**Submission**

**to**

**Department of Justice and Attorney-General**

**Review of the *Queensland Civil and Administrative Tribunal Act 2009***

**Introduction**

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland Anti-Discrimination Act 1991 (AD Act).
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into and where possible effecting conciliation of complaints of contraventions of the AD Act and whistle-blower reprisal.
3. Complaint matters include:
   1. discrimination on the basis of any of the 16 protected attributes;[[1]](#footnote-1)
   2. sexual harassment;[[2]](#footnote-2)
   3. vilification on the basis of race, religion, sexuality or gender identity;[[3]](#footnote-3)
   4. victimisation;[[4]](#footnote-4)
   5. unlawful requests for information;[[5]](#footnote-5)
   6. requesting or encouraging a contravention of the AD Act;[[6]](#footnote-6)
   7. reprisal for making a public interest disclosure (whistle-blower reprisal).[[7]](#footnote-7)
4. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal (QCAT) for hearing and determination. The number of complaints referred to the tribunal has been:
   1. 118 – for the financial period 2011 to 2012; and
   2. 112 – for the financial period 2010 to 2011.
5. The functions of the tribunal under the AD Act include:
   1. hearing and determining complaints referred by the Commissioner;[[8]](#footnote-8)
   2. hearing and determining applications for exemptions;[[9]](#footnote-9)
   3. hearing and determining applications for interim orders before referral of a complaint;[[10]](#footnote-10)
   4. considering applications for review of a decision that a complainant has lost interest;[[11]](#footnote-11) and
   5. providing opinions about the application of the Act.[[12]](#footnote-12)
6. This submission focuses on aspects of the terms of reference that impact on the tribunal’s jurisdiction under, and the objects of, the AD Act.

**Recommendations**

1. In this submission, the Commission outlines and makes the following recommendations:
2. That no amendment is necessary to the objects of the QCAT Act and functions of the tribunal.
3. That the distinction between legally qualified members and other members be retained.
4. That section 176 of the *Anti-Discrimination Act 1991* be amended to clarify whether, for matters under the Anti-Discrimination Act other than opinions, the tribunal must be constituted by 1 or more legally qualified members, or at least one legally qualified member.
5. That section 228A of the *Anti-Discrimination Act 1991* be amended to clarify that for the purpose of considering a request to provide an opinion the tribunal must be constituted by a judicial member.
6. That section 70 of the *Queensland Civil and Administrative Tribunal Act 2009* be amended to provide that for matters under the *Anti-Discrimination Act 1991* a compulsory conference must be heard by a legally qualified member.
7. That no amendment is necessary to the specialist powers and procedures for matters under the Anti-Discrimination Act jurisdiction of the tribunal.
8. That if legal representation is to be as of right in the human rights jurisdictions, appropriate measures should to be adopted to ensure equality of access to justice.
9. That the judicial leadership structure of QCAT be retained.
10. That the internal appeals mechanism be retained.

**Objects of the Act**

1. The *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) sets out the objects of the Act and the functions of the tribunal relating to the objects.
2. The objects of the QCAT Act are:
   1. to establish an independent tribunal to deal with the matters it is empowered to deal with under this Act or an enabling Act;
   2. to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick; and
   3. to promote the quality and consistency of tribunal decisions; and
   4. to enhance the quality and consistency of decisions by decision-makers; and
   5. to enhance the openness and accountability of public administration.[[13]](#footnote-13)
3. To achieve the objects the QCAT Act requires the tribunal to:
   1. facilitate access to its services throughout Queensland; and
   2. encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative resolution processes; and
   3. ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and
   4. ensure like cases are treated alike; and
   5. ensure the tribunal is accessible and responsive to the diverse needs of person who use the tribunal; and
   6. maintain specialist knowledge, expertise and experience of members and adjudicators; and
   7. encourage members and adjudicators to act in a way that promotes the collegiate nature of the tribunal; and
   8. maintain a cohesive organisational structure.[[14]](#footnote-14)
4. The Commission considers the objects of the QCAT Act, and the functions of the tribunal relating to the objects, are still valid, and do not require amendment.

**Recommendation I**: That no amendment is necessary to the objects of the QCAT Act and functions of the tribunal.

**Distinction between legally qualified members and other members**

1. The Commission considers the distinction between legally qualified members and other members should be maintained.
2. This issue is inextricably related to the issues of the constitution of the tribunal and the leadership structure, both of which are discussed below.

**Recommendation II**: That the distinction between legally qualified members and other members be retained.

**Constitution of the tribunal**

1. Before the commencement of QCAT, tribunal functions under the AD Act were performed by the Anti-Discrimination Tribunal (ADT). The ADT was established under the AD Act and was comprised of members, one of which was president, appointed by the Governor in Council.
2. As regards qualifications of members, the AD Act provided:

A person is not eligible for appointment as a member unless the person is a barrister, solicitor, barrister and solicitor or legal practitioner of not less than 5 years standing, of the High Court or the Supreme Court of the State or another State.[[15]](#footnote-15)

1. It was also a requirement that members be appointed on a part-time basis.[[16]](#footnote-16) Consequently, members of the ADT were mostly practising barristers, and a few were practising solicitors.
2. The AD Act provided that the tribunal is constituted by 1 member of the tribunal for the purpose of conducting a hearing.[[17]](#footnote-17) In practice, all hearings were conducted by 1 member only.
3. With the introduction of QCAT, it was the Commission’s view that, for the functions under the AD Act other than providing opinions, QCAT be constituted in the same way as the ADT had been constituted. Section 176 of the AD Act was amended to provide that for matters other than providing an opinion, QCAT is to be constituted by 1 ‘legally qualified member’.[[18]](#footnote-18)
4. Section 176 of the AD Act has since been interpreted by the tribunal as a statement of sufficiency of the constitution of the tribunal rather than a mandatory prescription of the membership of the tribunal.[[19]](#footnote-19) On this interpretation of section 176 of the AD Act, for anti-discrimination matters, arguably the tribunal could be constituted by more than one member, provided one of them is a legally qualified member.
5. With the ADT, as all members were required to be barristers, solicitors or a legal practitioner of at least 5 years standing, if the tribunal was constituted by more than one member, all of them would have held qualifications in law. With QCAT however, as not all members of QCAT are required to hold qualifications in law, arguably the tribunal could be constituted by members without qualifications in law, provided at least 1 of them is a ‘legally qualified member’.
6. This may not have been the intention of the legislature. The Commission considers that section 176 of the AD Act should be amended to clarify whether it is intended that for anti-discrimination matters other than opinions, the tribunal must be constituted by one or more legally qualified members, or at least one legally qualified member.
7. Chapter 8 of the AD Act provides for the function of the tribunal to provide advice about how the AD Act applies in a specific situation at the request of the Anti-Discrimination Commissioner (Commissioner). Before QCAT, requests for opinions under this chapter were dealt with by the ADT, constituted by a single member. There was a right of appeal, by the Commissioner or a person with a relevant interest, to the Supreme Court on a question of law. Providing an opinion under the AD Act is similar to a ‘case stated’ before a court. An opinion can have significant consequences as it limits the right to make a complaint in certain circumstances.[[20]](#footnote-20)
8. For these reasons, under QCAT, an opinion can only be provided by a judicial member.[[21]](#footnote-21) This also means that under the QCAT appeal provisions, an appeal lies with the Court of Appeal rather than the appeal tribunal. Judicial member is defined in the QCAT Act to mean a Supreme or District Court judge, or a member who is a former judge.
9. Before QCAT, the ADT dealt with a number of requests for opinions under Chapter 8 of the AD Act. In some cases the ADT provided an opinion and in others it declined to provide an opinion.[[22]](#footnote-22) There have been no requests made to QCAT by the Commissioner for an opinion.
10. The Commission considers that for the purpose of considering an opinion under chapter 8 of the AD Act, the tribunal should be constituted by a judicial member. Section 228A of the AD Act should be amended to clarify that for considering whether to provide an opinion the tribunal should be constituted by a judicial member, as well as for providing an opinion.
11. QCAT’s process for dealing with complaints referred under the AD Act includes requiring the parties to attend a compulsory conference. The purposes of a compulsory conference are:[[23]](#footnote-23)
    1. to identify and clarify the issues in dispute;
    2. to promote a settlement of the dispute;
    3. to identify the questions of fact and law to be decided by the tribunal;
    4. to make orders and give directions about the conduct of the matter if it is not settled; and
    5. to make orders and give directions appropriate to resolve the dispute.
12. The compulsory conference is an important part of the dispute resolution process. The Commission does not have available to it statistics on the number of complaints under the AD Act that are resolved at compulsory conference in QCAT. Before QCAT, the percentage of matters resolved through conciliation conference at the ADT ranged from 45 to 57.[[24]](#footnote-24)
13. The requirement that the tribunal be constituted by a legally qualified member for hearing complaints under the AD Act recognises that complaints before the tribunal usually involve complex legal and/or factual issues, and include deciding questions of whether particular acts of omissions amount to a contravention of the AD Act. It is therefore appropriate that compulsory conferences are conducted by a member qualified to hear a complaint, namely, a legally qualified member. The fact that a compulsory conference is conducted by a member who would otherwise be qualified to hear the matter, should carry significant weight for the parties involved in the complaint. In the event that the complaint is not resolved, the member is able to make directions to progress the matter effectively and efficiently to hearing. If the issues are identified appropriately, the directions can ensure evidence and the hearing are confined to those issues, to aid the efficiency of the tribunal and assist self-represented parties who may otherwise struggle with the process.
14. The QCAT Act provides that a compulsory conference must be heard by 1 of either a member, adjudicator or principal register as chosen by the president.[[25]](#footnote-25) This provision should be amended to provide that for matters under the AD Act, a compulsory conference must be heard by a legally qualified member.
15. The President has broad responsibilities and functions. It is not feasible to expect that the President should personally choose who is to constitute the tribunal in all matters; the task would simply be overwhelming and would not allow time for the other important functions. The provisions in enabling Acts that specify the constitution of the tribunal in certain ways and for certain matters allow the President to delegate the function of choosing the constitution of the tribunal with confidence.[[26]](#footnote-26)

**Recommendation III**: That section 176 of the *Anti-Discrimination Act 1991* be amended to clarify whether, for matters under the Anti-Discrimination Act other than opinions, the tribunal must be constituted by 1 or more legally qualified members, or at least one legally qualified member.

**Recommendation IV**: That section 228A of the *Anti-Discrimination Act 1991* be amended to clarify that for the purpose of considering a request to provide an opinion the tribunal must be constituted by a judicial member.

**Recommendation V**: That section 70 of the *Queensland Civil and Administrative Tribunal Act 2009* be amended to provide that for matters under the *Anti-Discrimination Act 1991* a compulsory conference must be heard by a legally qualified member.

**Specialist procedures**

1. The specialist powers and procedures for matters under the AD Act are contained in the AD Act and the QCAT Rules, and are described in Appendix 1 to this submission.
2. The Commission examined the specialist powers and procedures in detail in consultation with the Department, before the commencement of QCAT. As a consequence, some provisions were repealed as they were unnecessary in view of the generic QCAT Act provisions.
3. The Commission considers the remaining specialist powers and procedures are still necessary. Amendment could be made to some of the generic QCAT Act provisions to incorporate the specialist provisions; however doing so would not reduce ‘red tape’.
4. If any change is proposed to the specialist powers and procedures for matters under the AD Act, the Commission would appreciate specific in depth consultation.

**Recommendation VI**: That no amendment is necessary to the specialist powers and procedures for matters under the Anti-Discrimination Act jurisdiction of the tribunal.

**Legal representation & accessibility**

1. The question of legal representation in matters under the AD Act, whether as of right or by leave, is a complex one. QCAT has advised that in 2011-2012, legal representation was sought in 59% of anti-discrimination cases, with leave granted in 82% of those applications.[[27]](#footnote-27) It is not clear what is meant by anti-discrimination cases, that is, whether it refers to the number of complaints referred, the number of complaints that proceed to hearing, the number of both complaints and other matters such as exemption applications and applications for orders before referral of a complaint.
2. In 2011-2012 the Commission referred 118 complaints to the tribunal. If QCAT’s statistics refer to the percentage of referred complaints, the number of applications for legal representation would be 69. The Commission has compiled a table of the number of published decisions involving applications for representation, legal and non-legal, which appears in Appendix 2.[[28]](#footnote-28) Clearly, not all applications are represented in the published decisions.
3. Before QCAT, the AD Act provided that a party may be represented before the tribunal by a solicitor, counsel or agent, with the leave of the tribunal.[[29]](#footnote-29) In practice, a non-legal representative was required to file an application and certain material for consideration of the tribunal, and legal representatives were usually granted leave.[[30]](#footnote-30)
4. For the complaint process in the Commission, a person may be represented by another person at a conciliation conference only with the permission of the Commissioner’s delegate.[[31]](#footnote-31) Criteria for deciding permission includes whether being represented will assist and not hinder the process. Legal representation in the Commission process is common, and generally legal representatives do assist the process, particularly where a party has special needs.
5. It can be a challenge for parties, particularly those with special needs, where they have had legal representation in the Commission but are then unable to obtain the leave of the tribunal to be legally represented.
6. Whether legal representation should be as of right is largely dependent on the nature of the tribunal process and the availability of legal assistance. If the process is more akin to that of a court, the need for legal representation is greater and thus the argument in favour of legal representation carries greater weight.
7. In anti-discrimination matters, complainants are usually individuals, and more complainants will be self-represented than respondents to the complaint. This is born out when comparing the number of applications for legal representation made by complainants compared to the number of applications made by respondents in the Commission’s table in Appendix 2. Respondent parties often include organisations, companies, or the State as well as individuals. The State usually has lawyers available to assist it, whether internal or external, and companies and larger organisations often utilise lawyers in defending complaints.
8. It appears from published decisions of QCAT that in complaints under the AD Act, parties are required to file and serve ‘contentions’ before participating in a compulsory conference. There are a number of published decisions made on applications to strike out a complaint or otherwise concerning contentions, and the decisions indicate that contentions are somewhat in the nature of pleadings.
9. For example, a complaint of discrimination was dismissed because the complainant had not complied with orders made by the tribunal to file and serve contentions.[[32]](#footnote-32) The Tribunal said:

* QCAT expects parties to take active steps to engage in a proceeding;[[33]](#footnote-33)
* It is essential that the applicant set out details of the complaint at the very outset of the tribunal process;[[34]](#footnote-34)
* The details should identify:
  + what facts are relied on by the applicant;
  + what that applicant is alleging is the legal basis for the complaint;
  + what impact the alleged contravention has had on the applicant;
  + what outcomes the applicant is seeking from QCAT.[[35]](#footnote-35)
* As to the purpose of the contentions:[[36]](#footnote-36)
  + it is not uncommon for the complaint and remedies sought to change between the initial complaint to the Commission and referral to the tribunal;
  + contentions enable the respondent to be informed of the particulars of the complaint and to consider whether to make an early challenge to the content.
* In this case, although the factual basis of the complaint may be able to be discerned from the complaint made to the Commission, in the tribunal the applicant is required to set out in the contentions:[[37]](#footnote-37)
  + the legal basis on which it is alleged the respondent discriminated against the applicant at work;
  + the impact the alleged contraventions have had on the applicant; and
  + the outcome the applicant is seeking from QCAT.

1. Dismissal of a complaint is a serious consequence. The reasons for failure to provide contentions is not apparent from the decision above or other decisions where complaints have been dismissed for failure to comply with directions to provide contentions. It might be reasonable to assume however that failure to provide contentions could arise simply because a self-represented party is unable to understand or do what the tribunal expects. There are a number of published decisions where self-represented complainants have provided contentions however an application has arisen and the tribunal has decided the contentions are not satisfactory. These decisions would suggest that self-represented complainants experience difficulty providing contentions as required by the tribunal.[[38]](#footnote-38)
2. In a recent decision of the tribunal, a self-represented complainant whose complaint was dismissed for failure to comply with directions to ‘set out essential elements of her complaint and her evidence in support of her complaint’ was ordered to pay the costs of the respondent.[[39]](#footnote-39) This is a very serious outcome, and concerning if the failure to comply with the tribunal’s directions was attributable to the difficulty of the tribunal’s process.
3. If QCAT requires parties to comply with a legalistic process, then arguably legal representation should be as of right. As more often than not a respondent is better able to afford legal representation, there is potential for an imbalance of power between parties. The potential imbalance is heightened as complainant’s bear the onus of proof. The QPILCH Self-representation civil law service at QCAT provides advice and assistance to people with matters under the AD Act, however the service does not provide representation or act on a person’s behalf. The Law Council of Australia has recently observed that the ‘deepening crisis of legal aid funding in Victoria was symptomatic of a national legal aid system in turmoil’.[[40]](#footnote-40) Even with greater funding of Legal Aid, many people who are unable to afford legal representation do not qualify for Legal Aid. Access to justice is limited and insufficient legal assistance impacts more heavily on the more vulnerable groups, who are often parties to matters in the human rights jurisdictions of the tribunal.
4. A means of addressing imbalances between parties is for the tribunal to utilise existing powers and functions to adopt a more ‘inquisitorial’ process where necessary and appropriate. These provisions include:

AD Act

section 208 - Evaluation of evidence

QCAT Act

section 3(b) - Deal with matters in a way that is accessible, fair, just, economical, informal and quick

section 28 - Conducting proceedings

section29 - Ensuring proper understanding and regard

Section 30 - Principal registrar to help parties and potential parties

1. The following comments of the Supreme Court in an appeal from a decision of the ADT, are nonetheless still valid, notwithstanding that QCAT is a court:[[41]](#footnote-41)

Whilst the tribunal is clearly required to comply with the requirements of procedural fairness it is important to remember that the Anti-Discrimination Tribunal is a tribunal which has been set up in a way whereby it is intended to operate differently from a court. Section 208 clearly is the basis for the way in which the tribunal is to operate and as s208(1)(b) indicates, the tribunal may inform itself on any matter it considers appropriate which means that the tribunal is an inquisitorial tribunal and not a strictly adversarial tribunal. The authors Bedford and Creyke in an analysis of Australian Tribunals indicated that:

…courts accustomed to adversarial process may fail, when reviewing their decisions, to appreciate and make due allowance for a different procedural regime imposed on tribunals. In other words, the courts may impose standards in relation to matters of fact finding, evidence testing, and the level of natural justice which are inappropriate for tribunals required to operate at the inquisitorial end of the procedural spectrum.

1. It is encouraging to see that in an application for further directions where a self-represented complainant had filed contentions that did not set out why the alleged conduct amounted to unlawful discrimination and identify the sections of the AD Act on which he relied, the tribunal refused to make further orders at that stage, and said:

As part of the requirement to be accessible, QCAT recognised that at times considerable latitude should be given to unrepresented persons who are unfamiliar with legal matters.[[42]](#footnote-42)

1. The two-tiered process for seeking remedies for contraventions of the AD Act and whistle-blower reprisal is intended to be accessible and informal so that parties are able to represent themselves. The first stage of the process is the Commission stage which is relatively accessible and user friendly for self-represented parties, with the option of parties utilising legal representation. The objectives of the tribunal are that it too should be accessible in a way that parties can represent themselves. It would however be unrealistic not to expect the tribunal stage to be more formal than the Commission stage. The more formal the process the greater the need for legal representation. These considerations need to be balanced in light of the objectives of the jurisdiction to ensure that access to justice is not compromised.

**Recommendation VII**: That if legal representation is to be as of right in the human rights jurisdictions, appropriate measures should to be adopted to ensure equality of access to justice.

**Presidential structure, independence and functions**

1. The independence of the tribunal is a fundamental and primary objective. Institutional independence and impartiality was a necessary factor for the Court of Appeal in determining that the tribunal is a court of the State within the meaning of Chapter III of the *Commonwealth* *Constitution*.[[43]](#footnote-43) The consequence of this finding is that the tribunal is vested with the power of the Commonwealth by way of section 77 of the *Constitution* and section 39(2) of the *Judiciary Act 1903* (Cth), and is thus competent to determine matters of constitutional interpretation.
2. The constitutional issue arose in a complaint of sexuality vilification under section 124A of the AD Act. The respondent contended that section 124A of the Act was invalid on the basis that if offended the implied freedom of political communication under the *Constitution*. The Court of Appeal determined upheld that the provision does not offend the implied freedom under the *Constitution* and upheld the validity of section 124A of the AD Act. In discussing an alternate construction of Chapter III the President said:

In the context of the present case, this would mean that any person the subject of a complaint under s124A could thwart the jurisdiction of QCAT simply by raising a constitutional issue, no matter how unmeritorious.

1. If the tribunal is to continue to be able to determine constitutional issues that might arise in the future, in any of its jurisdictions, the tribunal must maintain its status as a court of the State. If the tribunal had to refer constitutional issues to a higher court, the objective of dealing with matters ‘in a way that is accessible, fair, just, economical, informal and quick’[[44]](#footnote-44) would be somewhat thwarted.
2. The independence of the tribunal is essential also because the State of Queensland is a party to proceedings in a significant number of matters before QCAT, particularly in the review and anti-discrimination jurisdictions.
3. So how should the tribunal maintain or strengthen its independence and impartiality to remain a court? The Hon Duncan Kerr SC, MP (as His Honour then was) drew an analogy between observations of the High Court about framing a definition of judicial power and the framing of a definition of a ‘court’ and cited another High Court decision.[[45]](#footnote-45) He said (emphasis added and citation removed):

Various negative and positive indicia have emerged but there appears to be broad agreement that there is ‘no identifiable hallmark by which a court…may unerringly be identified. **It is largely a matter of impression**’.

1. The tribunal needs to have the gravitas and credibility of a court to engender the respect and confidence of the public. A strong judicial leadership structure is a significant feature and means of achieving respect and confidence. A significant element too is that the tribunal is subject to the supervisory and appellate jurisdictions of the Supreme Court.[[46]](#footnote-46)
2. Members of the tribunal need to perform adjudicative functions robustly without fear of interference of the executive. Although the QCAT Act mandates the independence and impartiality of the tribunal,[[47]](#footnote-47) members must act and be seen to act in this way. Independence in the exercise of judicial functions is best achieved where the person adjudicating is independent of the executive. Judges have independence because of their tenure; a judge holds office indefinitely, subject only to removal for misbehaviour or incapacity and retirement at age 70.[[48]](#footnote-48) The former ADT was comprised wholly of sessional members who were otherwise independent senior lawyers.
3. The purpose and objectives of having a tribunal would be defeated if all of the judicial junctions were to be performed by judges. Likewise there would be significant operational impediments if all of the members of the tribunal were sessional members. There needs to be a balance in the composition of the tribunal between judicial, sessional and full time membership for fixed terms.
4. The objects of the QCAT Act include establishing an independent tribunal. The Explanatory Note to the Bill states:

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 of control by the executive.[[49]](#footnote-49)

1. In the interests of the independence and gravitas of the tribunal, the Commission recommends retaining the judicial leadership structure and appeals processes.

**Recommendation VIII**: That the judicial leadership structure of QCAT be retained.

**Appeals**

1. In the Commission’s experience, the system of both internal and external appeals has worked well.
2. In matters under the AD Act here have been both internal and external appeals across 4 types of decisions:
   1. applications for legal representation - 4 appeals against decisions declining leave to be legally represented. Of those 2 were successful, leave to appeal was not granted in 1, and the appeal was unsuccessful in 1;
   2. decisions on the substantive complaint – 3 appeals, 1 yet to be decided by the appeal tribunal and 1 further appeal to the Court of Appeal, yet to be decided.
   3. costs decisions – 1 appeal, unsuccessful;
   4. application for order protecting interests before referral of complaint (section 144 of the AD Act) – 1 appeal, successful, then further appeal to Court of Appeal, unsuccessful.
3. The Commission considers the internal appeals mechanisms should be retained, as the reasons of the Independent Panel of Experts for recommending an internal appeals mechanism remain valid.[[50]](#footnote-50)

**Recommendation IX**: That the internal appeals mechanism be retained.

**Concluding remarks**

1. The Commission thanks the Department for the opportunity to make this submission into the review of the *Queensland Civil and Administrative Tribunal Act 2009.*
2. Under the respective Acts that create them, the Anti-Discrimination Commission and QCAT are separate entities, and each performs their functions independently of the other. Since QCAT commenced the Commission and QCAT have attempted to institute regular meetings between senior officers/members to discuss issues of interest or concern, and to problem solve through communication and dialogue. This is necessary in order to ensure that the administration of the complaint handling process under the *Anti-Discrimination Act 1991* is an efficient, comprehensive and coherent service to the parties involved in complaints, and to ensure that the objects of the AD Act and the QCAT Act are being realised for the benefit of the Queensland public.
3. While the Queensland Civil and Administrative Tribunal has been in existence and functioning for just over 3 years, it is the experience of the Commission that this communication can be an effective and efficient way of attempting to resolve administrative and other issues that may be of concern to either entity. The Commission is keen to continue regular dialogue with QCAT into the future, and thanks the President Justice Wilson, the former Deputy President Judge Kingham, and Senior Member Endicott for their willingness to engage with the Commission to date.

**Specialist powers and procedures for matters under the *Anti-Discrimination Act 1991***

***Anti-Discrimination Act 1991***

| **Section** | **Description** |
| --- | --- |
| 113 | Application for exemption |
| 113A | Appeal from decision on exemption application |
| 144 | Applications for orders protecting a complainant’s interests before referral to the tribunal |
| 174A | Tribunal’s functions |
| 175 | Time limit on referred complaints |
| 176 | Constitution of tribunal |
| 177 | Tribunal may join a person as a party |
| 178 | Complaints may be amended |
| 185 | Solicitor or counsel assisting the tribunal |
| 186 | Officer assisting the tribunal |
| 189 | Resolution before tribunal order |
| 191 | Anonymity |
| 193 | Complainant may withdraw complaint |
| 194-200 | Representative complaints |
| 204 | Burden of proof – general principle |
| 205 | Burden of proof – indirect discrimination |
| 206 | Burden of proof – exemptions |
| 207 | Commissioner may provide investigation reports |
| 208 | Evaluation of evidence |
| 209 | Orders the tribunal may make if complaint is proven |
| 210 | Tribunal may dismiss complaint |
| 227 | Unincorporated association represented by committee member |
| 228-233 | Opinions |
| 264 | No communication of official information to court |

***Queensland Civil and Administrative Tribunal Rule 2009***

| **Section** | **Description** |
| --- | --- |
| 101 | Requirements for application for exemption |
| 102 | Additional requirement for application for review of decision about a complaint lapsing |
| 103 | Alternative requirements about statement of address for particular complaints |
| 104 | Giving copy of application for order under section 144 of the AD Act |
| 105 | Giving copy of order under section 144 of the AD act |
| 106 | Principal registrar to give copy of reasons for decision to Anti-Discrimination Commissioner and parties |
| 107 | Notice of appeal against exemption application decision to Anti-Discrimination Commissioner |

**Published decisions involving applications for representation at QCAT**

| Year | Number | Granted | Not granted | Sought by complainant | Sought by respondent | Sought by  all parties | Respondent is State of Qld |
| --- | --- | --- | --- | --- | --- | --- | --- |
| 2012 | 6 | 4 | 2 | 1 | 2 | 3 | 2 |
| 2011 | 13 | 6 | 7 | 1 | 9 | 3 | 6 |
| 2010 | 12 | 3 | 9 | 2 | 7 | 3 | 3 |
| TOTALS | **31** | **13** | **18** | **4** | **18** | **9** | **11** |

1. *Anti-Discrimination Act 1991*, section 7 [↑](#footnote-ref-1)
2. *Anti-Discrimination Act 1991*, section 118 [↑](#footnote-ref-2)
3. *Anti-Discrimination Act 1991*, sections 124A & 131A [↑](#footnote-ref-3)
4. *Anti-Discrimination Act 1991*, section 129 [↑](#footnote-ref-4)
5. *Anti-Discrimination Act 1991*, section 124 [↑](#footnote-ref-5)
6. *Anti-Discrimination Act 1991*, section 122 [↑](#footnote-ref-6)
7. *Public Interest Disclosure 2010*, section 40 [↑](#footnote-ref-7)
8. *Anti-Discrimination Act 1991*, section 175 [↑](#footnote-ref-8)
9. *Anti-Discrimination Act 1991*, section 113 [↑](#footnote-ref-9)
10. *Anti-Discrimination Act 1991*, section 144 [↑](#footnote-ref-10)
11. *Anti-Discrimination Act 1991*, section 169 [↑](#footnote-ref-11)
12. *Anti-Discrimination Act 1991*, section 228 [↑](#footnote-ref-12)
13. *Queensland Civil and Administrative Tribunal Act 2009*, section 3 [↑](#footnote-ref-13)
14. *Queensland Civil and Administrative Tribunal Act 2009*, section 4 [↑](#footnote-ref-14)
15. *Anti-Discrimination Act 1991,* section 250(2) (now repealed). The same eligibility qualification applied also to the registrar of the ADT. [↑](#footnote-ref-15)
16. *Anti-Discrimination Act 1991,* section 250(4) (now repealed) [↑](#footnote-ref-16)
17. *Anti-Discrimination Act 1991,* section 176 (since amended) [↑](#footnote-ref-17)
18. Defined in the *Queensland Civil and Administrative Tribunal Act 2009*, schedule 3

    ***legally qualified member*** means –

    a judicial member; or

    an ordinary member or supplementary member who is a magistrate; or

    a senior member or ordinary member who is an Australian lawyer of at least 6 years standing. [↑](#footnote-ref-18)
19. *CH v State of Queensland* [2012] QCAT 536 at [34] [↑](#footnote-ref-19)
20. See *Anti-Discrimination Act 1991,* section 231; and *Opinion re: Pharmacist Board of Queensland* [2008] QADT 3 at [17] [↑](#footnote-ref-20)
21. *Anti-Discrimination Act 1991,* section 228A [↑](#footnote-ref-21)
22. The tribunal has a discretion whether or not to provide an opinion – *Anti-Discrimination Act 1991,* section 229 [↑](#footnote-ref-22)
23. *Queensland Civil and Administrative Tribunal Act 2009,* section 69 [↑](#footnote-ref-23)
24. Anti-Discrimination Commission Queensland Annual Reports: In 2008-2009 48% of matters settled at conciliation conference; in 2007-2008 45% of matters conciliated settled at conference; in 2006-2007 57% of matters conciliated settled at conference. [↑](#footnote-ref-24)
25. *Queensland Civil and Administrative Tribunal Act 2009,* section 70 [↑](#footnote-ref-25)
26. *Queensland Civil and Administrative Tribunal Act 2009,* section 182 empowers the President to delegate functions other than adjudicating in the tribunal. [↑](#footnote-ref-26)
27. QCAT News, February 2013; Proctor, February 2013 Letter to the editor from the President QCAT [↑](#footnote-ref-27)
28. Decisions published on the Supreme Court Library website [↑](#footnote-ref-28)
29. *Anti-Discrimination Act 1991*, section 187 (now repealed) [↑](#footnote-ref-29)
30. Anti-Discrimination Tribunal Practice Direction 9 [↑](#footnote-ref-30)
31. *Anti-Discrimination Act 1991*, section 163 [↑](#footnote-ref-31)
32. *Gill v Roberts* [2011] QCAT 515 [↑](#footnote-ref-32)
33. Ibid, at [6] [↑](#footnote-ref-33)
34. Ibid, at [7] [↑](#footnote-ref-34)
35. Ibid, at [7] [↑](#footnote-ref-35)
36. Ibid, at [8] [↑](#footnote-ref-36)
37. Ibid, at [10] [↑](#footnote-ref-37)
38. See for example, *Dapontes v State of Queensland & Anor* [2011] QCAT 716; *Dapontes v State of Queensland & Anor (No. 2)* [2011] QCAT 717; *Dapontes v State of Queensland & Anor (No. 3)* [2011] QCAT 718; *Aleksic v Commonwealth Bank of Australia* [2011] QCAT 78 [↑](#footnote-ref-38)
39. *Paties v Tricare (Hostels) Pty Ltd* [2012] QCAT 696 [↑](#footnote-ref-39)
40. ‘Precis’, Law Council of Australia, Issue 163, 19 February 2013. [↑](#footnote-ref-40)
41. *State of Queensland v Mahommed* [2007] QSC 18 at [34], and referencing Narelle Bedford and Robin Creyke: *Inquisitorial Processes in Australian Tribunals* 2006, AIJA publication, p27 [↑](#footnote-ref-41)
42. *Cross v Rio Tinto Coal Australia Pty Ltd & Anor* [2012] QCAT 370 at [6] [↑](#footnote-ref-42)
43. *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170 [↑](#footnote-ref-43)
44. *Queensland Civil and Administrative Tribunal Act 2009,* section 3(b) [↑](#footnote-ref-44)
45. Duncan Kerr, ‘State Tribunals and Chapter III of the Australian Constitution’ (2007) 31 *Melbourne University Law Review 632.*< <http://www.austlii.edu.au/au/journals/MULR/2007/25.html>> [↑](#footnote-ref-45)
46. See *Owen v Menzies* at [15], [49] & [54] [↑](#footnote-ref-46)
47. *Queensland Civil and Administrative Tribunal Act 2009,* section 162, which provides –

    In exercising its jurisdiction, the tribunal:

    must act independently; and

    is not subject to direction or control by any entity, including any Minister. [↑](#footnote-ref-47)
48. *Constitution of Queensland 2001*, sections 60 & 61, and *Supreme Court of Queensland Act 1991*, section 21 [↑](#footnote-ref-48)
49. *Queensland Civil and Administrative Tribunal Bill 2009*, Explanatory Note, page 4 [↑](#footnote-ref-49)
50. The Independent Panel of Experts reasons for recommending an internal appeals mechanism as opposed to appeals to the Supreme Court were:

    it would support the leadership role of judicial members and provide guidance to members by way of authoritative decisions on substantive law and procedure;

    internal appeals would be decided more quickly and more cost effectively than in the Supreme Court;

    appeals would generally be heard by the same judicial members which would assist in developing a more coherent and consistent body of law;

    it would promote consistency in tribunal procedure and quality of decision making. [↑](#footnote-ref-50)