

**CITATION:** *XYZ & Anor v Department of Communities, Child Safety and Disability Services* [2016] QCAT 157

**PARTIES:** AB XYZ and CD XYZ  
(Applicants/Appellants)  
v  
Department of Communities, Child Safety and Disability Services  
(Respondent)

**APPLICATION NUMBER:** APL033-15

**MATTER TYPE:** Appeals

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member Brown**  
**Member Ford**

**DELIVERED ON:** 28 July 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. CD XYZ is joined as an appellant;**
- 2. The application for leave to appeal is refused;**
- 3. The appeal is dismissed;**
- 4. The Tribunal prohibits the publication of the name of the applicant and any other information that may identify the applicant's children and/or grandchildren.**

**CATCHWORDS:** APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – FOR BIAS IN JUDICIAL PROCEEDINGS – INTERFERENCE WITH FINDINGS OF FACT – ERROR OF LAW – where applicant claimed tribunal biased – whether findings of fact available on the evidence – whether provisions of *Child Protection Act 1999* (Qld) correctly applied

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY

JURISDICTION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATING TO CARE AND PROTECTION – OTHER MATTERS – where application for approval as foster carer – where tribunal found applicants not suitable persons to be foster carers - *Child Protection Act 1999* (Qld) – whether person suitable to be an approved foster carer

*Child Protection Act 1999* (Qld), s 4, s 5A, s 82, s 122, s 133, s 135, Schedule 3

*Child Protection Regulation 2011* (Qld), s 22, s 23

*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20, s 32, s 66, s 142, s 146, s 147

*Cachia v Grech* [2009] NSWCA 232

*Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388

*Hills v Chalk & Ors (as executors of the estate of Chalk (deceased))* [2008] QCA 159

*Livesey v New South Wales Bar Association* (1983) 151 CLR 288

*Mclver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577

*QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41

*Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700

*WCR and WL v Department of Communities, Child Safety and Disability Services* [2014] QCAT 647

*Ericson v Queensland Building Services Authority* [2013] QCA 391

*John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 87

*Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* (2010) 186 FCR

*Craig v Ravenshoe Community Centre Inc & Ors* [2013] QCATA 177

## **APPEARANCES:**

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

## REASONS FOR DECISION

### What is this appeal about?

- [1] Mr and Mrs XYZ applied to the Department of Communities, Child Safety and Disability Services ('the Department') to become foster carers. In May 2013, the Department advised the XYZs that their application had been refused on the basis that they were not suitable persons. Mr and Mrs XYZ sought a review of that decision in the tribunal. In December 2014, the tribunal confirmed the decision of the Department. Mrs XYZ subsequently appealed that decision.

### What does Mrs XYZ say?

- [2] The application for leave to appeal or appeal was brought by Mrs XYZ alone. Directions were made on 22 April 2015 giving Mr XYZ the opportunity to indicate whether he wished to be a foster carer and whether he wished to be joined as a party to the appeal. Mr XYZ subsequently notified the Tribunal and the Department that he had "no issues with being one of the applicants in (the) Appeals Process". Accordingly, we order that Mr XYZ is joined as an applicant and we will proceed on the basis that both Mr and Mrs XYZ are the appellants.
- [3] In the application for leave to appeal or appeal ('the appeal'), the XYZs identify the grounds of appeal as:
- Panel members did not fully understand.
  - One of the members was very negative towards any challenging the Department of Child Safety.
  - So the decision was without bias.<sup>1</sup>
- [4] The XYZs seeks orders that the decision of the tribunal be reviewed and that they be approved as foster carers.
- [5] In subsequent submissions filed in the Tribunal, the XYZs clarified the grounds of appeal as:
1. The tribunal erred in placing any, or undue, weight on Mrs XYZ's manuscript "Little Heartaches in Life" ("the manuscript");
  2. The tribunal erred in not placing appropriate weight on the evidence of Mrs XYZ that she would not use physical discipline when caring for children;
  3. The finding by the tribunal that Mrs XYZ had a tendency toward "fight" or unregulated emotional responses when faced with threat, challenging situations or a different perspective was not supported by the evidence;

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<sup>1</sup> Application for leave to appeal and appeal.

4. The tribunal failed to place appropriate weight on the expert reports by Di Abbott, Jodie Boydell and Loretta Protheroe;
5. The tribunal erred in taking into consideration in making its decision the complaints Mrs XYZ had made about the conduct of the Department;
6. The tribunal erred in finding that Mrs XYZ was responsible for the degree of mistrust between Mr and Mrs XYZ and the Department;
7. The tribunal failed to give appropriate weight to the evidence of Mrs XYZ that, in writing her memoirs (ie the manuscript), she had “moved on”;
8. The tribunal erred in not taking into consideration the best interests of the children in reaching its decision and in failing to take into consideration the expressed views of the children;
9. Mr and Mrs XYZ were “not given a fair trial without bias”.

### **What does the Department say?**

- [6] The Department says that the substantive issues raised on the appeal involve questions of mixed law and fact.
- [7] The Department says that there is no evidence of bias by the Tribunal or that the XYZs were in any way prejudiced in the conduct of the proceeding.
- [8] The manuscript was, says the Department, intended for wide dissemination by Mrs XYZ and the Tribunal did not place undue weight upon the manuscript in reaching its decision. The Department says that the Tribunal considered the evidence of Ms Abbott, Ms Boydell and Ms Protheroe and that it was a matter for the Tribunal as to the weight to be given to the evidence.

### **The application for leave to appeal and appeal**

- [9] The grounds of appeal relied upon by the XYZs raise questions of law, questions of fact and questions of mixed law and fact.
- [10] Questions of law can be difficult to distinguish from questions of fact or mixed questions of law and fact. Questions of law include whether a relevant legal test has been identified and applied, whether there is any evidence to support a finding of a particular fact and whether facts found fall within a statute properly constructed.<sup>2</sup> Questions of fact involve what

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<sup>2</sup> *Federal Commission of Taxation v Trail Brothers Steel & Plastics Pty Ltd* (2010) 186 FCR at [13]

actually happened – who did what and when. Questions of mixed law and fact involve consideration of whether facts, as found, satisfy legal tests.<sup>3</sup>

- [11] An appeal on a question of law is as of right.<sup>4</sup> An appeal on a question of fact or mixed law and fact may be made only if the party has obtained the leave of the appeal Tribunal.<sup>5</sup>
- [12] The relevant principles to be applied in determining whether to grant leave to appeal are: Is there a reasonably arguable case of error in the primary decision;<sup>6</sup> Is there a reasonable prospect that the applicant will obtain substantive relief;<sup>7</sup> Is leave necessary to correct a substantial injustice to the applicant caused by some error;<sup>8</sup> Is there a question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to the public advantage.<sup>9</sup>
- [13] If we decide that there has been an error of law we may confirm or amend the decision of the tribunal or set aside the decision and substitute our own decision. However it is only if the determination of the question of law on the appeal is capable of resolving the matter as a whole in the appellant's favour that the appeal tribunal will be in a position to substitute its own decision.<sup>10</sup> Otherwise, the matter must be remitted to the tribunal for re-hearing.<sup>11</sup>
- [14] If leave to appeal is granted and we allow the appeal on a question of fact or mixed law and fact, then we must proceed to rehear the matter.<sup>12</sup>
- [15] We must consider and determine each ground of appeal separately before making a final order disposing of the appeal.<sup>13</sup>

### ***Child Protection Act 1999 (Qld) – the legislative framework***

- [16] The purpose of the *Child Protection Act 1999 (Qld)* ('CPA') is to provide for the protection of children.<sup>14</sup>
- [17] The main principle for administering the CPA is that the safety, wellbeing and best interests of the child are paramount.<sup>15</sup> The CPA sets out a

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<sup>3</sup> *Craig v Ravenshoe Community Centre Inc & Ors* [2013] QCATA 177 citing *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at [35] per Iacobucci J.

<sup>4</sup> *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act') s 142(1).  
<sup>5</sup> QCAT Act s 142(3)(b).

<sup>6</sup> *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

<sup>7</sup> *Cachia v Grech* [2009] NSWCA 232 at [13].

<sup>8</sup> Op cit 5.

<sup>9</sup> *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389; *Mcliver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577 at 578, 580.

<sup>10</sup> *Ericson v Queensland Building Services Authority* [2013] QCA 391.

<sup>11</sup> QCAT Act s 146(c).

<sup>12</sup> QCAT Act s 147(2).

<sup>13</sup> *John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 87.

<sup>14</sup> CPA s 4.

<sup>15</sup> CPA s 5A.

number of principles for ensuring the safety, wellbeing and best interests of a child.

- [18] The CPA provides that a child may be placed in the care of an approved kinship carer or an approved foster carer.<sup>16</sup> The chief executive must take reasonable steps to ensure that a child placed in care under s 82(1) of the CPA is cared for in a way that meets the standards set out at s 122(1) of the CPA.
- [19] The CPA provides that a person may apply to the chief executive to be issued with a certificate of approval as a foster carer or a certificate of approval as a kinship carer.<sup>17</sup> The chief executive must first be satisfied in relation to a range of matters before granting an application for a certificate.<sup>18</sup> The applicant must be a suitable person.<sup>19</sup> A person suitable to be approved as a foster carer or kinship carer is defined.<sup>20</sup> An applicant must, among other requirements, understand and be committed to the principles for administering the CPA.<sup>21</sup> An applicant must also be able to meet the standards of care in the statement of standards.<sup>22</sup>

### **The findings by the Tribunal**

- [20] The Tribunal, in conducting a review of the decision of the Department made 3 May 2013 not to grant the XYZs' application to become foster carers, was required to hear and decide the review application by way of a fresh hearing on the merits and to produce the correct and preferable decision.<sup>23</sup>
- [21] The Tribunal heard from, among others, Mr and Mrs XYZ and three witnesses who had undertaken assessments of the XYZs and provided reports at various times: Diane Abbott a social worker, Loretta Protheroe a psychologist, and Jodie Cross a placement worker. Ms Abbott, Ms Protheroe and Ms Cross had all provided reports to the Department in which they expressed the view that the XYZs were suitable to be foster parents.<sup>24</sup>
- [22] The Tribunal found that Mr and Mrs XYZ were not "suitable persons" to be appointed as foster carers and confirmed the decision of the Department.
- [23] The Tribunal made a number of findings:

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<sup>16</sup> Ibid, s 82(1).

<sup>17</sup> Ibid, s 133.

<sup>18</sup> Ibid, s 135.

<sup>19</sup> Ibid, s 135(1)(a)(i).

<sup>20</sup> Ibid, Schedule 3 and *Child Protection Regulation* 2011 (Qld) ('Child Protection Regulation') s 22, s 23.

<sup>21</sup> Child Protection Regulation s 22(c), s 23(c).

<sup>22</sup> CPA s 135(1)(a)(iv), s 135(2)(b)(v).

<sup>23</sup> QCAT Act s 20.

<sup>24</sup> Report of Diane Abbott dated 29 September 2011; Reports of Loretta Protheroe dated 21 March 2014 and 6 August 2014; Report of Jodie Cross (nee Boydell) dated 11 January 2013.

- the manuscript, which was in evidence before the Tribunal, contained the closely held beliefs of Mrs XYZ best described as an authoritarian view of raising children.<sup>25</sup>
- Mrs XYZ's oral evidence and the manuscript showed that she had a personal belief about the benefits of physical discipline.<sup>26</sup>
- the insights Mrs XYZ had gained into the use of physical discipline and its impact on children were not reflected in the manuscripts.<sup>27</sup>
- Mrs XYZ's responses to situations of behavioural crises suggest that she is more likely to enact a fight response and raise concerns regarding her capacity to role model appropriate ways of managing conflict in responding to the inappropriate behaviour of adults.<sup>28</sup>
- Mrs XYZ's behaviour and her expressed views in relation to corporal punishment raise concerns about her ability to comply with the Statement of Standards.<sup>29</sup>
- the degree of mistrust between the XYZs' and the Department had affected communication between the parties.<sup>30</sup>
- the inability of the XYZs' to "let matters go" displayed a lack of trust and confidence with the Department<sup>31</sup> and that it would be difficult for the XYZs to maintain an appropriate relationship with the Department.<sup>32</sup>
- the assessment and report by Diane Abbott was either incomplete or selective which in turn impacted upon the assessments undertaken by Loretta Protheroe, and Jodie Cross.<sup>33</sup>
- the approach by Ms Abbott to her assessment was to largely receive and accept information provided by Ms XYZ without analysis.<sup>34</sup>
- the approach taken by Ms Cross to her assessment report was to largely receive and accept information provided by Mrs XYZ without analysis.<sup>35</sup>
- there remains a possibility that Mrs XYZ's parenting strategies pose a level of risk to a child's safety and that Mrs XYZ's feelings of anger and frustration at the Department's historical actions remains a barrier to her capacity to effectively communicate with and resolve concerns around the development of plans for the protection of children.<sup>36</sup>

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<sup>25</sup> Reasons at [20].

<sup>26</sup> Ibid, at [27].

<sup>27</sup> Ibid, at [30], and presumably referring to version 1 and version 2 of the manuscript.

<sup>28</sup> Ibid, at [35].

<sup>29</sup> Ibid, at [38].

<sup>30</sup> Ibid, at [48].

<sup>31</sup> Ibid, at [49].

<sup>32</sup> Ibid, at [54].

<sup>33</sup> Ibid, at [60].

<sup>34</sup> Ibid, at [61].

<sup>35</sup> Ibid, at [73].

<sup>36</sup> Ibid, at [79].

## Discussion

- [24] On the application for review, the Tribunal stood in the shoes of the Department. The purpose of the review was to produce the correct and preferable decision after a fresh hearing on the merits. The Tribunal was required to decide whether it was satisfied, on the evidence then placed before it of the matters set out at s 135 CPA.
- [25] Upon an application to review a decision that a person is not a suitable person to be a foster carer or kinship carer, the tribunal is required to consider the following:
- a) Whether the tribunal is satisfied of all the matters set out at s 135(1)(a) CPA (for a foster carer certificate) or s 135(1)(b) CPA (for a kinship carer certificate);
  - b) In considering whether an applicant is a “suitable person” to be an approved foster carer or kinship carer, whether the tribunal is satisfied of the matters set out at s 22 of the CPA regulation (for a foster carer) or s 23 of the CPA regulation (for a kinship carer);
  - c) In considering whether an applicant is able to meet the standards of care in the statement of standards, the tribunal must consider whether the applicant will care for a child that meets all of the matters set out at s 122(1) CPA and must take into consideration the matters set out at ss 122(2), (3) and (4) CPA;
  - d) The purpose of the CPA<sup>37</sup>;
  - e) The principles of the CPA<sup>38</sup>;
  - f) The principles relevant to making a decision under the CPA<sup>39</sup>.
- [26] The decision of the Tribunal was to confirm the original decision that Mr and Mrs XYZ were not suitable persons to be approved foster carers. For the reasons that follow we refuse the application for leave to appeal and dismiss the appeal.
- [27] Whilst not expressed by Mrs XYZ thus, the grounds of appeal can be conveniently grouped as:
- a) Allegation of bias;
  - b) Findings on the evidence;
  - c) Failing to properly apply the CPA.
- [28] We will deal with the various grounds of appeal through these broad groupings.

## Allegation of bias

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<sup>37</sup> CPA s 4.

<sup>38</sup> CPA ss 5A and 5B.

<sup>39</sup> CPA s 5D.



- [29] A party who seeks to contend on appeal that the decision of the primary court is affected by bias, actual or apprehended, should not be allowed to pursue such a contention at the same time as it seeks orders vindicating its substantive rights.<sup>40</sup> In other words, the issue of bias must be dealt with first. If the decision of the Tribunal is found to be infected by bias, then the appropriate order is to remit the matter for re-hearing before a differently constituted tribunal.
- [30] Bias may be actual or apprehended. Mrs XYZ does not articulate upon what grounds she relies in asserting bias by the Tribunal.
- [31] A claim of actual bias requires Mrs XYZ to establish that the Tribunal approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence.<sup>41</sup>
- [32] In order to establish apprehended bias, it is necessary that Mrs XYZ establish that a fair-minded person would entertain a reasonable suspicion that the Tribunal might not have brought an impartial and unprejudicial mind to the resolution of the proceeding.<sup>42</sup>
- [33] Mrs XYZ refers to one member of the (three member) Tribunal looking at the window and one member “clearly showed her resentment towards me straight up in the aggressive manner she spoke to me”.<sup>43</sup>
- [34] We have read the transcript of the hearing. There is nothing to suggest that the Tribunal members conducted the hearing in other than an appropriate manner. The evidence was permitted to unfold without interruption or interference and the parties appearing were given every opportunity to ask questions and make submissions as and when appropriate.
- [35] The XYZs were represented at the hearing by competent legal counsel. The transcript does not reveal anything to suggest that the XYZs’ counsel was concerned in any way by the manner in which the hearing was conducted or which could suggest bias. At the conclusion of her evidence the Tribunal asked Mrs XYZ whether there was anything else she would like to say. Mrs XYZ responded:

No. I’m just grateful that you were able to hear from my – an open mind from my view where I was sitting. Yep. That’s all. And I appreciate that. Thank you.<sup>44</sup>

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<sup>40</sup> *Hills v Chalk & Ors (as executors of the estate of Chalk (deceased))* [2008] QCA 159 citing *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577.

<sup>41</sup> *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700.

<sup>42</sup> *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294.

<sup>43</sup> Application for leave to appeal or appeal.

<sup>44</sup> Transcript page 2-36.

- [36] There is nothing in the transcript nor in the reasons to suggest that there is any substance in the complaints by Mrs XYZ as to bias, actual or apprehended. We do not find this ground of appeal made out.

### Findings on the evidence

- [37] The XYZs complain of a number of findings of fact made by the Tribunal. An appeal tribunal will not usually disturb findings of fact on appeal if the facts as found have rational support in the evidence.<sup>45</sup> It is not enough to express disappointment at the original decision, or a subjective feeling that justice has not been done.<sup>46</sup>

- [38] The XYZs say that the Tribunal erred in placing any weight, or at the very least undue weight, on Mrs XYZ's manuscript "The Little Heartaches in Life" which was in evidence before the Tribunal. The manuscript is a voluminous document, running to 120 pages in length in addition to which there are 4 equally voluminous appendices. Mrs XYZ's evidence was that she started writing version 1 of the manuscript in May 2013.<sup>47</sup> Mrs XYZ edited the manuscript at the beginning of 2014<sup>48</sup> resulting in version 2 being completed in March or April 2014.<sup>49</sup> Both versions of the manuscript were completed after Mrs XYZ had completed foster care training programs. In these reasons we will refer to the versions of the manuscript as, collectively, the manuscript. The XYZs say that Mrs XYZ's evidence before the Tribunal was the most current and reliable indication of her approach to caring for children.

- [39] The XYZs specifically refer to the reasons at [37]:

The Tribunal is unable to reconcile Mrs XYZ's philosophy of physical discipline as expressed in the manuscript that shows little insight into the foster care training she received with her oral evidence where she effectively stated that she would not use physical discipline or threats of physical discipline if a foster child were placed under her care.

- [40] The XYZs say that the Tribunal based its decision on the manuscript rather than Mrs XYZ's evidence at the hearing. We do not accept this submission.

- [41] At the commencement of the hearing there was an exchange between the Tribunal and the XYZs' counsel, Mr King, regarding the manuscript. Mr King expressed a "first preference" that the manuscript not be relied upon or in the alternative that the Tribunal place the appropriate weight on what Mr King described as a personal diary.<sup>50</sup> It is clear therefore that the manuscript was before the Tribunal and that it was open to the Tribunal to have reference to it. It was a matter of the weight to be given to the manuscript in the context of the entirety of the evidence.

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<sup>45</sup> *Fox v Percy* (2003) 214 CLR 118.

<sup>46</sup> *Robinson v Corr* [2011] QCATA 302 at [7].

<sup>47</sup> Transcript page 2-9 line 30.

<sup>48</sup> Transcript page 2-10 line 1.

<sup>49</sup> Transcript page 2-10 line 15.

<sup>50</sup> Transcript page 1-5 line 45 to page 1-6.

- [42] Mrs XYZ was referred to, and asked questions about, the manuscript at various times during her evidence. At no stage did Mrs XYZ, or her counsel, object to the manuscript being referred to nor was any objection taken to any questions being asked about the manuscript or its contents. The transcript reveals that when she was asked questions about the manuscript, Mrs XYZ freely answered.
- [43] We do not accept the XYZs' submission that the decision of the Tribunal was based on the manuscript and not the oral evidence of Mrs XYZ. The paragraph of the reasons upon which the XYZs rely in their grounds of appeal specifically refers to Mrs XYZ's oral evidence.<sup>51</sup> There are, in addition, numerous references in the reasons to the oral evidence of Mrs XYZ.<sup>52</sup> It is readily apparent that the Tribunal took into consideration both the contents of the manuscript and the oral evidence of Mrs XYZ. There is nothing in the reasons to suggest that the Tribunal discarded Mrs XYZ's oral evidence or placed no weight upon her evidence and preferred instead the contents of the manuscript.
- [44] The XYZs say that it was not open to the Tribunal to find that Mrs XYZ has a tendency towards "fight" or unregulated emotional responses when faced with a threat, challenging situations or a different perspective. The reasons refer to two examples, both of which were contained in the manuscript and were the subject of oral evidence by Mrs XYZ.<sup>53</sup> The episodes referred to by the Tribunal involved violent and confronting behaviour by Mrs XYZ. The occurrence of the episodes was not denied by Mrs XYZ although, as the reasons detail, she sought to justify her actions. It was, in our view, open to the Tribunal on the evidence to make the finding complained of by Mrs XYZ.
- [45] The XYZs say that the Tribunal erred in finding that Mrs XYZ was the cause of the mistrust between the XYZs and the department. We understand the submission to mean that the mistrust was mutual. The difficulty with this submission is that the Tribunal did not make such a finding. The Tribunal found that the actions of Mr and Mrs XYZ in pursuing complaints and review processes displayed a lack of trust and confidence in the Department.<sup>54</sup> The Tribunal made no finding as to the cause of the lack of trust. The Tribunal specifically declined to make any findings in relation to the complaints made by the XYZs against the Department and did not apportion blame.<sup>55</sup>
- [46] Mrs XYZ says that the Tribunal failed to properly take into account the reports by Di Abbott, Jodie Boydell and Loretta Protheroe. It is necessary to pause here to outline who these witnesses were and what they said.

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<sup>51</sup> Reasons at [37].

<sup>52</sup> Reasons at [16], [18], [21], [27], [28], [30], [32], [34], [37], [41], [50], [51].

<sup>53</sup> Reasons at [33]-[34]; see Transcript page 1-94 to page 1-96; Transcript page 1-102 to page 1-104.

<sup>54</sup> Reasons at [49].

<sup>55</sup> Ibid.

- [47] Diane Abbott was a social worker who prepared a kinship carer assessment report in September 2011. Ms Abbott recommended the XYZs as kinship carers. Ms Abbott gave evidence at the hearing. The Tribunal found that Ms Abbott's report omitted a number of important issues.<sup>56</sup> Ms Abbott gave evidence that she was aware, before preparing her report, that a family member had a relevant history of sexual offending involving children however that information was not included in her report. Ms Abbott's evidence was that she did not consider the information was significant for the decision maker.<sup>57</sup>
- [48] Ms Abbott gave evidence about a stick said to have been used by Mrs XYZ for disciplinary purposes and referred to as the "the educator stick". Ms Abbott recalled Mrs XYZ showing her a wooden stick.<sup>58</sup> In her report Ms Abbott refers to a stick used by Mrs XYZ for disciplinary purposes. The Tribunal specifically referred to the relevant part of the report in its reasons.<sup>59</sup> Ms Abbott did not ask to see the stick<sup>60</sup> nor was able to say which children had been the subject of the threatened use of the stick<sup>61</sup>. Ms Abbott gave evidence that the description of the stick said by one of Mrs XYZ's grandchildren as being used to threaten the children with did not accord with the stick shown to her by Mrs XYZ.<sup>62</sup> Ms Abbott gave evidence that she had not asked Mrs XYZ to show her the stick used to threaten the children.<sup>63</sup> Ms Abbott was unable to say which children she was in fact referring to in her report.<sup>64</sup> Ms Abbott was unable to explain why certain historical information was not contained in her report.<sup>65</sup>
- [49] The Tribunal was entitled to find that, on the evidence, there were critical omissions both in the conduct of the assessment and the preparation of the report by Ms Abbott. There was no error by the Tribunal in making the findings it did in relation to the evidence of Ms Abbott.
- [50] Loretta Protheroe was a psychologist who undertook an independent social assessment of the XYZs and prepared two reports. Ms Protheroe interviewed the XYZs in January 2014. Ms Protheroe was of the view that the XYZs were suitable foster carers. Ms Protheroe gave evidence that Mrs XYZ declined to be interviewed for a second time.<sup>66</sup>
- [51] The XYZs' submissions do not make clear why they say the Tribunal failed to take into consideration the opinion expressed by Ms Protheroe. The reasons identify evidence relating to certain matters which Ms Protheroe was not aware of when expressing her opinion.<sup>67</sup> Mrs XYZ does not take

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<sup>56</sup> Reasons at [56]–[61].

<sup>57</sup> Transcript page 1-59.

<sup>58</sup> Transcript page 1-45.

<sup>59</sup> Reasons at [57].

<sup>60</sup> Transcript page 1-56.

<sup>61</sup> Ibid.

<sup>62</sup> Transcript page 1-55.

<sup>63</sup> Transcript page 1-56.

<sup>64</sup> Transcript page 1-56.

<sup>65</sup> Transcript page 1-58.

<sup>66</sup> Transcript page 1-35.

<sup>67</sup> Reasons at [64], [65].

issue with these findings. The reasons make clear that the evidence of Ms Protheroe was considered by the Tribunal. We do not accept that the Tribunal failed to properly consider the evidence of Ms Protheroe.

- [52] Jodie Cross was a placement worker who assessed the XYZs over a 7 month period in 2012 and who subsequently prepared a report. Ms Cross recommended the XYZs for approval as foster carers. The Tribunal expressed reservations regarding the evidence of Ms Cross.<sup>68</sup> In her evidence Ms Cross referred to an alleged incident involving Mrs XYZ administering discipline using a wooden spoon.<sup>69</sup> She acknowledged having been provided with a substantial file from the Department for review<sup>70</sup> and having met with the XYZs after reviewing the file.<sup>71</sup> Ms Cross gave evidence that she had not read the manuscript.<sup>72</sup> Ms Cross gave evidence that she had not challenged the XYZs' statements of relevant events.<sup>73</sup> Ms Cross gave evidence that, having received the Department file, she did not have the capacity to cross-check the information provided by Mrs XYZ with what was contained on the file provided to her.<sup>74</sup> She described her understanding of the relevant events as "probably a bit of a mash up".<sup>75</sup>
- [53] The Tribunal accepted that the description by Ms Cross of the incident involving the XYZs' grandson ABC on 26 September 2011 was not an event detailed in other relevant documentation.<sup>76</sup> Ms Cross conceded that she had not undertaken a process of verifying what she had been told by the XYZs with what the Department files contained. Ms Cross gave evidence that she had not challenged anything she had been told by the XYZs. The criticisms of, and observations of, the approach taken by Ms Cross to the assessment and reporting process were justified on the evidence before the Tribunal. It was open to the Tribunal to make the findings it did regarding the evidence of Ms Cross.

### **Failing to properly apply the CPA**

- [54] The XYZs complain generally that the Tribunal did not apply the CPA and say that the Tribunal erred in failing to consider what was in the best interests of the children and in failing to take into consideration the expressed wishes of the children.
- [55] The main principle for administering the CPA is that the safety, wellbeing and best interests of the child are paramount.<sup>77</sup> The Tribunal's reasons

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<sup>68</sup> Reasons at [71]-[73].

<sup>69</sup> Transcript page 1-65, Transcript page 1-75.

<sup>70</sup> Transcript page 1-65.

<sup>71</sup> Transcript page 1-66.

<sup>72</sup> Transcript page 1-74.

<sup>73</sup> Transcript page 1-77.

<sup>74</sup> Transcript page 1-78.

<sup>75</sup> Transcript page 1-77.

<sup>76</sup> Reasons at [71].

<sup>77</sup> CPA, s 5A.

specifically recognise this.<sup>78</sup> We accept that the Tribunal applied this principle in making its decision. We have identified the consideration by the Tribunal of s 122 and s 135 of the CPA.<sup>79</sup> The CPA does not, contrary to the submissions by the XYZs, mandate that the wishes of the child are to be considered in every instance.

- [56] Section 135 CPA sets out the matters in relation to which the chief executive must be satisfied of in order to grant an application for a certificate. The use of the conjunctive in the section emphasises the very significant requirements for an applicant to be successful. Section 22 of the regulation sets out the circumstances in which a person is a suitable person to be an approved foster carer. Again, the use of the conjunctive emphasises the significance of the matters an applicant must establish in order to be an approved foster carer. An applicant for either a foster carer certificate or kinship carer certificate must be able to satisfy all of the matters set out (relevantly) in s 135(1) CPA.
- [57] The reasons reveal that the Tribunal considered the relevant sections of the CPA in reaching their decision.<sup>80</sup> The Tribunal's reasons reveal that the decision to confirm the original decision of the Department that Mr and Mrs XYZ were not suitable persons to be appointed as foster carers was based upon a consideration of the matters required under ss 122 and 135 CPA.<sup>81</sup>
- [58] The Tribunal was satisfied that Mrs XYZ's parenting strategies included physical punishment. For the reasons we have set out, this finding was reasonably open to the Tribunal on the evidence. The Tribunal was not satisfied that Mrs XYZ was a suitable person to be an approved foster carer on the basis that there remained a possibility she posed a risk to the safety of a child in her care.
- [59] An applicant for a foster carer certificate must be able to meet the standards of care in the statement of standards. The statement of standards includes a prohibition on the use of corporal punishment or punishment that humiliates, frightens or threatens a child.<sup>82</sup> Mrs XYZ's use of physical punishment as found by the Tribunal was clearly inconsistent with the statement of standards.
- [60] A suitable person must not pose a risk to a child's safety.<sup>83</sup> The term "risk" is not qualified or limited in any way. If a person poses *any* risk to a child they are not a suitable person to be an approved foster carer. Such an interpretation is consistent with both the purpose and paramount principle of the Act. If a person is not a suitable person then they cannot satisfy the

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<sup>78</sup> Reasons at [77].

<sup>79</sup> Reasons at [8], [9], [36], [38].

<sup>80</sup> See for example - reasons at [36]: CPA, s 122(1)(a), s 122(1)(g), s 122(2); reasons at [45]-[54]: CPA, s 135(1)(a)(v); reasons at [78]: CPA, s 135(1)(a)(i), regulation, s 22, CPA, s 5A.

<sup>81</sup> Reasons at [8], [9], [36], [38].

<sup>82</sup> CPA s 122(2).

<sup>83</sup> Child Protection Regulation s 22.

requirements of s 135(1) CPA and they cannot be granted a foster carer certificate. If a person is unable to meet the standards of care in the statement of standards then the chief executive cannot be satisfied of all of the matters set out at s 135(1)(a) CPA. If an applicant is unable to effectively work with the Department to help in appropriate ways towards achieving plans for the protection of a child placed in the carer's care then, again, the chief executive cannot be satisfied of all of the matters set out at s 135(1)(a) CPA.

- [61] Implicit in the reasons is a finding by the Tribunal that it could not be satisfied that the XYZs were able to meet the standards of care in the statement of standards. The Tribunal found that the XYZs could not effectively communicate with the Department and thereby may not be able to satisfy s 135(1)(a)(v) CPA. The Tribunal found that the XYZs were not suitable persons. Having made these findings, which were supported by the evidence, the Tribunal could not make any decision other than one confirming the decision of the Department and it was correct in so doing.

### **Conclusion**

- [62] We find no error in the decision of the Tribunal. The application for leave to appeal is refused. The appeal is dismissed.

### **Non publication order**

- [63] We are of the view that, in the interests of justice, it is appropriate a non publication order should be made in respect of the identity of Mr and Mrs XYZ. In the absence of such an order it would be possible to identify Mr and Mrs XYZ's family members including her grandchildren. A non publication order is required to avoid such public scrutiny.<sup>84</sup> We order that the publication of the name of the applicants and any other information that may identify the applicants' children and/or grandchildren is prohibited.

### **Orders**

- [64] We order as follows:

1. CD XYZ is joined as an applicant;
2. Leave to appeal is refused;
3. The appeal is dismissed;
4. The Tribunal prohibits the publication of the name of the applicants and any other information that may identify the applicant's children and/or grandchildren.

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<sup>84</sup> QCAT Act s 66.