17 August 2015

Queensland Law Reform Commission
PO Box 13312
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Brisbane QLD 4003

By email only: lawreform.commission@justice.qld.gov.au

Dear Commissioners,

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011

The Queensland Association of Independent Legal Services Inc. (QAILS) is the peak organisation for Queensland’s community legal centres. In 2013-14, Queensland’s community legal centres assisted over 46,000 vulnerable Queenslanders with legal problems, providing over 100,000 pieces of legal information and advice, and opening over 9,000 new cases to provide ongoing help. Where we see the law operating unfairly or with unintended consequences, community legal centres can contribute to improving those errors.

QAILS welcomes the opportunity to provide this submission in response to the Queensland Law Reform Commission (QLRC) discussion paper WP72 (the Discussion Paper), released as part of the QLRC’s statutory review of the Neighbourhood Disputes (Dividing Fences and Trees Act 2011 (Qld) (the Act).

In 2013-14, Queensland community legal centres provided 1,785 pieces of legal information and 1,605 instances of legal advice in relation to ‘neighbourhood dispute’ problems, and opened 89 new cases. Over a quarter of the calls to QAILS in 2012-2013 were in relation to neighbourhood disputes, and we developed the www.qldneighbourhoods.com website to provide online legal information to people with neighbourhood problems, with financial support from the Brisbane City Council and significant in-kind legal services from Holding Redlich. This exemplifies community legal centres’ approach to our work; where we see repeat inquiries, we respond through educating people about their rights and responsibilities, and support constructive changes to law and practice.

Based on our members’ experience helping Queenslanders understand their rights and responsibilities under the Act, QAILS recommends:¹

- extending the Act’s jurisdiction to retaining walls in limited circumstances (for relatively low-cost structures);

¹ QAILS gratefully acknowledges the contributions of our member community legal centres, including Junkuri Laka Community Legal Centre, Nundah Community Legal Service, South West Brisbane Community Legal Centre, SunCoast Community Legal Service, The Advocacy and Support Centre (Toowoomba), Townsville Community Legal Service, and student volunteer Jordan Mathas-Carleton to this submission.
requiring parties to attempt informal or alternative dispute resolution mechanisms before more formal QCAT hearings;

• reviewing the QCAT application fee;

• strengthening enforcement options; and

• that the QLRC review process include mechanisms for community members’ participation, in addition to an opportunity to respond to its detailed Discussion Paper.

1. Objects

In QAILS view, the objects of the Act remain valid and that the Act generally meeting those objects. Some definitional and operational issues continue to exist, however, and could be improved, such as the exclusion of retaining walls below.

2. Dividing Fences

2.1 Statutory Procedure and Approved Forms

The statutory procedure and template approved forms for seeking a contribution to fencing work are generally clear and easy to use. Community legal centres report that people do have some difficulty understanding the process to determine their boundary, and perceived unfairness about being required to pay surveyors’ fees, even where the fence is not on the boundary and should be moved.

Community legal centres do also receive inquiries from landholders on or adjoining ‘rural land’ or larger tracts of lands that fall outside the jurisdiction of the Act;2 perhaps the QLRC could consult directly with representatives of primary producers to determine whether these exclusions are appropriate, and if they are, how landholders might assert their rights outside the jurisdiction of the Act.

2.2 Retaining Walls

Community legal centres are commonly asked to provide clients with assistance in relation to retaining walls. In our view, the Act’s explanatory materials (and, to some extent, the Discussion Paper) assumes that retaining walls and dividing fences are separate structures, doing different ‘jobs’. This assumption (and the resulting exclusion of retaining walls from the Act’s definition of ‘fence’ and, therefore, ‘dividing fence’) is overly simplistic and does not reflect the reality that one structure may do both jobs, in whole or in part. The Queensland Supreme Court has appropriately recognised that a retaining wall could be used for multiple things, including to mark a common boundary and divide adjoining lands.3

While the objects of the Act include providing for the efficient resolution of common disputes between neighbours, the exclusion of retaining walls means there is no easy way for neighbours to deal with them, even where they are built on the common boundary. This is inefficient and causes confusion.

The Act should be expanded to take this into account and provide for disputes about retaining walls that are built on the common boundary. The existing statutory procedure for obtaining a contribution and resolving disputes does not need to be extended to retaining walls, but the Act should address those matters in a similarly clear and accessible way. In order to ensure fairness and equity, disputes could be limited to an appropriate monetary

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2 S 42(3)(b).

amount, such as the Queensland Civil and Administrative Tribunal (QCAT) minor civil dispute jurisdiction ($25,000). Within that jurisdiction, QCAT should be able to determine:

1. who is responsible for repairing an old retaining wall (the practical reality is that where an old retaining wall needs replacing or repairing, both parties benefit from it being replaced or repaired);
2. who is responsible for any damage caused to a neighbour’s land by a failure to support the land where the land has been built up or excavated out (including responsibility for constructing a retaining wall, if required); and
3. how the proportion of costs should be attributable to each owner when replacing or repairing a retaining wall.

3. Trees

3.1 Statutory Procedure and Approved Forms

The statutory procedure and template approved form for seeking the removal of overhanging tree branches are generally clear and easy to use.

We suggest that tree disputes be described as ‘tree disputes’ rather than ‘other civil disputes’, making it easier for people to find the right form. Websites would be better referring to ‘fence disputes’ and ‘tree disputes’.

4. Dispute Resolution Processes, Compliance, and Enforcement

4.1 Informal dispute resolution

The Act appropriately encourages the informal resolution of neighbourly disputes, but statutory aspirations like these are difficult to enforce or operationalise.

Community legal centres will almost always recommend that clients engage directly with their neighbours to discuss and resolve these issues. It’s surprising how few people have attempted to discuss the issues with their neighbours to informally resolve these issues. On QAILS’s www.qldneighbourhoods.com website, template letters are provided to assist people that might not feel comfortable engaging in conversation with their neighbours. Agencies should always encourage informal resolution, advising people to try to speak to their neighbours about these issues.

If clients are unwilling to discuss the issue with their neighbour, community legal centres may advise clients to use the Dispute Resolution Branch (DRB) of DJAG. However, if the other party declines overtures to have the matter resolved through a DRB mediation, this step can be superfluous. QAILS notes the Discussion Paper finds that, from 2,817 enquiries, less than 20 disputes are resolved at DRB mediation.

When advising people with issues under the Act, community legal centres invariably suggest a client attempt mediation with the neighbour before proceeding to giving the relevant notice

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4 See, eg, ss 7(3), 56(1), and 60(1).
6 Discussion Paper, [4.23]-[4.24]. This figure is extrapolated from the number of mediations and the success
and then proceeding to QCAT. Given that QCAT generally refers people to mediation, it seems sensible to try mediation in the first instance.

The statutory procedure of the Act might be improved by requiring disputing neighbours to attend an alternative dispute resolution process before bringing a proceeding in QCAT. Conciliation or mediation are appropriate processes that could be required, and the Act could introduce a formal role for DRB as part of this process. This may also reduce the QCAT workload in this jurisdiction, and could result in a less adversarial process that surely undermines neighbourly cohesion.

It may be considered that a formal requirement to attempt ADR may add unnecessary formality or bureaucracy to the process. On balance, it may be more appropriate to require an attempt at informal resolution before applying to QCAT for an order, evidenced by a copy of a letter sent to the neighbour and a copy of the refusal, or just the expiration of a reasonable timeframe in which to receive a response.

4.2 Role of QCAT

While the Discussion Paper notes the decrease in QCAT applications from 2012-13 to 2013-14, more historical data would provide more useful trend information, that may help the QLRC to understand the role of QCAT in this jurisdiction.

Community legal centres suggest that some of the statutory timeframes can be tight, particularly where parties to a dispute need to seek external assistance, including legal advice from a community legal centre.

The QCAT application fee for trees matters of $305 is a major disincentive for many community legal centre clients. Although the Act clearly sets out parties' rights and responsibilities, once clients are told about the fee, they often choose not to use this process, even for those clients that may be able to seek a fee waiver or have the other party refund these costs. Properly advised, landholders are aware that they might not obtain a successful order and, even if they do, the order may not be enforced. This review should consider the prohibitive impact of this QCAT fee.

The whole enforcement of QCAT orders is fraught with difficulty for the majority of clients, who have no idea that getting an order from QCAT is often just the beginning of another lengthy process, including a requirement to seek enforcement by local governments, or through the Magistrates Court. Non-monetary, open-ended orders (including regular maintenance of branches, roots, etc) are particularly difficult to enforce. The QLRC should consider strengthening enforcement mechanisms in the Act.

5. Review process

QAILS acknowledges that there are complex legal concepts that underpin the Act, and these are explored thoroughly in the Discussion Paper. However, it is vital that everyday Queenslanders are able to participate in any law reform activity or statutory review, and that there are accessible and appropriate mechanisms to ensure appropriate levels of community engagement and participation. This might include a summary of the Discussion Paper, an

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8 Discussion Paper, [4.40].
online questionnaire, increased engagement through mainstream media, and public forums (face-to-face or using technology).

As discussed with QLRC assistant director Cathy Green, QAILS would be happy to work with the QLRC to engage with community legal centre practitioners on the issues raised in this submission, and in the Discussion Paper. A roundtable discussion might be an appropriate forum for this engagement.

We would be happy to discuss the issues raised in this submission further; please contact me on (07) 3392 0092 or director@qails.org.au.

Yours sincerely,

James Farrell OAM
QAILS Director