

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Devon v Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships* [2022] QCAT 386

PARTIES: **MICHAEL OWEN DEVON**
(applicant)

v

DEPARTMENT OF SENIORS, DISABILITY SERVICES AND ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS
(respondent)

APPLICATION NO/S: GAR268-21

MATTER TYPE: General administrative review matters

DELIVERED ON: 18 October 2022

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Goodman

ORDERS: **The respondent's decision that the applicant poses an unacceptable risk of harm to people with a disability is confirmed.**

CATCHWORDS: ADMINISTRATIVE REVIEW – clearance to work – where exclusion issued – whether applicant is an unacceptable risk to people with a disability

Disability Services Act 2006 (Qld), s 40, s 41, s 50, s 51, s 86, s 87, s 88, s 92, s 93, s 94, s 138ZR, s 138ZS, s 367, s 371, s 382, s 385, Schedule 8
Human Rights Act 2019 (Qld), s 8, s 13, s 17, s 25, s 58
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17, s 18, s 28

CMH v Director General, Department of Justice and Attorney-General [2020] QCAT 15
Director-General, Department of Justice and Attorney-General v CMH [2021] QCATA 6
Volkers v Commission for Children and Young People and Child Guardian [2010] QCAT 243

APPEARANCES & This matter was heard and determined on the papers pursuant

REPRESENTATION: to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] Mr Devon applied to the respondent for authority to work in the disability sector. Under the recent amendments to the *Disability Services Act 2000* (Qld) (“DSA”), he must be issued with a clearance in order to do so. Instead, following the mandatory screening process provided for in the DSA, Mr Devon was issued with an exclusion.
- [2] On 29 March 2021, the Department reassessed Mr Devon’s status and made a decision not to cancel the exclusion after finding that he was an unacceptable risk to people with a disability.
- [3] Mr Devon has applied to the Tribunal for a review of the Department’s decision. He states that he is not an unacceptable risk to people with a disability, and seeks a decision to that effect from the Tribunal.

CRIMINAL HISTORY

- [4] Mr Devon had been charged with, but not convicted of, the following offences:
 - (a) 1x indecent act in any place to which the public are permitted access in 2000; and
 - (b) 5x sexual assaults between 1997 and 2017.
- [5] The applicant was convicted of stealing in 1966.

THE SEXUAL ASSAULT ALLEGATIONS

- [6] Three adult women made complaints about the applicant’s behaviour when he was working as a massage therapist in the period 1997-2000, which resulted in charges being laid and proceeding to trial.
- [7] The first trial dealt with complaints made by complainant A. The charge of indecent act was discontinued at trial. During the trial, complainant B came forward, and the jury was discharged.
- [8] A further trial was conducted to deal with complaints made by both A and B (four charges of sexual assault).
- [9] The material before the Tribunal contains graphic descriptions of the alleged assaults. The details of the allegations are known to the parties and it is not necessary to detail them in this decision. I will provide a summary only.
- [10] A alleged that:
 - (a) In September 2000 she attended for a massage and the applicant asked her to remove all of her clothes. He did not leave the room while she undressed, or offer her a towel to cover herself;
 - (b) The applicant twice instructed her to bring her legs up and her knees to the side, then put his finger inside her vagina, telling her it was to massage pressure points. He did not wear gloves;

- (c) The applicant touched her breasts. He then pulled down his pants and said he would show her pressure points. He touched his groin and asked “can you feel this?”; and
- (d) She was 29 years old at the time and did not consent to the applicant’s actions.

[11] B alleged that:

- (a) In August 1997 she attended a massage with the applicant’s son and kept her underwear on;
- (b) She returned for a further massage the following week. At the second massage, the applicant’s son started the massage and the applicant finished it. When the applicant took over, he asked her to remove her bra and underpants. He did not provide any coverage for her. He massaged between her legs, on the inside of her thighs and up to her groin area;
- (c) She returned for a further massage later in the month. The applicant advised her to remove all of her clothing and lie on her back. He did not provide any covering;
- (d) The applicant said something like “sometimes problems with peoples’ backs comes from their pelvic area”. He massaged her groin and put his finger inside her vagina. He was not wearing gloves. She opened her eyes and pushed his hand away, saying something like “stop it” or “don’t do it”. The applicant said something like “the pelvic muscles are tight and need working”. She left.

[12] Witness X provided a statement saying that she was a 42 year old woman who worked for the applicant from 1995, and they would massage each other each week. She said that:

- (a) The applicant would remove her underwear during the massage and would remove a towel if she attempted to cover herself. She also saw that he did this with other female clients;
- (b) On at least four occasions, the applicant touched her inappropriately on the breast or groin; and
- (c) On numerous occasions the applicant would say to her something like “If you’re lonely, I can fix you up. I will satisfy you, we can have sex.”

[13] Witness Y provided a statement saying that she was a 35 year old woman who was a client of the applicant’s between March and September 1997. She said that:

- (a) The applicant removed her underwear during the massage without her consent. When she mentioned to him that she felt uncomfortable being naked, he said words to the effect of “Don’t worry about me, nothing fazes me, there’s times when I’ve had women orgasming on the table. I don’t think anything of it”; and
- (b) The applicant massaged her groin and touched her vagina. When she spoke to her friend who had had a massage with the applicant earlier the same day, her friend told her that he had inserted his finger in her vagina.

- [14] After a trial, the jury failed to reach a verdict and was discharged. When the matter was retried, the jury again failed to reach a verdict and was discharged. The Crown determined that the matter did not warrant a third trial and the proceedings were discontinued.
- [15] Complainant C also reported the applicant to the police. She alleged that:
- (a) She was 38 years old in February 2017. She was massaged by the applicant, who did not provide a towel for coverage. He massaged her groin area and rubbed against her vagina and clitoris;
 - (b) She texted the applicant five days later saying that she felt very uncomfortable and his actions were not appropriate. She texted “If it was an accident on your part, then you need to be careful when massaging the top of the legs but for it to happen twice (first time was more of a brush over) makes me think this was intentional. I wanted to talk to you face to face but was advised not to by a friend. I would appreciate some kind of response from you ...”. The applicant responded by text message to say “Hi...I’m on my way home I am an honest person and will talk to you face to face if you wish”; and
 - (c) She later spoke to the applicant with her husband present and recorded the conversation. The applicant apologised and said that if he touched her inappropriately it was by accident.
- [16] Witness Z is C’s husband. He provided evidence that C had reported to him the inappropriate touching by the applicant when she returned from her massage.
- [17] The applicant was charged with sexual assault and was found not guilty at trial.

THE LEGISLATIVE FRAMEWORK

- [18] Given the newness of the current legislative provisions, and the complication of the transitional provisions, I will set the relevant sections of the legislation out in some detail.
- [19] The *Disability Services Act* 2006 (Qld) sets out the process for disability worker screening. The Act contains the following relevant provisions:

40 Main purposes of part

This part—

- (a) establishes a scheme for screening persons, by obtaining and considering their criminal history and other relevant information, to assess whether the persons pose an unacceptable risk of harm to people with disability; and
- (b) requires persons who carry out, or propose to carry out, particular work with people with disability to be screened under the scheme before they start carrying out the work; and
- (c) prohibits persons from carrying out particular work with people with disability if the chief executive decides they pose an unacceptable risk of harm to the people with disability.

41 Paramount consideration

The paramount consideration in making a decision under this part is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation

50 Meaning of clearance and types of clearances

- (1) A clearance is a declaration, issued by the chief executive to a person, that—
 - (a) screening of the person has been conducted under this part; and
 - (b) the person is permitted to carry out disability work...

51 Meaning of exclusion and types of exclusions

- (1) An exclusion is a declaration, issued by the chief executive to a person, that—
 - (a) screening of the person has been conducted under this part; and
 - (b) the person is excluded from carrying out disability work...

Schedule 8 *Disability work* means NDIS disability work or state disability work

Division 4 Dealing with and deciding application

Subdivision 1 Preliminary

87 Dealing with application

- (1) The chief executive must—
 - (a) consider the person's application and the information available to the chief executive about the person; and
 - (b) ...; and
 - (c) if section 91 or 92 apply to the person—conduct a risk assessment of the person before deciding the application under that section...

88 Information to be considered

- (1) The chief executive must consider each of the following types of information for a person of which the chief executive is aware, if any—
 - (a) police information;
 - (b) ...;
 - (c) disciplinary information;
 - (d) ...;
 - (e)

- (2) The chief executive may consider other information about the person that is relevant to whether the person poses a risk of harm to people with disability.

92 Deciding application—general assessment of risk posed

- (1) This section applies if sections 89, 90 and 91 do not apply to the person.
- (2) The chief executive must—
 - (a) if satisfied the person does not pose an unacceptable risk of harm to people with disability—issue a clearance to the person; or
 - (b) if satisfied the person poses an unacceptable risk of harm to people with disability—issue an exclusion to the person.

93 How chief executive conducts risk assessment

- (1) The chief executive conducts a risk assessment of a person by—
 - (a) considering the information about the person obtained by the chief executive under this part; and
 - (b) deciding whether the person poses an unacceptable risk of harm to people with disability.
- (2) In conducting the risk assessment, the chief executive—
 - (a) must consider information as required under this division; and
 - (b) may decide the person poses an unacceptable risk of harm to people with disability—
 - (i) if satisfied there is a real and appreciable risk that the person might cause harm to people with disability; and
 - (ii) without needing to be satisfied it is likely the person will cause the harm.

94 Matters to consider

- (1) This section applies if the chief executive is aware of conduct of the person (the person's offending conduct) that—
 - (a) involved the commission of an offence; or
 - (b) was the subject of a complaint, allegation or investigation under a law; or
 - (c) is otherwise relevant to whether the person poses a risk of harm to people with disability.
- (2) The chief executive must consider the following matters—
 - (a) the nature, gravity and circumstances of the person's offending conduct;
 - (b) how the person's offending conduct is relevant to disability work;
 - (c) how long ago the person's offending conduct occurred;
 - (d) if the person's offending conduct was committed against another person (the victim)—

- (i) the victim’s vulnerability at the time of the conduct; and
- (ii) the person’s relationship to, or position of authority over, the victim at the time of the conduct;
- (e) whether the person’s offending conduct indicates a pattern of concerning behaviour;
- (f) the person’s conduct since the offending conduct;
- (g) any other circumstances relevant to the person’s offending conduct.

- [20] The Tribunal is considering this application in its review jurisdiction.¹ The decision of the Department to issue an exclusion to the applicant is a “reviewable decision”.² This is a fresh hearing on the merits, not an appeal, and the Tribunal must determine the correct and preferable decision. Neither party bears an onus of proof. The Tribunal is not bound by the rules of evidence.³
- [21] Amendments to the DSA took effect from 1 February 2021. The “negative notice” under the previous arrangements became a “transitioned exclusion”⁴ under the current legislation. The existing review at this Tribunal was dismissed,⁵ and the Department was required to conduct a risk assessment, and a decision made to cancel or not cancel the transitional exclusion.⁶ The Department was required to assess the applicant’s risk to people with disability in accordance with ss 93-96 of the DSA.⁷ Because of the transitional arrangements, the applicant was able to apply to the Tribunal for a review of the decision without having the decision internally reviewed.⁸
- [22] The DSA sets out the considerations for conducting a risk assessment⁹ to determine whether an applicant poses an unacceptable risk of harm to people with disability. I am required to consider police information for the applicant,¹⁰ which includes his criminal history, and investigative information about the applicant.¹¹ “Criminal history” includes both convictions and charges, both before and after the commencement of the Act.¹²
- [23] I may decide the applicant poses an unacceptable risk of harm to people with disability if satisfied there is a real and appreciable risk that he might cause harm to people with disability. There is no need to be satisfied it is likely the person will cause the harm.¹³ “Harm” is defined as including any detrimental effect on a

¹ s 17(1), s 18 QCAT Act.
² s 138ZR(1) DSA.
³ s 28(3)(b) QCAT Act.
⁴ s 367 and s 371(2) DSA.
⁵ s 382 DSA.
⁶ s 385(2) DSA.
⁷ s 385 DSA.
⁸ s 138ZS and s 385 DSA.
⁹ s 93 DSA.
¹⁰ s 88(1) DSA.
¹¹ Schedule 8 DSA.
¹² Schedule 8 DSA.
¹³ s 93 (2)(b) DSA.

person's physical, emotional, sexual or financial wellbeing, however the detrimental effect is caused.¹⁴

- [24] The applicant has engaged in "offending conduct". "Offending conduct" includes the commission of an offence, and conduct which was the subject of a complaint, allegation or investigation under the law.¹⁵
- [25] The applicant was convicted of stealing in 1966. This is "offending conduct". While any criminal conviction is of concern when assessing risk, I take into account that the offence was over 50 years ago, when the applicant was a young man. There is no evidence of a pattern of offending behaviour. I am not satisfied that there is any real and appreciable risk that the applicant might cause harm to people with disability arising out of the conviction.
- [26] The sexual assault charges also amount to "offending conduct". I take into account:¹⁶
- (a) The nature, gravity and circumstances of the applicant's offending conduct. Sexual assault is listed as a "serious offence".¹⁷ I consider that the conduct as alleged is very grave, taking into account the position of power and authority the applicant held as a professional person massaging naked or nearly naked women in his own home business;
 - (b) The offending conduct as alleged is highly relevant to disability work as it involves the abuse of a position of authority over women who the applicant was employed to help;
 - (c) The offending conduct spanned a 20 year period. The most recent allegation related to conduct which was said to occur in 2017;
 - (d) The complainants were in a highly vulnerable position at the time of the offending conduct. They were lying down naked in the applicant's home. The relationship between the applicant and the complainants was one of authority, where they followed his instructions as an experienced professional;
 - (e) The applicant's offending conduct indicates a pattern of concerning behaviour as it involves five women coming forward separately over the span of approximately 20 years to report very similar behaviour;
 - (f) There is no evidence that the applicant has engaged in further behaviour similar to the offending behaviour since the criminal charges were tried in court. There is also no evidence that the applicant has altered his approach to massage or adjusted his techniques in acknowledgement of the concerns raised by the complainants; and
 - (g) There is no evidence of complaints or charges against the applicant during the period he has been employed as a support worker for people with a disability. The applicant has not been convicted of any of the charges against him. He was found not guilty of the charges arising from allegations made by C.

¹⁴ Schedule 8 DSA.

¹⁵ s 94(1) DSA.

¹⁶ s 94(1) DSA.

¹⁷ Schedule 8 DSA.

- [27] It is not my role to find the applicant guilty or not guilty. I must determine whether I am satisfied, on the balance of probabilities, that the applicant poses an unacceptable risk of harm to people with disabilities.

THE DEPARTMENT'S DECISION AND SUBMISSIONS

- [28] The department's position is summarised as follows:

- (a) The applicant was a mature adult (aged 54 – 70 years) at the time of the offending conduct;
- (b) The allegations are of sexual assaults against three separate female complainants and two separate witnesses (which did not result in charges) over a period of 20 years with the same or similar description of the alleged behaviour;
- (c) Each of the three complainants is independent and they are unknown to each other. The weight of the evidence is significantly increased by the numerous allegations;
- (d) The recency of the 2017 allegations raises significant concerns;
- (e) In viewing all the complaints in totality, there is an unacceptable risk presented that the applicant cannot be entrusted with the care of people with a disability. The allegations are that the applicant repeatedly abused his position of trust to gain access to the complainants, who were all female, with a serial nature and pattern of conduct. The allegations were repeated, and not a once off isolated incident. He gained additional trust as clients assumed he was a professional massage therapist and had professional standards, and he exploited that position of trust;
- (f) The applicant behaved unprofessionally by not providing a towel for clients to cover themselves, asking clients to remove underwear, staying in the room while clients undressed, and locking the treatment room door. These allegations raise concerns about the applicant's behaviour in a professional setting, and his ability to afford clients privacy, dignity, respect and safety. These risks are directly referable to the disability sector;
- (g) The applicant has not provided any evidence that he has reviewed his methods or implemented protective strategies since being charged;
- (h) If granted a NDIS Worker security clearance, the applicant would have one on one unsupervised access to people with a disability who may be particularly vulnerable to sexual abuse or exploitation;
- (i) The applicant is an unacceptable risk of harm to people with a disability; and
- (j) There is no legislative basis upon which to issue a conditional clearance.

THE APPLICANT'S CASE

- [29] The applicant submitted:

- (a) He is not guilty of any of the charges brought against him and denies all allegations, none of which were proved at trial;

- (b) The statements of Witnesses X and Y were not relied upon at trial and so are untested;
- (c) A's account at trial was full of inconsistencies and uncertainties;
- (d) The complainant and witness statements are severely discredited and should be disregarded. Instead, reliance should be placed on his positive reference, and his long history of working in the disability care industry;
- (e) He held a Blue Card (working with children authorisation) from 2008 until it was cancelled in 2019 following the charges against him;
- (f) In assessing risk, the respondent discounted material in support of his application regarding his work history with persons with a disability. There is no nexus between the alleged conduct and any persons with a disability to "elevate any risk to an unacceptable level";
- (g) Reliance should be placed on the Tribunal's decision in *CMH*,¹⁸ which concerned an application for a Blue Card (working with children authority);
- (h) The 2017 allegations were referred to the Office of the Health Ombudsman, who interviewed him and advised him that he was not prohibited from massaging clients; and
- (i) He worked for a homeless shelter for 23 years providing caring service to the people that he worked with, and worked as a support worker from 2014 until he lost his approval to engage in that work. There is no suggestion of inappropriate conduct in those settings.

[30] The applicant provided a number of references in support of his application:

- (a) His former supervisor stated in 2015 that he had known and worked with the applicant for 20 years and had never found the applicant to be a threat to clients in vulnerable situations. The supervisor supported the application for a yellow card (as it was then known);
- (b) In 2015 a former female co-worker and client of the applicant's massage business stated that they had worked together for 17 years and the applicant was a caring person who treated his clients with respect. He had never massaged her with any sexual overtones; and
- (c) Many long term former clients, colleagues and friends attest to the applicant's honesty and professionalism having observed and interacted with him for many years. They have recommended him to family and friends.

[31] The parties have referenced *CMH*, a 2020 decision of this Tribunal considering a Blue Card application. I do not propose to rely on that decision as I note that it was the subject of an appeal which was allowed in 2021¹⁹, and the matter was remitted for rehearing.

[32] The Department relies on the matter of *Volkers*,²⁰ another Blue Card matter determined by the Tribunal in 2010. While there are some factual similarities with

¹⁸ *CMH v Director General, Department of Justice and Attorney-General* [2020] QCAT 15.

¹⁹ *Director-General, Department of Justice and Attorney-General v CMH* [2021] QCATA 6.

²⁰ *Volkers v Commission for Children and Young People and Child Guardian* [2010] QCAT 243.

the current case, I do not propose to rely on *Volkers* in the determination of this application. That is because the test for Blue Card matters is different (involving a consideration of whether an exceptional case exists) to the test in this case (involving a consideration of unacceptable risk). The reference to “exceptional circumstances” in s 91 of the DSA does not apply in these circumstances.

- [33] I note that s 93 (2) of the DSA provides guidance as to when the Tribunal may decide a person poses an unacceptable risk of harm to people with a disability.
- [34] The applicant’s submissions, prepared by his lawyers, were received by the Tribunal on 10 June 2022. The submissions contain references to “positive notice”, “negative notice” and “exceptional circumstances”. Those terms do not apply under the current legislation.
- [35] The applicant claims that his most recent National Police Check shows no “disclosable court outcomes against his name”. He submits that it follows that he “has no criminal history that needs to be considered for the purpose of the review”. There is no reference in the current legislation to “disclosable court outcomes” but rather to “offending conduct”, and so I have not accepted those submissions in reaching my decision. The submissions confuse the term “offending conduct”, which is set out in s 94 of the DSA and includes conduct the subject of a complaint, allegation or investigation under a law. There is, therefore, relevant offending conduct in this case.
- [36] The applicant submits that the respondent has failed to provide the Tribunal with the best and most current information upon which it can make its determination by failing to provide transcripts of the criminal trials. His application for a direction requiring the Department to provide the transcripts was previously dismissed by the Tribunal. The applicant states that there is therefore “insufficient material before the Tribunal to properly ground the factual basis upon which a determination of conduct attributable to applicant can be grounded upon which to assess the risk to persons with a disability”. He submits “Because factual issues, the applicant is unable to address s94 of the DSA. He maintains his innocence he denies the existence of any offending conduct attributable to him”.
- [37] The applicant submits that it would be procedurally unfair to make a finding about the alleged conduct without access to the court transcripts.
- [38] Mr Devon states that there is no onus on him to produce the transcripts. I accept that. There is, however, no explanation as to why the applicant has not provided the transcripts to the Tribunal when he submits that they are essential.
- [39] The applicant submits that without the transcript, the best and most current information is not available, and without it the material contained in the police brief of evidence is of limited utility to the Tribunal. He submits that the Tribunal cannot find with any certainty what conduct is attributable to him. The applicant submits that “there is no proper basis upon which any assessment of risk acceptable or otherwise to a person of disability can be made”.
- [40] I do not accept the applicant’s submission. The Department has complied with its obligations under s 21 of the *Queensland Civil and Administrative Tribunal Act* 2009. The Department’s obligations as a model litigant do not extend to providing the Tribunal with evidence available to the applicant which he says will advance his case but he has not provided. The presentation of evidence to support his case is a

matter for the applicant. If the applicant seeks to rely on the court transcripts, it is open for him to provide them to the Tribunal. The Tribunal may inform itself in any way it considers appropriate.²¹ I do not consider it necessary for the Tribunal to take steps to obtain them, and will proceed to make a decision based on the evidence available to me.

- [41] The applicant seems to suggest that it is necessary for the Tribunal to make a finding about whether the alleged conduct in fact occurred. Bearing in mind the different standard of proof in the Tribunal compared to the criminal court, I consider it is possible for the Tribunal to make a finding that, on the balance of probabilities, particular behaviour occurred when the conduct did not result in a conviction in a criminal trial. Further, a finding of guilt in a criminal trial requires that each element of an offence is proved. It may be that in the Tribunal one element of the charge is found to have occurred which, while insufficient to sustain a criminal conviction, will be sufficient to establish that an applicant is an unacceptable risk of harm to people with a disability.

THE DECISION OF THE TRIBUNAL

- [42] The applicant has charges for “serious offences” (sexual assault), and a conviction for an offence other than a serious offence (stealing). An exclusion must be issued if the applicant poses an unacceptable risk of harm to people with a disability.²² The paramount consideration is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.²³
- [43] I must conduct a risk assessment of the applicant²⁴ and may find that the applicant poses an unacceptable risk of harm if there is a real and appreciable risk that he might cause harm to people with disability. I need not be satisfied that it is likely that he will cause the harm.²⁵ I must consider both the applicant’s criminal history, and also investigative information about him.²⁶
- [44] The legislation sets out relevant factors to take into account where the applicant’s conduct has been the subject of a complaint, allegation or investigation under a law.²⁷
- [45] I accept that the applicant has not been found guilty of criminal charges in relation to the alleged sexual assaults. I accept that he has a long history of working with vulnerable people and there is no evidence of allegations of inappropriate behaviour outside of his massage business. I take into account that many friends, colleagues and former clients attest to the applicant’s professionalism and care.
- [46] I cannot be absolutely sure that the applicant assaulted the women precisely as they have described, and as he denies. That is not the purpose of these proceedings. However, I am satisfied that the applicant engaged in behaviour, in the course of his work as a masseuse, which prompted three women to make complaints of sexual assault to police, and a further two other women to make statements alleging

²¹ s 28(3)(b) QCAT Act.

²² s 92(2) DSA.

²³ s 41 DSA.

²⁴ s 87, s 92 DSA.

²⁵ s 93 DSA.

²⁶ Schedule 8 definition of police information.

²⁷ s 94 DSA.

inappropriate behaviour. All women were vulnerable, and the applicant was in a position of authority at the time of the incidents. I take into account that the allegations span over 20 years, and are similar in nature. The applicant has been found not guilty in relation to only one of the charges.

- [47] People with disability are vulnerable members of society. The screening process is in place to assess whether applicants pose an unacceptable risk of harm to people with disability. The paramount consideration in making a decision is the right of people with disability to live lives free from abuse, violence, neglect or exploitation. In all of the circumstances, I find that the applicant is an unacceptable risk of harm to people with a disability. He has behaved in a way that made a number of vulnerable people uncomfortable and distressed. He has failed to protect the privacy, dignity, respect and safety of his clients. There is a real and appreciable risk that he might cause harm to people with disability. The decision of the respondent is confirmed.
- [48] In making this decision, I must give proper consideration to relevant human rights under the *Human Rights Act* 2019 (Qld). It is unlawful for me to make a decision in a way that is not compatible with human rights, or to fail to give proper consideration to a relevant human right in making a decision.²⁸ Human rights must be limited only if justified under the Act.²⁹
- [49] A clearance allowing the applicant to work in the disability sector may impact on the rights of persons with a disability to be protected from cruel, inhuman and degrading treatment.³⁰
- [50] An exclusion could impact on the applicant's right to privacy and reputation. He has the right not to have his reputation "unlawfully attacked".³¹ This process may impact on the applicant's right to a fair hearing and his right not to be tried or punished more than once.
- [51] I am satisfied that the applicant's rights to a fair hearing have not been limited. The application has been determined by a competent, impartial and independent tribunal after a fair hearing. I note that the hearing was not conducted in public, but these reasons for decision are publicly available. The applicant has submitted that the Tribunal should have regard to particular evidence which is not before it. As the Tribunal has not prevented the applicant from providing relevant evidence, I am not satisfied that his right to a fair hearing has been limited. Nor has his right not to be tried or punished more than once. Accordingly, the process and decision are compatible with the applicant's human rights in those regards.³²
- [52] It is not clear that this process and decision "unlawfully attacks" the applicant's reputation. It seems that he considers that it does. Taking a generous view on that point in the applicant's favour, I note that the DSA makes the safety of persons with a disability the paramount consideration, and that I am able to make a decision not compatible with human rights if I could not reasonably have acted differently because of a statutory provision.³³ I am satisfied that I am able to lawfully make this

²⁸ s 58 HRA.

²⁹ s 8, s 13 HRA.

³⁰ s 17 HRA.

³¹ s 25 HRA.

³² s 8 HRA.

³³ s 58 (2) HRA.

decision if it is not compatible with the applicant's right to privacy and reputation. That is because the DSA compels me to conduct a risk assessment, and to make the safety of persons with a disability the paramount consideration.

- [53] The respondent's decision that the applicant poses an unacceptable risk of harm to people with a disability is confirmed.