



NEW ZEALAND HEALTH PRACTITIONERS DISCIPLINARY TRIBUNAL

What Happens Following Notice of Disciplinary Proceedings Against a Health Practitioner

A Guide to Disciplinary Proceedings

New Zealand Health Practitioners Disciplinary Tribunal
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Disciplinary Proceedings

Under the Health Practitioners Competence Assurance Act 2003

What Is The Health Practitioners Disciplinary Tribunal?

The Health Practitioners Disciplinary Tribunal hears and determines disciplinary proceedings brought against registered health practitioners under Part 4 of the Health Practitioners Competence Assurance Act 2003 (“the Act”).

This guide does not replace the Act, which contains the legal and statutory provisions relating to the operation of the Tribunal. This guide sets out the usual procedures to be followed before and during a hearing, but the Tribunal may adopt different procedures, appropriate to the circumstances, from time to time.

The Tribunal comprises a Chair, two Deputy Chairs and a panel of registered health practitioners and lay members, all appointed by the Minister of Health. When the Tribunal sits to hear and determine any matter, it sits with a presiding Chair or Deputy Chair and four members, three of whom are health practitioners – all of whom practise in the same area as the respondent health practitioner - and one person who is not a health practitioner, the lay member.

Health practitioners are registered by their Regulatory Authority. There are 16 Regulatory Authorities who register 22 categories of health practitioners. Each Regulatory Authority appoints an Executive Officer to attend to administrative functions associated with the Tribunal. Details of the relevant Executive Officers may be obtained from the Tribunal’s website.

The HPDT Website

The Tribunal’s website www.hpdt.org.nz, provides a central point for members of the public to access information on the Tribunal and its functions and procedures.

In line with its policy of openness and transparency, all decisions and orders of the Tribunal are published on the website. The website also provides statistical information on the decisions and orders and an Events Calendar listing forthcoming disciplinary hearings.

General Information

Commonly Used Terms

Adjournment:

Occurs when the Tribunal may postpone proceedings for any reason but will resume them at a later date.

Appeal:

A party who is dissatisfied with the decision of the Tribunal may apply to the High Court to reconsider the matter. A right of appeal against any decision of the High Court to the Court of Appeal applies on a question of law only. In both cases this is called an appeal.

Chair and Deputy Chairs:

A Chair is allocated to conduct every hearing. These persons are senior lawyers who are appointed to be the presiding officer at hearings. They also run “Directions Conferences” to ensure that matters proceed to a hearing as soon as possible, and are responsible for writing the Tribunal’s decision.

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Checklist:

The document (supplied by the Tribunal) which is to be filed by or on behalf of each party after a “Notice of Intention to Bring Disciplinary Proceedings” has been received. It is a formal response by the parties to the matters raised by the Notice of Disciplinary Proceedings. It should be filed no later than 21 days after receipt of the Notice of Disciplinary Proceedings.

If no Checklist is filed on behalf of a health practitioner, then the Tribunal may proceed and the health practitioner will be entitled to appear and be heard at the hearing only on such conditions as to payment of costs and expenses or otherwise as the Tribunal thinks fit and so orders.

Complainant:

The person who took a complaint to the Health and Disability Commissioner or the relevant Regulatory Authority.

Decision:

Once a matter has been heard, the Tribunal makes a “Decision”, which is set out in writing, signed by the presiding Chair on behalf of the Tribunal and distributed to the parties involved. The complainant will receive a copy of the Decision from the party that laid the charge, either the Director of Proceedings or a Professional Conduct Committee. If the complainant has any questions about the Decision, he/she should discuss them in the first instance with the lawyer who prosecuted the charge.

Directions Conference:

This is a compulsory meeting between parties, conducted by the Chair or Deputy Chair, after the health practitioner has notified the Tribunal in writing whether he or she wishes to be heard by the Tribunal. It is usually a telephone conference. The conference is one of the procedures established by the Tribunal to ensure that proceedings are conducted fairly and expeditiously, that the expense of the hearing is minimized and that a consistent manner is maintained throughout the circumstances of each case. The conference provides the opportunity for discussion about the issues to be raised at the hearing, how the evidence will be put before the Tribunal, the date and location of the hearing and any other matters which have to be resolved before the hearing. The process is relatively informal, and discussions are confidential. The matters agreed to are recorded by the presiding Chair and forwarded to the parties.

Director of Proceedings:

The person designated under section 15 of the Health and Disability Commissioner Act 1994 as the Director of Proceedings. Disciplinary proceedings against a health practitioner can only be brought before the Tribunal by either the Director of Proceedings or a Professional Conduct Committee.

Executive Officer:

The person appointed by the Regulatory Authority who attends to administrative functions associated with the Tribunal's proceedings and attends hearings. Each Regulatory Authority appoints an Executive Officer.

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Health Practitioner:

This refers to a health practitioner registered under the Act by a Regulatory Authority. There are 22 categories of health practitioners:

*Chiropractors • Dentists • Dental Therapists • Dental Hygienists • Dental Technicians
Clinical Dental Technicians • Dietitians • Dispensing Opticians • Optometrists
Medical Practitioners • Medical Laboratory Scientists • Medical Laboratory Technologists
Medical Radiation Technologists • Midwives • Nurses • Occupational Therapists
Osteopaths • Pharmacists • Physiotherapists • Podiatrists • Psychologists • Psychotherapists*

Interim Suspension / Imposition of Conditions on Practice

At any time after a Notice of Disciplinary Proceedings has been given to a health practitioner, the Tribunal may, if it is satisfied that it is necessary or desirable to do so, having regard to the need to protect the health and safety of members of the public, make an order that until the disciplinary proceedings in respect of which a charge is pending has been determined:

a) That the registration of that health practitioner shall be suspended;

or alternatively:

b) That the health practitioner may practise only in accordance with conditions specified by the Tribunal.

The Tribunal may make such an order, under section 93 of the Act, on the recommendation of the Director of Proceedings, or a Professional Conduct Committee, or of its own initiative.

Although the Tribunal is not obliged to give any notice to a health practitioner that it intends to make one or other of the above orders, in practice, only in very unusual circumstances would it do so without first giving an opportunity for submissions to be made.

Under section 94 of the Act, the health practitioner may apply at any time to the Tribunal for the revocation of one or other of the above orders. Also, the Tribunal may, at any time, of its own initiative, revoke one or other of the above orders.

Notice of Disciplinary Proceedings:

The Notice which the Chair must give when required under section 92 of the Act to convene a hearing of the Tribunal to consider a charge against a health practitioner.

Party:

Means either a Professional Conduct Committee, the Director of Proceedings, or a respondent health practitioner in any proceedings before the Tribunal, and includes any person added to the proceedings.

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Preliminary Matters:

These are pre-hearing procedural steps (sometimes referred to as “interlocutories”) which may be taken prior to the hearing. Their purpose is to assist the presentation of facts at the hearing. The procedures include discovery (or disclosure) and inspection of documents. The need for any interlocutories will normally be discussed at the Directions Conference when timetable deadlines will be indicated.

Professional Conduct Committee:

A Professional Conduct Committee (or “PCC”) consists of two registered health practitioners who are registered with the relevant Regulatory Authority and one layperson. PCCs are appointed by a Regulatory Authority to investigate complaints referred to the Authority by the Health and Disability Commissioner. PCCs are also required to investigate the circumstances of certain offences allegedly committed by a health practitioner. At the conclusion of an investigation, a PCC may determine that a charge be brought against the health practitioner before the Tribunal. The PCC is usually represented by an independent lawyer to prosecute the charge against the practitioner.

Respondent:

The health practitioner who is called upon to respond to the charge.

Regulatory Authority:

The body responsible for registering health practitioners. There are 16 Regulatory Authorities:

1. *Chiropractic Board New Zealand*
2. *Dental Council of New Zealand*
3. *New Zealand Dietitians Board*
4. *Medical Council of New Zealand*
5. *Medical Laboratory Science Board*
6. *Medical Radiation Technologists Board*
7. *Midwifery Council of New Zealand*
8. *Nursing Council of New Zealand*
9. *Occupational Therapy Board of New Zealand*
10. *Optometrists and Dispensing Opticians Board*
11. *Osteopathic Council of New Zealand*
12. *Pharmacy Council of New Zealand*
13. *Physiotherapy Board of New Zealand*
14. *Podiatrists Board of New Zealand*
15. *New Zealand Psychologists Board*
16. *Psychotherapists Board of Aotearoa New Zealand*

Technical Advisor:

The Tribunal may on occasion appoint a Technical Advisor for the purpose of providing advice on clinical or scientific matters, or to advise the Tribunal on matters of law, procedure or evidence.

Grounds On Which A Practitioner May Be Disciplined

Disciplinary Grounds for Health Practitioners

Section 100 of the Act provides a health practitioner may be disciplined if the Tribunal is satisfied the practitioner:

- a) Has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, amounts to malpractice or negligence in relation to the scope of practice in respect of which the practitioner was registered at the time that the conduct occurred; or
- b) Has been guilty of professional misconduct because of any act or omission that, in the judgment of the Tribunal, has brought or was likely to bring discredit to the profession that the health practitioner practised at the time that the conduct occurred; or
- c) Has been convicted of an offence that reflects adversely on his or her fitness to practise; or
- d) Has practised his or her profession while not holding a current practicing certificate.
- e) Has performed a health service that forms part of a scope of practice of the profession in respect of which he or she is or was registered without being permitted to perform that service by his or her scope of practice; or
- f) Has failed to observe any conditions included in the practitioner's scope of practice; or
- g) Has breached an order of the Tribunal under section 101 of the Act.

Information For All Parties In Proceedings Before The Tribunal

What Happens After The Forms Are Filed?

Pre-Hearing Requirements:

Once the Notice of Disciplinary Proceedings has been given to the health practitioner and he/she (or counsel) has returned the completed reply Checklist to the relevant Executive Officer (or after 21 days has elapsed without filing of the reply Checklist), the Executive Officer will consult with the parties to confirm the date and time of the Directions Conference.

There are particular procedures available under the Act with which the parties should be familiar. For example, the health practitioner is reminded of the obligation under section 92(3) of the Act to notify the Tribunal in writing whether or not he or she wishes to be heard by the Tribunal, either personally or by a representative. This is the first question to be answered in the reply Checklist.

Pursuant to section 95 of the Act, hearings of the Tribunal are held in **public** unless grounds for the Tribunal to order otherwise exist.

Where one party or the other, or the complainant, requests an order that the whole or any part of the hearing shall be held in private, or where the Tribunal itself wishes to consider that possibility, the Tribunal will invite all parties affected to submit their views.

Where the Tribunal is satisfied that it is desirable to do so, it may order that the whole or any part of the hearing shall be held in private. Similar orders may be made prohibiting publication of written materials or the name, or any particulars of the affairs of any person. As section 106(2) of the Act provides a right of appeal against the whole or any part of any order made under section 95 of the Act, the Tribunal needs to deal with applications in advance of the hearing. Accordingly it is essential that any such applications are identified promptly and made formally to the Tribunal so that they can be dealt with well in advance of the hearing.

There are special protections for complainants contained in section 97 of the Act. Where the charge relates to or involves any matter of a sexual nature, or any matter that may result in the complainant giving evidence on matters of an intimate or distressing nature, special safeguards to protect privacy can be implemented.

After the Directions Conference, the Tribunal will forward a minute to the parties setting out a timetable, or steps to be taken, any directions or orders made and such other matters as are appropriate.

Hearing Procedures

What Happens At The Hearing?

The hearing is held in **public** unless otherwise ordered.

The hearing remains always under the control of the Chair.

The Tribunal must comply with the rules of natural justice which, amongst other things, require that each party is entitled to a fair and impartial hearing, to have opportunity to put its case and to be present when the other party is starting its case. Subject to this, the Tribunal may receive as evidence any statement, document, information or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not it would be admissible in a Court of law.

Where the charge relates to or involves any matter of a sexual nature, or where any matter that may require or result in the complainant giving evidence on matters of an intimate or distressing nature, the Tribunal will offer the complainant the right to give his or her oral evidence in private.

Under section 98 of the Act, the Tribunal also has a discretion to order that evidence of acts performed on a complainant, or which the complainant is alleged to have been compelled or induced to perform or to consent to, may not be the subject of publication in any report or account.

Subject to the rules of natural justice, under Schedule 1, section 15 of the Act, the Tribunal may at any time during the hearing of any charge, amend the charge in any way.

The Tribunal may from time to time appoint a Technical Advisor, who may be present at any hearing of the Tribunal and at any time may respectively advise the Tribunal on matters of law, procedure, evidence, or on clinical or scientific matters. However a Technical Advisor is not entitled to be present during any deliberations of the Tribunal.

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The Tribunal may adopt whatever procedures are appropriate to the circumstances, however, the usual procedure at the hearing is as follows:

- a) The Tribunal requires the parties to adduce evidence by way of written statements unless applications to the contrary are made and granted prior to the hearing of the charge(s), e.g. where appropriate, evidence may be given by affidavit or video-link by witnesses who cannot attend.
- b) The party upon whom the burden of proof lies, either a Professional Conduct Committee or the Director of Proceedings, will present its case first. The burden of proof is the burden of establishing the facts that give rise to the charge. The party with the burden of proof will be referred to as the “prosecution”. Prosecution counsel will make opening submissions and will call each of the prosecution witnesses in turn. Each party attempts to establish its case by providing evidence sufficient to satisfy the Tribunal.
- c) Evidence may be given either on oath or affirmation. If so, each witness must be sworn or affirmed. The procedure for taking the oath is as follows:

The witness holds a Bible in his or her right hand and the Executive Officer says to the witness:

“Do you swear that the evidence you are about to give in these proceedings will be the truth, the whole truth and nothing but the truth?”

The witness replies:

“I do.”

Alternatively the witness may make an affirmation, a non-religious binding obligation. The procedure for affirmation is similar.

The Executive Officer asks the witness:

“Do you solemnly, sincerely and truly declare and affirm that the evidence you are about to give in these proceedings will be the truth, the whole truth and nothing but the truth?”

The witness replies:

“I do.”

- d) The witness then gives evidence of the facts that are within his or her knowledge. If an expert is called, that person may give an opinion on the relevant issues. This part of the evidence is called “evidence-in-chief”. The evidence-in-chief will normally be presented in the form of a written statement which is read to the Tribunal. Alternatively, the evidence may be led, that is, given in response to questions from prosecuting counsel. During this examination (“examination in chief”) the usual rules of evidence apply. For example, leading questions may not be asked on matters which are in dispute between the parties. A leading question is one so worded that it suggests the desired answer to the witness. Leading questions may, however, be put in preliminary matters, matters that are not in dispute, or during cross-examination.

- e) Counsel for the respondent health practitioner may then cross-examine the witness.
- f) If a witness has been cross-examined, prosecution counsel may re-examine the witness but only on matters which have been raised in cross-examination.
- g) The same procedure is followed for all other witnesses called by the prosecution. Counsel for the respondent health practitioner then makes opening submissions and calls witnesses in the same way.
- h) Counsel for the prosecution then has a right to make final submissions, as does respondent counsel in turn.
- i) The Tribunal Chair and members may ask questions of a witness. Isolated questions may be asked during examination-in-chief and cross-examination but members of the Tribunal will usually reserve questions until the conclusion of the re-examination of the witness. The parties (or their counsel) will be given an opportunity to question the witness on any issues which arise from the Tribunal's examination.
- j) The Executive Officer will keep a formal record of the hearing. The evidence will be recorded, usually by way of a verbatim transcript which will then be available during the course of the hearing.
- k) The Tribunal will retire to consider the case and reach a decision.

What Happens After The Hearing?

If circumstances permit, the Tribunal will meet in private to consider the evidence which has been placed before it and reach a decision immediately after the conclusion of the hearing. If possible, the Tribunal will reconvene and announce its decision orally. If the charge has been upheld, the Chair will invite counsel to make submissions as to penalty.

If the Tribunal does not communicate its decision to the parties on the day of the hearing, the written Decision will be sent direct to the health practitioner and counsel for both prosecution and respondent health practitioner with a copy to the complainant. If the charge has been upheld, written submissions on penalty will be sought.

The submissions from counsel on penalty will be considered by the Tribunal before it issues a final Decision or finding. This Decision will be sent to the respondent health practitioner, the complainant and to counsel for the prosecution and respondent.

Penalties

Orders Available To The Health Practitioners Disciplinary Tribunal

The Tribunal in making orders may –

- a) Order that the registration of the health practitioner be cancelled;
- b) Order that the registration of the health practitioner be suspended for a period not exceeding three years;

- c) Order that the health practitioner may, after commencing practice following the date of the order, for a period not exceeding three years, practise his or her profession only in accordance with any conditions as to employment, supervision, or otherwise that are specified in the order;
- d) Order that the health practitioner be censured;
- e) Order that the health practitioner pay a fine not exceeding \$30,000 (subject to subsections (2) and (3));
- f) Order that the health practitioner may pay part or all of the costs and expenses of and incidental to any or all of the following:
 - i) Any investigation made by the Health and Disability Commissioner
 - ii) Investigation and prosecution by the Director of Proceedings
 - iii) The hearing by the Tribunal.

Publication Of Information

Publication of Tribunal Orders

Under section 157(2) of the Act, when the Tribunal makes an order under the Act in respect of any health practitioner, the Executive Officer must arrange, subject to any existing suppression orders under section 95 of the Act, publication of a notice in such publications as the Tribunal may order, stating:

- a) The effect of the Order;
- b) The name of the health practitioner in respect of whom the order is made; and
- c) A summary of the proceedings in which the order is made.

Information Published on the Tribunal's Website

All Tribunal decisions and Interlocutory orders are published on the Tribunal's website, www.hpdt.org.nz, subject to any suppression orders. It is the usual practice of the Tribunal to publish decisions and orders a week after they have been received by the parties and to notify news media that the decision has been published.

Any Questions?

This guide summarises what happens before, at, and after a disciplinary hearing. If you have any questions, please do not hesitate to ask either your counsel or the appropriate Executive Officer of the Tribunal (contact details are available on the Tribunal's website: www.hpdt.org.nz).

For further information about the Tribunal's procedures, please refer to the Practice Notes published on the Tribunal's website