**Observations on Evidence & Practice in QCAT and the Supreme Court of Queensland**

**Presentation to the QCAT Conference 2016**

**The Hon. Justice Roslyn Atkinson AO**

## Introduction

Good morning colleagues and thank you to Justice Thomas and Judge Sheridan in particular for the invitation to speak today. I would like first of all to acknowledge the traditional custodians of this beautiful bend of the river on which we meet this morning and pay my respects to their elders past, present and future. No doubt they met over millennia to discuss how to solve community problems fairly and with compassion and I hope we continue that tradition today.

My introduction to being a decision-maker rather than an advocate was as a member of tribunals: the Social Security Appeals Tribunal, the Human Rights and Equal Opportunity Commission, and the Anti-Discrimination Tribunal. Each of those experiences has informed the way in which I approach the task of hearing cases fairly and efficiently.

My discussion of court craft will consist of comments about, first, the rules of evidence and, second, how the just and fair administration of the law can be promoted by the manner in which members of courts and tribunals engage with the diversity of litigants who appear before them. Throughout this presentation, I will offer observations on the similarities and differences relevant to evidence and practice in QCAT and the Supreme Court of Queensland.

The rules of evidence present, at first glance, more significant contrasts, whereas the endeavour to promote the equal treatment of all litigants in practice is, thankfully, a source of much similarity, even if the extent or specific kinds of formal rules and guidelines designed to achieve this end might differ.

## Observations on the Rules of Evidence

The most obvious starting point for any discussion of the rules of evidence applicable to QCAT proceedings is section 28 of the *QCAT Act*. No doubt you will be familiar with it. It provides, *inter alia*, that in conducting a proceeding, the tribunal is "not bound by the rules of evidence, or any practices or procedures applying to courts of record, other than to the extent the tribunal adopts the rules, practices or procedures." It also permits the tribunal to "inform itself in any way it considers appropriate", and requires the tribunal to ensure, as far as practicable, that "all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts."

This contrasts significantly with the position applicable to Supreme Court proceedings, where the court must restrict itself to the evidence presented by the parties to the dispute, with the limited exception of facts of which judicial notice may be taken. While, in some cases, the court might suggest to parties that certain evidence would assist judicial determination and might, with the parties' agreement, adjourn the proceeding until such evidence is gathered (I'm thinking here principally of the gathering of evidence of a clean drug-test prior to sentencing an offender who claims to have rehabilitated), it does not have the same inquisitorial powers afforded a member of QCAT. In addition, a Supreme Court judge is bound to apply the many exacting rules of evidence developed at common law and as

provided in the *Evidence Act* to ensure only 'admissible' evidence is acted upon by it or, in a criminal trial, by a jury. The receipt of evidence in QCAT proceedings is not subject to the same restrictions.

But the fact that the rules of evidence applicable in Supreme Court proceedings do not bind members of QCAT does not mean that these rules are irrelevant. Many of these rules have strong rationales which are as applicable to a residential tenancy dispute or an administrative review as to any other civil trial. Most importantly, the rule that evidence must be relevant,[1] under which so many other rules of evidence can be subsumed, is enforced by both judges and tribunal members in order to achieve fair, just, and expeditious outcomes.

The second basis for the rules of evidence which applies no matter what the jurisdiction is reliability. This underpins, for example, the sometimes complex rules governing the admissibility of hearsay evidence. There are generally three main reasons for the inadmissibility of hearsay evidence.[2]

1. Hearsay is not the best evidence of what occurred;
2. The 'primary' evidence is not given on oath and cannot be cross-examined as to its accuracy; and
3. The demeanour of the primary witness (i.e., the maker of the original statement) cannot be assessed in court.

As was observed by the High Court in *Pollitt v The Queen*,[3] an overarching reason why hearsay is generally excluded is its reduced reliability.

A tribunal member is in a good position to assess the significance of the relevance and reliability of the evidence before the tribunal, including hearsay evidence, and may therefore choose to disregard or give reduced weight to that evidence, despite not needing to decide whether required by the rules of evidence to do so. On the other hand, a tribunal member may give it full weight where the hearsay evidence is the *only* evidence of what is said to have taken place at a particular time. Moreover, the inability to test the original evidence through cross-examination may be less problematic where there is no reason to think that what was purported to have been said by the original witness would have been fabricated or been the product of mistake.

In one sense then, s 28 of the *QCAT Act*, provides tribunal members with the best of both worlds. You can act informed by the rules of evidence, and the underlying rationales, but need not make strict admissibility decisions on categories of evidence whose ultimate utility cannot be pin-pointed with any certainty, especially at the outset of a hearing. In such cases, the tribunal member may note the potential weaknesses of the evidence but be content to weigh its persuasiveness in the context of the remainder of the evidence presented at a hearing. This may be a particularly useful approach in cases where a party may deserve special consideration or protection. Finally, the tribunal's unique power to inform itself of relevant evidence may complement a decision to refrain from ruling certain evidence inadmissible before further inquiries are conducted to see whether doubts about that evidence can be allayed (for example, by finding evidence that independently corroborates it).

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[1] See, e.g., *BBH v The Queen* (2012) 245 CLR 499.
[2] *Teper v The Queen* [1952] AC 480 at 486.
[3] (1992) 174 CLR 558, 620.

So in what ways might the tribunal inform itself? Section 98 of the *QCAT Act* provides that the tribunal may:

- call a person to give evidence;
- examine a witness on oath or require a witness to give evidence by statutory declaration;
- examine or question a witness to obtain information; and
- order a witness to answer questions relevant to the proceeding.

The first of these options – the calling of a person to give evidence – is also open to Supreme Court judges pursuant to r 391(1) of the *UCPR*, but the power is rarely employed. However, it is not uncommon for a judge to briefly question witnesses in the course of, especially, civil trials in order to clarify the evidence being given. Detailed 'examination' of a witness by a judge is rare and, if it occurs, will be preceded by the judge seeking the acquiescence of the party who called the witness. Failure to do so would be out of line with the adversarial nature of Supreme Court hearings, where the judge is arbiter of, not participant in, the dispute.

The more inquisitorial nature of QCAT proceedings, pursuant to s 28(3)(c), gives a QCAT member more options for obtaining relevant and important evidence. In theory, a QCAT member might, in addition to calling or examining a witness, conduct their own research to best understand an issue that arises in a given case, where no satisfactory evidence has been presented by the parties. However, given the important obligation that the tribunal observe the rules of natural justice it would be critical for any independent research done to be drawn to the attention of the parties and a response invited. A tribunal member must exercise caution to remain an arbiter and not to become a participant. Moreover, and most particularly, where some doubt arises in an area of technical specialisation, the tribunal must not hold itself out as possessing expertise it does not hold.

The standard procedures by which expert evidence is obtained and presented at QCAT hearings is closely analogous with what is often directed in Supreme Court directions hearings, case flow reviews, and supervised case list mentions. For a QCAT hearing, whenever a party proposes to call expert evidence in a proceeding, the standard rules set out in QCAT Practice Direction 4 of 2009 apply, unless varied by an order of the tribunal. The Practice Direction limits each party to calling only one expert for each area of expertise and all experts engaged by the parties are under a primary obligation to assist the tribunal. Unless ordered otherwise, the experts must attend a conclave convened by a member, adjudicator or principal registrar for the purpose of identifying and clarifying areas of agreement and disagreement, and the reasons for any disagreement, and must prepare a joint report to that effect.

The rules of court governing Supreme Court proceedings do not contain an equivalent, unambiguous, requirement as appears in the QCAT Practice Direction that each party may call only one expert on a given area of expertise. Instead, both the *UCPR* and Supreme Court Practice Direction 2 of 2005 requires the parties to give consideration to the appointment of an expert to be the only expert witness on a particular substantial issue in the proceeding. One of the stated purposes of Chapter 11, Part 5 of the *UCPR* is to "ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court." In reality, the rules governing QCAT and Supreme Court proceedings probably produce similar outcomes and there is, or at least I hope there is, an increasing acceptance and understanding

by practitioners that this produces better (and certainly cheaper) outcomes than litigation that pitted teams of experts against each other.

The final remarks I wish to make about how evidence is given in QCAT and Supreme Court proceedings relate to the provisions concerning evidence given by children and other vulnerable witnesses. The *QCAT Act*, and related Practice Direction, provides extensive and commendable protections of children in particular. Pursuant to s 99, the tribunal may make special arrangements for a witness who is a child or a person who it considers would be likely to:

- be disadvantaged because of their mental, intellectual or physical impairment or other relevant matter; or
- suffer severe emotional trauma; or
- be disadvantaged because they are intimidated.

Among other things, QCAT may allow a support person to be with such witnesses while they give evidence, obscure their identity or exclude a particular person from the proceeding.[4] Similar protections are applicable to witnesses in various Supreme Court proceedings, but the protections and apply principally to criminal and other prescribed proceedings.[5]

In QCAT hearings, further measures can be put in place to assist children and young people giving evidence in reviews of decisions made by the Department of Communities, Child Safety and Disability Services in child protection matters pursuant to the *Child Protection Act* 1999 (Qld). I do not need to refer to them in detail.[6]

These provisions provide important examples of where legislation has been introduced in order to facilitate the participation of vulnerable individuals in proceedings that affect their rights. However, legislation does not presently provide the same measures of protection for all participants in court or tribunal proceedings that experience special vulnerabilities or circumstances of disadvantage.

**Observations on Practice and the Equal Treatment of Litigants**

It is in this context that I wish to make some observations on the wider practice of conducting court and tribunal hearings, looking to broader considerations than just the rules of evidence. To begin, it is worth returning to that most significant of provisions in the *QCAT Act*: section 28. It provides in subsection (1) that "the procedure for a proceeding is at the discretion of the tribunal, subject to this Act, an enabling Act and the rules". So, as with the principles governing the receipt of evidence, a great deal of flexibility is afforded the tribunal in carrying out its obligation to conduct proceedings fairly, efficiently and in accordance with natural justice.

A matter which concerns us all, is how to give effect to the requirements of fairness. We know, for instance, that fairness requires equal treatment of litigants. But this, of course, does not mean treating each case or even each litigant identically. What it does mean is that each litigant must be given an equal opportunity to be heard and to have relevant evidence placed before the decision maker. Each is also entitled to a just determination of the merits of

[4] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 99(2).
[5] See *Evidence Act 1974* (Qld), ss 9E, 21A, Part 2 Div 4A, Part 2 Div 6.
[6] QCAT Practice Direction 6 of 2015

their case. Achieving substantive equality in these areas means reducing substantive difference. That requires identifying the barriers that may present to litigants from particular cultural backgrounds, from particular circumstances of disadvantage, and from special vulnerabilities or disabilities. Sometimes these barriers may not be readily apparent and may not be raised by the litigant. However, as decision-makers, we can educate ourselves to be alert to these problems. One invaluable resource for this purpose is the Supreme Court's Equal Treatment Benchbook, currently in the final stages of revision for an anticipated second-edition release. It is my intention to provide you with a preview into what the new edition covers.[7]

***An overview of the ETBB's Contents***

The Benchbook was conceived of as, and remains, a resource for courts, court staff, legal practitioners and the general public to increase their understanding of how diversity in our communities can influence the way in which our legal system, which developed with a far narrower group of court users in mind, can and should modify its practices to enable all citizens access to justice and fair treatment in our courts and tribunals. This sounds very close to the very reason QCAT itself exists. The Benchbook provides an overview of cultural, religious, and family diversity in Queensland. It examines effective communication in proceedings to enhance understanding by both litigants and courts of the issues, evidence and law. Four chapters are dedicated to exploring the experience of Aboriginal and Torres Strait Islander people in our legal system and the particular difficulties they can encounter. The remaining chapters discuss issues arising in relation to persons with disability, self-represented litigants, children and young people, gender equality, and sexuality and gender identity.

I aim to briefly provide some examples of the kinds of considerations raised by the Benchbook that are likely to arise, from time to time, in QCAT proceedings.

***Persons with Disabilities***

The first area I wish to examine is the issues that arise in relation to persons with a disability. Research by the Australian Bureau of Statistics, reported in the revised Equal Treatment Benchbook, suggests that nearly one in five Queenslanders have some limitation, restriction or impairment which restricts their engagement in everyday activities and has lasted, or is likely to last, for at least six months. For the majority of these individuals, their disabilities have had various negative impacts on their self-care, mobility, communication, or education and employment participation. Each of these difficulties can have a bearing on court proceedings, some of which can be addressed quite simply, given early awareness of the issue. For instance, the basic issue of physical access to a court room for a person with a mobility impairment, if not already accommodated by the building's design, can often be overcome by simple modifications if court staff are made aware of the restriction in advance.

I learnt from one of the first disability discrimination cases over which I presided, *Cocks v State of Queensland*,[8] that a command by a court officer when a judge or tribunal member enters a court or hearing room to "All stand" fails to take account of the fact that a party, witness, legal practitioner, court staff or members of the public may not be able to "stand" and so commanding them to do so is not to show them the respect that we expect court and

[7] The first edition of the Benchbook is accessible on the Supreme Court website: http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin

[8] [1994] QADT 3.

tribunal users to show us. In the Supreme Court, the bailiff opening the court says "All rise", a way of showing respect where standing is not possible.

Of course, mobility restrictions are just one barrier to the efficient and dignified conduct of court proceedings for people with disabilities. The Benchbook raises the following general considerations:

- people with disabilities may need more time than is common with persons without disability;
- the stress of coming to court may exacerbate their symptoms;
- making any special arrangements in advance will save time and embarrassment at the trial;
- the person with a disability may not be able to hear, read or be understood whilst in court, or to fully comprehend what is taking place; and
- some ailments may make it impossible to attend court at all.

QCAT members deal frequently with individuals with cognitive and other psychological impairments in guardianship and discrimination proceedings and deal every day with the challenges surrounding determination of capacity – as applied to the particular competency in question (e.g., managing financial affairs, making health care decisions, etc). The Equal Treatment Benchbook has a significant focus on the considerations applicable to persons with intellectual and psychiatric disabilities giving oral evidence.

Ideally, participants in the legal proceeding will be aware of the best, evidence-based approach to enhancing communication with witnesses who have a particular disability (or combination of disabilities). Whilst it may generally be advisable ask the same question in a different way, if the first elicits confusion, simple repetition can be the best approach for persons with particular comprehension difficulties associated with slower processing of information (whereas the attempt to clarify by explaining the same thing in different words can create confusion).

This example illustrates the limitations of any form of guidelines on court practice – they cannot be so detailed as to cover every possible contingency. The Equal Treatment Benchbook does not attempt to do so. Rather, for the most part, it provides background knowledge so that judges, court staff, and practitioners are alerted to circumstances which, if overlooked, could result in real or perceived injustice. The adoption of any remedial measures that are suggested in the Benchbook are clearly stated to depend on all the circumstances of the case, balancing the interests of all participants.

***Self-represented Litigants***

A category of court participants for whom significantly more existing support and management structures exist – and certainly a category that would be very familiar to QCAT members – is self-represented litigants. The Supreme Court does not have the equivalent of s 43 of the *QCAT Act*, which provides that self-representation is the default position in a tribunal hearing. Nonetheless, the court still sees significant numbers of self-represented litigants appearing at both trial and appellate hearings.

The Equal Treatment Benchbook notes that self-represented litigants are not homogenous in terms of their cultural, economic and educational backgrounds. A common challenge faced by all self-represented litigants is the frustration of navigating an unfamiliar and sometimes

rigid court environment. In this respect, the flexibility of QCAT procedure and the focus on expedition and, to the greatest degree practicable, informality, no doubt have a beneficial effect on self-represented litigants' anxiety and comprehension of tribunal proceedings. However, there is no doubt that tribunal members, as with judges, still face the challenge of striking an appropriate balance in respect of the level of intervention and assistance necessary to assist the self-represented litigant understand what they need to do in a hearing and maintaining an appropriate degree (and perceived level) of impartiality. Moreover, the need to maintain control over the course of hearings involving self-represented litigants presents an ongoing challenge.

The discretion conferred on the tribunal in s 95(3) of the *QCAT Act* to place time limits on the giving of evidence, or the power conferred in s 95(2)(a) to refuse to allow a party to call further evidence invite a judgment call to be made about whether or not to impose such restrictions and whether to do so will result in a more expeditious hearing in the case in question. The fact that the tribunal is not bound by all the rules of evidence applicable to other court proceedings does not meant that self-represented litigants should not be warned where they are failing to present persuasive evidence or, as can frequently occur, when they are making submissions rather than giving evidence. The Equal Treatment Benchbook advises judges to explain to self-represented litigants their entitlement to give and call evidence orally. This explanation should be accompanied by a complementary and contrasting instruction as to their capacity to make submissions *about* any evidence elicited. Of course, patient and frequent reminders of this distinction may be necessary.

***Indigenous Australians***

One further specific area covered by the Benchbook I wish to discuss relates to the difficulties faced by Aboriginal and Torres Strait Islander people. Substantial attention is provided to this area in the Benchbook in light of the overrepresentation of this group in the justice system. While this is most stark in criminal proceedings, the disadvantage experienced by Indigenous Australians related to inadequate housing, healthcare, education and employment result in their frequent exposure to other legal issues, for example relating to tenancy, guardianship and administration, wills and estates and unpaid debts, all of which are matters frequently dealt with by QCAT.

The Benchbook begins addressing this area by providing helpful, contextualising, demographic information about Indigenous Australians, which often provides an explanation of, or forewarning, of potential challenges they might face with accessing and participating in the legal system. An additional resource containing information of this type, including specific treatment of particular Aboriginal and Torres Strait Islander communities in Queensland, is the collection of Community Profiles published on the Supreme Court Library website.[9] Speaking generally, however, research summarised in the Equal Treatment Benchbook shows that approximately 4% of Queensland residents identify themselves as being of Aboriginal or Torres Strait Islander origin. Nearly 10% of those reside in Brisbane however about 20% live in areas classified as "very remote" or "remote" (compared with only about 2.5% of the rest of the Australian population), meaning that services can be difficult to access. In 2008, one quarter of households in which Aboriginal and Torres Strait Islander people lived experienced overcrowded conditions. While this problem is particularly acute in remote parts of the State, a significant proportion of Indigenous people experience

[9] See http://www.sclqld.org.au/information-services/aboriginal-and-torres-strait-islander-community-profiles-a-resource-for-the-courts.

overcrowding in households in major cities. The Benchbook goes on to present the evidence of poorer healthcare access and health indicators amongst Indigenous Australians and their typically lower incomes.

In the following chapter, the Benchbook takes up the recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers and persons working in court services be apprised of contemporary Aboriginal society, customs and traditions in a context which emphasises the historical and social factors which contribute to the kinds of disadvantage experienced by many Indigenous people, as discussed in the previous chapter. The Benchbook explains that the significant impact of colonisation felt by Aboriginal and Torres Strait islander Australians that remains tangibly recent and continues to affect the cohesiveness and identity of these communities and, of particular relevance to court and tribunal work, their relations with the broader Australian society. In this chapter and the following, particular aspects of Aboriginal and Torres Strait Islander culture and society are explored, the practical significance of which will vary in degree from case to case but remain always an important framework for understanding the way in which many Indigenous Australians live and view the world.

One aspect which I had cause to deal with recently, was the ways in which some Aboriginal and Torres Straits Islander communities deal with the deaths of individuals. Cultural practices vary from community to community, and of course this extends beyond a discussion of Indigenous peoples, but in a recent matter before me an Aboriginal woman approached the court, in significant distress, with an urgent application seeking to restrain the imminent cremation of her son. Dealing with the application sensitively, and with a clear understanding of her submissions, required some understanding of the significance of some Aboriginal cultural practices dealing with the treatment of a deceased person's body after death. I was also able to acknowledge, when giving reasons for my disposition of the application, the distress that mentioning the name of the deceased might cause his family. Although mentioning the deceased by name was unavoidable when giving *ex tempore* reasons in this case, it was appropriate to not let any potential distress caused by this go unacknowledged. It is best practice to seek permission from the appropriate person to use the name or image of a deceased person.

Other aspects of Aboriginal and Torres Strait Islander society that often have a bearing on court proceedings include often complex and extended family network and kinship systems. This might have a bearing on understanding property claims, determining appropriate custody arrangements for children, and making orders relating to living arrangements for persons given bail for criminal offences. At a broader level, different conceptions of interpersonal relationships and social roles can pose potential barriers to communication with non-Indigenous court participants. The Benchbook provides an example where, under a kinship system treating siblings of the same sex as equivalent relations, a child might call her mother's sister "mother", who would correspondingly call the child "daughter". A later chapter in the Benchbook describes in greater detail the potential for misunderstanding that can arise from the differences between Aboriginal English and Anglo-Australian English as well as different cultural practices with regard to non-verbal communication.

These potential hazards showcase the reason why, even where there may appear to be no need for an accredited translator, interpreter or cultural facilitator, such services may in fact be useful. The challenge of obtaining adequate interpreting services is also discussed in the Benchbook.

***The Challenge of Cross-Sectional Disadvantage***

But rather than provide more detail on that topic, I wish to move finally to note the critical point made repeatedly in the Benchbook that the intersection of different sources of potential disadvantage can, among other things, promote the likelihood of what would otherwise be possible problems, when considered as the outcomes of one form of disadvantage or another, into the realm of probable problems because of interaction effects among the several forms of disadvantage. This complexity is yet another reason why no one resource can provide all the answers, but why exposure to many examples of the different issues that can arise from various causes may usefully be deployed to sensitise one's antennae to potential problems and their solutions.

In the Benchbook's chapter on gender inequality, significant treatment is given to relevant challenges faced by women (as a general category compared to men), such as their increased vulnerability to domestic violence and their increased likelihood to face difficulties accessing justice whilst being, more often than not, the primary caregivers to children, the elderly, or family members with disabilities. However, the chapter also notes that gender inequality often intersects with other individual characteristics like ethnicity, sexuality and age (all given separate treatment elsewhere in the Benchbook) in such a way as to compound disadvantage or vulnerability.

Addressing the problems of women who experience inequality on multiple levels is not simply a matter of examining these factors discretely. Problems associated with different individual characteristics may be compounding. To draw on two instances of disadvantage already mentioned, consider first that women generally are more likely to experience domestic violence than men and then, second, that Aboriginal and Torres Strait Islander persons from remote or regional areas are less likely to be able to access appropriate support services and legal assistance. The result is that, in comparison to individuals falling within just one of these categories, domestic violence perpetrated against Aboriginal and Torres Strait Islander women is less likely to be addressed by necessary interventions and presents a greater risk of serious injury or death.

**Conclusion**

The ease with which these and other problems may be dealt with, even with forewarning, will differ from case to case. I hope to have demonstrated that the Equal Treatment Benchbook has an important operational function. Members of the QCAT are in a unique position to adapt flexibly to address disadvantage in accessing justice, as illuminated by the Benchbook. The discretion conferred by s 28 of the *QCAT Act* to adopt procedure best suited to achieving the objects of the Act, provides the means by which, through creativity, persistence, and evaluation of one's ongoing attempts, the challenges of social disadvantage can be addressed. In doing so, the tribunal will go a long way to addressing the obligations imposed by s 4 of the *QCAT* including:

- facilitating access to QCAT services throughout Queensland;[10]
- ensuring like cases are treated alike;[11] and
- ensuring the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal.[12]

[10] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 4(a).
[11] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 4(d).

I do hope that the observations I have made today on both evidence and practice will be of use to you in carrying out the tribunal's important work.

[12] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 4(e).