

Conciliation FAQ

For Complainants and Respondents

What is Conciliation?

Conciliation is a form of alternative dispute resolution, similar to mediation. Conciliation processes can vary in different contexts, but they usually involve an independent person with expert knowledge (the conciliator) helping the parties to identify and agree on a fair resolution of their dispute.

The conciliator does not adjudicate or otherwise determine the outcome of your dispute. However, if required, a conciliator may use their expert knowledge of the legislative context and apply the relevant provisions of the law to challenge positions or raise relevant issues for consideration. That means a conciliator might talk to the parties about the reasonableness of their demands and arguments, or provide an opinion on matters relevant to the dispute, such as the interpretation of the Information Privacy Principles or the prospects of the complaint succeeding if referred to the Victorian Civil and Administrative Tribunal (VCAT).

At OVIC, conciliation is voluntary and facilitated by a staff member acting as the conciliator. Conciliation may be conducted indirectly, over the phone, or at a face-to-face meeting. One of the many advantages of conciliation is that it is confidential — any evidence of things said or done in conciliation is not admissible before the tribunal or other legal proceedings, unless you and the organisation agree.

Why does OVIC conciliate privacy complaints?

Conciliation is the fastest, cheapest and easiest way of resolving privacy complaints. If a complaint can't be resolved through conciliation at OVIC, the next step is to have the matter referred to VCAT for hearing, which can be stressful and expensive for both parties.

That's why the *Privacy and Data Protection Act 2014 (Vic) (PDP Act)* requires privacy complaints to go through OVIC first, before they can be referred to VCAT. If the Information Commissioner believes that there is a chance the complaint can be resolved through conciliation, he is required to make all reasonable endeavours to conciliate the complaint.

Is conciliation like an investigation? Or a court or tribunal?

None of the above. Conciliation is more akin to a guided mediation than an investigation or a hearing before a court or tribunal. Though legal arguments or factual details may be relevant in a conciliation, they should not be the primary focus. The goal of conciliation is to try and resolve complaints, and parties don't need to agree on every fact or issue in order to resolve a complaint.

What are the benefits of conciliation? Do I have to participate?

Individuals

Conciliation is a voluntary process and you do not have to participate, though we would encourage you to consider it. Conciliation provides you with an opportunity to 'have your say' about what has happened in your complaint. It is also an opportunity to resolve your complaint without having to go through the time, stress and monetary costs of a hearing at VCAT.

If you do not want to participate, or have any concerns about the process, please discuss this with the Conciliator assigned to your complaint at the earliest possible stage.

Organisations

You should participate if there is some prospect of resolving the dispute, or of resolving some aspect of the dispute. In accordance with the Victorian Government Model Litigant Guidelines, organisations should take ‘such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve disputes by agreement, including participating in appropriate dispute resolution (ADR) processes’.¹

If you believe that conciliation may be inappropriate or unhelpful, you should discuss this with the OVIC Conciliator assigned to the complaint at the earliest possible stage.

What if conciliation is inappropriate?

If the Information Commissioner does not consider it reasonably possible that a complaint may be conciliated successfully, he will notify the parties and conciliation will not proceed.

The Commissioner may do this, for example, when:

- parties indicate a refusal to participate in the process;
- the relationship between two parties is so poor that it makes resolution not reasonably possible;
- any party displays unacceptable and/or threatening behaviour.

If this happens, the complainant may ask the Commissioner to refer the complaint to VCAT for hearing. Referral request must be in writing, and must be made within 60 days of receipt of notification that conciliation is inappropriate.

What does the Conciliator do?

The Conciliator (an OVIC staff member trained in alternative dispute resolution processes and the PDP Act) organises and chairs a discussion between the two parties to help each party put its point of view forward and come up with ways to resolve the dispute.

The Conciliator must remain impartial and independent, and cannot force either party to accept a particular outcome. However, the Conciliator can make suggestions on how to resolve the complaint, or provide their expert opinion on matters related to the dispute. For example, the Conciliator can discuss how the PDP Act works, how the Information Privacy Principles may apply in the circumstances and how VCAT might approach the matter based on previous complaints.

What things can't a Conciliator do?

The Conciliator cannot:

- make an individual or an organisation do something (or agree to something);
- provide legal advice to either party; or
- tell you what you should or should not do (for example, whether you should or should not accept an offer).

¹ Department of Justice and Regulation, Victorian Model Litigant Guidelines, March 2011, available at <http://www.justice.vic.gov.au/home/justice%2Bsystem/laws%2Band%2Bregulation/victorian%2Bmodel%2Blitigant%2Bguidelines>.

(For individuals) Complainants from non-English speaking backgrounds

As conciliation is an opportunity for both parties to discuss what has occurred and how to resolve a matter, it is important that you understand what is discussed and feel confident communicating during the process.

Please tell your conciliator if you have difficulty communicating in English or prefer to speak in a language other than English. The Office of the Victorian Information Commissioner can arrange an interpreter at no cost to you. Interpreters are required to maintain confidentiality at all times.

(For individuals) Complainants with disabilities or impairments

If you have a disability or impairment of any type and feel that your participation in the conciliation process may be affected, please contact your conciliator as soon as possible to discuss this. Conciliation is a flexible process, and OVIC will make any reasonable adjustments that are required to ensure the process can be conducted in a way that is fair and reasonable for all parties.

What types of conciliation are there?

The Conciliator can conduct the conciliation process in two ways:

- Indirect – where negotiation occurs through the Conciliator (also referred to as ‘shuttle negotiation’). This is the most common form of conciliation conducted by OVIC.
- Direct – the two parties meet (either in person or by telephone) together with the Conciliator to try and resolve the complaint.

The OVIC conciliator will decide on the best approach to conciliation in each case. If you have any concerns or preferences as to the form of conciliation that is undertaken, you should discuss them with the Conciliator.

Are conciliations confidential?

Yes. We expect that all parties to a complaint treat information that is obtained in the course of conciliation in confidence. That is, we expect that such information is not used or disclosed for purposes outside of conciliation through this office.

Additionally, section 70 of the PDP Act states that evidence of things said or done in conciliation are not admissible before the tribunal or other legal proceedings, unless the parties agree. This means you can talk openly about the complaint in conciliation without being worried that what you say can be used against you later if the matter proceeds to VCAT. This extends to discussions, letters, telephone calls or things said and done in a meeting.

As far as practicable, OVIC will also treat any information we receive during the course of a conciliation in confidence. In order to facilitate the conciliation process, we will give a high-level summary of each party’s respective position to the other party throughout the process, but we will not disclose any documents that a party submits to OVIC to the other party without consent.

Nevertheless, conciliation works best whenever both parties actively engage in a constructive and open dialogue through OVIC and we will often ask for consent to pass documents on to the other party. We would therefore ask that they try as far as possible to draft correspondence in a manner that they would be satisfied to be passed on to the other party if requested by OVIC.

If an agreement is reached, the parties can decide whether they want to make the agreement reached confidential.

What happens during a conciliation meeting?

Usually, a conciliation meeting starts with each party meeting with the conciliator separately, so that the Conciliator can explain the ground rules, and each party can ask questions about the process. A 'joint session' then occurs where both parties are given a chance to put their side of the complaint forward and discuss the matter in a respectful manner.

After this, the Conciliator will talk with each party separately in 'private sessions' to review what happened in the joint session and discuss ways to resolve the complaint.

The Conciliator may then conduct a shuttle negotiation between both parties, or bring both parties back together again in another joint session so that the parties can discuss ways of resolving the complaint directly.

Conciliation meetings are usually about three hours in length.

What should I talk about?

Individuals

Conciliation is an opportunity to talk to the organisation directly about your complaint. It can be helpful if you can explain what effect the complaint has had on you. The organisation might know what happened, but not the impact it has had on you.

Conciliation is also an opportunity to ask questions and get to understand the issue from the organisation's point of view. Organisations are expected to bring representatives who understand the factual issues and organisational processes that are involved in your complaint, so a conciliation is often a good environment to ask questions, and hear why things might have been done in a particular way, or what an organisation is doing to fix a particular issue.

Organisations

As it does for individuals, conciliation provides an opportunity for an organisation to put their view forward and explain what they think has occurred from their end.

More importantly, conciliation provides an opportunity to understand and engage with a complainant's concerns, and to demonstrate that your organisation is taking the matter seriously and genuinely cares about the complainant's experience. Putting a human face on your organisation and engaging in a meaningful, personal way goes a long way towards de-escalating and resolving disputes.

(For organisations) Who should attend from an organisation?

It is important that an organisation's representative:

- understands the factual issues involved and can talk about them;
- has authority to participate fully and effectively as a representative of the organisation, and to make decisions on behalf of the organisation to settle the matter; and
- was not closely involved with the subject matter of the complaint (for example, the employee alleged to have caused a privacy breach).

If it is not possible for your representative(s) to have authority to settle the matter themselves, you should make sure that they have a direct line to someone who does, and who has been briefed on the complaint so that they can arrange the necessary approvals on the spot.

There should be at most two representatives from the organisation at a conciliation meeting. Bringing too many people can be intimidating to a Complainant and might be a barrier to productive discussion.

Can I bring a lawyer? / Should I bring a lawyer?

Individuals

The conciliation process doesn't require lawyers, but they can play a positive role in helping you prepare and participate in a conciliation process. For example, a lawyer might be able to assist you to understand and articulate how the law applies to your complaint, or to identify, prioritise and explore options for resolving your complaint. A lawyer might also help you to understand your options if your complaint is not resolved through conciliation, including by helping you understand the potential risks and benefits of pursuing your complaint at VCAT.

The OVIC conciliator will decide whether it is appropriate for an advocate or lawyer to participate in conciliation, and what role they will play. This decision will be made on a case by case basis, in consultation with both parties and with a view to ensuring the conciliation process is fair, equitable and constructive.

If you would like to bring a lawyer, you should discuss this with the Conciliator at the earliest possible opportunity.

Organisations

Legal representation is not necessary, though it is not uncommon for organisations to be represented at conciliation by a member of their legal department, along with a person with subject matter expertise.

The OVIC conciliator will decide whether it is appropriate for an advocate or lawyer to participate in conciliation, and what role they will play. This decision will be made on a case by case basis, in consultation with both parties and with a view to ensuring the conciliation process is fair, equitable and constructive.

If you are planning on briefing outside counsel to represent you at a conciliation meeting you should discuss this with the Conciliator at the earliest possible opportunity.

(For individuals) Can I bring a support person?

Yes, you can. A support person is someone who can attend a conciliation with you to provide support. They might help you to understand or process the issues in the dispute or simply help you feel more comfortable in a conciliation meeting. A support person should not advocate or talk on your behalf, but they can prompt you if you forget something you want to talk about.

A support person should be someone you feel comfortable with, but who is not involved in the dispute. They may be a friend, relative, colleague teacher, social worker or other service provider. The OVIC conciliator may exclude a support person if their presence is unhelpful to the process of conciliation.

If you would like to bring a support person, you should discuss this with the Conciliator at the earliest possible opportunity.

How should I prepare for a conciliation meeting?

Individuals

In preparing for a conciliation meeting, you should:

- Review your complaint and any response or correspondence that you have received from the organisation.

- Understand how the IPPs apply to your complaint. You can find the text of the IPPs on the OVIC website,² as well as detailed guidance on their application.³ The OVIC conciliator can also help you to understand how the IPPs might apply.
- Understand what might happen if the complaint can't be resolved in conciliation. The OVIC conciliator can explain this to you.
- Think about what you want to say to the organisation. During the conciliation you'll have an opportunity to tell your story and explain how the interference with your privacy has affected you.
- If you have any documents you would like to discuss, or specific questions you would like answers to, it is a good idea to provide them to the Conciliator in advance so that they can provide them to the organisation and ensure they come prepared.
- Think about how you would like the complaint to be resolved and be prepared to explain why you think this is fair. Try to have a number of different options in mind, and think about how far you may be willing to compromise to resolve the complaint. Making a list in order of importance, is helpful. Try to be open to alternative solutions too — sometimes the parties to a complaint come up with new and creative ways of resolving their dispute during the course of the conciliation meeting. OVIC have published a separate guide to identifying realistic outcomes in privacy complaints, which is available on our website.⁴
- Consider getting advice from a lawyer, if you feel this is necessary. If you get advice from a lawyer you will need to pay for this yourself. You may be able to get free legal advice from a Community Legal Centre or industry group.
- Consider if you want to bring a support person or lawyer to the meeting, and if you do, discuss it with the Conciliator.

Organisations

In preparing for a conciliation meeting, you should:

- Review the facts and law related to the complaint and consider your organisation's position.
- Think about the dispute from the Complainant's perspective. What does the complaint mean to them, and how might they have been personally affected? What level of familiarity are they likely to have with government generally, and your organisation in particular? Rules and processes that seem natural to you may be totally foreign and counterintuitive to them.
- Think about what your organisation wants to communicate to the Complainant. This is an opportunity to put forward your organisation's view of what happened, clear up any misconceptions and to directly address the Complainant's concerns.
- Review the outcomes that the Complainant is seeking and consider your organisation's position on each. Be prepared to explain why you think your organisation's position is fair. If appropriate, brainstorm options for resolving the complaint and if necessary get approval or check the viability of these options in advance. OVIC have produced a separate guide to identifying realistic outcomes in privacy complaints, which is available on our website.

² The full text of the Information Privacy Principles is available on the OVIC website [here](#).

³ OVIC's *Guidelines to the Information Privacy Principles* is available [here](#).

⁴ OVIC's *Guide to identifying realistic outcomes in privacy complaints* is available [here](#).

What if there is no agreement on the day?

If the Conciliator believes that it is possible the parties may reach agreement, he or she can adjourn the conciliation and arrange another meeting to continue the process, or continue the process indirectly, through the Conciliator.

Alternatively, further attempts to conciliate the complaint are unlikely to be successful, the Commissioner will terminate the process and notify the parties that conciliation has 'failed'.

What happens when an agreement is reached?

If agreement is reached, either party can request it be put in writing (within 30 days after agreement). This will generally be prepared by the Conciliator and sent to both parties for signature. The Commissioner certifies the agreement and provides a certified copy to each party. Any party can seek to have the agreement registered at VCAT. If registered, the agreement becomes an order of VCAT.

What happens if an agreement cannot be reached?

If the parties cannot reach an agreement through conciliation, the Commissioner will notify both parties in writing that conciliation has failed.

If this happens, you may ask the Commissioner to refer your complaint to VCAT for hearing. Your referral request must be in writing, within 60 days from when you receive notification that conciliation has failed. The Office for the Victorian Information Commissioner will generally have no involvement after referral of a complaint to VCAT and cannot assist you in preparation of legal documents before VCAT.

What if I have more questions?

If you have any questions relating to a specific complaint, please contact the Conciliator assigned to your complaint. Their contact details will be on the letter from the OVIC notifying your organisation of the complaint.

If you have general questions about OVIC's conciliation process or about privacy complaints generally, feel free to contact us by phone or email as below.

Further Information

Contact Us

t: 1300 00 6842
e: enquiries@ovic.vic.gov.au
w: ovic.vic.gov.au

Disclaimer

The information in this document is general in nature and does not constitute legal advice.