

# BLUE CARDS – THE LAW IN BLACK & WHITE

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## Introduction

- [1] Screening for child-related employment is not a new legislative idea, but rather it is an expanding concept seeking to extend scrutiny beyond public sector employees working with children to those employees in equivalent non-government child related fields.
- [2] The *Working with Children (Risk Management and Screening) Act 2000 (Qld)* (the Act) followed on from the developments in the United Kingdom and New South Wales and was enacted to fill the gaps in employment screening for child related employment. Implemented within the Act are parts of the Government's response to the recommendations of the Forde Inquiry<sup>1</sup> and the Briton Review,<sup>2</sup> and it recognises the growing community concerns about the safety of children who are placed in the care of others.
- [3] Recognised within the Act is the vulnerability of children and the obligations of employers, the government and the community as a whole to protect children and young people from harm or the likely risk of harm, and to have the rights and interests of children safeguarded.
- [4] The objects of the Act are to promote and protect the rights, interests and wellbeing of children and young people in Queensland through a scheme requiring the development and implementation of risk management strategies; and the screening of those people employed in particular employment or carrying on particular child related employment businesses.<sup>3</sup> The need is recognised to ensure that people employed as paid employees or engaged as volunteers in child-related employment are suitable to work with children.
- [5] Therefore, any administration of the provisions of the Act is to be under the principles that the welfare and best interests of a child are paramount; and every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.<sup>4</sup> Importantly, those provisions apply despite anything in the *Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)*. That is, it is not the intention of the Act to impose additional punishment on someone who has acquired police or disciplinary information, the central focus is more so to put gates around employment so as to protect children from harm. It is not the legislative intent is to punish people twice; it is to protect children from future abuse.<sup>5</sup>

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<sup>1</sup> The Forde Inquiry (1998–1999), or formally known as the Commission of Inquiry into Abuse of Children in Queensland Institutions, was a special inquiry into child abuse in Queensland presided over by Leneen Forde AC, a former governor of Queensland. The inquiry covered 159 institutions from 1911 to 1999 and found abuse had occurred to children and young people. There were 42 recommendations made relating to contemporary child protection practices, youth justice and redress of past abuse.

<sup>2</sup> In September 1998, the Government commissioned John Briton to conduct an independent review of the Children's Commissioner and *Children's Services Appeals Tribunals Act 1996 (Qld)*. The review was completed, and a report and recommendations were submitted to the Government in April 1999.

<sup>3</sup> *Working with Children (Risk Management and Screening) Act 2000 (Qld)*, s 5.

<sup>4</sup> *Working with Children (Risk Management and Screening) Act 2000 (Qld)*, s 6.

<sup>5</sup> *Commissioner for Children and Young People Bill*, second reading speech, Queensland Parliament Hansard, 14 November 2000 at p. 4391.

- [6] The purpose of this paper is to provide guidance and an explanation with respect to the relevant important issues of a merits review undertaken for blue card matters –
- The Tribunal’s role and function;
  - The discretion afforded to the Chief Executive to consider an exception case;
  - The determination of what is an exception case;
  - Whether a stay can be granted;
  - Whether the Tribunal can direct the Chief Executive to issue a positive notice;
  - The onus (or burden) of proof in merits reviews;
  - The Briginshaw test;
  - Insight displayed by an applicant;
  - Fresh or new evidence (after original decision by the Chief Executive);
  - Applicant’s knowledge, ability and skills;
  - Whether it is the Tribunal’s role to establish an applicant’s guilt or innocence;
  - The making of a de-identification order; and
  - Police information, criminal history; and is traffic history classed as criminal history?

### **The Tribunal’s role and function**

- [7] Discussed later in this paper is the role of the Chief Executive when an application is made for a positive notice and blue card. If the Chief Executive makes a decision to issue a negative notice, the applicant has the discretion to apply to the Tribunal for a review of that decision.<sup>6</sup> These are merits reviews, not judicial reviews.
- [8] Subject to the provisions of the Act, the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (‘the QCAT Act’) and the *Queensland Civil and Administrative Tribunal Rules 2009 (Qld)* (‘the QCAT Rules’), review proceedings are conducted at the discretion of the Tribunal.<sup>7</sup>
- [9] When exercising that discretion, the Tribunal is required to apply fair procedures that are adapted to the circumstances of each particular case.<sup>8</sup> The rules of natural justice must be observed,<sup>9</sup> and the Tribunal must act fairly and in accordance with the substantial merits of the case.<sup>10</sup> A pertinent feature is the Tribunal’s obligation to act judicially, and with judicial fairness and detachment. In undertaking a merits review of an administrative decision, the Tribunal is subject to the general constraints to which the Chief Executive

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<sup>6</sup> *Working with Children (Risk Management and Screening) Act 2000 (Qld)*, ss 353 and 354.

<sup>7</sup> *Working with Children (Risk Management and Screening) Act 2000 (Qld)*, Chapter 8, Part 7, Division 3; *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, Chapter 1, s 6 and Chapter 2, Division 3.

<sup>8</sup> *Kioa v West* (1985) 159 CLR 550, 585.

<sup>9</sup> *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 28(3)(a).

<sup>10</sup> *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 28(2).

whose decision is under review was subjected to, namely, that the relevant power must not be exercised for a purpose other than that for which it exists.<sup>11</sup>

- [10] The Tribunal must hear and decide the application by way of a fresh hearing on the merits of the application<sup>12</sup> and the goal is to produce the correct and preferable decision.<sup>13</sup> Importantly, there is no presumption the Chief Executive's original decision was correct<sup>14</sup> and in endeavouring to undertake its review function, the Tribunal stands in the Chief Executive's shoes when executing the purpose of the review hearing.
- [11] In merit review hearings, the Tribunal has the discretion to inform itself in any way it considers appropriate and is not confined to the evidence or materials that were present during the process of the Chief Executive's original decision.<sup>15</sup> Nor is the Tribunal bound by the rules of evidence,<sup>16</sup> although this does not generally mean the Tribunal should overlook those rules. Every effort or attempt must be made to administer substantial justice and methods of inquiry should not be adopted that unnecessarily place one party at a disadvantage whilst favouring the evidence of the other party.<sup>17</sup> If the Tribunal considers there was a gap in the applicant's case, those principles do not ordinarily require the Tribunal to warn the applicant of that gap so as to provide the opportunity of addressing that gap (if they could).<sup>18</sup>
- [12] A point that must be understood is that unlike a judicial review, the Tribunal's function in a merits review is to review the matter on its merits, not the process by which it was arrived at, nor the reasons for making it.<sup>19</sup> Accordingly, the Tribunal is not required to identify an error in either the process or the reasoning that led to the original decision being made and the question for the Tribunal's determination is not whether the original decision was the correct or preferable one based on the material before the Chief Executive when the original decision was made, but rather whether the decision of the Tribunal is the correct and preferable one based on the available evidence at the time of the review hearing.<sup>20</sup>
- [13] In carrying out its review function by reaching the correct and preferable decision, the Tribunal has the discretion to either confirm or amend the Chief Executive's original decision; or set aside that original decision and substitute its own decision; or set aside the original decision and return the matter for reconsideration to the Chief Executive, with the directions the Tribunal considers appropriate.<sup>21</sup>
- [14] If the Tribunal decides to set aside the Chief Executive's original decision, the Tribunal's decision does not take effect until the end of the period within which an appeal against the Tribunal's decision may be started; or if the Chief Executive appeals the Tribunal's decision, the appeal is decided or withdrawn.<sup>22</sup>

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<sup>11</sup> *Water Conservation & Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492, 505.

<sup>12</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20(2).

<sup>13</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20(1).

<sup>14</sup> *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [9].

<sup>15</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(c).

<sup>16</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(b).

<sup>17</sup> *The King v The War Pensions Entitlement Appeal Tribunal and Another; ex parte Bott* (1933) 50 CLR 228, 256.

<sup>18</sup> *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564, 593.

<sup>19</sup> *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [9].

<sup>20</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

<sup>21</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24(1).

<sup>22</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 354A. This applies despite the provisions of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 145 and 152.

## **Chief Executive's role – where no conviction, or conviction for a serious offence**

- [15] On 20 May 2022, amendments were made to the Act. In respect to an assessment of whether a case is exceptional, those amendments included section 221. What was once a convoluted somewhat confusing part of the Act, the amendments make the legislative drafting somewhat easy to read.
- [16] The first step in regard to a decision about a working with children clearance is the Act expressly providing that the Chief Executive must either approve or refuse an application.<sup>23</sup> If the application is approved, a working with children clearance (positive notice) must be issued.<sup>24</sup> On the other hand, if the application is refused, a negative notice must be issued.<sup>25</sup>
- [17] When deciding whether to issue a positive or a negative notice, the Chief Executive is guided by the provisions of section 221(1) which expressly provide that if the Chief Executive is not aware of an applicant having any police information or disciplinary information, then a positive notice must be issued. Having said that, this section goes on to provide a balance to the Chief Executive's decision making role by saying that the Chief Executive is not required to issue a negative notice to the applicant under section 221(2).
- [18] Section 221(2) also expressly provides that the Chief Executive must issue a negative notice to the applicant if the Chief Executive is aware of relevant information about the person; and is satisfied the applicant's case is exceptional whereby it would not be in the best interests of children for a working with children clearance to be issued.
- [19] Section 221(3) explains that for the purposes of section 221(1) and section 221(2), relevant information means information that the applicant has a charge for an offence other than a disqualifying offence; or a charge for a disqualifying offence that has been dealt with other than by a conviction; or a conviction for an offence other than a serious offence.
- [20] Relevant information also includes investigative information; domestic violence information; disciplinary information; and other information about the applicant that the Chief Executive reasonably believes is relevant to deciding whether it would be in the best interests of children to issue a working with children clearance.
- [21] At this point it is important to observe that although the Chief Executive may form a preliminary opinion as to whether a case is exception or not, there is still an obligation to provide procedural fairness and natural justice to the applicant. Section 229A provides that when undertaking any exceptional case assessment, there is a requirement, and the Chief Executive must afford an opportunity to the applicant to address or make submissions about the contents of any police information, disciplinary information or any other information.

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<sup>23</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 220(1).

<sup>24</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 220(2).

<sup>25</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 220(3).

[22] Relevant to any assessment of an exceptional case are the conditions provided for in section 226 of the Act. If the Chief Executive is aware the applicant has been convicted of, or charged with an offence, regard must be given to a number of significant features, including –

- whether the offence was a conviction or a charge; and
- whether the offence was a serious offence. If it was, whether it is a disqualifying offence; and
- when the offence was committed or is alleged to have been committed; and
- the nature of the offence and its relevance to employment, or the carrying on a business that involves or may involve children; and
- 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,<sup>26</sup> the court's reasons for its decision.

[23] Further to the Chief Executive's discretion in regard to deciding if an exceptional case exists, consideration is to be given to any information or report given to the Chief Executive by –

- the Director of Public Prosecutions or Queensland Corrections;<sup>27</sup>
- a registered health practitioner who has conducted an examination of the applicant relating to the applicant's mental health;<sup>28</sup>
- the Mental Health Court or the Mental Health Review Tribunal;<sup>29</sup>
- the Chief Executive of Disability Services;<sup>30</sup> or
- anything else relating to the commission, or alleged commission of the offence that the Chief Executive reasonably considers to be relevant to the assessment of the applicant.

[24] Importantly, the Chief Executive is not restricted to considering only those matters just discussed. Helpfully, the Queensland Court of Appeal in *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492 (Maher's case) provided a guide about whether or not the Chief Executive was restricted to just those matters contained within section 226. The Court of Appeal found that section 226 merely specifies certain particular matters which the Chief Executive is obliged to consider in deciding the application and the provisions of section 226 do not expressly or impliedly confine any consideration to only those matters referenced in the section.<sup>31</sup>

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<sup>26</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 358.

<sup>27</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), ss 318 and 319.

<sup>28</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 335.

<sup>29</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), ss 337 and 338.

<sup>30</sup> *Disability Services Act 2006* (Qld), s 138ZG.

<sup>31</sup> *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [42]. The observations and considerations by Philippides J were undertaken with respect to the previous legislation, the *Commission for Children and Young People and Child Guardian Act 2000* (Qld), s 102. The equivalent of those provisions are contained in section 226 of the *Working with Children (Risk Management and Screening) Act 2000* (Qld).

- [25] If the Chief Executive reasonably believes that a domestic violence protection order has been made, or a police protection notice has been issued against an applicant, the Police Commissioner must provide that information to the Chief Executive, including a brief description of the circumstances.<sup>32</sup>

### **Can the Tribunal order a stay of the Chief Executive's decision?**

- [26] If an applicant applies to review the Chief Executive's original decision, the Tribunal may not stay the operation of the decision; or grant an injunction in the proceedings.<sup>33</sup> There is no review or appeal provisions under the Act in relation to a decision to issue, or refuse to cancel, a negative notice or negative exemption notice, other than a review under Chapter 8 of the Act.<sup>34</sup>
- [27] However, if the Police Commissioner decides that information about an applicant is investigative information; and after that information is given to the Chief Executive, the applicant may appeal the Police Commissioner's decision. That appeal is to the Magistrates Court, not the Tribunal. The usual time limit of 28 days to appeal applies.<sup>35</sup>

### **Exceptional Case**

- [28] Already referenced in this paper is the principle that the protection of children is paramount, and the legislative intent is not to punish people twice; it is about protecting children from future abuse.
- [29] In respect to any proceedings involving the question of whether a positive notice should be issued to an applicant, regard must be given to the intent, purpose and design of the Act. The Tribunal need only weigh up the competing facts and apply the balance of probabilities principle. The threshold in deciding whether a person should be issued with a positive notice is the determination of whether the circumstances of an applicant's case will render it an exceptional case.
- [30] Although the term "exceptional case" is not defined in the Act, it has been the subject of previous discussions throughout a variety of State and Federal jurisdictions of the Commonwealth, including the Tribunal's own appeal jurisdiction. The term is said to be a question of fact and degree to be decided in each individual case and is a matter of discretion.<sup>36</sup>
- [31] Any consideration of the term must be undertaken in accordance with the context of the Act,<sup>37</sup> and the term has been said to mean 'unusual, special, out of the ordinary course' and it would be undesirable to attempt to define in the abstract what the relevant facts are.<sup>38</sup>

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<sup>32</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 315A.

<sup>33</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 354(2).

<sup>34</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 354(3).

<sup>35</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 307.

<sup>36</sup> *FGC v Commissioner for Children and Young People and Child Guardian* [2010] QCAT 350, [18].

<sup>37</sup> *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291, [31] citing *Kent v Wilson* [2000] VSC 98, [22].

<sup>38</sup> *Kent v Wilson* [2000] VSC 98, [22].

[32] In *Re Imperial Chemical Industries Ltd's Patent Extension Petitions* [1983] 1 VR 1, the Victorian Supreme Court observed that particular attention should be paid to the warning given in the frequently cited definition of exceptional case which arises out of Justice Luxmoore's comments in *Re Perry and Brown's Patents* (1930) 48 RPC 200, where it was observed that –

it would be most unwise to lay down any general rule about what an exceptional case is. Discretion should be used and each case should be considered on its own facts.<sup>39</sup>

[33] In Queensland, the approach taken by the Victoria Supreme Court was adopted and endorsed by the Queensland Court of Appeal in Maher's case where the court said that –

it would be most unwise to lay down any general rule with regard to what is an exceptional case. All these matters are matters of discretion.<sup>40</sup>

[34] If the Chief Executive arrives at a decision and determines that an applicant's case is exceptional because of their criminal history, or because of an event that occurred involving the applicant, then that decision may be justified if the decision was made in the best interests of children.<sup>41</sup> Notwithstanding that, the facts of each case must be examined in the light of the legislative intent and each case must be judged on its own merits.

[35] However, any consideration given by the Chief Executive to an application does not expressly or impliedly decree that the Chief Executive must only consider the matters specified therein. As observed in Maher's case, there is no basis for applying an unnecessary limitation on the interpretation of this provision.<sup>42</sup>

### **Can the Chief Executive be ordered or directed to issue the applicant a positive notice and blue card?**

[36] On a number of past occasions, the question whether the Tribunal is vested with the authority to order or direct the Chief Executive to issue a positive notice or a blue card has been raised.

[37] In 2016, Carmody J considered this issue in *RPG v Public Safety Business Agency* [2016] QCAT 331 (RPG's case). RPG's case was determined because of an earlier decision of the Tribunal in *RPG v Chief Executive Officer, Public Safety Business Agency* [2015] QCAT 485.

[38] RPG was a former army officer who had been volunteering with a cadet group unit in Monto. RPG and his wife were also foster parents. He required a blue card for purposes of his involvement with the cadet group, as well as a foster carer. The Chief Executive found an 'exceptional case' against RPG and issued him with a negative notice. Upon a review of that decision, the Tribunal set aside the Chief Executive's decision and ordered the Chief Executive to issue RPG with a blue card. The Chief Executive disputed that order and refused to issue a blue card to RPG, instead requiring him to submit a fresh application for a blue card. Because the Chief Executive did not comply with the Tribunal's order, RPG brought contempt proceedings against the Chief Executive.

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<sup>39</sup> *Re Imperial Chemical Industries Ltd's Patent Extension Petitions* [1983] 1 VR 1.

<sup>40</sup> *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [34].

<sup>41</sup> *Working with Children (Risk Management and Screening) Act* 2000 (Qld), s 221.

<sup>42</sup> *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [42].

- [39] The Chief Executive argued the Tribunal fell into error and acted *ultra vires* when it made that order. Clarification was sought whether the Tribunal had any statutory power to direct the Chief Executive to issue a positive notice, even if it sets aside the original decision.<sup>43</sup> Carmody J agreed with the Chief Executive and said that although the Tribunal had power to set aside the original decision, there was no power to order the Chief Executive to issue a positive notice or a blue card.<sup>44</sup>
- [40] To understand why Carmody J reached that conclusion, examination must be undertaken of the relationship between the enabling Act and the QCAT Act. An enabling Act is the legislation conferring review jurisdiction on the Tribunal and it may state the Tribunal's functions. The enabling Act may also add to, otherwise vary, or exclude functions stated in the QCAT Act.<sup>45</sup> The enabling Act can also be subordinate legislation that confers review jurisdictions on the Tribunal and may include provisions about the conduct of the proceedings including practices and procedures, and the Tribunal's powers.<sup>46</sup>
- [41] The Tribunal's particular role in merit reviews is distinct. That is, the QCAT Act provides the authority for the Tribunal to make the correct and preferable decision. Although the Tribunal has all the functions of the original decision maker,<sup>47</sup> the only authority provided by the QCAT Act is the exercise of a discretion to either confirm or amend the Chief Executive's original decision; or set aside the original decision and substitute that decision with its own decision; or set aside the original decision and return the matter for consideration to the Chief Executive maker with directions that the Tribunal considers appropriate.<sup>48</sup> The Tribunal is confined to those powers.
- [42] Ultimately, any correct and preferable decision reached by the Tribunal<sup>49</sup> is binding on all parties in the proceedings,<sup>50</sup> and the Tribunal's decision takes effect when the Tribunal makes its decision, unless a later date is specified.<sup>51</sup>
- [43] Therefore, in merit review proceedings, unless the enabling Act or the enabling subordinate legislation confers a particular power or function upon the Tribunal with respect to the issuing of a permit, authority, notice or otherwise, the Tribunal's determination in making the correct and preferable decision is restricted to its functions for the review.<sup>52</sup> It would then be up to the Chief Executive to issue a positive notice and blue card within a reasonable time, in line with the Act<sup>53</sup>

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<sup>43</sup> *RPG v Public Safety Business Agency* [2016] QCAT 331, [4].

<sup>44</sup> *RPG v Public Safety Business Agency* [2016] QCAT 331, [27].

<sup>45</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 6(4).

<sup>46</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 6(7).

<sup>47</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 19(c).

<sup>48</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24(1).

<sup>49</sup> Pursuant to the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24.

<sup>50</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 126(1).

<sup>51</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 127.

<sup>52</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24.

<sup>53</sup> *RPG v Public Safety Business Agency* [2016] QCAT 331, [29].



## Onus (or burden) of Proof

- [44] Under common law, the duty is upon one party (usually the one bringing the proceedings against another) to make out its case against the other party and to prove to the court that their case has been established. The onus (or burden) of proof is a common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law.
- [45] One of the chief difficulties of this concept has been the necessity to distinguish between its so called legal and evidential aspects. The concept is concerned with matters such as the order of the presentation of evidence and the decision the Tribunal should give when it is left in a state of uncertainty by the evidence on a particular issue.
- [46] The use of the legal rules governing this part of the law of evidence outside the Courts should be approached with great caution.<sup>54</sup> This is particularly true when the Tribunal is exercising its merits review function which, by its statute is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.<sup>55</sup>
- [47] Having particular regard to the Tribunal not being bound by the rules of evidence, the onus of proof principle which plays such an important fact finding role in adversarial proceedings before judicial Tribunals, has no part to play in merits review proceedings.<sup>56</sup> This principle was settled by the Tribunal in *Commissioner for Children and Young People and Child Guardian v Storrs* [2011] QCATA 28 where the Tribunal found –

a proper analysis of the law must lead to the conclusion that there is no onus on the Commissioner to convince the Tribunal that on the balance of probabilities Mr Storrs's case was an exceptional case such that it would harm the best interest of children for him to have a blue card. The Tribunal is required to determine whether an exceptional case exists or not after evaluating all available evidence before it without any party bearing the onus of proof that an exceptional case exists.<sup>57</sup>

## Briginshaw Test

- [48] As already discussed in this paper, the Tribunal is not bound by the rules of evidence. However, that still leaves the question of what weight should the Tribunal give to the evidence presented in the proceedings by either party.
- [49] In *Briginshaw v Briginshaw* (1938) 60 CLR 336, the High Court arrived at a test (the *Briginshaw* test) for what weight should be applied. A detailed analysis was made about the development of the standards of proof in criminal and civil matters, noting the civil standard was depending on the reasonable satisfaction of the Tribunal.
- [50] That analysis continued on to observe:

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular

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<sup>54</sup> *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 356.

<sup>55</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(b) & (c).

<sup>56</sup> *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425.

<sup>57</sup> *Commissioner for Children and Young People and Child Guardian v Storrs* [2011] QCATA 28, [19].

finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters 'reasonable satisfaction' should not be inexact proofs, indefinite testimony, or indirect inferences.<sup>58</sup>

The nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues .... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.<sup>59</sup>

- [51] A question for the Tribunal to decide is whether an exceptional case exists bearing in mind the gravity of the consequences involved. In Maher's case, the Court of Appeal observed –

It was accepted by both parties that the test in *Briginshaw v Briginshaw* (1938) 60 CLR 336 was applicable in respect of the level of satisfaction needed .....that is, that the Tribunal was required to be satisfied on a balance of probabilities, bearing in mind the gravity of the consequences involved, that there was an exceptional case, in which it would not harm the best interests of children for a positive notice to be issued.<sup>60</sup>

- [52] Other examples whereby the gravity of the consequences flowing from a particular finding can be found in cases decided in regard to domestic violence matters and whether or not it is necessary or desirable for the court to make a protection order pursuant to the *Domestic and Family Violence Protection Act 2012* (Qld).

### **Insight**

- [53] A question that should be addressed by the Tribunal in reaching its correct and preferable decision relates to whether the applicant has insight into their behaviour or conduct which was relative to the issuing of a negative notice.
- [54] Good insight is a protective factor, and this may become a critical issue for determination. In *Re TAA* [2006] QCST 11, the Tribunal found that a person who is aware of the consequences of their actions upon others is less likely to re-offend than a person devoid of insight into the effect of their actions. Insight is particularly important with children because they are wholly dependent on adults around them having insight into their actions and the likely effect upon children.<sup>61</sup>
- [55] In assessing whether the applicant possesses insight, the Tribunal is obliged to have regard to all the evidence placed before it, particularly if it is relevant to a risk of repetition of the applicant's offending or concerning behaviour. Ultimately, the Tribunal has to be satisfied the potential for any future risk of harm to children has been sufficiently negated so a

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<sup>58</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

<sup>59</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 363.

<sup>60</sup> *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492, [30]. Other examples whereby the gravity of the consequences flowing from a particular finding can be found in cases decided in regard to domestic violence matters and whether or not it is necessary or desirable for the court to make a protection order pursuant to the *Domestic and Family Violence Protection Act 2012* (Qld): *Grainger v Grainger* [2001] QDC 016, [28]; *GKE v EUT* [2014] QDC 248, [36].

<sup>61</sup> *Re TAA* [2006] QCST 11, [97].

conclusion can be reached that the paramount principle relating to the welfare and best interests of children is not offended.<sup>62</sup>

- [56] Quite often, when faced with a task of determining whether the applicant's conduct which led to the issuing of a negative notice has been sufficiently or appropriately addressed by the applicant, the issues which may be considered are –
- What, if any, is the risk of repetition of the concerning behaviour of the applicant;
  - Is the risk of harm to children sufficiently negated so that it could be concluded that there is little likelihood of the future risk to children;
  - Can the Tribunal be satisfied that there are protective factors in place that sufficiently mitigate the concerns relating to a future risk to children; and
  - Have strategies been adopted by the applicant to enable that person to deal with stressful situations. That is, has the applicant undertaken any counselling, and if so, what and how often and when was the latest occasion.
- [57] Of note, it is not sufficient for an applicant to rely solely upon the fact that they have attended counselling to address any concerns about their ability to cope with stressful situations, the issue is whether there is evidence that the counselling has greatly reduced the risk of the applicant of being susceptible in stressful situations. The question would be, has counselling enabled the applicant to cope with stressful situations?

#### **Fresh or new evidence (after original decision by the Chief Executive)**

- [58] Previously discussed was the principle that the Tribunal must hear and decide the review by way of a fresh hearing on the merits of the application,<sup>63</sup> remembering that the Tribunal is not confined to the evidence or materials which were present in the Chief Executive's original decision-making process.
- [59] Understandably, many days, weeks, months or even a year or more may have passed since the Chief Executive's original decision was made. The Tribunal is generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration.<sup>64</sup> Therefore, when the Tribunal elects to make the correct and preferable decision in substitution for the Chief Executive's original decision, it would be surprising in the extreme if the substituted decision did not have to conform to that standard.<sup>65</sup>
- [60] A key consideration relating to the admission of fresh or new evidence after the hearing is completed, but before judgment is given, is whether the evidence is material to the facts in issue and the interests of justice require it to be admitted. The circumstances of those facts must be relevant to the Tribunal's determination as to what was the correct and preferable decision taking into account the paramount principle as provided under the Act. Overall, the Tribunal has to be satisfied the interests of justice require the evidence to be admitted and there is no prejudice to any party by reason of its introduction at such a late point in time.<sup>66</sup>

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<sup>62</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 6(a).

<sup>63</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20(2).

<sup>64</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 299.

<sup>65</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 299.

<sup>66</sup> *Murray v Figge* (1974) ALR 612 considering *Watson v Metropolitan (Perth) Passenger Transport Trust* [1965] WAR 89.

## **Applicant's knowledge, ability and skills**

- [61] On occasions there may be circumstances whereby an applicant will argue their case is not exceptional because they possess a skillset, or particular knowledge that may benefit children. If the Tribunal is to consider this issue, the paramount principles relating to the welfare and best interests of the children; the promotion of the wellbeing of children; and every child is entitled to be cared for in a way that protects that child from harm would always be to the forefront of any decision and those principles will override any skillset or special knowledge.
- [62] Therefore, if the Tribunal turns its mind to whether there is an unacceptable risk to children from future contact with an applicant, any benefit which might flow to children because of the applicant's knowledge, experience or flair is of no relevance.<sup>67</sup>

## **Does the Tribunal's role include establishing guilt or innocence**

- [63] In some cases, consideration is given by the Chief Executive to an applicant's investigative information, or the applicant's police information containing entries that reflect no evidence was offered to a charge, or the applicant was acquitted. In undertaking its function in a merits review, it is not for the Tribunal to establish the applicant's guilt or innocence. That role remains the domain of another jurisdiction.
- [64] This point was discussed by the Western Australian Court of Appeal in *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] WASCA 28. In that case, the Court arrived at a principle that –

It is not the CEO's function or the Tribunal's function (on a review application) to adjudicate upon whether the applicant is, in fact and at law, guilty or not guilty of the non-conviction charge in question. The relevant function involves an analysis and evaluation of risk. It is not concerned with the proof of offences which the applicant may have committed previously, but with the prevention of potential future harm.<sup>68</sup>

- [65] Overall, the Tribunal's function involves an analysis and evaluation of risk. The arrival at the correct and preferable decision should not be concerned with the proof of offences that the applicant may have committed previously, but more so the ultimate decision should focus on the prevention of potential future harm. The analysis and evaluation of the risk must be based on all the evidence and other material properly before the Tribunal at the time the correct and preferable decision is made.<sup>69</sup>

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<sup>67</sup> *Grindrod v Chief Executive Officer, Department for Community Development* [2008] WASAT 289, [33].

<sup>68</sup> *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] WASCA 28, [84].

<sup>69</sup> *Chief Executive Officer, Department of Child Protection v Scott (No 2)* (2008) WASCA 171, [128].

## De-identification order

- [66] Ordinarily, any discretion exercised by the Tribunal to make a de-identification order is reinforced by the very important legal principle of open justice<sup>70</sup> which aims to ensure that not only are Tribunal proceedings fully exposed to public scrutiny and criticism, but to also maintain confidence in the integrity and independence of the Tribunal.<sup>71</sup>
- [67] Although the Act expressly provides that review proceedings for child-related employment matters are to be held in private,<sup>72</sup> there is no provision for the Tribunal's discretion to de-identify either, or all the parties. Therefore, if the principle as outlined in RPG's case by Carmody J was to be applied, any consideration for the de-identifying of a party would fall within the discretionary ambit of the QCAT Act.<sup>73</sup>
- [68] The QCAT Act supports the principle that when the Tribunal is considering exercising the discretion to make a de-identification order, it may undertake that responsibility upon the application from either party or on its own initiative.<sup>74</sup> The discretion extends to prohibiting the publication of the contents of a document or other thing produced to the Tribunal; evidence given before the Tribunal; or information that may enable a person who has appeared before the Tribunal, or is affected by a proceeding<sup>75</sup> to be identified.
- [69] If an applicant has been a party to domestic violence proceedings, the Tribunal should be particularly mindful of the prohibition contained within the *Domestic and Family Violence Protection Act 2021* (Qld) regarding the publication<sup>76</sup> of certain information<sup>77</sup> in respect to those domestic violence proceedings.<sup>78</sup>

## Police information, criminal history and is traffic history classed as criminal history?

- [70] Any criminal and traffic history relating to an applicant will be part of any information (police information) disclosed by the Police Commissioner. Police information is defined in the Act to mean and include an applicant's criminal history or any investigative information about the applicant.<sup>79</sup>
- [71] An applicant's criminal history includes not only every charge preferred against that person, but also every conviction for an offence in Queensland or elsewhere. An offence is defined as an act or omission that renders the person doing the act or making the omission liable to punishment.<sup>80</sup> A conviction is a finding of guilt by a court, or the acceptance of a plea of guilty by a court, whether or not a conviction is recorded.<sup>81</sup>

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<sup>70</sup> *Nash v Von Doussa* [2005] FCA 660; *Foran v Bloom* (No. 2) [2007] QADT 33, [10].

<sup>71</sup> *Russell v Russell* (1976) 134 CLR 495, 520 cited in *Cutbush v Team Maree Property Service (No 3)* [2010] QCATA 89, [8].

<sup>72</sup> *Working with Children (Risk Management and Screening) Act 2000* (Qld), s 361.

<sup>73</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66.

<sup>74</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66(3).

<sup>75</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 66(1).

<sup>76</sup> Publish means publish to the public by television, radio, the internet, newspaper, periodical, notice, circular or other form of communication.

<sup>77</sup> Information includes a photograph, picture, videotape and any other visual representation.

<sup>78</sup> *Domestic and Family Violence Protection Act 2012* (Qld), s 159(1).

<sup>79</sup> *Working with Children (Risk Management and Assessment) Act 2000* (Qld), Schedule 7 – Dictionary.

<sup>80</sup> *Criminal Code Act 1899* (Qld), s 1.

<sup>81</sup> *Working with Children (Risk Management and Assessment) Act 2000* (Qld), Schedule 7 – Dictionary. A similar definition is found in the *Penalties and Sentences Act 1992* (Qld), s 4.

- [72] When a person is charged, the actual charge is a formal allegation that a person has committed an offence. The term ‘charge’ as it applies to an offence is defined within the Act to mean a charge in any form, including for example a charge upon arrest; a notice to appear; a complaint, or an indictment.<sup>82</sup>
- [73] In describing those terms just mentioned, an arrest is explained as consisting of the seizure or the touching of a person’s body with a view to their restraint. Words may amount to an arrest if in the circumstances of the case they are calculated to bring, and do bring, to a person’s notice that they are under an obligation to submit to that arrest.<sup>83</sup>
- [74] The issuing of a notice to appear is a procedure carried out pursuant to the *Police Powers and Responsibilities Act 2000* (Qld). This provides an alternative way for a police officer to start or continue a proceeding against a person and reduces the need for that person’s custody associated with their arrest, and it does not involve the delay usually associated with issuing a complaint and summons under the *Justices Act 1886* (Qld) (Justices Act).<sup>84</sup>
- [75] A complaint made pursuant to the Justices Act includes the terms “information”, “information and complaint”, and “charge” when used in any Act, and means information, complaint or charge before a Magistrates Court.<sup>85</sup> It is associated with the issuing of a summons and is a method of instituting proceedings (where permissible) against a person. A complainant means a person who makes the complaint before a justice of the peace and initiates those proceedings<sup>86</sup>
- [76] An indictment means a written charge for an indictable offence preferred against an accused person in order for that person’s trial or sentence in either the District Court or the Supreme Court jurisdictions.<sup>87</sup>
- [77] In Queensland, offences are defined into two categories, namely, criminal offences and regulatory offences.<sup>88</sup> Criminal offences comprise of crimes, misdemeanours and simple offences. Crimes and misdemeanours are indictable offences; that is to say, an offender cannot, unless otherwise expressly stated, be prosecuted or convicted except upon indictment. Whereas a person guilty of a regulatory offence or a simple offence may be summarily convicted before a Magistrates Court.<sup>89</sup>
- [78] When assessing whether a person’s traffic history can be classed as part of their criminal history, careful attention should be made to any reference to the finalisation of any of the listed offences before a court, or whether a court has imposed a penalty.

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<sup>82</sup> *Working with Children (Risk Management and Assessment) Act 2000* (Qld), Schedule 7 – Dictionary.

<sup>83</sup> *Lewis v Norman* [1982] 2 NSWLR 649, 655 citing *Halsbury’s Laws of England*, 4<sup>th</sup> Edition, volume 11, paragraph 99, page 73 and referred to in *The Queen v Kairouz* [2017] QSC 270, [27].

<sup>84</sup> *Police Powers and Responsibilities Act 2000* (Qld), s 382.

<sup>85</sup> *Justices Act 1886* (Qld), s 4.

<sup>86</sup> *Justices Act 1886* (Qld), s 42

<sup>87</sup> *Criminal Code Act 1899* (Qld), s 1; *Justices Act 1886* (Qld), s 4.

<sup>88</sup> An offence not otherwise designated is a simple offence. Regulatory offences are classified as offences created in respect to three common illegal activities: taking shop goods, failing to pay for services and minor damage to property. *Regulatory Offences Act 1985* (Qld), ss 5, 6 and 7.

<sup>89</sup> *Criminal Code Act 1899* (Qld), s 3.

- [79] In most cases, offences listed on a traffic history are instituted by way of an infringement notice<sup>90</sup> pursuant to the *State Penalties Enforcement Act 1999* (Qld) as opposed to the person being charged with an offence. An infringement notice for an offence<sup>91</sup> offers the person to whom it is issued the opportunity to have the offence dealt with by paying an amount specified in the notice. This dispenses with having the offender appear at court.
- [80] Therefore, in circumstances where a person has offences recorded on their traffic history, consideration should be given to whether those offences arose out of the person being charged, or the offences were otherwise dealt with by way of an infringement notice, or by a court.
- [81] In conclusion, the description provided as to what constitutes a criminal history includes every charge and conviction taking into account what those two terms mean. Therefore, unless offences recorded on a traffic history arise out of a charge or a conviction, they do not fulfil the description as provided by the Act and should not be categorised as part of a criminal history.

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<sup>90</sup> *Transport Operations (Road Use Management) Act 1995* (Qld), Schedule 4 – Dictionary.

<sup>91</sup> An offence for a particular infringement notice means the offence stated in the infringement notice: *State Penalties Enforcement Act 1999* (Qld), Schedule 2 – Dictionary.