained that—

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.

Protective Factors Must Lessen Risks

- [216] The Applicant and her character witnesses have stressed the Applicant’s dedication to working with children, and especially those with special needs, and the support she offered parents of children with special needs.¹⁴⁸

¹⁴² Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [9].

¹⁴³ *Commissioner for Children and Young People v FGC* [2011] QCATA 291 [28-35]

¹⁴⁴ *Commissioner for Children and Young People v FGC* [2011] QCATA 291 at [33], per President, endorsing the findings of Philippides J in *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492, as cited in Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303 at [38].

¹⁴⁵ Respondent’s Outline of Submissions, 11 May 2021, para 27.

¹⁴⁶ *GP v Commissioner for Children and Young People* [2013] QCAT 324.

¹⁴⁷ *GP v Commissioner for Children and Young People* [2013] QCAT 324 at [14].

¹⁴⁸ Applicant, Life Story, 24 June 2020, JD Reference 28 October 2020; GB, Reference, 26 October 2020.

[217] However, authorities appear to suggest 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, on the basis that, ‘The Act is only intended to benefit children in so far as it is intended to protect them.’¹⁴⁹ in *Scot*, Buss J held that [my emphasis]—

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*.¹⁵⁰

[218] This does not however mean that since the value of the Applicant’s likely contribution to children does not relate directly to the protection of children from risk, it is not to be taken into account when determining whether the case is an exceptional case.

[219] It merely suggests that where a risk factor has been identified that suggests that it would not be in the best interests of children for the Applicant to be issued a positive notice, that the applicant’s work with children would also benefit them should not be taken into account as a protective factor that wholly or partly offsets the risk.

[220] In this case, the Applicant’s demonstrated skills in working with children, advocating for the needs of children with special needs and her employer’s apparent high regard for her work as evident by their advice that said that she would love her to do her placement there when she is issued a positive notice even though notified of the issuing of her negative notice¹⁵¹ are relevant to the determination and qualification of perceived risks to children, were she to be issued a blue card to work with children.

[221] If inferences as to risks are to be drawn from the Applicant’s two years of fraudulent behaviour, then equally they should to be drawn from assessments of the Applicant’s four years of volunteering and advocacy work.

[222] In this sense an assessment of the likelihood of risk to children must take into account not only predictions and conjecture as to risks but also the Applicant’s track record of working with children and assessments as to whether her involvement was in the best interests of the children.

What is the Relevance of the Applicant’s Hardships?

[223] Having effectively lost her work and career as a bookkeeper through her conviction for fraud, accepting her guilt, taking responsibility, showing remorse for her criminal convictions, being dependent on government support and being prevented from commencing work in a career that she is passionate about by the issued negative notice, the Applicant is understandably focused on her current hardships and wishes to make a fresh start.

[224] However, on the basis that the focus of the Tribunal’s review is on potential risk to children, judicial authority is clear that any hardship suffered by the Applicant

¹⁴⁹ *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 2008 WASCA 171 at [109].

¹⁵⁰ *Ibid*

¹⁵¹ Applicant, Life Story 24, June 2020.

through the issuing of a negative notice is irrelevant to the Tribunal's deliberations on whether the case is an exceptional case.¹⁵²

[225] However, as discussed below, hardship suffered by the Applicant may be construed as limiting her human right not to be punished again for an offence for which she has already been punished.

[226] The HR Act requires the Tribunal to determine whether any hardship occasioned to the Applicant does limit her human rights. In doing so the Tribunal is expected to 'interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights'.¹⁵³ The Tribunal is also required to 'act and make decisions in a way compatible with human rights'.¹⁵⁴

[227] In order to be compatible with human rights, any limits to which the Applicant's human rights are subject must be reasonable and justifiable.

[228] Consequently, any hardship occasioned to the Applicant can no longer be dismissed as irrelevant.

Overview of Findings Regarding Key Risk factors and Protective Factors

[229] It is clear that the Applicant's fraudulent misuse of the business card over two years appears to pose a significant risk to children. The Applicant's dishonesty, breach of trust and apparent disregard for the law suggest that she would be a poor role model for children with whom she would work.

[230] The perception of the risk presented by the Applicant's dishonesty is magnified by revelations as to her acts of dishonesty as a child and by some apparent inconsistencies in the Applicant's evidence and statements.

[231] The seriousness of the offence was emphasised by the Magistrate who pointed out that the maximum penalty for the type of offence committed by the Applicant was 12 years imprisonment. Her Honour also emphasised why such offences carried penalties of imprisonment. She particularly emphasised breach of trust.

[232] However, inferences as to the risks posed by the Applicant need to also take account the factors that place the nature and likelihood of risk in context.

[233] The Applicant's actions on being charged with her offences demonstrated what the Magistrate described as genuine remorse, awareness of the impact of her actions on others and particularly on her children.

[234] How and why the Applicant told her children about what she had done, demonstrated an awareness of her influence as role model. This was underlined by her explanation of how she, having been convicted, could still be a positive role model.

¹⁵² *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 2008 WASCA 171 at [109].

¹⁵³ *Human Rights Act 2019* (Qld) s 4(f).

¹⁵⁴ *Ibid* s 4(b).

- [235] That this offence occurred reasonably recently it has been suggested that the Applicant has not had the time to address the issues underlying her offending. Nevertheless, the Applicant does appear to demonstrate an understanding and insight into the factors surrounding her offending. However, it is also the case that there may well be some underlying issues including her Depression and Anxiety that need to be further explored.
- [236] That the Applicant has some remaining psychological/psychiatric issues to address is in my view only relevant if it creates or increases the potential risk to children. I find that the Applicant's involvement in counselling therapy has been sufficient for her to gain a fuller insight into her actions and triggers for such actions.
- [237] I also note that the Applicant is aware of the benefits and availability of further counselling and has indicated that she would return to complete sessions with her psychologist 'when [she]needs it' or if 'spiralling'.¹⁵⁵ The Applicant also reported that she was seeing another therapist.¹⁵⁶ To delay issuing a positive notice until she completes all other therapy would be unjustifiable, as it would impose a standard on the Applicant that is not expected of others working with children.
- [238] I find that the perceived risk factors when considered in context and in the light of changes to the Applicant's circumstances and understanding, are less than the real and appreciable¹⁵⁷ risks that would satisfy me that this is an exceptional case requiring a negative notice to be issued.

Human Rights Considerations

- [239] In addition, to the factors required to be considered by the WWC Act, the Tribunal is required to 'give proper consideration to human rights relevant to the decision'.¹⁵⁸ In Section 58(1)(1) the HR Act states that—
- (1) It is unlawful for a public entity—
- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision to fail to give proper consideration to a human right relevant to the decision.
- [240] As outlined earlier, having identified and considered any human rights relevant to the decision¹⁵⁹, the Tribunal must identify any limits on such human rights and determine whether an 'Act, decision or provision' is compatible with the human right.¹⁶⁰

¹⁵⁵ Applicant, in cross examination, 11 May 2021.

¹⁵⁶ Ibid.

¹⁵⁷ *GP v Commissioner for Children and Young People* [2013] QCAT 324 at [14].

¹⁵⁸ Human Rights Act 2019 (Qld), s 58(1)(b).

¹⁵⁹ Ibid, s 58(1).

¹⁶⁰ Ibid, s 8.

[241] The HR Act requires ‘courts and tribunals to interpret provisions to the extent possible that is consistent with their purpose in a way compatible with human rights.’¹⁶¹

[242] This is particularly important in identifying and addressing possible limits on human rights rendering a provision or process incompatible with human rights. Thus, where a limit on a human right

cannot be interpreted in a way that is compatible with human rights... the provision must, to the extent possible that is consistent within its purpose, be interpreted in a way that is most compatible with human rights’¹⁶²

[243] Consequently, when interpreting relevant statutory provisions, a decision maker is now obliged to consider and justify any limiting of an Applicant’s human rights.

[244] Any limit found to be reasonable and demonstrably justifiable is compatible with human rights.¹⁶³

[245] In determining whether a limit imposed on a human right by an Act, decision or statutory provision is justified and reasonable, the HR Act lists factors in section 13(2) of the Act that ‘may be relevant’ to the Tribunal’s 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).

[246] Even where a limit is found to be incompatible, the Tribunal must ‘interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights’.¹⁶⁴

[247] The law and procedures governing the Applicant’s application for a blue card, and the review of the decision not to issue a positive notice appear to have affected a number of the Applicant’s Human Rights.

¹⁶¹ Ibid, s 4(f).

¹⁶² Ibid, s 48(2).

¹⁶³ Ibid, s 8(b).

¹⁶⁴ Ibid, s 4(f).

The Human Rights of Children

[248] The Respondent submits that the human rights to be considered include not only the human rights of the Applicant but also of ‘the right of every child to ‘the protection that is needed by the child and is in the child’s best interests, because of being a child.’¹⁶⁵

[249] I note the paramount consideration of the WWC Act and its express limitations on the competing rights of the Applicant, and I have found the limitations of the law and procedure relating to the application for a positive notice and the review of the Respondent to be reasonable and justifiable limitations of the Applicant’s human rights.

[250] However, as outlined above, I have also concluded that a decision that the Applicant’s case is an exceptional case would exceed reasonable and justifiable limitations of the Applicant’s human rights, and consequently not be consistent with the Applicant’s human rights.

[251] In so doing, I have also taken into account the impact of the of the Applicants human rights on the human rights of children with whom she may be in contact if granted a blue card. I have addressed factors considered relevant by the HR Act,¹⁶⁶ and especially the following—

- (a) the importance of the purpose of the limitation¹⁶⁷ – the human rights of the Applicant.
- (b) ‘the importance of preserving the human right’ of children. – ‘taking into account the nature and extent of the limitation on the human right’,¹⁶⁸and
- (c) The balance between the first two matters.¹⁶⁹

[252] I conclude that the WWC Act and its specified implementation by this Tribunal is not intended to limit the human right of children. The concept of an exceptional case is intended to ensure that blanket considerations as to the issuing of positive or negative notices do not infringe on the rights of children, and only infringe on the human rights of Applicants where the best interests of children and the protection of their human right demands.

Is the Applicant Being Tried and Punished Again for her Criminal Offences

[253] The Applicant has expressed her frustration with the process of review, noting in particular that she had completed her sentence on 26 March 2020, yet continues to be punished by not being permitted to complete her vocational studies and to engage in work of her choosing.

¹⁶⁵ Ibid, s 26(2)

¹⁶⁶ Ibid, s 13(2)

¹⁶⁷ Ibid s 13(2)(e).

¹⁶⁸ Ibid s 13(2)(f).

¹⁶⁹ Ibid s 13(2)(g).

[254] It may appear that the review constitutes a retrial and punishment. Such a perception questions whether the laws, the legal process and actions of this Tribunal are in compliance with human rights.

[255] If this process was in fact a retrial of the Applicant's two convictions or a further punishment, it would be incompatible with section 34 of the Human Rights, 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.

Tried Again for Offences for Which Already Convicted

[256] On closer scrutiny, however, the Respondent's refusal to issue a positive notice to the Applicant, and the Tribunal's review do not constitute retrials of the Applicant for the offences for which the Applicant was convicted.

[257] Neither the Respondent's issuing of a negative notice nor the Tribunal's review seek to determine whether the Applicant is guilty of the charges.

[258] 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.¹⁷⁰ It is not concerned with proving or disproving the commission of offences which the Applicant may have committed previously. Instead, the Tribunal's concern is with the prevention of future potential harm.¹⁷¹

[259] On that basis this review's considerations must encompass more than just the offences. The Tribunal has held that, 'in making that assessment of risk the totality of the evidence was to be considered, not merely the charges'¹⁷²

[260] Thus distinguished, this review by the Tribunal does not violate the Applicant's right under section 34 of the HR Act not to 'be tried...more than once for an offence in relation to which [she] has already been finally committed.'

[261] For the above reasons I find the Applicant's human right not to be tried more than once for an offence, not to be limited.

Punished Again for Offences for Which Already Punished

[262] While the law, legal processes and decisions governing this review do not expressly punish the Applicant, they do appear to punish the Applicant for offences for which she has already been punished. Consequently, the determination of whether a positive notice is to be issued may have the unintended effect of punishing a person

¹⁷⁰ *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489 at [89].

¹⁷¹ *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 [84].

¹⁷² *TNC Chief Executive Officer, and Public Safety Business Agency* [2015] QCAT 489 at [90].

where as in the Applicant's case the decision maker is required to take into account previous convictions.

[263] That the provisions of the WWC Act, as well as the process and decisions of the review undoubtedly have a punitive effect has been recognised by Parliament.

[264] In parliamentary debates of the Working with Children Bill, it was expressly acknowledged that the screening for the purposes of the WWC Act may have the unintended effect of punishing a person in the Applicant's position.

[265] The second reading speech debate offers an explanation for why the WWC Act in some cases imposes additional punishment on those convicted or even acquitted or simply charged with offences by pointing to the objective of the WWC Act - '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.'¹⁷³

[266] Even if the effect is unintended, the law and processes of issuing a negative notice to the Applicant, the lengthy process of review and denial of opportunity to study and work in her chosen vocation, has served to punish the Applicant for offences for which she has already been punished under criminal law.

[267] Although her human right has been limited or interfered with, in s 13(1) the HR Act states—

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.

[268] Consequently, limits on a human right may still be compatible with the human right as long as the limit imposed is reasonable and justifiable.¹⁷⁴

[269] As noted above, in s 13(2) the HR Act sets out a helpful list of criteria to be used in determining whether a limitation on rights is reasonable and justifiable, and consequently compatible with human rights. This includes a consideration of the purpose of the limitation¹⁷⁵ the importance of the human right being limited¹⁷⁶ and whether the limitation is reasonable and least restrictive.¹⁷⁷

[270] 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 WWC Act is to promote and protect the rights, interests and wellbeing of children and young people.¹⁷⁸

[271] The importance of the purpose of this limitation may justify a limitation of the right not to be punished more than once for offence for which they have already been punished by law. However, in order for the limitation to be 'reasonable' the limit

¹⁷³ *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].

¹⁷⁴ *Ibid*, s 8(b).

¹⁷⁵ *Ibid*, s 12(2)(e).

¹⁷⁶ *Ibid*, s 12(2)(f).

¹⁷⁷ *Ibid*, s 12(2)(g).

¹⁷⁸ *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 5.

imposed on a human right must be demonstrably proportionate, needed and least restrictive of the human right not to be punished twice.¹⁷⁹

- [272] In view of the object, purpose and nature of decisions enshrined in the WWC Act and the inherent impossibility of predicting future risk with certainty, it is not surprising that past risks has been seen as indications of future risks and consequently as justifying decisions being made with caution.¹⁸⁰
- [273] However, mere speculative risk may be insufficient, and not able to be justified in terms of compliance with an Applicant's human rights.
- [274] Arguably, the implication is that any limits on the human rights of persons in the Applicant's position imposed pursuant to the WWC Act must be reasonable and justifiable, albeit in the context of the Act's overriding objective to protect the safety and welfare of children.
- [275] Consequently, this Tribunal is obliged to consider the Applicant's human right not to be punished for an offence for which she has already been punished. If the limitation of her human right cannot be avoided, the Tribunal is required to only limit her right to an extent that is reasonable and justifiable. Such compliance with human rights is to be attained according to criteria specified in the HR Act. This includes balancing 'the importance of the purpose of the limitation' with 'the importance of preserving the human right'.¹⁸¹
- [276] I find the Applicant's human right not to be punished more than once, to be limited, but nevertheless to be compatible with the HR Act, as her human right was in all the circumstances limited 'only to the extent that is reasonable and demonstrably justifiable'.¹⁸²

Right to Further Vocational Education

- [277] As the Respondent notes, the Applicant's human right to further vocational education and training¹⁸³ also appears to have been limited. Without a positive notice she is unable to complete her Certificate 3 TAFE course. in Education Support.
- [278] While the screening process established under the WWC Act, whether the Applicant's right to vocational education and training is limited by the issuing of a negative notice will ultimately depend on whether the limitation is just and reasonable.
- [279] Applying the factors listed by s 13 of the HR Act I find that the process and considerations prescribed by the WWC Act are just and reasonable. However I note that an overly cautious approach to the issuing of a positive notice, may well be incompatible with the Applicant's human right.

¹⁷⁹ *Human Rights Act 2019* (Qld), s 13(2).

¹⁸⁰ *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492 at [30] per Philippides J.

¹⁸¹ *Human Rights Act 2019* (Qld), s 13(e)(f)(g).

¹⁸² *Ibid*, s 8.

¹⁸³ *Ibid*, s 36(2).

Right to Work

[280] The Applicant is a single mother with two young children reliant on government support, who is being denied the opportunity to work with children. This appears to impinge on her human right to work. The work in which she seeks to be permitted to work is work in which she is said to be proficient and work in which she is possibly most likely to gain employment.

[281] The HR Act lists a number of key Civil and Political Rights¹⁸⁴ as well as Economic, Social and Cultural Rights.¹⁸⁵ While the HR Act does not list the right to work amongst its 23 fundamental human rights, it states that—

A right or freedom recognised under another law must not be taken to be abrogated or limited simply because the right or freedom it is not included in the Act or is only partly included.

[282] The HR Act lists ‘rights under the International Covenant on Economic, Social and Cultural Rights’ (ICESCR) as an example of ‘another law’.¹⁸⁶

[283] Article 6(1) of the ICESCR recognises

the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

[284] As the ICESCR’s provisions must be taken into account through the interpretation of statutory provisions to the extent possible that is consistent with their purpose in a way that is most compatible with human rights.¹⁸⁷

[285] The ICESCR describes the right as a ‘right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. However, the right to work is implicitly qualified by the requirement that a person possesses the appropriate skills and qualifications to undertake particular work.

[286] For that reason, the right to have the opportunity to undertake particular work cannot be said to be denied simply through reasonable and justifiable regulation of the employment.

[287] The WWC Act establishes and regulates the screening of persons wishing to work with children. On that basis the right to undertake ‘regulated employment’ appears to be a right to be assessed and if deemed suitable to be issued a positive notice.

[288] Rather than being perceived as a statute that limits the Applicant’s right to work, the Act may be said to safeguard the Applicant’s right to undertake work of her choice within the context of the primary object of protecting the safety and best interest of children.

¹⁸⁴ Ibid, Part 2, Division 2.

¹⁸⁵ Ibid, Part 2, Division 3.

¹⁸⁶ Ibid, s 12 Examples of another law.

¹⁸⁷ *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; 183 CLR 273.

[289] The right to work enshrined in Article 6 of the ICESCR is also expressly qualified by article 4 which provides that

the State, may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

[290] I find that that the restrictions of the WWC Act fall within the qualification of the right and are compatible with this human right.

The Right to be Accorded Natural Justice

[291] The Applicant has also expressed her concerns regarding the administrative procedures and what she saw as the unfairness of the protracted review process.

[292] The Tribunal is required to act ‘fairly and according to the substantial merits of the case.’¹⁸⁸ In proceedings, the Tribunal ‘must observe the rules of natural justice.’¹⁸⁹

[293] ‘Natural justice’ is sometimes referred to as procedural fairness or due process. Natural justice includes the right to be treated fairly and applies to a wide range of judicial, quasi judicial and administrative decision-making processes.

[294] At its core, natural justice refers to the right to a fair hearing. A fair hearing generally entails appropriate notice of a hearing, a right to present one’s case, and a decision maker who is impartial, competent and unbiased. It also recognises that a party to proceedings has the right to present their own case, and be provided with a logically probative decision based on all the evidence presented.

[295] The HR Act lists the right to a fair hearing as a human right. Section 31 provides 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.
- (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.

[296] The provisions of the QCAT Act, and the enabling WWC Act, set out many provisions designed to ensure that parties to Tribunal proceedings are accorded natural justice.

[297] In my examination of records of hearings, directions and orders made leading up to the hearing in this matter, notices and extensions have been granted as requested.

¹⁸⁸ *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 28(2).

¹⁸⁹ *Ibid*, s 28(3)(a).

The Applicant has also been provided with all documents to be considered by the Tribunal.

[298] Equally, the Applicant was provided with the opportunity to be legally represented. As the Applicant was not legally represented in the hearing the Tribunal provided the Applicant with some guidance to ensure that she received a fair hearing.

[299] The Applicant has been provided with adequate opportunity to respond to submissions and to present her own case

[300] Transparency of proceedings, or the right to a public hearing is also a part of natural justice.

Right to Fair and Public Hearing

[301] That the hearing in this case was closed, and that I propose to make an order to prevent the disclosure of the identities of children involved in the matter, parties to the proceedings, witnesses and third parties, appear to be incompatible with the Applicant's human rights.

[302] The HR Act clearly states that a party to civil proceedings has a right to have their proceeding decided 'after a fair and *public hearing*'.¹⁹⁰ It also states that 'all judgments and decisions made by a court or tribunal in a proceeding must be publicly available'.¹⁹¹

[303] Section 31 provides 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.
- (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.

[304] 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 by the foreshadowed non publication order.

[305] Limitations on the rights to public hearings and published decisions may on occasion also be found incompatible with the Applicant's right to privacy and reputation¹⁹²

[306] I turn to consider each of these elements of the right to a fair trial.

¹⁹⁰ Ibid, s 31(1).

¹⁹¹ Ibid, s 31(3).

¹⁹² Ibid, s 25.

(a) Closed Hearing

[307] Section 90(1) of the QCAT Act states that ‘Unless an enabling Act...provides otherwise, a hearing of a proceeding must be held in public’.

[308] The enabling Act in this case is the WWC 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.’

[309] 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.¹⁹³

[310] Such exceptions are recognised in Section 31(2) of the HR Act, which provides—

...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 the interests of justice.

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

(a) Limits on Publication

[312] As set out above, the section 31(3) of the HR Act requires all tribunal decisions to be ‘publicly available’.

[313] However, s 66(1)(c) of the QCAT Act permits the Tribunal to make a non publication order,

- (1) prohibiting the publication of...
 - (c) information that may enable a person who has appeared before the Tribunal, or is affected by a proceeding, to be identified.

[314] The Tribunal may only make such an order if it considers the order necessary for a number of specific reasons¹⁹⁴ including ‘to avoid the publication of confidential

¹⁹³ *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 90 (2).

¹⁹⁴ *Ibid*, s 66(2).

information or information whose publication would be contrary to the public interest'¹⁹⁵, and 'for any other reason in the interests of justice'.¹⁹⁶

[315] As the proceedings concern child-related employment under the WWC Act, the interests of justice require that nothing be published that could identify the Applicant's children who are clearly 'affected by the proceeding'.¹⁹⁷

[316] I also consider it necessary to prohibit the publication of the names or anything otherwise identifying the Applicant, witnesses or any third party to these proceedings. I consider this necessary, as the publication of their names not only may, but in the circumstances is likely to unintentionally lead to not only the identification of the children, but also to the disclosure of confidential information. Such disclosure would be likely to cause the Applicant's human right to privacy and not to have her reputation unlawfully attacked.¹⁹⁸and arbitrarily interfered with.¹⁹⁹

[317] Both Section 66(1)(c) of the QCAT Act, permitting non publication orders and the actions of this Tribunal in issuing directions regarding non publication, clearly limit the Applicant's right to a fair hearing, enshrined in s 31(3) of the Human Rights Act. However, I also find that the limit imposed is reasonable and justifiable for the purposes of s 13 of the Human Rights Act, and therefore consistent with the Applicant's right.

[318] In this respect 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',²⁰⁰ 'the importance of preserving the human right, taking into account the nature and extent of the limitation on the right'²⁰¹, 'the balance between the [last two factors]'²⁰² and 'whether there are any less restrictive and reasonably available ways to achieve the purpose'.²⁰³

[319] 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, any child, witness or third party in these proceedings.

Findings Regarding Compatibility with Human Rights

[320] The Respondent submits that a decision that the Applicant's case is an exceptional case will be compatible with human rights—

because, despite any limit the decision places on the Applicant's human rights, the decision will be justified by the factors outlined under section 13 of the HR Act... inter alia because it will have the proper purpose of promoting and

¹⁹⁵ Ibid, s 66(2)(d).

¹⁹⁶ Ibid, s 66(e).

¹⁹⁷ Ibid, s 66(1)(c).

¹⁹⁸ *Human Rights Act 2019* (Qld), s 25 (b).

¹⁹⁹ Ibid, s 25 (a).

²⁰⁰ *Human Rights Act 2019* (Qld), s 13(2)(e).

²⁰¹ Ibid, s 13(2)(f).

²⁰² Ibid, s 13(2)(g).

²⁰³ Ibid, s 13(2)(d).

protecting the rights interests and well being of children and young people which is itself a human right.²⁰⁴

[321] As a public entity the Tribunal is required to identify ‘the human rights Parliament specifically seeks to protect and promote’²⁰⁵ and to act and make decisions in a way compatible with human rights’.²⁰⁶ 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’.²⁰⁷

[322] I have identified and considered the human rights of children with whom the Applicant may work and of the Applicant, and other parties to the proceedings that parliament intends to protect by the HR Act, the WWC Act and the QCAT Act.

[323] For reasons set out above I have found the Applicant’s human rights to have been limited by the laws governing the screening and review in accordance with the WWC Act. In determining whether any such limitations are nevertheless still consistent with Applicant’s human rights, I considered whether such limitations were reasonable and justifiable.²⁰⁸ In doing so, I considered a number of factors that the HR Act states ‘may be relevant.’²⁰⁹

[324] I accept the Respondent’s submission that

any limitation on the Applicant’s human right is consistent with the object, purpose and paramount principle of the WWC Act, that is the welfare and best interests of children are paramount.⁷⁰

[325] While noting the paramount consideration of the WWC Act and its recognised limitations on the competing rights of the Applicant I consider the limitations of the law and procedure relating to the application for a positive notice and the review of the Respondent to be reasonable and justifiable limitations of the Applicant’s human rights.

Overall Conclusions and Findings

[326] In this review the Tribunal must decide whether the Applicant’s case is an exceptional case in which it would not be in the best interests of children for her to be issued with a ‘working with children clearance’

[327] As the Court of Appeal held in *Maher*,²¹⁰ in order to confirm a decision that a case is exceptional, the Tribunal is,

required to be satisfied on the balance of probabilities, bearing in mind the gravity of the consequences involved, that there was an exceptional case, in

²⁰⁴ Respondent’s Outline of Submissions, 11 May 2021, para 69, referring to *Human Rights Act 2019* (Qld), s 13(2)(b).

²⁰⁵ *Human Rights Act 2019* (Qld), s 4(a).

²⁰⁶ *Ibid*, s 4(b).

²⁰⁷ *Ibid*, s 48(1).

²⁰⁸ *Ibid*, s 8(2).

²⁰⁹ *Ibid*, s 13(2).

²¹⁰ *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 492.

which it would harm the best interest of children for a positive notice to be issued.²¹¹

[328] I am also satisfied that in reaching its decision the Tribunal has—

- (a) Considered all the evidence before it in light of
- (i) The WWC Act's objects and principles
 - (ii) The 'principle that the welfare and best interests of a child are paramount' under which a 'child-related employment decision is to be reviewed.'²¹²
 - (iii) The statutory factors listed in s 226(2), to which the Tribunal, as decision maker, must have regard, including any other factors which the Tribunal considers reasonably relevant
 - (iv) The requirement that the Tribunal---
 - give a proper consideration to human rights relevant to the decision,²¹³
 - act and make decisions in a way compatible with human rights,²¹⁴
 - interpret statutory provisions interpreted 'to the extent that is consistent with their purpose, in a way compatible with human rights'.²¹⁵
 - determined whether any identified limits on human rights are reasonable and justifiable in accordance with s 13 of the Human Rights.

[329] I note that the paramount consideration of the WWC Act is appropriately said to call for a precautionary approach to be taken in child related employment matters. In the words of Philippides J, 'the Tribunal was required to be satisfied on the balance of probabilities, bearing in mind the gravity of the consequences involved, that there was an exceptional case'.²¹⁶ This, the Respondent submits requires a finding that this case is an exceptional case such that it would not be in the best interest of children and young people for the Applicant to be issued with a working with children clearance and a blue card.²¹⁷

[330] However, in this case I have failed to identify any factor or factors that would satisfy me that it would not be in the interest of children to issue a blue card to the Applicant.

[331] Consequently, I make the following finding and decision.

²¹¹ Ibid, at [30].

²¹² *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 360.

²¹³ *Human Rights Act 2019* (Qld), s 58(1)(b).

²¹⁴ Ibid, s 4(b).

²¹⁵ *Human Rights Act 2019* (Qld), s 4(f).

²¹⁶ *Commissioner for Children and Young People and Child Guardian v Maher and Anor* [2004] QCA 49 at [30].

²¹⁷ Respondent's Outline of Submissions, 11 May 2021, para 34.

[332] I am not satisfied that the Applicant's case is, in terms of s 221(2) of the WWC Act, is 'an exceptional case in which it would be in the interest of children for the chief executive to issue a positive notice'.

Decisions

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, any child, witness, or third party in these proceedings.