# Achieving a positive outcome at conciliation or mediation

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.

## What is a conciliation or mediation?

A mediation or conciliation conference is where you and the person you have complained about meet and try to reach an agreement about how to resolve your complaint. The meeting takes place in private and is overseen by a person who is not involved in the complaint.

A conciliation can take place before you start formal legal proceedings. It can also be ordered by a court or tribunal once you’ve started legal proceedings. Often in a conciliation you will be called the Applicant or Complainant. The person your claim is against is called the Respondent. Together, you are called the parties to the complaint. The person supervising the conciliation or mediation is called the conciliator or mediator.

If you are going to the Victorian Civil and Administrative Tribunal (VCAT), you may also be offered a compulsory conference. This is like a mediation or conciliation, but a VCAT member will supervise the meeting and may offer you their views about the case. A VCAT member is like a judge. They decide claims in hearings before VCAT. However, they will not make a final decision in a compulsory conference.

You do not need to prove your claim to achieve an outcome and the conciliator or member cannot make decisions about who is right and who is wrong.

When you resolve your complaint at conciliation, mediation or compulsory conference, it is called ‘settling’ your complaint. Your complaint can settle for anything you and the Respondent are willing to agree to. Ordinarily the Respondent will ask you to withdraw your complaint and take no further legal action about the discrimination in exchange for the remedies you seek.

## How will I know what to agree to?

Your complaint will only settle if both parties compromise on their ideal outcome.

Before the conciliation or mediation happens, it is important to think about how you would like to see your complaint resolved and what might happen if you are unable to reach an agreement.

The following steps will help you prepare for a conciliation or mediation:

### Identify your interests

Your interests are the needs, goals or concerns that have motivated you to bring a complaint. Some interests can be measured in dollars (like financial loss) but some cannot. An example of possible interests are:

* + acknowledgment that the Respondent treated you unfairly and caused you hurt and humiliation
  + ensuring that the discrimination does not happen to others in future
  + protecting your reputation
  + penalising the Respondent for their unlawful conduct
  + financial security, or receiving fair financial compensation for the loss caused by the discrimination.

### Consider the Respondent’s interests

Try and put yourself in the Respondent’s shoes and consider what their key interests might be. If you can predict these you will be in a better position to negotiate. This is because you will be more likely to resolve your claim to your satisfaction if you can propose a resolution that meets some of your interests and some of the interests of the other party.

### Identify possible options

Options are possibilities for how you and the Respondent might meet your interests together. Options can involve both offers and concessions. For instance, you might offer to withdraw your complaint if the Respondent compensates you for your financial loss.

Some examples of possible options that you might explore with the Respondent are that they:

* apologise for their conduct
* agree not to say negative things about you
* implement anti-discrimination training
* make changes to work systems or processes
* assist you with job-seeking, for example by providing a statement of service
* pay you compensation for your financial loss and expenses
* pay you compensation for your hurt, humiliation and distress.

### What are your options if your complaint does not resolve?

You should think about what alternatives you have that could meet some or all of your interests if you cannot reach an agreement. This will help you to weigh up whether any offer made by the Respondent is a reasonable offer or one you should accept.

You need to decide on what is your best alternative. This will be the alternative that is likely to meet most of your interests. This might include things like withdrawing your complaint and walking away, taking your story to the media, applying for another job or taking your complaint to a court or tribunal.

In determining whether pursuing your matter to hearing is the best alternative, you will need to weigh up the following:

* + the strength of your discrimination case
  + whether, if you prove your claim, the court or tribunal can make an order that will meet your interests
  + any other legal claims you may have (eg. income protection claim, workcover etc) and the strength of those claims
  + the emotional burden and work involved in taking a matter to hearing
  + the time it will take for your matter to reach a hearing stage (this usually takes at least 6 months)
  + risks and uncertainties: including the cost of legal representation and the risk of an adverse costs order (this is when you are ordered to pay the Respondent’s legal costs).

It may be useful to get legal advice before the conciliation or mediation to help you assess these matters and determine what is your best alternative.

## Have you made an agreement?

Be careful when accepting any offers made by the Respondent in a conciliation or mediation. An in person or oral agreement can be binding even if you haven’t yet signed an agreement. If you need more time to think about an offer or speak to someone, or if you want to see the offer in writing before you decide, make this clear to the Respondent and the conciliator.

You should also be clear about all of the terms of the offer you are accepting or making. See ‘[Written settlement agreements](#_Written_settlement_agreements)’ for common settlement terms. If you need to seek clarification you should do so. For example, if you are agreeing to accept a sum of money, be clear about whether it is compensation for ‘pain and suffering’ or ‘lost income’. If it is characterised as lost income, it’s likely you will have to pay some tax on the amount and it’s more likely to affect any Centrelink benefits you may be receiving.

### Written settlement agreements

Agreements reached at conciliation will often be formalised into a written document, called a deed of release or a settlement agreement. These are binding legal contracts that are signed by both parties and set out the conditions or terms of their agreement. A party can rely on the signed agreement to take another party to court if they haven’t abided by the terms.

**Common terms in these agreements are:**

* + Non-disclosure or confidentiality: this means that you agree not to tell anyone about the complaint or the agreement. If you are generally happy to agree to non-disclosure or confidentiality but would like to be able to speak to a counsellor or family member about your experience and the settlement agreement, ask for this to be included as an exception in the agreement.
  + Non-disparagement: this means that you agree not to say or infer negative things about the Respondent.

Note: If you are agreeing to non-disclosure or non-disparagement terms you should make sure that they are ‘mutual’. That is, that they apply to and protect both you and the Respondent.

* + Release: this is where you agree to withdraw your current claim against the Respondent and not to make any more legal claims about the way they treated you. Make sure that this term is conditional upon the Respondent meeting their obligations (eg. conditional upon payment of financial compensation to you) and that the release only covers the conduct that is the subject of your complaint. The release should not stop you from making a new complaint about different conduct or issues.

**Other things to keep in mind:**

* Enforcement: the agreement should state clearly what steps you can take if the Respondent doesn’t abide by the agreement. This might, for example, be that you can apply to a court or tribunal for orders.
* If the agreement involves payment of monies, you should make sure the agreement says when the money is to be paid and how (eg. within 7 days of the agreement being signed and by electronic transfer into your bank account or by cheque made out to you).
* You can’t sign away your rights to superannuation or workers compensation. If a term of an agreement appears to do this it will be unenforceable. It is best to be clear in the agreement that these things are outside the release.

Settlement agreements can sometimes be very technical and difficult to understand. You may want to seek advice from a lawyer before signing.

## 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.

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