Queensland Law Society

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Our ref: Elder Law Committee

22 February 2013

Review of the Queensland Civil and
Administrative Tribunal Act 2009
Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
Brisbane QLD 4001

By Email: [redacted]

Dear Attorney

CONSULTATION PAPER REVIEW OF THE QCAT ACT 2009

Thank you for inviting the Queensland Law Society to comment on the Consultation Paper Review of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act.)

The ***attached*** submission was written with the assistance of the Elder Law, Criminal Law and Industrial Law Committees of the Queensland Law Society. The submission is not confidential.

Yours faithfully

[redacted]

Annette Bradfield
President

Queensland Law Society

Submission

CONSULTATION PAPER
REVIEW OF THE QCAT ACT 2009

Department of Justice and Attorney-General

A Submission of the
Queensland Law Society

22 February 2013

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Who we are

The Queensland Law Society (QLS) is the peak professional body for the solicitors branch of the State's legal profession. We represent and promote more than 8,500 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

QLS issues for consideration

1. Cost Assessments in QCAT

The Society is concerned that should a costs assessor be appointed to assess costs by QCAT, they are not afforded any protection from liability. An assessor appointed pursuant to an order would be deemed to be an official pursuant to Section 238(4) of the Queensland Civil and Administrative Tribunal Act 2009 as they are acting under the direction of the Tribunal. An official has no civil liability for an act done, or omission made, honestly and without negligence. An official is therefore liable in negligence.

Presently costs assessors who undertake a cost assessment in the Supreme, District and Magistrates Courts are protected from suit as s93LA(1) of the Supreme Court of Queensland Act 1991 relevantly states:

> *93LA Ordinary protection and immunity allowed*
>
> *(1) In performing the functions of costs assessor, the person appointed as a costs assessor has the same protection and immunity as a judge performing the functions of a judge*.

The cost assessment is then undertaken pursuant to Part 7 of the UCPR.

Whilst the *Queensland Civil and Administrative Tribunal Act 2009* ("*QCAT Act")* does provide a mechanism for the Governor in Council to make rules for the assessment of costs,[1] r87 of the Queensland Civil and Administrative Tribunal Rules 2009 and indeed the Rules in toto do not make a reference to cost assessor immunity nor to the cost assessment procedures under the UCPR.[2] Unless a QCAT Member specifically orders that the cost assessment be pursuant to the UCPR, a costs assessor does not have immunity from suit. We trust that this is a mere oversight, as it would be inconsistent to provide costs assessors immunity in the Queensland Courts and to deny the same immunity in the Tribunal.

The Society therefore recommends that s107 of the *QCAT Act* be amended so that any order for a cost assessment is deemed to be an order pursuant to the UCPR. Such an amendment would not only provide costs assessors immunity from suit when undertaking a cost assessment (which is consistent with the procedure in the Courts), but would also provide costs assessors and Registry Tribunal staff with certainty as to the procedures involved for cost assessments.

[1] Ss 224(1)(b) and cl17 of Schedule 2 of the *QCAT Act.*
[2] Which by virtue of s93LA of the *Supreme Court of Queensland Act 1991* would afford the costs assessor immunity from suit.

2. Employment Matters

Members of our Industrial Law Committee expressed several concerns about the way in which discrimination matters are currently conducted in QCAT:

1. QCAT members dealing with employment related discrimination matters in particular often do not have a background of professional or tribunal experience in dealing with these matters, which have the capacity to be complex factually and legally technical. In the Society's view, discrimination matters call for experience in dealing with the distinct features of these cases and, in particular, the employment and industrial environment of workplaces in which these types of cases arise;

2. This can sometimes mean that QCAT members are not well versed in the law applicable to these types of cases which can result in longer hearings and outcomes which are more prone to appeal;

3. These matters are exacerbated by the rules of QCAT concerning legal representation and the restrictions on the ability of solicitors and barristers to appear in this jurisdiction.

Under the previous Anti-Discrimination Tribunal Queensland, a dedicated tribunal registry existed and matters were largely heard by part time members, usually from the legal profession. The system largely worked well and decisions of the Tribunal were well respected and cited as authority around the country.

The Society does not recommend a return to this system given the practical difficulties which would exist. However, the Society does consider that a practical alternative may exist in that the members of the Queensland Industrial Relations Commission have a great deal of experience in employment and industrial matters and in dealing with the dynamics of employer/employee disputes and claims.

In the Society's view, the QIRC could act in a similar way to the old Anti-Discrimination Tribunal Queensland, at least in relation to employment related discrimination matters. The QIRC Registry staff and the Vice President are well experienced in the management of employment and industrial matters. Commission members are also experienced in dealing with unlawful dismissal matters which overlap with and contain many of the features of cases commenced in the dedicated discrimination jurisdiction. Even unfair dismissal matters often contain elements of alleged discrimination to be considered by the Commission. The Society also notes that there have been recent legislative and budgetary changes which may result in increased capacity at QIRC to deal with these matters.

The rules for the conduct of matters in the QIRC could, in the Society's view, be adapted with little modification to the conduct of employment related discrimination matters. In addition, the Society considers that the addition of a conciliation conference stage with a Commissioner would have considerable merit. In this regard, we note that an avenue exists under Part 5A of the Magistrates Courts Act for certain types of civil employment claims to be referred to the QIRC for conciliation before being further dealt with by the court.

In the Society's view, at least all employment related matters under Part 4, Division 2 of the *Anti-Discrimination Act 1991* (Qld) (and potentially all work related matters) may appropriately be dealt with by the QIRC as well as work related sexual harassment matters, associated objectionable conduct and associated highly objectionable conduct under Chapters 3, 4 and 5 of the Act.

The Society also notes the recent legislative amendments to the *Industrial Relations Act 1999*, which have expanded the right to legal representation for matters heard by QIRC in relation to specific matters. If employment related matters under Part 4, Division 2 of the *Anti-Discrimination Act 1991* (Qld) are referred to QIRC, the Society's view is that the right to legal representation should be further expanded to specifically include these matters.

3. Children's issues

General experience of members

The Society has some reservations regarding the operation of the QCAT jurisdiction with regard to children's matters.

The experience of our members dealing with the child protection jurisdiction of QCAT has been:

- Written notices of reviewable decisions from Child Safety Services, which contain information about the right of review to QCAT, are not always provided to parents or children, even when they have been requested;
- Child Safety Services is frequently represented by at least two professional departmental workers at QCAT, including a representative from the Court Services area of Child Safety Services. The number of workers present, and the experience and familiarity, particularly of Court Services workers, with QCAT processes, can unintentionally but significantly exacerbate the power imbalance between the parties.
- The perceived power imbalance is of particular concern when children or young people are involved in proceedings, when the matter involves a high degree of conflict between the participants, and when parties do not have the benefit of a legal advocate.
- It is sometimes difficult for parents or other members in the child's support network to obtain leave to be legally represented and then obtain appropriate representation, which is of significant concern to our members given the perceived power imbalance between the professional departmental workers and the other parties to a tribunal proceeding;
- Generally, Child Safety Services will provide a lengthy statement of reasons for decision in response to a QCAT application by a parent or child. However, these reasons are often not received until shortly before the compulsory conference. A delay in obtaining reasons can place vulnerable clients at further disadvantage, as there is a limited amount of time to consider what is often voluminous or complex material. These clients are also expected to be ready to respond to those reasons during a compulsory conference, despite the short time frames;
- Compulsory conferences often yield mixed results, perhaps because of the challenges inherent in managing the perceived power imbalance between Child Safety Services and the applicant in an alternative dispute resolution setting, particularly where not all parties are granted legal representation. The difficulty observed by our members is that the effect of the compulsory conference is that having exercised their right to review a decision, the applicant is encouraged at first

instance to reach an agreement with the decision maker from Child Safety Services. The perceived power imbalance in a compulsory conference can lead to parents and children experiencing this as pressure to adopt a particular position; and

- There are narrow grounds for review of administrative decisions.

We will provide some suggested changes to the operation of the QCAT jurisdiction which we consider would greatly enhance accessibility and fairness in the proceedings.

Legal representation for children and parents at QCAT

The Society recognises that s43(2)(b)(i) of the Act allows for the representation of children. In the experience of our members, however, this legal assistance does not always appear to be accessible to young people when placed in the child protection system and working with Child Safety Services. We consider that practical support for children to consistently contact and access legal representation will greatly enhance of the objective of s29 of the Act.

Members of the Society have reported that the views of children and young people are not adequately addressed during Tribunal conferences and proceedings. There is an inherent power imbalance between a young person and representatives of Child Safety Services, due to the vulnerability of the young person. It has also been the experience of our members that parents who are challenging decisions of Child Safety Services are often in a weak negotiating position when unrepresented and as a result may feel pressured to withdraw their challenge.

We consider that both children and parents in this jurisdiction should be recognised as vulnerable parties, as they are challenging decisions of a well-resourced and well represented government department. Also, considering the significance of the decisions being considered, the vast majority of these matters should be viewed as complex enough to require legal representation for the parties.

Lack of structure in the child protection jurisdiction

The Society also notes that there appears to be a lack of structure in this jurisdiction. For example, directions hearings are not set regularly for these proceedings. In our view, directions hearings and guidance from the Tribunal is essential to ensure that matters are dealt with efficiently.

Our members report that there have been situations involving concurrent proceedings in the Childrens Court of Queensland and QCAT, and a decision is made in QCAT without the knowledge of the Childrens Court's or other parties in those proceedings. Whilst there is a court proceeding concerning an application for a child protection order, we suggest that applications in QCAT should be transferred to the court to be heard concurrently. If such an approach were to be adopted, we also consider that if applications are made in the 'wrong' jurisdiction, there should be no formality needed to transfer this to the appropriate jurisdiction. We are mindful of the need to avoid creating barriers for people, and to ensure that there is a single decision-maker for a single family.

Practice Direction on Hybrid Hearings

The Society has also recently considered Practice Direction No 1 of 2012 issued by QCAT dealing with hybrid hearings. There appears to be no clarification as to whether this practice direction is intended to apply for children's matters. We highlight the principle that, when dealing with children's matters in QCAT, the best interests of the child must be considered (s99C(a), *Child Protection Act 1999).* In our view, it may be difficult to reconcile this principle with a hybrid hearing, where a Member may destroy the proposed decision, made in the child's best interests and based on evidence heard, where an agreement has been reached by the parties. An agreement reached by the parties may not always be in the best interests of the child involved. This is of particular concern where evidence has already been heard and the Member has come to a decision.

The Society is also concerned that there was no consultation with legal stakeholders before the introduction of this Practice Direction. We note that in other jurisdictions, such as the Supreme Court of Queensland, an opportunity is often provided to legal stakeholders to review and comment on the operational impact that a practice direction may have on the profession. We consider that is it important to ensure legal practitioners are prepared for the introduction of directions regarding matters in a particular court or tribunal.

Limited number of reviewable decisions at QCAT

The Society is also concerned that as there is a limited number of reviewable decisions allowable by QCAT under the *Child Protection Act 1999* and the *Adoption of Children Act 1964*, there is reduced accountability for persons making decisions about children and young people. The Society notes with concern that there are relatively few applications for review by parents, children and carers in QCAT. This demonstrates a considerable disparity with the number of children the subject of child protection orders, the number of reviewable decisions being made and the large numbers of complaints that are made to the Commission for Children, Young People and Child Guardian. Our members also anecdotally report that there are very few instances of children participating in QCAT, as compared to the former Children Services Tribunal. This is supported by the recently published discussion paper by the Queensland Child Protection Commission on Inquiry that provides in the year 2011-12, only 4 applications for review were made by children/young people [page 272].

In terms of applications to review a decision, the QCAT Annual Report provides some statistics.[3] We note that the 2010/2011 Report does not contain specific statistics on child protection, but there are some relevant statistics in relation to the Human Rights Division. In our view, it is important for government agencies, including QCAT, to provide detailed statistics to the public on child protection matters, particularly in relation to review matters.

Aboriginal and Torres Strait Islander families

The Society also notes that we support the view that the tribunal dealing with an Aboriginal and Torres Strait Islander family should be constituted by someone who is of Aboriginal and Torres Strait Islander background or otherwise has appropriate cultural experience. We note with support s99H, *Child Protection Act 1999* which requires tribunal proceedings involving an Aboriginal and Torres Strait Islander child to include a member who is Aboriginal or Torres

[3] QCAT Annual Reports found at: http://www.qcat.qld.gov.au/about-qcat/publications

Strait Islander and s183(6)(b), *QCAT Act 2009*, which emphasises that there is a need for Aboriginal and Torres Strait Islander members to be appointed. We also note that the power to appoint an expert is provided for in s110, *QCAT Act 2009*. We consider that the proportion of Aboriginal and Torres Strait Islander membership/expertise on the tribunal should appropriately reflect a commitment to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system.

4. Resourcing

An overriding issue for QCAT is resourcing, which may be a barrier impacting on the ability of QCAT to meet its objects. The backlog is significant, and delays are considerable. Our members have experiences where a deadline approaches, a party writes asking for an adjournment and does not hear back until well after the time period has lapsed. Alternatively the other experience our members have of the Tribunal is that adjournments are granted late without the non-applicant being given an opportunity to heard on the issue. In other jurisdictions it is our experience that an adjournment requested by one party only will not be granted without the other parties being given an opportunity to be heard.

5. External Mediations

We understand that in QCAT, mediations have been replaced by compulsory conferences which are presided over by a member. Whilst the Society observes that compulsory conferences are useful as part of the case management process, we consider that the compulsory conferences should not be a complete substitute for mediations. This is particularly in light of the disparate levels of experience and quality of skills by members conducting the compulsory conference with respect to knowledge of the subject area (eg building) and in ADR skills.

There are a large number of professionally qualified alternative dispute resolution professionals who would consider undertaking QCAT related work and whose engagement might well provide better public and access to justice outcomes and ease demands on public funds. In circumstances where parties are able, the Tribunal could consider external mediations in order to alleviate lengthy delays in certain matters. The previous Queensland Building Tribunal was very effective and successful in settling issues by ordering external mediation and referring matters to an experienced panel of building mediators.

We therefore request that there be consideration for external mediations.

6. Time for Service of Documents

Regulation 19 of the QCAT Rules requires service of a copy of an application within 28 days of filing the application.

Practically, it is frequently difficult to effect service within 28 days of issuing proceedings. Whenever this occurs, an extension must be sought, which causes additional and unnecessary cost and delay. This is particularly the case where service must be effected personally on an individual, and a process server must be engaged to locate and serve the documents.

The Society submits that no public policy benefit is achieved by requiring service to be effected within such a short timeframe. The general timeframe for a proceeding to 'go stale' in other jurisdictions is at least 12 months.

The Society members' experience is that an extension is routinely given on application – for which there is a standard form. There appears to be no public policy reason to require this procedure.

As no steps can be taken to pursue the application without proof of service, the Society submits that no benefit is gained by imposing this procedural requirement, and that the time for service referred to in r19 should be extended to two months.

Discussion Questions

1. Are the Act's objects and functions of the tribunal relating to the objects still valid? If not, please provide your reasons?

Section 3, *QCAT Act* sets out the objects of Act, which are:

> *(a) to establish an independent tribunal to deal with the matters it is empowered to deal with under this Act or an enabling Act; and*
> *(b) to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick; and*
> *(c) to promote the quality and consistency of tribunal decisions; and*
> *(d) to enhance the quality and consistency of decisions made by decision-makers; and*
> *(e) to enhance the openness and accountability of public administration.*

The Society is supportive of the objects and consider they are valid. The objects underscore the philosophy and the goals of the Tribunal.

Section 4, *QCAT Act* outlines the Tribunal's functions relating to the objects, which are:

> *To achieve the objects of this Act, the tribunal must—*
> *(a) facilitate access to its services throughout Queensland; and*
> *(b) encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative dispute resolution processes; and*
> *(c) ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and*
> *(d) ensure like cases are treated alike; and*
> *(e) ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal; and*
> *(f) maintain specialist knowledge, expertise and experience of members and adjudicators; and*
> *(g) ensure the appropriate use of the knowledge, expertise and experience of members and adjudicators; and*
> *(h) encourage members and adjudicators to act in a way that promotes the collegiate nature of the tribunal; and*
> *(i) maintain a cohesive organisational structure.*

The Society is supportive of the functions and consider they are valid. The Society considers that one important function that may be overlooked in applications for leave for legal representation is function (e) – that *the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal.* To that end, there may be consideration as to whether certain functions of the Tribunal be weighted so as to ensure that the Tribunal is accessible and responsive to the diverse needs of persons who use it. This may be achieved in practice by the Member highlighting that the weighted functions have been achieved. In circumstances where there is a conflict between functions, the weighted function has priority.

2. ***What, if any, amendments should be made to the QCAT Act to strengthen the independence of QCAT?***

Following the Court of Appeal decision in *Maher v Adult Guardian & Anor* [2011] QCA 225 ("Maher"),[4] the Society considers that the following amendments to the *QCAT Act* would strengthen the independence of QCAT:

- provision for parties to apply in writing for a decision (whether at first instance or on appeal) to be heard on the papers;
- parties be notified in writing which QCAT members will constitute the appeal panel prior to an appeal being heard; and
- QCAT members disclose any conflict of interest (apparent or real) prior to hearing a matter (whether at first instance or on appeal).

There should be consideration as to the interchange of members between the review and appeal arms of QCAT. Often the one person sits in both jurisdictions. That means that a tribunal member can one day be hearing a matter with a fellow member, and then the next day deciding an appeal from that fellow member. It would be better if the members were assigned to particular jurisdictions of QCAT. As an alternative, there are often two members appointed to hear cases, at least in the disciplinary area. There should be consideration as to whether two members are necessary.

3. ***What, if any, amendments should be made to the QCAT Act, the QCAT Regulation or the QCAT Rules to promote accessibility?***

The Society considers that all parties should have access to legal representation, as this facilitates and promotes accessibility to the Tribunal, particularly for parties where English is their second language. This will be discussed further at item 12. The Society also notes that the Queensland Law Reform Commission, in its recent review of the guardianship regime, recommended that all parties in guardianship and administration hearings be allowed legal representation.

We also note that the QCAT website has provided the public with a forum to familiarise itself with QCAT procedures and judgments. This has been a tribute to the QCAT website and its public education factsheets.

Whilst not strictly an issue for legislative amendment, the Society also considers that:

- there is an over-reliance on written submissions for interlocutory procedural points. Sometimes matters are progressed quicker and with less expense with just with brief oral submissions; and
- the provision of Microsoft word form applications and factsheets translated in other languages would also assist in promoting accessibility.

4. ***What, if any, amendments could be made to the QCAT legislation to further promote fairness?***

Costs on appeal

[4] http://archive.sclqld.org.au/qjudgment/2011/QCA11-225.pdf

The Society notes that Chapter 2, Part 6, Division 6 of the *QCAT Act* makes provision in relation to costs. The Society considers, however, that the Division is silent in relation to awarding costs on appeal. Our members and their clients have experienced circumstances of disadvantage where the QCAT Appeal Tribunal is reluctant to orders costs and sends the issue back for reconsideration by QCAT. The end result is that the party vindicated in relation to the correct legal position, still has to "carry" the enormous burden of costs and loss of time just to be in the same position as if the Tribunal "got it right" in the first instance.

The Society recommends that the *QCAT Act* clarify that costs can be made on appeal.

Costs v Fees

We have received feedback from our members that when summoned to appear before QCAT as a witness in their professional capacity as a solicitor, they have been denied payment for their fee to attend. The feedback we received is that, notwithstanding s97(3), *QCAT Act,* it was interpreted that their professional fee was a cost of the proceeding. To clarify the distinction between costs of a proceeding and a professional's fees to attend and give evidence as a witness, we recommend that there be an example provided in s97(3), *QCAT Act.*

5. *What, if any, amendments could be made to the QCAT legislation to further promote economical, informal and quick resolution of disputes?*

As discussed at item 3, there is an over-reliance on written submissions for interlocutory procedural points. Sometimes matters are progressed quicker and less expense with brief oral submissions.

6. *What, if any, amendments could be made to the QCAT legislation to further promote the quality and consistency of decisions?*

Justices of the Peace constituting QCAT

The Society understands that a trial is anticipated for Justices of the Peace to sit and constitute QCAT for minor disputes. The Society is concerned that this may have a negative impact on the quality and consistency of decisions. We refer to the Report prepared by the Queensland Law Reform Commission (the QLRC Report) in 1999 on "the Role of Justices of the Peace in Queensland." Recommendation 10.2 on page (v) is of particular relevance:

> *Justices of the peace (qualified) should not have the power to constitute a court for any purpose.*[5]

We agree with this recommendation. We also refer to the QLRC's Discussion Paper[6] where the QLRC observed:

- *"that justices of the peace (qualified) had not constituted a Magistrates Court for any purpose at any of the Magistrates Courts surveyed by the Commission during March and April 1998…"; and*

[5] QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", page v http://www.qlrc.qld.gov.au/reports/r54.pdf

[6] The Role of Justices of the Peace in Queensland (WP 54, May 1999).

- *"although it (the QLRC) had received 75 submissions from justices of the peace (qualified) in response to the (QLRC) Issues Paper, none of those respondents indicated that they had ever performed any bench duties."*[7]

The QLRC Report then restated the Commission's view that:

> *"…it is undesirable for powers that are not exercised by justices of the peace to remain vested in them, since the infrequent exercise of those powers would make it less likely that justices of the peace would develop the necessary experience and expertise to exercise them. The Commission considered that, in relation to court powers, this could lead to a lack of consistency in the decisions made by justices of the peace when constituting a court (emphasis added).*[1017]
>
> *Further, the Commission was of the opinion that, if large numbers of justices of the peace were, at least theoretically, authorised to exercise a range of court powers, it would be virtually impossible to keep all of them up to date with the frequent changes in the relevant law and procedure. The Commission considered it more effective for the exercise of court powers to be restricted to a relatively small group of more intensively trained justices of the peace.*[1018]
>
> *For these reasons, the Commission's preliminary view was that the exercise of court powers should be restricted to justices of the peace (Magistrates Court). Justices of the peace (qualified) and old system justices of the peace should not be able to exercise these powers."* [8]

In summary, the Society supports the QLRC's Report[9] and strongly urges for it to be taken into account, particularly with respect to the issue of quality and consistency of decisions.

7. *What impact, if any, do you think the establishment of QCAT has had on the quality and consistency of administrative decisions by government agencies and on the openness and accountability of public administration?*

The Society is not in a position to comment on what impact the establishment of QCAT has had on the quality and consistency of administrative decisions by government agencies and on openness and accountability of public administration as that would likely require longitudinal analysis. However anecdotal feedback we have received from members is that there has been impact in residential tenancy matters where some jurisprudential value is being gained by written reasons. We have also received anecdotal feedback that as administrative decisions now being subject to review, this appears to have had an impact on decision making within government departments to promote consistency in decision making.

The Society also understands that there is value in QCAT negotiating outcomes between governmental departments and parties as it assists parties to resolve matters and leads to fewer decisions set aside. However the corollary of this is that it can be an expensive exercise for the parties when the matter proceeds to the appeal stage. Therefore the

[7] QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", p193 - http://www.qlrc.qld.gov.au/reports/r54.pdf
[8] QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", p192 - http://www.qlrc.qld.gov.au/reports/r54.pdf
[9] QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland."

Society considers there is benefit in either the legislation or a Practice Direction providing guidelines as to what is good government decision making practice.

8. What, if any, amendments could be made to the QCAT legislation that would enhance quality and consistency in administrative decision making and openness and accountability of public administration?

The Society recommends that consideration be given to undertaking study and research to ascertain whether quality and consistency in administrative decision making is a matter best addressed by legislation or education.

We also consider that as QCAT has a vast jurisdictional base, that QCAT be provided with adequate funding and be sufficiently resourced.

9. Should amendments be made to the QCAT Act to remove the distinction between legally qualified members and other members?

The Society does not support removing the distinction between legally qualified members and other members. The Tribunal is a multi-disciplined body which is a creature of statute and contains significant powers to provide parties with remedies and make other judicial orders. Only legally qualified members can exercise these powers as the powers require a considerable understanding of the law which significantly impact upon the rights and liberties of persons. To remove the distinction between legally qualified members and other members will not assist in reducing the strain on judicial resources in QCAT but rather will see an increase in the number of decisions appealed, which will place a greater strain on the justice system in Queensland.

No amendments should be made to remove the distinction between legally qualified members and other members. We also refer to our concerns outlined in question 6 above and the QLRC Report findings.

10. Are provisions in enabling Acts requiring the tribunal to be constituted in a certain way necessary given the President's responsibilities and functions under the QCAT Act?

Feedback the Society has received from its members is that there may be matters that warrant the involvement of the President or Deputy President, because of their public interest or test case value but where resourcing allocations, especially in rural, regional or remote (RRR) areas means they do not get that level of membership for hearing.

Members with experience in children's matters support retaining provisions in enabling Acts which ensure the tribunal is constituted by members with experience and expertise relevant to the jurisdiction.

11. In relation to enabling Acts you have experience with, are the specialist procedures or powers contained in the enabling Acts still necessary in light of the objects of the QCAT Act?

The Society has not received any adverse feedback from its members on this issue.

12. Should legal representation as of right in QCAT proceedings be extended? If yes, to what types of matters and in what circumstances?

The Society has long advocated for legal representation as of right in QCAT proceedings and supports amendments to the *QCAT Act* in this regard.

We are acutely aware of the need for citizens to access quality legal representation in pursuing their rights and interests. Presently legal representation as of right is limited to:

- A child;
- Persons with impaired capacity;
- If the proceeding relates to taking disciplinary action, or reviewing a decision about taking disciplinary action against a person;
- An enabling Act which allows legal representation; or
- If the party has been given leave by the tribunal to be represented.

The Society considers that access to justice would be better served if the following matter types have legal representation as of right. These matter types deal with personal or commercial matters which strike at the heart of people's livelihoods, liberties and freedoms:

1. Administration for adults and guardianship for adults

Prior to and following enactment, the Society has been a strong advocate calling for legal representation as of right for all parties to proceedings relating to the administration and guardianship for adults. The Society has identified instances of disadvantage where a party was denied legal representation, particularly when they were placed in a position similar to that of 'David v Goliath.'

The fact that families are meant to attend an unfamiliar environment without legal representation, may intimidate many.

The Society notes that the Public Advocate Report 2010-2011 at pages 33 – 34 states:

> *"The small proportion of families and friends making an application for guardianship may be the result of families having a low level of awareness about, or confidence in, the guardianship system. Further investigation of this issue is needed."*

To ensure justice for all parties, the Society therefore recommends that all parties have legal representation as of right.

2. ***Anti-discrimination***

As anti-discrimination matters strike at the very heart of the livelihoods and freedoms of people, the Society considers that there be legal representation as of right for all parties.

Human Rights Division
In summary, children protection matters, guardianship and antidiscrimination matters, which all compromise of QCAT's human rights division, should be provided with legal representation as of right. The decisions in these matters, at their core, are intrusions into people's rights to family, self-determination and work and thus require further safe guards

3. Building disputes

The Society considers that building dispute proceedings should allow all parties to have legal representation as of right, as the nature of the dispute cuts across the tenet of people's lives, homes and work and there are often quite specific, technical issues in dispute One particular example of disadvantage was that in *Clarke v Langham and Anor* [2011] QCATA 286. A 61 year old builder was denied legal representation against a legal practitioner who was appearing as a homeowner in the proceeding.

The builder on appeal argued that he was "denied legal representation in circumstances where there was a clear imbalance in experience and ability to run the case." The builder like many applicants was not familiar with Tribunal processes, thus demonstrating the need for legal representation.

The experience of some of our members is that QCAT is at times used to thwart claims put to the BSA. The Society submits that by having parties legally represented at QCAT this may assist in reducing the scope of this abuse of process.

4. Consumer, trader and debt disputes

In *Kokoda Spirit Pty Ltd v Harris* [2011] QCATA 154 the appellant sought an appeal from the minor civil disputes jurisdiction in circumstances where the appellant was denied leave to appear in proceedings against a legal practitioner, acting in a private capacity. On appeal the Senior Member found that that the original proceedings, which raised allegations of breach of the then *Trade Practices Act 1974*, were sufficiently complex. Of particular interest were the Senior Member's observations that:

It is evident from the correspondence annexed to the application for leave to appeal, and which was not before the decision maker, that Mr Harris (the respondent legal practitioner) has applied his knowledge and skill as an experienced litigation solicitor to mount his claim for damages against the respondent. There can be no doubt that even in the informal processes of QCAT, in particular the without prejudice mediation discussions that will occur on 30 June 2011, this legal expertise will come to bear in negotiations and subsequent prosecution of each of the claims, if not resolved. The applicant cannot match this legal expertise in the somewhat complex area of misleading and deceptive conduct.

…As a consequence the decision maker was in error in not granting legal representation.

This appeal case highlights the Society's concern that a lay person was placed not only at a legal disadvantage in having to represent himself at first instance, but now has encountered further cost and delay in having this matter resolved in a timely manner, which is contrary to the objects set out in section 3(1) of the *Queensland Civil and Administrative Tribunal Act 2009*.

The Society recommends that all consumer and trader disputes and all debt disputes over $15,000 allow parties to have legal representation as of right.

5. ***Other civil disputes –***

The Society notes that there are other civil disputes which impact upon people's livelihoods and therefore recommends, that in the following matters parties may be legally represented as of right:

- Residential tenancy disputes,

- Tree disputes,
- Body corporate and community management scheme disputes,
- Financial losses caused by motor and property agents,
- Integrated resort development matters,
- Legal cost agreement claims,
- Manufactured home park disputes,
- Retirement village disputes; and
- Sanctuary Cove Resort disputes.

6. Review of administrative decisions

The Society notes there are circumstances where the legislation is silent on a party's right to legal representation when there is a review of an administrative decision. To ensure consistency and to even the playing field so that there are not 'David v Goliath' type proceedings, the Society recommends that any review of an administrative decision allow all parties the right to legal representation particularly as such administrative issues often deal with fine, legal points

General observations – parties avoiding QCAT due to no right of legal representation

Members have also advised the Society that, in their experience, clients are refusing to commence claims in QCAT or abandon them as they are concerned they will not be granted leave for legal representation. Members report that clients feel they are being placed in a 'David v Goliath' proceeding where the other party is likely to be an experienced government official, legal practitioner, corporate representative, or experienced at appearing before the Tribunal.

The Society is very concerned that clients decide not to seek to enforce their rights, rather than face the Tribunal alone. They feel trepidation and anxiety at the thought of being placed in a litigious circumstance that involves facing personally the other party, public speaking and submitting argument to an individual in a position of authority. (It is easy for us to forget that while this may be a familiar and comfortable environment for legal practitioners, it is often an overwhelming and intimidating environment for members of the public, many of whom are not articulate, well-educated or confident but nonetheless have serious concerns that deserve being heard although their matter may not be 'complex' from the Tribunal's perspective.)

Recommendation

The Society recommends there be amendments to the Act to allow legal representation as of right for the proceedings listed 1-6 above.

13. How could free legal representation be extended to impecunious parties in QCAT proceedings?

Community legal centres play a large role in providing free legal advice and representation to people in QCAT. QPILCH manages the QLS pro bono referral service and refers matters to the private profession for pro bono representation in cases that warrant it. Most clients are seen through the QPILCH Self Representation Service, which is based at QCAT and assesses merit and determines whether representation is required. Mostly, people are assisted to represent themselves. Very limited assistance is available through

Legal aid. Therefore further funding of community legal centres, QPILCH and Legal Aid is really the main way impecunious parties in QCAT can receive free legal help – whether it be by staff providing the assistance or lawyers coordinating the provision of pro bono assistance. The Society therefore strongly recommends that there be additional funding to assist this work and provide assistance to impecunious parties.

14. Taking into account the present restrictive fiscal environment in Queensland, what could be done to improve QCAT's regional and rural service delivery?

Whilst we note the restrictive financial environment, we consider that the establishment of a northern regional office, for example in Townsville, might be an overall contribution of efficiency and direct service to the community. We also suggest that there be scoping of use of state-wide video-conferencing facilities and use of the facilities of the network of Magistrates Courts through the states. It is also an opportune time to consider arrangements with respect to the State Reporting Bureau tender as transcription services for regional and remote areas would hinge on this technology.

15. Is a judicial presidential structure preferable for the effective operation of QCAT?

We are supportive of a judicial presidential structure, similar to the VCAT model, appropriately amended for Queensland legislative scheme.

16. If you are of the view that a judicial presidential structure is not required, how should QCAT be restructured to ensure it continues to meet its objectives?

N/A

17. If there were no judicial members, should appeals from some QCAT decisions continue to be heard within QCAT or should appeals be heard by the courts?

If there were no judicial members, then appeals should then go to the courts. It is vital that judicial officers hear such appeals to ensure natural justice and the rule of law is upheld.

The Society stresses the importance of retaining judicial members.

18. Should internal appeals be abolished with appeals being heard by the courts?

If internal appeals are abolished it would free up hearings in QCAT. However factors to consider are:

- The number of appeals that would be referred to the Magistrate Court/District Court/Supreme Court. Would that place a significant impact on resources?
- The cost for parties to appeal externally.

The experience from our members are that internal appeals work reasonably well and that there are no reasons for them to be abolished provided judicial members remain available to hear such appeals when needed.

19. If yes to question 18, what should be the grounds of appeal?

N/A

20. Which court should hear appeals from QCAT decisions? Should leave of the relevant court be required to appeal or should an appeal be as of right?

If such decisions are going to go to the courts, then it depends on the nature of the issue. Occupational/disciplinary, administrative review decisions and other matters involving the protectionist jurisdiction (eg guardianship, children, anti-discrimination) should at least go to the District Court if not the Supreme Court. Other matters such as minor debts can perhaps go to the Magistrates Court. There should be leave to appeal.

21. Should appeal rights be restricted according to the monetary value of the matter in issue? If so, how should appeal rights be restricted?

Appeal rights should not be restricted according to the monetary value of the matter.

22. How could financial disincentives be appropriately used to discourage unmeritorious appeals without denying access to meritorious but impecunious parties?

The Society refers to its comments at item 4 above.

23. Do you have any other comments or views on issues relating to QCAT's appellate jurisdiction, in particular appeals from decisions in minor civil disputes?

The Society has no further comments in relation to QCAT's appellate jurisdiction.