

**NO TO
DISCRIMINATION**

JobWatch
Employment Rights Legal Centre

**DISCRIMINATION CLAIMS
SELF-REPRESENTATION
TOOLKIT**

Contents

Introduction	3
Terms used in this Toolkit	4
How can this Toolkit assist you?	5
What is discrimination?	6
What is a discrimination claim?	8
Resolving your dispute informally	10
Stages of the discrimination claim process	12
Stage 1: Choosing a jurisdiction	13
Stage 2: Filing your claim	16
Stage 3: Before conciliation	16
Stage 4: At conciliation	17
Stage 5: After the conciliation	23
Key Contacts	26
Checklist: Preparing for a Conciliation	27
Draft Terms of Settlement	28



Introduction

Why was this Toolkit published?

A core organisational value of Job Watch Inc (JobWatch) is access to justice for workers.

We recognise that the cost of legal representation can deter some people from pursuing their legal rights. We identified a need for this Toolkit following a significant number of calls from employees who experience discrimination in the workplace, and are unsure of their legal options.

This Toolkit is designed to assist workers in Victoria who are capable of conducting their own federal or state discrimination claim up to the initial stage of conciliation. This Toolkit also provides some basic information about the process for workers in Queensland and Tasmania.

We always encourage workers to contact our free and confidential Telephone Information Service (TIS) for initial legal information relevant to their situation - (03) 9662 1933 for Melbourne metropolitan callers or 1800 331 617 for regional Victorian, Queensland and Tasmanian callers.

Further resources

This Toolkit includes references to a number of different forms and resources from both state and federal anti-discrimination agencies. To access the current version of these forms and other resources from these agencies, visit:

- **Australian Human Rights Commission:** [humanrights.gov.au](https://www.humanrights.gov.au)
- **Victorian Civil and Administrative Tribunal:** [vcat.vic.gov.au](https://www.vcat.vic.gov.au)
- **Victorian Equal Opportunity and Human Rights Commission:** [humanrights.vic.gov.au](https://www.humanrights.vic.gov.au)
- **Queensland Human Rights Commission:** [qhrc.qld.gov.au](https://www.qhrc.qld.gov.au)
- **Queensland Industrial Relations Commission:** [qirc.qld.gov.au](https://www.qirc.qld.gov.au)
- **Equal Opportunity Tasmania:** [equalopportunity.tas.gov.au](https://www.equalopportunity.tas.gov.au)
- **Tasmanian Civil and Administrative Tribunal:** [tascat.tas.gov.au](https://www.tascat.tas.gov.au)

JobWatch also has a number of discrimination Fact Sheets available on our website: [jobwatch.org.au/resources/fact-sheets](https://www.jobwatch.org.au/resources/fact-sheets).

Important disclaimer

This Toolkit provides general information only. It is not intended to be comprehensive and is not a substitute for professional legal advice.

Readers should not act on the basis of any information contained in this Toolkit without first obtaining professional legal advice that takes into account the particular facts and circumstances of their legal case.

Job Watch Inc. disclaims any liability in respect of any action taken or not taken in reliance upon the contents of this Toolkit.

This information is current at time of publication October 2023.

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Victoria Law Foundation, the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and Victoria Legal Aid.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.

Produced by: Job Watch Inc
Level 10, 21 Victoria Street
Melbourne VIC 3000
Telephone: (03) 9662 1933 or 1800 331 617
Edition: October 2023
Copyright: Job Watch Inc 2023

Terms used in this Toolkit

AHRC

Australian Human Rights Commission

Applicant

The person (usually the worker) that has made a discrimination claim through either state or federal jurisdictions.

Conciliation

(See also – Mediation)

The preliminary stage of a discrimination claim process. It is an informal private and confidential discussion between the parties to the discrimination claim at either a state or federal anti-discrimination agency.

The conciliation will usually be held as a joint telephone or video conference, or as a face-to-face meeting, and is conducted by an agency-appointed conciliator. This private and confidential discussion is not bound by formal rules of evidence and the conciliator has no formal decision-making power. The conciliator can assist the parties to resolve the matter and to formalise the agreement made between the parties in what is commonly referred to as a Terms of Settlement or Deed of Release document.

Costs

The amount a person has been charged for legal services. In some circumstances, including when making a discrimination claim in the federal court system, the Applicant can be liable for the costs of the Respondent if the claim is not found in their favour.

EOT

Equal Opportunity Tasmania

Legal Representative

Being assisted by a person who is a lawyer or legal practitioner.

Mediation

Mediation is similar to conciliation in that it is often the preliminary stage of a discrimination claim process. Like conciliation, it is a private and confidential discussion between the parties to the discrimination claim at either a state or federal anti-discrimination agency – it is generally (not always) more informal than a conciliation.

For the purposes of this Toolkit, we will refer to both mediation and conciliation as ‘conciliation’, except in instances where it refers to official documentation (e.g. ‘Notice of Mediation’).

Parties

A commonly used term to indicate all sides of a legal dispute.

Private and Confidential

Generally means that whatever is said between the parties within legal proceedings cannot be used in evidence at some later point of the proceedings so far as the law allows.

QHRC

Queensland Human Rights Commission

QIRC

Queensland Industrial Relations Commission

Representative

Being assisted by a person who is not a lawyer or legal practitioner i.e. a union representative, an industrial advocate, a human resource person etc.

Respondent

The employer or individual that is defending the allegation of discrimination.

Terms of Settlement (or Deed of Release)

A formal document that establishes the ‘terms of settlement’ or ‘terms of agreement’ that have been identified and agreed upon by both parties to resolve the claim.

Note: This document usually allows either the Applicant or the Respondent to take action in court if the other party is in breach of this agreement.

VCAT

Victorian Civil and Administrative Tribunal

VEORHC

Victorian Equal Opportunity and Human Rights Commission

How can this Toolkit assist you?

This Toolkit can assist you by providing information and insight into the **conciliation*** process in a discrimination claim so you are able to represent yourself.

Provided that you are confident in your ability to present your own matter, and you use this Toolkit as a guide, then you should be well placed to participate in a conciliation without the need for **legal representation***.

You can use this Toolkit if you:

- Have lodged, or are about to lodge a discrimination claim in either the state or federal jurisdiction; or
- Have already lodged and been given a time and date for a conciliation; and
- Have explored the possibility of legal representation but have chosen to represent yourself during conciliation; and
- Have the capacity to represent yourself in a conciliation for a discrimination claim; and
- Have sought legal advice (if applicable) to confirm that your discrimination claim is the appropriate course of action for you in the context of other potential legal claims such as unfair dismissal, workplace injury, General Protections Dispute, and/or underpayment or contractual actions, that may be in a different legal jurisdiction. See JobWatch’s Fact Sheets on these topics for further information.



What is discrimination?

Generally, discrimination is when a person or people with a legally protected attribute are treated unfavourably because of that attribute. This can include situations where people are treated unfavourably because of a characteristic that is generally connected to a person with that legally protected attribute.

An example of the attributes that are protected by federal anti-discrimination legislation include:

- age
- colour
- criminal record
- disability or impairment
- family responsibilities
- gender identity
- intersex status
- marital or relationship status
- medical record
- national extraction
- political opinion
- pregnancy or breastfeeding
- race
- religion
- sex
- sexual orientation
- social origin
- trade union activity

Attributes that are protected by Victorian state anti-discrimination legislation include:

- age
- disability
- employment activity
- expunged homosexual conviction
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parent and carer status
- physical features
- political belief or activity
- pregnancy and breastfeeding
- profession, trade or occupation
- race
- religious belief or activity
- sex
- sex characteristics
- sexual orientation
- spent conviction
- personal association with someone who has, or is assumed to have, one of these personal characteristics

Similar attributes are also protected in Queensland and Tasmania. For a full list of attributes protected in these states, visit:

- **Queensland Human Rights Commission:** qhrc.qld.gov.au
- **Equal Opportunity Tasmania:** equalopportunity.tas.gov.au

Discrimination can be **direct** or **indirect**.

Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that is not reasonable and that has, or is likely to have, the effect of disadvantaging persons with an attribute.

Discrimination also occurs when an employer fails to make reasonable adjustments for an employee with a disability, and under the *Equal Opportunity Act 2010 (Vic)*, when an employer unreasonably refuses to accommodate an employee's parental or carer responsibilities.

When are employees protected against discrimination?

Federal and state anti-discrimination laws make it unlawful to discriminate against a person because of a protected attribute in the area of employment, which here is defined to cover employees and independent contractors. They protect workers from discrimination at all stages of employment, including:

- **before employment**, including how positions are advertised, how interviews are conducted, whether employment is offered and on what terms;
- **during employment**, including being given less favourable terms or conditions of employment, being demoted, denied training opportunities, promotion, transfers, performance pay or other employment-related benefits; and
- **at the end of employment**, including being selected for redundancy or dismissed.

When is an employer liable for discrimination?

If a person engages in discriminatory conduct during employment, the employer is vicariously liable for the discriminatory conduct unless the employer took reasonable precautions to prevent their employee from engaging in discriminatory conduct.

It is also unlawful to victimise a person, for example, dismissing or threatening to dismiss an employee because they made a complaint about discrimination.

Conduct is discriminatory if the protected attribute is among the reasons for the conduct – it does not need to be the only reason.

Note: In determining whether a person discriminates, the person's motive is irrelevant.

The employer may have a defence if the employee cannot perform the inherent requirements of their job (for example, the ability to drive a vehicle for a person employed as a driver), or where the requirement, condition or practice is reasonable. Other exceptions and exemptions may apply.



What is a discrimination claim?

If discriminatory conduct has occurred to you at work because of a protected attribute, you may be able to make a **state** or **federal** discrimination complaint.

There are significant differences between the state and federal jurisdictions, including in relation to costs. You also cannot make both state and federal claims at the same time. Once you have lodged a complaint in a state jurisdiction, you cannot lodge a complaint under federal anti-discrimination law about the same conduct. However, you may be able to lodge a complaint in the federal jurisdiction and then change to the state jurisdiction.

If you are still unsure about what is best for your circumstances after reading this Toolkit, we recommend contacting JobWatch, your union, or a lawyer before deciding which jurisdiction to choose.

Table 1: Quick comparison of discrimination claims in federal and state jurisdictions

	Federal jurisdiction	State jurisdiction - Victoria
Time limits for Applications* <i>*May not be strictly applied in some circumstances, seek legal advice.</i>	Within 24 months of the discriminatory conduct occurring	Within 12 months of the discriminatory conduct occurring
Application	Online complaint form	
Consideration of Application	Application may be terminated by the Commissioner if not considered to be discrimination.	All discrimination Applications accepted.
Representation	Self-representation. Legal or other representation may require permission from the agency. Permission not needed in federal courts	
Process	1. AHRC conciliation. 2. If AHRC conciliation is unsuccessful, a court application in the federal courts OR file in the state jurisdiction.	1. Optional voluntary conciliation through VEOHRC before filing in VCAT. 2. VCAT mediation, normally by consent. 3. If VCAT mediation is unsuccessful, then referred to a directions hearing prior to a VCAT hearing.
Potential timeframes for dispute resolution* <i>Note – these will fluctuate from year to year, this are a guide only.</i>	6-12 months	In VEOHRC: 2-6 months In VCAT: 6-12 months for mediation, 12 months – 3 years for a hearing.
Potential remedies	<ul style="list-style-type: none"> Financial compensation Apology Reinstatement Policy changes or updates Anything else that can be agreed 	<ul style="list-style-type: none"> Financial compensation Apology Reinstatement Policy changes or updates Anything else that can be agreed
Costs*	Normally not liable for Respondent's costs unless proceeding to federal court applications.	Normally not liable for Respondent's costs.

Note: Applicants in Queensland and Tasmania need to file their discrimination claim in the anti-discrimination agencies (Queensland Human Rights Commission or Equal Opportunity Tasmania) to go through the conciliation process. If the conciliation is unsuccessful, their claim will be referred automatically to a tribunal (Queensland Industrial Relations Commission or Tasmanian Civil and Administrative Tribunal). Unlike in Victoria, applicants in Queensland and Tasmania are unable to file a discrimination claim directly with the tribunals.

Though the application processes differ, many sections of this Toolkit will still be relevant for applicants from Queensland and Tasmania, especially in relation to preparing for conciliations.

Other options

Depending on the individual circumstances, some people may choose to make a different legal claim in relation to workplace discrimination rather than making a discrimination claim. These claims could include the following.

Table 2: Other legal options to address workplace discrimination

	Unfair Dismissal	General Protections Dispute – Termination claim	General Protections Dispute – Non-Termination claim	Sexual harassment dispute
Time limits	21 calendar days from the date of dismissal	21 calendar days from the date of dismissal	6 years	24 months
Eligibility	<ul style="list-style-type: none"> 6 or 12 months employment depending on size of employer AND dismissal was harsh, unjust or unreasonable AND earn less than high income threshold or covered by Modern Award or Enterprise Agreement 	Must be an employee (not independent contractor)	Any employee or independent contractor	Any employee or independent contractor
Jurisdiction	Fair Work Commission	Fair Work Commission / Federal Courts	Fair Work Commission / Federal Courts	Fair Work Commission
Potential remedies	<ul style="list-style-type: none"> Reinstatement Financial compensation (capped) 	<ul style="list-style-type: none"> Reinstatement Financial compensation 	Usually financial compensation	<ul style="list-style-type: none"> Financial compensation Orders for the Respondent to take action to prevent or address sexual harassment

For more information about the above options, please view JobWatch's Fact Sheets at jobwatch.org.au/resources/fact-sheets.

Resolving your dispute informally

Collect all relevant information

It is a good idea to collect all information that might be relevant to a discrimination claim.

As discrimination can, in some circumstances, be difficult to clearly define, keeping a diary or record may be a good way to demonstrate a pattern of behaviour. For instance:

22/8/2023 10am – John made an offhand remark in the work kitchen that he shouldn't have to make his own coffee and that a woman in the office should make it for him

25/8/2023 5pm – Ted went around the office inviting all the men to after work Friday drinks, but specifically excluded the women, saying "Not for you chicks, we're going to be talking about sports all night".

28/8/2023 10am – Had an in-person conversation with my manager Bill about the discriminatory behaviour in the office, but he brushed it off and said "that's just how the team is".

In other circumstances, you may have other information or evidence of discrimination. Consider things like:

- Agreements you have signed or made with your employer
- Position descriptions or job advertisements relating to your role
- Rosters, timesheets or payslips
- Text messages and emails

Talk to your employer

Depending on your relationship with your employer, you might first try raising your concerns verbally. Stay calm and professional when speaking to your employer; making threats and becoming aggressive will not help.

If your employer ignores or disagrees with what you are claiming, you can send your employer a letter outlining your experience and what you would like to see change. Your letter can be sent by post or by email but, either way, it is important that you keep a copy of it for your own records. The tone of your letter will vary depending on your relationship with your employer.

In this letter you should:

- State why you are claiming that you experienced discrimination
- List each occasion you have already raised this as an issue
- Request for certain changes to be made to address the discrimination
- Specify any action you will take if the requested changes are not made

The letter may provide evidence that proves you attempted to resolve the dispute with your employer before making a discrimination claim.

Note: It is unlawful for your employer to terminate your employment or change your employment terms and conditions to your detriment because you make an inquiry or complaint about your employment. See JobWatch's 'General Protections Dispute - Termination claim' and 'General Protections Dispute - Non-Termination claim' Fact Sheets for more information.

Sample Letter to Employer

Ms Employer
Workplace Name
123 Main Street
Bosstown VIC 3000

[date]

Dear Ms Employer,

RE: Discrimination experienced in Workplace Name

I am writing to raise my concerns about continued race discrimination in the workplace.

On multiple occasions, a number of my colleagues have made negative remarks about my nationality and aspects of culture. For example:

- On **21 March 2023**, Bob made a comment about my lunch, saying that he doesn't understand how people from my culture eat 'stinky food'
- On **12 April 2023**, Sarah made a comment about her travels in my home country, and then said to me, "I suppose you people don't bathe regularly do you?"
- On **7 May 2023**, Bob and Sarah were having a conversation in the tearoom and when I entered the room, they immediately stopped their conversation, looked at me and then laughed, with Sarah saying "Oh no, we better stop talking about that in case Jane thinks we're being racist again"

I have raised my concerns with you on multiple occasions, including through conversations on 22 March 2023, 13 April 2023 and 8 May 2023. However, on all of these occasions, you have declined to act and have made excuses for my colleagues.

I ask that you and **Workplace Name** take the following actions to address these continued instances of race discrimination:

1. Review and update the 'Safe Workplace' policy to specifically address discrimination with a zero tolerance approach, and require all staff to read and confirm their understanding of the policy.
2. Provide a written warning to both Bob and Sarah about their behaviour and emphasise the workplace's zero tolerance approach to discrimination.

If these actions are not taken to address discrimination within **Workplace Name**, I will commence legal proceedings through a discrimination claim to ensure my ongoing safety in the workplace.

Yours sincerely,

Jane Worker

Stage 1: Choosing a jurisdiction

It can be tricky to make a decision about whether to file a discrimination claim in the state or the federal jurisdiction. Some factors that might influence your decision may include:

- How much time has passed since the discriminatory conduct occurred;
- How long it might take before your claim is concluded;
- Whether you are still employed in that workplace;
- Opportunities for filing follow-up claims if the first is unsuccessful;
- Your understanding of the formality and procedures of certain jurisdictions;
- The potential for being liable for costs through some courts; or
- Any requirements for legal representation.

Table 1 on page 8 provides further information about the differences between state and federal jurisdictions. **Flowchart 1** and **Flowchart 2** on the following pages 14 and 15 also provide guidance on the process of filing a claim in both jurisdictions.

Generally speaking, choosing where to file your discrimination claim depends on you and your circumstances, including which protected attributes are involved, which types of discrimination are alleged, costs considerations, and more. The case studies below provide some examples of how people make a decision about where to file their claim.

Case study #1

You believe that age discrimination played a part in the recent round of redundancies in your workplace which led to you losing your job. You decide to file a discrimination claim initially with the Australian Human Rights Commission, reasoning that you can always file the same claim in the state jurisdiction if the federal conciliation process is unsuccessful.

Case study #3

You have been the victim-survivor of workplace sexual harassment. Though you are no longer in that job, your experience is still impacting your mental and emotional wellbeing. You are keen to see justice be served but worry about going through formal tribunal channels and the risk of re-traumatisation.

You decide to file a discrimination claim with the Victorian Equal Opportunity and Human Rights Commission as you have been advised by the lawyer you consulted that the voluntary conciliation can be a more supportive and trauma-informed process than a formal tribunal process.

Case study #2

You are on parental leave when you receive an email from your manager letting you know that your role has been changed and that you will be demoted to a junior role when you return from parental leave. You hear from colleagues that a new person has been hired in your role and think that your demotion is the result of parental discrimination.

You decide to file a discrimination claim with the Victorian Equal Opportunity and Human Rights Commission, using their voluntary conciliation process rather than proceeding to a tribunal as you wish to preserve a relationship with your employer.

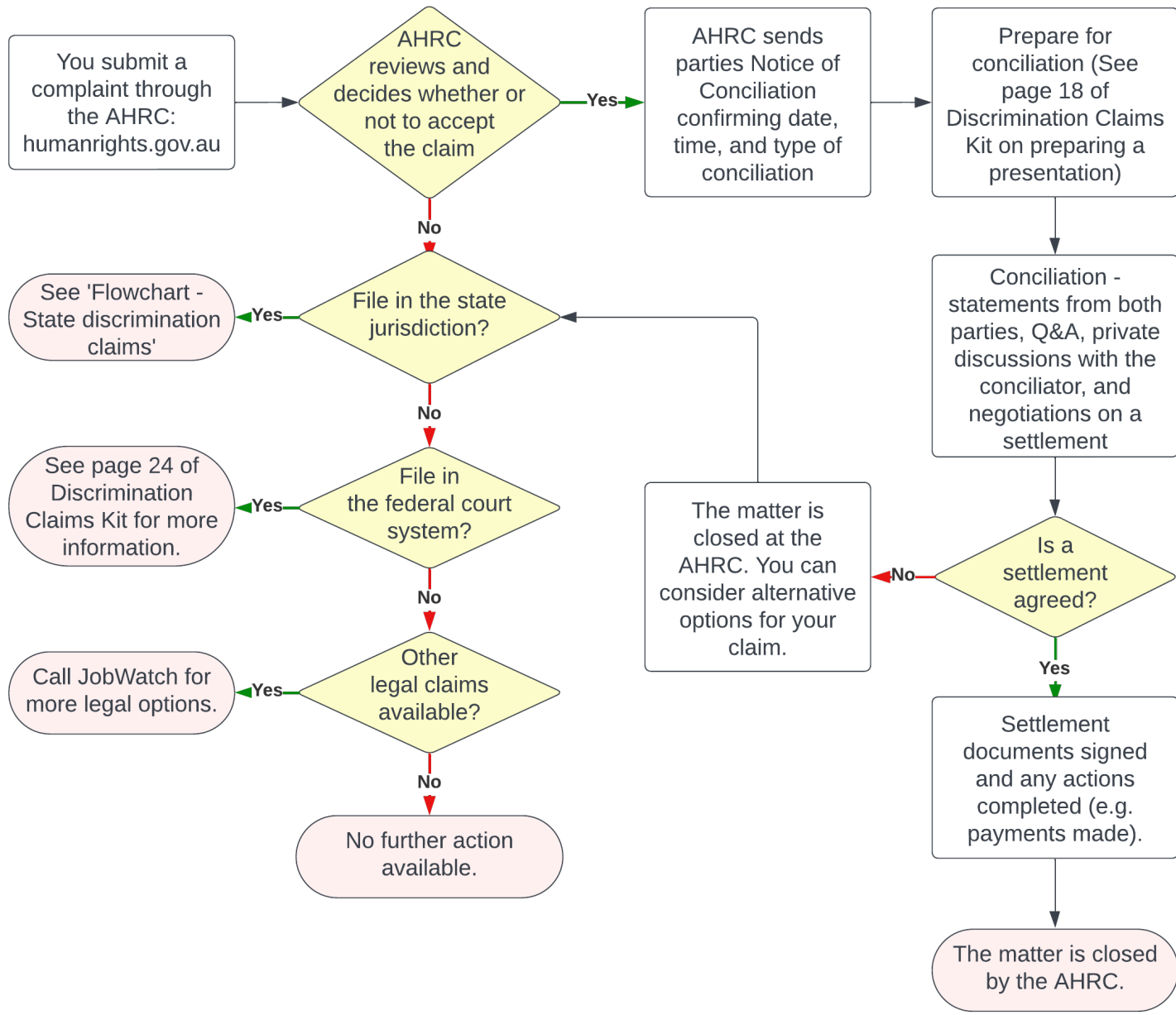
Case study #4

After resigning from your job, you catch up with some ex-colleagues for a drink. You find out that they were all receiving 20% more pay than you and believe that this is due to your gender. As you have already left your employment, you decide to file a discrimination claim directly with the Victorian Civil and Administrative Tribunal as you believe your ex-employer will be more likely to engage in a formal tribunal process than a voluntary conciliation.



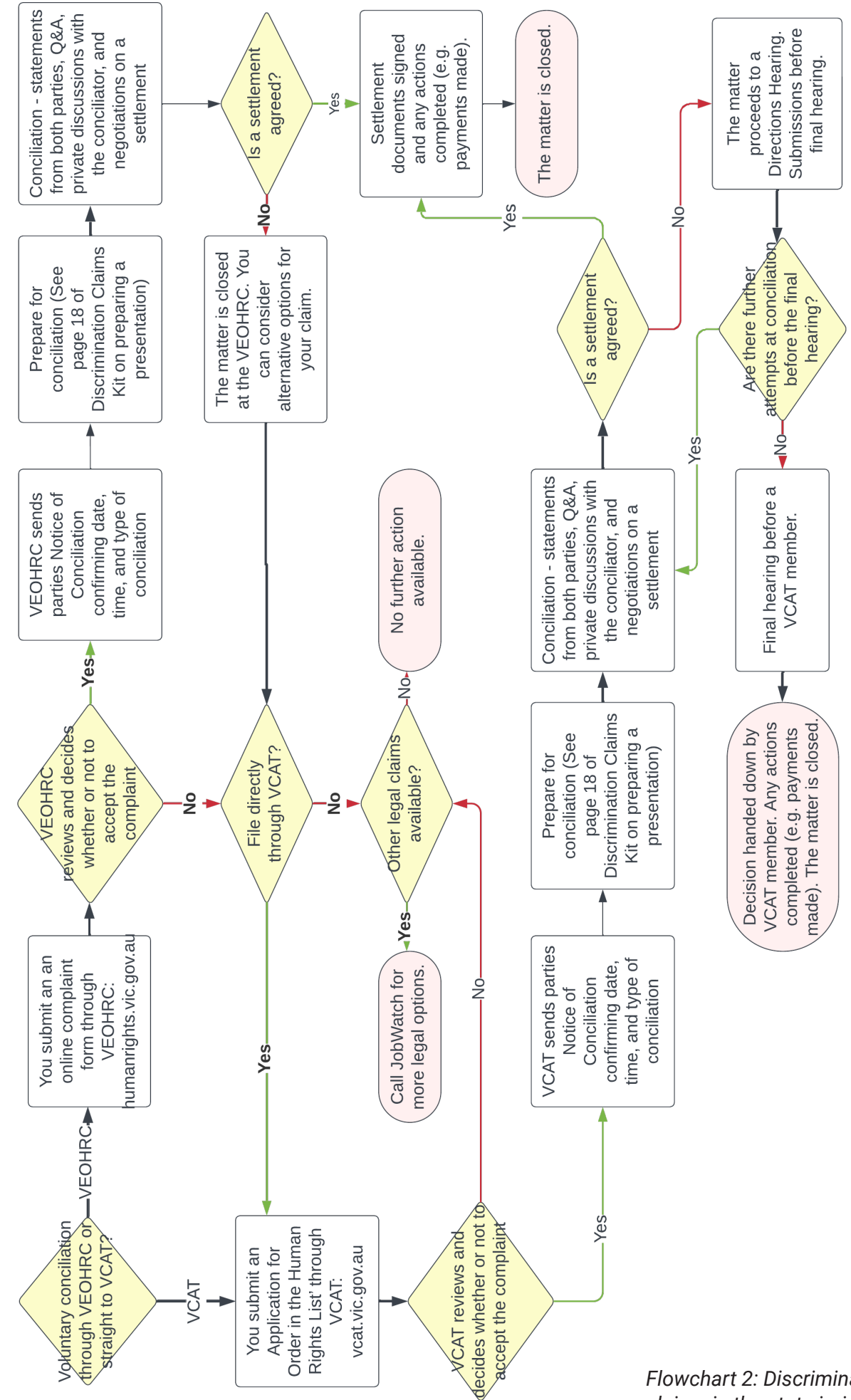
STAGES OF THE DISCRIMINATION CLAIM PROCESS

FLOWCHART: FEDERAL DISCRIMINATION CLAIMS



Flowchart 1: Discrimination claims in the federal jurisdiction

FLOWCHART: STATE DISCRIMINATION CLAIMS



Flowchart 2: Discrimination claims in the state jurisdiction

Stage 2: Filing your claim

Once you have decided which jurisdiction to file in, you should contact the appropriate agency or tribunal to check your eligibility to file a discrimination claim.

In most circumstances, this can be done through an online complaint form. Print-friendly application forms can normally also be downloaded from the agency or tribunal websites.

- At AHRC, this is called the 'AHRC Complaint Form'.
- At VEOHRC, this is the 'Online Complaint Form'. They also accept complaints by email, phone and mail.
- At VCAT, this form is called the 'Application for Order in the Human Rights List'.

Before you fill in the forms, it is a good idea to make sure you have collected all the relevant information to include in your application (see page 10).

The forms typically ask you to explain why you are making the application. Being able to provide a clearly written account of your experience of discrimination, complete with dates of incidents recorded in your diary, will be useful.

There are no costs to make these claims in any of these agencies or tribunals in the first instance. However, fees may apply at VCAT later if the claim progresses to hearing and requires issuing summons to a witness to appear, file inspection, and so on. For a full list of these potential fees, visit vcat.vic.gov.au/fees.

Fees also apply if you decide to progress a claim to a federal court.

Stage 3: Before conciliation

Once your claim has been filed, the agency or tribunal will review your claim. If they decide to proceed with the claim, they will advise you and the **Respondent*** about the claim and their process.

It is also at this stage that the Respondent may engage a lawyer. If you wish to confirm the Respondent's representation prior to the conciliation, you can contact the agency or tribunal.

If the Respondent does have legal representation, try not to let this overwhelm or intimidate you as it may actually assist the conciliation process. A **legal representative*** is likely to understand the applicable laws and be able to advise their client (the Respondent) about the merits of your application and the benefits of making a suitable offer to resolve your discrimination claim.

Next you will receive the Notice of Conciliation or a Notice of Mediation (the Notice). This confirms the date, time, and type of conciliation (i.e. by telephone, video or face to face).

The Notice will also list the **parties*** that have been notified. These are often (but not always) the same parties that will participate in the scheduled conciliation. For example, a human resource manager may represent the Respondent instead of the person you have named in the claim.

Depending on the agency or tribunal where you have filed your claim, the conciliation will usually be conducted within a few weeks (or months!) of the date you receive the Notice.

Stage 4: At conciliation

The conciliation is the initial stage of your discrimination claim. It is **private and confidential*** in nature, and confidentiality applies in so far as the law allows.

Conciliations are usually conducted as a phone conference with all three parties, including the agency or tribunal appointed conciliator. Whilst most conciliations are conducted as phone conferences, it is possible for either party to request to have the conciliation conducted as a face to face meeting at the agency or tribunal. This request may be granted by the agency or tribunal in some circumstances provided both parties agree and where the agency or tribunal is satisfied there are substantial grounds.

The conciliation aims to see whether there is any prospect of the matter being resolved prior to the matter being taken further through hearing or court applications.

The parties to a conciliation are usually:

- The Applicant (you) and your **representative*** or support person (if applicable); and
- The Respondent (your former employer) and their human resource person and/or their representative/lawyer (if applicable); and
- The conciliator.

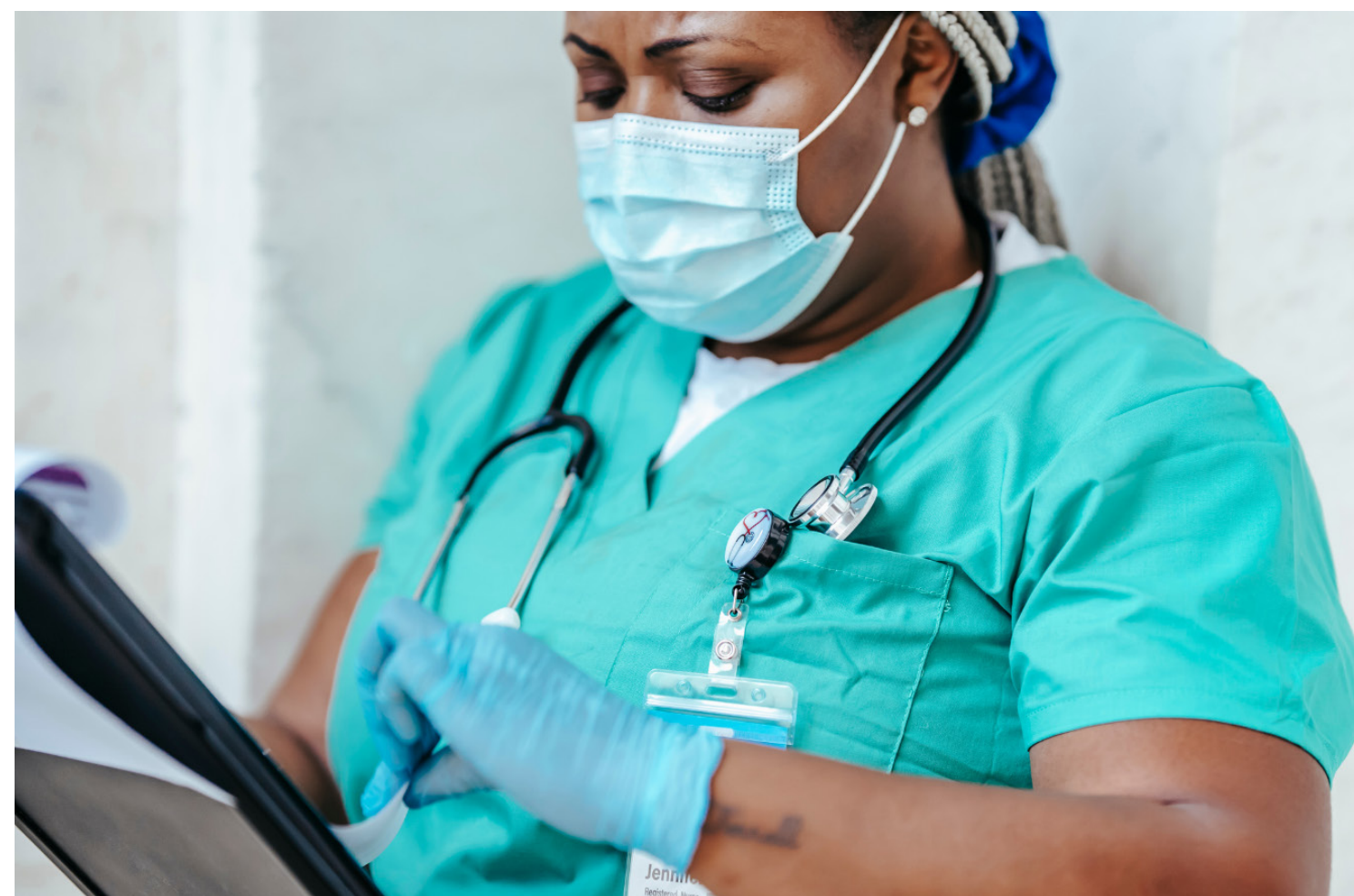
The conciliator is impartial and independent. Their role is to facilitate the conciliation and assist both sides in reaching an agreement to avoid a formal hearing or further court action. Not all conciliations follow the same process as each conciliator will usually have their own unique style and/or approach to each conciliation.

Generally the conciliation process is as follows:

- Introduction of the parties;
- Conciliator's opening statement;
- Opening statements of both parties;
- Identification and exploration of major issues;
- Private sessions for both parties with the conciliator;
- Negotiation - conciliator will convey proposals for settlement options between the parties; and
- Agreement and/or close.

The time allocated for conciliations can be from half a day to a full day.

The agency or tribunal may grant an adjournment request when satisfied there are substantial grounds for doing so. Adjournment requests must be made in writing.



The conciliation process

On the date and time indicated on the Notice of Listing the conciliator will contact you on the number provided and will coordinate the phone conference so that all three parties (including the conciliator) can hear each other by phone:

- The conciliator will then check if there are any other individuals listening in or in attendance;
- The conciliator will usually clarify the involvement of any other person(s) and confirm that all parties are comfortable with the nature of their involvement in the conciliation;
- If you wish to have a support person with you in the conciliation, you should indicate this to the conciliator as early as possible. If your support person is not a lawyer or a representative, then they should not participate in the conciliation as your representative;
- The conciliator will then usually clarify their particular role in the conciliation and will indicate that the conciliation is private and confidential and that, for example, sworn evidence will not be given;
- In the absence of sworn evidence, the conciliator will at times hear two different versions of the same event. The conciliator does not have the authority to make findings on which version of events are to be preferred;
- The conciliator will usually clarify that they are unable to make a decision that is binding upon the parties as this can only happen at a hearing or formal court proceedings. However, in private, they may indicate to each party the respective 'strengths and weaknesses' of each party's position; and
- Having defined their role, the conciliator will then usually ask you to explain why you have lodged your discrimination claim i.e. present your version of the relevant events.

Your presentation

It is a good idea to make your presentation using scripted notes, or 'bullet point' guidance notes, that present the relevant facts in chronological order. This is where your diary will come in handy.

As a general rule and where applicable, your presentation should:

- Be presented in date/event order, starting with confirmation of your commencement date, your length of employment, your role, and the key events relating to the discrimination experienced;
- Be concise (around 5 minutes long);
- Be relevant to your discrimination claim;
- Avoid raising rumours or gossip;
- Present in such a way as to be respectful to all parties involved in the conciliation;
- Be accurate and honest and present in a calm manner that avoids personal threats and/or remarks of a personal nature that may only result in the conciliation being unsuccessful and prematurely concluded (which is rarely in the best interests of either party);
- Acknowledge issues that you believe the Respondent is likely to mention in their later presentation, so as to maintain your credibility in the eyes of the conciliator; and
- If you think any responses from the Respondent in relation to the alleged discrimination are a sham or untrue, you should make this clear at the end of your presentation, and state what you believe was the true reason for the alleged discrimination.

Sample Presentation

I have been working for XYZ Company in a permanent full-time position since 2013. Throughout the past ten years, I believe that I have experienced sex discrimination, pregnancy discrimination and parental and carer status discrimination. The most recent incident happened less than a month ago. I have prepared a timeline of my experiences.

- **February 2013:** I started working for XYZ Company as a sales assistant on an annual contract of \$60k per annum + superannuation. I tried to negotiate this contract up to \$65k per annum before starting work, but was told that they could only offer \$60k for this role.
- **May 2013:** I spoke to my male colleague who also worked as a sales assistant, and had 3 years less experience than I do. He told me that he was offered \$65k when he interviewed, and successfully negotiated a pay increase to \$70k before he started. I checked in with other female sales assistants after this conversation, and found out that we were all being paid less than the male colleague even though we all had more experience.
- **July 2013:** I brought up the pay discrepancy with my manager during my annual review, and he told me that everyone was paid based on the value that they brought to the role. He also threatened me with dismissal, and said that it was illegal to discuss my pay with my coworkers. He marked me on my annual review as being ineligible for a pay increase.
- **July 2014:** I was once again denied a pay increase during my annual review. I found out from my male colleague that he received a 5% increase during his review.
- **July 2015:** I received a small 3% CPI increase during my annual review, as did all the other female sales assistants. Our male colleague received another larger increase, and because of that, from that point earned \$80k compared to our \$61.8k. We were all doing the same job.
- **September 2015:** I brought up the pay discrepancy again with my manager, and he said that the male colleague should be paid more as the primary earner in his household, and that he had a baby on the way to pay for.
- **March 2016:** I announced my pregnancy and said that I intended to take 12 months of unpaid parental leave from August 2016. Between March and August 2016, I was forced to use up all my annual leave entitlements before I went on parental leave, because my workplace said 'we don't want to owe you anything while you are on leave'.
- **May 2016:** As my pregnancy advanced, I asked my employer if they could adjust my duties so that I could spend more time on online sales rather than face-to-face sales. This would have allowed me to sit for longer during the day to accommodate my pregnancy. They refused, and I ended up having to take quite a bit of sick leave so that I could have time to rest.
- **June 2017:** When I was one month away from returning from parental leave, I got an email from my employer saying that they had restructured the team and that my role as a sales assistant wasn't available. I was told in the email that I would be returning to a role as a junior sales assistant, and that my salary would be unchanged.
- **August 2017:** When I returned to work from parental leave, I spoke to the manager and said that like my male colleague, I now also have a baby to look after and should be paid more. He said that as I'm now in a junior role, my pay was in line with my position.
- **March 2019:** I applied for a sales manager role in the organisation and was unsuccessful. The reason I was given was because "we need someone who is more reliable, and you've taken too much carers leave for your child".
- **June 2020:** I applied for a sales assistant role, and was successful. However, I was only offered a salary increase to \$66k, though other male sales assistants were on \$70k.
- **January 2022:** I asked for flexible working arrangements because my child started school – asking to start my day at 9.30am and finish at 5.30pm so that I could do school drop off. This was denied because "our clients expect us to be available from 9am to 5pm". I was offered a part-time junior sales assistant role instead if I wanted to start at 9.30am – I turned this offer down because it would have meant a further pay cut.
- **July 2023:** I asked for a pay increase in my annual review to match the other male sales assistants on \$70k. I was denied this pay increase as I had 'taken too much leave'. The other sales assistants all received CPI increases.

This long history of sex, pregnancy and parental and carer status discrimination at XYZ Company has meant that I have been unable to build financial security as my colleagues have.

I have been consistently underpaid due to my gender, demoted because of my pregnancy, denied promotions because of my parental and carer status, and haven't even received CPI increases to my pay in 9 out of 10 years. Because of this significant impact on my financial security, I have been over-relying on credit cards to pay for my living expenses, resulting in high interest charges.

Further, my confidence and self-esteem have been severely affected, so that I don't feel confident in applying for positions outside of this company anymore as I don't think that XYZ Company will provide a good reference for me.

I am making this discrimination claim because I estimate that over the course of these ten years, I have lost out on approximately \$100k of pay when compared to male colleagues performing the same job as me. I've calculated this based on the following:

- **Year 1:** \$10k gender pay disparity
- **Year 2:** \$13.5k gender pay disparity
- **Year 3:** \$18.2k gender pay disparity
- **Year 4:** \$18.2k gender pay disparity, and \$7.2k forced use of annual and sick leave
- **Year 5:** Parental leave year
- **Year 6:** Demoted to junior position, worth \$8.2k
- **Year 7:** Denied promotion worth \$25k increase, continued \$8.2k gender pay disparity
- **Year 8:** \$4k gender pay disparity
- **Year 9:** \$4k gender pay disparity
- **Year 10:** \$9k gender pay disparity

Total - \$100.5k of lost income due to gender pay disparity, plus \$75k of lost income due to denial of promotion due to gender and parental and carer status discrimination

I am genuinely open to resolving this matter today in this conciliation. I am seeking:

- Lost backpay of \$100,500 due to the gender pay disparity.
- Interest on this lost backpay of 10.10% based on the current Federal Court post-judgement interest rates - \$10,150.50.
- Lost superannuation of 10% (averaged over ten years) - \$10,050.
- An increase of my annual salary to \$70k to match the male sales assistants, with agreed CPI increases every year.
- A signed agreement for my request for flexible working arrangements, to work from 9.30am to 5.30pm every day.
- An apology from XYZ Company for the workplace discrimination they have fostered for a decade.
- A commitment from XYZ Company that they will review their anti-discrimination policies and procedures, and require all managers to undergo anti-discrimination training.
- A commitment from XYZ Company that they will conduct a gender pay gap audit within the whole company and act to correct any gender pay discrepancies.

If this matter cannot be resolved today, I have no option but to continue to pursue the matter.

After your opening statement

Once you have made your opening statement, and answered any further questions, the conciliator will ask the Respondent to make their presentation in response.

You should take notes where necessary during this time and remain quiet and respectful during the Respondent's presentation. Be prepared to hear things that you don't like or you do not think are true.

When the Respondent finishes their presentation you can ask them questions (usually through the conciliator) to clarify any points raised that were inaccurate or exaggerated in your view. The conciliator will possibly also ask questions to clarify any points they feel are relevant to the matter.

At the end of the exploration of the major issues and after any questions and answers, the conciliator will adjourn the joint session and speak with the parties privately. It is at this time that options for settlement of the dispute will be discussed in private with the conciliator. Usually, the conciliator will convey proposals and offers between the parties.

At this stage, the conciliator will ask you what you are seeking as a remedy for your discrimination claim. The conciliator will not make any recommendations or give advice regarding settlement proposals. However, the conciliator will answer any questions you have regarding the law as it applies to your application.

Around this time, it will usually become clear whether a settlement is either:

- **Not possible:** in which case the matter will either be ended if at AHRC or VEOHRC, or proceed to a hearing if at VCAT;
- **Possible:** in which case the conciliator may persist in seeking resolution between the parties; or
- **Agreed upon:** in which case the conciliator may assist the parties to prepare a **Terms of Settlement*** (or Deed of Release) that identifies the basis upon which both parties agree to settle the matter.

What do I ask for at conciliation?

This is a very difficult question to answer since discrimination matters can settle for anything to which the two parties agree, including all or any of the following:

- a handshake and an apology;
- a written reference;
- reinstatement (with or without back pay);
- monetary compensation; and/or
- anything else to which the parties can agree.

There are some important factors you should consider, including:

- What a court or tribunal may award you if your claim proceeded past conciliation;
- Any financial loss due to loss of income and / or expenses incurred (e.g. cost of counselling after experiencing discrimination);
- The circumstances of the parties, i.e. your length of tenure, service record, future employability, etc;
- Whether or not the offer and/or counter offer is 'in the ballpark' (i.e. whether the offer or counter offer is realistic or something you can accept to avoid a more time-intensive hearing or court proceedings);
- Any risk of an 'order for costs' being made against you later in the proceedings;
- How much time and energy you are prepared to commit to the process of representing yourself; and
- Any legal costs associated with pursuing your application to a hearing.

Other things to keep in mind:

- Consider making an opening offer of settlement that is possibly higher than what you are willing to accept;
- Know what your bottom line is (i.e. what you are not prepared to go under) to settle your claim;
- Think of an upper and lower range of settlement possibilities;
- As the conciliation process unfolds, and you get a sense as to how the conciliation is progressing, you may wish to reassess your settlement goal within that range;
- Remember that the Respondent's offer or counter-offer may not be their best or last offer. It is possible that their offer will improve with time but this cannot be guaranteed. Keep in mind that the Respondent may also withdraw an unaccepted offer, and/or refuse to make a counter-offer;
- If you get to the point of signing a Terms of Settlement document, you should first read it carefully and make sure that you understand it. Ask for assistance from the conciliator if you do not fully understand the document. You should pay particular attention to:
 - what you will get from the Respondent;
 - when you will get it; and
 - what you will be giving up in terms of future claims against the Respondent if you agree to the Terms of Settlement.
- Ask yourself if you still want to pursue any other matters against the Respondent (e.g. for underpayment of wages etc). If so, does this document stop you from pursuing those matters?; and
- If you do have other claims and you want to continue to pursue them, you should make it clear from the outset that you are only negotiating to resolve your discrimination claim and any documents signed should reflect this fact.

Additional tips for phone or video conciliations

- Use a 'hands free' phone (e.g. mobile phone on speaker mode) on the day of the conciliation so that you can have both hands free to write notes or find documents;
- Have all relevant documents and writing materials with you;
- Avoid distractions around you prior to and during the conciliation (remember conciliations can go for anywhere between two hours to a whole day (with breaks));
- If waiting for the conciliator's call ensure that you are ready and available to take the call on time;
- Have a constant awareness that you (and any support person) can likely be heard by the conciliation participants in a joint phone conference; and
- Have a glass or jug of water with you.

Additional tips for face to face conciliations

- Attend the conciliation on time. You should arrive early and locate the room the conciliation is going to take place in.
- You may consider arriving at the allocated room early and if it is vacant, take a moment to get a 'feel' for the environment before the conciliation commences and then go and get refreshments nearby and prepare accordingly.
- If going to a local café (or similar) before or after a conciliation, always be aware of the people that are around you at that time, particularly if/when discussing your matter with a support person in that environment.
- If attending a conciliation in the city, consider using public transport as parking and parking fines can be expensive, especially if a conciliation runs over the allocated time.

Stage 5: After the conciliation

Once the Respondent has done what it said it would do in the Terms of Settlement agreement (i.e. they have reinstated you or paid you compensation etc) you should discontinue the matter. Depending on the stage of your claim, discontinuing the matter may require consent orders (i.e. drafted by agreement between the parties). Speak to the conciliator about what you need to do.

Note: It is a good idea that any monies sent to you by cheque or money order be 'cleared' by the bank before you discontinue the matter.



What happens if the employer has not made an offer, or an acceptable offer, and the matter is going to a VCAT hearing or requires an application in the federal court system?

At this point JobWatch strongly recommends that you seek further legal advice and assistance, especially as costs apply in the federal court system and you will be exposed to financial risk. See 'Key Contacts' in the Appendix of this Toolkit.

In brief however, a VCAT hearing proceeds as follows:

1. A Directions Hearing will be scheduled. This is a 'pre-hearing', to prepare for a hearing. At this Directions Hearing, you will be provided with information on what you will need to prepare and provide in relation to formal statements, evidence, written submissions, and more.

There may be multiple Directions Hearings. In some outlying cases, it can take up to four years before the actual hearing.
2. It is likely that VCAT may suggest further attempts at mediation / conciliation prior to the actual hearing. Where offered and both parties are amenable, it is always worthwhile to try another conciliation session as this is less time-consuming than an actual hearing.
3. In an actual hearing, both the Applicant and the Respondent will be cross-examined, and all submissions and evidence examined. You will need to ensure that you are completely familiar with the evidence and be prepared to defend any statements you have made.
4. Following the hearing, the VCAT member will make a decision. This will not happen immediately. In some cases, decisions can take months.

If your matter requires an application in the federal court system, this process normally proceeds as follows:

1. Lodge your application through either the Federal Court of Australia or the Federal Circuit and Family Court of Australia. Your legal representative will be able to advise which is best for you. Forms are available on the court website, and you may also need to provide other documents such as affidavits or statements of claim.
2. You will need to serve a copy of the filed court documents on the Respondent. Rules apply as to how these documents should be served.
3. The court will advise you of the time, date and place of your hearing. Typically, this is done in person. If you want to attend by phone or video, you will need to ask permission well in advance of the hearing date.
4. You will normally receive some documents from the Respondent before the hearing, such as their Defence (their view of the situation). They may also file a claim against you in response.
5. There will be a case management hearing, which is designed to help the two parties agree on the logistics of the matter and how it should be heard – e.g. evidence and witness requirements, capping costs, agreeing what matters should be heard, re-considering mediation or conciliation, etc.
6. Once the matter progresses to a Court hearing, both the Applicant and the Respondent will be cross-examined, and all submissions and evidence examined. You will need to ensure that you are completely familiar with the evidence and be prepared to defend any statements you have made.
7. Following the hearing, the Judge will make a decision. This will not happen immediately. In some cases, decisions can take months.

What if you don't agree with the VCAT member or Judge's decision?

The next step is the Supreme Court of Appeal. Seek legal representation, as this can be costly and difficult to navigate.

What if the VCAT member or Judge orders in your favour but the Respondent won't pay?

You will need to get the VCAT order converted to an Order of the Magistrates' Court. Following this, the Respondent will receive a summons to appear at the Magistrates' Court to give an account of their financial position. They can be jailed if they do not attend.

Further, there are opportunities to enforce these orders by applying to the court to issue a Warrant which authorises the Sheriff to demand payment from the Respondent or otherwise seize property and other assets to pay their debts. Legal representation is recommended before proceeding, especially where you suspect the Respondent doesn't have any or enough assets (e.g. the employer has gone bankrupt).



Key Contacts

JobWatch's Telephone Information Service

- 03 9662 1933 / 1800 331 617
- www.jobwatch.org.au

For legal information regarding workplace issues, including a wide range of Fact Sheets.

Australian Human Rights Commission

- 1300 656 419
- www.humanrights.gov.au

For discrimination claims in the federal jurisdiction.

Victorian Equal Opportunity and Human Rights Commission

- 1300 292 153
- www.humanrights.vic.gov.au

For an optional voluntary conciliation about discrimination in the Victorian state jurisdiction.

Victorian Civil and Administrative Tribunal

- 1300 018 228
- www.vcat.vic.gov.au

For discrimination claims in the Victorian state jurisdiction.

Queensland Human Rights Commission

- 1300 130 670
- www.qhrc.qld.gov.au

For discrimination claims in the Queensland state jurisdiction.

Equal Opportunity Tasmania

- 1300 305 062
- www.equalopportunity.tas.gov.au

For discrimination claims in the Tasmanian state jurisdiction.

The Fair Work Infoline (Fair Work Ombudsman)

- 13 13 94
- www.fairwork.gov.au

For assistance in figuring out and recouping wages and entitlements and general employment information.

Australian Council of Trade Unions

- 1300 486 466
- www.actu.org.au

For assistance in joining a union.

Legal Referral Service (Law Institute of Victoria): 03 9607 9311

Queensland Law Society: 1300 367 757

Law Society of Tasmania: 03 6234 4133

For referral to a lawyer.

Checklist: Preparing for a Conciliation

Pre-claim

- Step 1:** Collect relevant information
- Step 2:** Attempt to resolve the dispute informally with your employer
- Step 3:** Send a letter to your employer
- Step 4:** Review options for claims in state and federal jurisdictions and decide which best suits your circumstances

Discrimination claim application

- Step 5:** Complete and file the application form in the jurisdiction you decide on
- Step 6:** Review the information you have and consider what additional information you may need for the conciliation

Prepare for a conciliation

- Step 7:** Develop your strategy for the conciliation – prepare your statement, and consider what remedies you are seeking, and what remedies you would settle your claim for
- Step 8:** Organise your notes and information in a logical manner (e.g. chronological), ensuring you have multiple copies if required
- Step 9:** Confirm with the conciliator whether an interpreter will be present if you need one

Draft Terms of Settlement

This is an example of a discrimination claim settlement document that may be provided at conciliation by the conciliator when you and your former employer agree to settle your discrimination claim. The purpose of this document is to help you better understand the meaning of terms that are usually used in discrimination claim settlement documents.

Note - This is an example only, and deals with a specific situation where employment has ended. It is not an exhaustive settlement document as terms may be added, removed, or amended as agreed between the parties depending on the circumstances

[Your details and your former employer's details go here]

1. The Applicant has made an application to [insert tribunal or agency name here] for a remedy alleging the Applicant experienced discrimination based on a protected attribute in the workplace.

(This means that you have made a discrimination claim that alleges that you experienced discrimination based on a protected attribute in the workplace).

2. The Respondent denies the allegations.

(This means that your former employer doesn't necessarily believe that you experienced discrimination in the workplace but is willing to compromise to settle your discrimination claim to avoid the cost and inconvenience of further legal proceedings).

3. The Applicant and the Respondent agree to fully and finally settle the matter on the following bases:

("Fully and finally" means that you can't continue your discrimination claim or make another discrimination claim against your former employer).

3.1 The Respondent will pay the Applicant the amount of \$X,XXX (gross) taxed according to law within 14 days of receiving this document signed by or on behalf of the Applicant.

(This means that you have to sign this 'Terms of Settlement' document before an adult witness and send the original to your former employer, preferably by registered post (**Note:** Keep a copy for yourself)).

Generally speaking, payments for damages like "pain and suffering" are not taxable, but payments for lost income are taxable. This is a complex area and tax advice is recommended. Contact the Australian Tax Office to check the tax related issues of any payment offered).

3.2 The Respondent will, within 14 days of receiving this document signed by or on behalf of the Applicant, provide the Applicant with a Statement of Service with the Respondent, outlining the Applicant's period of service with the Respondent, the Applicant's position with the Respondent and the Applicant's duties for the Respondent.

(A statement of service is a neutral statement by your former employer, usually on its letterhead, outlining your length of service, duties and position. You may ask your former employer to provide you with a positive reference instead of a neutral statement of service. However, some employers may not be prepared to do this. If this is the case, it can be a good idea to have a personal reference from a co-worker to help you get a new job.

This clause may be omitted if you are continuing in your employment with your employer. It could be replaced with another clause that has been agreed during the conciliation – e.g. that the Respondent will commit to providing anti-discrimination training workshops for all their staff).

3.3 On the Respondent complying with clauses 3.1 and 3.2 above, the Applicant releases and forever discharges and releases the Respondent, its Directors, employees, assignees or successors from any liability past, present or future from all claims, suits, demands, actions or proceedings arising out of or connected with the Applicant's employment with the Respondent, including but not limited the discrimination.

(This means that, in agreeing to accept a payment/settlement from your former employer to resolve your discrimination claim, you are also agreeing not to make any further claims (e.g. take legal action) in relation to your employment whatsoever against your former employer, its owners and its staff etc and to discontinue any other claims you have already started.

If you think you may have other claims against your former employer that you wish to pursue such as, for example, an underpayment of wages claim, then you may not want to agree to this clause. Instead, you may only want to settle your discrimination claim and nothing else. If your former employer doesn't comply with clauses 3.1 or 3.2 you may be able to continue your claim/s but obtain legal advice first).

3.4 The Respondent releases and forever discharges and releases the Applicant from any liability past, present or future from all claims, suits, demands, actions or proceedings arising out of or connected with the Applicant's employment with the Respondent, including but not limited to the cessation of the employment.

(This means that your former employer agrees not to take any legal action against you in relation to your employment. This can be important where your former employer has made allegations against you such as, for example, that you still have its property or that you have somehow harmed its business causing it loss and damage).

3.5 Nothing in the provisions of these terms of settlement affects any entitlement the Applicant has under workers compensation legislation or superannuation legislation.

(Regardless of paragraph 3.3, you are still entitled to make a WorkCover and/or an unpaid superannuation claim. If you have other claims in relation to personal injury or otherwise e.g. common law, you should obtain legal advice before agreeing to any terms of settlement).

3.6 The Applicant and the Respondent will keep the provisions of these terms of settlement, and any information relating to the employment, confidential, provided that they may disclose the provisions to their legal or financial advisers or any other person that by law must be informed of the provisions.

(This means you have agreed to not tell anyone, especially other employees or former employees of your former employer, anything about your discrimination claim and its outcome. If you break this agreement, your former employer may take legal action against you. However, you can tell your legal and financial advisers).

3.7 Neither the Applicant nor the Respondent will disparage or denigrate the other.

(This means that you and your former employer have agreed not to say or write anything to any other person that is insulting or critical of each other. This can help you if you are concerned that your former employer may disparage or denigrate you in the context of any future/prospective employer's contact with them).

3.8 Within 7 days of the Respondent complying with clauses 3.1 and 3.2, the Applicant will discontinue this matter.

(This means that you agree to discontinue this matter within 7 days of you receiving the payment, your statement of service, and anything else that has been agreed upon herein. It is a good idea to make sure any payments made are 'cleared' prior to doing this.

Depending on the stage of your claim, discontinuing the matter may require consent orders. Speak to the conciliator about what you need to do).

4. This agreement will be taken as being executed when each party holds a copy signed by the other party, even though the signatures of both parties do not appear on the same copy.

(This means that, if you have a copy of this document signed by your former employer and you have sent your former employer a copy signed by you, then the document has been completed).

[Signatures go here]

Produced by: Job Watch Inc
Level 10, 21 Victoria Street
Melbourne VIC 3000
Telephone: (03) 9662 1933 or 1800 331 617
Edition: October 2023
Copyright: Job Watch Inc 2023