

4.3.2 Guidance

Member discipline system

For Schemes being prepared under Professional Standards
Legislation

June 2021





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Disclaimer

This guidance is applicable only to an occupational association preparing a Scheme for approval under Professional Standards Legislation. It does not constitute legal or other professional advice and should not be relied on as such. An occupational association should seek its own legal/professional advice to find out how the Professional Standards Legislation and other relevant laws and regulations may apply to it. For access to legislation in force in NSW, go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

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1. Guidance statement

A key aim of this guidance is to assist your association in completing Submodule 4.3 *Discipline of members system*, which is mandatory for applicant associations to submit when seeking approval of the Professional Standards Councils for a Professional Standards Scheme.

The submodule and guidance are linked to the broader Module 4.0 *Professional risk management strategies* and should be read together. An additional resource is the Councils' *Policy Statement on Complaints and Discipline Systems* (August 2014) located on the Councils' website (www.psc.gov.au).

This guidance is designed to assist you to understand and respond to the submodule's terminology and application requirements, particularly the consideration of member discipline systems as a regulatory objective for strengthening consumer safeguards in an association member's activities.

If your association is unable to complete the submodule, please contact the Councils, as they have a statutory function to advise, assist and encourage associations with their professional standards and member regulation (refer to section 43 of the *Professional Standards Act 1994* (NSW) (for example).

For associations applying to remake or amend a Professional Standards Scheme, the submodule and guidance establish the discipline system information required by the Councils. Section 6 of this guidance outlines the administrative process in this regard.

2. Context

You will appreciate how critical it is for an occupational association to have effective strategies designed to manage the risk a member may cause harm to consumers in the provision of occupational services. Consistent with Module 4.0 *Professional risk management strategies*, a key function of the member discipline system is to guide decision making on controls and mitigation activities with the objective of reducing the risk of harm to consumers.

The Councils' assessment of the efficacy of the member discipline system helps the Councils to consider assess overall the likely effectiveness of the association's risk management strategies and the means by which those strategies are implemented.

The Councils' assessment of an association's member discipline system focuses on three questions:

- Does the system address and reduce consumer harm?
- Does the system improve professional standards?
- Is the system sufficiently integrated with other required elements of the association's professional risk management strategies to provide reasonable assurance of consumer protection and professional standards improvements?



The submodule is designed to achieve the following:

- to assist applicant associations to understand and comply with the Council's requirements relating to the member discipline systems
- to encourage and support the deployment of efficient and effective member discipline systems by associations
- to ensure improved governance by associations in the administration of their member discipline systems
- to ensure member discipline systems are integrated with other elements of the association's professional risk management strategies including its governance, membership, consumer complaints and continuing professional education arrangements
- to ensure member discipline systems provide effective information and feedback to the association's professional risk management systems concerning changing community expectations and emerging risks to professional standards and practice
- to ensure member discipline systems promote professional standards improvement by helping the association and its members identify the need for changes in standards and/or changes in practice to mitigate risk and reduce consumer harm
- to encourage associations to develop measurable, improved consumer protection outcomes for the users of their members' services
- to raise awareness of significant issues facing Schemes, associations and members including good practices to facilitate the effective management of risk associated with member discipline systems and to mitigate consumer harm.

3. Legislative obligations

The Professional Standards Legislation requires applicant associations seeking approval for a Scheme to submit the following professional risk management information to the Councils. The relevant sections of the legislation (using the *Professional Standards Act 1994* (NSW) as an example) are:

- (a) sections 10 and 36 in respect of providing their detailed professional risk management strategies, the means by which they are intended to implement those strategies, and the means by which they may be imposed as a condition of membership
- (b) section 37(1) in respect of associations providing information on their risk management strategies to the Councils if requested to do so.

Both the Submodule 4.3 and this guidance are designed to assist in fulfilling the objects of the legislation which are, (using the *Professional Standards Act 1994* (NSW) as an example (our emphasis):

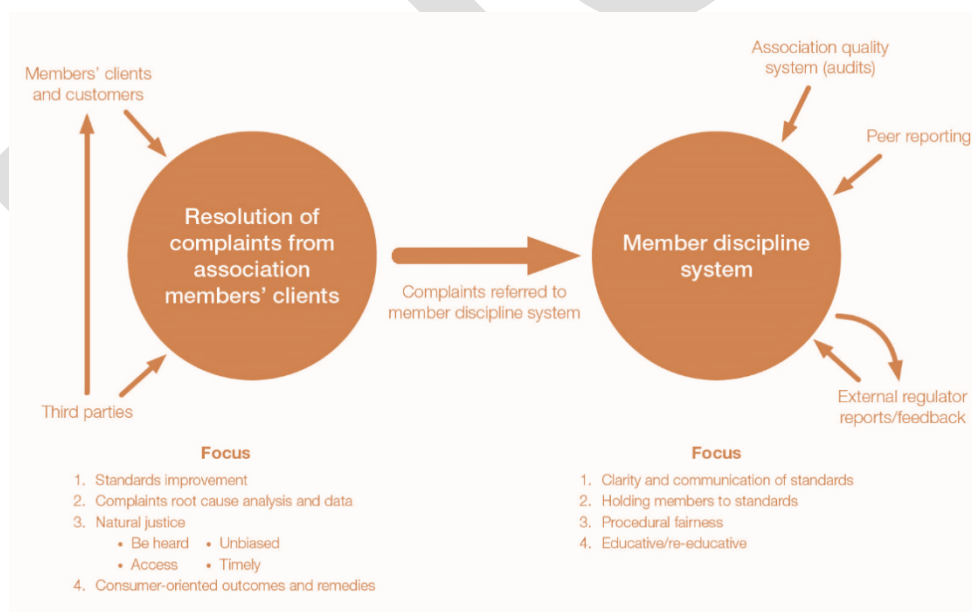


- a) to enable the creation of Schemes to limit the civil liability of professionals and others,
- b) to **facilitate the improvement of occupational standards** of professionals and others,
- c) **to protect the consumers of the services provided by professionals** and others,

to constitute the Professional Standards Council to supervise the preparation and application of Schemes and **to assist in the improvement of occupational standards and protection of consumers**. Note that the legislation does not mandate an association having its own member discipline system as part of its risk management strategies. However, an effective discipline system is a critically important element of professional risk management as evidenced in the Professional Standards Legislation and it is the Councils' policy for each association to have, or have access to, a member discipline system as a part of its risk management strategies.

Section 38 of the NSW Act provides that your association's Scheme may adopt the *Occupational Associations (Complaints and Discipline) Code* (the Model Code), which is set out in Schedule 1 to the Act. Your association can make additions, omissions, or other modifications to the Model Code, including the matters set out in section 38(2). If you adopt the Model Code with amendments, such additions, omissions, or other modifications of the Model Code require the approval of the Councils.

The direct linkages between your consumer complaints system and your discipline of members system are well recognised, as illustrated in the diagram below:



For the Scheme application process, your association will need to describe separately the aspects of its processes that are pertinent to a consumer's ability to make a complaint and, where the outcome of a complaint is a disciplinary sanction, what sanctions are available, and how they are applied and – and, importantly, how the complainant is apprised of this.



(For detail in respect of consumer complaints, Submodule 4.2 *Resolution of complaints from (members') client system*).

The next sections of this guidance set out the information being sought by the submodule alongside a brief commentary on each to explain their relevance for member discipline systems.

Application Step 1: Documentation evidence

The submodule asks that you provide and explain your association's current, or proposed, consumer complaints system by providing materials or documents such as:

- *governing document elements*
- *by-laws, regulations, rules*
- *governing body approved policy, procedures, processes*
- *forms, templates, internal or external standards*
- *oversight of management bodies or committees and their terms of reference.*
- *oversight of management bodies or committees and their terms of reference*
- *standing communication to members*
- *relevant website content*

Commentary

The above list of materials and documents seeks to establish an evidentiary framework by which the Councils can assess the scale, depth, and consistent application of the member discipline system that you currently or propose to apply.

This documentation is practice-focused, input based evidence of how the member discipline system is applied by an association to protect consumers and continuously improve. The value of this documentation is that it assists the Councils to understand the system and processes which you have in place or are proposed, to help in identifying any gaps and to make recommendations to the applicant association on actions that are considered appropriate to address those gaps.

Application Step 1: Implementation and other statutory or regulatory requirements

As the next part of step 1, the submodule asks the following questions about how your member discipline system is implemented and whether your association or members are subject to other statutory or regulatory requirements for all or part of the discipline system:

- *Where a member discipline system is proposed, or being amended, discuss how your association will implement the system, including the association's resources (e.g. staff, financial, IT) and implementation timetable.*
- *Where your association or members are subject to a statutory or regulatory requirement for all or part of the member discipline system, provide the Councils with references to*



the relevant statutory provisions, regulator, and explain the interaction between the association as a co-regulator and the statutory regulator (examples include scheduled meetings or consultation, membership of panels or committees, reporting, information sharing).

Commentary

Consistent with the requirements outlined in Module 4.0 *Professional Risk Management strategies*, a clear implementation plan and supporting processes are vital to the effectiveness of your member discipline system. It is important that you clearly identify and explain the implementation approach, including setting out your association's resources (e.g. staff, financial, IT) and implementation timetable.

The question about whether your association or members is subject to a statutory or regulatory requirement for all or part of the member discipline system is important. Answering this question will help the Councils to better understand the statutory context in which your association and members operate and, importantly, to ensure an effective regulatory relationship with the Councils alongside the provisions required by other statutes.

Application Step 2: Your governance, improvement & consumer protection outcomes

For step 2, the submodule asks that you provide information about how your member discipline system is governed, improved, and delivers consumer protection outcomes. Areas covered in the submodule's questions include the following:

- your association's published member discipline policy, its administration and governance
- consumer representation in designing, operating, and providing feedback on the member discipline system
- independence in considering disciplinary actions and outcomes
- human, technological, and financial resources deployed to support the discipline system
- how the stakeholders including consumers are apprised of the outcomes
- how the system is improved
- data collection including that of procedural fairness
- review/audit report concerning the member discipline system.

Commentary

The purpose of this information is for your association to demonstrate the scale and quality of the governance, improvement and consumer protection outcomes that underpin your member discipline system.



Consistent with the requirements outlined in Module 4.0 *Professional risk management strategies*, the questions being asked are directed to showing the dynamics of what makes your discipline system operate effectively.

New approaches to occupational discipline focus on the improvement of a member's standards, competency and conduct improvement through education and other direct interventions, while punitive or excluding sanctions are a last resort. These look to positive models of engagement with members to improve standards in the occupation and facilitate continuous improvement of professional standards.

Making the discipline system transparent and easy to understand, for example by making the association's member discipline policy available on your website, is a requirement for consumer protection. Addressing community expectations plays a major role for facilitating association accountability and transparency. One example is that the discipline actions are handled fairly, and in timely and unbiased manner.

Looking from the perspective of a principles-based approach, effective and efficient member discipline systems should respond to the following features:

- **data-driven:** enabling the collection, analysis, synthesis and reporting of complaints/discipline data such as in the critical area of identifying emerging trends that inform revisions of your professional risk management strategies
- **risk integrated:** assisting the association and its members to identify and manage risks in the practice of the occupation
- **consumer responsive:** ensuring that complainants are not adversely affected by making a complaint and there is emphasis on early resolution of complaints and communication
- **root cause responsive:** assisting the association and its members to understand, identify and remediate the root causes of poor practice and consumer harm
- **strategic:** informing strategies the association may adopt to improve member conformance with professional standards including whether changes in practice, or in professional standards are recommended to prevent consumer harm
- **educative:** informing changes to member practice and behaviour to reduce professional risk
- **resourced:** providing the necessary resources assigned by your association to maintain and progress improvements.

Practical measures or metrics showing the effectiveness of member discipline systems are vital to demonstrate their success. Such measures may include collecting and publishing data from conformance activities, holding members to account for non-conformance to professional standards including correcting instances of member non-conformance to those standards, and a proportionate focus on punishment or expulsion. In addition, you need to state how the measures are going to monitor the effect of the discipline system.

Note that the information on your member discipline system's continuous improvement is also linked to the Councils' annual reporting process. For details, see Module 6.0 *Annual reporting capacity & capability against annual reporting requirements*.



4. Organising the application submission

The information being requested in this submodule is freestanding and can be completed and provided to the Councils on its own or alongside some or all other application modules.

For this reason, your submission responding to the submodule should have its own table of contents, body, and attachments, and should avoid cross-referencing other application modules prepared by your association. This allows for the submodule to be assessed and analysed as a discrete submission to Councils.

5. Related application modules

Other professional risk management processes need to be assessed as part of the application process. These exist as stand-alone modules, or other modules/submodules, as indicated below:

- Codes (code of ethics; code of practice)
- Complaints management
- Association insurance standards
- Notification of limitation of liability (disclosure of the Scheme by members)
- Enterprise risk management
- Compliance plan for complying with the Professional Standards Legislation and corporation requirements.

6. Application to remake or amend a Professional Standards Scheme

For an application to remake or amend a Professional Standards Scheme, the submodule and guidance set out the member discipline system information required by the Councils.

Before starting the submodule, you need to confirm the Councils' requirements for your remake application with the Professional Standards Authority. If your association has previously provided the information and data sought in this Submodule to the Councils, whether in a Scheme application, annual association report, or ad hoc report, you need only refer to the previously provided information, or attach that information, and then complete the submodule by clearly identifying and advising on improvements or changes undertaken by the association since the previous information was provided to the Councils.