Review of the QCAT Act

QAILS Submission

22 February 2013

QAILS
Queensland Association of Independent Legal Services Inc

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QAILS thanks Barry Dunphy, Eleanor Dickens and Jill Kingston of Clayton Utz for their valuable pro bono assistance in preparing this submission.

Summary of Recommendations

The recommendations made by QAILS are:

1. Amend section 3(b) of the QCAT Act to identify that fair processes and just outcomes have primacy over objectives to be economical and efficient.

2. QCAT should develop a practice note to provide guidance to Members with respect to exercising Part 6 discretions, including practical examples (such as the ones discussed in this submission).

3. QCAT should develop a process for the timely consideration of interlocutory applications, including adjournments, disclosure of evidence, etc. QCAT should also consider issuing a practice direction encouraging more active case management.

4. Widen the scope for circumstances in which a person may apply for a stay to include cases where a person applies to re-open a proceeding or set aside or amend a decision by default. QCAT should issue a practice direction to this effect, as well as amending Form 44.

5. QCAT should develop a process to ensure that the compulsory conference procedure is only used where it is appropriate to do so having regard to the circumstances of the case and concerns raised above. QCAT should issue a practice direction to this effect.

6. Parties should be able to make their entire claim before one judicial body. The Magistrates Court's jurisdiction under Division 2, Part 9, Chapter 13 of the UCPR should be transferred to QCAT. QCAT would then be able to decide matters beyond that of minor debt claims, and parties would be able to bring their matters before QCAT rather than the Magistrates Court.

7. QCAT should issue a practice direction clarifying that 'may' in section 43(2)(b) means that, where an party falls into one of the categories listed in subparagraphs (i) to (iii), that representation is as of right, and that no leave is required. The practice direction might also specify how representatives should give advance notice to QCAT that they are representing a person who falls within one of these categories so that the issue does not arise at the hearing.

8. Individuals subject to applications for guardianship and/or administration orders should be entitled to representation as of right. Section 43(2)(b) should be amended to include a new subparagraph (v), 'the party is an adult who is the subject of proceedings under the *Guardianship and Administration Act 2000* (Qld)'.

9. Vulnerable persons should be entitled to representation as of right. Section 43(2)(b)(i) should be amended to include the words 'or a person with a vulnerability'. QCAT should then issue a practice direction explaining the types of vulnerabilities that would be captured by the section.

   Alternatively, vulnerability should be added as a factor to weigh in the Tribunal's decision to grant leave pursuant to section 43(3).

10. Increase funding to community legal centres to deliver civil law services to eligible clients appearing before QCAT.

11. QCAT should issue a practice direction emphasising the importance of section 43(6) in appropriate cases.

12. It is appropriate that legally qualified Tribunal members continue to sit on particular matters.

13. Provisions in enabling Acts requiring the Tribunal to be constituted in a particular manner are essential to protecting the rights of vulnerable groups. The Government should also consider extending the current requirement to provide that all Tribunal panels must include at least one person with (non-legal) expertise in the relevant area.

14. QAILS recommends that there be better training for all members on the QCAT Act and practice.

15. QAILS recommends that applications for leave to appeal be heard separately from the substantive appeal hearing.

16. QAILS recommends that appellants should always be given an opportunity to make oral submissions.

17. Amend section 143 to specify the time within which an appeal must be filed in circumstances where no reasons are obtained.

18. QCAT should establish a process whereby parties are informed of their right to request written reasons – either at the time of the hearing, or by notice enclosed with written confirmation of the decision. Registry staff should also be trained to inform people that they have a right to request written reasons.

19. Option 1 is not appropriate. Broadly speaking, the existing financial disincentives are sufficient. QAILS considers that focus should be on improving the quality and consistency of decisions and the decision making process.

20. All registries need to have a common checklist of how cases run from start to finish, but have flexible options for dealing with parties in regional and rural areas.

21. QAILS also recommends providing better training for Magistrates on the QCAT Act and practice as well as better support for regional and rural registries. Alternatively, the Government may consider implementing specialist QCAT registries in rural and regional areas.

Introduction

QAILS

The Queensland Association of Independent Legal Services (**QAILS**) supports the Queensland Government's (**Government**) commitment to undertaking the current review of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**). QAILS supports the Government's commitment to seeking submissions from the broader public, including from community legal centres and service providers such as QAILS.

QAILS appreciates the opportunity to make submissions on the matters detailed in the *Review of the Queensland Civil and Administrative Tribunal Act 2009 Consultation Paper* (**Consultation Paper**) and is pleased to now submit these submissions to Government.

Community Legal Centres

QAILS is the independent peak body for community legal centres (**CLCs**) in Queensland and represents the 33 funded and unfunded member CLCs operating across the state. This submission draws on the experiences of QAILS' members and the lawyers working in CLCs assisting clients every day with legal issues.

The following QAILS members are well placed to respond to the Consultation Paper questions and have contributed to the content of this submission:

1) The Queensland Public Interest Law Clearing House Incorporated (**QPILCH**) has operated a Self-Representation Service at QCAT since January 2010. The Self-Representation Service offers discrete task assistance to people representing themselves in QCAT in a variety of areas within QCAT's jurisdiction. Assistance is provided throughout the progress of proceedings via one hour appointments staffed by volunteer lawyers.

2) The Tenants Union of Queensland (**TUQ**) is a statewide community organisation that provides legal services for residential tenants in Queensland. TUQ aims to improve and protect the rights of all Queensland tenants, including caravan park and boarding house residents.

3) The Townsville Community Legal Service (**TCLS**) is a community legal centre based in North Queensland and was established in 1991. TCLS has represented clients in QCAT and its predecessors for twenty years. TCLS has also been a regular commentator[1] on administrative review in Queensland and was heavily involved in the processes leading up to the establishment of QCAT.

4) Queensland Advocacy Incorporate (**QAI**) is an independent, community-based legal and systems advocacy organisation for people with disabilities. Since 2008, QAI has been representing vulnerable adults in guardianship, administration and restrictive practices matters.

Terms of Reference

These submissions respond to the Consultation Paper questions in sections as follows:

1) Objectives of the QCAT Act: Fairness

[1] See eg Bill Mitchell, 'Administrative Review in Queensland in 2006' (2006) 51 *AIAL Forum* 13.

a. Question 1: Are the Act's objects and functions of the tribunal relating to the objects still valid? If not, please provide your reasons.
b. Question 4: What, if any, amendments could be made to the QCAT legislation to further promote fairness?

2) Objectives of the QCAT Act: Quality and consistency of decision-making
   a. Question 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?

3) Objectives of the QCAT Act: Efficiency
   a. Question 5: What, if any, amendments could be made to the QCAT legislation to further promote economical, informal and quick resolution of disputes?

4) Representation
   a. Question 12: Should legal representation as of right in QCAT proceedings be extended? If yes, to what types of matters and in what circumstances?
   b. Question 13: How could free legal representation be extended to impecunious parties in QCAT proceedings?

5) Constitution of the Tribunal
   a. Question 9: Should amendments be made to the QCAT Act to remove the distinction between legally qualified members and other members?
   b. Question 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?

6) Appeal rights
   a. Question 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?
   b. Question 18: Should internal appeals be abolished with appeals being heard by the courts?
   c. Question 19: If yes to question 18, what should be the grounds of appeal?
   d. Question 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?
   e. Question 21: Should appeal rights be restricted according to the monetary value of the matter in issue? If so, how should appeal rights be restricted?
   f. Question 22: How could financial disincentives be appropriately used to discourage unmeritorious appeals without denying access to meritorious but impecunious parties?

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

Objectives of the QCAT Act: Fairness[2]

General

The objects of the QCAT Act include 'to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick'.[3] QAILS supports this provision.

In QAILS' view, if there is any inconsistency between the objectives of fairness and just resolutions on the one hand, and efficiency on the other, fairness and just resolutions should have priority.

This could be achieved by separating section 3(b) into two components - one dealing with objectives relating to just outcomes and fair processes, and another dealing with efficiency. A separate section could then provide that in the event of any inconsistency, the first part prevails, i.e. fairness and just resolutions.

Recommendation 1: Amend section 3(b) of the QCAT Act to identify that fair processes and just outcomes have primacy over objectives to be economical and efficient.

Relief from procedural requirements

The importance of prioritising fairness and justice is particularly significant in the context of the statutory discretions in Part 6 of the QCAT Act. Of particular relevance here is section 61, which allows the Tribunal to, among other things, extend or shorten a time fixed by the QCAT Act (or an enabling act) and to waive compliance with other procedural requirements. This discretion allows the Tribunal to act in a flexible manner where warranted and appropriate.

QAILS contends that if fair processes and just outcomes are prioritised over efficiency objectives, Tribunal members will be encouraged to have recourse to section 61 in appropriate circumstances.

For example, in an application concerning a residential tenancy dispute, if the Tribunal makes an order for a warrant of possession, the warrant must be obtained within 3 days of the Tribunal's order and executed within 14 days.[4] However, if a tenant wants to appeal, he/she must apply for written reasons within 14 days.[5] The Tribunal then has 45 days to provide reasons.[6] The tenant has 28 days to lodge leave to appeal documents.[7] Following that, procedural orders are made. This is illustrated below:

[2] This section responds to Consultation Paper questions 1 (Are the Act's objects and functions of the tribunal relating to the objects still valid? If not, please provide your reasons.) and 4 (What, if any, amendments could be made to the QCAT legislation to further promote fairness?).

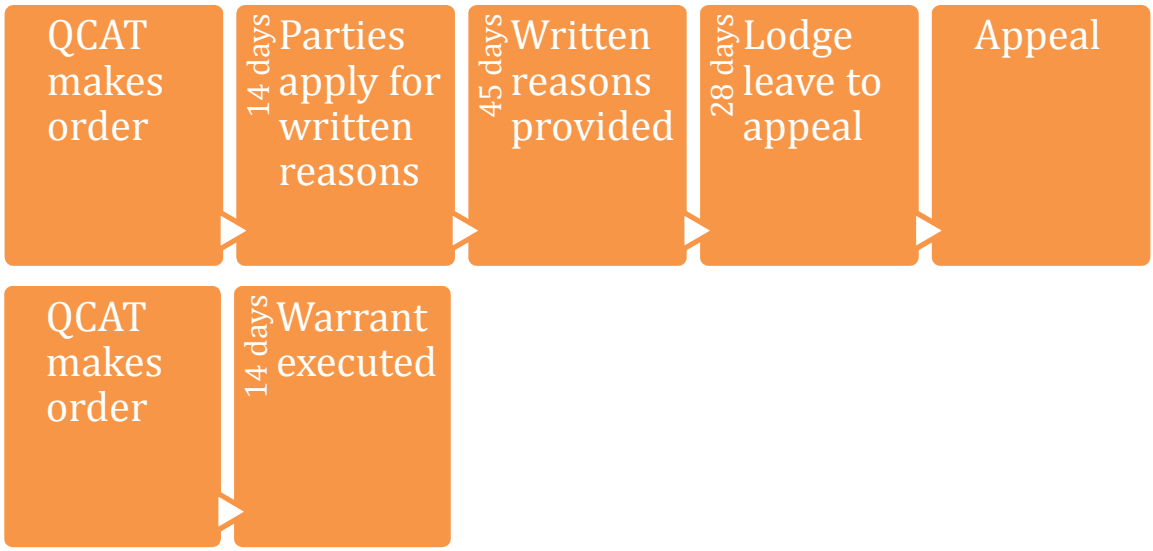
[3] Section 3(b) of the QCAT Act .

[4] See *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) sub-ss 351(4) and (5).

[5] See section 122(2) of the QCAT Act.

[6] See section 122(3) of the QCAT Act.

[7] See section 143(3) of the QCAT Act.



In order to obtain a stay of the warrant, the Tribunal generally requires an appeal to be lodged, and neither the stay nor leave to appeal will be granted unless there is appropriate evidence. However, a tenant cannot obtain the relevant evidence for at least 45 days. These timeframes present significant problems, and can result in unjust outcomes.

These restraints have also presented problems for QPILCH clients.

- ⇨ Case example: A client had a default decision made against him and sought to have it set aside. The client sought to file an application to stay the decision along with his application to set aside, however, the registry rejected his application.

Recommendation 2: QCAT should develop a practice note to provide guidance to Members with respect to exercising Part 6 discretions, including practical examples (such as the ones discussed in this submission).

Interlocutory steps

Other difficulties experienced by QAILS members and their clients which may be resolved if fairness and justice are prioritised relate to adjournments, disclosure, and other interlocutory steps. For example:

1) Adjournment applications are not decided until the scheduled day of the hearing, so parties have to reschedule other commitments despite, in many cases, the adjournment being granted.

2) Much of the evidence that parties seek to rely upon (for example, letters from neighbours, police reports, etc, in residential tenancy matters) is not provided until the time of the hearing, making it impossible for other parties to properly prepare challenges to the evidence.

3) Disclosure directions are not made until the substantive hearing – often because parties are unaware of the requirement to request disclosure.

4) Similarly, decisions to grant leave for representation (by lawyers and non-lawyer advocates or support workers) are generally made at the time of the substantive hearing (and in some extreme cases, after the hearing has concluded). This requires that parties bring their lawyers, but must also be prepared to argue the matter themselves.

5) In many regional areas, directions and orders cannot be given without approval from the Brisbane registry.

These examples demonstrate the importance of prioritising fairness and natural justice over efficiency considerations. It appears that, at present, important interlocutory steps are not being decided until the substantive hearing, making it difficult for parties to properly prepare their case. This reduces the chance of a just outcome.

Recommendation 3: QCAT should develop a process for the timely consideration of interlocutory applications, including adjournments, disclosure of evidence, etc. QCAT should also consider issuing a practice direction encouraging more active case management.

Circumstances in which a person may apply for a stay

Currently, an party can apply for a stay where:

- A proceeding for an application for the review of a decision has started in QCAT,[8] or
- An act allows QCAT to stay the decision while another entity is reviewing a decision,[9] or
- The party is appealing a decision of the tribunal to the QCAT appeal tribunal or the Court of Appeal.[10]

The remedies available for parties seeking to have a decision set aside and/or re-opened are compatible and suited for an application to stay the decision.

Section 51 of the QCAT Act provides that a party may apply to the Tribunal to have a default decision set aside or amended on terms, including terms about costs and the giving of security. The opportunity to apply for the setting aside of a decision should logically include the right to apply for a stay of the decision while the Tribunal determines the application.

If the Tribunal decides to re-open a proceeding the Tribunal can re-consider the case afresh on the merits.[11] It therefore makes sense that the applicant should be able to stay the decision until the tribunal allows or rejects the re-opening.

Recommendation 4: Widen the scope for circumstances in which a person may apply for a stay to include cases where a person applies to re-open a proceeding or set aside or amend a decision by default. QCAT should issue a practice direction to this effect, as well as amending Form 44.

[8] Section 22(3) of the QCAT Act.

[9] See eg *Guardianship and Administration Act 2000* (Qld) s 128.

[10] Section 145(2) of the QCAT Act.

[11] Section 140(2) of the QCAT Act.

Objectives of the QCAT Act: Quality and consistency of decision-making[12]

Section 3(d) of the QCAT Act provides that one of the objects of the Act is to enhance the quality and consistency of decisions made by decision-makers. QAILS (and the community legal centres that it represents) supports this objective.

While the establishment of QCAT may have increased the quality and consistency of decision-making, we have seen no independent evidence that QCAT has improved decision making in Queensland. Regardless, QAILS has some concerns with respect to the processes adopted for external review of government decision-making.

QAILS' submission relates to QIPLCH's dealings with the Department of Communities, Child Safety and Disability Services (**Department**). The QPILCH Self Representation Service (**Service**) has assisted 20 people seeking to review decisions made by the Department since the Service commenced operation in January 2010.

Proceedings to review decisions made by the Department involve significant resources through the various stages of the QCAT review process. Frequently, such proceedings do not progress to a final hearing. The Department will often reconsider its decision at the compulsory conference stage of proceedings after significant resources have been expended, with QCAT becoming a mechanism to encourage the Department to make the decisions that it should have made at first instance.

Although this achieves a resolution of the matter for the person concerned, it is a resolution which:

1) is achieved at a significant expense;

2) does not hold the Department accountable for its erroneous decision-making; and

3) does not result in the development of any precedent which could be drawn upon to guide the Department, QCAT, and parties about what is good decision-making process.

QAILS understands that the motivation for such an approach is non-adversarial resolution of matters where an ongoing relationship between the parent and/or carer and the Department is important. However, the value of formal decisions, which can have a normative effect on decision makers, is lost.

Recommendation 5: QCAT should develop a process to ensure that the compulsory conference procedure is only used where it is appropriate to do so having regard to the circumstances of the case and concerns raised above. QCAT should issue a practice direction to this effect.

[12] This section responds to Consultation Paper question 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?).

Objectives of the QCAT Act: Efficiency[13]

Civil claims for debt or damages

QCAT's approach to determining its jurisdiction under section 12(4) of the QCAT Act is inconsistent and has created problems for clients. Section 12(4) of the QCAT Act outlines the circumstances where QCAT can exercise jurisdiction for minor civil disputes.

- ⇨ Case example 1: a community legal centre client applied to strike out a minor debt application filed against him because there was no underlying agreement to pay. QCAT rejected his strike out application and considered evidence filed by the applicant to calculate damages in order to make an award against the client.

- ⇨ Case example 2: a QPILCH client was awarded damages by QCAT after his car was damaged by the negligent respondent.[14] His ancillary claim for costs associated with the car rental was dismissed under this section as they were consequential damage and were therefore outside the scope of section 12(4)(d). His subsequent claim under section 12(4)(a) was rejected as the amount claimed was not under an agreement with the respondent. This was despite the client having evidence to substantiate costs incurred.

QCAT's jurisdiction in minor civil disputes includes 'a claim to recover a debt or liquidated demand of money'. This is commonly misapplied to include damages claims where there is no proper evidence of a liquidated sum or debt. Liquidated damages are a sum fixed by parties to a contract as a genuine pre-estimate of loss or an amount ascertainable by a mere process of calculation.[15] Damages can be assessed in other areas of the minor civil dispute such as those for 'payment of an amount for damage to property caused by, or arising out of the use of, a vehicle', but these are not liquidated damages. As a result of different approaches, QAILS members cannot be confident in advising clients about QCAT's jurisdiction under s 12(4)(a).

The blurring between these fundamental jurisdictional issues must be clarified by amending legislation. QCAT needs to have this jurisdiction made certain in the same way that the Small Claims Tribunal (**SCT**) also needed such clarity. Many of these jurisdictional issues are simply inherited by QCAT from the SCT.

An example of the difficulty with this definitional and jurisdictional issue is where a claim is issued as if it were a liquidated demand but in fact it is a claim in negligence or other breach of duty. As a result, the jurisdiction of QCAT to award damages is limited, and parties seeking damages outside of an agreed amount or outside its actual minor civil jurisdiction must pursue that matter separately in the Magistrates Court. This is contrary to the aims and purposes of QCAT.

Section 12(4) of the QCAT Act lists what a 'relevant person' means in a minor civil dispute. The Explanatory Notes provide that section 12(4)(b) to (f) represent the jurisdiction transferred from the Small Claims Tribunal, while section 12(4)(a) represents the jurisdiction transferred from the Magistrates Court courtesy of the simplified procedures listed in the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**).

While the UCPR's old simplified procedures referred predominantly to minor debt claims, they could be applied to other claims. This scheme was quick and easy as it allowed simplified procedures to be applied to claims other than debts.

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[13] This section responds to Consultation Paper question 5 (What, if any, amendments could be made to the QCAT legislation to further promote economical, informal and quick resolution of disputes?).

[14] Under section 12(4)(d) of the QCAT Act.

[15] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79; *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138; *Alexander v Ajax Insurance Co Ltd* [1956] VLR 436.

The minor debt claims jurisdiction of the Magistrates Court was transferred to QCAT. However, the UCPR still contain provisions with regard to 'simplified procedures for minor claims'.[16] This means that parties often have to apply to both QCAT and the Magistrate's Court for different types of damages arising from the same action. The current approach is inconsistent with the object of the QCAT Act to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick.[17]

Recommendation 6: Parties should be able to make their entire claim before one judicial body. The Magistrates Court's jurisdiction under Division 2, Part 9, Chapter 13 of the UCPR should be transferred to QCAT. QCAT would then be able to decide matters beyond that of minor debt claims, and parties would be able to bring their matters before QCAT rather than the Magistrates Court.

[16] See Division 2, Part 9, Chapter 13 of the UCPR.

[17] Section 3(b) of the QCAT Act.

Representation[18]

Interpretation of s 43(2)(b)

The meaning of 'may' in s 43(2)(b) has been interpreted inconsistently, leading to much uncertainty and anxiety for clients. In some instances, it has been interpreted to mean that the Tribunal may decide whether a party can appear with representation, despite the party falling within one of the categories in subparagraphs (i) to (iii). This is occurring more frequently in regional and rural areas.

It is particularly important that where a party falls within one of the categories in subparagraphs (i) to (iii), representation is as of right, that is, that leave is not required, and there is no uncertainty in this respect.

Recommendation 7: QCAT should issue a practice direction clarifying that 'may' in section 43(2)(b) means that, where an party falls into one of the categories listed in subparagraphs (i) to (iii), that representation is as of right, and that no leave is required. The practice direction might also specify how representatives should give advance notice to QCAT that they are representing a person who falls within one of these categories so that the issue does not arise at the hearing.

Guardianship matters

QAILS considers it is particularly important that individuals subject to applications under the *Guardianship and Administration Act 2000* (Qld) be entitled to legal representation as of right.

Guardianship matters commonly involve serious questions of rights and obligations. Decisions made in this context can have long term adverse impacts on the life and quality of life for the person.

For example, the Tribunal has the power to make declarations about the capacity of an adult, appoint guardians, approve a proposed exercise of power for an adult with impaired capacity, consent to the withholding or withdrawing a life sustaining measure for an adult with impaired capacity, and consent to the sterilisation of a child with an impairment, approving use of a restrictive practice.[19]

Additionally, the Tribunal has the power to make a range of limitation orders, including, an adult evidence order requiring the adult concerned to give information in the absence of members of the public or the active party, a closure order requiring that the hearing be closed to the public or a particular person, as well as non-publication orders and confidentiality orders.[20]

In these matters, it is also commonplace that the counterparty is the State. Given the resources of the State, it is appropriate that legal representation in these matters is available as of right. There should be no discretion on the issue of whether legal representation is available for the subject individual.

Over the last 2 years, QAILS members indicate that there in only a small percentage of cases, the Tribunal did not grant leave for legal representation. Indeed, this is highlighted in the Consultation Paper[21] where it states that applications for leave to be represented by a lawyer were made in only 4% of lodgements in 2011-12 and of these, the Tribunal granted 86%. Despite these percentages,

[18] This section responds to Consultation Paper question 12 (Should legal representation as of right in QCAT proceedings be extended? If yes, to what types of matters and in what circumstances?).

[19] See *Guardianship and Administration Act 2000* (Qld) s 81.

[20] See *Guardianship and Administration Act 2000* (Qld) ss 100, 106, 107, 108 and 109.

[21] See page 17.

the fact that there is still a level uncertainty for CLC clients remains a strong concern, particularly because the types of persons involved in guardianship and administration matters may not be able to fully appreciate the chances of being granted leave. The Consultation Paper also suggests that leave is only granted where a party applies for leave to be represented, although section 43 provides QCAT with a discretion to grant leave, and there is no requirement for a party to apply for leave to be represented.

QAILS recognises that the Act provides a right to representation in situations where the party is a person with impaired capacity.[22] However, there are other situations where it is equally important that a person have a right to legal representation, such as where the Tribunal is making a declaration about the capacity of an adult, appointing a guardian or administrator and making orders in relation to enduring documents. These types of proceedings necessarily involve a finding of 'capacity' under the *Guardianship and Administration Act 2000* (Qld) and can have a significant impact on the individuals that are the subject of such findings.

Recommendation 8: Individuals subject to applications for guardianship and/or administration orders should be entitled to representation as of right. Section 43(2)(b) should be amended to include a new subparagraph (v), 'the party is an adult who is the subject of proceedings under the *Guardianship and Administration Act 2000* (Qld)'.

Representation as of right in guardianship matters is not a unique concept. Indeed, the *Guardianship and Administration Act 1993* (South Australia) provides that a person is entitled to appear personally or by counsel, or if the person is the subject of the proceedings, by a Public Advocate or a recognised advocate.[23] Similar provisions exist in Western Australia,[24] Tasmania[25] and the Australian Capital Territory.[26]

Vulnerable persons

In addition to the discussion above, QAILS considers that it is particularly important that representation be allowed as of right where the matter involves a 'vulnerable person'.

The following characteristics of CLC clients make them vulnerable within the Tribunal setting and processes:

a) age;
b) cultural or linguistic diversity;
c) power imbalances between the parties;
d) medical issues, including cognitive impairment and mental illness;
e) poverty or homelessness;
f) social housing tenants; and
g) literacy, numeracy, educational background
h) relative complexity of the dispute and/or any test case or public interest dimensions.

Queensland CLCs spend additional time and funds on preparing submissions on the issue of representation for clients. The need to undertake this process on every occasion is time intensive, resource intensive, counterproductive and contradictory to the objectives of the QCAT Act.

[22] Section 43(2)(b)(i).

[23] *Guardianship and Administration Act* 1993 (SA) s 14(4).

[24] Section 39 of the *State Administrative Tribunal Act 2004* (WA) provides that a party to a proceeding before the Tribunal may appear in person or may be represented by another person. There are limits as to when a party can be represented by someone other than a legal practitioner.

[25] Section 32 of the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) provides that at a hearing of a proceeding before the Court, a party to a proceeding may appear in person, be represented by a legal practitioner (unless any enactment specifically states to the contrary) or be represented by some other class of person specified in that enactment.

[26] Section 30 of the *ACT Civil and Administrative Tribunal Act* 2008 provides that a person may appear in person or be represented by a lawyer or someone else (other than a person prescribed under the rules).

Extending representation as of right to parties with particular vulnerabilities would reduce the time needed to hear these matters and, in turn, would increase the available resources of the Tribunal. There would be no need for the parties to make submissions and for Tribunal members to exercise their discretion to grant representation. Further, it would prevent the situation where leave is refused but where a practitioner remains present during the hearing. In this situation, it is unclear what role the practitioner is to play in the proceedings and the extent to which the client can rely on the practitioner to represent him/her.

Recommendation 9: Vulnerable persons should be entitled to representation as of right. Section 43(2)(b)(i) should be amended to include the words 'or a person with a vulnerability'. QCAT should then issue a practice direction explaining the types of vulnerabilities that would be captured by the section.

Alternatively, vulnerability should be added as a factor to weigh in the Tribunal's decision to grant leave pursuant to section 43(3).

With respect to recommendations 8 and 9, QAILS submits that while parties who are the subject of guardianship proceedings and vulnerable persons should be entitled to representation as of right, this should not automatically apply to the other party to the proceedings. As is the current practice, the Tribunal may take this into account in deciding whether or not to grant leave for the other party to be represented.[27]

Access to free legal representation[28]

Access to free legal representation can be extended by increasing the Government's investment in legal assistance services. QAILS acknowledges the Government's references to the current fiscal environment and the problems this poses with respect to additional funding. However, the *Economic Cost Benefit Analysis of Community Legal Centres*, commissioned by the National Association of Community Legal Centres (**NACLC**) and published in June 2012 (**Cost Benefit Analysis**), found that for every dollar of funding provided to CLCs, $18 worth of benefits are provided to the community.[29] Legal matters are resolved at an earlier stage, thereby minimising the costs to the parties and the Government (by avoiding using the resources of the Tribunal). Domestic violence and child abuse can also be avoided through early intervention.

In its 'Review of the allocation of funds from the Legal Practitioner Interest on Trust Accounts Fund', the Department of Justice and Attorney-General found that some of the greatest economic benefits are achieved through holistic case management which provides cost savings both inside and outside of the legal system.[30]

In 2011-12, Queensland CLCs received funding of approximately $11.5 million and provided service to 43,136 clients. This service consisted of 33,954 information activities, 59,803 advice activities and 7551 cases.[31]

Existing services are operating beyond capacity, with 73% unable to meet current demand.[32] In particular, we note that the Tenants Advice & Advocacy Service was defunded by the Queensland Government in 2012, and its current funding arrangement with the Commonwealth is due to expire

[27] Section 43(3)(c) of the QCAT Act.

[28] This section responds to Consultation Paper question 13 (How could free legal representation be extended to impecunious parties in QCAT proceedings?).

[29] John Storer, Judith Stubbs and Colleen Lux, *Economic Cost Benefit Analysis of Community Legal Centres* (Judith Stubbs and Associates, Bulli NSW, 2012) 17-24.

[30] Department of Justice and Attorney-General, *Review of the allocation of funds from the Legal Practitioner Interest on Trust Accounts Fund* (October 2012) 25.

[31] In addition to direct client work, Queensland CLCs provided 603 community legal education activities and 157 law reform projects

[32] Australian Council of Social Service, Australian Community Sector Survey 2012: National Report (2012) 12.

in June 2013. This is particularly concerning to QAILS and the CLCs. Tenancy matters represent the largest dispute category before QCAT. It will be an injustice to a significant portion of the community if tenants do not have access to free legal assistance. It is vital that CLC funding is maintained to meet current service levels.

Additional funding will increase the number of parties appearing with legal representation before QCAT. In the longer term, it will also provide greater cost savings for the Government.

Recommendation 10: Increase funding to community legal centres to deliver civil law services to eligible clients appearing before QCAT.

Section 43(6)

Section 43(6) of the QCAT Act allows the Tribunal to appoint a person to represent an unrepresented party. QPILCH has been able to provide valuable assistance where the Tribunal has relied on section 43(6) to refer the person to QPILCH for *pro bono* representation. This section should be relied upon more frequently by QCAT members presiding over hearings and conferences, but it must be recognised that relying on the goodwill of the private profession in providing services *pro bono* is not the answer; sufficient resourcing of CLCs and Legal Aid Queensland is also required.

Recommendation 11: QCAT should issue a practice direction emphasising the importance of section 43(6) in appropriate cases.

Constitution of the Tribunal

Legally qualified Tribunal members[33]

Having Tribunal members who are legally qualified, particularly for guardianship and anti-discrimination proceedings, will ensure that one party is not taken advantage of and will ensure that all relevant legal rights are observed and upheld. This aligns with the Tribunal's obligation to 'ensure like cases are treated alike'[34] and 'ensure the appropriate use of the knowledge, expertise and experience of members and adjudicators'[35].

Recommendation 12: It is appropriate that legally qualified Tribunal members continue to sit on particular matters.

Non-legal Tribunal members[36]

It is important that all Tribunal panels include a person with (non-legal) expertise in the relevant area.

It is not sufficient that the president simply 'consider' the need for the tribunal hearing the matter to have special knowledge, expertise or experience relating to the matter.[37]

For example, there is a requirement in the *Child Protection Act 1999* (Qld) that in a matter relating to a young person in care, members must be committed to a number of child-centric principles and have extensive professional knowledge and experience with children.[38] This is critical to ensuring young people are not only heard but understood.

Recommendation 13: Provisions in enabling Acts requiring the Tribunal to be constituted in a particular manner are essential to protecting the rights of vulnerable groups. The Government should also consider extending the current requirement to provide that all Tribunal panels must include at least one person with (non-legal) expertise in the relevant area.

[33] This section responds to Consultation Paper question 9 (Should amendments be made to the QCAT Act to remove the distinction between legally qualified members and other members?).

[34] Section 4(d) of the QCAT Act.

[35] Section 4(g) of the QCAT Act.

[36] This section responds to Consultation Paper question 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?).

[37] Section 167 of the QCAT Act.

[38] Section 99H of the QCAT Act.

Appeal rights

General[39]

Quality of decision making and decision making process

The Consultation Paper suggests various ways to limit the number of applications for leave to appeal.[40] QAILS considers that, rather than limiting appeal rights, the Government should focus on improving the quality and consistency of Tribunal decisions and the decision-making process. It naturally follows that, where a party understands the decision making process adopted by the Tribunal and raises any objections at an early stage, that party is less likely to lodge an appeal, despite an adverse decision at first instance.

Recommendation 14: QAILS recommends that there be better training for all members on the QCAT Act and practice.

Hearing of applications for leave to appeal

Where leave and the substantive appeal are heard together parties can be disadvantaged by not having an opportunity to build an appeal case through submissions and evidence (where appropriate). The current system relies on appeals being formulated in their entirety at lodgment. This is unusual in the legal system and very difficult in complex cases involving legal errors. Applications for leave to appeal should be heard before the substantive appeal hearing.

Recommendation 15: QAILS recommends that applications for leave to appeal be heard separately from the substantive appeal hearing.

Appeals on the papers

The current system lacks transparency and fairness as appeals are often dealt with on the papers, behind closed doors without any opportunity to canvass issues beyond the original appeal documents. Providing appellants with an opportunity to make oral submissions would assist the Tribunal to understand the appeal grounds.

Recommendation 16: QAILS recommends that appellants should always be given an opportunity to make oral submissions.

Section 143

Section 143 provides that a person must file an appeal within 28 days of the 'relevant day', being the day the person receives written reasons for the decision.

QPILCH's Self Representation Service has received a number of requests for assistance from people seeking to appeal a QCAT decision but who have not sought written reasons (mostly because they are unaware of their right to do so). The QCAT Act does not specify that a person must seek written reasons prior to lodging an appeal. The time limit for lodging an application for leave to appear/appeal is not clear where the person has not received written reasons. The application of the time limits are not well understood by advisers or legal practitioners. The legislation should be amended to dispel ambiguity.

[39] This section responds to Consultation Paper question 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?).

[40] See 4.6.3, 4.6.4, and 4.6.5 of the Consultation Paper.

Recommendation 17: Amend section 143 to specify the time within which an appeal must be filed in circumstances where no reasons are obtained.

Section 122

Section 122 provides that a person has a right to request written reasons for a decision within 14 days of the day the decision takes effect (typically the date of the relevant hearing).

QCAT provides an appeals information notice[41] which outlines appeal rights and the option to request written reasons. It is not known whether this notice is sent to every party who is subject to a decision. In any event, the appeals information notice does not make the importance of requesting reasons clear.

The experience of the QPILCH Self Representation Service so far suggests that the timeframe imposed by the QCAT Act and the current practices of QCAT make it difficult for a person to exercise their right to request written reasons in time:

- ⇨ Case example 1: a client did not receive written confirmation of a decision, the nature of which, the client did not fully comprehend, until nearly 1 month after the hearing, by which time her right to request written reasons for the decision had expired.

- ⇨ Case example 2: a client had written to QCAT expressing his dissatisfaction with a decision and requesting an explanation of 'the law that the decision was based upon'. Even in these circumstances, where it was clear the client would benefit from receiving written reasons, the client was not provided with them or even advised of his right to request them.

Recommendation 18: QCAT should establish a process whereby parties are informed of their right to request written reasons – either at the time of the hearing, or by notice enclosed with written confirmation of the decision. Registry staff should also be trained to inform people that they have a right to request written reasons.

Options 1, 2 and 3[42]

In the event that it is determined that some steps must be taken to decrease the burden on QCAT in processing appeals, QAILS makes the following submissions.

Option 1 and 2

External appeals to the District Court is preferable to restricting appeal rights by monetary value, although this would create additional barriers to achieving fair and just outcomes. To tie appeals to monetary limits would entrench a perception that QCAT is only for persons of means. Limiting appeals in this way may decrease public confidence in QCAT's administration of justice. A proper appeals system ensures that legal errors are corrected and helps to build an understanding of the limits of the law.

Option 3

In QAILS' view, the current fee structure appropriately balances the rights of appellants to challenge incorrect decisions and the Tribunal's objectives and the principle of finality.

[41] See section 121(2) of the QCAT Act.

[42] This section responds to Consultation Paper questions 18 (Should internal appeals be abolished with appeals being heard by the courts); 19 (If yes to question 18, what should be the grounds of appeal?); 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?); 21 (Should appeal rights be restricted according to the monetary value of the matter in issue? If so, how should appeal rights be restricted?) and 22 (How could financial disincentives be appropriately used to discourage unmeritorious appeals without denying access to meritorious but impecunious parties?).

The Consultation Paper suggests possible financial disincentives. Of these suggestions, the only disincentive QAILS considers appropriate is the abolition of the requirement to refund 50% of the appeal fee to unsuccessful appellants as it rewards unmeritorious appeals.[43] All other financial disincentives will prohibit parties without means from pursuing appeals.

Recommendation 19: Option 1 is not appropriate. Broadly speaking, the existing financial disincentives are sufficient. QAILS considers that focus should be on improving the quality and consistency of decisions and the decision making process.

[43] *Queensland Civil and Administration Tribunal Regulation 2009* (Qld) r 8(5).

Regional and rural access[44]

QCAT was established as a statewide body that would afford equal justice to all Queenslanders. However, in QAILS' experience, the service varies considerably between South East Queensland centres and regional and rural areas.

Case management

QAILS has concerns about case management in rural and regional areas. For example, local Magistrates more often require strict adherence to the rules of evidence and exclude members of the public. This is inconsistent with the provisions of the QCAT Act, as well as its purpose. These sorts of situations lead to an increase in the number of appeals.

Also where documents need to travel back and forth to Brisbane there is a risk of miscommunications, delays in decision-making and loss of evidence/material. Parties also feel shut out of the process where local registry staff communicate with expert Tribunal staff in Brisbane. These communications need to be transparent and inclusive of the parties.

Correspondence with parties in rural and regional areas should be done via email where that party has provided an email address and the party has indicated this as their preferred mode of communication. Additionally, timeframes for compliance with directions may need to be extended in certain situations.

- ⇨ Case example: QPILCH clients in rural and regional areas have received a direction after the date for compliance with the direction has passed. In one case, it took approximately 7 days for mail to reach a client living in the Northern Territory. Despite this client's requests to receive correspondence via email due to these difficulties, QCAT refused to do so.

Recommendation 20: All registries need to have a common checklist of how cases run from start to finish, but have flexible options for dealing with parties in regional and rural areas.

QCAT staff and magistrates

While section 30 of the QCAT Act requires the Principal Registrar to give reasonable help to parties, and section 29 requires QCAT to take reasonable steps to ensure each party understands the proceedings, this varies, especially outside Brisbane.

The Consultation Paper notes that 'a significant proportion of the workload in the appeals jurisdiction are applications for leave to appeal from minor civil dispute decisions of Magistrates sitting as ordinary members of QCAT …'.[45] It is only regional tribunals that are constituted in this form. The Consultation Paper also notes that considerable resources are needed to deal with appeal matters from decisions of Magistrates sitting as the Tribunal. This suggests that a disproportionately high number of parties appearing in regional Tribunals constituted by Magistrates are unhappy with the result or process.

This trend can be overcome by providing better training for Magistrates in rural and regional areas. The use of Justices of the Peace may exacerbate the problem. Training Magistrates about key legal issues would also help to ensure consistent decision making across Queensland.

[44] This section responds to Consultation Paper question 14 (Taking into account the present restrictive fiscal environment in Queensland, what could be done to improve QCAT's regional and rural service delivery?).

[45] At page 25.

It would also be useful to clarify some of the vexed definitional questions that plagued the SCT and now plague the QCAT – see for example the discussion on 'Civil claims for debt or damages' at page 9 above. These inherited issues won't be resolved without careful legislative reform.

Recommendation 21: QAILS also recommends providing better training for Magistrates on the QCAT Act and practice as well as better support for regional and rural registries. Alternatively, the Government may consider implementing specialist QCAT registries in rural and regional areas.

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