QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Director-General, Department of Justice and Attorney-General v FRW* [2020] QCATA 13
PARTIES:	**DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (applicant/appellant) **v** **FRW** (respondent)
APPLICATION NO/S:	APL212-18
ORIGINATING APPLICATION NO/S:	CML176-17
MATTER TYPE:	Appeals
DELIVERED ON:	29 January 2020
HEARING DATE:	14 May 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Howard, Presiding Member Browne
ORDERS:	**The application for leave to appeal or appeal filed 22 August 2018 is dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where Tribunal set aside decision of the applicant and found that there was no 'exceptional case' – whether the Tribunal erred in relation to the protective nature of the *Working With Children (Risk Management and Screening) Act* 2000 (Qld) – whether the Tribunal erred in relation to standard of evidence required – whether the Tribunal erred in determining that no 'exceptional case' existed *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 20 *Working With Children (Risk Management and Screening) Act* 2000 (Qld) s 5, s 6, s 221, s 221(2), s 226(2), s 226(2)(a), s 266(2), s 266(2)(a), s 353, s 354 *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291

Commissioner for Children and Young People and Child Guardian v Maher & Anor [2004] QCA 492
FRW v Director-General, Department pf Justice and Attorney-General [2018] QCAT Unreported 25 July 2018
House v King [1936] 55 CLR 499

APPEARANCES & REPRESENTATION:

Applicant:	P Clohessy, instructed by Crown Law.
Respondent:	S Lynch, instructed by Bouchier Khan Lawyers.

REASONS FOR DECISION

[1] FRW, a minister of religion, held a blue card from 2002 until a negative notice was issued and his blue card was cancelled in 2014. It was cancelled because the Director-General, Department of Justice & Attorney-General ('DJAG') was notified by the Queensland Police Service ('QPS') of charges presented against FRW for disqualifying offences concerning the indecent treatment of two complainants under the age of 16 years at the time the offences were alleged to have occurred.

[2] The allegations giving rise to the charges relate to events alleged to have taken place in FRW's home when he was alone with each of the complainants. One of the complainants was FRW's step-daughter ('C1') and the offences allegedly occurred between 1987 and 1988. C1 first complained of the conduct when she was aged 15 years but no action was taken. C1 later made a formal complaint to the QPS when she was aged about 29 years in 2014.

[3] The other complainant was FRW's step-granddaughter ('C2') and the offences allegedly occurred between 2007 and 2009 when C2 was turning 7 years (in about 2007). C2 made a formal complaint to the QPS in 2014.

[4] Subsequently, charges were presented against FRW in respect of the allegations made by C1 and C2.

[5] Two separate criminal proceedings followed in the District Court of Queensland in 2015 and 2016, respectively, before a jury. In January 2015, no evidence was offered in respect of three of the charges and the matter was discontinued. Later, in October 2015, FRW was found not guilty by a jury of three further charges; and in September 2016, FRW was found not guilty by a jury in respect of two charges and the prosecution entered a nolle prosequi in respect of a third charge.

[6] FRW then applied for a positive notice to issue so as to allow him to hold a blue card again under the *Working with Children (Risk Management and Screening) Act* 2000 ('the Act'). FRW's application was refused on the basis that that it was an 'exceptional case' in which it would not be in the best interests of children for him to be issued with a positive notice.[1]

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1 Decision made 27 June 2017, Appeal Book, p 239.

[7] FRW applied for a review of the decision. Following a two-day hearing, the Tribunal set aside the decision that there is an exceptional case within the meaning of s 221(2) of the Act and by way of a substituted decision, found that there is no 'exceptional case'.[2]

[8] DJAG now appeals the Tribunal's decision that there is no 'exceptional case'.[3] Although there are three grounds of appeal alleging error of law, the essential issue on appeal is whether there was an error in the exercise of the Tribunal's broad discretion under the Act.

[9] On appeal, an applicant must establish that there is some error in the exercise of the Tribunal's discretion in accordance with established principles: the Tribunal acted upon a wrong principle; or allowed extraneous or irrelevant matters to guide or affect him; made mistakes of facts; or did not take into account some material consideration.[4] It is not enough that the Appeal Tribunal, had they been in the position of the learned Member, would have taken a different course.[5]

[10] DJAG seeks final orders on appeal setting aside the Tribunal's decision made on 25 July 2018 and confirming the applicant's decision that FRW's is an 'exceptional case' pursuant to s 221(2) of the Act. Alternatively, DJAG seeks an order that the matter be sent back to the Tribunal to conduct the review in accordance with the Act.[6]

The *Working with Children (Risk Management and Screening) Act* 2000 (Qld)

[11] The Act provides a legislative regime for the issuing of positive and negative notices. If a positive notice has issued, the person may hold a blue card allowing the person to work with children and young people in Queensland. A blue card is fully transferable and enables a person with a blue card to work with children and young people without restriction.

[12] The Act is protective in nature and its objects are to promote and protect the rights, interests and wellbeing of children and young people through a scheme requiring the screening of persons employed in particular employment or carrying on particular businesses.[7] The Act mandates that the welfare and best interests of a child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.[8]

[13] In determining whether a person is suitable to hold a blue card, the Chief Executive (or tribunal on review), must have regard to certain matters prescribed under the Act, including, relevantly here, whether the person has a charge for an offence other than a disqualifying offence.[9] Under s 221(2) of the Act, if the Chief Executive is satisfied the person's case is an exceptional case in which it would not be in the best

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2 *FRW v Director-General, Department pf Justice and Attorney-General* [2018] QCAT Unreported 25 July 2018.
3 Decision made 27 June 2017, Appeal Book, p 183.
4 *House v King* [1936] 55 CLR 499, 504.
5 Ibid.
6 Appellant's outline of argument filed 21 November 2019, p 11.
7 *Working With Children (Risk Management and Screening) Act* 2000 (Qld) s 5 ('the Act').
8 Ibid, s 6.
9 Ibid, s 221.

interests of children for the chief executive to issue a positive notice, the chief executive must issue a negative notice.

[14] An eligible person may apply, as provided under the Act and the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld ('QCAT Act') to the tribunal for a review of a decision as to whether or not there is an 'exceptional case' for the person.[10]

[15] Although the Act does not define the meaning of an 'exceptional case', it is settled law that the determination of whether there is an 'exceptional case' involves the exercise of a broad discretion that should be 'unhampered by any general rule and is to be construed in the particular context of the legislation'.[11] That said, the Act requires that the Chief Executive (or tribunal on review) must take into account the prescribed matters under s 226(2). The list of matters is not exhaustive and in reviewing the decision the tribunal is required to arrive at the correct and preferable decision.[12]

Grounds of appeal

[16] There are three primary grounds of appeal that raise questions of law about the exercise of the Tribunal's broad discretion:

> **Ground One:** That the learned Member erred by misapprehending the fundamental protective nature of the statutory regime in the Act and his findings were adversely affected;
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> **Ground Two:** That the learned Member erred by misdirecting himself that conclusive evidence was required of the allegations forming part of the criminal history of the applicant; and
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> **Ground Three:** That the learned Member erred in determining whether there is an exceptional case pursuant to s 221(2) of the Act by failing to address each of the mandatory considerations set out in s 226(2) of the Act.

[17] Each of the grounds of appeal is separately considered below, following a consideration of the evidence and the Tribunal's reasons for decision.

Summary of evidence and the Tribunal's reasons

[18] FRW was acquitted of criminal charges that, as a matter of law, must be proved to the requisite high criminal standard of beyond reasonable doubt. More importantly, FRW was acquitted of charges by two differently constituted juries who heard allegations and evidence against FRW from each complainant (C1 and C2) in isolation from each other. Other than the complaints made by C1 and C2, there is no evidence of other such complaints or allegations made against FRW.

[19] Each of the complainants' evidence and the nature of the allegations made against FRW were similar notwithstanding the passage of time being some 20 years between the alleged events. The Tribunal's reasons refer to DJAG's summary of the

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10 The Act, s 353–4. See also s 20 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

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

12 QCAT Act, s 20.

similarities in respect of the alleged offences concerning C1 and C2 made in the hearing below, as follows:

(a) C1 and C2 were of a similar age at the time of the alleged offences;

(b) The alleged offences took place in the family home when FRW was said to be caring for the children;

(c) The offences involved similar inappropriate sexual behaviour;

(d) The allegations are 'strikingly similar'; and

(e) There is no evidence of C1 and C2 colluding.[13]

[20] As reflected in the Tribunal's reasons, C1 was about 29 years old when she complained to police and 15 years of age at the time the allegations were originally made.[14] Evidence was given in the hearing below about the reason for C1 making the complaint at first instance when she was aged 15 years, such as C1 was said to be leaving home and her parents were 'blocking that move'.[15]

[21] Further C1's mother (who is FRW's wife) ('FAE') gave evidence about her relationship with C1 and C1's relationship with FRW. Relevantly, as reflected in the Tribunal's reasons, around mid-1995 LLJ, a close family friend of FRW (who is LLG's spouse—LLG also gave evidence as discussed later), and her family moved from the town in which they all lived and C1 initiated friendships with 'undesirable' persons and made up her mind to move out of the family home. This led to the parents' attempts to establish some boundaries around C1's behaviour.[16]

[22] FAE also gave evidence about C1's relationship with the family and with FRW and that she (FAE) has continued to support C1 financially and 'in other ways' and C1 often visited and has stayed for short periods in the family home.[17] FAE gave evidence that C1's actions represent a vendetta against her but were, as stated, 'executed via the allegations made against FRW.' FAE's evidence about the allegations, as reflected in the Tribunal's reasons, is that the allegations might have originated from the termination of the marriage between FAE and C1's biological father, with FAE and FRW being held responsible.[18] The transcript of the hearing below shows that when questioned about any risks concerning FRW and children, FAE stated that FRW has worked with children his whole life without accusations (other than those relating to the alleged offences). She considers her family is dysfunctional. The relevant extract from the transcript is as follows:

> …FRW has worked with children all of his life. He has never, ever had any accusations or bad feelings or – I – no one has ever, ever said that they have felt uncomfortable or he has made any attempts to do anything inappropriate to anyone. To me, he is not a risk at all. And I'm sorry to say it, but my family is totally dysfunctional. And I know you don't want to know about whether

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13 Tribunal's Reasons, [14].
14 Ibid, [15].
15 Ibid, [15].
16 Ibid, [58].
17 Ibid, [61].
18 Ibid, [62].

> it's guilty – he's guilty or not guilty, but this is a vendetta against me, not him. And he's paying the price for it.[19]

[23] There was evidence given in the hearing below about the allegations and complaint made by C2. As reflected in the Tribunal's reasons, FAE gave evidence that FRW has never been in a situation in which he was asked or sought to care for C2 overnight or alone. The only time FRW was alone with C2 is when taking her to and from music lessons. FAE gave evidence that despite the allegations, C2 'begged' FAE to be allowed to move from her parents' home to FRW's home, a plea that was rejected.[20]

[24] There was also evidence given in the hearing below that C2 may have overheard conversations about the allegations made by C1 against FRW. FRJ (FRW's biological son) gave evidence that he and his step-brother (C2's father) had many discussions about FRW's situation and that many times during those discussions C2 was 'always hanging around', listening in on the conversation and C2 was told to go away.[21] The transcript of the hearing below reveals that FRJ was questioned about the allegations made by C2 and specifically whether anything was occurring at that point in time that may have triggered the allegations. FRJ referred to C2 as having overheard conversations about C1's allegations and C2 effectively telling a 'story' similar to C1. The relevant extract from the transcript is as follows:

> …Now, as far as C2 goes, I believe that what has happened is C2 was coming into an age where she was starting to want to explore different avenues. She'd been with her boyfriend for a while. They're teenagers. Things happen. I think C2's parents have found out and she's made – she's jumped to the first thing she could to get out of trouble. She's heard us talk about it countless times before, which she had, and she's run with her story and the story's gotten blown out and she couldn't back out. And that's my honest opinion because, again, I have seen the exact same thing happen before. And as far as C1 goes, C1's just wanted to move out of home. It's the same thing. She just wanted to get out. So it happened to a friend of hers. She just changed the names, changed a few details. It's just to get what she wants. All the things I've said before, I have no problem saying them again.[22]

[25] Independent evidence was given in the hearing below by other witnesses who know FRW. MGG, a minister of religion, has known FRW since the early 2000s. MGG said that C1 and C2 were regularly involved in church activities with FRW and others and said that he had never 'perceived any tensions between FRW and the complainants'.[23]

[26] LLG, a close family friend of FRW since 1989, gave evidence in the hearing below about the allegations made by C1 and C2. One of LLG's daughters was C1's closest friend and regularly visited FRW's home and interacted with FRW. LLG gave evidence about the allegations and FRW's character. LLG supported FRW as a character witness during the criminal proceedings stating that he has 'absolute confidence' that the allegations 'were not FRW'.[24] The transcript reveals that LLG

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19 Transcript, T2-21, L36-43, Appeal Book, p 117.
20 Ibid, [63]. See Transcript T2-19, L19-20, Appeal Book, p 115.
21 Ibid, [69]. See Transcript T1-88, Appeal Book, p 93.
22 Transcript T1-88, L39-47 to T1-89, L1-4, Appeal Book, p 93-4.
23 Tribunal's Reasons, [49].
24 Transcript T1-54, L33.

was questioned about the allegations. LLG said that he spent a lot of time talking to his two daughters about the allegations trying to find out if anything happened. LLG said that his daughters could not believe the charges and they knew that nothing happened to them while they were in FRW's household 'ever in relation to these allegations'.[25] The relevant extract from the transcript is as follows:

> …And my two daughters, who I have great respect – and they're very well respected in their communities, and they could not believe the charges and they knew that nothing had – nothing happened to them while they were in the FRW household ever in relation to these allegations.
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> …We talked about that quite a bit, and they emphatically told me that that never happened to them.[26]

[27] LLJ gave evidence about the allegations made by C1. As reflected in the Tribunal's reasons, LLJ's daughter was C1's best friend and their relationship extended into their adult years until C1's announcement of the allegations when LLJ's daughter terminated the friendship.[27] LLJ stated that her daughter was disgusted by C1's allegations. LLJ was questioned about why she thought the allegations were not true. LLJ stated that she was unable to believe the allegations as the two girls (C1 and LLJ's daughter) were friends and if such events occurred her daughter would have been privileged to that information and would have immediately passed the information on to her.[28] Further, LLJ stated that her daughter would not have gone back to FRW's home if she was aware that 'anything had happened'.[29] LLJ also stated that C1 was not 'the most honest child' and that the allegations (made by C1) were false.[30] The relevant extract from the transcript is as follows:

> C1 and [LLJ's daughter] were very close. They talked about anything and everything. If there's something that happened to C1, she would've told [LLJ's daughter] and would've told us, because [LLJ's daughter] talked to me about everything. She talked a lot. So, if anything had happened [LLJ's daughter] would've- would've known and she would've told me and [LLJ's daughter] would not – would've (sic) wanted to go back to the house, but that never happened.[31]

[28] Finally, FRW gave evidence in the hearing below denying the allegations made by C1 and C2. FRW also gave evidence about his extensive experience working with the church and with children and young people. FRW denied that he ever got into the shower with C1 as alleged (by C1).[32] Further, when questioned about C2, FRW stated that he was never left alone in the house with C2 except when he took her to music lessons.[33]

[29] When questioned about the complaints, FRW referred to the allegations as being 'heinous acts' and denied the allegations. The relevant extract from the transcript is as follows:

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25 Transcript T1-54 to T1-55, Appeal Book, p 59–60.
26 Ibid, T1-54, L46-47 to T1-55, L5-7, Appeal Book, p 59–60.
27 Tribunal's Reasons, [56].
28 Ibid, [56].
29 Ibid.
30 Ibid. See Transcript T1-74, L12, Appeal Book, p 79 and T1-73, L3, Appeal Book p 78.
31 Transcript T1-72, L25-31, Appeal Book, p 77.
32 Transcript T2-46, L42.
33 Ibid, T2-51, L26-27, Appeal Book, p 147.

> …There is no way I would do it. It was proven that I didn't do it. I stand by the fact that I said I didn't do it, nor at any – would I even consider doing it. There's no way I have done, will do or anything else committed any of those sort of acts. I think – I think are, as I said before, heinous acts that would – are not acceptable by people in our society. But I haven't done them, and there's no way in the world I would do them, and I – as I said earlier, I have taken measures to make sure that the allegations against me could never be repeated, because I will not put myself in such a position with people so that anybody can even come up with that sort of idea. They can make all the allegations they like if they want to, But I'll easily be able to say to people when, where, how – how did this happen, because I know that it won't occur. I will not put myself in such a position for people to be able to make any allegations against me whatsoever.[34]

[30] Independent evidence was also given by Dr Hatzipetrou, clinical psychologist who provided an opinion about, amongst other things, FRW's risk of reoffending. As reflected in the Tribunal's reasons, Dr Hatzipetrou opined that FRW presented as a low risk of perpetrating sexually abusive behaviours.[35]

Ground One – misapprehending the statutory regime

[31] In written submissions, DJAG says that the Tribunal did not have proper regard to the protective purpose of the legislation in determining risk to children and that the learned Member appeared to misapprehend the fundamental protective nature of the statutory regime. In the oral hearing, DJAG submitted that the learned Member erred in two respects relevant to establishing this ground of appeal. Firstly, by embarking upon a determination of guilt of FRW; and secondly, by applying an incorrect test involving balancing the protective factors against the risk factors to determine whether there is an exceptional case.

[32] We have considered the Tribunal's written reasons that identify the issues to be determined on review; the law to be applied and the facts as he found them. We observe that no issue is raised with his fact-finding on appeal. In particular, we have carefully considered the reasoning behind the Tribunal's decision set out under the heading 'The Tribunal's decision' at paragraphs [89] to [106], inclusive of its reasons.

[33] While we acknowledge that the learned Member's choice of words was perhaps unfortunate at times and may have lacked clarity in some respects, on a fair reading, we do not accept that the learned Member failed to have regard to the protective purpose of the Act or, as contended, misapprehended the protective nature of the Act. Moreover, we do not accept that he erred in the two respects raised at oral hearing.

[34] The learned Member identified the Tribunal's role on review as being to consider what is in the best interests of children and whether it would be in their best interest for FRW to work with them in regulated activities.[36] The learned Member observed

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34 Transcript T2-60 L38-L47 to T2-61, L1-4, Appeal Book, p 156–7.
35 Tribunal's Reasons, [34]–[39], see Appeal Book p 311–30.
36 Tribunal's Reasons, [89].

that the Tribunal's 'focus' is whether FRW's circumstances represent an exceptional case having regard to s 226 of the Act.[37] The learned Member said at paragraph [89]:

> My decision, as it was for the Director, Screening Services Unit is to consider what is in the best interests of children and whether it would be in their best interest for FRW to work with them in regulated activities. My focus is whether FRW's circumstances represent an exceptional case as set out in s 226(2).[38]

[35] In explaining his reasons for decision, the learned Member correctly observed the purpose of the Act as being the protection of the rights, interests, and wellbeing of children in Queensland.[39] More importantly, the Tribunal considered the protective nature of the statutory regime in recognising the paramount consideration that children are entitled to be cared for in ways that protect them from harm and promote their wellbeing. The learned Member said as follows:

> …the Tribunal recognises that the Act is specific about its purpose, that being the protection of the rights, interests and wellbeing of children in Queensland taking into account the paramount consideration that children are entitled to care in ways that protect them from harm and promote their wellbeing…[40]

[36] Indeed there are many references contained within the Tribunal's reasons relevant to its role on review such as, amongst other things to consider the totality of FRW's circumstances to determine if an exceptional case exists and that the decision must be consistent with the Act.[41] Further, the Tribunal observed that the 'apparent infringement' under the Act of a person's right to the presumption of innocence is considered justified to uphold children's entitlement to care that protects them from harm and promotes their well-being.[42]

[37] Here, FRW's case concerned charges that had been dealt with other than by a conviction. As provided under s 221(2) of the Act, the Chief Executive, and in a review, the tribunal, must issue to the person a positive notice unless satisfied it is an exceptional case in which it would not be in the best interests of children for the chief executive to issue a positive notice, in which case, a negative notice must issue.

[38] The learned Member correctly observed that the Act does not define the meaning of an 'exceptional case' but, as stated by the learned Member, is a matter of discretion based on the circumstances of the case'.[43] The Tribunal went on to consider relevant authority in *Commissioner for Children and Young People and Child Guardian v Maher & Anor* ('*Maher*').[44] He said that in *Maher* the Court of Appeal 'endorsed a balancing approach' between the relevant risk and protective factors arising from the

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37 Ibid.
38 Tribunal's Reasons, [89].
39 The Act, s 5.
40 Tribunal's Reasons, [104].
41 Ibid, [7].
42 Ibid, [13].
43 Ibid, [105].
44 [2004] QCA 492.

circumstances of the particular case and that procedure was said to have been adopted by DJAG in the matter and by the Tribunal in numerous earlier decisions.[45]

[39] Although, in *Maher,* Philippides J saw no error in the approach taken by the Tribunal in that case, Philippides J did not endorse a balancing of risk and protective approach as being the task required by the Tribunal on review in determining whether an exceptional case existed. Correctly stated, Philippides J said that the Tribunal's ultimate determination was made having regard to the criterion specified by the Act and 'its satisfaction that the criterion had been met'.[46] In determining whether an 'exceptional case' exists, the proper approach is, as stated by Philippides J, to consider its application in each particular case, 'unhampered by a special meaning or interpretation'.[47]

[40] We do not consider that the Tribunal by stating that *Maher* endorses the balancing of relevant risk and protective factors, has misconstrued the task on review or, as contended, applied an incorrect balancing test. As we have said, the Tribunal correctly stated that what constitutes an exceptional case is 'a matter of discretion based upon the circumstances of the case'.[48]Although the learned Member's statement as to what is to be drawn from *Maher* was incorrect in suggesting that it endorsed the balancing of risk and protective factors, that is not to say that is what he proceeded to do, cognisant as he was that the determination was a matter of discretion based on the circumstances of the case. In this regard, it is worth noting that the Tribunal said that DJAG's submissions 'mounts a case which argues that the risk factors', largely based upon the charges, 'outweigh the protective factors'.[49]

[41] Ultimately, the Tribunal found that, as stated, the factors summarised and described in evidence do not sustain a position that 'would suggest that FRW's risk to children is any greater than for any other adult of his age in the community'.[50] Although he adds the words, 'and that these protective factors outweigh the risks that the Director-General argues are present', [51] on a fair reading for the reasons set out in the following paragraphs, the task he undertook was to consider all of the relevant circumstances and conclude that an exceptional case did not exist. Indeed, in context, his comments about protective factors here may be reasonably viewed as observations responding to submissions made.

[42] It is apparent from the Tribunal's reasons that in exercising its broad discretion, the Tribunal considered matters relevant to whether there is an exceptional case. In particular, he considered the factors prescribed in s 226 of the Act. Section 226(2)(a) of the Act relevantly provides a list of matters that the chief executive or tribunal on review must have regard to in deciding whether the person's case is exceptional in FRW's circumstances. The tribunal on review is of course not confined to the list of matters prescribed under s 226 of the Act nor is it confined to any general rule in the exercise of its broad discretion. In this regard we note that there is an apparent typographical error in paragraph [89] of his reasons for decision in saying that his

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45 Ibid, [105].
46 *Maher,* at [28].
47 *Maher*, [33]. See *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291, [33].
48 Tribunal's Reasons, [105].
49 Ibid, [106].
50 Ibid, [106].
51 Ibid, [106].

focus is whether FRW's circumstances represent an exceptional case having regard to s 266(2). Although he does not set out the matters specified in s 226(2)(a), he considered them. It is worth setting them out here, together with references to paragraphs in his reasons for decision in which they are identified, discussed or considered.

[43] Section 226(2)(a) is as follows:

> (2) The chief executive must have regard to the following –
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> (a) in relation to the commission, or alleged commission, of an offence by the person –
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> (i) whether it is a conviction or a charge; and
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> (ii) whether the offence is a serious offence and, if it is, whether it is a disqualifying offence; and
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> (iii) when the offence was committed or is alleged to have been committed; and
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> (iv) the nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children; and
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> (v) in the case of a conviction – the penalty imposed by the court and, if the court decided not to impose an imprisonment order for the offence or not to make a disqualification order under section 257, the court's reasons for its decision….

[44] In particular, regarding s 226(2)(a)(i), the Tribunal identifies the charges against FRW and identifies that FRW was not convicted of the charges at paragraphs [1]-[3]. In paragraphs [1], [5] and [91], the Tribunal identifies the alleged offences as disqualifying offences as required by 226(2)(a)(ii). In paragraphs [1] and [14], the learned Member identified when the alleged offences were said to have been committed, and the ages of the complainants at the time, as required by s 226(2)(a)(iii).

[45] Section 226(2)(a)(iv) requires that regard be had to the nature of the offence, and its relevance to employment (or conducting business) that involves or may involve children. The Tribunal specified that it did not intend to catalogue 'the details of the alleged offences': paragraph [12]. However, it said that 'if relevant', they were referred to: paragraph [12]. Specifically, the Tribunal referred to the nature of the alleged offences as concerning the 'indecent treatment of two girls under the age of 16 years': paragraph [1]. In paragraph [3], he stated that the alleged offences included inappropriate touching including in a shower stall in the family home. He observes that, as DJAG submitted, there were 'multiple charges made by two complainant children familiarly (sic) related to FRW.': [13]. Further, he refers to DJAG's submissions concerning the alleged similarity between the alleged offences despite the 20 year gap between when each complainant alleges the events occurred. He refers throughout his reasons for decision to other aspects of the evidence and submissions of the parties concerning the alleged offences. An allegation that he did not consider the nature of the alleged offences cannot be sustained.

[46] The Tribunal's regard to the relevance of the nature of the alleged offences to employment that may involve children is revealed primarily through his consideration of relevant evidence received at the hearing. Without purporting to exhaustively consider relevant references, the following are noted. At paragraph [70], he recounts FRW's evidence about his work in the church involving children; his knowledge of and support for the Church's child safety policies; the need for a blue card; and need for children to be in a safe environment. Further, he refers to FRW's assertions that child abuse 'causes irreparable damage' and is a 'heinous crime.' He had regard to the report (paragraphs [29]-[39]) and oral evidence (paragraphs [42]-[47]) of Dr Hatzipetrou who concluded that FRW presented with a low risk of perpetrating sexually abusive behaviours in the context of his history of active engagement with children through church activities and lack of any complaints arising from it: [34]-[39]. There was no serious challenge to his conclusion in cross-examination. MGG's evidence is considered at [48]-[50]. Also a minister of religion, MGG refers to FRW's involvement in children and youth programs; child safety protocols; and his own relevant observations, having regard to his own history of working with children who had been subjected to sexual abuse and his knowledge of likely signs of abuse.

[47] Further, in his reasoning, the learned Member, commencing in [89] (and then, reiterated and expanded upon in [104]), considers the importance of the best interests of children in the context of determining whether FRW should be allowed to work with them, before going on to consider the alleged, offences, the evidence and the parties submissions in [91] and later paragraphs.

[48] Here, DJAG submits in particular that the Tribunal misdirected itself as to the correct way to treat the charges which have been dealt with other than by conviction and refers to the Tribunal's findings at paragraphs [96] and [97] of its reasons as follows:

> Putting aside the concept of an all-knowing, all-seeing deity, there are only three people who know if the events as alleged did occur: FRW, C1, and C2. And while there is no conclusive evidence as required in a criminal prosecution, there is a body of evidence presented in this matter that casts reasonable doubt on the authenticity of those allegations.
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> I do not find the Director-General's case compelling. It is easy to assert suspicion but in the present matter, there is little conclusive evidence to point to FRW's wrongdoing. I have taken what evidence has been provided into consideration but cannot give it great weight.

[49] DJAG submits that the learned Member erroneously considered that he required conclusive evidence that the allegations occurred in considering whether this was an exceptional case in which, notwithstanding that FRW has not been convicted of any disqualifying criminal charges, it would not be in the best interests of children to issue a positive notice.

[50] Although his choice of words is no doubt unfortunate, we do not accept that the learned Member has, in stating that amongst other things, 'there is no conclusive evidence as required in a criminal prosecution', erroneously conflated the standard of proof to the task required, as contended.

[51] On a fair reading of the Tribunal's reasons as a whole, the Tribunal's reference to there being no conclusive evidence is an observation intended to convey that it could not know for certain, because no-one other than FRW, C1 and C2 actually knows, what did or did not occur, in the context of reaching his own conclusions based on the whole of the evidence before him (on the balance of probabilities: [9]) and, in particular, in determining the weight to be attributed to the evidence of the alleged offences in the context of the totality of the evidence having regard to the matter raised by the parties in determining whether it was an exceptional case: [92]-[94]. Importantly, the Tribunal had before it the various statements of the witnesses and their oral evidence ([42]-[43]) and the transcripts from the various criminal proceedings (Appeal Book, page 8, lines 10-13 and [25]).

[52] (We observe that somewhat irregularly, it appears that the transcripts from the criminal trials were not formally tendered. We take this opportunity to impress on parties, and tribunals respectively, the desirability of tendering of documents relied upon, and marking of them as exhibits in hearings. This assists with clarity in any subsequent appeal proceedings.)

[53] Further, the Tribunal considered submissions from FRW's representative concerning the inconsistencies in the witnesses' evidence in the criminal proceedings and the manner of the police investigation: [87] and [93].

[54] As discussed earlier, the Tribunal clearly had regard to the nature of the charges presented against FRW that were disqualifying offences defined within the Act and referred to s 226(2) of the Act. Even if, as contended by the applicant, the Tribunal's reference in its reasons to s 226 is a typographical error in that Tribunal was in fact referring to s 221 (and not s 226(2) of the Act), we do not consider that by reason of omitting to refer to s 226(2) and the mandatory factors prescribed therein that the Tribunal has failed to consider the required matters under s 226.

[55] The learned Member had regard to the legislative requirement that the charges be considered even if there is no conviction.[52] The learned Member summarised the DJAG's submissions made in the hearing below as being 'serious risk factors' such as the independence of the complainants (i.e. there was no evidence of collusion); that the events occurred in a private context with only FRW and the children (of the same age at the time of the alleged offences) present on each occasion; and the willingness of C1 and C2 to pursue the complaints even though the events occurred years before.[53]

[56] The learned Member considered DJAG's submissions made about the veracity of FRW's denials and the utility of FRW's support network and that the Tribunal should give little weight to FRW's submissions. The learned Member said at [92]:

> …The Director-General questioned the veracity of FRW's denials, and minimised the utility of FRW's support network. In conclusion, the Director-General insists that the Tribunal should give little eight to FRW's submissions against the totality of the police information.[54]

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52 Tribunal's Reasons, [91].
53 Ibid, [92].
54 Ibid.

[57] The learned Member also considered FRW's submissions given in the hearing about the inconsistencies in the complainants' evidence and in policing procedures, such as the uncertainty as to why there was a delay by C1 and C2 in making their respective complaints and the evidence given in the hearing about the household dynamics. The learned Member said as follows:

> FRW asserted that the prosecution's cases foundered because of inconsistencies in the complainants' evidence and in policing procedures. Along with these is the continuing uncertainty as to why C1 and C2 delayed for so long in lodging complaints. Evidence was given during the hearing about the household dynamics at the time C1 first alleged sexual abuse and there are the unanswered questions about why she would have authorised FRW to be with her son alone if she has been subject to his abusive behavior. C2's case is less clear, as several witnesses testified, although her apparent presence when her father and FRJ were discussing C1's allegations might (or, indeed, might not) be relevant.[55]

[58] Having regard to the matters discussed, we see no error in the Tribunal's reaching of its conclusions about the allegations relevant to the alleged offences and whether there was an exceptional case. More importantly, as submitted by DJAG, the Tribunal did not erroneously conflate the criminal standard of proof, that is beyond reasonable doubt, in performing the task required of it in determining whether there was an exceptional case.

[59] At its highest the Tribunal made a number of observations about the relevant features of the matter such as the fact that the criminal charges had been dismissed and withdrawn and to the effect that the Tribunal can not know with certainty what occurred but must reach its own conclusions on the evidence before it about whether it was an exceptional case. It was cognisant of the standard of proof relevant to its determination.

[60] We do not consider that by reason of the learned Member's reference to the criminal standard of 'reasonable doubt' the Tribunal has, as contended, fettered its discretion by applying an irrelevant consideration, i.e. the question of the 'guilt' of the respondent. Indeed, although not expressly stated in the Tribunal's reasons, the transcript shows that the learned Member stated in the hearing below that the Tribunal in making its decision is not deciding or is not retrying whether [FRW] is guilty or innocent of the offences that he was charged with. The relevant extract from the transcript is as follows:

> …and so in terms of the risk factors of the applicant's case, the – and – my apologies. I should also add as well that the tribunal in making its decision isn't deciding or isn't retrying whether the applicant is guilty or innocent of the offences that he was charged with. The question that the tribunal is concerned with is the question of risk to children. The – and so in terms of looking at the risk factors that apply I this case, the risk factors revolve around the charges for the disqualifying offences that were brought…[56]

[61] Although the Tribunal has not expressly stated in its reasons that it accepts the evidence of FRW and his witnesses given in the hearing below, it is apparent on a fair reading of the reasons that the Tribunal accepted FRW's evidence and the

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55 Tribunal's Reasons, [93].

56 Transcript T1-6, L46-47 to T1-7, L1-5, Appeal Book, p 11-2.

evidence given by a number of FRW's witnesses to ultimately find that FRW's case is not an exceptional case, and gave it greater weight than the other evidence before it.

[62] The Tribunal referred to the evidence of Dr Luke Hatzipetrou, Clinical Psychologist, who conducted a psychological assessment and prepared a report for FRW. The Tribunal in referring to Dr Hatzipetrou's evidence, observed that there is no evidence of mental health issues or of any indicators that suggest that he has a disposition toward sexual misconduct and that there have been no other allegations of misconduct between C1 and C2's allegations, separated by 20 years, or at any other time.[57]

[63] The learned Member stated that FRW sought medical/psychological assistance when he became aware of his depressed mood leading up to the Court cases and that such treatment was, as stated by FRW, to be beneficial and FRW was able to implement strategies to improve his psychological situation and that seeking help would remain as an option should it be necessary into the future.[58]

[64] The Tribunal also observed that there has been no evidence given that FRW attempted to maintain secrecy of the allegations against him and stated that FRW approached police when the allegations were made, informed friends, he informed Church elders and its administration and he resigned from duties immediately (after) the charges were laid.[59]

[65] The Tribunal referred to FRW's social network as being a protective factor, in particular the 17 referees who provided 'comment' upon FRW's character when he was defending the allegations in the criminal proceedings. Further, FRW's involvement in the church, the wider community and his dealings with children and youths. The learned Member stated:

> And while the Director-General is unconvinced about the benefit of FRW's social network as a protective factor, 17 referees provided comment upon his character when he was defending the allegations in Court. All speak highly of him, his involvement with his Church, the wider community, and his dealings with children and youths. While it is not clear if all of those referees had full knowledge of the allegations made against him, those who provided oral evidence during the hearing stated full knowledge, maintained their skepticism of the allegations, and stated their willingness to support him in times of need. Evidence was given that FRW's friendship and professional network includes member of his Church who were specifically assigned to support him through the legal process and he stated that they would remain as important mentors/counsellors into the future.[60]

[66] The Tribunal also referred to FRW's evidence given about the impact of sexual abuse and FRW's evidence that since the initial allegations by C1 he has been sensitive to his environment in regard to involvement with children to ensure that there were no occasions when he could be accused of misconduct.[61] The Tribunal

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57 Tribunal's Reasons, [99].
58 Tribunal's Reasons, [100].
59 Ibid, [101].
60 Ibid, [102].
61 Ibid, [103].

summarised FRW's evidence given about the allegations and complaints involving allegations of sexual abuse generally.[62] The learned Member stated:

> …As with C1's allegations, he was shocked by C2's. He gave evidence that sexual abuse is a heinous crime and that if he were able to return to his ministry he would ensure that there would be no occasion when he would be alone with children or youths. He states that this has been his practice for years, even in his own home. He was able to describe the child safety protocols that operate in his Church, completely agrees with them, and was also aware of the need for systems such as the blue card. He was aware of the child safety requirement in employment situations regulated by the Act and stated that in the unlikely event that he would seek an employment situation other than the Church, he would familiarise himself with the relevant protocols and seek membership of relevant professional bodies to ensure the implementation of those protocols.[63]

[67] As we have discussed above, the Tribunal recognised the Act and its purpose being the protection of the rights, interests and wellbeing of children in Queensland taking into account the paramount considerations under the Act.[64] The Tribunal recognised that what is an exceptional case is a matter of discretion based upon the circumstances of the case as articulated in *Maher*.[65] The Tribunal found that the protective factors described in the evidence do not sustain a position that would suggest that FRW's risk to children is any greater than for any other adult of his age in the community and that these protective factors outweigh the risks that the Director-General argues are present.[66] The Tribunal did not consider the matter to be an exceptional case as proposed by the Director-General.[67]

[68] Ground One of the appeal is refused.

Ground Two – error in the Tribunal's findings of conclusive evidence

[69] DJAG submitted that the point of the statutory discretion is to consider the nature and impact to risk of those offences which have not been proved to a criminal standard and cases where the offences have not been conclusively proved. At the oral hearing, DJAG conceded that the contentions relevant to Ground Two of the appeal overlap with the contentions raised in Ground One. It submitted that the learned Member misdirected himself that conclusive evidence was required of the allegations forming part of the criminal history. DJAG, in referring to paragraphs [95] and [97] of the reasons, submitted that the Tribunal applied a level of satisfaction approaching the high criminal standard of beyond reasonable doubt as he had reasonable doubt and considered there was no conclusive evidence of guilt, he indicated that he cannot give the evidence of wrongdoing great weight.

[70] Further, DJAG submitted that the learned Member's reasoning reveals that he essentially disregarded the nature and fact of the charges because he did not consider that there was conclusive evidence that the allegations were true and has subverted

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62 Ibid.
63 Tribunal's Reasons.
64 Ibid, [104].
65 [2004] QCA 492.
66 Tribunal's Reasons, [106].
67 Ibid.

the legislative intent with respect to the exercise of this discretion which is wholly directed to protect the interests of children.

[71] For the reasons discussed above, we do not accept that the learned Member misapplied the standard of proof by, as contended, indicating in [97] of the reasons that he cannot give the evidence of wrong doing great weight. Although again not clearly expressed in paragraph [97] of the reasons, on a fair reading of the reasons as a whole, what the learned Member intended by his statement 'there is little conclusive evidence to point to FRW's wrongdoing' was simply that he could not know for certain what had occurred but in the circumstances based on the whole of the evidence on the balance of probabilities he was satisfied that FRW's case was not an exceptional case.

[72] The learned Member correctly identified in his reasons the correct standard to be applied on review, that is, on the balance of probabilities.[68] The transcript of the hearing below also reveals that the learned Member properly construed his task on review and more importantly that he was not required to determine the validity of the allegations. The relevant extract from the transcript is as follows:

> No, just let me reiterate a comment I made a bit earlier, that – and I've made it to several of the witnesses that, you know, my job's not to ascertain whether the accusations that were made are true or false. I'm not doing a review of the not guilty verdict or any of those things. Essentially, as Mr McCowie has just indicated, the issues really are relevant to the Act and to the issue of whether [FRW's] case is exceptional as it's fairly loosely defined in the Act…[69]

[73] The learned Member has, although not expressly stated, effectively accepted and given greater weight to FRW's evidence before him including the evidence of FRW's witnesses (than the weight he gave to the evidence of the alleged offences) in all of the circumstances to find there is no exceptional case. As discussed above, there was evidence before the Tribunal about C1's relationship with her mother, FAE and FRW at the time she made the complaint at first instance as a young person and many years later when she complained to police in her late twenties. There was evidence before the Tribunal about C1 as a young person from family friends of FRW. There was also evidence given about C2's complaint and relevant to the similarities in the allegations made by both C1 and C2 against FRW, the evidence showed that C2 was present when there were discussions in the family about the allegations made by C1 and C2 may have overheard the discussions. There was also evidence before the Tribunal about FRW's involvement in the church and his dealings with children and young people over many years without allegations being made. As observed by the learned Member in paragraph [102] of his reasons there was evidence before him of 'protective factors' such as FRW's social network including 17 referees who provided comment upon his character when he was defending the allegations in Court.

[74] It was open to the Tribunal on review to accept and give greater weight to some of the evidence before him. Although not expressly stated in the reasons, the Tribunal has effectively made findings about FRW's evidence and the evidence of FRW's witnesses given in the hearing below.

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68 Tribunal's Reasons, [9].

69 Transcript p 2-63, L26-31, Appeal Book, p 159.

[75] There is no merit in this ground of appeal.

Ground Three – error in the exercise of discretion

[76] As we have discussed above, we find no error in the Tribunal's identification of its task on review and in construing the protective nature of the Act and in determining if there is an exceptional case, nor is there error in the Tribunal's application of s 226 of the Act. DJAG has not identified an error in the Tribunal's exercise of its discretion to determine if FRW's case is an exceptional one. This task, as we have discussed above, required the Tribunal to have regard to the protective nature of the Act; s 221 and the relevant matters prescribed under s 226. It was also entitled in exercising its discretion to consider any other relevant matters. It considered a broad range of matters as discussed throughout these reasons for decision in determining whether FRW's was an exceptional case.

[77] Here, we observe once again that DJAG does not raise any contention in the appeal about the Tribunal's summary of the evidence given in the hearing below that, as we have discussed above, although not expressly stated as the Tribunal's findings, we consider that the Tribunal has accepted and given greater weight to FRW's evidence and the evidence of FRW's witnesses to find that there is no exceptional case.

[78] Ground Three of the appeal does not have merit.

Disposition of appeal and orders

[79] We have found no error in the Tribunal's exercise of its discretion in finding that there is no exceptional case. The applicant has failed to identify an error in the Tribunal's consideration and application of the legislative scheme and more importantly the matters prescribed under s 226 of the Act. The grounds raised on appeal are without merit. The appeal is dismissed and we order accordingly.