



NCAT Occupational Division Procedural Direction 4

PROFESSIONAL DISCIPLINE MATTERS

This Procedural Direction applies to:	Proceedings in the Occupational Division
Effective Date:	26 November 2014
Replaces Procedural Direction:	ADT Professional Discipline: Legal Practitioners, Veterinary Practitioners, Architects and Building Professionals: Original Applications: Guideline
Notes*:	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at www.ncat.nsw.gov.au

Purpose

- 1.1 This procedural direction sets out the procedure to be followed in applications in the Tribunal's general jurisdiction for findings and orders in professional discipline matters involving legal, health and veterinary practitioners, architects and building professionals.
- 1.2 This procedural direction does not apply to applications in the administrative review or external appeal jurisdictions of the Tribunal. Nor does it apply to reviews under the Health Practitioner Regulation National Law (NSW).

Relevant Legislation

- 2.1 The following Acts and their subordinate instruments are relevant:
 - (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) Veterinary Practice Act 2003.

Application

- 3.1 An application to commence proceedings must be filed (lodged with the Tribunal) in the approved form.
- 3.2 The application must:
 - (a) list the disciplinary finding or findings sought by reference to the statutory provision or provisions of law on which the applicant relies under each disciplinary finding sought,
 - (b) give a general description of the conduct said to justify that disciplinary finding identifying the statutory provision, including any provisions in delegated legislation, on which the applicant relies,
 - (c) set out the facts, acts and or omissions that are alleged to constitute the conduct that justifies the disciplinary finding,
 - (d) state the order or orders sought against the respondent. In requiring the orders to be specified the Tribunal notes that the orders that will be made are those that are in the public interest given the protective nature of the jurisdiction. The Tribunal also notes the obligation to ensure the respondent is aware of the allegations made against him or her and the potential consequences of the proceedings. The Tribunal may make such orders as it thinks fit, including any one or more of the orders sought,
 - (e) be accompanied by one copy of the primary documentary evidence (the material) relied upon by the applicant,
 - (f) attach a blank “Reply to an Application for Disciplinary Findings” form for the respondent to complete, file and serve (give to the other party) within 21 days.

Service of the application

- 4.1 The applicant must serve a copy of the sealed application and the material as soon as practicable after filing, preferably within 3 working days.
- 4.2 The application and material is to be served by one of the methods set out in the Civil and Administrative Tribunal Rules 2014, rule 13(2). See the Service and Giving Notice Procedural Direction for more information.
- 4.3 The applicant should file an affidavit of service if directed by the Tribunal. The affidavit of service should list the material served but not attach it.

Substituted Service

- 5.1 If it is impracticable to serve the respondent with the application and material in the way described by the rules the Tribunal may make an order substituting another way of serving them.
- 5.2 An order for substituted service will outline the steps to be taken for bringing the documents to the attention of the respondent and state that they are taken to have been served on the happening of a stated event or at the end of a stated time.
- 5.3 The Tribunal may make this order even though the respondent is not in New South Wales or was not in New South Wales when the proceeding commenced.

Reply

- 6.1 Within 21 days of being served with the application and material the respondent must file and serve a reply in the approved form.
- 6.2 The reply must:
 - (a) state any preliminary issues to be determined such as an objection to the lodging of the application out of time, or an objection to the jurisdiction of the Tribunal and give the basis for the objection,
 - (b) admit or deny the description of the conduct said to justify the disciplinary finding,
 - (c) admit, deny or express inability to admit or deny, each particular alleged to constitute the conduct,
 - (d) set out the facts on which the respondent relies in response,
 - (e) indicate whether any proposed order is contested.
- 6.3 In the reply, the respondent may set out the orders he or she is prepared to agree to, but there is no obligation on the respondent to do so.
- 6.4 The Tribunal is not bound to make the orders requested by either party even if the parties are in agreement.
- 6.5 If the respondent fails to lodge a reply within the 21 days, or within such further time as the Tribunal may allow, on hearing of the application, the respondent may not, without leave 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.

Directions listing

- 7.1 A directions listing will be held not less than 28 days after the application has been filed.
- 7.2 The Tribunal will make directions or orders to prepare the matter for hearing including in some cases fixing a date for a pre hearing case conference.

- 7.3 The parties may, by consent, submit a written timetable for approval by the Tribunal. The Tribunal is not bound to approve the timetable and may vary it if appropriate.
- 7.4 The applicable time standards require the hearing of the substantive proceedings to be listed within 3 months of the application being filed.
- 7.5 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.

Standard directions

- 8.1 If it is impracticable to serve the respondent with the application and material in the way described by the rules the Tribunal may make an order substituting another way of serving them.
- (a) applicant filing and serving any documentation, including additional evidence and submissions relied upon in support of the application, by a specified date, usually within four weeks of the directions listing,
 - (b) respondent filing and serving his or her documentation by a specified date, usually four weeks after the applicant's material is filed,
 - (c) applicant filing and serving any material in reply to the respondent's material,
 - (d) fixing of a time, date and place for the hearing and pre hearing conference, usually two weeks after all the material is filed.
- 8.2 The person attending the directions listing must have full knowledge of the matter including but not limited to:
- (a) what the matter is about,
 - (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 hearing.

Summons

- 9.1 A party can apply to the Tribunal to issue a summons for evidence either documentary or in person. See the Tribunal's Procedural Direction on Summonses for more information.

Pre Hearing Case Conferences

- 10.1 The aim of the pre hearing case conference is to narrow the issues in dispute between the parties.
- 10.2 The Tribunal may direct the parties to file an agreed statement of facts.
- 10.3 The pre hearing case conference will usually occur after all the material has been filed.

Number of copies of documents required

- 11.1 As these matters are heard by a panel of members the Tribunal requires multiple copies of the written material.
- 11.2 Initially and in accordance with the dates directed the parties are to file one hard copy of the material and serve a copy on the other party. The registry will stamp this as the original for the Tribunal file.
- 11.3 The additional copies are to be provided to the Tribunal two weeks prior to the hearing. In health matters four additional copies are required. In all other professions three additional copies are required.
- 11.4 The additional copies may be filed in folders. If folders are used the spine of the folder is to be labelled with the file name, number and also indicate whether it is copy 1, 2, 3, or 4.
- 11.5 In addition, at the time of filing the additional copies, the parties are to provide 3 usb sticks (4 for health matters) containing the complete set of the material. The usb sticks are to be labelled with the matter name, number and a return address. The sticks will be returned at the completion of the matter.

Hearing

- 12.1 The Tribunal panel hearing the matter will be a combination of legally qualified members, professional members having expertise in the relevant area of practice and lay or community members.
- 12.2 During the course of the hearing the Tribunal members may ask questions of the witnesses and or the parties.
- 12.3 The order in which the proceedings are conducted is determined by the legally qualified or presiding member. Generally proceedings will start with a short opening statement or introduction to their case by the parties.
- 12.4 The applicant presents their case first. This includes evidence given by witnesses. The respondent can then ask questions of (cross-examine) the applicant's witnesses. Next the respondent presents its case and the applicant can cross examine the witnesses for the respondent.
- 12.5 After cross-examination, the witness can be 're-examined' by the party who asked the witness to give evidence. Re-examination involves asking the witness further questions which arise from the answers given in cross-examination.
- 12.6 The Tribunal may limit the time that a party can spend presenting their case.

- 12.7 After all the evidence has been given, each party will be given a chance to tell the Tribunal what factual findings it should make on the basis of the evidence, what the relevant law is and how that law applies to the facts of the case. Submissions of this kind are usually given orally at the end of the hearing. Sometimes the Tribunal may allow parties to give submissions in writing but because this delays the case and is more expensive, it is not encouraged.

Failure to appear

- 13.1 The Tribunal may conduct a hearing despite the failure of the respondent to appear, if the following matters are proved to the satisfaction of the Tribunal:
- (a) service or substituted service on the respondent of the application and material relied on,
 - (b) that the time provided for filing a reply, or any extension of time ordered by the Tribunal, has expired,
 - (c) that the time specified for compliance by the parties with any directions made by the Tribunal has expired,
 - (d) sufficient notice of the hearing has been given to the respondent.
- 13.2 If a party does not appear before the Tribunal at either a directions listing or a hearing the Tribunal may make orders in the absence of that party including adverse costs orders.

Non Publication Orders

- 14.1 The Tribunal may make orders prohibiting or restricting publication and broadcasting of names and materials including evidence in proceedings pursuant to section 64 of the Civil and Administrative Tribunal Act 2013.

Costs

- 15.1 Health Practitioner matters – refer to section 175B and Schedule 5D clause 13 of the Health Practitioner Regulation National Law (NSW) 2009.
- 15.2 Legal Practitioner matters – refer to Schedule 5 clause 23 of the Civil and Administrative Tribunal Act 2013.
- 15.3 Architects and Building Professional matters – refer to section 60 of the Civil and Administrative Tribunal Act 2013.
- 15.4 Veterinary Practitioner matters – refer to Schedule 5 clause 26 of the Civil and Administrative Tribunal Act 2013.

Decision

- 16.1 The Tribunal will usually reserve and deliver a written decision at a later stage. The Tribunal aims to have reserved decisions delivered within 3 months of the

hearing. The parties will be notified when the decision is ready to be handed down. The parties do not need to attend for the delivery of the decision.

16.2 The decision will be sent to the parties and published on the Caselaw website.

Compensation in Legal Profession Act matters

17.1 Any application for compensation by a complainant will be determined once the disciplinary orders are made.

17.2 The complainant must inform the applicant in writing of their wish to receive compensation within 28 days of the Tribunal's decision being published.

Consent Orders in Legal Profession Act matters

18.1 The Tribunal may make consent orders concerning a legal practitioner without conducting a hearing if it considers it is in the public interest to do so, section 564 of the *Legal Profession Act 2004*.

18.2 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.

18.3 The Tribunal will publish its reasons and decision.

Appeals

19.1 There is no appeal to the Tribunal's internal appeal panel against a decision by the Tribunal under these provisions. Parties should seek legal advice about their right to appeal to the Supreme Court of NSW. See the Internal Appeals Guideline for further information.

(Sgd)

WRIGHT J

President

25 November 2014

* As at August 2017, *Procedural Direction 4 - Professional Discipline matters - NCAT Occupational Division* (November 2014) was superseded and replaced by *Professional Discipline matters - NCAT Occupational Division Guideline* (August 2017).