THE LAW SOCIETY
OF NEW SOUTH WALES

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24 July 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: natalie.cooper@lawcouncil.au

Dear Dr Popple,

Administrative Review Tribunal Practice Directions

Thank you for the opportunity to contribute to the Law Council's response to the consultation being conducted by the Administrative Appeals Tribunal (**AAT**) on draft Practice Directions for the new Administrative Review Tribunal (**Tribunal**). The Law Society's Public Law and Human Rights Committees contributed to this submission.

General Comments

Accessibility
While the Law Society appreciates that the new Practice Directions will be drafted with a degree of formality as instruments made under s 36(1) of the *Administrative Review Tribunal Act 2024* (**Act**), we draw attention to the fact that a high number of unrepresented litigants will need to use them in matters before the Tribunal. While lawyers could reasonably be expected to navigate the Practice Directions, we suggest that their introduction will need to be accompanied by significant educational resources (e.g., videos, factsheets, infographics etc.) so that they are as accessible as possible to a general audience.

Review mechanism
The operation of the Practice Directions will necessarily be informed by the experience of applicants, representatives and Members once the Tribunal is operational from 13 October 2024. We therefore suggest that it would be useful to ensure that the Tribunal develops a mechanism for regular review by user groups of relevant stakeholders, including legal professionals with experience appearing in the Tribunal's different jurisdictions. This will assist in ensuring the Practice Directions remain flexible and responsive to problems as they emerge. We note that a similar approach to the review of practice notes and directions has been adopted by the Federal Court of Australia.

Administrative Review Tribunal (Common Procedures) Practice Direction 2024

Removal of representation
Paragraph 2.21 is imported from s 66(3) of the Act, which sets out the circumstances in which the Tribunal can order removal of a representative. Paragraph 2.23 supplements paragraph

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au

T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au

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2.21 by providing for a list of circumstances that the Tribunal may consider in deciding whether to make such an order. We suggest the addition of a subsection (e) under 2.23 which provides that the Tribunal may consider any representation made by a person, or their representative, that:

i) there is no conflict of interest, or the conflict is capable of being managed; and
ii) the representative is acting on instructions consistent with their fiduciary duties.

It would also be helpful for the Tribunal to be informed whether a representation in the manner described above was made on the basis of information or material not before the Tribunal, including due to legal professional privilege.

The addition of these provisions would assist where relevant circumstances around a potential conflict of interest are not known to the Tribunal and may therefore unnecessarily lead to the removal of a representative.

Adjournments
We suggest that an additional sentence be added to paragraph 5.11 which provides that while the matters (a) and (b) are not, of themselves, sufficient reasons for an adjournment to be granted, the Tribunal will take into consideration circumstances beyond the control of the applicant which lead to the unavailability of counsel or representation, for example when a representative is removed in accordance with s 66(3) of the Act or becomes unavailable at short notice.

Ending a proceeding
We suggest that paragraph 8.1 be qualified as follows (see underscored text below):

> Once the Tribunal has made a <u>lawful</u> decision which finally determines all outstanding issues in a matter it no longer has the power to make any further orders;

Or alternatively:

> <u>Generally</u>, once the Tribunal has made a decision which finally determines all outstanding issues in a matter it no longer has the power to make any further orders.

The amendments suggested above would reflect the case law that, in limited circumstances, the Tribunal will be empowered to re-open a matter: see *Minister v Bhardwaj* [2002] HCA 11.

Representatives
The Law Society is supportive of the way in which the Act provides for a right to legal representation in proceedings without the need to seek leave, as was the case under s 32 of the *Administrative Appeals Tribunal Act 1975* (Cth). In our view, this is consistent with a simpler and more cost efficient way of the Tribunal carrying out its functions.

In cases where the representative is not a legal representative, consideration should be given to whether specific guidance should be provided, as is the case in the NSW Civil and Administrative Tribunal (NCAT), which notes, for example, that the proposed representative should have sufficient knowledge of the issues in dispute so as to be able to represent the party effectively.

Referral for legal assistance
It may be helpful to provide some guidance to applicants about any processes in place in the new Tribunal whereby a matter is deemed necessary to be referred to legal aid commissions and community legal centres for further support and assistance.

Administrative Review Tribunal (Migration, Protection and Character) Practice Direction 2024

Specific Arrangements for Expedited Character Review
Paragraph 5.5(b) states that:

> the Tribunal cannot have regard to any document not provided to the Minister 2 days prior to the hearing of the application and cannot have regard to any oral evidence on a matter unless it is set out in a written statement and provided to the representative of the Minister 2 days prior to the hearing of the matter;

We are concerned that this drafting does not accurately reflect the High Court authority that the AAT can, in certain circumstances, have regard to oral evidence adduced under cross-examination or questioning by the AAT: see *Uelese v Minister* [2015] HCA 15. We suggest the following amendment to 5.5(b) may be appropriate to better reflect this authority (see underscored text below):

> the Tribunal cannot….have regard to any oral evidence presented in support of the person's case unless it is set out in a written….

Access to information given to the Tribunal by the Department
The Law Society considers that particular attention should be paid to provisions in the Practice Direction around access to information given to the Tribunal by the Department. This is particularly important, given that while the Act permits applicants to request written materials from the Department, and there is an obligation on the Department to respond to this request, no timeframes are provided by the legislation. We are concerned by the absence of specified timeframes, given known delays in the Freedom of Information process.

Paragraph 3.17 provides that the Tribunal will not consider a late request for written material to be an adequate reason by itself for the adjournment of a hearing. The Law Society is concerned that this provision may particularly disadvantage protection applicants, many of whom do not engage legal assistance until they have been allocated a hearing date. Therefore, they are often unaware of the opportunity to apply to the Department for evidence which would support their application. While the Law Society appreciates hearings cannot be adjourned indefinitely, in the interests of fairness, the decision-maker should be permitted to exercise their discretion in favour of applicants who only become aware of the ability to make an application for access to information at this later stage.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,

Brett McGrath
President