



Australian Government
Migration Review Tribunal

PRINCIPAL MEMBER DIRECTION – 2/2005
[Date of issue: 5 October 2005]

Principal Member Direction 2/2005 (in effect from 5/10/2005)

This is a Principal Member Direction pursuant to section 353A of the *Migration Act 1958* (the Act). This direction replaces Administrative Circulars 1/1999, 1/2000 and 3/2000, Principal Member Direction 1/2002 and documents relating to the basic preparation model with effect from 5 October 2005.

EFFICIENT CONDUCT OF MRT REVIEWS

Definitions

delegate means an officer acting as a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs;

the Department means the Department of Immigration and Multicultural and Indigenous Affairs (also referred to as DIMIA);

Minister means the Minister for Immigration and Multicultural and Indigenous Affairs;

the Act means the *Migration Act 1958*;

the Regulations means the Migration Regulations 1994;

the Tribunal means the Migration Review Tribunal;

time limited case means an application for review of a decision to refuse to grant a bridging visa, or of a decision to cancel a bridging visa, where a person is in immigration detention because of that refusal or cancellation.

Background

1. The Tribunal, in carrying out its functions under the Act, is required to provide a mechanism of review that is 'fair, just, economical, informal and quick' (section 353). The Principal Member may give directions as to the operation of the Tribunal and the conduct of reviews by the Tribunal (section 353A).
2. This Direction provides general guidance on the conduct of reviews.
3. In conducting a review, the Tribunal must have careful regard to the procedural provisions in the Act, particularly:
 - the requirement to put certain adverse information to the review applicant, and to provide the review applicant with an opportunity to comment on any such information (section 359A);
 - the requirement to provide the review applicant with an opportunity to appear before the Tribunal to give evidence and present arguments (section 360);
 - with limited exceptions, the entitlement for the review applicant to have access to any written material given or produced to the Tribunal (section 362A);

- the entitlement for the review applicant to be represented other than when appearing before the Tribunal (section 366A);
 - the requirement that the Tribunal produce a written statement of decision and reasons (section 368A).
4. The Act and the Regulations set out procedures and prescribed methods and periods in some detail and should be used as the primary reference source for such matters. There are Ministerial directions made under section 499 of the Act which are relevant to the Tribunal's operations, including Directions Nos. 11 of 1999, 12 of 1999 and 13 of 1999.
 5. The Tribunal is required by law to give priority to the review of decisions where a person is held in immigration detention, and to the review of decisions to cancel visas. The Tribunal is required to finalise 'time limited' cases within 7 working days of receipt of an application for review unless an extension is agreed (section 367 and regulation 4.27). The Tribunal's caseload and constitution policy sets out priorities to be given to other cases.

Constitution

6. The Tribunal is usually constituted by a single Member. The Member who constitutes the Tribunal for the purposes of a particular review has responsibility for the conduct of the review and makes the decision on the case.
7. Cases are to be constituted and referred to Members as soon as possible after lodgement.

Cases to be decided within time standards

8. The time standards that the Tribunal is aiming for are:
 - time-limited cases finalised within 7 working days (or within agreed extended period) of the lodgement of the application for review;
 - visa cancellations finalised within 90 calendar days of the lodgement of the application for review;
 - standard cases finalised within 180 calendar days of the lodgement of the application for review;
 - complex cases finalised within 200 calendar days of the lodgement of the application for review;
 - more complex cases finalised within 240 calendar days of the lodgement of the application for review.
9. Members are to take all reasonable steps to complete cases within the time standards, including:
 - on receipt of an application for review, following constitution, quickly identifying the relevant issues in the application;
 - identifying ways to finalise each case in an expeditious manner, including seeking early legal, country or registry support;
 - after constitution, determining whether a decision can be made in the review applicant's favour on the papers without a hearing (section 360);

- identifying, as early as possible, any need to invite a person to provide additional information, or any need to invite the review applicant to comment on particular information;
 - if a hearing is considered necessary, booking a hearing for the earliest available time subject to the prescribed period of notice;
 - not postponing or rescheduling hearings without good reason;
 - not extending the time for the provision of further information or comments without good reason;
 - making oral decisions at the conclusion of hearings in appropriate cases.
10. The majority of review applicants have a registered migration agent acting as their representative. Registered migration agents are governed by a Code of Conduct and are required to conduct themselves in accordance with the Code (section 314).
11. A review applicant (or a registered migration agent acting as a representative of a review applicant) is expected:
- to provide, wherever possible, a fax number for communications from the Tribunal;
 - to provide on lodgement of an application for review all relevant evidence and a detailed submission setting out the applicant's claims, or, if this is not possible (where, for example, a registered migration agent is appointed after the lodgement of the application for review application), to provide all relevant material and submissions to the Tribunal no later than 14 days from the date of lodgement of the application for review or the date of appointment as the review applicant's representative, whichever is the later;
 - to lodge any additional submissions or documentary information, which were not earlier available, no later than 7 days (or no later than 1 day for detention cases) before any scheduled hearing;
 - to identify clearly any changes to previous claims or any new or additional claims in any submission;
 - to notify the Tribunal promptly in any cases where the applicant for review consents to the Tribunal deciding the review without the review applicant appearing before the Tribunal;
 - if providing comments or further information within a prescribed period, to do so as early as possible within the prescribed period;
 - if intending to make any post-hearing submissions, to make any such submissions within the period determined by the Tribunal.

Applications for review

12. An application for review must be in the approved form (section 347). The application form is available from the Tribunal's Registries (offices) in Sydney and Melbourne and from its Internet website (www.mrt.gov.au). The application form contains information about time limits and methods of lodging applications for review.
13. The Tribunal must receive applications for review within the prescribed time limit (section 347 and regulation 4.10). The Tribunal has no power to extend the period for the making of an application for review.

14. Where an application for review includes more than one review applicant, each person included is regarded as a review applicant in his or her own right. The application form provides for one applicant (or that person's authorised recipient) to be authorised to receive communications from the Tribunal on behalf of all applicants, unless the applicants advise otherwise.
15. An application fee of \$1400 is payable, for all cases other than time-limited cases. The fee may be refunded or waived in certain circumstances (regulations 4.13 and 4.14).
16. Where the Tribunal receives an application for review and it appears the Tribunal has no jurisdiction to consider the application, for example, where the application appears to have been lodged outside the time limit for applying for review, the Tribunal may write to the review applicant asking for comments. The comments are to be provided within 14 days (or within 2 working days for detention cases) of being given the invitation to make comments. The Tribunal will consider any comments provided and decide if it has jurisdiction to consider the application. If the Tribunal decides that it has no jurisdiction, the Tribunal will prepare a written record of decision. The decision in respect of which review was sought will remain unchanged.

Related applications for review

17. Review applicants should inform the Tribunal if several family members have separate applications before the Tribunal.
18. Where separate applications for review have been received from more than one family member or closely associated applicants, the Tribunal will, where practicable and appropriate, seek to conduct hearings together. The Tribunal will only conduct hearings of such applications together where the applicants have consented to a joint hearing.
19. If a review applicant who is included in an application with other family members no longer wishes to be included in that application and wishes his or her application to be treated separately, the review applicant should advise the Tribunal in writing immediately. The Tribunal will from that point communicate separately with the review applicant, and arrange any hearings separately.
20. The Tribunal may issue separate statements of reasons in relation to each review applicant.

Children

21. In cases involving a review applicant who is a child (that is, under 18 years of age) and who is not represented by a guardian, the Member will ensure that the review applicant understands the nature of the process and is able to present his or her own case. Before hearing the evidence of a child, the Member will determine whether the child understands the obligation of an oath or affirmation and whether the child is competent to give evidence.

Gender-related issues

22. A review applicant should inform the Tribunal at the earliest opportunity of any factors relating to the application that would make it appropriate that a Member of a particular gender conduct the review. The Tribunal will give consideration to these factors at the time the matter is allocated to a Member for the conduct of the review.

Criteria in dispute

23. As a general rule, where the Minister or delegate has made an adverse decision on particular criteria or issues, the Tribunal should restrict its review to those matters. The Tribunal has a

power to remit applications for visas to the Department for reconsideration, and may do so by finding that one or more of the criteria have been met.

24. For example, where the issue is whether a person is the spouse of another person, and the Tribunal decides that a spouse relationship exists, it would normally remit the matter to the Department with directions that a visa applicant meets relevant criteria. A delegate will then consider the remaining criteria, which would generally involve assessments in relation to health and public interest criteria.
25. One exception is 'time limited' cases, where the Tribunal generally deals with all issues to decide whether or not a visa can be granted.
26. The power to remit matters is limited to applications for visas. The Tribunal is required to deal with all issues arising in a review in relation to other matters, including in cancellation and sponsorship cases.

Representatives and authorised recipients

27. A review applicant may engage a person to represent or assist him or her in relation to an application for review. With very limited exceptions, a person providing representation or assistance must be a registered migration agent (sections 276 and 280).
28. A review applicant is entitled to have a person present to assist him or her while appearing before the Tribunal. However, except where the Tribunal is satisfied exceptional circumstances exist, such a person is not entitled to present arguments or address the Tribunal during a Tribunal proceeding (section 366A).
29. A review applicant is also entitled to appoint an authorised recipient to receive correspondence on his or her behalf (section 379G). If a review applicant nominates an authorised recipient, all correspondence from the Tribunal about the application will be sent to that person, and will be taken to have been sent to the review applicant.
30. Generally, the Tribunal would expect that if a review applicant appoints a representative, that person will also be nominated as the review applicant's authorised recipient.
31. The Tribunal may refer concerns about the conduct of a registered migration agent to the Migration Agents Registration Authority or other appropriate body.

Letters and notifications

32. Any letters or notifications that the Tribunal is required to or otherwise sends to the review applicant are sent to the review applicant, if the review applicant has not nominated an authorised recipient. Where the review applicant has nominated an authorised recipient, any letters or notifications will be sent to the authorised recipient. Other than in the following circumstances, copies of letters are not sent to representatives or review applicants where another person has been appointed as authorised recipient.
33. There are two circumstances where the Tribunal will send a copy of any correspondence to a review applicant as well as sending the correspondence to the review applicant's authorised recipient. The first is where the review applicant is in immigration detention. The second is where a review applicant has nominated a person as his or her authorised recipient, and that person's registration as a migration agent has been suspended or cancelled.

34. Letters or notifications are generally sent by facsimile or by ordinary mail. Registered mail is used where original documents are being sent (e.g. passports, photos, originals of letters tendered as evidence, video tapes).
35. Where several review applicants have combined their applications for review and indicated that all communications should be sent to a nominated review applicant, any letters or notifications given to the nominated review applicant, or that person's authorised recipient, are to be taken as having been given to each review applicant.
36. There should be no direct contact or communication between review applicants (and representatives) and Members other than during a hearing. Contact or communication will be through Tribunal staff at other times. Case letters are sent by staff, as requested by Members.

Communication

37. Review applicants (and representatives and authorised recipients) are responsible for providing accurate and current address and contact details to the Tribunal. The Tribunal must be notified in writing of any change of address or contact details. Notification of a change of address to DIMIA will not be sufficient.
38. Where a person gives a document or thing to the Tribunal for the purpose of a review, the person must give the document or thing to the Tribunal by:
 - by posting it to the Tribunal;
 - by leaving it in a designated box at the Tribunal;
 - by leaving it with a person employed at the Tribunal authorised to receive such documents;
 - by means of electronic facsimile transmission to the Tribunal; or
 - by giving it to a Member of the Tribunal in the course of a hearing.
39. Wherever possible, electronic communication is to be used to send and receive documents. Facsimile is the preferred mode of electronic communication.
40. Generally, there is no requirement for a copy of letters, submissions or copies of documents transmitted electronically to be also sent by mail.
41. Where a document is evidence of a particular matter, the original must be given to the Tribunal, or be available to be provided to the Tribunal on request. Originals of all documents which have been provided to the Tribunal by electronic means must be brought to any hearing of the case.
42. A review applicant may provide documents containing evidence or submissions during the review. All documents that are not in English should be translated into English by a translator with a 'Translator' level accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI). Both the documents and the translations should be provided.
43. Information provided to the Tribunal in the course of a review is used in making the decision on the review and may be divulged or communicated for the purposes of the Act or for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under the Act. Any information provided to the Tribunal during a review may be provided to other participants in the proceedings, and to other individuals or organisations, for example when seeking expert opinion or assessment. In certain circumstances the Tribunal may also provide information which it obtains in the course of a review to other government and non-government

individuals or organisations. These include but are not limited to DIMIA, the Migration Agents Registration Authority, courts and tribunals, and law enforcement agencies.

The Department

44. The Tribunal is required to notify the Secretary of the Department of the lodgement of an application for review, and the Secretary must give the Tribunal a copy of the decision of the delegate and other documents (whether paper or electronic) relevant to the review (section 352, subject to sections 375, 375A and 376).
45. The Secretary may provide written submissions to the Tribunal on any issue arising in the review (section 352).
46. The Tribunal is not required to invite the Secretary to attend a hearing. In practice, DIMIA is not represented in proceedings.

Access to documents

47. Access to documents in the Tribunal's possession may be requested under section 362A of the Act, or under the *Freedom of Information Act 1982* (the FOI Act). A request must be in writing. Forms are available from the Tribunal and from the Tribunal's website.

Extensions of time to prescribed periods

48. A request by a review applicant for an extension of time to a prescribed period for responding to a subsection 359(2) request or a section 359A invitation should generally be made in writing and before the expiry of the prescribed period. If the Member decides to extend the time under subsection 359B(4), the review applicant should be advised in writing of the extension (for the prescribed further period).

Failure by review applicant to respond to a subsection 359(2) letter or section 359A letter

49. If a review applicant has not responded to a subsection 359(2) letter or section 359A letter, or did not respond within the prescribed period (or prescribed further period), the Tribunal may make a decision on the review without taking further action to obtain the information or comments, and without inviting the review applicant to appear before the Tribunal (sections 359C and 360).

Withdrawal of application

50. An application for review can be withdrawn at any time. If an application is withdrawn, the Tribunal no longer has jurisdiction to conduct the review and the decision under review will remain unchanged. A refund of the application fee is only available in limited circumstances (regulation 4.14 of the Regulations).

Hearings

51. Section 360 sets out the circumstances in which the Tribunal is required to invite the review applicant to appear before the Tribunal to give evidence and present arguments. An invitation to a hearing must be consistent with the requirements of sections 360A and 361. A review applicant may be invited to provide comments at interview during the course of a hearing.
52. A hearing may be rescheduled or postponed at the discretion of the Member (sections 362B and 363).

53. The rescheduling or postponement of a scheduled hearing at the review applicant's request will only occur where the Member is satisfied that there are exceptional circumstances and cogent reasons for granting the postponement. If a postponement is not granted, the hearing will proceed on the scheduled hearing date.
54. If a review applicant seeks postponement of a scheduled hearing, the review applicant must contact the Tribunal immediately and state the reasons why the date is unsuitable. If a review applicant seeks a postponement of the hearing on medical grounds, the review applicant must contact the Tribunal as soon as possible and must provide a certificate from a medical practitioner certifying that the review applicant is unable to attend before the hearing will be rescheduled.
55. Requests for postponement of a scheduled hearing will not be granted simply on the basis of the convenience of the review applicant or his or her representative. Where the Tribunal has given sufficient advance notice of the hearing, postponements will not be granted on the basis of a need to gather further evidence unless good cause can be shown.
56. If the review applicant fails to attend a hearing, the Tribunal may proceed to make a decision without contacting the review applicant further.
57. Arrangements may be made for a person to appear in person, by conference telephone or by video conference facilities (section 366). All proceedings are to be audio recorded.
58. If a review applicant specifies that he or she needs an interpreter at the hearing, the Tribunal will provide, and meet the cost of, a qualified interpreter for the hearing (section 366C). Wherever possible, the Tribunal will engage an interpreter with an 'Interpreter' level accreditation from the National Accreditation Authority for Translators and Interpreters (NAATI).
59. A person who is dissatisfied with the quality of interpreting at a hearing should tell the Member immediately. The Member will assess whether the hearing should continue in light of the person's comments.
60. The Tribunal is required to conduct hearings in public, unless the Tribunal is satisfied that it is not in the public interest to do so (section 365). A daily schedule of hearings that are open to the public is to be available at reception in each Registry.
61. Persons giving evidence, and interpreters, are generally required to take an oath or affirmation.
62. A review applicant may have another person present to assist her or him when appearing before the Tribunal (section 366A). Generally, this would be the review applicant's representative, if a representative has been appointed. A Member may consider it appropriate in the circumstances of a particular case to permit a representative to present arguments or submissions or to make comments on specific matters.
63. A review applicant may request that the Tribunal take oral evidence from nominated persons. The Tribunal will have regard to the review applicant's wishes but is not required to obtain the evidence.

Identification of persons who have applied for protection visas

64. The Tribunal should take all reasonable steps to not disclose the identity of persons or relatives or dependents of persons who have made current or past applications for protection visas. (Noting that the Act restricts other bodies from publishing the names of applicants for protection visas.)
65. Members should consider directing that any proceedings involving a person who has made a current or past application for a protection visa be conducted in private (section 365).

Personal information

66. As mentioned above, the Tribunal may conduct proceedings in private, if the Tribunal is satisfied that it is in the public interest to do so (section 365), and the Tribunal may restrict the publication of certain matters, if it is in the public interest to do so (section 378).
67. The fact that a case involves personal information may not alone be a basis for conducting a hearing in private or restricting publication in the public interest. There is a legislative intent that proceedings of the Tribunal will generally be held in public and that decisions of particular interest will be published. There would generally need to be some concern that some degree of harm or prejudice may result. Examples may include cases involving persons who have applied for protection visas, cases involving allegations of children at risk or domestic violence, and cases involving persons who are HIV positive.

Oral decisions

68. Members are encouraged to make oral decisions whenever they are able to do so. Oral decisions provide immediate resolution of the case and avoid the need for the decision to be formally handed down. Oral decisions may be made at the end of a hearing or at the resumption of the hearing after an adjournment.
69. A review applicant is taken to have been notified of a decision on the date of the oral decision (section 368) and this becomes the relevant date for appeal periods.
70. Both the review applicant and DIMIA should be provided with a written advice of the decision on the day of oral decision.
71. A written statement of decision and reasons must be prepared and given to the review applicant and DIMIA within 14 days of the oral decision. Members should however make every effort to finalise the decision statement in a shorter time period.

Statements of decisions and reasons

72. Statements of decision and reasons should be of consistent format and style. A statement of decision and reasons should be easy to understand and written in a plain English style.
73. In writing any decision, Members are required to always consider carefully the necessity of including detailed personal information. In many cases, there may be no need to specifically identify the names of relatives, the names of schools children are attending, bank account numbers, telephone numbers, employers, the particular medical conditions that resulted in a binding adverse health assessment or the full addresses of persons involved.
74. Decisions should be as concise as possible in addressing the legislative requirements for a statement of reasons (section 368). The findings on material questions of fact and references to the evidence (including to any oral evidence) on which such findings are based should be succinctly stated. It is generally unnecessary and undesirable to copy verbatim into decisions material that exists on Tribunal or DIMIA files.
75. A review is not final until the decision has been given to the review applicant or DIMIA (that is, until an oral decision has been made, or the decision has been handed down, or the decision has been dispatched by post or electronically).
76. The Act provides for different methods of notification of the written statement of decision and reasons in different circumstances. Other than where an oral decision has been given, or where

the review applicant is in immigration detention, the Tribunal is required to invite the review applicant and DIMIA to a handing down of the decision (sections 368A, 368B and 368C).

Publication of decisions

77. The Tribunal is required to publish decisions of ‘particular interest’ (section 369). Decisions which are regarded as of particular interest are decisions:
- identified as representing a broad cross-section of decisions having regard to factors such as the visa subclass and the outcome of the review; or
 - where there is detailed consideration of legal arguments or policy issues; or
 - where the factual circumstances are complex or unusual or where there is or is likely to be significant external interest; or
 - where there is clear precedential value.
78. If a statement of decision and reasons is identified as a decision of particular interest for publication, and there is a question about whether the publication should be restricted (for example, if the case involves a protection visa applicant, relative or dependent), the decision should be referred to the Member (or the Principal Member if the Member is unavailable) to consider whether a direction should be made directing that the decision can only be published in a way in which the applicant or any relative or dependent is not identified (section 378).
79. The nature of any restriction on publication would normally be to remove identifying information prior to publication. Where such a direction is made, the decision will be edited to remove identifying information prior to publication.

Corrigenda

80. Once a statement of decision and reasons has been provided to the review applicant or DIMIA, the statement can be amended to correct any minor or clerical errors by way of a formal corrigendum.

Service Charter

81. The Tribunal has a service charter which is available from Tribunal registries and from the Tribunal’s website. The Charter provides information on standards of service, how to contact the Tribunal, and how to make complaints.