

QCAT 2026 Review conducted by the Hon David Thomas

Submission by QCAT President in respect of
Issues paper 1: QCAT's objects and
procedures

Response to Questions 15 – 20 Legal representation.

30 March 2026

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Issues paper 1: objects and reasonable help

Introduction

1. I observe that some of the issues raised in Issues paper 1, and questions posed, go to matters of policy, and thus are ultimately matters for Government, not something about which a sitting judge would ordinarily express a view.
2. However, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('**QCAT Act**') provides that one of the functions of the President is to advise the Minister about how the QCAT Act or the enabling Acts could be made more effective,¹ and that the President may do all things necessary or convenient to be done for the performance of the President's functions.²
3. Although a Reviewer has been appointed, I note that this is a statutory review by the Minister of the QCAT Act pursuant to section 240, directed to whether or not there should be legislative amendment of the Act and enabling Acts.
4. I consider it necessary in order to properly discharge my statutory functions to respond to the Minister's review. In addition, since this will be the only response made on behalf of QCAT, I wish to provide as much assistance as possible to the Review team to enable it to make informed recommendations to the Minister.
5. I have not, however, purported to respond to, or verify the accuracy of, everything said in the Issues paper.

Remit of the section 240 Review

6. As in other issues papers, some of the consultation questions posed in this paper might give the impression that the Reviewer intends to make recommendations to the Minister about non-legislative operational change. I am sure this is not the Reviewer's intent, given QCAT's status as an independent tribunal and the terms of section 240 of the QCAT Act.
7. Section 240 of the QCAT Act, entitled 'Review of Act', requires the Minister to review the Act, not the practice of the Tribunal. The section is, rather, directed to whether there needs to be legislative change to:
 - a) the QCAT Act to change its objects if its currently stated objects do not remain valid; and/or
 - b) the QCAT Act or an enabling Act or Acts to assist QCAT to be able to meet, or

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 172(3)(b) ('**QCAT Act**'). See also section 240(2)(d) of the QCAT Act which provides that one of the objects of the statutory review is investigate any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal.

² QCAT Act s 172(4).

better meet, its objects. This may include changes giving QCAT the ability to enhance operational efficiency, such as removing legislative hurdles to such efficiency.

8. The Ministerial review contemplated by the provision does not, on its clear language, concern non-legislative operational changes.
9. It is trite to say that QCAT, as an independent tribunal, is free from the direction of the Executive as to the way in which it conducts its operations. So much is plain from convention, the separation of powers doctrine, and the Act itself:
 - a) section 3(a) of the QCAT Act states that one of the objects is to establish an independent tribunal;
 - b) section 162 provides that in exercising its jurisdiction, the Tribunal must act independently and is not subject to direction or control by any entity, including any Minister;
 - c) section 172(5) provides that the President is not subject to direction or control by the Minister.
10. These provisions are consistent with the Explanatory Memorandum to the QCAT Bill which states that the objectives of the Bill are to 'establish an independent tribunal' and that:

The independence of QCAT will be achieved by providing for the appointment of a Supreme Court judge as president of the tribunal and by providing that the tribunal is not subject to direction or control by the executive.³

11. I recognise that section 240(2)(d) includes among the objects of the Review 'investigating any specific issue recommended by the Minister or the president, including, for example, whether any provision of an enabling Act affects the effective operation of the tribunal'. This provision must be read, however, in the context of section 240's focus on the Act itself, and of course, having regard to the independence of both Tribunal and President from Ministerial direction.
12. The issues and statement of 'Scope' in the Terms of Reference appear to have been drafted with these obvious propositions in mind.
13. The issues set out in the Terms of Reference turn on provisions of the Act and are consistent with an examination of whether legislative reform is called for:
 - whether the current legislation creates hurdles to procedural efficiency within the Tribunal;
 - QCAT senior leadership structure (set out in Chapter 4, Part 3 of the QCAT Act), with comparison to tribunals in other states and the Commonwealth (including whether the President and Deputy President should be appointed to the Supreme and District Courts, and including Heads of Division);
 - the role and functions of the QCAT President and Deputy President (sections

³ Explanatory Memorandum, Queensland Civil and Administrative Tribunal Bill 2009 (Qld) 4.

172 to 174 of the QCAT Act);

- the current appeal structure for QCAT decisions (Chapter 2, Part 1, Division 4 of the QCAT Act);
- the operation of various professional disciplinary lists (in the exercise of the Tribunal's review jurisdiction under section 17 of the QCAT Act) and whether QCAT remains the most appropriate forum for these jurisdictions;
- whether legal representation should be 'as of right' for certain, or all, types of tribunal matters (section 43 of the QCAT Act) and the impacts of any change on both the ability for QCAT to meet its objectives and the funding arrangements for legal service providers;
- the current Minor Civil Dispute jurisdiction (sections 11 to 14 of the QCAT Act) and whether the jurisdiction could be expanded, minimised, or transferred to a different forum;
- other jurisdictions conferred on QCAT through enabling Acts which have significant impact on its operations and the appropriateness of QCAT as a forum for those matters, including, for example, QCAT's role in relation to certain public housing disputes;
- the role of Justices of the Peace at QCAT (Chapter 4, Part 4B of the QCAT Act) and ways their involvement in matters and processes can alleviate pressures at the Tribunal;
- ways in which QCAT can be improved to support the small business community (presumably this concerns whether and if so how the QCAT Act should be changed to support the small business community);
- the capacity of QCAT to hear matters, with reference to the available Tribunal Members and physical meeting or hearing room space (this would properly entail considering the ability of QCAT to carry out what is currently within its statutory remit pursuant to the QCAT Act and the enabling Acts; in this context it would be relevant to consider budget and resourcing); and
- the extent to which previous statutory review recommendations still apply and may assist in addressing issues (the single previous review, conducted by then Minister D'Ath was confined, as section 240 requires, to legislative reform).

14. The statement of scope also makes plain that the remit of the Review is to examine whether legislative reform is necessary, with a consideration of resourcing relevant in that context:

The review will take a genuine look at QCAT to identify ways to alleviate the significant pressures QCAT is currently facing, including an examination of any systemic operational or legislative issues impacting on the ability for QCAT to perform its statutory functions, in an accessible, economical and timely manner. 'Systemic operational considerations' are those linked to how the legislation is currently framed and whether there should be changes in order to alleviate the significant pressures that QCAT is facing.

15. The reference to ‘systemic operational considerations’, it can be seen, is appropriately limited to a consideration of how systemic pressures on QCAT could be addressed by legislative change – that is, how pressures affecting its ability to achieve its statutory objects could be alleviated, having regard to the amount and breadth of its work, and its resourcing, (with reference, among other matters to the availability of Tribunal Members and physical meeting or hearing room space).
16. Obviously, the Attorney-General, as First Law Officer of the State, and possessed of a clear understanding of the independence of the Tribunal and the President’s insusceptibility to the direction of the Minister, did not frame Terms of Reference intended to extend to the Reviewer’s making recommendations to the Minister, about how QCAT should run its business. (Nor, I am sure, would anyone think that a limited life, desk-top review, by an external person or group, without the requisite comprehensive and current understanding of operations, would be well-placed to make recommendations about non-legislative operational change).
17. The Terms of Reference, read as a whole, demonstrate no intent to depart from the restricted form of Ministerial review contemplated by section 240.
18. As stated above, I am sure it is not the Reviewer’s intent to make recommendations to the Minister about non-legislative change, that is, about matters concerning which the Minister is expressly prohibited from directing the President of the Tribunal.⁴ I accept, however, that it would be reasonable to have regard to budget and resourcing, in the context of the reference in the Terms of Reference to ‘identifying the implications for other forums if transfer of jurisdiction is proposed, the key cost drivers, and any potential savings and efficiencies’ and to ‘the capacity of QCAT to hear matters, with reference to the available tribunal members and physical meeting or hearing room space’.
19. Accordingly, in providing responses to the consultation questions, I have taken the questions to be directed to whether changes to the QCAT Act or the enabling Act would be desirable, in order for QCAT to better achieve its objects, taking into account any resource implications of the options posited.
20. As always, I encourage any stakeholders who have suggestions for operational reform, to write to the Principal Registrar and/or the President of QCAT with those suggestions, and to do so by providing as much specificity as possible of any problem encountered so that there can be a proper interrogation of the matter raised, and an informed view reached as to the best course of action moving forward. As the Reviewer would appreciate from his time as President, very generalised complaints which do not provide QCAT with sufficient information to explore the issue and get to the root of any problem (or perceived problem) are, unfortunately, not helpful vehicles for operational reform.

⁴ Pursuant to section 172(5) QCAT Act. I acknowledge that section 240(2)(d) states that the objects of the review include investigating any specific issue recommended by the Minister or the President, including, for example, whether any provision of an enabling Act affects the effective operation of the Tribunal. This provision must be read together with the limitation in section 172(5) in determining its ambit.

21. In those limited instances where the issues papers have set out assertions of non-legislative and non-budgetary concerns in a way which provides sufficient detail for QCAT to interrogate the concerns, the Minister can be assured that QCAT has taken notice.

Legal Representation

Consultation question 15

Q15 Should the QCAT Act allow for 'as of right' legal representation and, if so, when should it be allowed? For example:

- (a) Should this be in all matters or only some types of matters?
- (b) Should this be allowed for certain parties, such as people with a disability or people from culturally and linguistically diverse backgrounds?
- (c) Should the QCAT Act also allow for 'as of right' representation by a non-lawyer?

Representation in Guardianship – Issues Paper 4

22. Issues Paper 4 contains a number of questions about representation in guardianship matters.⁵ As such, I shall confine my response here to Civil, Administrative and Disciplinary ('CAD') matters.

Existing Powers

23. Section 43 of the QCAT Act requires a party to represent themselves unless the interest of justice requires otherwise, and the party is given leave to be represented. However, pursuant to s 43(2) of the QCAT Act a party may be represented by someone else if: the party is a child or a person with impaired capacity; or the proceeding relates to taking disciplinary action, or reviewing a decision about taking disciplinary action, against a person; or an enabling Act or the rules states that a person may be represented; or the party is given leave by the Tribunal.

⁵

Those questions are:

Q21 Should the adult have an automatic right to legal representation or other representation, without needing to seek leave?

Q22 Should an adult have an automatic right to the appointment of a representative under section 125, without needing to seek leave?

Q23 Should adults be provided with funded representation to support these rights?

Q24 Should other parties (including active parties) or a person given notice to attend a hearing have an automatic right to legal representation or other representation in guardianship matters?

Q25 Should government entities (for example, the Public Guardian or the Public Trustee or the Public Advocate (as intervenor)) be permitted legal representation as of right?

Q26 What safeguards, if any, are required to ensure parties who are not legally represented are not disadvantaged? For example, should the legal representative be legally required to assist the tribunal?

24. Section 43(3) of the QCAT Act sets out the matters the Tribunal may consider in supporting a decision to give leave.

Legal Representatives – Summary

25. I note that the Review has been asked to consider whether legal representation should be as of right for certain, or all, types of tribunal matters and the impacts of any change on both the ability for QCAT to meet its objectives and the funding arrangements for legal service providers.
26. The Issues Paper notes the following recommendation by the 2014 Productivity Commission Inquiry *Report into Access to Justice Arrangements*:
27. In tribunal, where matters are relatively simple in legal and factual terms and equality between parties is likely to be the norm, the use of legal representation should be limited. To achieve this... Australian, State and Territory Governments and tribunals should rigorously apply existing restrictions, that is legal representation should only be allowed with leave and that leave should only be granted in exceptional cases where one party would otherwise be significantly disadvantaged.
28. While it is true that there are matters before QCAT which are relatively simple in legal and factual terms, (for example, a sizeable portion of Minor Civil Disputes), it is no longer the reality for a great number of matters before the Tribunal; nor is equality between the parties (particularly when one party is the government or a sophisticated litigant).
29. Several Members and Adjudicators have communicated their views to me about the issue of representation in QCAT, based on their experience. Although opinions on the topic are not unanimous, the weight of the views tend towards the following propositions:
- a) there may be benefit in amending the QCAT Act to allow as of right legal representation in all jurisdictions of the Tribunal, with the exception of Minor Civil Disputes;
 - b) it would be beneficial for the QCAT Act to state expressly that leave of the Tribunal is not required to seek legal advice or assistance in connection with a proceeding before the Tribunal. (This is so whether or not there is as of right legal representation in that particular type of matter).
30. At page 18, paragraph 121, Issues Paper one states:
- Applications to decide whether to give leave to be legally represented increase costs to parties and the tribunal and may cause delays in proceedings. Those costs and delays could be avoided if parties had legal representatives as of right. However, there are also countervailing concerns that increased reliance on legal representation by parties could further formalise QCAT proceedings, drive up costs for parties and undermine the accessible nature of QCAT.
31. As to the first proposition, it is certainly true that resources are consumed by QCAT needing to determine applications for leave to be represented. Each year there are a great deal of applications for leave to be represented. It is also true that Registry and Tribunal resources spent on the administrative burden of dealing with such

applications, and the judicial burden of hearing and determining such applications, could be diverted if there were as of right legal representation. However, this does not mean that there should be blanket as of right legal representation for all matters which come before QCAT. A more bespoke approach is called for.

32. In respect of non-MCD CAD matters, many people have commented to me that they have found it beneficial for parties to be represented. Their feedback includes that it minimises the time and resources that need to be expended in compliance with sections 29 and 30 of the QCAT Act, that it tends to help narrow issues, that it (although not always) helps to reduce the number of issues litigated or proceedings brought to those which are reasonably arguable and brings with it the benefit of the legal practitioners' obligation to assist the Tribunal as officers of the court governed by a professional duty to assist the Tribunal.⁶ This is particularly so in matters which are legally and/or factually complex. The feedback is that representation also appears to help parties who would otherwise struggle to be able to litigate their case effectively.
33. The Review states there are countervailing concerns,⁷ namely that increased reliance on legal representation by parties could further formalise proceedings, drive up costs, and undermine the accessible nature of QCAT. With respect to this, I note that while these things are a possibility, it needs to be borne in mind that the Members of the Tribunal who are managing and hearing and determining cases should be able to counteract many of these issues by proper exercise of their powers under section 28 and elsewhere in the QCAT Act.
34. In respect of the Minor Civil Disputes jurisdiction, most of the feedback I have received is that as of right legal representation is not considered to be in the best interests of achieving the objects of the QCAT Act. (with the notable exception of s 43(2)(b)(i) of the QCAT Act).⁸ Concerns expressed to me include that having as of right legal representation may lead to increased adjournments (due to the short period between when a MCD application is filed and when it is heard) and thus cause undesirable delay and increased use of Tribunal resources. (Adjournments are very bad for the efficient use of QCAT's limited resources). The majority of feedback I have received is that rather than have as of right representation in the MCD jurisdiction, it is preferable to retain the section 43 discretion to grant leave to be represented, in those MCD's which may benefit from legal representation of the parties, (for example, in a complex dividing fence dispute, or a complex motor vehicle property damage dispute). More will be said on this topic in the response to issues paper 3, Minor Civil Disputes.

Legal advice and/or assistance in preparation – call for express clarification in the QCAT Act

35. It is not uncommon for QCAT (both staff Members and Adjudicators) to receive queries as to whether or not a party can obtain legal advice and/or assistance from a lawyer outside of the hearing, for example, to help prepare documents or otherwise prepare for hearing. Feedback I have received is that there may be some benefit in the QCAT

⁶ *Australian Solicitors' Conduct Rules 2023* (Cth) r 3.1 and *Barristers' Conduct Rules* (Qld) rr 25-36.

⁷ The Honourable David Thomas, 'QCAT's objects and procedures' (Issues Paper 1, Queensland Civil and Administrative Tribunal Act Statutory Review 2025-6, October 2025) [121].

⁸ In particular, where the party is a person of impaired capacity.

Act expressly stating that a party can seek legal advice and/or assistance outside of the hearing, without obtaining leave, even in cases where leave must be sought to be legally represented in a proceeding (provided that there is also a very clear statement that it does not follow that the legal costs of such advice or preparatory work will be recoverable).

Section 328 Legal Profession Act 2007 (LPA) – applications to set aside costs agreement

36. Section 328(1) of the LPA provides that the Tribunal may order that a costs agreement be set aside if satisfied the agreement is not fair or reasonable.
37. The respondent to these applications is a law practice. The practical consequence of this is that the respondent is inevitably represented by a lawyer of that practice (unless the practice itself seeks, and is granted, leave to be legally represented, in which case they will be represented by outside lawyers).
38. There is no as of right legal representation for applicants.
39. This creates an imbalance which, in my view, could readily be remedied by legislative change. Given this would be a simple change, consideration might be given to including it within a *Justice and Other Legislation Amendment Bill* ('JOLAB') sooner rather than later.
40. If, ultimately, the QCAT Act is amended so as to create as of right representation in all non-MCD CAD matters, then the amendment will of course become redundant, but that should not prevent correcting the imbalance inherent in the legislation now in the meantime.

Non-Legal Representatives – summary

41. The strong feedback I have received on this topic is that the proscription against being represented by a non-lawyer without leave should remain. In this regard, it is noted that non-legal representatives do not carry the same professional duties to the Tribunal as lawyers do.
42. The requirement for leave is considered to be an important protective mechanism to avoid proceedings being delayed or adversely affected by individuals who are seeking to interfere with or prolong disputes rather than to assist proceedings, or by individuals who are not sufficiently skilled or equipped or able to provide proper representation for the party. As to the latter, the Tribunal experience is that sometimes the would-be representative would likely do a worse job than the party themselves.
43. Maintaining a requirement for leave in MCDs is considered to strike the best balance in the quest to achieve the objects of the QCAT Act.

Statement of section 43(3) factors

44. Section 43(3) sets out a number of non-exhaustive factors which the tribunal may consider as supporting the grant of leave. It may be prudent to revisit these factors once a landing has been reached in terms of the types of matters, if any, do not have as of right representation.

45. Consideration might also be granted to including other factors which are regarded as supporting the grant of leave. For example, the Issues Paper states that people with a disability or persons from culturally or linguistically diverse backgrounds ('**CALD**') may benefit from such a right. Care should be taken not to assume that persons with a disability or from a CALD background are less able to represent themselves than a person without a disability or who is not from a CALD background. To assume such persons are less able to represent themselves without consideration of whether the disability or the CALD background is likely to prevent equitable access to justice is prone to infantilize the person. As the Review no doubt appreciates, more nuance than a generalised presumption is required and any proposed legislative amendment should draft factors accordingly. The same can be said as to "vulnerable persons" as that term appears to be used in section 132. True equitable access to justice for parties must be the guiding rationale.

Consultation question 16

Q16 Should QCAT have the power to appoint a representative for an unrepresented party at no cost to that person? If so, in what circumstances should this be available?

Summary

46. No. While the Tribunal has the power to appoint a person to represent an unrepresented party pursuant to s 43(6) of the QCAT Act, the execution of this power is problematic in the absence of dedicated allocated resources and a very clearly established program for appointments, engagement, and payment. Many questions and issues arise – who pays for the representation? How is the representative chosen? What obligation falls on the Tribunal to select the "right" representative? What happens if the representative appointed by the Tribunal does not act in a way the party for whom they are appointed is happy with? How is conflict of interest avoided when the Tribunal is appointing the particular representative? (ie. the very entity that is deciding the matter is appointing the representative for a party).
47. It is preferable that legal aid/assistance organisations (Legal Aid, Law Right, Caxton Legal Service etc) are provided with funding and resources to be able to assist parties in QCAT, including, if at all possible, duty lawyer arrangements. QCAT has found that when a party is assisted by such organisations, there are several benefits – they flow to the Tribunal, to the party represented, and often, because of the efficiency such legal representation can bring to the proceeding, to the other party. QCAT is grateful for the assistance that such organisations have been able to provide, but acknowledge that the extent to which they can assist (ie, the number and types of cases they can take on), is very limited given lack of funding and resources. The feedback I have consistently received is that their involvement assists QCAT to achieve the objects of the QCAT Act.
48. So far as I have been able to discern, the limitations on the assistance they can provide is not due to the legislative provisions in the QCAT Act, but due to lack of funding. If the Review has any proposal for legislative amendment on this topic, QCAT would be happy to provide feedback in respect of it.

Consultation question 17

Q17 How should parties be notified if a party becomes represented?

Summary

49. The usual process by QCAT is that all parties are notified by QCAT when a party is granted leave to be legally represented. I note that the issues paper states that “the Review has heard, at this early stage of the Review, that there have been instances where one party is not aware that the other party is legally represented.” In the absence of specifics, I am unable to interrogate this assertion. I accept, of course, the possibility that in the tens of thousands of matters that QCAT handles, that the process of notification that a party has been granted leave to be represented may fail from time to time. The question for the Review is whether or not legislative amendment might act as a protective feature against such unintentional occurrences.
50. However, the QCAT Act and/or QCAT Rules do not currently require the filing and service of a notice of address for service when a party is granted representation or when a party changes their representative. It would likely be beneficial for the QCAT Rules to be amended to expand and strengthen the requirement for provision of an address for service, by all parties, including a requirement that a party file and serve an address for service on commencing or changing representation.

Consultation question 18

Q18 Should appointed representatives have obligations to assist the tribunal to meet its objectives?

Summary

51. In so far as legal representatives are concerned, views on this differ. On the one hand, legal representatives already have a professional obligations to assist the Tribunal,⁹ (and some are also bound by the Model Litigant Principles)¹⁰ and thus there may not need to be a statutory overlay to the professional obligations which already exist. On the other hand, there may be no harm in a statutory overlay which is specifically directed to assisting the Tribunal in meeting its statutory objects, and such an express statutory requirement may serve to emphasise the need for lawyers to comply with directions¹¹ and progress the matter as expeditiously as possible.

⁹ *Australian Solicitors’ Conduct Rules 2023* (Cth) r 3.1 and *Barristers’ Conduct Rules* (Qld) rr 25-36.

¹⁰ I should note that I have received feedback from various Members over time that reemphasis of what the Model Litigant Principles require has, unfortunately, been necessary for some practitioners.

¹¹ On this topic, see <https://www.qlsproctor.com.au/2024/07/directions-mandatory-not-aspirational/>. In a recent presentation to government lawyers at QLS CPD I discussed the

52. In so far as non-lawyer representatives are concerned, there is support for an express statement in the legislation that they are required to assist the Tribunal.

Provisions within the QCAT Act and other jurisdictions

53. Section 45 of the QCAT Act provides that each party to a proceeding must act quickly in any dealing relevant to the proceeding.
54. While s 45 of the QCAT Act imposes a general obligation on the parties to act quickly in any dealing relevant to the proceeding, it is not a provision expressly imposed on representatives to assist the Tribunal. Although legal representatives will know that this obligation extends to them, this may not be sufficiently obvious for some non-lawyer representatives. Nor is it made plain by the note to section 45 which states:
55. For possible consequences for a contravention of this section, see sections 48 (Dismissing, striking out or deciding if party causing disadvantage) and 102 (costs against party in interests of justice.)
56. The note to section 45 does not make any reference to s 103 which provides that the Tribunal may order the representative to pay a stated amount to the other party as compensation for unnecessary costs brought about by the representative being responsible for unnecessary disadvantage caused to the party in the proceeding.
57. Section 36 of the *Civil and Administrative Tribunal Act 2013 No 2* (NSW) is the governing legislation of the New South Wales Civil and Administrative Tribunal. It imposes an express duty on the representative to cooperate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal. It states (emphasis added):
- 36 Guiding principle to be applied to practice and procedure
- (1) The *guiding principle* for this Act and the procedural rules, in their application to proceedings in the Tribunal, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
- (2) The Tribunal must seek to give effect to the guiding principle when it—
- (a) exercises any power given to it by this Act or the procedural rules, or
- (b) interprets any provision of this Act or the procedural rules.
- (3) **Each of the following persons is under a duty to co-operate with the Tribunal to give effect to the guiding principle and, for that purpose, to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal—**
- (a) a party to proceedings in the Tribunal,

problem of non-compliance with directions as an ongoing issue. That presentation was given on invitation by the QLS with a specific request to offer suggestions I may have to government lawyers who are dealing with an avalanche of AI produced material from parties, and suggestions I may have as to how to optimise the prospect of efficient proceedings in QCAT.

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Tribunal.

- (4) In addition, the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.
- (5) However, nothing in this section requires or permits the Tribunal to exercise any functions that are conferred or imposed on it under enabling legislation in a manner that is inconsistent with the objects or principles for which that legislation provides in relation to the exercise of those functions.
58. One can see the rationale for such a provision. There may be benefit in including an express obligation on representatives in the QCAT Act.
59. Consideration might also be given to an express power to revoke a grant of leave to a non-legal representative if the Tribunal forms the view that the representative has, and or is, causing unnecessary disadvantage to a party (including the party they represent) and/or that the continued representation by that person is contrary to the interests of justice. Legislative drafters may have a better formulation of the test that should apply to such a provision in order to best advance the objects of the QCAT Act.

Consultation question 19

Q19 Should QCAT adopt the same approach as Queensland Courts and allow legal practitioners to represent persons unless and until their practising certificate is suspended, cancelled or revoked, or they are struck off?

Provisions within the QCAT Act

60. Section 43(4) of the QCAT Act provides that a party cannot be represented in a proceeding by a person, in accordance with rule 57 of the QCAT Rules, who is disqualified from being a representative of a party to a proceeding.
61. Under rule 57 of the QCAT Rules a person is disqualified from representing a party if a person has been the subject of a discipline application under the LPA; or an application equivalent to a discipline application under a corresponding law within the meaning of the LPA, and the person has, in the proceeding, been found guilty of professional misconduct or unsatisfactory professional conduct (**professional conduct findings**), and the President has not declared that the person is not disqualified from representing a party in a QCAT proceeding.
62. Section 24 of the LPA prevents a person from engaging in legal practice in the Queensland jurisdiction unless the person is an Australian legal practitioner (or one of the exemptions under this provision applies). An Australian Legal Practitioner is an Australian lawyer who holds a current local practicing certificate or a current interstate practicing certificate.¹²

¹² *Legal Profession Act 2007* (Qld) s 6.

63. In effect this potentially imposes a higher level of disqualification than is applied in the Courts in relation to a legal representative, if despite the professional conduct findings, the practitioner still holds a practicing certificate.
64. Some Members have expressed the view that given the significant number of self-represented litigants before the Tribunal and the power imbalance or vulnerability of many parties in proceedings before the Tribunal, maintaining this higher standard, is the preferred option and thus no amendment to s 43(4) of the QCAT Act is required.

Consultation question 20

Q20 Should applications for leave to be represented be decided by the Principal Registrar or a delegate of the Principal Registrar, as well as the tribunal? If so:

- (a) Should there be a mechanism to review this decision?
- (b) How should that mechanism work?

Summary

65. Again, this is ultimately a matter of policy.
66. However, given that many applications for leave to represented are not complicated, there would be operational efficiencies to be gained if these decisions could be determined at Registrar level. Whether that is done by the QCAT Act expressly stating that such applications can be heard and determined by the Principal Registrar, and/or a delegate of the Principal Registrar; or by creating a category of “judicial registrar” and giving both the Principal Registrar and the judicial registrar express power, would depend on what else the Minister has in mind in respect of Registry structure. Either could work, if resourced.
67. Under either option, decisions on such applications should not be the exclusive domain of the relevant Registrars – rather it would be a concurrent power – that is Members and Adjudicators would retain the power. The Tribunal could make operational decisions as to which matters are determined by the relevant Registrars and which should be determined at Tribunal level.
68. If the first option is adopted, the legislation will need to make it abundantly clear that:
 - a) The Principal Registrar has power to hear and determine such applications; and
 - b) That power is delegable; and
 - c) Who the power can be delegated to.
69. If the second option is adopted, the legislation will need to make it clear that the Principal Registrar and Judicial Registrars have power to hear and determine such applications.
70. Under both options, it would probably be prudent to make it clear that it is not necessary for the President to constitute the Principal Registrar or delegate, or Judicial registrar, as “the Tribunal” to hear and determine the application (or a similarly worded constitution provision). As a matter of operational expedience, it would be better if the

legislation just makes it plain that the Principal Registrar or delegate (or judicial registrar) can hear and determine these without having to be “constituted” for each matter.

71. Further, given these decisions involve the exercise of judicial discretion, there should be a minimum level of qualification for a Registrar to deal with same. Reasonable minds may differ as to what this minimum level should be. Perhaps it might be an Australian lawyer of at least 5 years standing, so as to marry with the lowest level of qualifications required of the current categories of judicial officers at QCAT (ie, adjudicators need to be Australian lawyers of at least five years standing).
72. There should be an appeal avenue to QCATA from such decisions, just as there is an avenue from such a decision made by an adjudicator or member. The QCAT Act will need to expressly set this out. Conceivably, this avenue of “appeal” could be similar to the review power in section 35(4) of the QCAT Act in respect of decisions to reject an application or accept with conditions,¹³ however my view is that the better means would be an appeal direct to QCATA: it is more efficient (QCATA being the last step that can be taken in appealing a decision in the Tribunal) and QCATA is very well placed to hear and determine such appeals.
73. The language of the current appeal provision for appeals from members and adjudicators is an appeal from “the Tribunal”: s142 of the QCAT Act. The legislative drafters would need to have in mind that “the Tribunal” is usually taken to refer to the Tribunal as constituted by the President for a proceeding (ie, a Member or an Adjudicator, or up to three of same) and is not a reference to Registry personnel.
74. As such, if the legislative means for establishing an appeal avenue from a decision of a Registry to grant or refuse legal representation to amend s142 of the QCAT Act, the legislation would need to make it plain that for the purpose of that section “the Tribunal” at first instance includes an appeal from a decision of the Principal Registrar or delegate/Judicial Registrar on decisions to grant or refuse leave to be represented, or the provision will need to add this category of decisions to the decisions that s142 applies to. Alternatively, a stand alone provision could be created to create the avenue of appeal. How the objective can best be achieved is a matter well within the expertise of experienced legislative drafters, but QCAT would be happy to provide any feedback it can on any proposed draft should the suggestion for enabling certain Registrars to make decisions on applications for leave to be represented should be taken up.

¹³ Section 35(4) QCAT Act provides: If the Principal Registrar rejects an application or referral, or accepts an application or referral on conditions—

(a) the Principal Registrar must notify the applicant that the applicant may request the Principal Registrar to refer the decision to the tribunal for review; and
(b) if the applicant makes the request, the Principal Registrar must refer the decision to the tribunal for review.

75. I hope this response is of some assistance to the Review in carrying out its remit. As always, please do not hesitate to contact me should you have any queries or if I am able to be of assistance.



The Honourable Justice Kerri Mellifont

Supreme Court of Queensland

President of the Queensland Civil and Administrative Tribunal