THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
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By email: natalie.cooper@lawcouncil.au

Dear Dr Popple,

ADMINISTRATIVE REVIEW TRIBUNAL PRACTICE DIRECTIONS—SIX-MONTH REVIEW

Thank you for the opportunity to contribute to the Law Council submission to the Administrative Review Tribunal (**Tribunal**) regarding its Practice Directions. The Law Society's Privacy and Data Law, Public Law, and Human Rights Committees contributed to this submission.

General comment

As the Tribunal has been operational for only six months, it is difficult to comment in detail on the effectiveness of the Practice Directions. In general, however, our members note that the Practice Directions remain legalistic in form, and may be impenetrable for some self-represented parties. We have received reports from practitioners appearing before the Tribunal in migration matters, who have observed that Tribunal Members in that jurisdiction rarely refer to the Practice Notes, possibly due to their complexity.

Practice Directions which communicate Tribunal processes and procedures in simple, plain-English would align with the objectives under ss 9 and 51 of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**) for the Tribunal to undertake reviews that are fair and just, as well as to conduct each proceeding in a way that is accessible for the parties and takes into account their needs.

One option could be for the Tribunal to develop simplified guidance in addition to the Practice Directions. We note the Federal Court, for example, has made significant progress in responding to the accessibility needs of diverse parties appearing in the Migration Division, including through the development of graphics, simple language guides and translated material in community languages. It will be important to ensure alignment between any simplified resources and the Practice Directions to ensure a consistency of approach.

We emphasise the importance of providing training to Tribunal Members to support parties in interpreting and discharging the administrative procedures demanded of them. Similarly, Commonwealth legal representatives should be reminded, as part of their model litigant duties, of the need to provide guidance to unrepresented parties on issues of practice and procedure in the Tribunal.

Administrative Review Tribunal (Freedom of Information) Practice Direction 2024

Our comments in relation to the Administrative Review Tribunal (Freedom of Information) Practice Direction 2024 (**FOI Practice Direction**) are set out below.

Section 1.11 – Definition of 'documents in issue'

'Documents in issue' is defined in s 1.11 as 'documents subject to the decision under review that are claimed to be exempt'. We suggest that this definition be amended to include not only documents that are claimed to be exempt under the *Freedom of Information Act 1982* (**FOI Act**), but any other documents that are sought to be released which are in issue. For example, parties may seek a review regarding the sufficiency of searches for relevant documents under the FOI Act, which are not exempt, but which were excluded for consideration in an FOI determination for reasons of being outside of scope.

Section 2.4 – Third Party Notifications

Section 2.4 requires agencies to which the request for access was made to notify affected third parties that an application has been made to the Tribunal. We suggest that the Practice Direction could set out in greater detail the requirements in relation to the notification of affected third parties to enable them sufficient time to prepare for a Tribunal hearing, if required, and to have their interests adequately represented. This could include requiring agencies to provide third parties with:

- Notice of an application within a specific timeframe e.g., 14 days before the hearing.
- Details of the parties to the proceedings.
- The time and date of the hearing.
- Details on how to make an application to be included as a party in the proceedings.

Section 2.5 – Referrals to the Guidance and Appeals Panel (**GAP**)

Section 40 of the ART Act provides for a matter to be referred to the GAP on the basis that it raises an issue of significance to administrative decision-making. However, s 2.5 of the FOI Practice Direction provides that FOI decisions cannot be referred to the GAP.

The reasons for excluding referral of FOI decisions are unclear. While the FOI Act has been in force for over 40 years, there continue to be novel issues of significance to be considered in this jurisdiction.[1] We suggest that in some circumstances, it may be appropriate for the President of the Tribunal to refer complex matters or 'test cases' to the GAP for hearing and determination at first instance, or for a second review.

Section 3.5-3.8 – Security Markings

The FOI Practice Direction refers at ss 3.5-3.8 to documents that have a security marking and documents that do not have a security marking. However, there does not appear to be provision for documents that have no security marking, but which may require such. In that context, we consider this section could be amended to include a third category of documents, e.g., 'Mislabelled Documents – Requiring Secure Handling.'

[1] See, for example, the recent decision of the Full Court of the Federal Court of Australia on unreasonable delays in decision-making in *Patrick v Australian Information Commissioner* [2024] FCAFC 93.

Alternatively, these sections of the FOI Practice Direction could be amended to include additional details for agencies to provide reasons why a given document should be considered as subject to a security marking.

Section 3.12(c) – Restricting publication or disclosure

Section 3.12(c) outlines only two instances in which the Tribunal Member may restrict publication or disclosure of information. We suggest that the grounds for restricting publication or disclosure be expanded to reflect those contained in section 4, which deals with confidential evidence and submissions. These include the grounds of national security, law enforcement and regulatory investigations, or other grounds as advanced by the parties.

Section 3.15(b) – Returning exempt documents

Section 3.15(b) provides for the process by which the Tribunal can return exempt documents to the agency or decision-maker. This section appears to operate under the presumption that the Tribunal would be handling hard copies of exempt documents. Given that documents provided to the Tribunal would be copies of original agency documents, their return would not be required under the *Archives Act 1983* (Cth), as they would be duplicates permitted to be destroyed. Further, there may be security concerns around effecting the return of exempt documents, which would also take time and increase costs.

We suggest the Practice Direction be amended to simplify these protocols and facilitate document destruction, where permitted, in hard copy and digital formats. To provide additional security and assurances for both agencies and the Tribunal, we suggest that the FOI Practice Direction be amended to incorporate a protocol for emailing a confirmation that the exempt documents were destroyed on a given date, using a specific method and overseen by a Tribunal staff member.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President