

PRACTICE DIRECTION 8: Material and Evidence

- 8.1 OVERVIEW:** The Tribunal in making a decision regarding an appeal is required to make findings of fact and to state the evidence upon which those findings were made. A party needs to carefully consider what factual material needs to be presented to the Tribunal in order to be successful. Factual material provided to the Tribunal must be in writing in the form of a statement of evidence. This must be a complete written statement of all facts or expert opinion to be given by a witness; it is not a summary or a list, and should read as one would state the facts as if speaking. This practice direction is to assist the parties in understanding the mode and format of presenting evidence before the Tribunal.
- 8.2 AUTHORIZING STATEMENTS OF EVIDENCE:** A statement of evidence must be individually prepared by each witness so that the author is identified and can be questioned during the hearing. The author of any document presented as evidence to the Tribunal must attend the hearing to be questioned about the document. A statement of evidence may include annexures such as letters, reports or studies. A party seeking to rely on the work of any other person must ensure that the other person attends the hearing in order to be questioned about the content of that document. A failure to do so may result in the evidence being excluded from consideration or, alternatively, be given diminished weight.
- 8.3 EXCEPTIONS:** The only exception to an author attending a hearing relates to documents which are generally accepted and used as authoritative such as dictionaries or medical and scientific texts. Reports by special groups or articles by experts not forming part of such accepted texts will not normally be accepted.
- 8.4 TIMETABLE FOR EXCHANGE OF EVIDENCE:** All evidence that the parties seek to rely upon must be forwarded to each other party and filed with the Tribunal at least 21 days before the hearing. The parties then have a period of 14 days to prepare statements of evidence in response. Response statements of evidence must only respond to material that was supplied in initial statements of evidence; they are not an opportunity to adduce new evidence.
- 8.5 SERVICE OF DOCUMENTS:** Each party must serve upon each other party their statements of evidence and response statements; this is not the responsibility of the Tribunal. One copy of all documents to be relied upon at the hearing must be filed with the Tribunal at the same time they are served on each other party. The Tribunal also requires an electronic copy of all evidence filed.
- 8.6 FORMAT OF EVIDENCE AND MATERIAL:** All statements of evidence are to:
- 8.6.1. Include a coversheet in accordance with Appendix 8A. Cover sheets are not to include illustrations or material other than set out in the Annexure.
 - 8.6.2. Where an original contains coloured material, copies for all parties and all Tribunal members must also be in colour.
 - 8.6.3. Be on A4 size paper, portrait layout, paginated and with paragraph numbers.

8.6.4 For all documents lodged in PDF, bookmarks must be inserted into the document. Bookmarks facilitate the location of contents within the document. This link explains the process: <https://helpx.adobe.com/acrobat/using/page-thumbnails-bookmarks-pdfs.html>

Parties are to file a complete list of the witnesses to be called at the hearing.

A failure to file material in accordance with this Practice Directions may result in the material being returned to be corrected.

8.7 EVIDENCE vs SUBMISSIONS: Persons who are not familiar with legal proceedings often make the error of confusing evidence with submissions or arguments. Appendix 8B is intended to show the difference between evidence and submissions. Statements of evidence should recognise the distinction between evidence and submissions as valuable hearing time can be wasted in dealing with objections correcting statements of evidence.

8.8 DRAFT PROPOSED CONDITIONS: The planning authority is to make, file with the Tribunal and serve upon each other party a set of draft conditions of approval seven days prior to the hearing. These conditions are provided in the event the Tribunal is minded to grant a permit for the use/development the subject of the appeal. The draft conditions are to be responsive to the issues in the proceedings and are to be provided regardless of whether the planning authority refused or approved the use/development at first instance. A planning authority is at liberty to submit that it is not possible to frame practicable conditions of approval which are responsive to the issues in dispute, but they are to place all parties on notice of that submission seven days prior to the hearing. That submission will need to be substantiated by reference to the evidence led at the hearing which demonstrates the argument.

8.9 AGREED FACTS: The Tribunal encourages parties to agree as many facts as possible prior to hearing. The Tribunal directs that parties to proceedings are to confer prior to the full hearing to attempt to identify facts which can be agreed. The parties are to confirm in writing to the Tribunal, seven days before the hearing, that they have conferred to agree facts and submit a statement of agreed facts. If there are no facts which can be agreed, then the Tribunal is to be advised of that result.

8.10 TENDERING OF COUNCIL'S FILE OR BUNDLES OF DOCUMENTS, REPRESENTATIONS: When a party seeks to tender a bundle of documents to the Tribunal, they will be required to take the Tribunal to the particular documents in the bundle relied upon. It is those documents that will be taken into evidence. Any documents to which the Tribunal is not taken are excluded.

The Tribunal at a full hearing will ordinarily not have regard to original development assessment materials unless they are tendered as evidence in the hearing. Please note the requirements for the authors of materials being required to appear as witnesses if documents are being relied upon in proceedings (see PD 13.2.2).

The Tribunal is obliged to have regard to any representations that were filed at first instance (see Section 51(2)(c) and Section 62(4) of the *Land Use Planning and Approvals Act 1993*). At

the full hearing of any appeal, the parties will be afforded an opportunity to be heard as to the extent to which any representations may be considered.

**APPENDIX 8A
COVER SHEETS FOR STATEMENTS OF EVIDENCE**

STATEMENT OF EVIDENCE

IN THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Tribunal reference number *

Appellant:

1st Respondent:

Other Respondents (if any):

Party Joined (if any):

Author:

Field of Expertise (if any).....

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Filed on behalf of:

(Appellant, Respondent or Third Party)

Date:

APPENDIX 8B:

GUIDELINES - EVIDENCE AND SUBMISSIONS BEFORE THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Witnesses Statements of Evidence and Advocates Submissions - Basic Distinctions

Evidence	Submissions
A statement given by a witness	Argument or persuasion - by an advocate
Of fact or opinion so as to prove that fact or opinion e.g. facts - details of a development e.g. opinion - access for traffic will be unsafe	Argument as to which facts or opinions should be accepted by the Tribunal and as to the effects of those facts and opinions and the law upon the issues before the Tribunal. Submissions refer to the evidence given or assessed. Submissions do not contain new facts and are not capable of proving anything.
Normally evidence is given first	Normally submissions are made after the evidence has been concluded
Normally not given as to construction of an Act, State Policy, Planning Ordinance or other legal instrument	Characteristically as to proper construction (meaning) of an Act, State Policy, Ordinance or other legal instrument, as well as about the effects of facts or opinion
May be non-expert or expert	
Expert - as to fact or opinion requiring special skill or knowledge Facts outside the expertise of the Tribunal e.g. accepted scientific fact behaviour of sound - behaviour of fume and odour plumes - accepted chemical reactions - accepted physical facts Opinion - e.g. inferences or conclusions drawn from facts proved by the expert or by other witnesses in the proceedings e.g. probable overshadowing resulting from a structure - likely behaviour of an odour plume - effect of a development upon heritage significance of a building - likely extent of overshadowing caused by a structure	
While expert opinions must be formed upon stated or proven facts, there are some facts that do not require proof, e.g. dictionaries, generally accepted scientific texts and writings and journals, generally accepted bodies of expert knowledge	
The Tribunal or a court is not obliged to accept expert evidence, even though it remains un-contradicted.	
Experts should not express an opinion upon the ultimate question the Tribunal is to decide.	Submissions may be made as to what conclusions the Tribunal should reach and the proper form of any

<p>e.g. In an appeal against the refusal of a permit, an opinion that the permit should be granted. An opinion that there is no apparent planning reason why a permit could not be granted would be acceptable.</p>	<p>order.</p>
<p>The limits of evidence - evidence is not receivable if it is not relevant to issues in the proceedings before the Tribunal.</p> <p>For example, in an appeal against the grant of a permit, residential amenity may be relevant, but the way in which Council reached its decision is not. Matters such as bias of Councillors, or a failure to follow the Council Planning Officer's advice, are not relevant. It is the decision (i.e. permit or the conditions imposed upon it, the refusal to grant a permit,) which are relevant and not the manner in which Council reached that decision.</p> <p>The only exception to the above is in the case of issues of jurisdiction, for example, where a requirement of LUPAA has not been complied with.</p>	
<p>Expert witnesses; expert witnesses as advocates; and the form of expert evidence:</p> <p>Please read the contents of PD15 and PD8.4 of these Practice Directions closely.</p>	
<p>'Issues'</p> <p>The issues in the proceeding are those which have been established by the grounds of appeal as elaborated by the lists of issues presented by the parties to the Tribunal at the first directions hearing, or as otherwise directed by the Tribunal.</p>	

APPENDIX 8C – DRAFT CONDITIONS OF APPROVAL

1. **OVERVIEW:** The Tribunal must ensure that in handing down its final determination, all relevant matters relating to the appeal are determined. As such, the Tribunal must ensure that it has all relevant information before it in the event it is minded to grant a permit. The Tribunal's Practice Directions have been modified to require the provision of draft conditions of approval by the planning authority in the event that the Tribunal is minded to grant a permit. Each other party will be required to identify which conditions are in dispute and / or any alternative sought to be imposed by that party. The provision of these draft conditions of approval are done so on a without prejudice basis. Their provision does not indicate a propensity for approval. It is provided to ensure that all matters that need to be disposed of can be done so in a single determination rather than multiple stages.
2. **COUNCIL'S PROVISION OF DRAFT CONDITIONS OF APPROVAL:** A planning authority is required to file with the Tribunal at the same time as all evidence a set of conditions of approval. Alternatively, the Council will need to file submissions detailing the basis upon which it says it cannot provide that set of conditions of approval. Notwithstanding a Council may have refused the proposal, they are required to turn their minds to a proposed set of conditions of approval in the event the Tribunal ultimately overturns that decision. Councils are granted the opportunity to file submissions detailing the basis upon which they say the provision of grounds of approval are not possible.
3. **RESPONSE BY OTHER PARTIES:** Each of the other parties to the proceedings are afforded the normal period of seven days to file any response evidence to the conditions of approval as proposed.
4. **EVIDENCE:** The parties to the proceedings should ensure that in the filing of response evidence for a hearing they have addressed the conditions of approval and any dispute identified in the evidence submitted by witnesses.