# How to prepare for a hearing at VCAT

This document was prepared by the Equality Law Program. We are a specialised team of lawyers at Victoria Legal Aid providing advice and representation to eligible people experiencing discrimination, sexual harassment and victimisation.

### How can I make a complaint of discrimination to VCAT?

* + - * You can lodge an application form in the Human Rights List of the Victorian Civil and Administrative Tribunal (‘VCAT’) registry. VCAT hears complaints under the *Equal Opportunity Act 2010* (Vic).
* The form is called an ’Application for an order in the Human Rights List’ and is available to download and submit online on the VCAT [website](https://www.vcat.vic.gov.au/equal-opportunity/resolve-a-dispute-about-unlawful-discrimination-sexual).
* The form will ask you to identify yourself and the other party. The other party is called the Respondent. The form will also ask you to identify what kind of claim you are making under the *Equal Opportunity Act 2010.* For example, you need to tick a box indicating whether you are claiming discrimination and/or sexual harassment and/or victimisation. You will also need to tick a box indicating where the conduct occurred – ie. at work? at school?
* You should not need to pay any fees at VCAT in the Human Rights List.

### What is a directions hearing?

* Once you have lodged your application, VCAT will often contact the parties to see whether the matter can go straight to mediation or a compulsory conference. Unless both parties agree to the matter going straight to mediation or compulsory conference, VCAT will set a date for a directions hearing.
* You and the Respondent will be required to attend the directions hearing.
* If you cannot attend in person, you can ask VCAT if you may attend by phone or videoconference.
* At the directions hearing, the VCAT member will make orders about how your complaint will progress. They will set out the steps each party must take before a final hearing. This will include setting dates for each step.
* The VCAT member will not hear any evidence or make any final decisions about your claim.
* The directions hearing is normally expected to take approximately 30 minutes. You may also have to wait before your matter is dealt with if there are delays at VCAT on the day.
* Victoria Legal Aid provides a duty lawyer service for most directions hearings at VCAT. If you want to speak to the duty lawyer you should arrive 30 minutes before your directions hearing is scheduled. However, you should seek legal advice before the day of the directions hearing if possible.
* During the directions hearing, the VCAT member may seek clarification from you as to the grounds upon which you claim the Respondent has breached the *Equal Opportunity Act 2010*. If your claim is one of discrimination, VCAT will want to know which area applies (employment, education etc) and which attribute applies (gender, disability etc).
* The VCAT member is likely to ask both parties for an estimate as to the number of witnesses they will call. This will assist with deciding the likely length of the final hearing.
* A date may be set for mediation or a compulsory conference, and if so both parties must attend. However, if the Respondent refuses to agree to participate, the VCAT member may not set a date for a mediation. You can also refuse to agree to participate if you want to go straight to a hearing, but we recommend you get legal advice before doing this.
* Both parties are usually ordered to file various documents with VCAT, including particulars of complaint, particulars of defence and witness statements. Each party can also prepare other evidence upon which it intends to rely (such as expert reports or correspondence) at the same time as their witness statements.
* The purpose of filing and serving these documents is so that there are no surprises for either party at the final hearing. The Respondent should be aware of all the matters you allege and the evidence you will rely on, including all the witnesses you will call. You should also be aware of how the Respondent will defend the claim and all the evidence they will rely on.
* To ‘file’ a document with VCAT, you are required to send it to the VCAT registry. The Registry accepts filing by email.
* You will also be required to ‘serve’ every document filed upon the Respondent. To serve a document on the Respondent, you are required to send it to the Respondent, and ensure it has been received. You can send it to the Respondent by email or by registered post.
* If you file documents with VCAT by email, you can serve them at the same time by copying in the Respondent.
* Usually, VCAT will order for the particulars of complaint and Defence to be filed and served before mediation, so the parties have a clear idea of each other’s positions when attempting to resolve your complaint at mediation.
* Typical orders at directions hearings are:

1. Applicant to file and serve particulars of complaint by (date)
2. Respondent to file and serve particulars of defence by (date)
3. Mediation or compulsory conference to be held on (date) at 10 am for half a day or full day

And if the matter does not resolve at mediation:

1. Applicant to file and serve witness statements and other material upon which it intends to rely by (date)
2. Respondent to file and serve witness statements and other material upon which it intends to rely by (date)
3. Applicant to file and serve any other material in reply by (date)
4. Hearing for (number of days) to commence on (date) at 10 am

* The member is not obliged to make these typical orders and may make different orders at the directions hearing.
* You need to make sure that all evidence you want to use in your case is filed with your witness statements or reply material, as VCAT usually also makes an order that no new evidence will be allowed after these dates unless VCAT agrees. This is so the Respondent knows all the details of your claim and can respond properly.

### Strike out hearings

* The Respondent has the option of applying for your complaint to be ‘summarily dismissed’. This means the Respondent is asking VCAT to refuse to order a final hearing of your complaint and to ‘strike out’ your claim. This usually only happens if the Respondent thinks that your legal case is very weak.
* If this is raised by the Respondent at the directions hearing, the VCAT member may include in their orders that the matter be listed for a strike out hearing.
* An application for summary dismissal is made under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). To succeed in having your complaint dismissed, the Respondent must convince VCAT that the complaint is ‘frivolous, vexatious, misconceived, lacking in substance or an abuse of process’. This means the Respondent is saying that your complaint is very unlikely to succeed, either because you have no way of proving your complaint or because the conduct that you have alleged is not unlawful under the *Equal Opportunity Act 2010*.
* The Respondent will usually be ordered to file submissions about why it says your complaint ought to be dismissed. You should be given the opportunity to file submissions in response.
* VCAT will then conduct a ‘strike out hearing’. The VCAT member will allow each party to discuss the evidence to be brought, without actually formally hearing that evidence.
* VCAT does not dismiss a complaint without a final hearing unless there are strong and clear reasons to do so. If the VCAT member forms the view that the *Equal Opportunity Act 2010* applies to your complaint, and that there may be some evidence of your complaint (even if you are the only witness), then VCAT will generally order for the matter to proceed to a full hearing.
* VCAT may decide that some of your claims can proceed to hearing but some claims cannot. This means that you will not be able to argue the struck out claims at hearing and must focus only on the claims that will be heard.

### What are particulars of complaint?

Refer to VLA fact sheet: ‘Sample VCAT Particulars of complaint’ for two examples of particulars of complaint.

* Once your complaint has been set down for hearing, you will be required to file and serve your particulars of complaint.
* Your particulars of complaint are a list of the most important facts that you will rely on to prove your legal case. It is not a list of the evidence you will rely on to prove those facts.
* The most important facts are those which prove each element of the specific legal claims you’ve raised.
* The particulars of complaint should be as brief as possible. They should also be in numbered paragraphs and clearly set out:
  + your allegations (ie what happened to you)
  + how these allegations breach the *Equal Opportunity Act 2010*
  + what is the harm or impact on you as a result of these allegations and
  + what orders you would like VCAT to make to remedy this harm.
* If there is more than one breach of the *Equal Opportunity Act 2010*, you should also use headings to separate out these allegations.
* If you need to give more details about a specific fact you can do so directly under the numbered paragraph, using a heading titled ‘particulars’.
* The Respondent will then be required to file and serve its particulars of defence.
* The particulars of defence will need to state clearly what conduct is admitted or denied, and why the Respondent denies liability under the *Equal Opportunity Act 2010*. They may also say they ‘do not admit’ the things you have said in your complaint. If they say ‘deny’ or ‘do not admit’, this means they are expecting you to prove those things happened.
* The Respondent might be defending your claim by saying the unlawful conduct in your complaint did not occur. Alternatively, the Respondent might be defending your claim by saying that the conduct is admitted, but is not unlawful under the *Equal Opportunity Act 2010*.

### Evidence

* You may know of a person who could give evidence to support your complaint. Ideally this should be a person who heard or saw the things you are alleging. You can ask that person to be a witness at the final hearing of your complaint.
* You will need to tell VCAT what your witnesses will say. This is why VCAT requires both parties to file witness statements before the hearing.
* You will also need to file any other material upon which you intend to rely to prove your claims before the final hearing, including for example expert or medical reports and other relevant documents such as correspondence or records.
* You should not file and serve documents containing legal advice to you or documents that contain statements or instructions you gave to a lawyer. If you do file and serve this material, it will be open to the Respondent to use these documents as evidence against you.
* The statement of each witness that you will be calling must include the following details:
* the witness’s name
* other identifying details such as the witness’s date of birth, occupation and address. (These details can be provided privately, so that only the VCAT member has access to this information)
* the evidence the witness will give.
* The witness statement should not include statements that are not relevant to your complaints. It should not contain opinions, only the things the saw or heard that relate to your complaint.
* You are also a witness in your case and should file and serve your own witness statement.
* You should inform any witness that you are intending to call that they will be asked to state to VCAT whether the content of their statement is correct and true.
* You should also tell any witness that you are intending to call that the Respondent or the Respondent’s lawyer will be allowed to cross examine them about the content of their statement and their recollections.
* You should consider speaking to witnesses and assessing available evidence before lodging your application with VCAT. Gathering evidence can be time consuming. If you wait and commence this work after you have filed your complaint, you risk running out of time. It is also helpful to know what evidence you have to support your complaint, as this may affect the strength of your claims and assist you to form a view about whether to lodge a complaint.
* Your complaint should be brought within 12 months of the most recent unlawful conduct against you. If you think you are at risk of lodging your complaint out of time, you may have to proceed without full information about your available evidence in order to protect your right to complain.

### Summonsing evidence

* If you think a person could give evidence to support your complaint but they are unwilling to do so, you can ask VCAT to issue a summons for that person to attend the hearing and give evidence.
* The form to apply for a summons is available on the [VCAT website](https://www.vcat.vic.gov.au/the-vcat-process/prepare-to-come-to-vcat/witnesses-and-witness-statements/summons-a-witness).
* A fee will apply if VCAT issues the summons. You can apply for this fee to be waived. There may also be further costs you have to pay for the documents to be produced or for the person to attend the hearing.
* If a person is refusing to voluntarily give evidence to support your complaint you should consider the risk that their evidence will not support your complaint. When a witness is summonsed you will normally not know what their evidence will be or whether it will assist you until the hearing.
* You can also ask VCAT to issue a summons for material held by the Respondent or any other person that you consider might support your complaint.
* The Respondent can also seek to summons material from you.
* VCAT may ask a party seeking to summons material or witnesses to state why the material or witness will be relevant. That is, why the material or witness to be summonsed might support that party’s claims. You may wish to provide this information when you apply for a summons.
* VCAT will not allow parties to engage in a ‘fishing exercise’. This means you cannot use a summons to get all the documents you want, if they don’t relate to your complaint. If VCAT is of the view that the material you are seeking to summons is not relevant to your complaint, or is very unlikely to be relevant, VCAT may refuse to issue the summons.

## Where to get help

Contact our Legal Help telephone information service for free information about the law and how we can help you. It’s open Monday to Friday, 8.00 am to 6.00 pm. Call us on 1300 792 387.

If we can’t help you with your legal problem, we may be able to refer you to other organisations that can.

You can also contact the Victorian Equal Opportunity and Human Rights Commission, the Fair Work Ombudsman, or the Australian Human Rights Commission for more information.

**© 2021 Victoria Legal Aid.** The material in this publication is intended as a general guide only. The information contained should not be relied upon as legal advice, and should be checked carefully before being relied upon in any context. Victoria Legal Aid expressly disclaims any liability howsoever caused to any person in respect of any legal advice given or any action taken in reliance on the contents of the publication.