



Occupational Division Guideline

August 2017

Professional Discipline Matters

What does this Guideline explain?

1. This Guideline provides information about professional discipline matters heard in the Tribunal's general jurisdiction. It applies to applications for findings and orders in professional disciplinary matters involving architects, legal practitioners, health practitioners, veterinarians and registered certifiers.
2. The Guideline does not apply to applications for administrative review or the external appeal jurisdiction of the Tribunal. Occupational Division Guideline – Health Professionals Registration Appeals deals with external appeals under s 175 of the *Health Practitioner Regulation National Law (NSW)*.
3. In this Guideline the professional body seeking orders is called 'the applicant'. The professional who is the subject of the application is called 'the respondent'.

Definitions

4. Definitions that explain words or concepts used in this Guideline are at the back of the Guideline.

Which legislation applies?

5. The Acts listed below and the regulations and rules made under them (subordinate instruments) apply to professional disciplinary proceedings.
 - a) *Architects Act 2003*
 - b) *Building Professionals Act 2005*
 - c) *Civil and Administrative Tribunal Act 2013*
 - d) *Health Practitioner Regulation National Law (NSW)*
 - e) *Legal Profession Act 2004*
 - f) *Legal Profession Uniform Law Application Act 2014*
 - g) *Legal Profession Uniform Law (NSW)*
 - h) *Veterinary Practice Act 2003*

How are proceedings commenced?

6. An application to commence proceedings must be given to (lodged with) the Tribunal on the approved form.
7. The application must:

- a) Set out the provision or provisions of the legislation on which the applicant relies for the disciplinary orders sought.
 - b) Set out the conduct said to justify the disciplinary findings identifying the relevant provision of the legislation, or subordinate legislation relied on by the applicant.
 - c) Set out the facts, acts and omissions that are alleged to constitute the conduct that justifies the disciplinary finding.
 - d) State the orders the applicant wants the Tribunal to make against the respondent.
8. The Tribunal notes:
- a) Because of the protective nature of the jurisdiction, orders that will be made must be in the public interest;
 - b) The respondent must be made aware of the allegations made against him or her and the potential consequences of the proceedings; and
 - c) The Tribunal, having given notice to the parties, may make such orders as it thinks fit under the relevant legislation.
9. The application may be accompanied by one copy of the material (the documents relied on by the applicant).
10. The application should have attached to it a blank 'Reply to an Application for Disciplinary Findings' for the respondent to complete and give the other party and the Tribunal within 21 days after receipt of the application.

How does the applicant give (serve) the application to the respondent?

11. The applicant must give to the respondent a copy of the application stamped by the Tribunal and the material relied on, if any, as soon as practicable after giving it to the Tribunal, preferably within 3 working days.
12. The application and material is to be given (served) by one of the methods set out in the *Civil and Administrative Tribunal Rules 2014* (Rule 13(2)). See Procedural Direction 1 - Service and Giving Notice for more information.
13. If directed to do so by the Tribunal, the applicant must give to the Tribunal an affidavit of service. The affidavit should list the material served, but not attach it.

What if the applicant is unable to give (serve) the application on the respondent?

14. If it is impracticable to serve the respondent with the application and material (if any) attached to it in the way provided in the Rules, the Tribunal may make an order providing for another way of serving them (substituted service).
15. The Tribunal's order for substituted service will outline what steps the applicant needs to take to bring the application to the attention of the respondent. The order will state the application is taken to have been served on the happening of a stated event or at the end of a stated time.
16. The Tribunal can make an order for substituted service even though the respondent is not in NSW or was not in NSW when the proceedings were started in the Tribunal.

What is the respondent required to do after he or she receives the application?

17. Within 21 days of being given the application and material (if any), the respondent must give to the Tribunal and to the Applicant a 'Reply to Application for Disciplinary Findings' in the approved form (Reply).
18. The Reply must:
 - a) Set out the details of any preliminary issues to be determined such as an objection to lodging the application out of time, or an objection to the jurisdiction of the Tribunal to hear and determine the application, and the basis for the objection;
 - b) Admit or deny the description of the conduct said to justify the disciplinary finding;
 - c) Set out any facts on which the respondent relies in response; and
 - d) State whether any or all of the proposed orders are contested.
19. In the Reply the respondent may set out the orders he or she is prepared to agree to but he or she is not obliged to do so.
20. The Tribunal is not bound to make the orders requested by either party even if the parties are in agreement.

What are the consequences if the respondent does not provide a Reply?

21. If the respondent fails to give a Reply to the Tribunal within 21 days or within such further time as the Tribunal may allow, on the hearing of the application, the respondent may not, without permission of the Tribunal, lead evidence of any matter of which notice should have been given in a Reply. This includes any expert evidence relied on by the respondent.

How does the application proceed in the Tribunal?

22. A directions listing will be held generally not less than 28 days after the application has been given to the Tribunal.
23. At the directions listing the List Manager or his or her delegate will make directions or orders to prepare the matter for hearing including, in some cases, fixing a date for a pre-hearing conference.
24. The parties may, by consent, submit a written timetable for approval at the directions listing. The Tribunal is not bound to approve the timetable and may vary it if appropriate.
25. The Tribunal's time standards, which are maintained to comply with the requirements of the objects of the *Civil and Administrative Tribunal Act*, require the hearing of the application generally to be listed within 3 months of the application being given to the Tribunal.
26. A consent timetable will not be approved if it falls outside the applicable time standards unless the parties provide compelling reasons why compliance is not possible. The unavailability of preferred legal representation for either party will not constitute sufficient reason to list outside the time standards.

What are the usual directions made by the List Manager at the Directions Listing?

27. The usual directions are:

- a) The applicant to give to the respondent any documentation, including additional evidence relied on in support of the application by a specified date, usually within 4 weeks of the directions hearing.
- b) The respondent giving to the applicant his or her documentation by a specified date, usually four weeks after the applicant's material is given to the respondent.
- c) The applicant giving to the respondent material in reply to the respondent's material usually two weeks after the respondent's material is given to the applicant.
- d) Fixing of a time, date and place for the hearing and pre-hearing conference.

What is required of parties or their representative who attend the Directions Listing?

28. The person attending the direction listing must have full knowledge of the matter including:

- a) what the matter is about, particularly if it is asserted there are any risk factors;
- b) whether there are any preliminary issues that need to be resolved prior to the hearing;
- c) what evidence is likely to be relied on;
- d) whether Summonses are required; and
- e) the availability of witnesses and legal practitioners for the hearing
- f) any special requirement for the hearing including audio visual equipment, or accessibility issues.

How can a party ensure documents or persons are available for the hearing (Summons)?

29. A party can request the Registrar to issue a Summons to ensure documents are produced to the Tribunal or that a person comes to the hearing. See the Tribunal's [Procedural Direction on Summonses](#) for more information.

What is a Case Conference and what happens as it?

30. A case conference (or pre-hearing conference) is a conference held to identify and narrow issues in dispute.

31. The case conference will usually be held after all the material has been filed.

32. At the conclusion of a case conference the presiding member may require the parties to give the Tribunal an agreed statement of facts.

How many copies of the documents does the Tribunal require?

33. Because these matters are heard by a panel of members, the Tribunal requires multiple copies of written and other material such as CD's.

34. On receiving the Application and later the Reply stamped copies will be given to the party providing the form to give to the other party. The original documents will be stamped and remain on the Tribunal file.
35. At the directions listing a direction will be made requiring each party to give to the Tribunal multiple copies of the documents approximately four weeks prior to the hearing date. Because the panel in health matters comprises four persons, five copies are required. One copy is retained on the Tribunal file. In all other professions when the panel comprises three persons, four copies of the material is required.
36. The documents may be given to the Tribunal in folders. If folders are used, the spine of the folder is to be labelled with the file name, number and the number of the volume (e.g. Volume 1, Volume 2 etc.).
37. In health disciplinary matters, at the time of giving the material to the Tribunal, the parties should provide 4 USB sticks containing the complete set of material of each party. The USB sticks are to be labelled with the name of the matter and the providing party.

Do the rules of evidence apply?

38. Schedule 5, clause 20 of the *Civil and Administrative Tribunal Act 2013* provides that the rules of evidence apply to proceedings in the Legal Services List. In health disciplinary matters the Tribunal is not bound to observe the rules of law governing the admission of evidence. In all other professional disciplinary matters the Tribunal is not bound by the rules of evidence and may inform itself in any manner it thinks fit subject to the rules of natural justice (s 38 *Civil and Administrative Tribunal Act*).

How does the hearing proceed?

39. The order in which the parties present their cases will be determined by the Presiding member. Generally the hearing will commence with the applicant presenting an outline of the case. This is followed by evidence by the applicant's witnesses. The respondent can then ask questions of the applicant's witnesses (cross-examination).
40. After cross-examination the respondent or his/her witnesses can give evidence about an answer given in cross-examination or in respect of a relevant matter to avoid any ambiguity. This is called 're-examination'.
41. If the respondent calls witness/es the applicant can question the witness/es, and the respondent may re-examine his or her witness.
42. The Tribunal panel that hears the appeal is a combination of legally qualified members, professional members having expertise in the relevant area of practice and a lay person (community member). During the course of the hearing the Tribunal panel may question either party.
43. The Tribunal may limit the time each party may use to present their case.
44. After the Tribunal has heard all the evidence, each party will be allowed to tell the Tribunal what factual findings that party says the Tribunal should make based on the evidence before it, what law is relevant and how it applies to the facts of the case (Submissions).

45. Submissions are usually made orally although in some circumstances the Tribunal may permit the parties to give it written submissions. As this delays a final decision it is not the usual practice.

What happens if a party fails to appear before the Tribunal?

46. If a party does not appear before the Tribunal without reasonable excuse at a directions listing or a hearing the Tribunal may make orders in that party's absence, including an order that the non-attending party pay the other party's costs.

Will the Tribunal make an order about costs?

47. Different costs provisions are set out in the various Acts regulating professional discipline. Reference should be made as follows:

- a) Health Practitioner matters – Section 175B and Schedule 5D clause 13 *Health Practitioner Regulation National Law (NSW)*
- b) Legal Practitioner matters – Schedule 5 clause 23 *Civil and Administrative Tribunal Act*
- c) Architects and Registered Certifiers – Section 60 *Civil and Administrative Tribunal Act*

What does the Tribunal do when it has heard the matter?

48. The Tribunal may give an oral decision at the end of the hearing. Generally it will 'reserve' its decision and deliver a written decision at a later time. Usually the written decision and orders will be made within three months of the hearing. The parties will be notified by the Registry staff when the decision will be published on NSW Caselaw.

49. Provided the parties have notice at the hearing that it may do so, the Tribunal may make an order immediately cancelling a health practitioner's registration, or removing a legal practitioner from the roll under the provisions of the *Legal Profession Act 2004* if that Act applies. It may recommend removal from the roll under the *Legal Profession Uniform Law (NSW)*.

What steps does a person who seeks compensation from a legal practitioner have to undertake?

50. A compensation order may be made under Part 4.9 of the *Legal Profession Act 2004* or Part 5.5 of the *Legal Profession Uniform Law (NSW)*.

51. A request for compensation can only be made after the commencement of proceedings in the Tribunal with the leave of the Tribunal.

52. The application for compensation will be determined after the decision in the professional disciplinary proceedings have been determined.

How are consent orders made in disciplinary proceedings about a legal practitioner?

53. The Tribunal can make consent orders concerning a legal practitioner without conducting a hearing unless it is not in the public interest to do so. (Section 564 of the *Legal Profession Act 2004* or Section 144 of the *Legal Profession Uniform Law Application Act 2014*).

54. The parties are to file an instrument of consent that has been signed by the practitioner, the Legal Services Commissioner and either the Law Society Council or the Bar Council as applicable.
55. The Tribunal will publish its reasons and decision.

Can the decision be appealed?

56. There is no appeal to the Tribunal's internal appeal panel from the decision made in the professional disciplinary proceedings. Parties should seek legal advice about their right to appeal to the Supreme Court of NSW.

What do some of the words in this Guideline mean?

- **Act:** *Civil and Administrative Tribunal Act 2013*
- **Rules:** Civil and Administrative Tribunal Rules 2014.

This Guideline applies to:

Proceedings in the Occupational Division of the Tribunal.

Effective Date

1 August 2017

Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#). The law about the information in this Guideline is mainly in:

- Schedule 5 clause 23 of the *Civil and Administrative Tribunal Act 2013*

There is a copy of this Act on the [NSW Legislation website](#).

The Hon A/Judge Jennifer Boland

Deputy President

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