

Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013

Report No. 28

Legal Affairs and Community Safety Committee

April 2013

Legal Affairs and Community Safety Committee

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Contents

Abbreviations	iv
Chair's foreword	v
Recommendations	vi
1. Introduction	1
1.1 Role of the committee	1
1.2 Referral	1
1.3 Inquiry process	1
1.4 Policy objectives of the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013.	1
1.5 Consultation on the Bill	2
1.6 Should the Bill be passed?	3
2. Examination of the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013	4
2.1 History of Justices of the Peace	4
2.2 Use of Justices of the Peace in Queensland Courts and Tribunals	4
2.3 Remote Justices of the Peace Magistrates Court Program	5
2.4 Achievement of policy objectives in the Bill	6
2.5 Justices of the Peace – increase in responsibilities and relative experience	6
2.6 Sitting Fees	8
2.7 Minor civil disputes/jurisdictional limitation	9
2.8 Review and monitoring	10
2.9 Evaluation of the trial	11
2.10 Other suggested amendments to the Bill raised in submissions	12
3. Fundamental legislative principles	14
3.1 Rights and liberties of individuals	14
3.2 Institution of Parliament	16
3.3 Explanatory Notes	17
Appendices	18
Statement of Reservation	19

Abbreviations

Attorney-General	The Hon Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
JP	Justice of the Peace
JPCD Act	<i>Justice of the Peace and Commissioners for Declarations Act 1991</i>
QAILS	Queensland Association of Independent Legal Services Inc
QCAT	Queensland Civil and Administrative Tribunal
QCAT Act	<i>Queensland Civil and Administrative Tribunal Act 2009</i>
QLS	Queensland Law Society
REIQ	Real Estate Institute Queensland

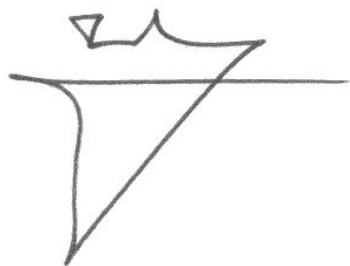
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this Report to the House.



Mr Ian Berry MP

Chair

April 2013

Recommendations

Recommendation 1 **3**

The Committee recommends the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013 be passed.

Recommendation 2 **11**

The Committee recommends that a program of regular, continual professional development opportunities be provided to the QCAT JPs.

Recommendation 3 **12**

The Committee recommends the evaluation framework for the QCAT JP trial captures information on the skills and experience of the participating applicants, appropriately anonymised and sorted into broad categories (such as years of age, gender, post-admission legal experience, other qualifications etc).

Recommendation 4 **12**

The Committee recommends the evaluation framework for the QCAT JP trial is made publicly available prior to the expiration of the trial and the results of the evaluation are tabled in the Legislative Assembly prior to any decision to continue the trial for an extended period.

1. Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The Committee's primary areas of responsibility include:

- the Department of Justice and Attorney-General;
- the Queensland Police Service; and
- the Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of the fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

1.2 Referral

The Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013 (the Bill) was introduced into the Legislative Assembly and referred to the Committee on 19 March 2013.

The Committee of the Legislative Assembly resolved, in accordance with Standing Order 136(2), that the Committee was required to report back to the Legislative Assembly by 24 April 2013.

1.3 Inquiry process

On 20 March 2013, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill. The Committee also invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department and received three submissions (see **Appendix A**). The advice from the Department and the submissions are published on the Committee's webpage at www.parliament.qld.gov.au/committees.

1.4 Policy objectives of the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013.

In a pre-election commitment, the Government committed to trialling an expansion of the role of justices of the peace (JP) in hearing and determining minor legal disputes in the Queensland Civil and Administrative Tribunal (QCAT) jurisdiction. This was reiterated in the *Six Month Action Plan January-June 2013*.

The objective of the Bill is therefore to enable the appointment of JPs to QCAT, so that certain types of matters² may be heard by two JPs, one of whom must be legally qualified.

A trial will be conducted over six months commencing June 2013 at Brisbane, Ipswich, Southport, Maroochydore, and Townsville. The objectives of the trial are to:

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 94.

² Minor civil disputes, excluding disputes with a value of more than \$5,000 and urgent residential tenancy matters.

- reduce the average time taken to finalise all minor civil dispute applications and improve the clearance rate for all minor civil dispute applications in the trial sites;
- reduce the cost of hearing minor civil disputes within the trial scope;
- enable QCAT adjudicators, judicial registrars (who act as QCAT adjudicators in regional areas and magistrates (who act as QCAT members in regional areas) to deal with more complex matters;
- recognise the substantial voluntary contribution of JPs to the community and provide opportunities to improve, develop and expand their role; and
- contribute to Government commitments to improve the administration of Queensland's justice system and frontline services for Queenslanders.

1.5 Consultation on the Bill

The Committee notes prior to the introduction of the Bill, there was broad consultation undertaken by the Department. A range of stakeholders were consulted by the Government including:

- President of QCAT;
- Chief Magistrate;
- Legal Aid Queensland;
- Residential Tenancies Authority;
- Real Estate Institute of Queensland;
- Queensland Law Society;
- Bar Association of Queensland;
- Queensland Association of Independent Legal Services;
- Queensland Public Interest Law Clearing Housing;
- Tenants Union of Queensland;
- Association of Justices of the Peace and Commissioners for Declarations Inc;
- Justice of the Peace Society (Qld);
- Queensland Justices Association;
- Caboolture Region Justices Association Inc; and
- Gold Coast Justices Association Inc.³

There were a number of submissions received by the Government throughout its prior consultation which lead to amendments to the draft Bill prior to it being introduced and referred to the Committee for consideration. The Explanatory Notes state:

Where possible, concerns related to the draft Bill have been addressed in the final Bill. These changes included increasing and equalising the sitting fee for justices of the peace appointed to QCAT.⁴

The Committee is pleased to note that stakeholders were invited to comment not simply on the Government's policy but on a draft bill.⁵

The Committee understands that sometimes time constraints on the implementation of policy do not allow for an exposure bill to be publicly released to stakeholders. However, in this instance the Committee commends the Attorney-General and his Department for engaging with stakeholders early in the developmental phase of the legislation and seeking comments on a draft bill.

³ *Explanatory Notes*, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 3.

⁴ *Explanatory Notes*, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 3.

⁵ *Explanatory Notes*, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 3.

1.6 Should the Bill be passed?

Standing order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed. After examination of the Bill, including the policy objectives which it will achieve and consideration of the information provided by the Department and from submitters, the Committee considers that the Bill should be passed.

Recommendation 1

The Committee recommends the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013 be passed.

The Committee has also made some specific recommendations on the Bill which the Committee considers will enhance the achievement of the Government's policy objectives. Those recommendations are set out in Part 2 of this Report.

2. Examination of the Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013

2.1 History of Justices of the Peace

To put this new use of JPs as described in the Bill into context, the Committee found it useful to consider the history of JPs and how they have evolved over time. A short summary of the history of JPs included in the Queensland JP Handbook is set out below.

The JP role dates back to the 14th century when King Edward III introduced an officer known as a 'peace officer' into English law to deal with minor offences and to 'guard the peace', thereby 'freeing up' judges to deal with more serious offenders. The peace officers could use the title 'Justice' and gradually became known as justices of the peace or JPs.

JPs tended to be drawn from the landed gentry. The role was a voluntary one and JPs were highly respected members of the community. Possibly because JPs tended to belong to the same class of society as Members of Parliament, they had a direct interest in seeing laws were actually implemented and enforced. JPs had power to try misdemeanours and infractions of local laws.

In England, until elected county councils were established in the 19th century, JPs administered counties, performing functions such as regulating food supplies, building and controlling roads and bridges and fixing wages.

In 1835, legislation removed the power to appoint JPs from municipal councils which had it and replaced it with the current process of Crown appointment. The JP role expanded over time and spread to the Australian colonies, including Queensland.

These days, JPs are drawn from a wider section of the public but are still respected members of the community who are entrusted to undertake special responsibilities – from witnessing signatures on documents (e.g. statutory declarations and affidavits) to sitting on certain types of court matters. Their role of dealing with routine type matters enables lawyers and courts to devote more time to cases that require legal training.

The functions and responsibilities of JPs have become more complex such that, at present, the role has been taken over partly by the appointment of professionally qualified magistrates. However, JPs still play an important role with various responsibilities. The JP Handbook (page 10) comments that JPs' importance can be illustrated through their part in acting as a check on powers of state authorities, including the Queensland Police Service through determination of matters such as warrants.⁶

2.2 Use of Justices of the Peace in Queensland Courts and Tribunals

Prior to 1991, there was just one level of JP in Queensland and the JP's role was very broad. The JP had administrative responsibilities (such as witnessing signatures on documents); 'non-bench' judicial functions (e.g. issuing summonses and warrants and attending police records of interview); and 'minor bench' duties (including adjournments and hearing bail applications).⁷

⁶ Source: [JP Handbook](#), page 10.

⁷ Source: [JP Handbook](#), pages 11-16.

In 1991, to streamline the functions and processes of JPs, the *Justice of the Peace and Commissioners for Declarations Act 1991* (JPCD Act) separated the single JP role into three parts as follows:

<i>Commissioners for Declarations</i>	<i>Administrative functions only</i> (i.e. do not have any judicial role)
<i>Justices of the Peace (Qualified)</i>	<i>Administrative functions and Non-bench judicial duties and Minor bench duties</i>
<i>Justices of the Peace (Magistrates Court)</i>	<i>Administrative functions and Non-bench judicial duties and Power to constitute – with one other JP (Magistrates Court) – a Magistrates Court to deal with pleas of guilty for simple offences.</i>

The Department set out in its briefing to the Committee, details of how JPs have been used in Queensland Courts. The Department advised:

The Justices Act 1886 enables two justices of the peace to constitute a magistrates court. However, the powers of justices of the peace to constitute a court are limited by section 29 JPCD Act. Section 29(3) limits the power of a Justice of the Peace (Qualified) to constitute a court to the taking or making of a procedural action or order. This would include, for example, issuing a summons, granting bail, issuing a warrant or adjourning a proceeding. The power of a Justice of the Peace (Magistrates Court), in addition, included the power to:

- *hear and determine charges for simple (which, under the Justices Act 1886, includes indictable offences able to be dealt with summarily) or regulatory offences where the defendant pleads guilty; and*
- *conduct committal hearings (section 29(4) JPCD Act).*

These limitations apply unless another Act expressly overrides them (section 29(7) JPCD Act).⁸

The Department further advised that in practice the duties of JPs are generally limited to witnessing documents and issuing summonses and warrants. The Department referred to the Queensland Law Reform Commission Report no 54 – *The role of Justices of the Peace in Queensland* (2000). That report found there was limited use of JPs conducting committal hearings and as the Department sets out: *since the 1970's there has been an ongoing trend towards professionalisation of the magistracy and a decreasing trend in utilising justices of the peace for court matters.*

2.3 Remote Justices of the Peace Magistrates Court Program

The Remote Justices of the Peace Magistrates Court Program began in 1993 as part of the Government's response to the recommendations of the *Royal Commission into Aboriginal Deaths in Custody 1991*. If an Indigenous community elects to participate, two JPs may constitute a court in the absence of a magistrate and these JPs are drawn from the relevant community.

The Department offers training to suitable members of participating communities so that they can become JPs (Magistrates Court). This program gives the communities greater access to courts to deal with local legal issues more frequently than waiting for a court circuit to the area. It also seeks to

⁸ Letter from the Department of Justice and Attorney-General dated 26 March 2013, page 2.

assist in overcoming the difficulties that Aboriginal and Torres Strait Islander people face in coming into contact with the criminal justice system.

The JPs (Magistrates Court) are qualified to sit on matters dealing with simple offences and some indictable offences that can be dealt with summarily where the defendant pleads guilty. Currently, JPs hear DVPOs, by-law offences, traffic matters, and bail applications. They sometimes, but rarely, conduct committal hearings (although this power is rarely used and likely to be removed).

The Department has advised that JPs (Magistrates Court) currently sit in five remote communities on a monthly basis and in two other communities every three months.⁹

2.4 Achievement of policy objectives in the Bill

The objective of the Bill is achieved by amending the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act) to conduct a trial which will enable JPs to be appointed to QCAT by Governor in Council and to enable the tribunal to be constituted by two JPs, one of whom must be a lawyer, to hear and decide certain minor civil disputes.

It is noted from the material set out above, that the proposed trial represents a significant increase in the responsibilities of JPs enabling them to make judicial decisions in the civil jurisdiction.

The Bill provides for similar appointment, resignation, removal and immunity provisions for JPs as for QCAT members and adjudicators. However, it limits the jurisdiction of JPs to minor civil disputes, excluding disputes with a value of more than \$5000 and urgent residential tenancy matters, and to locations specified in the Queensland Civil and Administrative Tribunal Regulation 2009.

The Bill amends the Queensland Civil and Administrative Tribunal Regulation 2009 to specify the trial locations and to set out the sitting fee for JPs.

The Bill does not amend the *Justices of the Peace and Commissioners for Declarations Act 1991* and does not affect the status of the JPs appointed to QCAT as JPs under that Act. Those appointed justices will be still able to perform the normal JP duties outside of QCAT and will still be able to use the title 'Justice of the Peace (Qualified)' or Justice of the Peace (Magistrates Court)' for this purpose.

2.5 Justices of the Peace – increase in responsibilities and relative experience

As stated above, the proposed trial will greatly increase the responsibilities of those JPs who participate in the QCAT trial by effectively requiring them to make judicial decisions in the civil jurisdiction as a panel of two members.

The Department advised that in the QCAT trial:

- *justices of the peace will hear and decide contested matters that are often accompanied by a high degree of conflict between the parties;*
- *justices of the peace will be required to make findings of fact and law, apply the relevant law, make enforceable decisions and give oral reasons for decisions at the time of the hearing;*
- *the hearings will be open to the public and recorded and the parties are entitled to a copy of the oral reasons on audio CD;*
- *the justices' of the peace decision will be subject to appeal to the QCAT appeal tribunal (with leave); and*

⁹ Letter from the Department of Justice and Attorney-General dated 26 March 2013, page 2.

- *although the matters will have a low monetary limit, these disputes can involve legal issues of some complexity.*¹⁰

The Department stated that to equip individuals with the necessary skills to perform this work, applicants will participate in five days of training and assessment.¹¹

Nonetheless, in its submission to the Bill, the REIQ raised concerns that JPs “*may not have the necessary skills and knowledge required to adjudicate the matters they are entitled to hear and determine under the Bill.*”¹² The REIQ also suggested that JPs should undergo training specific to tenancies, dispute resolution and procedural fairness.

With specific reference to the experience needed to discharge the responsibilities of hearing and deciding QCAT matters, Queensland Association of Independent Legal Services Inc (QAILS) was concerned that:

As the Bill currently sits, it is possible for first year lawyers, with only limited practical legal experience, to be called upon to answer complex questions of law in matters between parties with complex behaviours at times of significant stress.

QAILS believes that the following amendments should be made to the Bill to ensure that JPs engaged as QCAT members are qualified, experienced and able to provide fair, consistent and correct decisions:

1. *the definition of legally qualified QCAT justice of the peace in cl 7 of the Bill should be amended to ‘means a QCAT justice of the peace who is an Australian lawyer **of at least 3 years standing.**’*
2. *The following sub-section should be inserted into proposed section 206O of the Bill:*
‘A person is eligible for appointment as a justice of the peace (QCAT) if the person is a justice of the peace of at least 5 years standing.’¹³

Finally, the Queensland Law Society (QLS) as the peak professional body of solicitors in Queensland submitted:

*We are particularly concerned that the trial now removes the number of years of experience for a JP (legally qualified) and JP (qualified) to sit and determine minor civil disputes. In our view this undermines the public's confidence that the matter will be heard by persons with adequate experience and understanding of the law and Tribunal processes. It is important to note that legal qualifications and the practice of law are, more times than not, at different ends of the spectrum, which is why it is critical that persons presiding in QCAT for these matters have sufficient legal practice experience. We further note that there are significant time and cost implications for educating and training inexperienced persons. We also consider this trial to be an unnecessary impost on both the community and Tribunal as appointing persons with no or very limited experience may result in inconsistent decision making and further cost and time expended by an increase in appeals.*¹⁴

The QLS further submitted:

We renew our concerns above that no legal experience is required for QCAT JPs to sit. We also consider it to be an unnecessary impost on cost and time to have two persons sit and determine matters, particularly where one person is an Australian Legal Practitioner. From a

¹⁰ Letter from the Department of Justice and Attorney-General dated 26 March 2013, page 3.

¹¹ Letter from the Department of Justice and Attorney-General received 26 March 2013, page 8.

¹² Submission No. 1, Real Estate Institute Queensland, page 3.

¹³ Submission No. 2, Queensland Association of Independent Legal Services Inc, page 2.

¹⁴ Submission No. 3, Queensland Law Society, page 3.

*practical perspective we consider that there ought to be further thought to the proposal to approach universities and legal practice courses for law graduates to undertake voluntary training at QCAT, similar to the activities of a Judge's associate or a Magistrates' clerk, to provide assistance to presiding members.*¹⁵

The QLS went further than QAILS submitting that only JPs with legal qualifications and experience sit as a QCAT JP. In the alternative, the QLS submitted similar to QAILS that the legally qualified JP has three years post admission experience and the non-legally qualified JP has five years' experience.¹⁶

In responding to these submissions, the Department confirmed that the eligibility requirements were revised (experience lessened) from the original proposal in the draft Bill to encourage a greater number of applicants for the trial.¹⁷

The Department was satisfied that the compulsory five days of training would adequately prepare JPs to undertake the role. The training is stated to include modules which deal with protocols and behaviour required of JPs in hearing QCAT matters (for example, procedural fairness, independence, accountability and transparency) and modules on the subject matter constituting QCAT's minor civil disputes jurisdiction, including residential tenancy disputes.¹⁸ The Department also advised that applicants will be assessed using a practical performance based exercise.¹⁹

The concerns raised by stakeholders in relation to the level of experience of QCAT JPs are noted. The Committee considers however that there should be no requirement to specify in the Bill, any particular level of experience that must be met to perform the duties of either a legally qualified JP or a non-legally qualified JP.

The Committee is satisfied that the application process being undertaken by the Department is rigorous and will ensure that only those deemed as suitable will be able to sit as a QCAT JP. The Committee notes the advice from the Department that as at 20 March 2013, there were 12 legally qualified and 56 other JPs assessed as suitable for appointment and 23 applications from legally qualified persons (11 of whom are yet to be appointed as JPs) and 51 applications from other JPs.²⁰

Finally, the Committee notes the additional safeguards that have been included in the Bill, including:

- Legal support being provided to the JP panels on sitting days by an experienced QCAT member or adjudicator;²¹ and
- The QCAT JPs being able to refer a question of law to the Tribunal President.²²

2.6 Sitting Fees

The issue of appropriate level of sitting fees payable to QCAT JPs has been raised in submissions. The Bill provides for a daily sitting fee of \$100 to be paid to all QCAT JPs.²³

The Department advises that the draft Bill, set the daily sitting fees at \$75 for a legally qualified JP and \$37 for the other JP. Submissions received at that time showed concern about paying a higher

¹⁵ Submission No. 3, Queensland Law Society, page 3.

¹⁶ Submission No. 3, Queensland Law Society, page 3.

¹⁷ Letter from the Department of Justice and Attorney-General dated 10 April 2013, page 6.

¹⁸ Letter from the Department of Justice and Attorney-General dated 10 April 2013, pages 3-4 and 7.

¹⁹ Letter from the Department of Justice and Attorney-General dated 10 April 2013, page 4.

²⁰ Letter from the Department of Justice and Attorney-General dated 23 March 2013, page 4.

²¹ Letter from the Department of Justice and Attorney-General dated 23 March 2013, page 8.

²² Clause 7 (proposed section 206I) of the Bill.

²³ Clause 12 (proposed regulation 18) of the Bill.

sitting fee for the legally qualified JP; while others thought the sitting fee would be a disincentive for legally qualified JPs to apply.²⁴

Despite this increase in the daily sitting fees, two submitters still considered that the daily fees were too low. The REIQ submitted:

*Whilst we understand these fees are designed to reflect the voluntary nature of JPs' activities, we are concerned that the fees are too low and will not attract adequate numbers of JPs and/or the quality of candidate required for such an important role.*²⁵

The QLS stated in its submission to the Committee:

*We are also concerned that, if the trial is to go ahead, the proposed low level of remuneration proposed to be paid to legally qualified justices of the peace will act as a disincentive and will lessen the initiative's effectiveness.*²⁶

The QLS recommended amendments to the daily sitting fees as follows:

We are of the view that the amount nominated for the daily sitting fee for a legally qualified justice of the peace (QCAT) - \$100 is nominal and does not represent the breadth of legal skill and experience of an Australian lawyer or Australian Legal Practitioner. Compare this daily sitting fee with a sessional member of QCAT - for a meeting over 4 hours - where the amount paid is \$543. This will act as a disincentive and may lessen the effectiveness of the initiative.

*The Society therefore recommends a revision to the daily sitting fee for legally qualified justices of the peace to be in accordance with the District Court scale of costs with a cap which is below the sessional allowance. We also suggest that there be consideration in approaching universities and legal practice courses for law graduates to undertake voluntary training at QCAT, similar to the activities of a Judge's associate or a Magistrate's to provide assistance to presiding members.*²⁷

The Department has advised that the sitting fee of \$100 is intended to reflect the essentially voluntary nature of the office of a JP.²⁸ The Committee concurs with the Department and considers that prospective JPs applying to participate in the trial would clearly understand the nature of the service they are providing and that it is consistent with the voluntary ethos of JPs that has developed over many years. The Committee does not consider that the amount of the sitting fee ought to be increased further.

2.7 Minor civil disputes/jurisdictional limitation

New section 206L outlines the jurisdiction of the tribunal as constituted by two JPs. Justices of the peace will be able to hear minor civil disputes with a value of no more than \$5000, together with urgent residential tenancy applications.²⁹

The Explanatory Notes state:

²⁴ Letter from the Department of Justice and Attorney-General dated 23 March 2013, page 7.

²⁵ Submission No. 1, Real Estate Institute Queensland, page 3.

²⁶ Submission No. 3, Queensland Law Society, page 2.

²⁷ Submission No. 3, Queensland Law Society, page 5.

²⁸ Letter from the Department of Justice and Attorney-General dated 10 April 2013, page 6; Letter from the Department of Justice and Attorney-General dated 18 April 2013, page 7.

²⁹ See section 415 of the *Residential Tenancies and Rooming Accommodation Act 2008*. These include applications to terminate a tenancy and applications to prevent a person from causing damage or injury.

*Restricting the jurisdiction of QCAT justices of the peace to claims of \$5000 or less will enable members, adjudicators and magistrates sitting as members of QCAT to deal with more complex matters, while ensuring justices of the peace deal with more minor matters.*³⁰

The primary objectives of the trial are to reduce the time and cost of hearing minor civil disputes, and improve clearance rates. In this regard, REIQ was strongly supportive of the Bill, anticipating that the proposed amendments would “considerably reduce time delays provided that a sufficient number of JPs are appointed and jurisdictional limitations are reasonable.”³¹

With respect to the proposed jurisdiction of QCAT JPs, REIQ went on to express concern that, based on anecdotal information, “the monetary threshold requirement for non-urgent (applications) may limit the number of RTRA related applications JPs may hear....the purpose of the amendments may be undermined if these limitations result in JPs being unable to hear most residential tenancy applications.” REIQ recommended that “further analysis...be undertaken to ensure these limitations do not exclude the very same applications that the Bill is purporting to positively impact on.”³²

The QLS submitted that *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* and building matters be excluded from the trial as they have a considerable element of complexity and often involve reliance on expert evidence.³³

While the Committee appreciates that there are differing viewpoints, it regards the proposed jurisdiction of the tribunal as constituted by two JPs as appropriate (on the proviso that the JPs are appropriately qualified which has been discussed above), and notes that it was specifically arrived at with the intention of enabling more senior QCAT members to deal with more complex matters and improving clearance rates.

The Committee does not recommend any amendment to the proposed jurisdiction of the QCAT JPs.

2.8 Review and monitoring

The primary safeguard in relation to the proposed amendments is section 167 of the *Queensland Civil and Administrative Tribunal Act 2009*, which requires the President to have specific regard to the following factors when allocating persons to constitute the tribunal for a particular matter:

- (a) the nature, importance and complexity of the matter;
- (b) the need for the tribunal hearing the matter to have special knowledge, expertise or experience relating to the matter;
- (c) any provision of the Act, an enabling Act or the rules that may be relevant;
- (d) any other matter the president considers relevant.

This process should assist in ensuring that JPs are assigned to hear matters which they are appropriately skilled to handle. In addition, an avenue of appeal to the QCAT appeal tribunal exists. As mentioned in part 2.5 above, the Bill provides for the presiding QCAT JP to refer a question of law before the Tribunal to the President.³⁴

This safeguard will therefore provide a tribunal constituted by QCAT JPs an avenue to seek assistance in circumstances where it considers that it may not have the skills to determine some complex legal questions.

³⁰ Explanatory Notes, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 6.

³¹ Submission No. 1, Real Estate Institute Queensland, page 2.

³² Submission No. 1, Real Estate Institute Queensland, page 2-3.

³³ Submission No. 3, Queensland Law Society, page 3.

³⁴ Clause 7 (proposed section 206I) of the Bill.

In addition to the above, the REIQ suggested that consideration be given to other safeguard mechanisms for use beyond the trial period such as random audits, quality checks and ongoing professional development training.³⁵

The Committee considers that the existing safeguards are sound, however sees merit in REIQ's suggestion that ongoing professional development be provided to the QCAT JPs with the aim of ensuring they are kept fully apprised of issues within the ambit of their responsibilities.

The Committee considers that this proposal is consistent with the 'First Term Tasks' set out in the Premier's Ministerial Charter Letter sent to the Attorney-General on 10 April 2012. One of these specific tasks was stated as:

*Engage with community and training providers to deliver Justice of the Peace programs and continuing professional development.*³⁶

The Committee considers that providing professional development programs to sitting QCAT JPs will neatly dovetail into the above (broader) task and also ensure that the quality of QCAT decisions remains at a high standard.

Recommendation 2

The Committee recommends that a program of regular, continual professional development opportunities be provided to the QCAT JPs.

2.9 Evaluation of the trial

In its submission, QAILS commented that the Bill contained no information about the proposed evaluation of the trial and suggested the trial should be independently evaluated with feedback sought from QCAT users, their legal representatives and other interested stakeholders.³⁷

The Department advised that the trial will be evaluated by an officer sourced from the Criminal Justice Research Unit in the Department of the Premier and Cabinet. A mid-trial evaluation report is expected to be produced in August 2013 with the final report due in February-March 2014.³⁸ It is understood that the evaluation framework for the trial is currently being finalised. However, the Department reports that the evaluation will examine:

- whether JPs meet QCAT benchmarks for timeliness and quality at a lower cost;
- whether clearance rates and time taken to finalisation for the types of minor civil disputes the subject of the trial have improved at the trial sites;
- the extent to which adjudicators, the judicial registrar and magistrates have been freed up to focus on more complex matters.³⁹

Feedback is also expected to be sought from QCAT clients, JPs participating in the trial and other stakeholders.⁴⁰

The Committee has previously commented on the importance of having a thorough and rigorous evaluation to inform the success of a trial.⁴¹ Although those previous comments were made in relation to a criminal justice initiative, the Committee nonetheless considers that for any evaluation

³⁵ Submission No. 1, Real Estate Institute Queensland, page 4.

³⁶ Accessed at: <http://www.cabinet.qld.gov.au/charter-letters/assets/bleijie.pdf>

³⁷ Submission No. 2, Queensland Association of Independent Legal Services, page 2.

³⁸ Letter from the Department of Justice and Attorney-General dated 26 March 2013, page 8.

³⁹ Letter from the Department of Justice and Attorney-General dated 10 April 2013, page 8.

⁴⁰ Letter from the Department of Justice and Attorney-General dated 10 April 2013, page 8.

⁴¹ See Committee Report No. 18, Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2013, tabled 22 November 2012, pages 15-16.

of a trial to be effective, it must be conducted with clear, measurable goals from the outset. As the Criminal Justice Research Unit will be engaged in the process, the Committee is confident that this framework will be thorough and rigorous.

As part of this process, the Committee considers that it would be appropriate for the evaluation framework to consider whether the eligibility criteria set out in Bill has been successful in attracting suitable applicants, particularly in light of concerns raised with the Committee about the skills and experience of applicants (discussed above at part 2.5). This will enable any needs and gaps to be identified and used to inform future decision making about whether the trial continues, continues with modifications or ceases.

Overall, the Committee is pleased that steps have been taken to ensure a considered evaluation of the trial is undertaken and expects that this framework will be finalised and made available prior to the expiration of the trial. Taking the above matters into account, the Committee makes the following recommendations.

Recommendation 3

The Committee recommends the evaluation framework for the QCAT JP trial captures information on the skills and experience of the participating applicants, appropriately anonymised and sorted into broad categories (such as years of age, gender, post-admission legal experience, other qualifications etc.)

Recommendation 4

The Committee recommends the evaluation framework for the QCAT JP trial is made publicly available prior to the expiration of the trial and the results of the evaluation are tabled in the Legislative Assembly prior to any decision to continue the trial for an extended period.

2.10 Other suggested amendments to the Bill raised in submissions***Duration of the trial***

The QLS submitted that there was some confusion in relation to the length of the trial. The QLS stated:

We note that in numerous media releases and in the Introductory Speech delivered on 19 March 2013 by the Attorney General it has been said that "the trial will run for six months." There appears to be an anomaly as clause 206BB(1) reads that:

"This part expires 1 year after the day this section commences."

The Department confirmed the trial will only run for 6 months.⁴² As set out in the Explanatory Notes (at page 3), there is a possibility that the trial or a modified version of the trial may be extended beyond six months, depending on the findings of the evaluation.

The Committee does not consider any amendment is necessary, however echoes its statement about the need for thorough evaluation and consideration of the results of the trial prior to it being continued for an extended period.

Reconstitution of the Tribunal

Proposed section 206F contained in Clause 7 of the Bill enables the President of the Tribunal to change who constitutes the Tribunal from two JPs to members or to an adjudicator or vice versa.

⁴² Letter from the Department of Justice and Attorney-General dated 18 April 2013, page 5.

The provision is similar to section 168 of the QCAT Act which enables to the President to reconstitute the Tribunal between members and adjudicators.⁴³ The Bill contains helpful examples of when reconstitution of the Tribunal may occur.

The QLS considered that the proposed section was inconsistent with other sections of the Bill as it: *does not restrict the type of matters the President may reconstitute QCAT to change from members and adjudicators to Justices of the Peace (QCAT). The proposed amendment is also in conflict with proposed section 206C (which sets out excluded minor civil disputes) as it would allow the President to reconstitute QCAT so that justices of the peace (QCAT) could determine matters outside minor civil dispute matters. The inconsistency should be removed.*⁴⁴

The Department responded to the QLS suggestion stating that it did not consider that there was any inconsistency between any of the new sections 206E, 206F and 206C. The Department explained section 206E provides that the Tribunal may be constituted by two QCAT JPs for matters that QCAT JPs may hear and decide under new section 206L. New section 206L provides that two QCAT JPs may hear and decide a minor civil dispute, other than an excluded minor civil dispute (defined in new section 206C), if chosen by the President to constitute the tribunal of the matter.

The Department submits that new section 206F therefore only relates to reconstituting the tribunal for a matter that two JPs may hear and decide i.e. matters as provided by section 206L.⁴⁵

The Committee agrees with the explanation provided by the Department and considers that when the sections are read together no inconsistency arises. Accordingly the Committee does not consider that any amendment to the Bill is necessary.

⁴³ *Explanatory Notes*, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 6.

⁴⁴ Submission No. 3, Queensland Law Society, page 5.

⁴⁵ Letter from the Department of Justice and Attorney-General dated 18 April 2013, pages 4 & 5.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill. The Committee brings the following to the attention of the Legislative Assembly.

3.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

Criminal History Checks

Clause 7 of the Bill inserts proposed new section 206P into the QCAT Act to permit the Minister to ask the Commissioner of the police service for a written report about the criminal history of a prospective or serving QCAT JP, including a brief description of the circumstances of a conviction or charge mentioned therein. Where the JP is a prospective QCAT JP they must first give consent to the obtaining of their criminal history. Criminal history is defined in Schedule 3 of the Act to include convictions that have become spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986* as well as charges.

At its most basic this arguably could interfere with the reasonable expectation of personal information privacy that a JP might have in respect of their criminal history. The Bill does however contain some safeguards in relation to the use that may be made of criminal history information by the Minister. Firstly, before using the information to determine whether a person should continue to serve as a QCAT JP, or be nominated for appointment as a QCAT JP, the Minister must disclose the person’s criminal history information to them and allow the person a reasonable opportunity to make representations to the Minister about that information. Further, the Minister must ensure a report given under section 206P is destroyed as soon as practicable after it is no longer needed for the purpose for which it was requested.

The criminal history check requirements for serving and prospective QCAT JPs mirror those for senior and ordinary QCAT members under section 184 of the Act and adjudicators under section 199 of the Act. The Explanatory Notes for the *Queensland Civil and Administrative Tribunal Bill 2009* (now the QCAT Act) offered the following rationale for why criminal history checks of potential and serving QCAT members and adjudicators were desirable:

These provisions are required primarily for the child protection jurisdiction of QCAT and mirror the criminal history screening provisions currently set out in section 17 of the Children Services Tribunal Act 2000. This section was originally justified on the basis that tribunal members, in reviewing decisions about vulnerable children in the child protection system, are likely to have direct or indirect contact with, and access to personal details about, children and young people.

This power is consistent with the blue card provisions of the Commission for Children and Young People and Child Guardian Act 2000, although, unlike that Act, investigative information cannot be accessed.

Because QCAT members and adjudicators could be expected to sit on a range of matters and may not be confined to sitting only on matters in a particular jurisdiction, it is necessary for all members and adjudicators to be subject to the same screening regime.

The above rationale relating to the QCAT child protection jurisdiction that is used to justify intrusive criminal checks of prospective and serving QCAT members and adjudicators arguably does not extend to justifying criminal history checks of prospective or serving QCAT JPs as their limited jurisdiction as set out in section 206B will only extend to the hearing of 'particular minor civil disputes'. The Explanatory Notes for the current Bill, while stating the provisions replicate similar provisions for member and adjudicators currently in the QCAT Act, make no reference as to why those existing provisions were originally included in the QCAT Act.

Notwithstanding the above, the Committee considers that other public policy considerations such as maintaining public confidence in the integrity of QCAT justify the conduct of criminal history checks on serving and prospective QCAT JPs.

Immunity from proceedings

Clause 7 of the Bill also inserts the proposed new section 206BA(6) which states that section 237 of the QCAT Act applies as if a reference in section 237(1) to a member included a reference to a QCAT JP.

Section 237 of the QCAT Act currently gives the protection and immunities of a Supreme Court judge and Supreme Court proceedings to QCAT members, adjudicators and the principal registrar when performing quasi-judicial functions. Subsection 206BA(6) will serve to extend those same protections and immunities to QCAT JPs.

In respect of this extension of protection and immunity, the Explanatory Notes state:

The immunity will ensure that justices of the peace appointed to QCAT can act with appropriate confidence in carrying out their judicial role in the community interest. This role would be difficult to carry out if the office holders or others involved in the proceeding were subject to allegations and litigation taken against them personally for their actions in the office or in a proceeding. Decisions of a justice of the peace appointed to QCAT are subject to the supervision of the appeal tribunal and courts.

The Committee is satisfied that it is appropriate in the circumstances to apply the immunity to QCAT JPs in the same manner as other QCAT members.

Amendment of the Act by Regulation

Section 4(4)(c) *Legislative Standards Act 1992* requires that legislation only allows or authorises the amendment of an Act only by another Act.

In keeping with the Government's election commitment to expand and enhance the role of JPs in the community, the Bill, in proposed new Chapter 4 Part 4B, facilitates a trial of the expansion of the role of JPs to allow them to hear minor civil disputes in QCAT.

Reflective of the trialing of this newly expanded role, clause 7 of the Bill inserts proposed new section 206BB. Section 206BB(1) provides that part 4B expires one year after the day section 206BB commences.

Subsection 206BB(2) provides that before the end of that period in subsection (1), a regulation may extend the (trial) period before expiry to not more than 3 years after the day section 206BB commences.

The Explanatory Notes state in relation to the above provision:

Extension of the expiry date without the requirement to amend the Act will facilitate a smooth and efficient extension of the trial. This provision does not authorise a regulation to

amend the content of the Act. It merely extends the timeframe of its operation but limits the overall operation of the provisions to a total of three years.

Despite the above assurances, subsection 206BB(2) arguably permits a regulation to be made that alters the content of the QCAT Act because it allows the one year operative period of part 4B as prescribed in subsection 206BB(1) of the QCAT Act to be extended by up to a further 2 years by a regulation made under 206BB(2).

A provision of a bill which authorises the amendment of an Act other than by another Act is often referred to as a Henry VIII clause. The former Scrutiny of Legislation Committee (SLC) had defined a Henry VIII clause to mean a clause in an Act of Parliament which enables the Act to be amended by subordinate or delegated legislation.

The former SLC considered a clause similar to section 206BB to be a Henry VIII clause when it effectively provided that the operation of a provision of an Act could be modified by the making of a regulation. The former SLC did however consider that Henry VIII clauses may be excusable, depending on the circumstances, when the clause was to facilitate (as may apply here) the effective application of innovative legislation.⁴⁶

The Committee considers that in this instance the inclusion of the extension of the trial by regulation is justified.

3.2 Institution of Parliament

Does the legislation have sufficient regard to the institution of Parliament? – Section 4(2)(b) *Legislative Standards Act 1992*

As noted earlier in this Report, the Bill implements the Government's election commitment to expand and enhance the role of JPs in the community. The Bill will enable the conduct of a trial of the expansion of the role of JPs to hear minor civil disputes (excluding disputes with a value of more than \$5,000 and urgent residential tenancy matters) in QCAT.

The Explanatory Notes state:

[An] anticipated short time frame between passage and assent and commencement of the trial on the announced date. In order to commence the trial in the first week of June 2013, recruitment and selection processes must occur prior to commencement of the Act.

It should be noted that the positions were widely advertised in Queensland and in the proposed trial sites prior to introduction of this Bill.⁴⁷

The Department acknowledged that applicants for appointment as QCAT JPs will undergo five days of training and assessment, with Round 1 applicants having already undergone training in January and February 2013, and Round 2 applicants to undergo training in April.⁴⁸

Given the Attorney-General introduced the Bill into the House on 19 March 2013, the calling for, training and assessment of, 'Round 1 applicants' was undertaken prior to the Bill's introduction in pre-emptive anticipation of the Bill's eventual passage. Even with the Government's sizeable Parliamentary majority, early executive action to facilitate the expedient commencement of a not as yet approved legislative scheme could be considered to have a presumptive disregard for the role of the Committee, and, by extension, the Parliament.

⁴⁶ See *Legislation Alert 03/09*, Scrutiny of Legislation Committee, Queensland Legislative Assembly, at p.28

⁴⁷ *Explanatory Notes*, Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013, page 9

⁴⁸ Letter from the Department of Justice and Attorney-General dated 26 March 2013, page 2.

The general policy intent behind the Bill has been known for some time as it formed part of the Government's commitment to delivering swift and fair justice⁴⁹ and revitalising front-line justice services.⁵⁰ However, until the Bill was circulated, the specifics of the implementation of the policy were known only as *"providing increased funding of \$3.5 million over four years to expand and better support the role of Justices of the Peace, including trialling the use of JP (Magistrates Court) to hear suitable tribunal matters"*.⁵¹

The considerable Executive action already undertaken at departmental level (advertising, assessment of applicants, completion of training for prospective QCAT JPs) to prepare for the roll out of this scheme could be considered as failing to give due respect, regard or consideration to the deliberations of the Committee or the Parliament such to the extent that a whole new category of JPs have been created for the trial as opposed to using the existing JP (magistrates court) as earlier envisaged.

Steps taken to facilitate implementation of the model scheme as it is proposed in the Bill reflect a premature endorsement of the Bill's content and shows insufficient regard for the prospect that amendments to the scheme may be suggested by the Committee undertaking its statutory requirement of examining the Bill or by another Member during debate in the House.

Allowing the Executive to begin implementation of a legislatively based scheme that is yet to receive Parliamentary endorsement verges on showing an insufficient regard for the institution of Parliament and is akin to allowing the tail to wag the dog. It is possible in these circumstances that members of the Committee could feel constrained in their consideration of particular aspects of a bill when expenditure of public monies has already occurred in the early commencement of a particular policy objective.

3.3 Explanatory Notes

Part 4 of the Legislative Standards Act 1992 relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

⁴⁹ <https://lnp.org.au/revitalise-front-line-services/delivering-swift-and-fair-justice/>: accessed April 2013

⁵⁰ <https://lnp.org.au/news/leader-of-the-lnp/lnp-will-revitalise-front-line-justice-services/> :accessed April 2013

⁵¹ *State Budget 2012-13 Service Delivery Statement*, Department of Justice and Attorney-General, page 4.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
1	Real Estate Institute Queensland
2	Queensland Association of Independent Legal Services Inc
3	Queensland Law Society



LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013

23 April 2013

Statement of Reservation

I wish to submit the following Statement of Reservation to Report No. 28 of the Legal Affairs and Community Safety Committee on the *Queensland Civil and Administrative Tribunal (Justices of the Peace) Amendment Bill 2013*.

Experience

In announcing the extension of the application date for the QCAT Justices of the peace (JP) trial in a media statement dated 30 November 2012, the Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice, announced:

"To be eligible for the legal positions and preside over the panel, JPs must have been a lawyer with at least three years' standing in Australia."

"Applicants for the non-legal positions must have held an appointment for at least five years."

In a further media statement on 19 March 2013, the Attorney-General announced:

"The provision for legally qualified JP's (sic) to have five years' experience as a JP and three years' post-admission experience has been removed". This is reflected in this Bill.

In its submission to the Committee on the Bill, the Queensland Association of Independent Legal Services Inc (QAILS) advocated retaining the original intention of the trial because:

In our view, these protections would ensure that QCAT would continue to have experienced members with exposure to legal practice, statutory interpretation, procedural fairness and the rule of law.

The Queensland Law Society also held similar concerns. The QLS submitted:

We are particularly concerned that the trial now removes the number of years of experience for a JP (legally qualified) and JP (qualified) to sit and determine minor civil disputes. In our view this undermines the public's confidence that the matter will be heard by persons with adequate experience and understanding of the law and Tribunal processes. It is important to note that legal qualifications and the practice of law are, more times than not, at different ends of the spectrum, which is why it is critical that persons presiding in QCAT for these matters have sufficient legal practice experience.

We further note that there are significant time and cost implications for educating and training inexperienced persons. We also consider this trial to be an unnecessary impost on both the community and Tribunal as appointing persons with no or very limited experience may result in inconsistent decision making and further cost and time expended by an increase in appeals.

The only reason put forward by the Attorney-General for this change in policy was in his 19 March media statement, where he said it was *'to make more JP's eligible for the trial'*.

The Opposition is concerned that this is not a sound policy reason for expanding the eligibility for the trial, and queries why those originally considered unsuitable are now considered suitable for participation by the Attorney-General.

Training

The Explanatory Notes to the Bill state:

'Restricting the jurisdiction of QCAT justices of the peace to claims of \$5000 or less will enable members, adjudicators and magistrates sitting as members of QCAT to deal with more complex matters, while ensuring justices of the peace deal with more minor matters.'

The complexity of a legal issue relates to the subject matter of the dispute and the particular circumstances relating thereto, not the monetary value of the claim. A \$5000 small claim may involve more complex legal issues than a \$25,000 contractual matter. I note that the Bill enables the presiding QCAT justice of the peace to refer a question of law before the tribunal to the president. However there are no guidelines on how this provision will operate in practice.

Given the fact that the legally qualified QCAT JP is not required to have any minimum level of practical post-admission experience, adequate training before the position is assumed should be provided. This training should include legal and ethical education as well as procedural matters.

It is also important to ensure that further ongoing training is provided to all QCAT JPs to enable them to keep up to date with the demands of the position and the constant changes to the laws that they will be administering. Because these are essentially voluntary positions, with only token remuneration payable to cover costs, consideration should be given to whether there should be a training allowance provided to enable QCAT JPs to attend training sessions.

Conclusion

There are a number of other issues with which the Opposition may have some concerns in relation to the Bill. The Opposition therefore reserves its right to raise those concerns when the Bill is being considered by the Legislative Assembly.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Bill Byrne', with a long horizontal line extending to the right.

Bill Byrne MP
Member for Rockhampton