QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333
PARTIES:	**LM** (applicant) **v** **DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
APPLICATION NO:	CML484-20
MATTER TYPE:	Children's matters
DELIVERED ON:	5 September 2022
HEARING DATE:	6 and 7 December 2021
HEARD AT:	Cairns
DECISION OF:	Member Stepniak
ORDERS:	**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 confirmed.**
CATCHWORDS:	CHILDREN'S MATTER – BLUE CARD – where convicted of offence – where offence neither serious nor disqualifying – where issued a negative notice – where application to remove negative notice refused – where applied for review of decision – whether an 'exceptional case' HUMAN RIGHTS ACT – BLUE CARD SCREENING – where welfare and best interests of children are paramount consideration – where decision will cause hardship and limit applicant's human rights — whether any limitation of applicant's rights is compatible with human rights — whether the case is an 'exceptional case' *International Covenant on Economic, Social and Cultural*

KEY LEGISLATION:

Rights Articles 4, 6.

Child Protection Act 1999 (Qld) s 122.
Criminal Code Act 1899 (Qld) ss 280, 335, 339.
Evidence Act 1977 (Qld) s 93A.
Human Rights Act 2019 (Qld) ss 4, 8, 13, 23, 25, 26, 28, 31, 36, 48, 58.
Queensland Civil and Administrative Tribunal Act 2009 (Qld), ss 17, 19, 20, 21, 24, 28, 66, 90.
Working with Children (Risk Management and Screening) Act 2000 (Qld), ss 5, 6, 15, 16, 220, 221, 226, 318, 319, 335, 337, 338, 353, 354, 360, 361; Chapter 8, Part 4, Division 9; Chapter 9 Part 1, Schedule 1, s 11.; Schedule 2; Schedule 4; Schedule 7.

KEY CASES:

Briginshaw v Briginshaw & Anor [1938] HCA 34
Chief Executive Officer, Public Safety Business Agency v Masri [2016] QCATA 86
Chief Executive Officer, Department for Child Protection v Scott (No 2) 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 Lister (No 2) [2011] QCATA 87
Commissioner for Children and Young People and Child Guardian v Maher & Anor [2004] QCA 492
Director-General, Department of Justice and Attorney-General v CMH [2021] QCATA 6
Director-General Department of Justice and Attorney General v MAP [2022] QCATA
Commissioner for Children and Young People and Child Guardian v Storrs [2011] QCATA 28.
Director-General, Department of Justice and Attorney-General v PML [2021] QCATA 51
HF [2020] QCAT 482
JF [2020] QCAT 419
Kent v Wilson [2000] VSC 98.
LCA v Director-General, Department of Justice and Attorney-General [2017] QCAT 244
Luong v Director-General, Department of Justice and Attorney-General [2019] QCAT 302
McKee v McKee [1951] AC 352
PJB v Melbourne Health and Anor (Patrick's case) [2011] VCS 327
RA and RJ [2018] QCAT 95
Re Imperial Chemical Industries Ltd's Patent Extension Petitions [1983] VR 1.
Re TAA [2006] QCST 11

RPG v Chief Executive Officer, Public Safety Business Agency [2016] QCAT 331
TNC v Chief Executive, Public Safety Business Agency [2015] QCAT 489

APPEARANCES & REPRESENTATION:

Applicant:	Mr D McKinstry, WGC Lawyers.
Respondent:	Ms C Davis, representing the Director-General, Department of Justice and Attorney-General

REASONS FOR DECISION

Background

[1] LM ("the Applicant") is a 48-year-old woman who identifies as an Aboriginal and Torres Strait Islander. In the course of her 13-years of employment in the health sector the Applicant devoted herself to Indigenous health care issues in roles such as Advanced Indigenous Health Worker with the Queensland Health and the Torres and Cape Hospital and Health Service.

[2] When her blue card was suspended in 2018, she was moved to an administrative position. In November 2021 Queensland Health terminated her employment ostensibly on the grounds that even her employment in an administrative position was not viable without a blue card.[1]

[3] The Applicant has also been a foster carer. She and her partner, DR, became approved foster carers in October 2011[2] and cared for 'many foster children over a period of 8 years, caring for up to eight children at one time.'[3] The Applicant's most recent 2-year approval as a foster parent was on 16 February 2018.[4]

[4] At the time of the hearing the Applicant had almost completed her first year of a Bachelor of Nursing degree, but advised that she was unable to continue her studies as a blue card is required to undertake the clinical placement requirement of each year's study.[5]

[5] The Applicant had been issued a blue card for her child related employment in 2004, 2009, 2011 and 2014, as required by the *Working with Children Act 2000* (Qld)

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1 Letter from the Torres and Cape Hospital and Health Service dated 19 November 2021. Received at hearing on 6 December 2021 as Exhibit 2.

2 Certificate of Approval dated 18 October 2011, Documents produced on 30 July 2021 by the Department of Children, Youth Justice and Multicultural Affairs in response to the Tribunal's notice to produce dated 5 July 2021, ICMS10 page 8.

3 The Applicant's 'Life Story', at para 27, and Applicant's Submissions, dated 6 December 2021, at para 13.

4 Exhibit to Applicant's affidavit dated 17 November 2021, LM-03, at p 21.

5 Applicant's affidavit dated 17 November 2021 paras 18-21.

("WWC Act"). Her last working with children clearance, positive notice and blue card were issued by Blue Card Services on 29 January 2016.[6]

[6] In 2018, the Queensland Police Service ("QPS") notified Blue Card Services that the applicant's police information had changed in that her criminal history disclosed that she had been charged with assault occasioning bodily harm on 17 July 2018.[7] The Applicant was invited to make submissions as to why a negative notice should not be issued.

[7] On 13 November 2018, having considered all the evidence including the Applicant's submissions, her positive notice and blue card were cancelled, and she was issued a negative notice. Blue Card Services provided reasons for the decision to issue the negative notice.[8]

[8] On 11 December 2019, the Applicant lodged an application to cancel the negative notice.[9]

[9] On 22 April 2020 BCS wrote to the Applicant advising that her updated police information raised concerns about her eligibility to hold a blue card.[10] A national police check disclosed that on 5 December 2019 the Applicant had been convicted of Common Assault committed on 17 July 2018.

[10] The Applicant was provided an opportunity to make submissions about why her application to cancel the negative notice should not be refused.

[11] The application to cancel the negative notice was refused on 20 October 2020.[11] Accompanying the notice of outcome were reasons for refusing to cancel the negative notice.[12]

[12] On 18 November 2020, the Applicant applied to have the Respondent's decision that the Applicant's case was an 'exceptional case' in which it would not be in the best interests of children for the Applicant to be issued a working with children clearance and blue card, reviewed by the Queensland Civil and Administrative Tribunal. ('the Tribunal').

[13] The review application was heard by the Tribunal on 6 and 7 December 2021.

[14] The Respondent and Applicant filed written submissions on 6 December 2021 and as directed, the Applicant filed final/supplementary submission by 31 January 2022. The Respondent had been directed to file final submissions by 14 February 2022. However, the effect of extreme weather conditions led the Tribunal to agree to extend this due date. The Respondent's final submissions were filed on 10 March 2022.

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6 Respondent's Outline of Submissions, 6 December 2021, at para 1.

7 BCS-2, (BCS materials produced by Blue Card Services in accordance with *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 21(2), and the Tribunal's directions dated 1 February 2021.)

8 BCS–1-14.

9 BCS–36-37.

10 BCS–48.

11 BCS–97.

12 BCS–15-35.

Relevant Law

[15] The Tribunal's review of this 'reviewable decision' is governed by not only the WWC Act under which the decision under review was made but also by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act") and the *Human Rights Act 2019* (Qld) ("the HR Act")

The Tribunal's Power to Review Decision

[16] The WWC Act, under which the Respondent's decision was made, empowers the Tribunal to review the Act's 'reviewable decisions.'[13]

[17] Section 353 of the WWC Act lists the Act's reviewable decisions. The list includes—

> (a) a decision of the chief executive as to whether or not there is an exceptional case for the person if, because of the decision, the chief executive— ….
>
> (ii) refused to cancel a negative notice issued to the person.'[14]

[18] This was precisely the reason the Respondent gave for refusing to cancel the negative notice issued to the Applicant.[15]

[19] As outlined below, the WWC Act provides that in a case such as the Applicant's, where the decision maker is aware of a conviction for an offence that for the purposes of the WWC Act constitutes neither a serious or disqualifying offence,[16] the decision maker, '*must issue a working with children clearance.*'[17]

[20] However, if the decision-maker is, 'satisfied that the case is an exceptional case in which it would not harm the best interest of children for the respondent to issue a working with children clearance,' the Respondent, or on review the Tribunal, '*must issue a negative notice.*'[18]

[21] As the Respondent was satisfied that the case was an exceptional case, the WWC Act required the Respondent to issue a negative notice to the Applicant.[19]

[22] The Tribunal's role in this review is to determine whether, it is 'satisfied that the Applicant's case is an exceptional case in which it would not be in the best interests of children for the chief executive to issue a working with children clearance.'[20]

The Principles Governing the Review

[23] The principles under which the WWC Act is to be administered, as set out in section 6 of the WWC Act, state that –

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13 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 354; *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* s 17.

14 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 353(a)(ii).

15 Reasons for Refusing to Cancel a Negative Notice, 20 October 2020, para 8, BCS–31.

16 Serious Offences are defined in *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 15; and listed in Schedule 2. Disqualifying offences are defined in *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 16 and listed in schedule 4.

17 Ibid, s 221 (1).

18 Ibid, s 221(2).

19 Ibid, s 221(1).

20 Ibid, s 221(2).

(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.

[24] In addition, and specifically directed at, 'QCAT proceedings about child-related employment review,'[21] the WWC Act states that, 'A child-related employment decision is to be reviewed under the principle that the welfare and best interests of a child are paramount.'[22]

The Nature of the Review

[25] The QCAT Act provides that in this review the Tribunal has 'all the functions of the decision maker for the decision being reviewed'[23] and 'undertakes a fresh hearing on the merits.'[24] Consequently, this review is not an appeal against the Respondent's decision but rather a review of the earlier decision by way of a fresh hearing.

[26] One significance of this review being a 'fresh hearing on the merits' is that the Tribunal considers not only the evidence that was before the decision maker when the original decision was made, but also any additional or more recent evidence relevant to the Tribunal's review.[25]

[27] Underlining the relationship between this review and the Respondent's decision, the QCAT Act requires the Respondent as, 'the decision-maker for the reviewable decision' to, 'help the tribunal so that it can make its decision on the review,'[26] and states that the purpose of this review is to 'produce the correct and preferable decisions.'[27]

[28] Just as sections 220 and 221 of the WWC Act restricted the original decision maker's decision options,[28] so they limit the decisions the Tribunal is able to make. Consequently, the Tribunal lacks the jurisdiction to issue a conditional blue card,[29] or amend the Respondent's decision. What the Tribunal can do is, to confirm the Respondent's decision that the case is an exceptional case (obliging the chief executive under the Act to issue a negative notice), or set aside the Respondent's decision and substitute its own decision that the case is not an exceptional case, [30] in which case the Act would require the chief executive to issue the Applicant with a working with children clearance.

[29] The Tribunal also recognises that pursuant to section 24(1)(c) of the QCAT Act, on rare occasions, it is also able to, 'set aside the decision to issue a negative notice and send the matter back to the Director-General to reconsider the decision, together with any directions QCAT considers appropriate.' [31] However, even then, the

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21 *Working with Children (Risk Management and Screening) Act 2000*, Chapter 9, Part 1.
22 Ibid, s 360.
23 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19(c).
24 Ibid, s 20(2).
25 Ibid, s 21(3).
26 Ibid, s 21(1).
27 Ibid, s 20(1).
28 *Working with Children (Risk Management and Screening) Act 2000,* s 220.
29 *RPG v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 331, [27].
30 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24(1).
31 QCAT Practice Direction No 5 of 2022, para 4.

restrictions imposed by the WWC Act would still require the Applicant to issued either an unqualified working with children clearance or a negative notice.

The Onus and Standard of Proof

[30] As it is for the Tribunal to determine whether the case is an exceptional case, neither party bears the onus of proof of establishing whether the case is an exceptional case.[32]

[31] The Tribunal determines whether the case is exceptional by considering all available evidence and reaches a decision 'on the balance of probabilities,' while bearing in mind the gravity of the consequences involved,'[33]or 'the nature of the reviewable decision.'[34]

[32] While not bound by rules of evidence,[35] the Tribunal must observe the rules of natural justice.[36] Nevertheless, the Tribunal is required to provide reasons for its decision that are evidence and consequently must give varying and appropriate weight to the evidence before it.

The Focus of the Review

[33] The Tribunal's review is focused not on the Applicant's criminal guilt or innocence, or other liability, but rather on whether the issuing of a blue card to the Applicant would be in the best interests of children.

[34] The Tribunal is careful not to draw inferences from the findings of earlier proceedings against the Applicant. The outcome of criminal proceedings, may for example be attributable to evidence that would be admissible and relevant to tribunal reviews but excluded from criminal proceedings. Outcomes may also reflect the more onerous level of proof in criminal proceedings, or to the dropping or reduction in charges in recognition of pleas of guilty.

[35] The sole question for the Tribunal is whether the Applicant's case is an exceptional case in that it would not be in the best interests of children for her to be issued a blue card. For that reason, the Tribunal does not determine the existence of an exceptional case by weighing up the benefits against the risks of the Applicant being permitted to work with children.[37] The identification of a risk such as would make an Applicant's employment with children to not be in their best interests renders any benefits to children of that applicant working with them irrelevant to the question at hand.[38] The question is not whether on balance the Applicant is a person who deserves to be permitted to work with children.

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32 *Commissioner for Children and Young People and Child Guardian v Storrs* [2011] QCATA 28.

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

34 *Chief Executive Officer, Public Safety Business Agency v Masri* [2016] QCATA 86.

35 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(b).

36 Ibid, s 28(3)(a).

37 *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492 at [7].

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

Human Rights Act

[36] The HR Act is applicable to the Tribunal's review of this case, because in this review the Tribunal is considered to be a 'public entity' for the purposes of the HR Act.[39]

[37] Section 58 of the HR Act states—

> (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.

[38] The HR Act also requires the Tribunal to interpret legislation, 'in a way compatible with human rights.'[40]

[39] To give proper consideration to human rights obliges the Tribunal to '[identify] the human rights that may be affected by the decision; and '[to consider] whether the decision would be compatible with human rights.'[41]

[40] For a decision to be compatible with human rights it must either not limit human rights, or if it does, then no more that is reasonable and justifiable.[42]

What Makes a Case 'Exceptional'?

[41] In determining whether the case is 'exceptional', it is important to determine what the legislature intended this term to mean in this context.

[42] As the WWC Act does not define the meaning of 'exceptional case', what constitutes an exceptional case must be determined by giving the term its ordinary meaning in the context of the Act, or more specifically in the context of 'the intent and purpose of the legislation and the interests of the people whom it is designed to protect: children'[43]

[43] The stated object of the WWC Act is,

> to promote and protect the rights, interests and wellbeing of children and young people in Queensland through a scheme requiring—
>
> (b) the screening of persons employed in particular employment or carrying on particular businesses.[44]

[44] The principles under which the Act is to be administered, are –

> (a) the welfare and best interests of a child are paramount;

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

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

41 Ibid, s 58(5).

42 Ibid, s 8, s 13.

43 *Kent v Wilson* [2000] VSC 98 at [22] per Hedigan J, 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*, s 5(b).

(b) every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.[45]

[45] The ordinary meaning of paramount is 'above others in rank or authority superior in power or jurisdiction, chief in importance or preeminent.'[46] Accordingly, courts have held the welfare and best interests of a child to be 'the paramount consideration 'to which all others yield.'[47]

[46] What constitutes an exceptional case clearly needs to be determined on the unique facts of each case, or as a 'question of fact and degree in the whole of the circumstances of each particular case.'[48] It must also be considered in, 'the context of the legislation which contains them, the intent and purpose of that legislation, and the interests of the persons whom it is here, quite obviously designed to protect: children.'[49]

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

[48] While such determinations have also been described as 'matters of discretion,'[51] the decision maker's discretion is not unfettered. Apart from being expected to review the decision 'under the principle that the welfare and best interest of a child are paramount,'[52] the legislation requires the Tribunal to determine whether the Applicant's case is an 'exceptional case', by—

(a) Having regard to the factors listed in section 226(2) WWC Act.

(b) Giving proper consideration to human rights relevant to the decision;[53] including whether the decision would be compatible with human rights. [54]

[49] It is also appropriate for the Tribunal to consider factors that are not specifically required to be considered by legislation but which are relevant to the decision.[55]

[50] I turn to consider the factors that the WWC Act lists as mandatory considerations in accord with which to determine whether a particular case is exceptional.

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45 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 6.

46 Macquarie Dictionary (8th ed).

47 *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492 per McPherson JA citing Viscount Simonds in *McKee v McKee* [1951] AC 352, 365.

48 *LCA v Director-General, Department of Justice and Attorney-General* [2017] QCAT 244, citing *Re TAA* [2006] QCST 11 at [22].

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

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

51 R*e 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, per President at [33].

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

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

54 Ibid, s 58(1)(a).

55 Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303 at [33]; *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492 at [40].

Mandatory Considerations

[51] As the Tribunal is, 'aware that the [Applicant] has been convicted of, [and] charged with, an offence' it is required to have regard to the factors listed in section 226(2) of the WWC Act, which I propose to address in turn.

First: *Whether the offence was a conviction or a charge.*[56]

[52] On 5 December 2019, in the local Magistrates Court, the Applicant pleaded guilty to having committed 'common assault' on 17 July 2018. The Magistrate placed the Applicant on a recognisance of $500 to be of good behaviour for six months, and directed that no conviction be recorded.[57]

[53] For the purposes of the WWC Act, a 'conviction means 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.'[58] Consequently, for the purposes of the WWC Act, the Applicant's offence is a *conviction* even though the Applicant pleaded guilty and the Magistrate exercised his discretion to order that no conviction be recorded.[59]

[54] In addition to being convicted for common assault, the Applicant was initially charged with another offence. On 24 July 2018, she was charged with "assault occasioning actual bodily harm."[60]

[55] While it is the Applicant's conviction for common assault that is the 'offence' that is central to this review, that she was also charged with assault occasioning bodily harm is also to be considered. However, in being required to have regard to whether an offence is a conviction or a charge, the Tribunal is conscious of the need to take into account evidentiary and other distinctions between a conviction and a charge.

[56] Nevertheless, a consideration of the charge that was later withdrawn serves to highlight the distinctions and similarities between the two offences and why the Applicant's initial charge was not dealt with by the court.

[57] The earlier charge took into account the injuries to D's leg and alleged them to have been caused the by Applicant striking D with a wooden spoon and an electrical cord. Both D and R were consistently clear about D using both the spoon and cord. The evidence of other children who alleged being physically disciplined by the Applicant was that the Applicant had either used a hand or a wooden spoon. One child stated that any marks left would disappear by the following morning. The Applicant has consistently confessed to using the spoon to punish D, while denying to having used a cord.

[58] The Applicant suggested that there was an alternative explanation for the marks on D's leg, namely that on the day following the assault by the Applicant D was involved in a fight with another child who had been bullying her at school. Evidence as to whether this occurred is limited, and in my view insufficient to on balance establish a viable alternative explanation.

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56 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2)(a)(i).
57 Ibid.
58 *Working with Children (Risk Management and Screening) Act 2000*, Schedule 7.
59 Transcript of proceedings, BCS–103 at 33.
60 *Criminal Code Act 1899* (Qld), s 339(1); BCS-41.

[59] The evidence clearly leaves a doubt as to whether the Applicant struck D with both a wooden spoon and an electrical cord, and whether the injuries to D's leg were caused by the Applicant's disciplining of D.

[60] It is perhaps not surprising that the charge was reduced to one that did not require proof beyond reasonable doubt that the Applicant's assault caused actual bodily harm. However, when the evidence is assessed on the balance of probabilities, I am satisfied that the injuries noted on the day following the assault were caused by the Applicant and in view of them being found to be consistent with having been caused by a cord.

[61] My conclusion, while relevant to the severity of the assault, is not essential to establishing what the Applicant has conceded, that she struck D a number of times with a wooden spoon.

Second: *Whether the offence is a 'serious offence, and if it is, whether it is a disqualifying offence'.*[61]

[62] In classifying offences as 'disqualifying', 'serious', 'other offences' and 'alleged offences,' the WWC Act specifies how the Tribunal is to regard offences falling into a particular category, when determining whether it would be in the best interests of children for a working with children clearance to be issued.[62]

[63] The Applicant's offence of Common Assault[63] does not constitute a 'serious offence'[64] or a 'disqualifying offence'[65] for the purposes of the WWC Act. The Applicant's charge of assault occasioning bodily harm,[66] while carrying a significantly higher penalty,[67] is also not classified as either a serious or disqualifying offence.

[64] Consequently, for the purposes of determining whether the Applicant's case is *exceptional,* the Applicant falls into the category of cases where, 'the chief executive is aware of a conviction of the person for an offence other than a serious offence.'[68]

[65] Falling into this category of offences means that, 'the chief executive must issue a working with children clearance to [the Applicant]'[69]…[unless] 'the chief executive is satisfied it is an exceptional case in which it would not be in the best interests of children'[70] for the working with children clearance to be issued.

Third: *When the offence was committed.*[71]

[66] The Applicant pleaded guilty to a common assault committed on 17 July 2018.

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61 *Working with Children (Risk Management and Screening) Act 2000*, s 226(2)(a)(ii).
62 Ibid, Chapter 8 Part 4, Division 9 in general.
63 *Criminal Code Act 1899* (Qld), s 335.
64 *Working with Children (Risk Management and Screening) Act 2000*, s 15; schedule 2.
65 Ibid, s 16; schedule 4.
66 *Criminal Code Act 1899* (Qld), s 339(1).
67 Compare *Criminal Code Act 1899* (Qld), s 335 and s 339(1).
68 Ibid, s 221(1)(c).
69 Ibid, s 221(1).
70 Ibid, s 221(2).
71 Ibid, s 226(2)(a)(iii).

[67] A consideration of *when* an offence is committed has a distinct and significant role to play in determining whether a case is an *exceptional case*. Having regard to, 'when the offence was committed or is alleged to have been committed'[72] may permit a decision maker to draw inferences as to the relevance and significance of the other prescribed statutory considerations. It may, for example, reveal a pattern of behaviour, unique circumstances, yet unresolved issues or other factors relevant to the determination of whether the case is an exceptional case. In tandem with other considerations the Tribunal may determine that a past offence is highly significant or alternatively of little, if any, significance.

[68] However, each offender and the nature and circumstances of their offence must be assessed individually to determine the specific relevance of the timing of their offences.

Recency

[69] In the written reasons for refusing to cancel the negative notice, the Respondent described the Applicant's offence as occurring 'recently' and stated that, 'The recency of the applicant's violent offending constitutes a risk factor in my assessment.'[73]

[70] This view was reiterated in the Respondent's submissions dated 6 December 2021–

> the recency of the Applicant's offending supports a finding that 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 blue card.[74]

[71] The Applicant was charged with "assault occasioning bodily harm" and pleaded guilty to the lesser charge of "common assault". Particularly as the victim was an 8-year-old child in her foster care, the Applicant's continued engagement in child related employment could not at the time be considered to be in the best interest of children and consequently the Respondent found the Applicant's case to be an exceptional case.

[72] Consequently, there is a need to ascertain whether in the period since her offending on 17 July 2017 the Applicant has had time to distance herself from the offence and from any other factors that caused her behaviour at the time of the offence to be assessed being not in the best interests of children. Whether the Applicant has so distanced herself, I consider to be a decisive issue.

[73] Evidence of the Applicant's current understanding and insight into her offending and related behaviours and the detrimental impact of her assault and other actions on the welfare of children must be examined in order for the Tribunal to determine whether in the course of the four years that have elapsed since the offending, the Applicant has attained sufficient departure from views and behaviours that were found to constitute a risk to the welfare of children at the time of the offence.

Insight and Understanding

[74] Whether or not the Applicant has acquired insight into the harm caused by her action and in particular their likely effect on children is particularly significant as it has

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

73 Respondent's Reasons for Refusing to Cancel a Negative Notice, 20 October 2020, para 6.3 BCS–30.

74 Respondent's Outline of Submissions 6 December 2021, para 39.

been suggested that 'A person aware of the consequences of his actions on others is less likely to re-offend than a person who has no insight into the effect of his actions on others'[75]

[75] Determining any continuing or remaining relevance of the Applicant's July 2018 offence, calls specifically for an examination of her current attitudes towards and resort to physical punishment, as well as her insight and understanding of the impact of her actions on children, what caused her to commit the offence and what she needs to do to avoid committing similar offences.

[76] The Applicant's oral and written statements reveal some remorse, regret and insight into her actions and the impact of her actions on others. However, the significance of such statements appears to be largely undermined by most of the Applicant's evidence, which defends her actions, denies any adverse impact on children and regrets the impact of the assault on her life. The evidence also discloses her lack of understanding or unwillingness to accept standards of care applicable to those working with children and in particular regarding appropriate disciplining of children in foster care.

[77] It would appear that the Applicant's acquisition of required insight and understanding continues to be hindered by her preoccupation with minimising her responsibility and culpability. When questioned about her actions, and even when admitting fault, the Applicant has been observed to almost invariably qualify her role by also attributing or deflecting responsibility to, for example, inadequate training or support by the Department.[76] This includes the Applicant's inclination to raise and emphasise 8-year-old D's challenging behaviour[77] as an explanation for the assault.

[78] The Applicant also appears to still not understand why her assault conviction and related evidence led to her loss of blue card. She has trivialised the actions that constituted her offence,[78] and challenged any suggestions that her resort to physical discipline had any significant impact on the wellbeing of the children.[79] At most, she has acknowledged that smacking children 'may have had a negative impact on the children.'[80] However, even this concession appears to relate to those who use excessive force.

[79] The Applicant continues to question her conviction by minimising her actions.[81] She does so by emphasising that the court found her actions to be a one off and out of character, and by asserting that she was 'charged but not convicted of the assault.[82] While she pleaded guilty to common assault, she disputes some of the facts set out in the police court brief[83] and sentencing schedule,[84] such as her assault leaving any visible marks

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75 *Re TAA* [2006] QCST 11 at para [97].
76 Materials produced by Blue Card Services BCS–92.
77 Ibid.
78 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 40 (reference to 'This one mistake') and page 44 (reference to 'just one stupid thing')
79 BCS–94 reference to 'one second smack'.
80 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 86.
81 Ibid.
82 BCS-93
83 Materials produced by the Queensland Police Service, 1–3 to 1–5.
84 Ibid, 1–7 to 1–8.

[80] The Applicant's insistence that her offence was a one off out of character incident and that its relevance to her suitability for child related employment was exaggerated, appears to have left her unmotivated to distance herself from factors that led to her loss of blue card and foster carer approval.

[81] I agree with the Respondent's submissions that the Applicant's attempt to downplay her offence is inconsistent with accepting responsibility for those actions and with insight into the gravity of her behaviour.[85]

[82] Despite the time that has passed since her offending, the Applicant's focus appears to remain fixed largely on the impact of her actions on herself. However, this review is not about whether the Applicant is a good person, was rightfully convicted of a crime, should be an approved carer, should be permitted to complete her studies or whether she is a valued member of the community. Instead, it is solely about whether this is an exceptional case, in that it would not be in the best interests of children for the Applicant to be issued a blue card.

One-off and Out of Character

[83] In her references to the offence the Applicant continues to maintain that her actions were a one-off and an out of character aberration. She does so in spite of evidence to the contrary including her own admissions. Even though she has admitted to striking children in her care with an open hand,[86] she continues to maintain that the offence was her only resort to physical disciplining. When asked to explain her admissions, the Applicant says that she is unable to recall why she made such statements.

[84] On several occasions during her years as a foster carer, officers of the Department of Child Safety found the Applicant responsible for substantiated hurt to children,[87] yet she remains adamant that she caused no physical or emotional harm to 'any other children' in her care.[88] I find that the evidence of a number of foster care children and Child Safety officers outweighs the inconsistent denials of the Applicant.

[85] When her written and oral statements are viewed together, the Applicant's views and admissions appear to disclose that she considers corporal punishment of children to be appropriate as long as the children are not injured and only an open hand is used. It also appears that the Applicant considers it appropriate for children as young as 6 and 8 to be intimidated, demeaned and threatened by being referred to in derogatory terms, by deriding their family members, and by being reminded that their disciplining could be worse and they could be hit with a chord such as the one she shows them.[89]

[86] The Applicant qualifies her actions by emphasising the excessive stress she was under at the time of the offence and the particularly trying behaviour of the eight-year-old D. While these circumstances could, as the Applicant contends, provide an explanation of why the assault occurred, they also serve to highlight that the Applicant's employment in stress prone child related employment may not be in the

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85 Applicant's Submissions, dated 6 December 2021, page 19.
86 Applicant's letter dated 26 July 2018, ICMS09 page 3.
87 BCS–46-47.
88 Applicant's affidavit dated 17 November 2021 para 52.
89 Ibid, para 38, 'What led up to Incident', BCS–59.

best interests of children. As a Child Safety Officer points out, stress is never an excuse[90]

[87] The Applicant acknowledges that she cannot care for foster children while dealing with significant outside stresses at the same time. For that reason, she has advised the Tribunal that she recognises that she should not resume foster caring and only seeks to regain her blue card so that she can complete her studies and pursue a career in nursing.[91]

Passage of time

[88] The Applicant's submissions, emphasise the length of time that had elapsed since the offence, observing that, 'The Offence occurred approximately 3 years and 5 months ago, and the Applicant has not been charged with or convicted of any other offence.'[92]

[89] However, as the Respondent points out,[93] the age of an offence does not necessarily diminish its significance. As the Appeal Tribunal in *Lister,*[94] stated, 'the passage of time without further offending, of itself, is not conclusive that the risk of harm to children is reduced.'[95] I would add that this is particularly so in this case, as the Applicant has not during this period been permitted to undertake work with and therefore potentially offend against children.

[90] The Applicant offers a number of factors demonstrating that the Applicant does not pose a risk or a risk that she will reoffend.[96]

[91] The factors include her taking what are described as positive 'steps to address her behaviour.'[97] This is said to be evidenced by her certificate of completion for stress management and anger management courses. I note that the certificate of completion for the stress management course acknowledges completion of, '1 total hour of Stress Management: 40+ easy ways to deal with stress online course.' Similarly, the anger management course is a three-hour online course. While the Applicant states that she has found these courses very helpful I find the completion of these courses some 3 years after the offence and not before the commencement of Tribunal proceedings, to fall significantly short of establishing that stress and anger are no longer triggers for her offending behaviour as the Applicant submits. [98]

[92] Addressing 'behaviours' and in particular anger management would be significantly more meaningful if the Applicant was willing to assume responsibility for her behaviours, and took meaningful steps to address them. I note that while she says she has taken some steps to address her behaviour' through the stress management

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90 ICMS06 at page 84.
91 Applicant's Affidavit 17 November 2021 at para 36 (j) and (k); Applicant's Submissions, dated 6 December 2021, at para 33.6.
92 Applicant's Submissions, dated 6 December 2021, at para 27(c).
93 Respondent's Outline of Submissions dated 6 December 2021, page 20 para 60(c).
94 *Commissioner for Children and Young People and Child Guardian v Lister (No 2)* [2011] QCATA 87, [55].
95 Respondent's Outline of Submissions, 2 September 2021 at 40.
96 Applicant's Submissions, dated 6 December 2021, at para 27(d) p 8.
97 Ibid, at para 27 (d)(v) p 8.
98 Materials produced by Blue Card Services, BCS–92, and Applicant's Affidavit 17 November 2021 para 36(d).

and anger management courses,[99] she continues to deny that anger was a factor that she needed or still needs to address.

Stress

[93] As already noted, the Applicant has consistently referred to the stresses she was under at the time of the offence. In the absence of professional counselling addressing the Applicant's specific issues, and the filing of reports outlining what was addressed in the sessions and what the Applicant has gained from the counselling, I have no basis on which to conclude that the Applicant would deal with stress in future child-related employment whether it be in nursing or elsewhere, any differently to how she dealt with it at the time of the offence.

[94] What submissions on behalf of the Applicant refer to as remorse and insight into her behaviour, [100] in my view, consist in large measure of explanations of what occurred and regret at the impact it has had on the Applicant's life. A glaring absence in what is put forward as insight, is convincing insight into the effect of excessive corporal punishment and verbal threats to children, rather than one or two passing references.

Discipline and the Best Interests of Children

[95] What the Applicant appears to consider is in the best interests of children, appears to be at odds with applicable statutory standards that will be used to assess her suitability to engage in child related employment.

[96] Equally of concern, the Applicant does not acknowledge that the express or at best implied threats made to D regarding the use of the electrical cord are in themselves harmful.

[97] I stress the significance of evidence regarding the Applicant's compliance with statutory standards governing different areas of child related employment and care. The object of the WWC Act is–

> 5 To promote and protect the rights, interests and wellbeing of children and young people in Queensland through a scheme requiring —
>
> (b) the screening of persons employed in particular employment or carrying on particular businesses.

[98] In screening applicants for child related employment, a willingness and capacity to abide by applicable standards of conduct is crucial.

Compliance with Standards of Behaviour

[99] The Respondent submits that 'the Applicant appears not to accept responsibility for her decision to use physical discipline on children in her care. The Child Protection Act 1999 governing her work as a foster carer sets out clear standards with respect to disciplining of children in foster care.

[100] A child placed in care is expected to be cared for in a way that meets the standards set out in the Child Protection Act 1999 'statement of standards.'[101] What is expected with respect to the handling of inappropriate behaviour is specifically addressed in the section 122 Statement of Standards, which states –

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99 Applicant's Submissions, dated 6 December 2021, at para 28.2 (g)(ii), page 11.
100 Materials produced by Blue Card Services BCS–93, para 13. para 27 (d)(iv).
101 *Child Protection Act 1999,* s 122.

> (1)(g) the child will receive positive guidance when necessary to help him or her to change inappropriate behaviour…
>
> (2) For subsection (1)(g), techniques for managing the child's behaviour must not include corporal punishment or punishment that humiliates, frightens or threatens the child in a way that is likely to cause emotional harm.

[101] The Applicant continues to maintain that she had not been made aware that foster parents were not to administer physical discipline. Submissions on her behalf, even suggest that it was reasonable for her to assume that corporal punishment of children in foster care was appropriate.[102]

[102] However, the evidence that the Applicant was aware and had been provided with information advising her that physical disciplining was not permitted, is overwhelming. I note that the 25 October 2011 letter from the Department of Communities stating that the Applicant and DR had been approved as Foster Carers lists a number of enclosures including the fact sheets and relevant sections of the Child Protection Act 1999 and specifically mentions the Statement of Standards Child Protection Act 1999, Section 122).[103]

[103] The recommendation form for the Applicant's and DR's most recent Renewal of Foster Carer Approval[104] refers to accusations made by children who had left their care in 2016, and notes that, 'They both can quote the subsection on corporal punishment.'[105]

[104] In his statement, Senior Team Leader CSO who examined D's leg on the day she was taken to the police station, states –

> Approved foster carers are provided guidance and information pertaining to appropriate discipline of children in care which clearly directs that at no time is discipline in care to be administered by any physical contact or action.[106]

[105] As discussed further below, in her police interview regarding the assault, the Applicant acknowledged that she had breached the standards by resorting to physical disciplining.[107]

[106] I do not accept, as the Applicant asserts, that she and her partner had not been told and therefore were not aware that it was inappropriate to use corporal punishment.

[107] However, as the Respondent submits, even in the unlikely event that the Applicant had not been aware that physical punishment was prohibited –

> it was her responsibility as a foster carer in a position of trust to appraise herself of her obligations and the standard of care she was required to meet. In the Respondent's view, her failure to do so, together with her failure to acknowledge and accept responsibility for that failure, reflects poorly on her

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102 Applicant's Submissions, 6 December 2021 at 33.3(h).

103 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS10 at page 9.

104 Exhibit to Applicant's affidavit dated 17 November 2021 LM-02 page 5.

105 Ibid at 13.

106 QPS 4–1 at para 7.

107 Materials provided by Queensland Police Service, Disk 1 at 19 minutes, 50 seconds; also recorded in Court Brief, BCS–43.

> insight, as well as an evaluation of whether she has the necessary insight required to ensure her past failures will not be repeated.[108]

[108] Being aware that the children in her care had previously been abused and traumatised, should have been sufficient for the Applicant for the Applicant to realise that resort to physical discipline would not be in the children's best interests. Consequently, the Department of Child Protection noted –

> There appears to be little understanding or compassion for the fact that the children have already suffered trauma, and require a more empathetic approach to behaviour management.[109]

[109] That the Applicant fails to take into account the specific needs of children in foster care is evident in a submission on behalf of the Applicant suggesting that it was reasonable of her to discipline D by striking her with a wooden spoon.

> The Applicant believed that she was disciplining Child D in accordance with statutory function of section 280 of the Criminal Code Act 1899 (Qld) where it is "lawful for a parent or a person in the place of a parent…to use, by way of correction, discipline, management or control towards a child or pupil, under the person's care such force as is reasonable under the circumstances."[110]

[110] It is further submitted on the Applicant's behalf that she, 'acted in a way that reflects the knowledge and experience she had at the time of the offence, from any training she received and her own personal experiences from watching other family members raise their children.'[111]

[111] I agree with this submission to the extent that the evidence supports the submission that the Applicant's actions reflected what she saw as the norm in homes with which she was familiar. That this led to complaints being lodged with the Department and concerns to be expressed and children to complain is also documented.[112]

[112] In my opinion, the evidence clearly suggests that the Applicant was aware, and had been advised and provided with the information setting out her obligations and expectations regarding the disciplining of children in foster care. Similarly, the evidence establishes that at the very least, regular visits from the Department provided opportunities to seek clarification as to what was allowed.

[113] The Applicant denied and continues to deny having resorted to physical punishment other that on the one occasion of the assault. However, I prefer the evidence of the Applicant as contained in her statement and record of conversations in which she distinguished her physical disciplining from that which she considered not to be in the children's best interests.[113]

[114] The evidence does not leave me confident that the Applicant's view on physical discipline has changed significantly, even if she may be more mindful of the repercussions to herself of reoffending.

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108 Applicant's Submissions, 6 December 2021, Resp Dec p 20 para 60(d).

109 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 86.

110 *Criminal Code Act 1899* (Qld) s 280.

111 Applicant's supplementary submissions 6 December 2021 p 15.

112 See: Documents produced by the Department of Children, Youth Justice and Multicultural Affairs,

113 For example, ICMS09 at page 3.

Triggers No longer Present?

[115] Considering when the offence occurred may also serve to highlight unique or no longer present circumstances. The Applicant notes that she is no longer dealing with acute distressing circumstances or looking after several children known to have behavioural issues.[114]

[116] Undoubtedly, the Applicant committed her offence during a particularly difficult period in her life. However, materials obtained from the Department of Child Safety presents the Applicant's time as foster carer as a time punctuated by great stress, complaints and inability to cope.[115] However I reject the Applicant's implied submission that stress is unlikely to be a factor in the future because she is unlikely to find herself in circumstances similar to those at the time of the offence.

[117] The Applicant submits that she will avoid finding herself in a similar situation by avoiding stress and taking on more than she can handle.

[118] I note that while her application appeared to be in part, or even largely, motivated by a desire to resume her role as foster carer,[116] the Applicant now states that she will no longer seek to resume such work with children. This may suggest that she has come to realise that the offence reveals that she is not suited to a home carer role.

[119] Such a statement of intention, appears to be odds with earlier statements such as her description of what she wanted to happen in filing her application to the Tribunal to review the Respondent's decision – 'We would like [D and [R] be returned to our case as soon as possible.'[117] Even if not at odds with the Applicant's earlier statements and the understanding of her witnesses it is of little reassurance as the key elements surrounding this offence cannot be excluded from other child related employment including the Applicant's chosen career in nursing.

[120] Elements of concern to other forms of child related employment include the Applicant's lack of compassion for traumatised children in need of levels of care that other children may not require, her belief that a normal upbringing means strict discipline, confrontation and her unwillingness to abide by required standards of care.

[121] In any event, the Applicant's stated intention to not return foster parenting is not relevant as she cannot be issued a blue card that would permit her to work in particular categories of regulated employment. For that reason, whether this is an exceptional case must be determined on the basis of the best interests of any children with whom the Applicant as a holder of a working with children clearance would be entitled to work.

[122] The Applicant's understanding of what caused her to offend, why it was not in the children's best interests and how she would avoid similar actions in the future is at best unclear. In focusing on minimising her culpability she appears not to have focused on addressing aspects of her work with children that had previously been brought to her attention and that were relevant to the offence.

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114 Applicant's Affidavit at para 36(d).

115 Outlined below.

116 Application to review a decision – children's matters, BCS-71.

117 Application received by the Tribunal on 31 March 2021 page 4, BCS–74.

Fourth: *The nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children.* [118]

Evidence Regarding the Offence

[123] At the time of the offence D, an eight old indigenous girl and her 6-year-old younger sister R had been living with the Applicant, and her partner, DR, in a foster care placement for two years.

[124] After school on 18 July 2018 two Child Safety officers collected D and R to drive them to a scheduled home visit with their family members. During the trip D told them that her foster mother had hit her with a wooden spoon and an electrical cord the previous evening.[119]

[125] The car was stopped and D showed her left leg to the CSOs. According to one of the CSOs what was visible were 'red swollen marks on the outside of the upper calf of her left leg.'[120]

[126] As a result of this revelation the CSOs drove the girls to the Department of Child Safety Office where a Senior Team Leader Child Safety officer spoke with D and examined her left leg observing raised welt marks on her upper calf of her left leg.[121]

[127] The CSOs then drove D to a police station where they and D spoke with Detective Sergeant JS from the Criminal Investigation Branch. The police officer who interviewed D, R and the Applicant in July 2018. In his statement JS states that D had three raised red welts on her leg, indicating 'separate incidents of stinging force contact…by an instrument'[122]

[128] In the Solicitors Office Report Details,[123] JS recorded that he suspected the child victim had been struck with an unknown item possibly an electrical cord to her left leg. He described the Applicant's reported behaviour towards D as angry commands, actions forced on the victim. In another entry on the same day JS described the incident as, the Applicant verbally chastising the children and striking D with an electrical cord to leg.[124]

[129] JS also took photographs of D's injury[125] and requested the CSOs to immediately transport D to a Medical Centre to have her leg examined and the injury documented by a medical practitioner.[126]

[130] D was examined by Dr BL who noted three 'erythematous lesions round end/curved implement impact site' and an otherwise normal examination with no compression tenderness to D's body including her back.' The Doctor also recorded that D told

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118 *Working with Children (Risk Management and Screening) Act 2000*, s 226(2)(a)(iv).
119 Statement of Witness dated 5 December 2018 QPS 3–1. (QPS - Documents Produced by Commissioner of the Queensland Police Service on 30 July 2021 in response to the Tribunals notice to produce dated 5 July 2021).
120 CSO's witness statement 5 December 2018, QPS 4–1.
121 Statement 5 Dec 2018, QPS 3-2 at para 14.
122 Statement of Witness JS, QPS 1–9.
123 'Solicitors Office Report Details' entry dated 18 July 2018, QPS 4–5
124 Ibid, QPS 4–6.
125 Ibid, QPS 4–10 to 4–15.
126 Detective Sergeant JS, Statement of Witness, QPS 1-9.

him that 'mum, flogged me…with a wooden spoon – hit me three times on the leg'.[127]

[131] Following the medical examination, D and R were transported to alternative care accommodation for the night and brought to the police station the following day, where they were interviewed individually by JS.

The Children's Evidence

D

[132] In a recorded section 93 A statement on 19 July 2018[128] D told police that on 17 July 2018 the Applicant gave her a 'big hiding' or flogging.[129] She explained that she was in the bathroom of the Applicant's and DR's home. She said that the Applicant was unhappy with her for making a mess in the bathroom. Consequently, the Applicant fetched a wooden spoon and an electrical appliance cord from the kitchen and came into the bathroom and struck D's left leg once with the 'frying pan cord' and twice with a wooden spoon and 'palmed' her forehead.[130]

[133] D said that when the Applicant hit her, DR was away picking up the evening meal. However, she said that R saw the Applicant hit her, as R had come down stairs and was 'peeking' at her and sticking her tongue out.[131] After DR returned, D said she could hear DR and the Applicant talking about discipline.

[134] D told police that this was the first time the Applicant had disciplined her using an object although on other occasions the Applicant had smacked her using her hand.[132]

[135] According to police, during the interview D presented as bright, alert and articulate and gave consistent accounts of the alleged assault by the Applicant on 17 July 2018.

R

[136] Six-year-old R also made a section 93A statement,[133] She told police that she saw the Applicant hit D once with a power cord and twice with a wooden spoon. [134] She also said that she saw the red marks on D's leg made by the cord and wooden spoon.[135] R added that she also cried when D started to cry.[136]

[137] R also described the incident as a 'flogging', which she said was what happens when she or D are naughty.[137] R said that while she sometimes gets a flogging when she's naughty, D gets a lot of floggings.[138] R explained that the Applicant usually flogs them with a spoon[139] but sometimes she had been 'flogged' with bare hands. [140]

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127 Progress note, Dr William Liley 18 July 2018, QPS 1–14, see also Exhibit to Applicant's affidavit dated 17 November 2021, LM-07, page 28.
128 *Evidence Act 1977*, s 93A.
129 Documents Produced by Queensland Police Service, Disk 3, at 16 mins 50 secs to 17 minutes 30 seconds.
130 Ibid, 18 minutes 50 seconds.
131 Ibid, 22 mins 20 sec to 23 minutes 30 seconds
132 Ibid 21 mins 50 sec 28 mins 40 secs.
133 Disc 2.
134 Disk 2 at 13 minutes 50 sec and 14 minutes 50 seconds
135 Ibid, at 24 mins 40 secs. Disk 2
136 Ibid, at 23 minutes disk 2.
137 Ibid, at 15 mins.
138 Ibid, at 19 mins,

[138] R's statement was deemed consistent with that provided by D.[141]

[139] D and R were removed and placed in alternative care[142]

The Applicant's Version of Events

[140] The events constituting the offence were in part disputed by the Applicant, when accompanied by her mother, she attended the police station on 24 July 2018 and participated in a formal recorded interview.[143]

[141] In the course of the interview, the Applicant admitted striking D once with a wooden spoon to the left leg, but denied striking her with an electrical cord.[144] She explained that while she did not hit D with a cord, she had held it to tell D that she could have been hit with the cord just as when she was naughty she would 'get the spoon.'[145]

[142] She explained her behaviour, by telling police about the stress she had been under due to illness and death in her family.[146] She also told police about D having been defiant for some time, and not responsive to discipline and guidance. An example of this behaviour was the mess D made in the bathroom on the day of the offence.[147] The Applicant suggested that D's misbehaviour may have been linked to being bullied at school.[148]

[143] The Applicant's account of the incident also different form that given by D and R in that the Applicant stated that R did not see her strike D.

[144] The Applicant argues that this question of fact was never determined by police or a court of law.[149] The Applicant's view is supported by WA a foster carer who briefly looked after D and R after removed from Applicant's care WA wrote in her affidavit[150] that the Applicant had smacked D and that she knew this because D had told her.

[145] The Applicant also told police that D did not cry when she struck her with the spoon but rather reacted in shock.[151]

[146] She also said that she didn't bother' telling her partner that she had struck D with a spoon.[152]

[147] The recording of the interview reveals that despite her denials she knew that physical discipline was inappropriate discipline and that only non-physical discipline was permitted in parental guidance by foster carers.[153]

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139 Ibid, at 18 mins.
140 Ibid, at 20 minutes to 20 mins 30 secs.
141 BCS-43.
142 Materials produced by Blue Card Services, BCS–43-43
143 Documents Produced by Commissioner of the Queensland Police Service, Disk 1.
144 BCS–43; Disk 1 at 8 mins 10 secs to 8 mins 45 secs.
145 Sentencing Schedule QPS 1–8.
146 BCS–43.
147 Disk 1 at 13 mins and 13 mins 50 secs. Disk 1
148 Disk 1 at 13 mins 50 secs and 20 mins 30 secs.
149 BCS–93,
150 17 Nov 2021 at para 45.
151 Disk 1 at 8 mins 45 secs and 17 mins 50 secs.
152 Disk 1 at 8 mins.
153 Disk 1 at 19 minutes 50 secs.

[148] Police assessment of the Applicant's demeanour was that she appeared 'genuinely remorseful and upset at her actions.'[154]

Bullying

[149] In her Statement, D also told JS that three days earlier, on 16 July 2018 she was involved in a fight with another child who she said had pulled her hair, kicked her and hit her on her back.[155]

[150] Subsequently, JS visited D's school to speak to the school principal regarding the alleged bullying incident.[156] The principal advised that D was a bright and alert student with good school attendance and reported positive engagements by the Applicant in D's school life. He advised that he had not received any notifications of concern for the D's welfare or safety due to parental issues.[157]

[151] On 27 August 2018 a relief teacher who taught on the 18 July 2018 reported an incident involving D being bullied and having her hair pulled by another child. However, when the Primary Deputy Principal spoke to the alleged bully, the child could not remember the incident.[158]

[152] While the Applicant had made staff aware of incidents of D being bullied in April and June, staff were reported to 'have been unaware of any major concerns.'[159]

Police Records

JS

[153] The officer in charge wrote that he deliberated on all evidence including, all disclosures by claimant and witnesses, the medical evidence, evidence from DOCS and the favourable comments by the principal about the applicant's known good care of foster children was considered.

[154] Despite allegations by both girls that the Applicant had struck them on other occasions, police did not lay further charges against the Applicant. Police referred to D's 'vague disclosures describing rare incidents when she and sister had been disciplined by smack using bare hand,' and deemed the vagueness of these allegations as 'insufficient to substantiate further charges.'[160]

[155] As noted in the Submission on behalf of the Applicant[161] the antecedents recorded in the police brief indicate that police recognised that the assault on D using an

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154 Court Brief, BCS–43.
155 Material produced to the Tribunal by the Queensland Police Service, disk 3, 8 min and 13 minutes 10 sec.
156 QPS 1–10.
157 Ibid.
158 ICMS06 page 70.
159 Ibid.
160 QPS-9, BCS-42 para [12].
161 6 December 2022 (at para 6(k), page 40 quoting antecedent in police court brief BCS–43.

instrument was 'likely a one-off incident due to contributing circumstances of family stress and the child's non-response to non-physical guidance.'[162]

[156] Police also noted that due to the assault D and R were placed in alternative care accommodation, 'severing two years of attachment to the applicant and foster father who have provided a loving and safe home to the complainant child and her sibling.'[163]

Relevance of Offending to Working with Children

[157] As the Applicant pleaded guilty to physically assaulting an 8-year-old child in her foster care, her offence is of direct relevance to a determination of whether it is in children's best interests for the Applicant to be eligible to work in employment or businesses regulated by the WWC Act.'[164]

[158] The Applicant struck the child with a wooden spoon and allegedly also with a cord causing raised red welts still visible to Department of Child Safety Officers, Police Officers and a Medical Practitioner.[165]

[159] As the Respondent submits, 'The Applicant's actions could reasonably have been expected to have caused both the young children to experience fear, alarm, and emotional distress'[166] The victim's six-year-old sister told police she cried when she saw D cry.

[160] Respondent submits that the Applicant's offending –

> raises questions about whether she possesses the necessary abilities to work in child-regulated employment. In particular, her offending raises questions about her ability to act in a controlled and rational manner when interacting with children, provide a safe and protective environment for children and comprehend the impact of her behaviour upon the emotional and psychological development of children. Her offending raises further questions about her ability to respond appropriately to conflict.[167]

[161] A submission on behalf of the Applicant alleges that the Applicant's offending is not Directly relevant to question of protection of children and their best interest. It is no longer relevant because, she is 'no longer under the same stressors that she was at the time.' In addition, it is submitted that even though there is no legal obligation on blue card holders to possess skills of conflict resolution, anger management and the ability to respond to appropriately to conflict, the Applicant has undertaken stress management and anger management courses 'to further educate herself in relation to these matters, to assist her in circumstances that are stressful in the future para.'[168]

[162] With respect to these submissions, I accept that the Applicant is no longer under the same stress. However, this submission may also be seen as a concession that she may act similarly if she were to unforeseeably find herself under similar stress.

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162 Court Brief, QPS 1–4.
163 Ibid.
164 Respondent's Submissions 6 December 2021 at para 41.
165 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 85.
166 Respondent's Outline of Submissions 6 December 2021 at para 41.
167 Ibid at para 42.
168 Applicant's Submissions 6 December 2021 at page 11, para 28.2(g).

[163] I also note that the Applicant a young child entrusted to her care who she knew had already been traumatised. The Respondent submits that –

> The Applicant's offending is aggravated by the fact that it occurred in the course of her child-related employment as a foster carer and at a time she had a blue card. …[in addition] the children in the Applicant's care were particularly vulnerable. They were foster children who had already had trauma in their life[169] and may well have been particularly sensitive to such behaviour.[170]

[164] The Respondent cites the Tribunal decision in RA and RJ[171] which underlines that the community places its trust in foster carers to require the high level of care in response to the abuse and trauma they have experienced. Therefore, the Tribunal observes, the standards set out in s 122 of the Child Protection Act 1999 are to ensure that a child placed in care is cared for in way that meets the following standards. The implications are that in recognition of their vulnerability, 'Children need to feel safe, protected, that they belong to family and community and that they are loved.''

[165] Consequently, the Applicant's resort to physical punishment to manage an eight-year old's behaviour may be said to 'reflect poorly on her.' Such a decision is contrary to the prohibition on using such behavioural management techniques in the *Child Protection Act* s 122(1)(g) and (2) and demonstrates disregard for the emotional impact children are likely to suffer should they be removed from the home due to the standards of care not being met.[172]

[166] The full relevance of the Applicant's offence only becomes apparent when considered in the light of other related factors at the time of the offence as well as the Applicant's current views on matters pertinent to the review. However, in itself, the offence is directly relevant to the screening of person wishing to work with children and contrary to the governing legislation's object of protecting the rights, interests and wellbeing of children and young people. Consequently, any evidence indicating a risk that the Applicant may reoffend would suggest that it would not be in the best interests of children for the Applicant to be issued a working with children clearance.

Fifth, *the penalty imposed by the court and the court's reasons for not imposing an imprisonment order or a disqualification order and the court's reasons for its decision.*[173]

[167] On 5 December 2019, in the local Magistrates Court, the Applicant pleaded guilty to having committed 'common assault' on 17 July 2018. The Magistrate placed the Applicant on a recognisance of $500 to be of good behaviour for six months, and directed that no conviction be recorded.[174]

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169 ICMS06, page 84

170 Respondent's Outline of Submissions 6 December 2021 at para 43.

171 *RA and RJ* [2018] QCAT 95 at para [98].

172 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06, page 86.

173 *Working with Children (Risk Management and Screening) Act 2000*, s 226(2)(1)(v).

174 Ibid.

Sentencing Remarks

[168] In sentencing the Applicant, His Honour observed that the Applicant had pleaded guilty to common assault.

[169] The Magistrate also noted the presence of 'a number of stressors influencing behaviour on this day, including the child's challenging behaviour,[175] and stated, 'I have no hesitation in accepting that you must have been stressed to the point where you behaved in a way which was completely out of character.'[176] His Honour emphasised this finding by observing, 'I cannot see a more striking example of [someone doing something out of character] than in this case.

[170] The Magistrate also noted that, 'there is no doubt from the materials I have read that the people who know you well and speak very highly of you and in some detail about the qualities and attributes that you have as a person, as a foster carer, as a partner.[177]

[171] Reinforcing his finding of an out of character offence, His Honour also stated that having regard to sentencing principles 'there is no need to discourage you from any sort of behaviour in the future, deterrence – there is no rehabilitation that is required.'[178] In addition, the Magistrate deemed the offence to be a low-level offence and concluded that there was little to no risk in the Applicant offending.

[172] Noting that, 'a conviction is not recorded', His Honour observed that he had,

> taken into account that you have probably experienced a more serious consequence than the Court could possibly impose, which was to lose the opportunity to care for, it seems two young children that you obviously loved and were looking forward to seeing develop in your care. So, I have also, I think, most importantly taken into consideration as a consequence of what has happened.

Relevance to this Review

[173] The Applicant relies on these sentencing remarks,[179] and in presenting them as encapsulating all established facts she struggles to understand why she has not been successful in having her blue card reissued to her.

[174] The sentencing remarks that may appear to be of greatest relevance include the Magistrate's finding that a number of stressors had caused her to act in a manner that was completely out of character.

[175] In view of this review's focus on likely future risks to children, it also appears to be relevant that the Magistrate found that there was no need to discourage the Applicant from any sort of behaviour in the future and that no rehabilitation was required. In sharp contrast, the reasons given by the Respondent for refusing to issue her a blue card were based on contrary findings.

[176] The Magistrate also observed that those who know her spoke highly of her and her qualities and attributes as a foster carer. This has also been reflected in the written and oral evidence presented by witnesses called by the Applicant in this review. Yet,

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175 Materials produced by Blue Card Services, BCS–103.
176 Ibid.
177 Ibid.
178 Ibid
179 Applicant's Submissions 6 December 2021, pages 11-12, para 29.

as outlined below, materials produced by the Department of Child Safety appear to present the Applicant and her partner as struggling and occasionally failing to provide children in their care with appropriate love, care and discipline.

[177] Finally, the Applicant relies on the Magistrate's finding that there was no risk of the Applicant reoffending, as evidence that the Applicant will not pose a risk to children in the future. In the absence of foreseeable risk, the Applicant submits her case cannot be said to be 'exceptional'.

[178] Great care needs to be taken in drawing inferences and implications of the favourable sentencing remarks regarding the Applicant's culpability in a criminal trial to this review of a decision that the Applicant's case is an exceptional case in that it would not be in the children's best interests for the Applicant to be issued a blue card.

[179] Significant differences between criminal proceedings and this review must be taken into account.

[180] Unlike the Court in the Applicant's criminal proceedings, the Tribunal may consider any evidence relevant to a determination of whether it would be in the best interests of children for the Applicant to be issued a blue card. The Tribunal may obtain information on its own initiative and is not bound by rules of evidence other than those required by the rules of nature justice and specific provisions of the QCAT Act.[180]

[181] Needing to establish guilt beyond reasonable doubt, means that charges may be reduced in return for pleas of guilty, and evidence that is unable to be conclusively proven may not be presented.

[182] In criminal trials, evidence presented is confined to that complying with the rules of evidence and that is directly relevant to the accused's criminal liability. Importantly, the prosecution bears the onus of proof and the defendant is not obliged to confess to anything that the prosecution has not proven. In sharp contrast, neither party bears the onus of establishing the presence of an 'exceptional case'. Consequently, an Applicant who denies or does not disclose relevant facts until confronted by evidence, is not exercising a right but rather may be seen as concealing information relevant to an assessment of their suitability to take on child related employment.

[183] Unlike the presumption of innocence in criminal law, any presumption that a working with children clearance must be issued to an applicant convicted of an offence other than a serious offence,[181] is expressly qualified as dependant on the chief executive not being satisfied that the case is an exceptional case.[182]

[184] Most importantly, while the sentencing remarks reflect the Court's findings as to the Applicant's criminal liability, this review focuses on the best interests of children, encompassing evidence ranging well beyond the Applicant's criminal liability for an offence.

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180 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3).
181 *Working with Children (Risk Management and Screening) Act 2000*221(1)(c).
182 Ibid, s 221(2).

Sixth, *Information about the person given to the chief executive.*[183]

[185] No relevant information about the person was provided to the Chief Executive by the Director of Public Prosecutions or by Corrective Services under section 318 or 319 of the WWC Act.[184] No report about the Applicant's mental health was given to the Chief Executive under section 335 of the WWC Act.[185] And, no information about the Applicant was given to the chief executive under sections 337 or 338 of the WWC Act by the Mental Health Court or the Mental Health Review Tribunal.[186]

Lastly, *'Anything else relating to the commission of the offence that the [decision maker] reasonably considers to be relevant to the assessment of the person.*[187]

[186] Written and oral evidence presented by the Applicant and her witnesses also relates to the offence and is relevant to her assessment.

[187] Over the two days of hearing, the Applicant and a number of her witnesses gave oral evidence and were cross examined by the Respondent.

The Applicant

[188] The Applicant had lodged a number of written statements, including 'Personal History of the Applicant' dated 18 February 2021 and most recently an Affidavit dated 17 November 2021.

[189] Regarding the facts of the offence as alleged by the police, the Applicant denied hitting D with an electrical cord. Instead, she said she held the cord to indicate what would have happened when she was a child.

[190] The Applicant referred to 'stressful things' happening at the time of the offence, including illness and death in the family. She also mentioned D's misbehaviour when not given the attention she sought. The Applicant said, 'It all got to me'.

[191] Asked about R's involvement in the events surrounding the offence, the Applicant stated that R had passed her the spoon and had gone upstairs.

[192] She said that she was upset when told she would lose the kids, and described being told she would lose the kids as having her life torn apart.

[193] She also observed that the relationship she and her partner DR had with D and R had become close and the girls had called them Mum and Dad.

[194] Since being issued her negative notice and losing her work, the Applicant said she had done 'a lot of reflection' and had completed a couple of courses on stress and anger management.

[195] The Applicant described her mother as her role model and said that her aspirations related to nursing and caring for people and children.

[196] In cross examination, the Applicant maintained that she did not cause the marks on D's leg.

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183 Ibid, s 226(2)(b), (c) and (d).
184 Ibid, s 226(2)(b).
185 Ibid, s 226(2)(c).
186 Ibid, s 226(2)(d).
187 *Working with Children (Risk Management and Screening) Act 2000*, s 226(2)(d).

[197] Asked about her training to be a foster carer, she said that it took place over 1 day, including 'safety for home'. She described the training as consisting of a few modules, but that she couldn't remember any more.

[198] When referred to a list of foster care training units she had completed, the Applicant said she could only recall it vaguely. When the Applicant was reminded that she had worked with a counsellor for behaviour in care and covered behavioural techniques, she was vague in her answers stating that she had never fostered teenagers

[199] With respect to her letter dated 26 July 2018,[188] the Applicant reiterated that she believed that what she did in physically punishing D was lawful, but conceded that it was not appropriate to have done so with a spoon. She emphasised that she did not raise her voice. So, when asked what she would have done differently, the Applicant replied that she would not have used a spoon.

[200] Asked, when she realised that what she had done was inappropriate, she said 'straight away'. The Applicant added 'but she (D) didn't cry and apologised for her behaviour.'

[201] Questioned about her police interview, the Applicant explained that what she had meant to say about her state of mind at the time of the offence was that she was 'not angry' rather than 'not in control'.

[202] The Applicant denied being provided with information about behaviour control adding that it wasn't covered in the foster carer training modules.

[203] The Applicant cited 'talking to children' as her alternative way of responding to challenging behaviours.

[204] The Applicant confirmed that at the time she used a spoon on D she was aware that she was not allowed to use it, but qualified her response by observing that 'it was a little smack'.

[205] She stated that she understood the reasons for the ban on corporal punishment to be that 'some go too far' and that the children may be emotionally scarred.

[206] Invited to reflect on the assault, the Applicant expressed regret that she 'won't be a foster Mum again', noting distress and pain and aches through stress. She also added that the event had impacted everyone in her life.

[207] With regards to the marks on D's leg, the Applicant said that she had 'smacked on the fatty bit of thigh above her injuries.' She rejected as incorrect the suggestion that she used the spoon regularly.

[208] The Applicant confirmed that she held up an electrical cord, but said that she was not sure why she did so. She denied that she was frightening D although she did concede to having said 'this is what I would have got'.

[209] The Applicant denied palming D's forehead, explaining that it was something the kids did to each other.

[210] When questioning about telling the Department that discipline is culturally appropriate, the Applicant replied, 'not smacking, but discipline is.'

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188 Materials produced by Blue Card Services, BCS–57

[211] The Applicant emphasised that she did not use the spoon in anger, but regretfully as a last resort. She denied that she was relieving her frustration, stating that it was a mistake that she used a spoon. She said that she was frustrated, but in control and it was only one smack.

[212] The Applicant was asked to comment on having earlier said that the assault occurred because in part she had not been given guidance. When asked whether it was not her responsibility to learn how to handle challenging behaviour, as the Department had said they could ask, the Applicant said she accepted responsibility, "100%".

[213] The Applicant was also questioned as to why she had said that according to the medical report that D's injuries may have been caused by gravel,[189] when in fact that had not been documented. She said that she was not referring to the report but rather the altercation that D got into at school.

[214] The Applicant denied allegations by D that she had been smacked on other occasions and 'got flogged if naughty' sometimes by hand sometimes by spoon '. The Applicant described the assault on 17th July 2017 as 'one-off.'

[215] The Applicant was referred to a letter in which she says, 'I have smacked them on the bottom or leg when naughty.'[190] It was put to her that this suggests that she has smacked them more than once. The Applicant said, I talk to them more and have only smacked them once, so I'm not sure why I said that.

[216] It was put to the Applicant that four out of five children interviewed by the Department of Child Safety had said that physical discipline occurred in her home.[191] She denied the allegation.

[217] When questioned regarding a child's statement that she did not give ice to put on the leg this time[192] the Applicant said that this (earlier occasion) occurred at the beach.

[218] She also denied allegations that she hit a child so hard that she broke the spoon,[193] or that she broke a phone on a child's head.[194] In addition, she denied putting garlic and onion in children's mouths[195] for back-chatting, and smacking with an open hand for taking 'expensive things,' for which she said children had never been disciplined.

[219] In re-examination, Applicant stated that photographs of D's injuries show injuries caused by a bully, that DR's report makes no mention of emotional harm instead describes her as happy and stable and that she denied that she was in the habit of smacking children, but rather that it was a 'one-off'.

DR

[220] In a reference dated 15 November 2021, DR describes the Applicant as his fiancé and states that they had been in a relationship for the past 12 years.

[221] He describes her as 'caring, driven and hard working' and mentions that she loved working as an Aboriginal Indigenous Health Worker. He states that she has 'worked

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189 Materials produced by Blue Card Services, BCS–92.
190 Applicant's letter dated 26 July 2018, ICMS09 at page 3.
191 ICMS06 at page 85.
192 Ibid, page 57.
193 Ibid, page 85
194 ICMS07 at page 13.
195 ICMS07 at page 7.

very hard over the years to help better herself and further her career, working towards her dream job of being a registered nurse.'

[222] DR also notes that the Applicant had undertaken further study and had 'almost completed her first year of a Bachelor of Nursing but had to defer as she is 'unable to undertake clinical placement at the hospital because she does not have a valid blue card.' He further observed that without a blue card she not be able to undertake her chosen work 'or even work in the health industry itself.'

[223] He notes that despite this she has 'remained positive for the most part, and is working towards gaining her blue card back so she can finish her studies and become a registered nurse.'

[224] In his oral evidence, DR was asked to comment on the nature of discipline in his and the Applicant's home. He mentioned confiscation and time outs and stressed that discipline was never physical and he never had the need for it. Instead, he said, they talked to the children.

[225] Asked to comment about the Applicant at the time she struck D, he said that she was under a lot of stress from juggling schooling with work, serious sickness in her immediate family and on the day of the assault heard that an aunt had died.

[226] He said that when he got home on the evening of the assault, 'everything was normal.' He said there was no mention of physical punishment and they sat down to a family dinner that he had brought home. He had heard that D had been disciplined after mucking up and 'sat down with D to talk about why her behaviour had deteriorated.' In this conversation D mentioned being bullied by another girl who punched her and called her names.

[227] DR said that as he took the girls to school and picked them up after school R told him that D had been in a fight during which her hair was pulled and she was pulled down, punched and kicked.

[228] DR says that it was 3 days after the assault that the Applicant told him why the children had been taken away. DR stated that the Applicant knows that what she did was wrong and says, if I hadn't done what I did we would still the girls and we would still be a family.

[229] In cross examination, DR was questioned about foster carer training, he described it as 'rushed' but conceded that they were given 'some tools to use'

[230] Asked about what he observed about D when he returned home on the evening of the assault, DR said that he saw D cleaning the bathroom.

[231] When asked to comment on the following statement made by the Applicant in her application for review by the Tribunal, 'We are able to acknowledge that we have smacked the children and acknowledge that this may have a negative impact on the children,'[196] DR suggested that the statement may have referred to the night of the assault.

[232] While stating that he had not used physical discipline, he observed that physical discipline was allowed 'under the standard of care safety.'

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196 Application to review a decision – children's matters, received 31 March 2021, p 4; BCS–74.

[233] Accepting that in the earlier mentioned statement, the Applicant says she may have smacked children, he never saw her do that and she never told him that she had.

OM

[234] The Applicant's mother, OM provided two references, one dated 9 August 2018,[197] the other dated 14 November 2021.[198]

[235] In 2018 she wrote that the Applicant was 'the first in our family to complete year 12' and has gone on to tertiary study. OM describes her daughter as having a 'very loving and caring nature and likes helping others.'

[236] She concludes by urging that –

> [The Applicant] should be commended for the positive and considerate action and love and kindness she shows towards people she has met in her life to be considered for the positive things she has done to make their lives easier, for a better future.

[237] In 2021, OM wrote that since losing her blue card in August 2018, the Applicant had rapidly lost confidence and had been bullied and harassed at work and is at risk of losing her work which she requires to pay the mortgage on their new house.

[238] In her oral evidence she outlined her significant community work and 40 years of work as a counsellor. She observed that the Applicant looked up to her as a role model and wanted to follow in her footsteps.

[239] She said she, 'lived around the corner' from the Applicant and 'was always at their place.' She said she had observed that R and D had loved the Applicant and DR, their foster parents, and lived in a loving environment in which the foster parents gave the children 'their very best.'

[240] OM observed that she had never seen the children receive physical discipline and that voices were only raised in situations such as when the children were about to hurt themselves.

[241] She stated that the Applicant was sorry for what she had done, and believed that this action by the Applicant was a one-off incident.

[242] As someone who had worked in nursing, OM offered the opinion that that the Applicant's desire to help people and specifically to help Aboriginal and Torres Strait Islander people made her well suited to work in health care.

[243] In cross examination, OM stated that she had observed the Applicant disciplining the children usually by using her voice and never physically.

[244] Asked about the Applicant as a child, OM said that the Applicant was a 'soft, emotional child' who would cry when told she was a naughty girl. She said that she never smacked the Applicant.

[245] Asked about the Applicant being struck by a cord, OM said that other people may have used a cord on the Applicant but she didn't know whether that happened.

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197 Materials produced by Blue Card Services BCS–83; Exhibit to Applicant's affidavit dated 17 November 2021 LM–11, p 37.

198 Exhibit to Applicant's affidavit dated 17 November 2021 LM–11, p 36.

[246] Commenting on D, OM observed that family members have said that D 'has gone backwards' since leaving the Applicant's household. She also observed that D had been diagnosed with 'a condition' and showed signs of foetal alcohol syndrome disorder.

[247] With reference to D's behavioural problems, and intergenerational trauma of fostered children, OM said she was not surprised that the Applicant may have smacked the children.

WA and GA

[248] WA wrote a reference dated 1 May 2020[199] on behalf herself and her husband GA. Both appeared to give oral evidence and be cross examined.

[249] In the reference they state that D and R stayed with them on respite for a week in the last week of 2018.

WA

[250] WA recounts a conversation she had with R who told her that after D messed up the bathroom 'mummy was not happy and smacked [D].' WA states that when she asked R how she knew this, her response had been, '[D] told me'.

[251] She also recounts that D accused WA's foster boy of trying to rape R. 'Investigations by the Department of Child Safety was prompted in which the accusation was recognised as a fabrication.'

[252] When cross examined WA said that it was hard for her to believe that the Applicant had smacked D with a wooden spoon.

GA

[253] GA, the other respite foster carer, told the Tribunal that he had been impressed with the care the Applicant and DR had provided R and D. The disciplining that he said he saw took the form of reminders of manners.

[254] GA also stated that he and his wife still see the girls who often ask how Mum and Dad are doing. In GA's opinion the girls were never fearful of the Applicant and DR. He stated that he had no doubt that the children would have told them if they had been 'belted'.

[255] In cross examination he stated that he had not been present at the conversation recounted by his wife, WA.

[256] Asked what training was provided before foster carers are approved, he said that behavioural training techniques were covered but that he was not aware of any others.

[257] Finally, GA conceded that he never directly asked the Applicant whether she hit D.

DH

[258] DH is a Medical General Practitioner who wrote a reference dated 29 June 2021. He states that he has known the Applicant for over 20 years, and had 'worked with her as a local indigenous health worker.'

[259] Regarding the Applicant's offence, he said –

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199 Materials produced by Blue Card Services, BCS–95

> I consider it was due to extenuating circumstances and out of character when she hit a child who was in her care and was her kin. She realises that it was not the way to handle a very difficult child and will never (sic) any such thing in the future.

[260] He further suggests that the Applicant 'has insight into her offending behaviour and is remorseful and knows that it was wrong to hit her kin for whom she was a foster carer.'

[261] Regarding the circumstances surrounding the assault, DH that the Applicant 'no longer has the risk factors and stress that were present 3 years ago.'

[262] He also comments on the Applicant's insight into her difficulties with working with difficult children. He notes that she has no intention of returning to foster care again. DH concludes, 'I feel that [the Applicant] will have no problem working with children in the future as she now knows her limits of what she can handle and will not allow herself to end up in the position that occurred in 2018.'

[263] In oral evidence, DH explained that the Applicant has insight into her offending and has taken steps to make sure that the assault did not happen again by making sure that she did not take on too much.

[264] DH described the circumstances at the time of the offence as, 'a perfect storm.'

[265] In cross examination DH explained that his understanding was that the Applicant was alleged to have hit D with a cord and a wooden spoon whereas she only threatened D with the cord.

[266] He was asked to comment on the Applicant's resort to physical punishment in light of accepted standards such as the July 2013 RACP position paper on the punishment of children. He questioned hard and fast rules that did not take into account subjective factors, and added that not all mistakes should be punished.

[267] Finally, DH suggested that concerns for the effect on children should also take into account the detrimental effect on children taken away from foster parents.

KW

[268] KW wrote an undated reference[200] and a further reference dated 17 June 2021 jointly with her husband, HW, outlined below.

[269] In her undated reference, KW states that she has known the Applicant for the past 10 years, and that DR is her nephew.

[270] She says that during, 'Many visits and holidays with [the Applicant], [DR] and various foster children I have witnessed fair and normal interaction with all children not just their own.'

[271] She observes that thanks to the Applicant and DR, D and R 'have had their lives turned around for the better.'

[272] She describes the proceedings flowing from the assault as 'a fiasco', suggesting that, 'Every parent on the planet has disciplined their children this was, I am sure, not abuse Why? Why? Why? Has this gone so far.'

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200 Materials produced by Blue Card Services, BCS–89

[273] She concludes by urging that the girls need to be at home with their Mum and Dad (the Applicant and DR).

[274] In cross examination KW said she was not aware of any other allegations against the Applicant.

HW

[275] In their joint statement dated 17 June 2021, HW and KW offer the opinion that the Applicant and DR 'treated their foster children with as much love and care they would have as if they were their own flesh and blood.'

[276] They describe the Applicant's disciplining as 'no more than any other normal Mother, a raised voice maybe here and there, then cuddles from both Dad and Mum. That to us is normal.'

[277] In his oral evidence HW described the Applicant as quiet and stable and as someone whom the kids absolutely adored. He offered the opinion that 'under no circumstances' was she a danger to children.

CR

[278] In her reference [201] CR, a close friend of the Applicant, writes that she has known the Applicant for over 10 years.

[279] CR notes that it is because the Applicant and DR treated their foster children as 'their own' that the children ended up calling them Mum and Dad. CR describes them as 'fantastic carers' who devoted their lives to those children.

[280] CR described the Applicant as a 'strict parent but NEVER violent' (CR's emphasis).

[281] In her oral evidence, indicated that she was aware that the Applicant had pleaded guilty to striking D with a spoon. She described the Applicant's offending as 'out of character' and said there was 'no chance' that she would do it again.

[282] In cross examination CR she had not seen R and D 'really misbehave, but did see the Applicant discipline the girls by sending them to 'time out'.

BH

[283] In her letter dated 15 June 21, BH states that she has known the Applicant for over 10 years. She describes the Applicant as an 'honest, reliable and trustworthy person.

[284] BH mentions that she witnessed the Applicant being 'always so attentive and protective of all the children while in her care.'

[285] In her oral evidence, BH said that the Applicant treats children with respect.

[286] In cross examination BH said that she was surprised to hear about, and remorseful for what happened

BB

[287] In her 5 September 2018 reference[202] BB described the Applicant as 'extremely family oriented, loving and respectful.' She also notes that the girls display physical affection for the Applicant.

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201 Ibid, BCS–90.

202 Materials produced by Blue Card Services, BCS–88

[288] BB describes the Applicant's 'unconscious selflessness' as 'still evident with her main concern and inconsolable worry being the girls' safety and welfare.'

[289] In oral evidence, BB identified as a cousin of DR, the Applicant's fiancé.

[290] As to the Applicant's use of discipline, BB observed that the Applicant made sure that the girls did what they were told to do by explaining and giving good reasons. BB said she never saw the Applicant smack or threaten to smack the children. In her view the Applicant, 'absolutely does not pose a risk to children.

SP

[291] In an undated reference, SG presented the perspective of someone who as a teenager had lived with the Applicant and DR. She speaks of a positive environment and being made to feel like family.

[292] She says that she was starting to be become a troubled teenager before joining the Applicant's household where she says she was taught how to respect herself.

[293] In cross examination she said that she lived with the Applicant for 1-2 months. Asked about any disciplining by the Applicant, SP said that rules such as no TV after dinner or no phone were strict and although some kids did not react well, they did follow the instructions. She had not heard of any child being smacked.

GW

[294] In his letter dated 29 October 2018, GW, a CEO of a Community Centre Aboriginal Corporation attests that while in the care of the Applicant and DR, a trainee receptionist was 'tidy and neat,' very polite, always turned up for work and displayed very good manners. This, he points out ceased to be the case when she no longer lived with the Applicant.

[295] In oral evidence GW described the Applicant as very professional and well liked.

[296] In cross examination GW disclosed little understanding of why the Applicant had been issued a negative notice.

Untested Written References

[297] The following written references were also submitted. As these references were untested through cross examination, they are accordingly given less evidentiary weight.

JB

[298] In a reference dated 29 October 2018, former Community Visitor, JB states that he regularly visited D and R when they were placed with the Applicant and DR. He remembers D telling him on more than one occasion that she was happy living with the Applicant and DR and would like stay there.

[299] He sets out the following criticism of Departmental policies relating to the placement of children –

> I am not privy to all the details of this case, but I have an overwhelming sense of déjà vu. Placement disruption is extremely damaging for young children in out of home care, no placement apart from which the biological parents can ever approach perfection, and yet the Department appears to be willing to shuttle children around in response to perceived shortcomings and often

> mischievous allegations, apparently in search of the perfect placement. Departmental actions in this field swing wildly between a complete lack of appropriate action, and wildly excessive overreaction.

DC

[300] In a reference dated 8 June 2021, DC, the biological mother of D and R states that 'The children were very happy while they were with [the Applicant]…I trusted [the Applicant] and [DR] with the children. I found her to be caring, loving and trustworthy with the 3 girls.'

HH

[301] In a written reference dated 10 August 2018,[203] HH writes that she knew the Applicant since 1997.

[302] She states that she has never known the Applicant to be 'violent or forceful with anyone or any children.' HH further writes that when the Applicant became a foster carer, 'I found her to be a very caring and organised mother.'

Relevance of Witness statements and oral evidence

[303] The witnesses present the Applicant as someone who cared for children in her foster care as her own.

[304] Some present her as a carer who imposed strict effective discipline that was in the children's best interests.

[305] Many of the witnesses expressed surprise that she had resorted to physical discipline. They were likely to see the assault as an aberration.

[306] Whether any benefits which flowed to children in her foster care ought to be considered in assessing whether this is an exceptional case is address below.

Other Factors Relevant to the Applicant's Eligibility to Hold a Blue Card.

What else can be considered

[307] As this review is a fresh hearing on the merits,'[204] the Tribunal is not confined to considering only the evidence before the original decision maker and factors in existence at the time of the offence.

[308] 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. While such information may disclose factors of relevance to the assessment of an Applicant's suitability to be issued a working with children clearance, it may not necessarily also relate directly to a conviction or charge.

[309] The criteria for deciding exceptional cases where a party is convicted, as set out in section 226 of the WWC Act, appears to confine additional matters to be considered to matters that relate to 'the commission of the offence that the chief executive reasonably considers to be relevant to the assessment of the person.[205]

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203 Materials produced by Blue Card Services, BCS–87

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

205 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 226(2) (f).

[310] However, in *Eales,*[206] the Appeal Tribunal relied on the Court of Appeal decision in *Maher,*[207] 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.'[208]

[311] The Appeals Tribunal in *Eales*[209]set out the basis for the exercise of the Tribunal's discretion as to which factors may be taken into account —

> 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 working with children clearance to be issued.[210]

[312] The Appeals Tribunal observed that in the Court of Appeal decision in *Maher* Philippides J suggested that the mandatory considerations listed in s 226 of the WWC Act do 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.'[211]

[313] On the basis of the authorities, I consider that the WWC Act states that the decision maker *must* have regard to 'anything else relating to the commission, or alleged commission of the [Applicant's offences]' that I 'reasonably consider to be relevant to the assessment of the person'.

[314] Where the decision maker is aware of a factor that is relevant to the assessment of the Applicant's suitability to be issued a working with children clearance, that factor *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, but required to assess suitability.

[315] Some of the evidence considered above, and particularly that relating to foster carer approval, while directly relevant to the assessment of the Applicant's suitability to be issued a working with children clearance, may not have relate directly to the commission of the Applicant's offence.

[316] Having considered all the factors that the WWC Act stipulates must be considered, I turn to address remaining factors relevant to the assessment of the Applicant's suitability that are unrelated, or only indirectly relate to the Applicant's offences and charge.

The Relevance of the Character Witnesses' Evidence of Benefits to Children

[317] The Applicant's character witnesses shed light on the Applicant's private life and on her role as a long-term foster carer. However, evidence that an Applicant is a committed foster parent whose work with children is considered to benefit children

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206 Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303.
207 *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492.
208 Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303 at [33].
209 Commissioner for *Children and Young People and Child Guardian v Eales* [2013] QCATA 303.
210 Ibid, at [42].
211 *Commissioner for Children and Child Guardian v Maher and Anor* [2004] QCA 492, [40].

is rarely deemed relevant and able to be considered in determining the existence of an exceptional case.

[318] In *Scott*, Buss J held that—

> any benefit that might be thought to flow to children by having access to the Applicant's knowledge, experience or flair in working with children is of no relevance if there exists an unacceptable risk to children in future contact.'[212]

[319] While this judicial statement appears to be authority for the proposition that benefit to children is not relevant, I note that Buss J qualifies his statement with 'if there exists an unacceptable risk to children in future contact'.

[320] Noting that the Applicant has been a 'foster carer for 8 years and had worked with children in various employed positions whilst holding a Blue Card for approximately 18 years',[213] it is submitted on her behalf that –,

> The skills, experience and expertise the Applicant has gained working in the medical and healthcare industry is a protective factor of children and young people.[214]

[321] The Applicant goes on to list the work with children and particularly indigenous children that she would be able to continue her work if granted a blue card and that her work would 'promote and protect the rights, interests and wellbeing of children'.[215]

[322] However, it is clear that such benefits are not to be weighed against any risk flowing from her being issued with a blue card. The reasons for this, is straightforward, the presence of a risk that satisfies the decision maker that it would not be in the best interest of children for a blue card to be issued to the Applicant does not cease to be such a risk because evidence suggests that her return to work with children would in other ways also be of benefit to children with whom she worked.

[323] As the object of the Tribunal's review is concerned with the prevention of future potential harm to children, then her past record may prove to be a reliable indicator of future risk. Such evidence may serve as evidence indicating whether concerns relating to future offending are such as would justify the making of a decision to deprive the Applicant of a blue card or whether the evidence suggests that the relevance of the behaviours being considered does not warrant a finding that the case is exceptional.

Work as a Foster Parent

[324] The Applicant's work record as an approved foster carer is relevant and important to consider as it provides insight into whether the concerns flowing from her offending are isolated or indicative of ongoing or other concerns.

[325] In that respect I particularly refer to the over 300 pages of materials produced by the Department of Children, Youth Justice and Multicultural Affairs in response to the

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212 *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 2008 WASCA 171, at [109]
213 Applicant's Supplementary Submissions, 31 January 2022, page 14, para 37(i).
214 Ibid.
215 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 5.

Tribunal's notice to produce, which document numerous concerns for children in the Applicant's foster care.

[326] As early as 2012, feedback by a Child Safety Officer on the Applicant's foster carer renewal, reveals that while there were reports of children in their care being happy, the Applicant and DR appeared to confuse a child's behaviour with a lack of their own understanding and experience parenting.[216] I note that the Applicant's blaming of children rather than her own parenting identified at this early stage of her work as foster carer appears to have remained an issue of concern.

[327] I also note that in early 2018, a family risk evaluation assessed moderate neglect and emotional abuse of the children in the foster care of the Applicant and DR.[217]

December 2017 Investigation of Alleged Emotional Abuse of a Teenager

[328] An investigation commenced in December 2017 by Child Safety was considered to be 'required due to concerns that DR and [the Applicant] were no longer willing to care for [a child].[218]

[329] This investigation is particularly noteworthy as it provides a well documented instance of the Applicant's emotional abuse of a child, largely overlooked due to the physical discipline nature of the offence.

[330] Departmental documents recorded that a 14-year-old child was self placing with her family because she did not wish to live or communicate with the Applicant and DR because of several things she alleged the Applicant said and did. These included not supporting her wish to see her mother or babysitter,[219] and being told that with respect to alcohol abuse, she was just like her family,[220] and with respect to drug abuse, no better than sister.[221]

[331] I note that in a similar vein, D told police that the Applicant had told her that her 'actual mother' was horrible.[222]

[332] A Child Safety Officer recorded that the Applicant says things to make the 14-year-old child feel bad about herself and that consequently the child 'might feel like she doesn't know where she belongs, and that the adults that are supposed to always care for her, don't really care about her.'[223] The Child Safety Officer assessment was that the child had suffered cumulative harm due to the emotional abuse, with both parents responsible.[224]

[333] Child Safety list that they were aware of what DR and the Applicant did to the child.[225] The list of harmful actions included '[the Applicant] hitting [the child] in

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216 Case Note Summary dated 21 September 2012, ICMS01 at page 9.
217 ICMS05 at pages 38 and 39.
218 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 83.
219 Ibid, pages 83-84.
220 Ibid, pages 83-84 and ICMS05 pages 34-35.
221 Ibid.
222 Documents Produced by Queensland Police Service, Disk 3, 28 minutes.
223 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS05 page 43.
224 Ibid, page 43.
225 ICMS06 page 83.

the head,' not speaking to her 'at all for days at a time,' and telling her that they 'didn't want her in the house if she was going to be disrespectful.' [226]

[334] The investigation assessed that the Applicant and DR had emotionally harmed the child by saying things that make the child not want to speak or live with them, to feel like she is responsible for the relationship breakdown between them, that it is her behaviour that needs to change to make things better between them and that that they had not emotionally supported the child through times that a teenager needs support.[227]

[335] The outcome of the investigation and assessment was that the child had experienced emotional harm as a result of the actions of DR and [the Applicant],[228] and that the Applicant and DR had shown an inability to parent the child in a way that supports her emotional wellbeing and that they are not willing and not able to care for the child.[229]

[336] It is worth noting that the Applicant was aware of the child's vulnerability, having observed that the child was 'a damaged child' when she came to live with them, and she felt that they had done their best for her.[230] In contrast to the expectations of Child Safety, the Applicant appeared to pay little attention to the child's vulnerabilities, choosing instead to impose discipline and order.

In relation to D and R

[337] Child Safety documents also provide an assessment of the Applicant as D's foster parent.[231] The materials also establishes that concerns regarding the Applicant's care of D and R predate the offence in July 2018.

[338] A concern regarding the Applicants anger and resort to corporal punishment was reported to the Department on 6 December 2017. The notifier alleged that the Applicant had anger issues, and accused her of hitting the children with an open hand or wooden spoon on the arm, and stated that she 'smacks little girls on the bum.'[232]

[339] I also note that in early 2018, a family risk evaluation assessed moderate neglect and emotional abuse of the children in the foster care of the Applicant and DR.[233]

[340] After the Applicant was charged with assaulting D, a meeting was convened to give the Applicant a right of reply to her alleged assault of D.[234]

[341] The record of this meeting reveals the inconsistency of the Applicant's accounts. It notes that the Applicant said that –

> she disciplines the kids but not by "smacking". However, then [the Applicant] stated that she does smack the kids on the hand, demonstrating how she smacks them on the hand. [The Applicant] said when she does this it's just a

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226 ICMS05 page 42
227 Ibid, page 43.
228 ICMS06 Page 83.
229 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS05 page 43.
230 ICMS06 page 57.
231 Ibid, page 56.
232 Applicant's letter dated 26 July 2018, ICMS09 at page 3; ICMS05 at page 15.
233 ICMS05 at pages 38 and 39.
234 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 page 56.

> gentle smack on the hand… [She] then referred to the hitting on the back of the children's head as "just a little tap on the head.[235]

[342] In a similar vein, the 'assessment of ongoing safety' notes that the 'initial response of the Applicant and DR when confronted [with allegations about their physical discipline of children in their care] was that 'they never smack children, that this is a one-off incident. They then acknowledged smacking the children on the bottom, and at times on the hands.'[236]

[343] An additional example of the inconsistency of the Applicant's accounts is to be found in a letter dated 26 July 2018, in which the Applicant responds to concerns raised in June 2018, prior to her offence. In her letter she denies hitting children in her care with a cord, but admits to hitting D with a spoon. Then she says, 'I admit that I have smacked them on the bottom or leg when naughty but again, this was not done in anger and only a soft smack with my hand was used on those times.'[237]

[344] The notes on the meeting also refer to the Applicant referred to D as a 'little rat.' During the meeting.[238] Commenting on the Applicant's disregard for D's and R's emotional needs the assessment committee report notes that 'Throughout the interview process both carers referred to the girls as naughty, liars, thieves, difficult and sneaky.'[239]

[345] The assessment of the Applicant and DR also notes that while they had referred to the girls calling them Mum and Dad as an indication of how close they were, one of the girls had told interviewing police that they would 'get into trouble if they did not call DR and the Applicant 'mum and dad'.[240]

[346] The Investigation into her assault of D noted that this was not the first time she had harmed a child as previously, the Applicant and DR had been assessed as–

> people responsible for causing harm to a child who they were granted guardianship of.' This has resulted in current court proceedings to remove guardianship from them and return it to the Chief Executive.[241]

[347] The Investigation also noted that four out of five children who had previously been cared for by the Applicant who were interviewed maintained that physical discipline occurs regularly in the home.[242]

[348] Child Safety documents appear to provide evidence totally debunking any suggestion that D was the only child harmed by the Applicant through an out of character assault. A particularly concerning comment recorded in documents relating to another harm report relating to children in the Applicant's foster care states that 'the information received was that there was a longstanding pattern of behaviour that may have caused harm to any child in the care.'[243]

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235 Ibid.
236 Ibid, page 85.
237 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS0 page 3.
238 ICMS06 page 56.
239 Ibid, page 85.
240 Ibid, page 85.
241 Ibid, page 84.
242 Ibid, page 85.
243 Ibid, page 80.

[349] The report also assessed that the Applicant's and DR's treatment of other children in the home followed a similar pattern of belittling, name calling and unrealistic expectations being set. There appears to be little understanding or compassion for the fact that the children have already suffered trauma and require a more sympathetic approach to behaviour management.[244]

[350] Referring to the Applicant's use of fear of physical punishment as a discipline tool, the Department assessed that 'both girls have already had trauma in their life due to the actions of their parents and may be particularly sensitive to such behaviour.'[245]

[351] The investigation also observed that the Applicant and DR had little regard for the emotional impact on the girls if they were removed from the home because the carers failed to meet the standards expected of a foster carer.[246]

Explaining the Physical Punishment

[352] A Child Support Officer recorded that during a visit to the Applicant's house on 25 July 2018, the Applicant's response to the children being taken to alternate care was that she and DR did not receive support from Child Safety, and that no one taught them how to discipline children.[247]

[353] However, Child Safety has pointed out that both carers 'have undertaken ongoing training to understand the behaviours of a child and be provided with positive strategies to implement should the child's behaviours escalate'[248]

[354] Regarding the alleged lack of support, the Investigation into the Applicant's assault of D observed that, 'While they felt they don't have support to manage difficult children they never raised this as a worry with child safety or alternate care during regular visits to the home.'[249]

[355] Explaining her resort to physical punishment, the Applicant has argued

> I believe the punishment I was giving was lawful and never considered for one moment I was harming them compared to watching family members raising their children as I was growing up and still see to this day.[250]

[356] The Applicant is also said to have remarked that smacking children as woman of the house was 'culturally appropriate'.[251] The Applicant has consistently denied having made this remark, and has explained that she had said that *disciplining* children was culturally appropriate.

That the Applicant acted under severe stress

[357] While recognising that the stress at the time of the offence, 'would have made life more difficult to both the carers, and impacted on their patience, tolerance and compassion for others' Child Safety assessed that 'family stress is not an acceptable

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244 Ibid, page 86.
245 Departmental letter dated 28 August 2018 to the Applicant and DR, ICMS11 at page 10.
246 ICMS06, at page 86.
247 ICMS06, at page 44.
248 Materials provided by the Queensland Police Service, QPS–9; also, Renewal of Approval Recommendation Form, LM-02, page 9.
249 Renewal of Approval Recommendation Form, LM-02 pages 7 and 9; QPS–9 at page 5.
250 Applicant's letter dated 26 July 2018, BCS–57.
251 ICMS06 page 44.

reason to commit a criminal offence, particularly against a child.'[252] In addition the Department noted, 'this investigation has revealed a long standing pattern of dysfunction in the carer home that predates the current stressors being experienced.'[253]

[358] The Child Safety investigation considered the nature of the Applicant's offence, stating–

> The actions of [the Applicant] towards [D] cannot be classified as physical discipline or a behaviour management technique. [The Applicant] has struck [D] with a wooden spoon multiple times and with sufficient force to cause swelling and bruising.[254]

[359] It is submitted on behalf of the Applicant that –

> It is unreasonable and unjust to condemn the Applicant of serious allegations without affording the Applicant procedural fairness and natural justice by way of a right of reply or having the allegations determined by an independent Court of Tribunal. It is submitted that the Tribunal should give little to no weight to the other alleged incidents.[255]

[360] The Applicant further submits that –

- There was no formal investigation into these "other" allegations conducted and the Applicant:
- Was never questioned in relation to the allegations;
- Did not receive a warning;
- Did not receive an objection to any renewal applications which were approved every two years throughout the duration when I was a foster carer;
- Did not receive complaints by the Department of Child Safety or the Respondent in relation to her capacity as a foster carer; or(sic)

Further:

- The allegations made by the children and other children the Applicant had fostered were not included in a sworn or written statement;
- The full transcript of the type of questions and investigation techniques used when the Department of Child Safety when interviewing the children and other children the Applicant had fostered were not disclosed.[256]

[361] The Tribunal issued directions on 24 August 2021 stating that –

> The material provided to the Tribunal…by the Queensland Police Service and the Department of Children, Youth Justice and Multicultural Affairs may only be viewed and not copied by the parties and/or their legal representatives.

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252 Documents produced by the Department of Children, Youth Justice and Multicultural Affairs, ICMS06 at page 84.
253 Ibid.
254 Ibid, page 86.
255 Applicant's Supplementary Submissions dated 31 January 2022 at paras 29 and 30.
256 Ibid, paras 27 and 28.

[362] No transcripts of police interviews with the Applicant and the two children, D and R, were provided to the Tribunal. However, recordings of the two 93A interviews and the interview with the Applicant were made available on 3 DVDs.

[363] The Respondent 'made arrangements with the Tribunal to view the material held on the Tribunal file…and understood [from the Applicant's lawyer] that the Applicant made similar arrangements prior to the hearing.'[257] However, at the hearing on 6 December, the Applicant's lawyer advised the Tribunal that he had not viewed the materials.

[364] In directions issued following the hearing on 6 December, the Applicant and Respondent were given a timeline within which to submit final submissions.

[365] To ensure that the Applicant had ample opportunity to consider and respond to all the materials that had been produced by the Queensland Police Service and the Department of Children, Youth Justice and Multicultural Affairs, the directions also provided an alternative timeline should the Applicant chose to seek a further hearing date and call additional witnesses.

[366] The Applicant did not seek a further hearing date and in her final submissions did not address the materials relating to her work as a foster carer in any great detail but submitting that 'The Tribunal should give little to no weight to the other alleged incidents.'[258]

[367] The Applicant alleges that the Respondent relies on 'other materials' that suggest that the Applicant, 'used inappropriate physical discipline and behavioural management techniques on numerous other occasions,'[259] which the Applicant denies.

[368] What is clear is that the Tribunal must consider all materials relevant to its deliberations. In *PML*[260], the Appeal Tribunal held that, 'A failure to take into account some material consideration is an error of law…'[261]

[369] With respect to the appropriateness of considering untested evidence in *Lister (No 2)*[262] the Appeal Tribunal held that while the untested nature of evidence may affect its evidentiary, it does not render it irrelevant.[263] including untested allegations, as long as they are accorded appropriate weight.

[370] Both parties have been provided with access to all materials considered by the Tribunal and have been offered ample opportunity to call witnesses, and submit further evidence and submissions.

[371] The materials contain many specific allegations and related evidence relevant to the Tribunal's determination of whether the Applicant's case is an exceptional case. While many of the specific allegations have not been individually put to the Applicant, the Applicant has been made aware of this evidence that questions the Applicant's blanket denial of ever having 'used inappropriate physical discipline and

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257 Respondent's Outline of Submissions, 10 March 2022.
258 Ibid, para 30.
259 Ibid, 24.
260 Director-General, Department of Justice and Attorney-General v PML [2021] QCATA 51.
261 Ibid, at [51]
262 *Commissioner for Children and Young People and Child Guardian v Lister (No 2)* [2011] QCATA 87
263 Ibid, at [32].

behavioural management techniques on the Children or any children under her care or ever having caused physical or emotional harm to children'.[264]

[372] This Tribunal is not required to make findings of fact regarding all allegations and contested evidence. As the Respondent submits the Tribunal has previously determined that –

> it is sufficient having regard to 'the totality of the evidence considered, that the circumstances raise the possibility of a risk to children such that it is not in their best interests for the Applicant to be given a blue card.[265]

[373] I wish to reiterate that this review was not a hearing of allegations against the Applicant, which must be proved if she is to be denied her blue card. Unlike the presumption of innocence in criminal proceedings there is no entitlement to a presumption that it is in the best interests of children for an Applicant convicted of an offence to be issued a working with children clearance.

Conclusion

[374] The Applicant submits that the evidence fails to prove a real and appreciable risk determining instead that there was a risk on the mere possibilities not based on facts.[266]

[375] As the Appeals Tribunal clearly states the establishment of a real and appreciable risk is not the test of whether the case is an exceptional case.[267] I would also add that no one bears the onus of proof in this review and that the only tests is whether the case is an exceptional case such that it would not be in the best interests of children for the Applicant to be issued a working with children clearance.

[376] However, I understand the Applicant to be submitting that if the Tribunal is to protect children from future risks there must be evidence of risks beyond mere conjecture. I accept that in finding that there is an exceptional case, the Tribunal must find that it would not be in the best interests of children for the Applicant to be issued a working with children clearance. Natural justice requires that such a finding be based on and reflects the evidence presented.

[377] The Respondent, on the other hand, contends that the Tribunal can be satisfied on the balance of probabilities, and bearing in mind the gravity of consequences involved, that the Applicant's case is an exceptional case.

[378] The WWC Act lists specific matters relevant to the offence and the assessment of the Applicant that the Tribunal must consider. In addition, the Tribunal may consider other matters relevant to the assessment of the Applicant.

[379] A consideration of these matters in the context of the paramount principle under the WWC Act 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 blue card is to provide the bases of the Tribunal's decision.

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264 Ibid, para 24.

265 Respondent's Outline of Submissions, 10 March 2022 at para 55, referring to *TNC v Chief Executive, Public Safety Business Agency* [2015] QCAT 489 at [89]-[90] and *Director-General, Department of Justice and Attorney-General v CMH* [2021] QCATA 6 at [17]-[19].

266 Citing GP, page 28 at [13].

267 *Director-General, Department of Justice and Attorney-General v MAP* [2022] QCATA p 5.

[380] The Tribunal's consideration of prescribed and relevant matters has identified a number of concerns. These concerns, as set out above, relate to the Applicant's ability to 'promote and protect the rights, interests and wellbeing of children and young people.'[268]

[381] I am satisfied that the Applicant's offence on July 2018 exposed the Applicant's inappropriate and illegal disciplinary methods and led not only to criminal prosecution but to a withdrawal of her working with children clearance and her foster carers approval. The resulting investigations revealed materials establishing that the concerning aspects of the Applicant's offence were not one-off or out of character. In addition, evidence as to the Applicant's current suitability to be issued a working with children clearance has disclosed that matters of concern had not changed significantly.

[382] I reiterate that this review is not an assessment of the Applicant. Instead, it is an assessment of whether it is in the children's best interests that she be issued a working with children clearance. In that respect I have identified concerns and risks regarding the Applicant's capacity to protect the rights, interests and wellbeing of children and young people and specifically to care for children in a way that protects them from harm.[269] These risks, I am satisfied, make this case an exceptional case in that it would not be in the best interests of children for the Applicant to be issued a working with children clearance.

Compatible with Human Rights

[383] The Tribunal must also comply with the HR Act.[270] In particular, the HR Act requires the Tribunal to 'give proper consideration to human rights relevant to the decision.'[271] This, the Act states, includes 'identifying the human rights that may be affected by the decisions and considering whether the decision would be compatible with human rights.'[272]

[384] As noted earlier, the HR Act also states that, 'All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights'[273]

[385] The HR Act provides that a decision is compatible with human rights if it, a) does not limit a human right; or b) limits a human right only to the extent that is reasonable and demonstrably justifiable.[274]

[386] Section 13(1) the HR Act provides a guide to determining what limits are reasonable and demonstrably justifiable, stating—

> 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.

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268 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 5
269 Ibid, s 6(b).
270 See: *PJB v Melbourne Health and Anor* (Patrick's case) [2011] VCS 327 at [123]; *HF* [2020] QCAT 482 and *JF* [20220] QCAT 419.
271 *Human Rights Act 2019* (Qld), s 58(1)(b).
272 Ibid, s 58(5).
273 Ibid, s 48(1).
274 Ibid, s 8.

[387] In section 13(2) the HR Act lists factors that 'may be relevant' to the Tribunal's determination whether a limit on a human right is reasonable and justifiable —

> (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).

[388] The listed factors recognise not only the existence of competing and even inconsistent rights, but also that in particular statutory settings some rights take precedence over others. The clear object of these statutory provisions is to provide a formula to protect all human rights by restricting the limits on rights to what is reasonable and justifiable in the context of the purposes of statutory provisions.

Human Rights of Applicant

[389] A number of the Applicant's human rights will undoubtedly be affected by the Tribunal's decision, as they have been by the earlier decisions regarding the Applicant's blue card. The rights affected include her right to further vocational education and training,[275] her right to privacy and reputation,[276] her cultural rights HRA[277] and her right to take part in public life.[278]

Punished Twice

[390] The Respondent challenges the Applicant's reference to the Applicant's human right 'not to be punished twice'[279] by observing that the explanatory notes to the Human Rights Bill provide that clause 34, which provides for the right not to be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted according to law, do not apply to civil proceedings[280]

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275 *Human Rights Act 2019* (Qld), s 36(2).
276 Ibid, s 25.
277 Ibid, ss 27, 28.
278 Ibid, s 23.
279 Applicant's Supplementary Submissions, 31 January 2022 at para 46.
280 Explanatory Notes, Human Rights Bill 2018, page 27.

[391] The Respondent adds that in any event the WWC Act is not intended to impose additional punishment but rather is intended to put 'gates around employment to protect children from harm.[281]

[392] Nevertheless, a decision that appears to punish the Applicant by limiting her human rights excessively would arguably be incompatible with the HR Act for limiting her rights unreasonably and unjustifiably. In such a situation the Applicant would undoubtedly feel that she was being punished.

Cultural Rights

[393] The HR Act lists another human right that is particularly significant not only because the Applicant identifies as an Aboriginal woman but because of her significant work in the field of health care and indigenous affairs.[282]

[394] In section 28 the HR Act addresses the distinct cultural rights of Aboriginal peoples and Torres Strait Islanders peoples,[283] and states that Aboriginal peoples and Torres Strait Islander peoples must not be denied certain specific rights set out in section 28(2), including –

> (a) To enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and….
> (c) To enjoy, maintain, control, protect and develop their kinship ties…

[395] Section 28(3) also protects 'the right not to be subjected to forced assimilation or destruction of their culture.'

[396] The Applicant asserts that the Applicant's cultural rights are limited by the negative notice.[284] The reasons submitted on behalf of the Applicant are that she –

(a) Identifies as an Aboriginal and Torres Strait Islander;

(b) Has worked and lived in regional and rural Aboriginal and Torres Strait Islander communities for a large part of her life;

(c) Has built trust, and maintained good relationships, with members of the communities throughout her career as an Advanced Indigenous Healthcare Worker; and

(d) Has cultivated the bond she has with her local community through culture, which is inclusive of language, cultural expressions, kinship, spiritual practices, beliefs and teachings in her career.[285]

[397] I accept that the Applicant's rights set out in section 28 may be limited by a decision effectively denying her a working with children clearance.

Protection of Family Unit

[398] While it has not been mentioned in submissions, it could be posited that the protection of families as a human right may be applicable to foster carers, as foster

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281 Queensland Parliamentary Debates, Legislative Assembly, 14 November 2000, page 4391 per Anna Bligh regarding the Commission for Children and Young People Bill. Also cited in *Commissioner for Children and Young People and Child Guardian v Lister (No 2)* [2011] QCATA 87 at [60].

282 Applicant's Supplementary Submissions, 31 January 2022 at para 47(d).

283 *Human Rights Act 2019* (Qld), s 28(1).

284 Applicant's submissions 31 January 2022 page 19, at para 47(d).

285 Ibid.

care is regarded as a form of family-based care. In section 26 the HR Act states, 'Families are the fundamental group unit of society and are entitled to be protected by society and the State.' I do not see that the entitlement of bonds between parents and children to be protected need be dependent on whether the parents are biological parents, adoptive parents or (especially long term) foster parents. Dr DH and some other witnesses made reference to the need to take into account the effect of a blue card decision on foster care children.[286]

[399] To the extent that the decision may defend or limit the rights of parents and children as a family like unit, such rights need to be considered.

Right to Vocational Education and Training

[400] The Applicant lists education as one of the Applicant's human rights that are limited by a negative notice. The HR Act states that 'Every person has the right to have access, based on the person's abilities to further vocational education and training that is equally accessible to all.'[287]

[401] The Applicant has highlighted how the refusal to issue her a working with children clearance effectively prevents her from completing education required for her to pursue a career in nursing, her chosen career.

The Right to Work

[402] Similarly, the Applicant's right to work appears to have been limited by both the decision to issue a negative notice and by the lengthy review process.

[403] While the HR Act does specifically list the right to work amongst its 23 fundamental human rights, arguably this right may fall under one or more of related rights listed in the HR Act, rights such as the right to take part in public life,[288] or the right to further vocational education and training.[289]

[404] The right is recognised in international human rights covenants. For example, Article 6(1) of the International Covenant on Economic, Social and Cultural Rights' (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.

[405] However, 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.

[406] It could be argued that the qualification of the right is similar to the reasonable and justifiable limit of the HR Act.

[407] The right to work is undoubtedly qualified by the requirement that a person possesses the appropriate skills and qualifications to undertake particular work. On

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286 Oral evidence given by Dr DH is discussed above.
287 *Human Rights Act 2019* (Qld), s 36(2).
288 Ibid, s 23.
289 Ibid, s 36(2).

that basis it could be said that a negative assessment of a person's suitability to undertake particular work is not necessarily a breach or limitation of that right but rather an assessment of their suitability to undertake the work.

[408] However, the Applicant argues that the effect of issuing a negative notice is to bar her from a large part of the workforce. Such a limitation the Applicant argues is 'incompatible with the relationship between the limitation and its purpose.'

Hardship

[409] Citing Justice Buss in Scott (No 2) the Respondent submits that 'any consequences in terms of prejudice or hardship to the Applicant are not relevant in child-related employment decisions.'[290]

[410] However, the Human Rights Act appears to alter this approach by stating that it would be 'unlawful' for this Tribunal to 'fail to give proper consideration to a human right relevant to the decision.'[291] As already noted, the Act goes on to state that 'giving proper consideration to a human right in making a decision requires the Tribunal to identifying any human right that may be affected by the Tribunal's decision. [292] Consequently, the Tribunal is required to consider whether any hardships caused by its decision also affect human rights.'

The Rights of Children

[411] The WWC Act specifies that the Act is to be administered and specifically that child-related employment decisions are to be reviewed under the principle that 'the welfare and best interests of a child are paramount.'[293] Similarly, the Act also requires that it be administered under the principle that 'every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.'[294]

[412] Consequently, the most directly relevant and applicable human right would appear to be that set out in section 26(2) of the HR Act, 'Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.'

[413] That the protection of the rights of children in legislation concerning child related employment would have an unintended punitive effect on others was recognised by legislators, who stressed that the intention of legislation regulating child related employment was not about punishing others but, 'putting gates around employment to protect children...[and] protecting children from future abuse.' [295]

[414] As a paramount consideration, the rights of children are clearly to be given priority over other rights. However, in requiring the Tribunal's decisions to be compatible

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

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

292 *Human Rights Act 2019* (Qld) s 58(5)(a).

293 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 6(a) and s 360, respectively.

294 *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 6(b).

295 *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].

with human rights relevant to the decision, the HR Act requires any limitation of a right to be reasonable and justifiable. The implication for this review is that in protecting the rights of children under the WWC Act the Tribunal must do so, to the extent possible that is consistent with the statutory provisions of the WWC Act, in a manner that does not impinge on other human rights beyond what is reasonable and justifiable.

[415] That the decision options are limited and that the blue card is transferrable and unable to be issued with conditions may in some cases make compatibility with this HR Act requirement problematic.

[416] That this may be the case is recognised by the HR Act. In section 48 the Act provides that–

> (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
>
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

[417] In my opinion an interpretation of the relevant WWC Act provisions in a way that is (most) compatible with human rights requires the Tribunal identify human rights that may be affected by its acts or decisions and interpret statutory provisions in accord with section 48 of the HR Act.

[418] The Tribunal's decision in reviewing child-related employment decision under the WWC Act must reflect the Act's object 'to promote and protect the rights interests and well being of children and young people' and undertaken under the principle that the welfare and best interests of a child are paramount.' On this basis the rights of others may be limited where the rights of children and the implementation of the Act's purpose require.

[419] However, the HR Act's requirement that decisions be compatible with human rights requires the Tribunal to ensure that the rights of others are not affected any more than is justifiable and reasonable, while keeping in mind the paramount consideration of the WWC Act when considering the factors that the HR Act lists as relevant to the determination of whether a limit on a human right is reasonable and justifiable.

[420] In outlining some of the Applicant's human rights likely to be affected by the Tribunal's decision, I noted that some of the limitations, particularly on work and study appear to affect rights to a larger extent than is arguably necessary. As the Applicant has submitted is it necessary to prevent the Applicant from completing her heath studies or undertaking a wide range of employment in order to protect the interest of children?

[421] The Tribunal's options are to find that the case is an exceptional case and confirm the decision of the Respondent or find that the case is not an exceptional case and set aside the Respondent's decision and replace it with the Tribunal's finding that the case is not exceptional.

[422] I am satisfied that presently it would not be in the best interest of children with whom the Applicant may work in employment or business regulated under the WWC Act.

[423] However, even if I am wrong in finding that the effect of the decision on the Applicant's human rights is compatible with human rights, the provision of the HR Act declaring it unlawful 'to make a decision in a way that is not compatible with human rights' would be unlikely to apply to the Tribunal because the Tribunal could not have made a different decision because of the statutory provisions of the WWC Act.

[424] In section 58(2) the HR Act notes that the Act's provision making it unlawful to 'act or make a decision in a way that is not compatible with human rights or in making a decision to fail to give proper consideration to a human right relevant to the decision'[296]does not apply…if the [Tribunal] could not reasonably have acted differently or made a different decision because of a statutory provision…'[297]

Requirement to Act in a way that is compatible with Human Rights

[425] The Tribunal is also required to ***act*** in a way that is compatible with human rights.[298] In this respect I note the human rights likely to be limited by the process of this review and the making of the decision, namely, the right to a fair hearing encompassing the right to be accorded natural justice, and a fair and public hearing.[299]

The Right to be Accorded a Fair Hearing and Natural Justice

[426] 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.

[427] The QCAT Act requires the Tribunal to act 'fairly and according to the substantial merits of the case,'[300] and states that the Tribunal 'must observe the rules of natural justice.'[301]

[428] Natural justice includes the right to be treated fairly and applies to a wide range of judicial, quasi judicial and administrative decision-making processes.

[429] 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

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296 *Human Rights Act 2019* (Qld), s 58(1).
297 Ibid, s 58(2).
298 Ibid, s 58(1)(a).
299 Ibid, s 31.
300 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(2).
301 Ibid, s 28(3)(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.

[430] Some concerns were expressed on behalf of the Applicant, regarding the timing of materials produced in response to the Tribunal's issuing notices to produce. The desirability of the Tribunal being able to 'decide the proceedings with all the relevant facts'[302] is ensured by authorising the Tribunal to 'admit into evidence the contents of any documents despite the noncompliance with any limit or other requirement under the Act, an enabling Act or the rules relating to the document or the service of it. The Tribunal provided the Applicant with time agreed as sufficient to respond to the materials and an opportunity for the Applicant to call further witnesses. In so doing, the Tribunal ensured that it acted fairly and the Applicant was afforded key elements of natural justice.

[431] The Applicant also voiced concerns relating to reliance on evidence not tested or proven in court. The Tribunal 'must act fairly and according to the substantial merits of the case.'[303] It conducting proceedings the Tribunal does not rely on and confine its considerations to evidence presented by parties but rather is entitled to 'inform itself in any way it considers appropriate.'[304]

[432] As the Tribunal is not bound by the rules of evidence,[305] uncorroborated, hearsay and contested evidence is not excluded but rather is accorded appropriate evidentiary weight.

[433] The nature of Tribunal proceedings in a review is not intended to be adversarial, and proceedings are to be conducted with minimal formality and technicality.[306] However, Tribunal practices and procedures ensure that the Tribunal acts 'fairly and according to the substantial merits of the case.'[307]

[434] I find no evidence suggesting that the Tribunal has not observed the rules of natural justice. The concerns raised appear to relate to practices and procedures of the Tribunal that distinguish it from courts of law.[308]

a) Right to a Public Hearing

[435] As part of the right to a fair hearing, 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'*.[309]

[436] Legislative provisions governing the conduct of this review provide exceptions to these rights, which acknowledge that in some circumstances the protection of other rights should take precedence.

[437] 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'. However, the enabling

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302 Ibid, s 28(3)(e).
303 *Ibid,* s 28(2).
304 Ibid, s 28(3)(c).
305 Ibid, s 28(3)(b).
306 Ibid, s 28(3)(d).
307 Ibid, s 28(2).
308 *Queensland Civil and Administrative Tribunal Act 2009 (Qld),* s 28(3).
309 *Human Rights Act 2019*, s 31(1).

Act in this case is the WWC Act, states in s 361(1) that, 'A hearing of a proceeding for a QCAT child-related employment review must be held in private.'

[438] The QCAT Act also provides that –

> The tribunal may direct a hearing to be closed if the tribunal 'considers it is 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.[310]

[439] Section 31(2) of the HR Act, lists an exception to the holding of a public hearing. It states that—

> 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.

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

b) Decisions to be Publicly available

[441] Section 31(3) of the HR Act requires all tribunal decisions to be, 'publicly available'. 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.

[442] The Tribunal may only make such an order if it considers it necessary for a number of specific reasons[311] including, 'to avoid the publication of confidential information or information whose publication would be contrary to the public interest'[312], and 'for any other reason in the interests of justice'.[313] Such an order was made at an earlier stage of this review.[314] It prohibits –

> the publication of
>
> (i) the content of a document or thing filed in or produced to the Tribunal,
>
> (ii) evidence given before the Tribunal, and

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310 *Queensland Civil and Administrative Tribunal Act 2009 (Qld),* s 90 (2).
311 Ibid, s 66(2).
312 Ibid, s 66(2)(d).
313 Ibid*,* s 66(e).
314 24 August 2021.

(iii) any order made or reasons given by the Tribunal

…to that extent that it could identify or lead to the identification of the applicant, any family member of the applicant, any child, or any non-party to the proceedings, save as is necessary for the parties to engage in and progress these proceedings.'

c) Privacy and Reputation

[443] Public hearings, published decisions, the identification of parties and disclosure of personal information may also infringe on the Applicant's and others' right to privacy and not to have their reputation unlawfully attacked[315]and arbitrarily interfered with.[316]

[444] Both Section 66(1)(c) of the QCAT Act, permitting non publication orders, and the any directions regarding non publication, clearly limit the Applicant's right to a fair hearing, enshrined in s 31(3) of the HR Act.

[445] However, I also find that the limits imposed are reasonable and justifiable for the purposes of s 13 of the HR Act, and are therefore compatible to the rights of persons whose right may be limited.

[446] In accordance with factors listed in s 13(2) of the Act I note 'the importance of the purpose of the limitation',[317] 'the importance of preserving the human right, taking into account the nature and extent of the limitation on the right',[318] 'the balance between the [last two factors]'[319] and 'whether there are any less restrictive and reasonably available ways to achieve the purpose'.[320]

Conclusion regarding Human Rights

[447] I am satisfied that in accordance with the HR Act, the Tribunal has –

(a) acted and made this decision in a way compatible with human rights.

Where as discussed above, the Applicant's human rights including her right to privacy and reputation, cultural rights, protection of the family unit, right to vocational education and training, right to work are limited by this decision or actions of this Tribunal, I am satisfied that the limits and associated hardships are reasonable and justifiable in accordance with section 13(2) of the HR Act.

If I am wrong in finding that the limits on the Applicants, particularly with respect to her right to study and work are reasonable and justifiable, I am satisfied that, as provided by section 58(2) of the HR Act, I could not have reasonably made a different decision in giving effect to the statutory provisions of the WWC Act and consequently am not required to make a decision compatible with human rights.

(b) interpreted statutory provisions in a way compatible with human rights in accordance with section 13 HR Act; and

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315 *Human Rights Act 2019* (Qld), s 25 (b).
316 Ibid, s 25 (a).
317 *Human Rights Act 2019* (Qld), s 13(2)(e).
318 Ibid, s 13(2)(f).
319 Ibid, s 13(2)(g).
320 Ibid, s 13(2)(d).

(c) in making this decision has given proper consideration to a human right relevant to the decision by –

(i) identifying human rights that may be affected by the decision; and

(ii) considering whether the decision would be affected by the decision

Conclusion

[448] In determining whether the Applicant's case is an exceptional case in which it would not be in the best interest of children for the Applicant to be issued a working with children clearance, I have—

(a) Considered all the evidence;

(b) Undertaken the review 'under the principle that the welfare and best interest of a child are paramount;'[321]

(c) Had regard to the factors listed in section 226(2) of the WWC Act;

(d) Considered other factors relevant to the decision;

(e) Given proper consideration to human rights relevant to the decision;[322]and

(f) Acted and made a decision that is compatible with human rights;[323]

[449] On the basis of these considerations, and bearing in mind the gravity of the consequences involved, I am satisfied on the balance of probabilities that the Applicant's case is an exceptional case in which it would not be in the best interests of children for the Applicant to be issued a working with children clearance.

Order

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 confirmed.

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

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

323 Ibid, s 58(1)(a).