

The Honourable Anna Bligh MP
Premier
PO Box 18185
CITY EAST QLD 4002

Dear Premier

Queensland Civil and Administrative Tribunal – stage 3 report

I am pleased to provide you with the third and final report of Julie-Anne Schafer and myself, the Independent Expert Panel formed to advise the Government on the creation of the Queensland Civil and Administrative Tribunal (QCAT).

In our first report, we identified a number of essential elements for creating QCAT and included a number of recommendations about the operational requirements for the new tribunal. We did this as we considered that work needed to commence as soon as possible on implementing QCAT if it was to be operational by December 2009.

One of the essential elements identified was strong political support and I note that this has been provided by the Government largely adopting our stage 1 and stage 2 recommendations. Ongoing support, including adequate resourcing, will continue to be important to QCAT's future success.

This report considers the progress that has been made in implementing the recommendations in our stage 1 report about the operation of QCAT. It is pleasing that a number of the recommendations are being implemented including the adoption of a phased approach to creating QCAT and the development of a new QCAT registry structure.

QCAT represents the most significant reform to Queensland's tribunals. We believe it will improve the delivery of justice to tribunal users in the community. We thank you for the opportunity to be involved in the development of this important project.

Yours sincerely



The Hon Glen Williams AO QC
Chair

GPO Box 5236
Brisbane Queensland 4001

Telephone 07 32222309

Facsimile 07 3222 2323

Email enquiries@tribunalsreview.qld.gov.au

Website www.tribunalsreview.qld.gov.au

Table of contents

1	Introduction.....	3
2	Summary of essential elements for implementing QCAT	4
3	Essential elements for implementing QCAT	7
3.1	Appropriate legislation	7
3.1.1	Public interest immunity	7
3.1.2	Arrangements with heads of jurisdiction about the use by judges and magistrates as supplementary members of QCAT	7
3.1.3	Eligibility requirements for senior members, ordinary members and adjudicators.....	7
3.1.4	Representation	8
3.1.5	Punishment of contempt	9
3.1.6	Rehearings/re-openings.....	9
3.1.7	Role of chief executive.....	10
3.1.8	Transitioning of sessional members	10
3.1.9	Outstanding policy issues	11
3.2	Strong political support.....	12
3.3	Cohesive organisational structure	14
3.4	Flexible and appropriate processes and procedures.....	14
3.5	Regional and rural delivery.....	16
3.6	Organisational culture and strong leadership	18
3.7	Alternative dispute resolution as part of the fabric of the tribunal	19
3.8	QCAT is a tribunal, not a court	20
3.9	Critical factors for success at transition	21
4	Post implementation priorities	23
4.1	Background	23
4.2	Priorities for the new president.....	23
4.2.1	Panel’s reports and resource committee.....	23
4.2.2	Links with the Mental Health Review Tribunal	24
4.2.3	Evaluation	24
4.2.4	New jurisdictions	24
4.3	Priorities for government consideration	25
4.3.1	Impact of the Moynihan review on jurisdiction of civil matters..... in Magistrates Court should be considered.....	25
4.3.2	Protocols for incorporation of new jurisdictions in QCAT	26
4.3.3	Further standardisation of practices within QCAT jurisdiction.....	27
4.3.4	Operation of jurisdiction dealing with official misconduct	28
	Appendix 1 Stakeholders consulted about amendment of the <i>Judicial Review Act 1991</i>	29

1 Introduction

On 12 March 2008, the Queensland Government announced its intention to create a new civil and administrative tribunal. The new tribunal is to create a single recognisable gateway to increase the community's access to justice and increase the efficiency and quality of decision making through a larger administrative structure.

Also on 12 March 2008, the government announced that it would appoint an independent panel of experts to oversee the creation of the new tribunal. The appointed panel was retired Court of Appeal Judge, the Honourable Glen Williams AO QC (Chair), Peter Applegarth SC and Julie-Anne Schafer (Chairperson of the Commercial and Consumer Tribunal).

Prior to the finalisation of the Panel's last report, the stage 2 report on legislative amendments to implement the tribunal, Peter Applegarth SC was appointed to the Supreme Court and resigned his place on the Panel. Justice Applegarth has not been replaced due to the advanced stage of the Panel's work.

Under its terms of reference the Panel is to provide its advice to government in three reports. The first report, delivered in June 2008, outlined the scope and initial implementation arrangements for the new tribunal. The second report, delivered in October 2008, contains the Panel's recommendations about the legislation needed to create QCAT and included proposed drafting instructions for the bill to create QCAT. The stage 1 and 2 reports are available at www.tribunalsreview.qld.gov.au.

The Panel also acknowledges the substantial assistance provided by the Tribunals Review Team in completing its reports. In particular, the Panel wishes to thank Jenny Lang, Kyla Hayden, Joanne Bugden and Joanne Linde from the team for their assistance.

This report completes the third and final stage of the Panel's work under its terms of reference; a report on the operational implementation requirements for QCAT.

This report is structured around the essential elements for the creation of QCAT that the Panel identified in its stage 1 report. It considers the progress made since March 2008 in implementing QCAT having regard to the recommendations that the Panel made in the stage 1 report about the operational arrangements needed to create QCAT.

This report also reflects the Panel's role in relation to the implementation of QCAT. The Panel is not responsible for implementing QCAT as this is the responsibility of the Department of Justice and Attorney-General.

2 Summary of essential elements for implementing QCAT

In its stage 1 report, the Panel noted that identifying the jurisdictions that should be brought together to form the new tribunal is only one part of creating QCAT. A successful amalgamation requires consideration of a number of other factors or essential elements if it is to achieve maximum benefits. The Panel identified these essential elements as:

- appropriate legislation to establish the new tribunal
- strong political support
- a cohesive organisational structure – including members and registry
- flexible and appropriate processes and procedures
- organisational culture
- strong leadership
- alternative dispute resolution as part of the fabric of the tribunal
- recognition that the body is a tribunal not a court.¹

This report comments on the way in which the elements listed above and a new element of appropriate funding need to be implemented to create an effective QCAT and to the extent possible, how implementation of QCAT is occurring.

In this context, it is important to note that the Panel has not been directly involved in the implementation of QCAT and is not responsible for directing that implementation. As a result, the Panel's ability to comment on the activity taken to implement QCAT is limited.

The Department of Justice and Attorney-General has been tasked with implementing QCAT. The department has kept the Panel informed of various steps it has taken and its progress in implementing the tribunal.

While all of the elements listed above are important, the tribunal's leadership, both by the president and executive director, and the tribunal's culture, will decide what sort of tribunal QCAT is. As such the appointment of appropriate persons to those positions should be dealt with as a matter of priority.

In addition to the elements listed above, the Panel has also identified appropriate funding for QCAT as an essential element if the tribunal is to be successful and achieve its objectives.

Appropriate funding would ensure that QCAT's jurisdiction can be located in one place in Brisbane. It also means that there is funding to ensure that the Panel's recommendations from the stage 1 report are able to be implemented including an appropriate presidential and membership structure. Chapter 3.2 provides more detail on the types of things for which funding is required.

¹ Rachel Bacon, *Amalgamating Tribunals: a recipe for optimal reform* (D Phil Thesis, University of Sydney) 172 and Queensland Civil and Administrative Tribunal: stage 1 report on scope and initial implementation arrangements chapter 4

Under funding the tribunal will result in a body that does not work effectively, is likely to lead to backlogs and dissatisfaction by all who use it. Inadequate funding creates too high a risk of damage to the concept and reputation of the tribunal. That damage may be irretrievable and may affect other quasi-judicial bodies.

The Panel considers that if adequate funding is not available to create and maintain QCAT, then QCAT should be deferred until funding becomes available. In the interim, those tribunals that are currently within the justice portfolio could be co-located and rationalised which would provide some benefits of QCAT and facilitate the ultimate implementation of QCAT.

Finally, the Panel notes that both Western Australia and Victoria are conducting inquiries into the operation of their respective amalgamated tribunals.

The Standing Committee on Legislation of the Western Australian Parliament is conducting an inquiry into the jurisdiction and operation of that state's administrative tribunal.

The president of the Victorian Civil and Administrative Tribunal is currently undertaking a review of that tribunal. That review is looking at four broad areas:

- access issues - whether the Victorian Civil and Administrative Tribunal has improved access and delivered equitable outcomes for all Victorians
- operational issues - has the Victorian Civil and Administrative Tribunal been cost effective in delivering services to Victorians and how can it become more cost effective?
- jurisdictional issues – are the jurisdictions assigned to the tribunal appropriate?
- alternative dispute resolution (ADR) – should ADR be a compulsory step in every dispute. ²

While neither inquiry has been completed, both are likely to include recommendations that will be relevant to the implementation of QCAT. The reports of those inquiries should be reviewed by the department, QCAT's president and its executive director when available.

The Panel is aware that comparisons between QCAT and the Victorian, Western Australian and Australian Capital Territory amalgamated tribunals, will be inevitable. However, it is important that where comparisons occur, they take into account the sometimes significant differences between the tribunals in each state and territory.

In particular, the Victorian Civil and Administrative Tribunal has since its creation included planning matters. In Queensland these matters are dealt with by the Planning and Environment Court which was specifically excluded from the Panel's terms of reference. The Panel agrees with this exclusion

² See 'The role of VCAT in a changing world', consultation paper, March 2009, VCAT President's Review

noting that a planning jurisdiction would bring significant complexity and financial challenges to QCAT and that these matters are best dealt with by the court. Any future consideration of amalgamations should carefully consider the impact on QCAT's jurisdictions and the community's access to justice.

3 Essential elements for implementing QCAT

3.1 *Appropriate legislation*

The Panel's stage 1 report identified that the legislation to create QCAT will set the tone of the new tribunal. At the time of finalising this report, the legislation for QCAT has not been introduced into Parliament. The Panel is aware that significant progress has been made in the development of the legislation. It has also had the opportunity to review the exposure draft of the QCAT Bill 2009 that was released for community consultation by the Department of Justice and Attorney-General on 9 February 2009.

In addition, the tribunals review team in the department, has referred particular issues raised by stakeholders during consultation on the QCAT Bill to the Panel. The Panel is of the view that the consultation draft of the QCAT Bill substantially complies with the Panel's recommendations in the stage 1 and stage 2 reports. There have been a number of changes that have arisen out of consultation and the drafting processes.

3.1.1 Public interest immunity

The stage 2 report recommended that common law rules relating to public interest immunity should apply to QCAT proceedings. A provision was included in the drafting instructions attached to the stage 2 report which essentially codified the common law. This provision has been omitted as unnecessary.

3.1.2 Arrangements with heads of jurisdiction about the use by judges and magistrates as supplementary members of QCAT

The stage 1 and stage 2 reports recommended that a number of Supreme Court and District Court judges and magistrates be appointed as supplementary members of QCAT. After reviewing comment on the consultation draft of the Bill, the Panel was of the view that this provision should reflect the proposed administrative arrangements, that there be an agreement between the president and each head of jurisdiction about the use of a judge or magistrate as QCAT supplementary members. This approach appropriately ensures that the heads of jurisdiction retain control over the amount of time supplementary members may dedicate to QCAT duties.

3.1.3 Eligibility requirements for senior members, ordinary members and adjudicators

The stage 2 report recommended that lawyers appointed to QCAT have the following qualifications:

- senior member – a legal practitioner of at least five years standing
- ordinary member – a legal practitioner of at least three years standing

- Judicial Registrar (now called an Adjudicator) – a legal practitioner of at least five years standing.

It became apparent during the drafting of the Bill that these requirements were not appropriate. Adjudicators will generally be allocated to sit on minor civil disputes and other less complex matters. It is not appropriate for the eligibility requirements for an adjudicator to be the same as that of a senior member. However, it is necessary for their eligibility requirements to reflect those of judicial registrars in the Magistrates Court who currently do the work adjudicators will be allocated in QCAT. Consequently, the following eligibility requirements for legal members and adjudicators are included in the QCAT Bill:

- senior member – a legal practitioner of at least eight years standing
- ordinary member – a legal practitioner of at least six years standing
- adjudicator – a legal practitioner of at least five years standing.

3.1.4 Representation

As recommended in the stage 2 report, the general approach to representation in the draft QCAT Bill is that parties should represent themselves. The tribunal is required to comply with the rules of natural justice.

The application of the rules of natural justice in particular cases may or may not require that the parties be represented. Further, the tribunal may be of the view that the broader interests of justice in a particular case would best be served by allowing the parties to be represented. For example, the tribunal may be of the view that allowing representation in a particular case would promote the expeditious resolution of the matter, even though the rules of natural justice would not be breached by refusing to allow representation. Consequently, the broader test of the interests of justice has been inserted to guide the tribunal in exercising its discretion in relation to the granting of leave.

During consultation one agency questioned whether the way in which the further guidelines for the granting of leave are drafted is consistent with the policy set out in the stage 2 report. The Panel believes that, apart from the changes identified in this section, the provision in the draft bill is consistent with the policy intent and the provision is appropriate for QCAT.

Comments received during consultation also indicated that it would be appropriate to include in the bill an entitlement to representation for children and for people with impaired capacity rather than the decision about representation of these parties being subject to the leave of the tribunal. The Panel agrees with this proposal as the tribunal would always give leave for these particular parties to be represented.

Comments were also received during consultation that the tribunal should be required to be satisfied that any person seeking to represent a party, and who

is not an Australian legal practitioner or government legal officer, is an appropriate person to represent the party. The Panel supports this proposal as a way of ensuring that parties are protected from persons who may be seeking to exploit the party or are not qualified to adequately represent the views and interests of the party.

It should be noted that the QCAT rules will provide for the way in which a party who is not an individual may appear and for additional classes of matters where the parties are entitled to representation.

3.1.5 Punishment of contempt

The stage 2 report recommended that contempt of the tribunal should be referred to the Supreme Court to be dealt with under the *Uniform Civil Procedure Rules 1999*. The Panel is now of the view that, as QCAT will be a court of record and will have judicial members, it would be appropriate and more effective for contempt to be dealt with directly by a QCAT judicial member in accordance with the *Uniform Civil Procedure Rules 1999*.

3.1.6 Rehearings/re-openings

In the stage 1 report the Panel recommended that internal appeals in the tribunal should be supplemented by other forms of internal review, in particular, re-hearings. The drafting instructions attached to the stage 2 report included instructions for a legislative provision that would allow the president (or delegate) to rehear matters in certain circumstances.³

Concerns were raised during consultation on the draft Bill that the grounds for a re-opening were too broad and encompassed too many grounds that are also grounds for appeal, which could lead to numerous applications for re-openings. The Panel agrees that the grounds should be narrowed to the following two grounds:

- the party did not appear at the hearing and had a reasonable excuse for not attending
- the party would suffer substantial injustice if the proceeding was not re-opened because significant new evidence has arisen that was not reasonably available at the time the matter was heard and decided.

While the second ground is a ground for appeal, it is appropriate to include as a ground for re-opening because it may be more cost-effective and convenient to the parties and the tribunal for the matter to be reheard rather than appealed.

³ Stage 2 report on legislative amendments to implement the tribunal, drafting instructions, paragraph 4.8.11 at pages 148-149

3.1.7 Role of chief executive

In the stage 2 report, the Panel recommended that the QCAT Bill include provision for the employment of a senior public servant to be the Executive Director of QCAT. That officer's role is to assist the president in the administration of the tribunal and in managing the tribunal's business. It was recommended that this officer along with other registry officers be employed under the *Public Service Act 2008*.

The draft bill does not refer to this position and, instead, states that the functions of the Department of Justice and Attorney-General's Chief Executive include managing the tribunal's administrative support services and appointing the principal registrar and other staff of the registry. No mention is made in the bill of the position of Executive Director. While this approach may provide greater administrative flexibility for the Department of Justice and Attorney-General, the Panel continues to support the need for an Executive Director who is a senior officer to lead the QCAT registry. The panel notes that the recently released registry structure for QCAT includes an Executive Director position.

QCAT will be a large organisation with a wide range of jurisdiction. The principal registrar will have significant quasi-judicial functions under the Act and will not be able to perform these functions together with providing the level of leadership required for the administrative functioning of the tribunal.

3.1.8 Transitioning of sessional members

The stage 1 and 2 reports did not make any recommendation about how existing members of tribunals should be treated in the amalgamation process. The Panel notes that the consultation draft of the QCAT Bill⁴ provides that sessional members of existing tribunals are to be transitioned into QCAT as ordinary members for a period of two years. The Panel understands that the intention of this provision is to ensure that QCAT has ordinary sessional members from its commencement on 1 December 2009.

Two approaches in relation to sessional members are possible:

- 1 recruit new sessional members prior to 1 December 2009 and do not transition existing sessional members or
- 2 reappoint all sessional members for a specified period of time.

There are advantages and disadvantages of each approach. The Panel has not examined the qualification and skills of the members of each tribunal and is not in a position to recommend which sessional members, if any, should be appointed to QCAT. The Panel considers that part of the president's role in QCAT is to identify the tribunal's needs in relation to sessional members.

⁴ Section 257, Exposure draft of the Queensland Civil and Administrative Tribunal Bill 2009

Given the time constraints inherent in this project, with commencement of the tribunal due by 1 December 2009, the Panel's view is that if sessional members are transitioned into QCAT then they should only be transitioned for a period of one year. This will enable the president to make an assessment about the qualities of the members and whether their appointment should be continued.

3.1.9 Outstanding policy issues

Judicial review

In the stage 2 report, the Panel indicated that it was of the preliminary view that judicial review under the *Judicial Review Act 1991* should be limited for all proceedings in QCAT, not just small claims and minor debt matters. The Panel also indicated that it would consult with relevant stakeholders and agencies about the implications of limiting judicial review in this way.

In December 2008 a discussion paper was circulated to stakeholders (see **Appendix 1** for a list of stakeholders invited to comment). The discussion paper included the Panel's preliminary recommendation about judicial review as follows:

Subject to consultation, the Panel recommends that the QCAT Bill contain a provision which limits the application of the Judicial Review Act 1991 to allow for judicial review of decisions in proceedings of QCAT only on the ground of want of jurisdiction, i.e. where the Tribunal has or had no jurisdiction or has exceeded its jurisdiction in the hearing or making of a decision.

Whilst many of the existing tribunals and review or disciplinary bodies that will be superseded by QCAT are currently subject to judicial review, in practice where appeal rights otherwise exist, a judicial review application is unlikely to succeed unless there is want of jurisdiction.

Limiting judicial review of decisions in proceedings of QCAT to the ground of want of jurisdiction –

- *recognises the nature and extent of the appeal rights that will be contained in the QCAT bill...;*
- *provides consistency and as far as possible, clarity around appeal rights for users of QCAT; and*
- *subject to the appeal rights contained in the QCAT Bill, promotes a quick resolution of matters, provides finality in respect of proceedings and certainty to the parties involved.*

Stakeholders were generally supportive of the proposal.

The Queensland Law Society submitted that the legislation should allow for appeals on the ground of breach of natural justice, and alternatively, that

judicial review of QCAT decisions should not be limited. The submission drew the Panel's attention to the approach taken in the Victorian Civil and Administrative Tribunal legislation to judicial review.

Legal Aid Queensland agreed to the proposal, but on the basis that other procedural protections offered in the *Judicial Review Act 1991* were covered through the appeal processes in QCAT and in particular breach of the rules of natural justice.

The Panel is of the view that a breach of natural justice would be captured by the proposed appeal provisions for QCAT decisions. In addition, the proposed appeal rights are more extensive than in other jurisdictions, e.g. the Victorian Civil and Administrative Tribunal, and therefore limitation of the right to judicial review is justified.

Recommendation 1

Judicial review of proceedings in the new QCAT under the Judicial Review Act 1991 should be limited to want of jurisdiction.

Nature of review jurisdiction – fresh hearings

While there is no change to the general approach that matters heard in the review jurisdiction should be heard by way of a fresh hearing, the stage 2 report indicated that the drafting of this provision should not prevent the current processes for misconduct matters continuing to apply to those matters in QCAT.

The Panel understands that the Department of Justice and Attorney-General and the Queensland Police Service have agreed it is not possible to draft a provision that does not change the way in which appeals from police disciplinary decisions are currently heard in the Misconduct Tribunal. The Panel notes that it is proposed that the misconduct jurisdiction of QCAT will retain a requirement that police disciplinary decisions are by way of re-hearing.

3.2 Strong political support

In its stage 1 report, the Panel identified that amalgamating a number of separate bodies into the new tribunal could not succeed without strong political support. This element of 'support' encompasses support in the amalgamation process as well as support after the new tribunal commences.

The Panel believes one of the most important ways that the government has demonstrated its support for QCAT has been the acceptance of all the recommendations of the Panel's stage 1 and stage 2 reports.

Appropriate funding

Government's acceptance of the Panel's recommendations must also be supported by sufficient funding to ensure the recommendations can be implemented effectively. As outlined in chapter 2 of this report, the full benefits of an amalgamated tribunal can only be achieved if it is supported by adequate funding.

In particular, adequate funding must be ensured for appropriate remuneration of members of the tribunal to ensure the attraction and retention of high quality members, which in turn are essential to the delivery of good quality outcomes of the tribunal.

Funding must also be adequate so that a sufficient number of full time members are able to be employed to establish a core group who can facilitate the development of common approaches across the different jurisdictions within QCAT. A full complement of full time members increases the quality of decision making through the development of a common jurisprudence. It also means that QCAT is less reliant on having to fit hearings to meet members other, often more profitable, work commitments.

Finally and importantly an adequately funded registry with support staff is vital to the efficient running of the tribunal. These staff play a critical role in both providing a service to clients but also in ensuring the tribunal as a whole works well.

As indicated in chapter 2 of this report, the Panel's view is that if adequate funding cannot be found for the tribunal's operations then the implementation of the tribunal should be put on hold until it can be funded appropriately.

Appointment of president

The Panel's stage 1 report emphasised the importance of appointing an appropriate person as president of QCAT. The president's role in education, training and oversight of the members' performance is crucial to ensure the successful operation of the tribunal. In addition, the president's role in setting the tone, values and direction of QCAT is vital. This can only be achieved by a person with leadership skills of the highest order.

The Panel notes that no announcements have been made about the appointment of the president and reiterates the importance of the president being appointed as soon as possible. The appointment of a Supreme Court judge as president, to provide leadership to the development of the tribunal and to be involved in the development of the practices and procedures and culture of the tribunal is critical.

Project team

The Panel notes that the government's support has also been demonstrated by the decision by the Department of Justice and Attorney-General to dedicate a project team to work off line to provide support to this Panel. The

project team has also undertaken the implementation work that has had to continue apace with the development of the Panel's reports. A team that is dedicated to the one task has been necessary because of the size and scale of the work to be done to ensure that QCAT commences by 1 December 2009.

The multidisciplinary nature of the project team has also meant that the policy development work has benefited from the combined expertise of legal policy officers, financial analysts and information technology experts. The process of the development of the tribunal has been an iterative one, where decisions about different aspects of the tribunal have been influenced from the very early stages, by the analysis and expertise of the different disciplines.

3.3 Cohesive organisational structure

The organisational structure of QCAT relates to both the registry structure and also the membership and jurisdiction arrangements. While each is separate and unique with respect to the specific functions each is required to perform, they must link together in ensuring the objectives of QCAT are delivered.

As has been the case with both the Victorian Civil and Administrative Tribunal and Western Australian State Administrative Tribunal, the jurisdiction of QCAT is likely to increase and change over time. To ensure the organisation remains dynamic and responsive to change the president will need to have the powers to:

- establish and modify QCAT's divisional arrangements
- establish and modify QCAT's hearing lists
- adapt the membership structure to ensure it continues to support the list and division arrangements. This includes having the discretion to allocate members across specific divisions and lists in accordance with each member's skills and experience.

The Panel is aware that significant work has been undertaken to design a new registry structure specifically for QCAT. The Panel agrees that a QCAT designed registry is necessary if its vision of a cohesive organisation is to be achieved. Simply co-locating registries will not do this. The adoption of a cohesive registry structure for QCAT, with the proposed centralisation of many functions, provides for the simple alignment of the registry with the jurisdiction arrangements.

The need for cohesion and adaptability should underlie all structural decisions made by the tribunal and its management.

3.4 Flexible and appropriate processes and procedures

Legislation and rules

The legislation establishing QCAT (the QCAT Bill 2009 and the QCAT (Jurisdiction Provisions) Amendment Bill 2009) sets the framework for the

tribunal and the generic powers and procedures which will apply to it. In the stage 2 report the panel recommended the development of QCAT rules as subordinate legislation and recognised that the president needed to have the ability to make practice directions to ensure the smooth operation of the tribunal.

The QCAT rules and president's practice directions will set out the bulk of detailed procedures and processes for the various jurisdictions dealt with in QCAT. This structure ensures that QCAT is flexible and easily able to adapt to changing environments and responsive to stakeholders.

Current tribunal members, presidents and registry staff have a wealth of knowledge about how the jurisdictions to be amalgamated into QCAT operate in practice. The rules and practice directions should therefore be developed in consultation with existing tribunal members, presidents and registry staff to ensure the effective operation of the tribunal.

The Panel considers that there are general principles that should be applied to guide decisions about what matters should be dealt with in the rules and in what way. The rules should reflect the objects and guiding principles of the QCAT Act, and in particular should:

- as far as possible promote consistency in procedural requirements for all matters dealt with by QCAT, and retain specialist features for jurisdictions only where it is essential in order to ensure the proper conduct of proceedings
- ensure a cost effective process and early resolution of disputes
- promote accessibility and be responsive to the diverse needs of users of QCAT
- avoid unnecessary and burdensome procedural requirements
- be written in a way which is easily understood by users of QCAT, particularly non-lawyers.

Business processes

The creation of QCAT presents an opportunity to ensure that the new tribunal's processes and procedures are efficient and effective. The new registry which has been designed specifically for QCAT will facilitate the implementation of new ways of doing things. These processes should be designed to remove duplication and provide for efficient handling and processing of applications and matters within the registry.

The Panel has been advised that extensive work has been undertaken to identify and understand the amalgamating tribunals' business processes. While this is a good starting point, the QCAT processes that are developed must ensure that they do not simply replicate inappropriate or inefficient practices of the current tribunals. Of course the processes will need to recognise and accommodate specialisation where that is appropriate, but streamlining and rationalising processes where possible will be important.

This must happen if QCAT is to be a cohesive organisation. Otherwise, QCAT will simply be a co-location with a myriad of different practices and procedures for the same types of things.

3.5 Regional and rural delivery

The stage 1 report emphasised the importance of effective and efficient regional and rural service delivery due to Queensland's dispersed population. QCAT will need to consider all aspects of regional and rural service delivery and develop an appropriate service delivery model. This model will need to address the following matters.

Facilities

Access to appropriate facilities for tribunal hearings, conferences and mediation will be important for QCAT's regional operations. Developing an equitable and predictable model for the sharing of court room facilities will help to ensure tribunal matters are able to be scheduled within acceptable timeframes. An annual tribunal calendar, with a collaborative approach adopted with the Supreme, District and Magistrates Courts, would also assist with this.

The regional strategy must also consider whether court room facilities will be suitable for the type of tribunal proceeding. It is important that all aspects of QCAT, including the facilities used, recognise that QCAT is not a court.

The ability to use court rooms for QCAT hearings is not without its challenges. The Panel recognises that court hearing rooms are often fully booked in some regions. For this reason, the Panel is of the view that the tribunal should also develop a list of alternative and appropriate facilities in regional areas that could be used for hearings.

In identifying these facilities, consideration should be given to the needs of QCAT users which will require facilities that provide for disability access, hearing loops, and appropriate security. In addition, as recommended in the stage 1 report, the ability to record hearings must be catered for.

Appropriate consideration should be given to the use of technology, such as video and teleconferencing for regional hearings. While this technology will not be appropriate for all types of matters, there will be occasions when its use will provide the means for a quick and appropriate hearing.

Technology

The delivery of services in QCAT will be underpinned by the availability of appropriate technology. This technology will need to support the:

- use of teleconferencing and video conferencing to ensure hearings are timely and that all parties are able to attend
- seamless management of all applications
- diversity of jurisdictions which QCAT will have from 1 December 2009

- recording of all hearings
- certainty in planning and scheduling of all hearings, regardless of the physical location.

It is acknowledged that the required investment in technology can be extensive, with technological changes continually occurring. The initial implementation of QCAT's foundation technology elements will place QCAT in a good position to take advantage of technological advances after 1 December 2009. From a client perspective the technology arrangements for QCAT should be seamless.

Registry support

For clients across the state their first experience of QCAT will be with the tribunal registry. The registry is the public face of QCAT. Client needs will include:

- adequate information about the tribunal
- the ability to lodge applications
- getting good information about when their matters will be heard and
- understanding what will happen when they attend a hearing.

The Panel understands that in regional and rural Queensland the delivery of QCAT services for minor civil disputes (small claims and minor debt matters), will be provided through the current Magistrates Court registries. From a client perspective, it is important that the QCAT experience does not vary by location. At all locations clients must be able to:

- access information services
- get application forms
- lodge applications and pay any relevant fee.

Registry staff will need to be trained and supported to provide this level of service before QCAT commences. This training and support will however, need to be embedded as part of QCAT's culture, as the need for it will not cease on 1 December 2009. Support will need to include training and development and access to online procedural information. It will also be important that regional staff have access to designated staff in QCAT's Brisbane registry to obtain advice about processes and procedures.

Governance

The diverse physical spread of service delivery points, coupled with the use of Magistrates Court staff to provide registry support, means that a governance model will be needed which gives the QCAT president and executive director the ability to lead the tribunals' functions across the entire state.

The model will need to be developed with significant consultation with the Chief Justice, Chief Judge and Chief Magistrate.

Members

The stage 1 report recommended that QCAT have a mix of senior, ordinary and sessional members with the relevant skills and experience to undertake cases in the division and lists to which they will be assigned. These skill sets will be required to be available across the state.

QCAT may encounter specific challenges in securing members in rural and remote locations with the required skill sets. A member model will need to be developed which considers the following factors:

- use of sessional members, available locally
- enhancing sessional member capacity and capability through the use of retired legal practitioners and those with an interest in securing part-time employment
- regular and adhoc circuiting of Brisbane based members
- the capacity of existing judicial officers to deliver QCAT services
- the use of judges and magistrates outside the Brisbane area as supplementary members.

The model will need to be flexible to cater for both temporary and permanent jurisdictional fluctuations.

3.6 Organisational culture and strong leadership

Recommendation 38 of the stage 1 report stated that the inaugural president and the senior management roles should be recruited as soon as possible. The importance of this recommendation requires reinforcement in this report.

As indicated in the stage 1 report, these roles will be vital in establishing the culture of QCAT for both members and registry staff. Their early recruitment enables work to commence on this vision which can then be communicated to the staff and members that will form QCAT prior to 1 December 2009.

To enable QCAT to start on 1 December 2009, a significant body of work must be completed, for which the president, deputy president, executive director, and principal registrar will be responsible for operationalising in QCAT. This body of work includes:

- development of legislation and rules
- development of QCAT's fee structure
- definition of business processes
- definition of member requirements and recruitment arrangements
- creation and implementation of the registry structure
- implementation of the case management system.

Tribunal staff, clients and stakeholders will undergo a significant change process in order to amalgamate the disparate tribunals into one. Ensuring that QCAT's operational arrangements are planned and in place from 1 December 2009 or before will ensure a level of stability in the tribunal which will facilitate the achievement of QCAT objectives.

If this change is to succeed the president and the senior members of QCAT's registry need to be involved at an early stage in these processes.

The professionalism of QCAT members and staff will be a key factor in determining the type of experience that the general public will have with the tribunal. Maintenance of this professionalism through the creation of a learning organisation should be embodied within the culture of QCAT.

The ongoing professional development of both the members and registry needs to be factored into QCAT's training and development strategy and should be a focus of the president and executive director.

3.7 Alternative dispute resolution as part of the fabric of the tribunal

The Panel recommended in its stage 1 report that alternative dispute resolution (ADR) be part of the fabric of QCAT as it represents a quick and efficient means of resolving disputes in a consensual way, often early in the process.

The QCAT Bill provides the framework to ensure those recommendations are implemented, with flexible arrangements for the performance of both mediation and conciliation functions. Suitably qualified and skilled mediators should be used to ensure an appropriate standard of mediation is met.

The creation of QCAT provides opportunity to explore the way in which ADR is used across all of the amalgamating jurisdictions. This is not about creating a one size fits all approach to ADR. ADR processes need to be tailored to the jurisdiction in which they are being used and also, importantly, the clients who use that jurisdiction.

There are currently ADR processes that work well but also jurisdictions where ADR is not a feature. QCAT should take a strategic view of ADR, reviewing the ADR approaches, identifying which work best in particular jurisdictions and which have the most positive outcomes. It should look for opportunities to improve existing practices and standardise these where relevant as well as looking for opportunities to expand the use of ADR where appropriate.

QCAT should also look for opportunities to maximise the effective use of ADR in the regional areas which QCAT will service.

The released QCAT registry structure has a small dedicated ADR area which the Panel supports. This area should undertake this strategic work around ADR.

3.8 QCAT is a tribunal, not a court

While it might seem obvious, the principle that QCAT is a tribunal and not a court is one which needs to underpin all aspects of QCAT's development and operation.

QCAT is not bound by the rules of evidence, but it must observe natural justice, representation is not as of right in most cases and the tribunal's leave must be obtained before a party can be represented. QCAT may adopt an inquisitorial as opposed to an adversarial approach for many types of matters which recognises that many of the parties who use QCAT will be unrepresented and will need additional assistance to ensure that they are able to use and access the tribunal effectively.

A more formal court like approach to QCAT's operations will not assist users of the tribunal and is likely to impair the benefits that QCAT will deliver. However, the tribunal needs to be flexible in the way that it deals with matters and recognise that its procedural requirements will vary between jurisdictions. For example, the approach taken to a disciplinary matter is likely to be very different to the approach taken to a guardianship matter.

The president will need to balance the competing requirements of the different QCAT jurisdictions ensuring that the tribunal has procedures and processes that generate fair outcomes but being vigilant that QCAT does not become a 'court'. This is partly a cultural issue about which the president will need to send clear messages.

It is however important that the president and deputy president, as Supreme and District Court judges respectively maintain their close connection to those courts. The Panel remains of the view that these judges should sit in their 'home' courts for several weeks each year, at least in the initial stages of QCAT's development.

It will also be important to ensure that the tribunal is connected with the Magistrates Court and that the president has a close working relationship with the Chief Magistrate, particularly as it is proposed that Magistrates in regional areas continue to perform small claim and minor debt work for QCAT.

The president will also need to liaise closely with the heads of all jurisdictions about the use of judicial officers as supplementary members of QCAT.

QCAT should also inform itself generally about the work of other tribunals which have not been amalgamated. This report makes particular recommendations about the Mental Health Review Tribunal, however there may be other entities from which QCAT could benefit from understanding different approaches to common issues.

3.9 Critical factors for success at transition

The creation of QCAT represents a significant undertaking for the Queensland Government. The amalgamation of such a large number of tribunals into one is unprecedented in Queensland.

A number of factors will be essential in ensuring QCAT succeeds from the outset:

- clear communication to current and future clients on the changed arrangements
- proactive consultation and communication with current tribunal members
- staff engagement and involvement in the development and implementation of:
 - the amalgamated organisational structure
 - new business processes
 - policies and procedures
 - accommodation arrangements
- consultation with stakeholders about the tribunal's legislative arrangements.

The scale of change expected from staff in particular, is immense and will be intense for a period of time. As identified in the stage 1 report the phased implementation of the transition elements will ease the transition process, and assist in achieving greater ownership of the elements being adopted by QCAT.

The Panel understands that a good start has been made in the adoption of the QCAT case management system by many of the amalgamating tribunals, with the co-location of tribunal registry support arrangements already commenced. Continuation of this activity provides a means for staff, members and stakeholders to transition more easily into QCAT from 1 December 2009.

The current tribunals each have a fee structure relevant to their respective tribunal arrangements. QCAT will need to adopt a fee structure which reflects the amalgamated tribunal that is being created.

QCAT's fee structure will need to:

- be simple for both tribunal staff and the general public to understand
- maintain low or no fee arrangements for the human rights or protective jurisdictions
- ensure accessibility for all Queenslanders is maintained with respect to minor civil dispute matters
- standardise fees for similar jurisdictions wherever possible

- consider whether the value of a claim is relevant to the determination of the fee level
- allow the addition of new jurisdictions or the variation of existing jurisdictions
- accommodate QCAT's internal appeals.

The approved fee arrangements will need to be communicated to QCAT staff, members, stakeholders and the general public prior to QCAT's commencement.

Transitional arrangements for the period immediately following commencement will also be important with a high potential for confusion for both tribunal staff and users if these are not well planned.

4 Post implementation priorities

4.1 Background

After reviewing the work undertaken to establish the new tribunal, the Panel has identified a number of issues to be addressed as a priority to ensure the effective operation of QCAT. Some of the issues are appropriately addressed by the president of QCAT. Others are the responsibility of the government. As at the date of finalising this report, the Panel is not aware of the outcome of the government's deliberations about funding for the tribunal. The priorities identified below relate to a tribunal that is established in accordance with the Panels' recommendations. If the government decides not to provide funding to fully implement all the Panel's recommendations these priorities will need to be reconsidered.

4.2 Priorities for the new president

4.2.1 Panel's reports and resource committee

A critical success factor previously identified by the Panel, and confirmed in this report, is the role of the president to ensure the effective and efficient operation of the new tribunal.

The issues identified in each of the Panel's reports will be relevant to guide the development of the range of administrative processes that will be critical to the efficient and effective operation of the new tribunal.

One of the specific strategies not already discussed in those reports is the role of a resource committee in providing expert guidance to the tribunal on the financial operations.

The Western Australian State Administrative Tribunal has established a resource committee. The committee receives monthly reports about the tribunal's budgetary position and general financial and statistical performance of the tribunal.⁵

QCAT would benefit from having a similar committee particularly if, like the Western Australian committee, the president, tribunal members, QCAT Executive Director and Principal Registrar participate on the committee. This will help to ensure that members understand the financial and performance constraints under which QCAT must operate. The committee would be particularly valuable in QCAT's early years, when the tribunal's resources will need to be monitored closely.

⁵ The Honourable Justice Michael Barker, 'Roles and responsibilities of tribunal heads and senior members – the experience of the State Administrative Tribunal' (Paper presented at the Tribunal Leadership Conference, Rotorua, New Zealand, December 2006).

4.2.2 Links with the Mental Health Review Tribunal

The Panel's stage 1 report recommended that, although the Mental Health Review Tribunal should not be amalgamated into QCAT, a close association should be fostered between the two organisations. This report identifies three issues that QCAT's president may wish to consider:

- joint membership which facilitates an individual client having a number of matters dealt with in the one forum for example, mental health and guardianship issues being dealt with in the one proceeding
- sharing training resources on issues that are relevant to both tribunals, for example writing decisions that are clear, concise and easily understood
- cooperative arrangements to share access to appropriate hearing facilities and video conferencing equipment present opportunities for both tribunals to maximise efficient use of resources.

4.2.3 Evaluation

The Panel in its stage 1 report recommended the development of an evaluation framework that addresses whether the objectives of QCAT have been met, as well as whether the process by which the amalgamation has occurred was effective.

The Panel understands that work has already commenced on the evaluation framework.

The Panel reiterates that it will significantly enhance the quality of the evaluation if the framework is finalised and initial baseline data obtained before the commencement of the new tribunal.

The Panel in its stage 2 report also recommended that there be a legislative requirement to review the QCAT legislation to determine if the legislation is achieving its stated objectives.

The Panel believes that the provision in the draft Bill⁶ achieves the intention of the Panel's recommendation on this issue. In particular the Panel believes it adequately addresses the relationship between the evaluation and the statutory review.

4.2.4 New jurisdictions

QCAT will be a large, multi-jurisdictional tribunal that has a greater capacity and ability to acquire new jurisdictions than the individual amalgamating tribunals. It is likely to be an attractive and appropriate entity to deal with newly created jurisdictions, for example new rights of external review. However, the addition of new jurisdictions will impact on the tribunal both in its

⁶ Section 234, Exposure Draft of the Queensland Civil and Administrative Tribunal Bill 2009

ability to deal with matters in a timely way and the extra administrative burden to the tribunal in amalgamating these new jurisdictions.

Matters that would need to be considered include:

- the legislative arrangements for the new jurisdiction and its interaction with the QCAT legislation
- the financial cost for QCAT in supporting the jurisdiction
- the business processes and forms relevant to the new jurisdiction
- stakeholder and community communication
- member and staff training.

The first twelve months of QCAT's creation will be challenging. During this time, the president, executive director and principal registrar will be bedding down the practices and procedures of the tribunal and striving to achieve changes which maximise efficiencies in the new tribunal. It is important that the tribunal is not distracted by having to deal with the addition of new jurisdictions.

The Panel recommends that the government defer the addition of new jurisdictions to QCAT for the first twelve months of its operation to ensure that it is able to achieve maximum efficiency.

It will be important, after the expiration of this 12 month period, that QCAT has mechanisms in place to manage its jurisdictional growth. A proactive approach will ensure this is handled in an ordered and considered way. It would be useful for the tribunal to develop a toolkit for departments that want to give QCAT jurisdiction in particular matters. The toolkit should include information and templates to guide departments through the process of having a jurisdiction conferred on QCAT.

4.3 Priorities for government consideration

4.3.1 Impact of the Moynihan review on jurisdiction of civil matters in the Magistrates Court

At the time of finalising this report, the Panel understands that the government is considering the report of the Review of the Civil and Criminal Justice System in Queensland conducted by the Honourable Martin Moynihan AO QC.

The review was to consider how a more effective use of public resources could be achieved through the administration of the civil and criminal jurisdictions of the Queensland courts. The limits of the civil jurisdiction of the Magistrates Court were to be considered as part of that review and in that context the limits of the Small Claims Tribunal may also be considered.

Any changes to the monetary jurisdiction of the Small Claims Tribunal and minor debt claims heard by the Magistrates Court will impact on the new jurisdiction of QCAT to hear these matters as part of its minor civil disputes jurisdiction.

The Panel considers that any action taken by the government to change the monetary limits of these jurisdictions must consider the implications for QCAT.

The importance of accurate estimates of the financial implications of these changes can not be emphasised enough. The minor civil disputes jurisdiction will comprise the largest number of matters in QCAT. Estimates that do not adequately assess the financial implications of increasing the jurisdictional limit in these matters will have a significant impact on QCAT's ability to meet its objectives to operate in a cost efficient manner. Making significant changes to the largest jurisdiction in QCAT before the tribunal has had the opportunity to be established may also adversely affect the successful operation of the tribunal.

The Panel therefore recommends that the government defer implementing any changes to the jurisdictional limits to matters dealt with in QCAT as minor civil disputes until after QCAT has commenced, and the financial implications of a change in jurisdictional limit for these matters have been adequately addressed.

4.3.2 Protocols for incorporation of new jurisdictions in QCAT

A major benefit of establishing QCAT is that there will now be a flexible framework for the future. New jurisdictions can be conferred on QCAT, without the need to establish separate infrastructure.

The Panel recommends that a strategy be developed that details processes to be followed when new jurisdictions are to be considered for inclusion in QCAT.

The government's new administrative review policy provides a framework to ensure QCAT is considered as the principal mechanism for administrative review. Compliance with the policy is a useful way to ensure against any gradual increase in the establishment of unnecessary specialist tribunals.

However, when new jurisdictions are conferred on QCAT, both legislative and resource issues must be considered.

In relation to legislation, the Acts conferring jurisdiction on QCAT should continue to comply with the principles set out in the Panel's stage 2 report. In particular, the legislation should continue to ensure that the generic processes and procedures of QCAT apply, unless there are good policy reasons to adopt specialist processes or practices.

In relation to resource implications, it is important that the government consider the necessary resources required to be provided to the tribunal when making the policy decision to confer jurisdiction on QCAT.

Standard templates should be developed, and made available on the QCAT website that can assist agencies to identify the relevant legislative and resource issues when developing the proposals to confer new jurisdiction on QCAT.

While QCAT has been designed to flexibly manage the transition of additional jurisdictions, any additional jurisdictions with significant implications for policy, practices or funding for QCAT should take into account the need for QCAT to establish its own practices in its first three years of operation. This will ensure that QCAT is given the best possible opportunity to establish itself as a new tribunal.

4.3.3 Further standardisation of practices within QCAT jurisdiction

The establishment of QCAT and the process of amalgamating existing tribunals into one single entity has involved some standardisation across different jurisdictions.

The Panel in its stage 1 and stage 2 reports recommended standardised processes to some key aspects of QCAT including:

- that the review jurisdiction of the tribunal should be heard by way of a fresh hearing
- provision of standard information notices about the original decision, reasons and the process to apply to QCAT.

However the timeframe for implementation of the new tribunal, and in particular the legislation, has limited the ability of the Panel to consider and recommend further standardisation of processes and practices.

Once QCAT has been operating for a period of time, it may become apparent that further streamlining and the adoption of consistency of approaches could improve the operation of QCAT.

Recommendation 2

The Panel recommends that in particular, government should consider whether the practices of the different disciplinary jurisdictions could be further standardised to deliver increased consistency without compromising the need for specialist approaches. This is something that the president should consider during the first year of QCAT's operation.

4.3.4 Operation of jurisdiction dealing with official misconduct

The Panel recommended in its stage 2 report that the Attorney-General consider whether the privilege against self incrimination should be abrogated in disciplinary proceedings in the police misconduct and official misconduct jurisdiction of QCAT.

The Panel understands that this proposal is under consideration by the Attorney-General.

During the drafting of the relevant amending legislation for official misconduct matters, a further issue has been raised which the Panel recommends should also be considered.

The large majority of matters heard in the former Misconduct Tribunal are against police officers. Charges of official misconduct and reviews of decisions about other less serious misconduct are rarely heard against prescribed persons who are public sector employees.

With the extensive processes available to deal with disciplinary matters involving less serious misconduct of public sector employees, the question has been raised as to whether it is necessary to maintain in QCAT a review function for lesser charges of misconduct for public sector employees.

The Panel understands that the government will be reviewing the new public sector disciplinary processes established in the new *Public Service Act 2008*.

Recommendation 3

The Panel recommends that the government consider, as part of this review of the public sector disciplinary processes, whether it is necessary to retain in QCAT a review function for charges of general misconduct for public sector employees.

Appendix 1 – Stakeholders consulted about amendment of the *Judicial Review Act 1991*

Agency

1. Queensland Ombudsman
2. Queensland Police Service
3. Department of Tourism, Regional Development and Industry
4. Department of Emergency Services
5. Department of Main Roads
6. Department of Local Government, Sport and Recreation
7. Department of Infrastructure and Planning
8. Department of Public Works
9. Disability Services Queensland
10. Department of Communities
11. Queensland Health
12. Department of Natural Resources and Water
13. Queensland Transport
14. Queensland Corrective Services
15. Department of Education, Training and the Arts
16. Department of Child Safety
17. Department of the Premier and Cabinet
18. Queensland Treasury
19. Department of Justice and Attorney-General
Strategic Policy
20. Queensland Law Society
21. Queensland Bar Association
22. Chief Justice
23. Legal Aid Queensland