



Statutory Conciliation Practice Guidelines

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1 Document control and version history

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2 Purpose

The Australian Human Rights Commission (Commission) has developed a number of Practice Guidelines outlining the procedures for dealing with complaints made to the Commission under the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) and procedures for the Commission's National Information Service which provides information to the public about the complaint process and rights and responsibilities under federal human rights and anti-discrimination laws.

The complaints that the Commission receive vary markedly in terms of subject matter, seriousness, complexity and the needs and interests of those involved. The Commission aims to provide a complaint process which, while complying with legislative requirements and relevant legal principles, can be flexible and adapt to the particular circumstances of a complaint and the needs of those involved. Therefore, the procedures outlined in these documents, where not legislatively mandated, are intended to provide guidance for staff rather than strict rules of practice.

These Practice Guidelines are supplemented by other material which also guides the management of complaints. This material is summarised below.

- **Legislation:** The legislation administered by the Commission is neither simple nor uniform and it is not possible to comprehensively address the nuances of each piece of legislation in these practice guidelines. Therefore, continual and detailed reference to the legislation remains a key component in managing complaints.
- **Case law:** Decision making and procedures for managing complaints should be informed by relevant case law. While relevant case precedent is incorporated in these Practice Guidelines, continual reference to the ongoing determination of cases is also required.
- **Training:** The Commission provides comprehensive training for staff who deal with enquiries and complaints. Therefore, the information in these Practice Guidelines should be read in conjunction with information provided in these practical training programs.

The usefulness of these Practice Guidelines is dependent on the ongoing assessment of their practicality and suggestions for improvement. Staff are encouraged to provide feedback on the Practice Guidelines to the management team. It is the Commission's intention to regularly review the Practice Guidelines to incorporate changes regarding the legislation, case law and complaint procedures.

3 Introduction

These Practice Guidelines outline the basic legislative framework for the Commission's conciliation process and provide general guidelines for the conduct of conciliation.

These Practice Guidelines also reflect Alternative Dispute Resolution (ADR) theory and requirements of ADR practice as set out in the [National Mediator Accreditation System Practice Standards](#).¹

A characteristic of ADR is its ability to be flexible and responsive to individual circumstances. As such, officers will need to use professional discretion in conducting conciliation and where appropriate, seek the advice and assistance of their manager to adapt the process to address the particularities of each dispute.

4 Statutory conciliation

4.1 Defining statutory conciliation

The following definitions of 'conciliation' and 'statutory conciliation'² provide a framework for conciliation as conducted by the Commission:

Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Statutory conciliation takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute.

¹ While the National Mediator Accreditation System and associated Practice Standards use the language of 'mediation' they also refer to 'conciliation'. See for example 10.2 of the [Practice Standards](#).

² National Alternative Dispute Resolution Advisory Council, [Dispute Resolution Terms](#), 2003.

4.2 Statutory framework and role of the presiding officer

Statutory conciliation can be differentiated from other forms of ADR in that it takes place within a statutory framework. That is, the content of the dispute is framed in terms of the law and the law sets out basic requirements as to how the dispute resolution process is to be conducted. The public policy objectives of the law also provide parameters for the outcome of the dispute.

For example, section [28](#) of the AHRCA states:

The Commission shall, in endeavouring to effect a settlement of a matter that gave rise to an inquiry, have regard to the need to ensure that any settlement of the matter reflects a recognition of human rights and the need to protect those rights.³

While officers have a role in upholding the objectives of the legislation administered by the Commission, this does not in any way mean that officers 'take sides' in the dispute or make determinations as to whether a breach of the law has occurred. Rather, the statutory context means that it is a legitimate part of an officer's role to assist both parties:

- understand how the law may apply to the issues raised in the dispute
- understand the complaint process and consequences of resolution or non-resolution of the complaint as set out in the law
- resolve the dispute in a manner that accords with, rather than detracts from, the public policy objectives of law.

In addition to the requirements in the AHRCA for the Commission and the President to act fairly in the inquiry and conciliation of complaints⁴, section [46PK\(3\)](#) of the AHRCA requires presiding officers to take all reasonable steps to ensure that the conduct of a conciliation conference does not disadvantage any complainant or respondent. This reflects general requirements for ADR practitioners to act in a fair, equitable and impartial way, without favouritism or

³ See also the objectives of the *Disability Discrimination Act 1992* (Cth) in section [3](#) of the DDA, which include '...to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.'

⁴ See sections [20\(9\)](#), [32\(4\)](#) and [46PF\(6\)](#) of the AHRCA.

bias⁵ and to assist both parties participate in the process and make informed decisions⁶.

To avoid possible perceptions of bias or favouritism, it is important that the role of the conciliator is explained. For example, it is important for parties to understand that the presiding officer has no power to determine if a breach of the law has occurred and that it is not the role of the officer to decide if a person should settle the complaint or the terms of settlement.

It is also important that the reasons for particular actions by officers in conciliation are explained. For example, conducting a fair conciliation process does not necessarily mean treating both parties exactly the same. Where one party may be much more experienced in understanding the law and negotiation, an officer may be required to spend more time with the other party to assist them understand the law and process and make informed decisions. It is important that any such different treatment is explained so that it is not inappropriately perceived to be bias or favouritism.

Additional statutory requirements regarding conciliation and the role of the presiding officer are discussed throughout these Practice Guidelines.

5 Confidentiality in statutory conciliation

'Confidentiality' is often seen as a defining characteristic of ADR in contrast with the public dispute resolution processes of courts.⁷ In particular, restrictions on the use of conciliation information in subsequent court proceedings is said to not only encourage participation in ADR but also support behaviours such as concessions, openness and honesty that can assist the resolution of disputes.

The confidentiality of ADR proceedings is not, however, absolute.⁸ In terms of the Commission's conciliation process, confidentiality can apply to different aspects of the process and to different participants in different ways, as explained below.

⁵ The issue of 'reasonable perception of conciliation bias' is discussed in the case [Koppen v Commissioner for Community Relations](#) (1986) EOC 92-173.

⁶ See for example, part 7 of the National Mediator Accreditation System [Practice Standards](#).

⁷ See Astor, H & Chinkin, C, *Dispute Resolution in Australia*, 2nd Ed, Butterworths, 2002 and Boule, L, *Mediation: Principles, Process, Practice*, Butterworths, 1996.

⁸ For example, at common law, a settlement resulting from 'without prejudice' negotiations can be pleaded and proved to enforce its terms. The National Mediator Accreditation System [Practice Standards](#) also acknowledge that mediators may be required to breach confidentiality where this is reasonably considered necessary to prevent an actual or potential threat to human life or safety – see part 9.1.

5.1 Statutory provisions

(a) Use of information in subsequent legal proceedings

Provisions within the AHRCA indicate that the Commission's conciliation process is intended to be a confidential process differentiated from the public determination process of the courts.

For example, section [46PK\(2\)](#) of the AHRCA states that a conciliation conference 'is to be conducted in private'.

Additionally, section 46PKA of the AHRCA states:

Evidence of anything said or done by a person in the course of the conciliation of a complaint in accordance with section 46PF is not admissible in any proceedings relating to the alleged acts, omissions, or practices.

This statutory provision reflects the general 'without prejudice' protection at common law for parties involved in voluntary settlements.⁹

Section 46PKA must, however, be read in conjunction with section [46PSA](#), which states:

If:

- (a) proceedings have been instituted under section 46PO against a respondent to a terminated complaint; and
- (b) an applicant or respondent has made or makes an offer to settle the matter the subject of the complaint; and
- (c) the offer was or is rejected;

the court, or a judge of the court, in deciding whether to award costs in the proceedings, may have regard to the offer.

This means, for example, that where the court has dismissed a case and the respondent in conciliation made an offer to settle the complaint that was rejected, the respondent is able to bring evidence of that offer in the context of the court's consideration of whether costs should be awarded against the complainant. The *Human Rights Legislation Amendment Bill 2017* (Cth) [Explanatory](#)

⁹ The common law 'without prejudice' privilege extends to admissions, made in good faith, to settle disputes in a situation where settlement is not actually achieved.

[Memorandum](#)¹⁰ notes that this exception to 46PKA is intended to deter recourse to the court where earlier settlement offers may reasonably be regarded as equivalent to the remedy that the court has ultimately offered.

This carve out to the general confidentiality provision also mirrors provisions in the Federal Court Rules and the practice of ‘Calderbank offers’ which seek to encourage the reasonable settlement of disputes.¹¹

(b) Use of information by the Commission President

As well as the broad ‘non-disclosure of information’ restrictions on Commission members and staff at section [49](#) of the AHRCA, section [46PS](#) of the Act sets out specific requirements regarding information arising from conciliation proceedings.

This section states that any report the President provides to the Federal Court or Federal Circuit Court regarding a terminated complaint

...must not set out or describe anything said or done in the course of conciliation proceedings under this Part (including anything said or done at a conference held under this Part).

The AHRCA does not define ‘conciliation proceedings’. However, information provided ‘in the course of conciliation proceedings’ can be said to include admissions, concessions or settlement offers made by parties:

- in preparation for a conciliation conference or process
- during a conciliation conference or process
- in settlement negotiations following a conciliation conference.

The President may include material obtained as part of the inquiry into a complaint in a report to the court. The fact that this material may be referenced or discussed in a conciliation process does not change that fact that it was obtained as part of the inquiry and can therefore be included in a report.

In order to avoid confusion or argument about the status of particular information, it is important that officers clarify the difference between material provided as part of the complaint inquiry process and information provided for

¹⁰ Page 32, paragraph 167.

¹¹ These provisions and practices are discussed in more detail at 8.4.2-8.4.3 of [Federal Discrimination Law](#).

the purpose of conciliation. Parties should also be advised not to table any new information in support of facts or issues in dispute at a conciliation conference or during conciliation discussions. Such information may be provided to the Commission prior to the commencement of conciliation or after the process is concluded if the matter does not settle.

- (c) Application to complaints about breaches of human rights and discrimination (ILO)

The AHRCA does not provide for court determination in relation to complaints about breaches of human rights and discrimination (ILO). Instead, where the President is of the opinion that the act or practice is inconsistent with or contrary to any human right or constitutes discrimination, the President may report to the Attorney-General.

While section 46PS of the AHRCA does not apply to these complaints, it is usual practice that information provided ‘in the course of conciliation proceedings’ would not be included in any report prepared for the Attorney-General.

5.2 Case law

Prior to the legislative amendments in April 2017, there was no specific provision equivalent to section 46PKA of the AHRC Act. However, cases considered by the court in that period support the general principle that things said and done in conciliation proceedings are not admissible in subsequent legal proceedings.

In [*Bender v Bovis Lend Lease Pty Ltd*](#),¹² the Court had to consider whether the applicant could rely on affidavit evidence referring to statements made during a Commission conciliation process. Federal Magistrate McInnis concluded that to permit the applicant to rely upon such evidence would be ‘inconsistent with the spirit and intent of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) (now known as the AHRCA) and would: set an unfortunate precedent in relation to the conduct of conciliation proceedings to the extent that parties participating as directed in a compulsory conference would be less likely to openly contribute to the course of the discussion if it were thought that subsequently affidavit material would be lodged in Court reciting the negotiations and/ or discussions.¹³

¹² [2003] FMCA 277

¹³ [2003] FMCA 277, [34].

At paragraph 33 he said:

It would be somewhat artificial and inconsistent if a prohibition is placed upon the President reporting to this Court anything which may be said to be done in the course of conciliation proceedings, and to then allow parties by affidavit evidence or otherwise to refer to what may or may not have been said during the course of that conciliation conference at a subsequent court hearing.

Similarly, in [Treacy v Williams](#),¹⁴ Federal Magistrate Connolly ruled that those parts of the applicant's affidavit evidence that raised matters discussed during a Commission conciliation conference were inadmissible.¹⁵

Confidentiality has also been recognised by both the Administrative Appeals Tribunal (AAT) and the Office of the Australian Information Commissioner (OAIC) as an essential feature of the Commission's conciliation process. The AAT and the OAIC have both previously held that to disclose the content of communications passing between the Commission and parties in the course of conciliation, could reasonably be expected to have a substantial adverse effect on the functioning of the conciliation process. Consequently, those bodies have ruled that such information is not required to be disclosed under the [Freedom of Information Act 1982](#) (Cth).¹⁶

5.3 Other aspects of confidentiality

- (a) Confidentiality of private discussions between a party and presiding officer

It is generally understood that officers will not convey the content of private conversations with one party to another party, without the first party's consent. Again, the rationale for this is to enable parties to have open and frank discussions with the officer and freely explore possible resolution options.

It is important when entering into a conciliation process that officers clarify the confidentiality of their private discussions with each party and establish the basis on which information will be conveyed to the other party.

¹⁴ [2006] FMCA 1336.

¹⁵ [2006] FMCA 1336 [14].

¹⁶ [Lynch v Human Rights and Equal Opportunity Commission and Higgs](#) [1991] AATA 390; [L' and Australian Human Rights Commission](#) [2012] AICmr 21; [HT' and the Australian Human Rights Commission](#) [2015] AICmr 82.

In private meetings, officers should also take time to clarify the particular message to be conveyed, prior to conveyance. If circumstances arise where an officer has concerns that what she/he is being asked to convey is likely to be detrimental to resolution or that additional information could assist resolution, the officer should discuss this with the party with the aim of reaching agreement as to what will be conveyed.

(b) Confidentiality of terms of settlement

While it is often the case that parties wish to keep the terms of any settlement agreement confidential, this is not a requirement in the AHRCA. The Commission's standard conciliation agreement includes an optional confidentiality clause.

It is helpful if each party's views on the confidentiality of any settlement agreement is elicited early in the conciliation process to ensure that this can be incorporated in settlement negotiations as required.

5.4 ADR practice standards

Part 9 of the National Mediator Accreditation System [Practice Standards](#), as set out below, provides an overview of expected practice in relation to confidentiality.

1. A mediator must respect the agreed confidentiality arrangements relating to participants and to information provided during the mediation, except:
 - (a) with the consent of the participant to whom the confidentiality is owed; or
 - (b) where non-identifying information is required for legitimate research, supervisory or educational purposes; or
 - (c) when required to do otherwise by law;
 - (d) where permitted to do otherwise by ethical guidelines or obligations;
 - (e) where reasonably considered necessary to do otherwise to prevent an actual or potential threat to human life or safety.
2. Before holding separate sessions with different participants, a mediator must inform participants of the confidentiality which applies to these sessions.
3. With a participant's consent, a mediator may discuss the mediation, or any proposed agreement, with that participant's advisors or with third parties.

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4. A mediator is not required to retain documents relating to a mediation, although they may do so should they wish, particularly where duty-of-care or duty-to-warn issues are identified.
5. A mediator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the mediation and must take reasonable steps to ensure that administrative staff preserve such confidentiality.

It should be noted that Part 1.3 of the Practice Standards states:

Where a mediator practises under a legislative framework and there is a conflict between a provision of the Practice Standards and a provision of that framework, the legislative framework will override the Practice Standards to the extent of any inconsistency.

6 Assessing suitability for conciliation

The factors and circumstances conducive to successful conciliation are complex and varied. Similarly, it is difficult to list definitively the circumstances in which conciliation is likely to be ineffective. Outlined below are some relevant factors to consider when reviewing matters with a view to conciliation.

6.1 Nature of the dispute

Disputes that are complex and/or where the parties have long-standing conflict, are likely to be more difficult to resolve. There may also be difficulties in successfully resolving matters where the complaint to the Commission is part of an ongoing broader dispute or there is other related legal action on foot. It is important in such situations to explore the parties' views on the value of conciliation and if proceeding, ensure the facts and issues in dispute are clear and the scope of the complaint before the Commission is well-defined.

If a dispute is focused purely on a question of legal interpretation requiring judicial determination or on a particular policy decision outside the authority or capacity of the disputants, the value of attempting conciliation would need to be carefully considered in consultation with the parties.

6.2 Attitude of the parties

While a party's willingness to participate in conciliation is important, the process may be of minimal value if one or both parties are of the view that resolution of the complaint would require determination of disputed fact or an issue of credibility and/or there is a stated unwillingness to compromise or negotiate.

Similarly, the value of conciliation may be limited where there is significant distrust between the parties and/or a party has concerns about the process being used for ulterior purposes – for example, to harass or obtain information to assist any subsequent litigation.

In such situations, it is important for officers to talk with the parties about the objectives and limitations of conciliation and ascertain their views on the value of proceeding.

Disputes such as those underpinning complaints to the Commission, often involve high levels of emotion. However, where there appears to be unusually high levels of hostility between the parties, it is important for officers to talk with the parties about the expected communication and negotiation aspects of conciliation. Officers should also ensure careful consideration is given to preparation and the format and structure of any conciliation process.

5.3 Power imbalance and vulnerable parties

In some instances, a party to a complaint may have a particular vulnerability. If there is concern that participation in a conciliation may cause harm or exacerbate a perceived vulnerability, officers should raise their concerns with their manager. It is possible that progressing to conciliation may be appropriate if vulnerabilities can be addressed by appropriate measures including consideration of the most appropriate format for conciliation, access to a support person or representative, decisions about who participates in the conciliation process and the manner of their participation, or access to professional or other support to debrief after the conciliation process.

5.4 Party expectations of outcome

In some cases, parties to a complaint may appear to have unrealistic expectations about how a complaint may be resolved, with reference to the parameters of an ADR process and settlement/determination precedent. In other cases, parties may have vastly different views on the type of outcome they would be willing to discuss. For example, a complainant may indicate that they will only settle for a large amount of financial compensation, while the respondent is only willing to consider providing a written expression of regret.

In such situations, it is helpful if officers can assist the parties reflect on their expectations and make informed decisions about the value of proceeding to conciliation if their views remain unchanged.

7 Formats for conciliation

Section [46PJ](#)(1) of the AHRCA states:

For the purpose of attempting to conciliate a complaint in accordance with section 46PF, the President may decide to hold a conference, to be presided over by:

- (a) the President; or
- (b) a suitable person (other than a Commission member) determined by the President.

A conciliation process can take a number of formats as set out below. The Commission will offer the parties a particular format for conciliation after consideration of various factors, including those discussed at 5 above.

- **Face-to-face conferencing:** A face-to-face conference is facilitated with the parties together in the same room. The conference may involve private meetings between the parties and the presiding officer and/or private caucus sessions for the parties. A conference may also involve a component of shuttle conciliation as explained below.
- **Telephone conferencing:** In a telephone conciliation conference, the parties can be in different geographical locations but jointly involved in discussion as per a face-to-face conference. The conference may involve private discussions between the presiding officer and the parties and/or private caucus sessions for the parties. The conference may also involve a component of shuttle conciliation as explained below.
- **Video conferencing:** In a video conciliation conference, the officer conducts the conference by video in the same manner as a face-to-face conference. The conference may involve private discussions between the presiding officer and the parties and/or private caucus sessions for the parties. The conference may also involve a component of shuttle conciliation as explained below.
- **Shuttle conciliation:** In shuttle conciliation, the presiding officer conveys messages between the parties regarding their views of the dispute, their proposals for resolution and the rationale for these proposals. Messages can be passed by letter/email, by telephone or the officer can convey messages between the parties who are at the same location, but physically separated in different rooms. Face-to-face, telephone and video conciliation conferences may include shuttle conciliation at different stages in the process.

8 Preparing for a conciliation conference

Outlined below are steps that will assist preparation for a conciliation conference.¹⁷ Sound preparation by the presiding officer and the parties can help maximise the potential for resolution of the complaint.

8.1 Information about the dispute

It will assist the effectiveness and efficiency of the conciliation process if, prior to the start of the conference, all participants have an understanding of: the general facts and issues that are in dispute; the sections of the law that appear relevant to the complaint; and any supporting information that has been obtained by, or provided to, the Commission.

Officers should also explain to the parties why the Commission has proposed conciliation. This may include clarification of why the President has not terminated or declined the complaint.

8.2 Possible resolution options

Early private discussions with each party regarding options for resolution can assist the parties prepare for the negotiation stage of conciliation in which they will be expected to put forward and respond to resolution proposals.

In these private discussions, officers should clarify the parties' initial views on how they think the complaint may be resolved. It can be beneficial if each party is encouraged to generate a range of possible resolution options as this improves the chance of finding an option they can agree on. Officers should, where possible, ask the parties to clarify the relative importance of different resolution options and the extent to which these options are negotiable at this time.

Respondents should be encouraged to be proactive in generating options for resolution, rather than seeing their role as limited to responding to the complainant's proposals. For example, there may be actions a respondent is considering in response to a complaint irrespective of whether the matter can be resolved, such as a review of policy or staff training, which they may wish to propose as a resolution option.

¹⁷ While this section refers to preparation for conciliation conferences, the general principles are also relevant to shuttle conciliation processes.

These preparatory discussions about resolution proposals should, however, remain exploratory in nature. This will ensure the parties are not locked into positions too early before they have the benefit of hearing the other party's views.

8.3 Attendance

In this preparatory phase, it is helpful for officers to have discussions with the parties regarding who they would like to accompany them to the conference and why. This is because there are legislative requirements about attendance at a conciliation conference and also because decisions about attendance can significantly impact on the potential for successful resolution. For example, resolution of a complaint may be significantly impeded if the parties feel that they are not able to participate on an equal basis. Additionally, particular attendees may be of assistance to resolution where they can contribute to an understanding of the dispute and assist effective communication and negotiation.

Where there is concern about the number of people a complainant or respondent wishes to bring to a conference, the officer should discuss this with the relevant party and try to come to an agreement, in consultation with the other party. There are various options that can be considered. For example, the parties may agree that a particular individual will attend but not participate in the joint sessions or that a person will not attend but can be contacted in private sessions to provide advice, support, or authority for decisions.

Provisions in the AHRCA support that the final decision about who will attend a conference and the basis on which they will participate is made by the presiding officer.¹⁸

7.3.1 *Inviting or requiring people to attend*

Section [46PJ](#)(2) of the AHRC Act provides that:

The President may:

- (a) invite any or all of the complainants or respondents to attend the conference; and
- (b) invite any other person to attend the conference if:

¹⁸ See sections [46PK](#)(1) & [46PK](#)(4) of the AHRCA.

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- (i) the President reasonably believes that the person is capable of giving information that is relevant to the conciliation of the complaint: or
- (ii) the President reasonably considers that the person's presence at the conference is likely to be conducive to the conciliation of the complaint.

Section [46PJ](#)(3) also provides that the President can, by written notice, require a person to attend a conference.¹⁹ The requirements of any such notice are set out at section [46PJ](#)(4). It will be an offence if the person refuses or fails to comply with the notice.²⁰ A person who is required to attend a conference is also entitled to be paid a reasonable sum by the Commonwealth to cover their expenses.²¹

Generally, people will be invited to participate in conciliation. It is expected that a person would only be required to attend a conference where it is clear they will not voluntarily attend but there still appears to be a reasonable prospect of the complaint being resolved through conciliation. It should be noted that it may be unlikely that a person compelled to participate in conciliation would be inclined to negotiate in good faith.

Where a party indicates an unwillingness to voluntarily attend a conciliation conference, the issue must be escalated to a manager.

7.3.2 Representation & assistance

The presiding officer also has authority to determine if a person can be represented by another person at a conciliation conference.

Section [46PK](#)(4) of the AHRCA states:

Unless the person presiding at a compulsory conference consents:

- (a) an individual is not entitled to be represented at the conference by another person; and
- (b) a body of persons (whether or not unincorporated) is not entitled to be represented at the conference otherwise than by a person who is an officer or employee of that body.

¹⁹ A person can be required to attend the conference, whether or not they have already been invited to attend.

²⁰ Sections [46PJ](#)(5) & (6) of the AHRCA.

²¹ Section [46PJ](#)(7) of the AHRCA.

This legislative presumption of direct party involvement in conciliation reflects the aim of ADR to provide a dispute resolution system where, unlike court, parties have direct involvement in the process and control over outcomes.

‘Representation’ is not defined in the Act but presumably would include representation by a lawyer, a community or industrial advocate, or a friend or family member. Where both parties have similar types of representation, consideration should focus on whether this representation is likely to assist potential resolution of the complaint.

Where one party wants a representative to attend and the other party does not have similar representation, the officer should discuss the matter with the parties in the first instance. In some cases, an unrepresented party may be happy to proceed on the basis of procedural undertakings. For example, it may be agreed that the other party’s representative will not be permitted to participate in any joint sessions during the conference but may be available in private discussions, either on the phone or in person. Alternatively, it may be agreed to delay the conference to allow the unrepresented party to obtain representation or extra support or advice for the conference.

Where there is no agreement between the parties on the issue of representation and/ or an officer has concerns about proposed attendees, the issue should be escalated to a manager for review.

It is important to note that sections [46PK\(5\)](#) & (6) set out specific requirements regarding persons with disabilities. Section 46PK(5) of the AHRCA states:

...an individual who is unable to attend the conference because the individual has a disability is entitled to nominate another person to attend instead on his or her behalf.

In addition, section 46PK(6) of the AHRCA states:

If the person presiding at the conference considers that an individual is unable to participate fully in the conference because the individual has a disability, the individual is entitled to nominate another person to assist him or her at the conference.

The type of assistance a person with disability may require to ensure they can participate appropriately includes:

- a specialist interpreter (e.g. sign language, hand-on-hand, idiosyncratic or distorted speech)
- a person who provides information and general direction to a person with a cognitive impairment

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- a person who attends with someone whose disability impairs their capacity to make certain decisions for the purpose of assisted or substitute decision-making
- a carer who assists a person with disability in daily living.

7.3.3 Authority to settle

Resolution through conciliation is generally more likely if those attending a conciliation conference have the authority to decide settlement terms on the day.

When arranging a conciliation conference, officers should ask corporate entities, organisations, agencies, and departments to ensure their attendees have authority to make settlement decisions. Where this is not practicable, parties should be encouraged to ensure attendees have preliminary instructions on settlement and the ability to seek further instructions as appropriate during the conference.

A conference may still proceed if the parties do not have authority to settle on the day. However, wherever possible, this constraint should be made clear to all participants before the conference.

It is important to note that Commonwealth government entities participating in conciliation as respondents are required to comply with the [Legal Services Directions 2017](#). The directions set out requirements for sound practice in the provision of legal services to the Australian Government.²² They require that Commonwealth entities considering settling monetary claims must do so in accordance with 'legal principle and practice'. A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established.²³ The directions also state that entities may only enter into monetary settlements over \$25,000 if they have received written advice from the Australian Government Solicitor (or an external legal adviser) that the settlement accords with legal principle and practice and the accountable authority (or delegate) agrees with the settlement.²⁴

²² See also information on Attorney-General's website at <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx>

²³ Legal Services Directions, 2017, Appendix C, paragraph 2.

²⁴ Legal Services Directions, 2017, Appendix C, paragraph 4.

When dealing with Commonwealth entities, officers should ensure the issue of relevant settlement approvals are discussed.

8.4 Notification of a conference

In most cases, notice of a conciliation conference is provided by email and includes the following information:

- confirmed date, time, and venue/contact details for the conference
- a draft agenda, including a list of confirmed participants and broad outline of proceedings
- the Commission's information sheet on understanding and preparing for conciliation
- the Commission's information sheet for lawyers and advocates participating in conciliation, where appropriate
- information about the Commission's online Conciliation Register.

The parties should be provided with sufficient advance notice of the conference. The notification should also make it clear that the Commission expects parties to make themselves available at the scheduled time and date of the conference. This expectation regarding attendance should be emphasised where an officer will be travelling to conduct the conference in a regional or interstate location.

9 Conducting a conciliation conference

Section [46PK\(1\)](#) of the AHRCA states that subject to the other provisions of the section, a conciliation conference is to be conducted "in such manner as the person presiding at the conference considered appropriate".

Therefore, apart from the legislative directions discussed in these Guidelines, the conduct of a conciliation conference is at the professional discretion of the presiding officer.

Outlined below is a model for a face-to-face or telephone conciliation conference that reflects the typical stages in an ADR processes. The process may be varied in response to the particular circumstances of a dispute and/or the needs of the parties. For example, detailed discussions of facts and issues in dispute (see issue exploration at 8.4 below) may not be necessary where extensive information has already been exchanged between the parties and/or the parties

are already well aware of their perspectives on the dispute. The process may also be modified to accommodate a participant's disability.

9.1 Preliminary meetings

Presiding officers will generally arrange private meetings with the parties before the start of a conference. These meetings provide an opportunity for the parties to raise any questions or concerns. They also provide an opportunity for the conciliator to:

- set guidelines for the conduct of the conference
- clarify the role of the conciliator and of the participants (for example, representatives or support persons)
- establish rapport with participants who have not had contact with the Commission prior to the conference (for example, represented parties where the representative has been the main contact point)
- prepare the parties for constructive discussion and negotiation.

9.2 Conciliator's opening address

In opening a conciliation conference, it is important that the presiding officer sets the tone of the proceedings and establishes the terms under which the conference will proceed.

Generally, the matters covered in the opening address will have already been covered with the parties in separate preparatory discussions and/or during the preliminary meetings. However, it is useful to confirm these points in the presence of both parties.

The issues that are generally covered in a conciliator's opening address are listed below.

- **Authority:** The conciliator clarifies their authority to preside over the conference with reference to the AHRCA.
- **Role of the conciliator:** The conciliator clarifies that their role is to assist the parties resolve the complaint by facilitating communication and negotiation and reiterates that conciliators do not determine whether discrimination or a breach of human rights has occurred or how the complaint should be resolved, and do not act as advocates or provide legal advice for any participant.

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- **Process:** The conciliator outlines the proposed process for the conference and any relevant terms or conditions agreed in the preparatory stages. The officer also explains the process that will occur if the complaint is or isn't resolved.
- **Confidentiality:** The conciliator confirms confidentiality requirements as they apply to the participants and the President/Commission and notes the possible application of confidentiality to the terms of any conciliation agreement.
- **Participant conduct:** The conciliator reminds participants of the importance of allowing each other to speak without interruption and keeping the tone and content of discussions as constructive as possible.

9.3 Party opening statements

Given that a complainant initiates a complaint, it is generally considered appropriate for the complainant to speak first.

Following the complainant's opening statement, the respondent will be invited to speak. Rather than being asked to respond to the complaint or the complainant's statement, the respondent will be invited to put forward the respondent's view of the dispute.

Party opening statements should be uninterrupted wherever possible and parties should be invited to note any issues they wish to raise and table these on conclusion of the opening statements.

The time allowed for opening statements should be roughly equal for all parties unless provision of additional time to one party is reasonably necessary to ensure substantive equality of participation. Where different treatment is required, the reason(s) for this should be explained.

9.4 Issue exploration

Following opening statements, it may be helpful for the conciliator to summarise each party's contribution, noting any common ground and possible issues for discussion.

Where it appears that discussion of issues will aid resolution, it may be appropriate for the conciliator to set a broad agenda for the way in which these issues will be addressed. Any such agenda should be discussed and confirmed with the parties.

Discussion of settlement proposals should be held over until the next phase of the process. Where one party raises a settlement proposal during discussion, the conciliator would generally acknowledge the proposal and set it aside to revisit in the next phase of the process.

9.5 Private sessions

When relevant issues have been explored, it may be appropriate to provide a short break to allow the parties to reflect on what has been discussed.

The conciliator would then generally hold a private discussion with each party. Where there are multiple complainants or respondents, the conciliator should consult the parties on whether they wish to participate in these private discussions together or individually.

The confidentiality of private discussions should be clarified at the beginning of the session.

The time allowed for private sessions should be roughly equal for all parties unless provision of additional time to one party is reasonably necessary to ensure substantive equality of participation. Where different treatment is required, the reason(s) for this should be explained.

During the progress of a conference, private sessions may also be appropriate where:

- a party requests a private session
- the conciliator considers it appropriate – for example, to address issues arising in a joint session and/or to provide an opportunity for parties to discuss such an issue
- joint discussions or negotiations have stalled.

9.6 Settlement negotiations

While some parties may be comfortable making settlement offers and conducting negotiation in a face-to-face setting, not all parties will be able or willing to do so. In such cases the presiding officer may obtain proposals for resolution in private and with each party's consent, convey the proposals between the parties.

In this negotiation phase of the process, the conciliator's role will be focused on assisting the parties to explore, package, convey and reflect on settlement proposals and counter proposals.

Where parties are having difficulty generating resolution proposals or moving forward in negotiations, it may be appropriate for the conciliator to suggest types of settlement options or compromise positions that the parties may wish to consider. When doing so, conciliators should make it clear that their comments are suggestions only.

10 Conference outcomes

10.1 Where the parties have not reached agreement

Where the parties have not reached agreement on settlement terms at a conference it may be appropriate to consider either:

- a 'cooling-off period' – that is, a relatively short period to enable a party to consider and then accept or reject an open offer
- a period of further negotiation.

Post-conference negotiations may take the form of direct party negotiations, a brief telephone meeting chaired by the Commission or a Commission facilitated shuttle process. Post-conference negotiations would generally be of short duration and only pursued where there appears to be a reasonable prospect of the parties reaching agreement. Multiple conferences are unlikely to be appropriate other than in rare and exceptional circumstances. Therefore, any decisions about additional conciliation conferences should be made in consultation with a manager.

Where parties are clear that they cannot reach agreement, either on the day or after a relevant period of time, the officer will confirm that the complaint will be passed to the President for consideration with a view to either termination or further limited inquiry.

10.2 Where the parties have reached agreement

Where parties are able to agree on settlement terms it is generally the case that a written agreement will be prepared. However, there may be reasons why it may not be necessary or appropriate to do so. This may include:

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- where a complaint is resolved based on actions that have already been taken by a respondent when notified of the complaint
- where the outcome is straightforward and can be effected without the need for an agreement – for example, the provision and acceptance of an apology at the conference.

In such situations officers should write to the parties (by email or letter) confirming the basis on which the complaint has been resolved.

In other situations, a written agreement should be formalised as soon as possible, either at the conference or soon after.

Where the parties wish to use the Commission's conciliation agreement template, the conciliator can assist the parties draft the agreement. However, if the parties wish to substantially add to or amend the pre-drafted clauses on the template, the responsibility for this drafting rests with the parties.

Legally represented parties may also wish to enter into an agreement drafted by one or both of the lawyers. In such cases, parties should be encouraged to bring a draft agreement to a conference for discussion. Officers should also ensure that at the end of the conference, all parties are clear on the proposed process and timeframes for drafting and signing the agreement.

Where an agreement is signed at the conference, the complainant is provided with the original document and copies are provided to the other parties. A copy of the signed agreement is also kept for the Commission's records. Where an agreement is finalised after a conference, the officer should also request a copy of the signed agreement for the Commission's file.

11 Finalising conciliated complaints

For the purposes of sections [20\(2\)\(c\)\(vii\)](#), [32\(3\)\(c\)\(vii\)](#) and/or [46PF\(5\)\(b\)](#) of the AHRCA, a complaint may be considered settled or resolved where the parties' decision to settle the complaint has been confirmed in writing.

Where the President is satisfied that a complaint has been settled, letters should be sent to the parties congratulating them on resolution of the complaint and advising that the complaint has been finalised pursuant to sections [20\(2\)\(c\)\(vii\)](#), [32\(3\)\(c\)\(vii\)](#) and/or [46PF\(5\)\(b\)](#) of the AHRCA.



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1 Document control and version history

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2 Purpose

The Australian Human Rights Commission (Commission) has developed a number of Practice Guidelines outlining the procedures for dealing with complaints made to the Commission under the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA) and procedures for the Commission's National Information Service which provides information to the public about the complaint process and rights and responsibilities under federal human rights and anti-discrimination laws.

The complaints that the Commission receive vary markedly in terms of subject matter, seriousness, complexity and the needs and interests of those involved. The Commission aims to provide a complaint process which, while complying with legislative requirements and relevant legal principles, can be flexible and adapt to the particular circumstances of a complaint and the needs of those involved. Therefore, the procedures outlined in these documents, where not legislatively mandated, are intended to provide guidance for staff rather than strict rules of practice.

These Practice Guidelines are supplemented by other material which also guides the management of complaints. This material is summarised below.

- **Legislation:** The legislation administered by the Commission is neither simple nor uniform and it is not possible to comprehensively address the nuances of each piece of legislation in these practice guidelines. Therefore, continual and detailed reference to the legislation remains a key component in managing complaints.
- **Case law:** Decision making and procedures for managing complaints should be informed by relevant case law. While relevant case precedent is incorporated in these Practice Guidelines, continual reference to the ongoing determination of cases is also required.
- **Training:** The Commission provides comprehensive training for staff who deal with enquiries and complaints. Therefore, the information in these Practice Guidelines should be read in conjunction with information provided in these practical training programs.

The usefulness of these Practice Guidelines is dependent on the ongoing assessment of their practicality and suggestions for improvement. Staff are encouraged to provide feedback on the Practice Guidelines to the management team. It is the Commission's intention to regularly review the Practice Guidelines to incorporate changes regarding the legislation, case law and complaint procedures.

3 Introduction

The AHRCA provides the President with the dual functions of inquiring into, and attempting to conciliate, complaints.¹ These Practice Guidelines provide an overview of key principles relevant to the President's complaint inquiry function and outline the legislative framework and procedural steps relevant to conducting a complaint inquiry.² The President's conciliation function is the focus of the *Statutory Conciliation Practice Guidelines*.

4 Key principles

4.1 Characteristics of an administrative inquiry

An inquiry is defined as 'an investigation, as into a matter; the act of inquiring or seeking information by questioning or interrogation'.³

Inquiries can take place in different legal contexts.

Complaint inquiries undertaken by the President are best described as 'administrative inquiries' in that they involve the collection and examination of information with a view to making an administrative decision under a statute.

Administrative inquiries differ from other forms of inquiry or investigation, such as criminal investigations, in a number of ways. There are differences in the purpose of the inquiry, the potential outcome of the inquiry, the form the inquiry takes and applicable rules and requirements. For example, administrative inquiries are not bound by 'rules of evidence' that apply to inquiries related to judicial proceedings.⁴ Rather, administrative inquiries need to comply with requirements in the relevant statute and legal principles that guide the conduct and decision-making of administrative bodies.

Agencies that undertake administrative complaint inquiries such as the Commission, state/territory anti-discrimination bodies and ombudsmen,

¹ See for example sections [11\(1\)\(f\)](#), [31\(b\)](#) and [46PF\(c\)](#) of the AHRCA.

² While in relation to the human rights and discrimination (ILO) jurisdictions, the Commission is able to conduct inquiries into acts and practices that are not the subject of a complaint, these Guidelines only deal with inquiries into complaints.

³ Macquarie Dictionary Online, 2017, Macquarie Dictionary Publishers, www.macquariedictionary.com.au

⁴ See for example, section [14\(1\)](#) of the AHRCA, which states that the Commission is not bound by the rules of evidence when conducting an inquiry or examination.

generally deal with a very high volume of complaints. Therefore, inquiries tend, by necessity, to be undertaken ‘on the papers’ – that is, with a focus on obtaining and assessing written submissions and documents.

Where an administrative agency has a mandate to inquire into and resolve complaints, the agency may initially only conduct an inquiry to a level necessary to consider if conciliation is appropriate. Where an agency has an administrative determination function, a more detailed inquiry may be undertaken to determine if an alleged breach of the law has occurred. In some cases where such a determination cannot be made ‘on the papers’, for example where the decision relies on an assessment of credibility, the inquiry may involve oral hearings and examination under oath or affirmation.

4.2 The purpose of the President’s complaint inquiry

In relation to complaints of unlawful discrimination, the President’s powers are limited to inquiry and conciliation and there is no ability for the President to make an administrative determination as to whether unlawful discrimination has occurred or provide an enforceable remedy. A decision that unlawful discrimination has or has not occurred can only be made by the Federal Court or the Federal Circuit and Family Court.

Therefore, the purpose of the President’s inquiry into a complaint of unlawful discrimination is not to determine if discrimination did or did not occur. Rather, the purpose of the inquiry is to obtain information which will:

- assist the President consider if the complaint should be terminated and
- where appropriate, assist possible conciliation of the complaint.

In relation to complaints about breaches of human rights and discrimination (ILO), as well as the power to inquire into and conciliate a complaint, the President has the ability to determine that an act or practice is inconsistent with or contrary to any human right or constitutes discrimination. The President can also recommend an appropriate remedy and while any such remedy is unenforceable, the President may report the findings of the inquiry to the Attorney-General.⁵

In light of the above, the purpose of an inquiry into a complaint about a breach of human rights or discrimination (ILO) is to obtain information which will:

⁵ The reporting process is outlined in separate Guidelines.

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- assist the President consider if the complaint should be declined and
- where appropriate, assist possible conciliation of the complaint and
- where appropriate, assist the President determine if, on the balance of probabilities, there has been a breach of human rights or discrimination.

In some situations, complainants and/or respondents may have misconceptions about the scope and/or purposes of the President's inquiry function. For example, a person may expect that the inquiry will determine if unlawful discrimination has occurred and result in punishment of a respondent. Such misunderstandings can lead to dissatisfaction with the complaint process or inaccurate perceptions of officer bias. While written information which explains the President's powers and possible outcomes of a complaint is provided to both complainants and respondents at the commencement of the process, it is important for officers to also discuss this information with parties in their initial contacts.

4.3 Facilitating a fair inquiry

As noted at 4.1 above, the manner in which a complaint inquiry is conducted should not only comply with requirements in the AHRCA but also with Commonwealth administrative law principles such as natural justice and procedural fairness.

(a) Administrative law principles

Administrative law is a set of principles contained in both court decisions and legislation which specify how administrative decision makers should make decisions. Administrative law also provides avenues through which members of the public can challenge administrative decisions.⁶

Understanding and attending to the legal principles that underpin good administrative decision making ensures proper regard for people's rights and

⁶ A key piece of Commonwealth administrative law is the [Administrative Decision \(Judicial Review\) Act 1977 \(Cth\) \(AD\(JR\)Act\)](#) which sets out the basis on which particular administrative decisions can be reviewed by the Federal Court. Some decisions by the Commission and President may be reviewable under the AD(JR) Act. For example, a decision to accept a complaint; a decision by the President to terminate or decline a complaint; and a finding by the President that there has been a breach of human rights or discrimination.

interests and also means that decisions are less likely to be challenged. These legal principles include that a decision maker should:

- understand and apply the law correctly
- only act within their power
- consider all relevant matters and not rely on irrelevant matters
- ensure any findings of fact are based on evidence
- provide reasons for decisions and
- ensure that a person whose interests may be adversely affected by a decision is provided with natural justice/procedural fairness.

Of particular importance in facilitating a fair inquiry are the principles of natural justice /procedural fairness. While the terms 'natural justice' and 'procedural fairness' are commonly used interchangeably, the term 'procedural fairness' is considered preferable when talking about administrative decision making. This is because 'natural justice' is historically associated with hearing procedures of courts while 'procedural fairness' more aptly encompasses the need for fairness in all procedures connected with making an administrative decision.

Procedural fairness is generally understood to involve two key rules:

- **The Hearing Rule**, which requires that where a person may be adversely affected by a decision, they are entitled to know the case against them and have an adequate opportunity to respond, prior to any final decision being made.
- **The Bias Rule**, which requires that a decision maker must not be biased (actual bias) or be seen to be biased (apprehended or ostensible bias).

The requirements of the hearing rule are reflected in statutory obligations⁷ and also, in the stages of the Commission's complaint process.

In relation to the bias rule, officers conducting the inquiry on behalf of the President and the President as decision maker, should not be biased or be seen to be biased.

Officers are expected to conduct the process in a fair and impartial manner. Officers are not advocates for complainants or respondents and are required to

⁷ See for example sections [46PF\(7\)](#) and [27](#) of the AHRCA.

obtain relevant information that may support or refute the allegation(s) in the complaint. It is also a legitimate and necessary part of an officer's role to assist both parties understand how the law may apply to the allegations in the complaint and how information that has been obtained or provided appears to support or refute the allegation(s).

Facilitating an impartial inquiry does not mean that complainants and respondents must always be treated exactly the same. In fact, a level of different treatment may be required in order to ensure a fair process for both parties. For example, where a complainant or respondent has a particular type of disability, they may require additional time to provide information. Also, if there is an apparent disparity in the parties' knowledge of the law, it may be necessary for an officer to spend additional time explaining information to one party so that both parties are able to make informed decisions.

To avoid inaccurate perceptions of advocacy or bias, it is important for officers to explain their role to parties early in the complaint process and also explain the reason(s) for any noticeably different treatment during the process.

(b) Requirements in the AHRCA

A specific requirement for the President to be fair to both complainants and respondents when dealing with complaints was inserted as part of the 2017 legislative amendments (sections 46PF(6), [20](#)(9) and [32](#)(4)). Section 46PF(6) states:

The President must act fairly to:

- (a) the complainant or complainants; and
- (b) the respondent;

in dealing with the complaint in accordance with this section.

The *Human Rights Legislation Amendment Bill 2017* ((Cth)) [Explanatory Memorandum](#)⁸ states that while the principles of natural justice and procedural fairness already apply to the President's handling of complaints at all stages, these legislative provisions were introduced to ensure the President's obligation in this regard is clear on the face of the AHRCA. The Explanatory Memorandum notes that this obligation concerns the fairness of procedures adopted by the President, rather than the fairness of any outcome and requires the President not to favour the complainant or respondent.

⁸ Page 24, paragraphs 93 & 94.

The Explanatory Memorandum also states that the requirement to act fairly includes offering reasonable assistance to complainants and respondents, but any such assistance is not intended to extend to the provision of legal advice.

4.4 Confidentiality

(a) Requirements on members of the Commission/Commission staff

Section [49](#) of the AHRCA provides that a person who is, or has been, a member of the Commission or a member of the Commission's staff shall not either directly or indirectly, except where it is necessary to do so for the purposes of the AHRCA:

- make a record or divulge or communicate to any person or to a court, information relating to the affairs of another person acquired by means of their office or employment
- make use of any such information
- produce to any person or in a court a document relating of the affairs of another person furnished for the purpose of the AHRCA.

Similar provisions are included in the RDA, SDA, DDA and ADA.⁹

The object of these provisions is to prohibit the disclosure of information obtained during the complaint process, to parties outside that process¹⁰. The Commission is also required to comply with the [Australian Privacy Principles](#) (APPs) as set out in Schedule 1 of the *Privacy Act 1988* (Cth).¹¹

The disclosure of information obtained in the complaint process is, however, authorised in certain circumstances.

⁹ Section [27F](#) of the RDA, section [112](#) of the SDA, section [127](#) of the DDA and section [60](#) of the ADA.

¹⁰ It is important to note that the general prohibitions on disclosing information relating to the affairs of a person do not apply where the disclosure is pursuant to an application under the [Freedom of Information Act 1982](#) (Cth).

¹¹ For example, APP 6 relates to the use and disclosure of personal information. This APP requires that where an agency such as the Commission holds personal information about an individual that was collected for a particular purpose, the agency must not use or disclose the information for another purpose except in specified circumstances. Such circumstances include where the person consents to the information being used or disclosed, or where the use or disclosure is required or authorised under Australian law or a court/tribunal order.

Section 49 and other similar sections authorise disclosure where it is necessary for the purposes of the AHRCA. Information obtained from one party may be disclosed to other parties where it is necessary for the effective conduct of the inquiry. In the most obvious case, requiring a respondent to answer allegations will necessarily require disclosure of the allegations to the respondent. This intended disclosure of information where necessary for the Commission's process is explained in written information provided to complainants and respondents.¹²

Additionally, section [46PS](#) of the AHRCA states that the Commission may provide the Federal Court or the Federal Circuit and Family Court of Australia with a written report on a terminated complaint. While this section specifically prevents the President from including information about '...anything said or done in the course of conciliation proceedings...', information obtained during the inquiry may be included in a report to the court.

Where a complainant or respondent claims confidentiality over information that appears necessary to convey to another party for the purposes of the inquiry, the issue should immediately be brought to management's attention. In some situations, information will not need to be conveyed where it is not considered relevant to the inquiry. Any decision not to convey information should, however, be made in consultation with a manager and the reason(s) for this recorded in a file note. Additionally, the information or documents should be clearly labelled/marked so it is apparent what information has been provided and what has been redacted.

(b) Requirements on others

While there is no general confidentiality requirement in the law that applies to parties to complaints, the Commission encourages parties to maintain confidentiality during the complaint process, including in the inquiry stage. This

¹² Complainants are advised in the Complaint Form and subsequent correspondence that it is the Commission's general practice to provide a copy of the complaint (excluding their contact details) to the person or organisation they are complaining about and, if necessary, others who have relevant information about the complaint. The standard initial written notification to respondents also states that it is the Commission's usual practice to provide the complainant with a copy of the information that is provided in response to the complaint.

is because the potential for successful conciliation may diminish where a party publicises a complaint or information related to a complaint.¹³

There are, however, some specific legislative requirements that apply to parties to complaints and also powers of the Commission that can be exercised in very particular circumstances. These are explained below.

(c) Conciliation

In relation to complaints of unlawful discrimination, section [46PKA](#) of the AHRCA states:

Evidence of anything said or done by a person in the course of the conciliation of a complaint in accordance with section 46PF is not admissible in any proceedings relating to the alleged acts, omissions or practices.

This legislative requirement and an associated exception are discussed in the Conciliation Practice Guidelines.

(d) Complaints alleging sexual harassment

Section [92](#) of the SDA states that where a complaint alleging sexual harassment is lodged with the Commission, a person:

...shall not make a record of, or divulge or communicate to any other person, any particulars of that complaint until:

- (a) the President has commenced to inquire into the act; or
- (ab) the complaint is withdrawn under section 46PG of the *Australian Human Rights Commission Act, 1986* (Cth); or
- (b) the President terminates the complaint under section 46PE or 46PH of the *Australian Human Rights Commission Act, 1986* (Cth).

¹³ In correspondence to complainants and respondents the Commission states: “..the documents the Commission passes between the parties, such as the complaint and any response to the complaint, are provided for the purposes of the Commission’s investigation and conciliation function. It is expected that parties will not publish or use the information apart from this purpose while the complaint is before the Commission.”

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Failure to comply is an offence of strict liability¹⁴ with a penalty of 10 penalty units.¹⁵

Those exempt from this provision include:

- a member of the Commission or a staff of the Commission acting in the performance of a duty under, or in connection with, the Act;
- a person communicating particulars to (i) the complainant or person on whose behalf the complaint was made or (ii) the respondent or legal representative or employer of a respondent; and
- a complainant, or a person on whose behalf the complaint has been made, communicating any particulars to a near relative, a person or body dealing with proceedings regarding the same matter, or a person from whom they are seeking or receiving professional treatment.

It is important to note that this section only applies to complaints of sexual harassment, which are often of a highly sensitive nature.

(e) Identity of a person

Section [14](#) of the AHRCA, which applies to all types of complaints, provides that the Commission may make directions prohibiting the disclosure of the identity of a person:

- making a complaint
- providing (or proposing to provide) information or a document
- giving (or proposing to give) evidence or submissions

where the Commission considers that the preservation of their anonymity “is necessary to protect the security of employment, the privacy or any human right of the person...” (section 14(2)). The President has frequently issued directions under section 14(2) to preserve the anonymity of a person in reports to the Attorney-General.¹⁶

Section 14(3) provides that the Commission may also make an order directing that any evidence or information or the content of any document shall not be

¹⁴ Strict liability offences are those which do not require proof of intention, knowledge, recklessness or negligence.

¹⁵ See section 92(1A) of the AHRCA.

¹⁶ See for example the report [BW v The Commonwealth of Australia \(DIBP\)\(2017\)](#).

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published or shall only be published in a certain manner and to persons that the Commission specifies.¹⁷ Section 14(5) sets out a range of factors that the Commission must have regard to when exercising the power at section 14(3).

Any request by a person for a direction or order under section 14 should be made in writing to the President. These requests are managed in conjunction with the Commission's Legal Section.

4.5 Timeframes for a complaint inquiry

The AHRCA does not specify a timeframe in which a complaint inquiry is to be completed. However, in relation to complaints of unlawful discrimination, section 46PF(10) states:

The President:

- (a) must, having regard to:
 - (i) the nature of the complaint; and
 - (ii) the needs of the complainant or complainants; and
 - (iii) the needs of the respondent:

act expeditiously in dealing with the complaint in accordance with this section; and
- (b) must use the President's best endeavours to finish dealing with the complaint within 12 months after the complaint was referred to the President under section 46PD.

In relation to complaints about breaches of human rights and discrimination (ILO), sections [20\(10\)](#) and [32\(5\)](#) require the Commission to act expeditiously in dealing with the complaint and to use the Commission's best endeavours to finish dealing with the complaint within 12 months after the complaint was made.

As noted in the Human Rights Legislation Amendment Bill 2017 [Explanatory Memorandum](#), most complaints are finalised by the Commission within a short period.¹⁸ However, the abovementioned sections provide a legislative imperative

¹⁷ Section 14(4) states that any direction under section 14(3) does not prevent a person from communicating a matter contained in the evidence or information, if the person has knowledge of the matter independent of the production of evidence or information to the Commission.

¹⁸ Page 25, paragraph 99.

to continue to ensure that proceedings are not unnecessarily protracted. An inquiry needs to be both effective and efficient and the time taken will depend on numerous factors including the complexity of the issues in the complaint and the capacity and cooperation of complainants and respondents.

To ensure timeliness of the process, it is important that officers regularly consult with their managers about the progress of complaints and seek advice where any unforeseen delays arise. For example, where there are significant delays in receiving requested information from one or more parties.

5 Stages in a complaint inquiry

5.1 The inquiry as part of the complaint process

The complaints that the Commission receive vary markedly in terms of subject matter, complexity, seriousness and the interests and needs of the parties. Therefore, the Commission aims to provide a complaint process which, while complying with legislative requirements and relevant legal principles, can be flexible, and adapt to the particular circumstances of a complaint and the needs of those involved.

For example, while in many cases a level of inquiry will be conducted prior to consideration of conciliation, some complaints may proceed to conciliation immediately following notification of the complaint. This may be because the parties indicate that they want to pursue this course of action or because the Commission has identified that early conciliation may be appropriate and the parties agree.

Early conciliation may be appropriate in a range of situations, including where:

- there is an ongoing employment or service relationship between the parties and some impending detriment (for example, where there is possible dismissal from employment or suspension from school).
- the parties are already aware of the issues and information provided with the complaint includes documents outlining the respondent's version of events.
- information provided with the complaint supports a prima facie case and the key facts are not in dispute.
- there is a factual dispute between the complainant and respondent and it is likely that neither can provide corroborating evidence to support their

version of events (for example, a complaint of sexual harassment where there were no witnesses to the alleged event).

Where attempted conciliation at an early stage is unsuccessful, further inquiry may be undertaken as appropriate.

The text below outlines the general stages in a complaint inquiry. However, as stated above, this should not be taken to dictate a linear or invariable course of action for all complaints.

5.2 Commencing an Inquiry

(a) When does an inquiry commence?

In relation to complaints of unlawful discrimination, where a complaint is accepted and referred to the President, the President is first required to attend to the grounds for termination of complaints in section [46PH](#) and consider whether to inquire into the complaint or terminate it ‘upfront’ without inquiry.¹⁹ The law states that in making this decision, the President may “inform himself or herself of such facts and circumstances as are necessary..”.²⁰

Section [46PF\(1\)\(c\)](#) states that if the President does not terminate the complaint at this time, the President must inquire into the complaint and attempt to conciliate the complaint.

Therefore, while the President can seek information to assist decision making about possible ‘upfront’ termination of a complaint, the law differentiates this initial information gathering from the process of conducting an inquiry into the complaint. An inquiry into the complaint can only be said to commence after the President has considered early termination and has not terminated the complaint. It is only after the inquiry has commenced that the other legislative requirements, such as the notification requirements explained at 5.3 below, apply.

In relation to complaints about breaches of human rights and discrimination (ILO), the law does not specify when a complaint inquiry commences. However,

¹⁹ As provided for in section [46PF\(1\)\(b\)](#) of the AHRCA.

²⁰ See section [46PF\(1A\)](#) of the AHRCA.

section 20(3) states that a decision not to inquire into a complaint must be made within two months of the date the complaint is made to the Commission.²¹

(b) Can two or more complaints be the subject of the same inquiry?

Section 46PF(2) of the AHRCA states:

If the President thinks that 2 or more complaints arise out of the same or substantially the same circumstances or subject, the President may hold a single inquiry, or conduct a single conciliation, in relation to those complaints.

A situation in which this provision may be relevant is where two or more complainants have made separate individual complaints about the same incident and against the same respondent(s), and the information indicates that a single inquiry would be more efficient and effective.

(c) Concurrent criminal proceedings

In relatively rare situations, a complainant may have sought to initiate criminal proceedings regarding the subject matter of their complaint to the Commission. For example, where an alleged act could constitute both sexual harassment and sexual assault.²² It will generally be inappropriate for the Commission to commence an administrative complaint inquiry where a criminal investigation about the same subject matter is underway. This is because of the need to ensure that the higher standard of evidence required for criminal prosecutions is not compromised by non-criminal investigators.²³

Where the initial information provided by a complainant indicates that they are also pursuing criminal proceedings, the complainant and the police should be contacted to ascertain the status of the criminal investigation. If a criminal investigation is underway or about to commence, any decision to inquire into the complaint would generally need to be deferred until the conclusion of the criminal investigation, unless the police advise otherwise. Where the police

²¹ Section 33 of the AHRCA states that this requirement in section 20(3) in relation to complaints about breaches of human rights also applies to complaints about alleged discrimination (ILO).

²² A person is able to pursue both criminal and civil proceedings in relation to the same subject matter as these actions are for different purposes. Criminal law proceedings are undertaken by the state with a view to prosecution and punishment of the alleged offender. Civil proceedings, for example proceedings for sexual harassment in the Federal Court or Federal Circuit and Family Court, are remedial in nature with the purpose of redressing alleged harm to the applicant.

²³ As the information that police obtain is to be presented in court, it is required to comply with rules of evidence and meet a higher standard of proof.

indicate that it is acceptable for the Commission to proceed with an inquiry, officers should ask for this to be confirmed in writing.

Where a criminal investigation has been finalised, the President may seek documents obtained or produced as part of the criminal investigation to assist with decision making in relation to the complaint.

(d) Amendment of complaints

Sections [46PF\(3\)](#) & (4) and section [46PA](#) of the AHRCA deal with the amendment of unlawful discrimination complaints. The AHRCA provides that a complaint of unlawful discrimination may be amended, with the leave of the President, after it has been accepted and/or during the course of an inquiry.²⁴ A complaint cannot be amended after it has been terminated.²⁵

A complainant may, at any time, amend the complaint and this includes to add or amend an allegation of unlawful discrimination.²⁶ A complainant or respondent may also amend a complaint to add a respondent.²⁷

In light of the legislative requirement for complaints to be in writing, a request to amend a complaint should also be in writing. Where the President grants leave, the parties must be advised in writing of the decision and provided with details of the accepted amendment (see also 5.3 (a) below).

There are no specific legislative provisions regarding amendment of complaints about breaches of human rights and discrimination (ILO). Therefore, requests to amend these types of complaints are dealt with in a similar manner to complaints of unlawful discrimination.

(e) Initial procedures

On allocation of a complaint for inquiry, officers should undertake the following initial steps.

1. Review the complaint and any supporting information that has been provided and ensure they understand what is alleged and what law(s) and section(s) of the law(s) appear relevant.

²⁴ Section 46PF(3) of the AHRCA.

²⁵ Section 46PF(4) of the AHRCA.

²⁶ Section 46PA of the AHRCA.

²⁷ Section 46PF(3) of the AHRCA.

2. Confirm who needs to be notified of the complaint and clarify/confirm their contact details.

Respondents, and others who are to be notified about a complaint, will be identified during the assessment stage of the complaint process. Contact details will also be obtained at this time where available from the information provided by the complainant or another public source.

Officers may be required to make an initial phone or email contact with a respondent entity in order to identify or confirm the appropriate person(s) to receive the written notification. Where this is necessary, care must be taken to ensure that identifying details of the complaint are not disclosed to anyone other than the person who will have responsibility for dealing with the complaint or a person who is required to be notified about the complaint.

In some situations, for example where a complaint is made against an employer and individual co-workers, contact details for named individuals may not be provided or available. In these cases, the written notification from the Commission will ask for the employer's assistance to contact the named individuals. (See further discussion at 5.3(b) below.)

3. Consider how the allegations may be supported or refuted and identify the key questions to be answered by the inquiry.
4. Identify the information that should be sought with reference to the purpose of the inquiry and identify the most appropriate source of this information.
5. Consider any special needs or risk factors that may influence how the inquiry should be conducted. For example, a complainant with a sensory disability may require communication in a particular format or where a complaint raises very sensitive allegations, a particular form of notification may be appropriate to ensure confidentiality.
6. Wherever possible, have an introductory conversation with the complainant to:
 - a. explain the complaint process and the role of the officer
 - b. confirm the Commission's understanding of the complaint
 - c. explain the law that appears relevant to the complaint

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- d. confirm that the complainant has no other action on foot in relation to the subject matter of the complaint²⁸
- e. clarify if the complainant has any other supporting information and if so, ask for this to be provided as soon as possible
- f. explain the next steps in the process
- g. clarify what the complainant is seeking to resolve the complaint
- h. answer any questions the complainant may have.

Where a complainant indicates they have additional information to support the allegation(s) in the complaint and it is readily available, efforts should be made to obtain the information prior to formally notifying a respondent about the complaint. This ensures that the nature and scope of a complaint is as clear as possible at the time of notification. However, where a complainant indicates this information is not readily available, the notification should not be delayed. Rather, the information should be requested in writing and then any relevant information subsequently provided to the respondent.

A concise summary of each telephone or in-person contact an officer has with a complainant, respondent or relevant third party throughout the complaint process, should be recorded in a file note. Each file note should note the date, the name of the complainant, the file number, and the officer's initials.

5.3 Notifying about a complaint and obtaining information

(a) Legislative requirements

(i) Complaints of unlawful discrimination

Section [46PF\(7\)](#) of the AHRCA requires that if the President has decided to inquire into a complaint, the President must:

- notify the respondent(s) about the complaint unless satisfied that notification would be likely to prejudice the safety of a person

²⁸ If there is other action on foot not previously disclosed to the Commission, the complaint may need to be reassessed in light of this information.

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- where a complaint is amended to add a respondent, notify that respondent about the complaint unless satisfied that notification would be likely to prejudice the safety of a person
- notify any person (other than a respondent) who is the subject of an adverse allegation²⁹ arising from the complaint, unless notification would be likely to prejudice the safety of a person or it is not practicable to do so
- notify any person about the complaint, where the President is of the opinion that the person is likely to be able to provide information relevant to the complaint.³⁰

Section 46PF(8) requires that:

- respondents be notified as soon as the President has decided to inquire into the complaint or where the complaint has been amended to include the respondent, as soon as the complaint has been amended and
- persons who are the subject of an adverse allegation be notified as soon as the President forms the opinion that the person is the subject of an adverse allegation.

A respondent is defined in section 3 of the AHRCA as ‘...the person or persons against whom the complaint is made’. Only a person who is named as a respondent can be the subject of an application to the court under section 46PO of the AHRCA.

The Human Rights Legislation Amendment Bill 2017 [Explanatory Memorandum](#)³¹ notes that while a person who has an adverse allegation made against them cannot be the subject of an application to the court, they may suffer reputational harm and therefore, are entitled to know about the allegations and have an opportunity to challenge them.

²⁹ Section 46PF(9) of the AHRCA defines an adverse allegation as an allegation ‘(a) that: (i) one or more acts have been done; or (ii) one or more omissions or practices have occurred; and (b) that those acts, omissions or practices are unlawful discrimination”

³⁰ Page 25, paragraph 98 of The Human Rights Legislation Amendment Bill 2017 [Explanatory Memorandum](#) states that such people may not necessarily be respondents to a complaint, but may have knowledge of conduct that is alleged in the complaint, or other relevant information.

³¹ Pages 24-25, paragraph 97.

(ii) Complaints about breaches of human rights and discrimination (ILO)

In contrast to the unlawful discrimination provisions, there is no specific legislative requirement to notify a respondent about a complaint at the commencement of an inquiry. There is, however, a legislative requirement in section 27 of the AHRCA to obtain submissions from a respondent.³² This section states that where it appears as a result of an inquiry that the act or practice is inconsistent with or contrary to any human right, the Commission cannot provide a report to the Attorney-General about the act or practice until the respondent has been given a reasonable opportunity to provide written or oral submissions. What constitutes a 'reasonable opportunity' will depend on the particulars of the matter and should take into account the complexity of the allegations and the circumstances of the respondent.

In accordance with principles of natural justice and procedural fairness, it is the Commission's usual practice to advise respondents about complaints and provide the opportunity to reply to the allegation(s) at the commencement of an inquiry. Where, as a result of the inquiry the President is of a preliminary view that there has been a breach of human rights or discrimination, the respondent is then provided with a further opportunity to provide submissions in accordance with section 27.

(b) Procedures

(i) Notification of respondents

It is the Commission's standard practice that respondents are notified in writing about a complaint and provided with a copy of the complaint or the sections of the complaint pertaining to them. Respondents will also be contacted by telephone, where appropriate.

In some situations, for example where a complaint is against an employer and also individual co-workers, the complainant may not be able to provide the Commission with personal contact details for the named individuals. In such cases, the Commission will notify the employer about the complaint and at the same time seek the employer's assistance to contact the individual respondents.

³² Section 33 of the AHRCA provides that the content of section 27 also applies to the Commission's functions relating to discrimination (ILO).

This assistance can take the form of the employer:

- conveying the notification to the individuals and confirming in writing that this has been done
- providing the Commission with contact details for the individuals or
- asking the individuals to contact the Commission.

Respondents are notified about complaints by email or by a letter, which is sent by email or post.

Regardless of the format used, written notifications generally:

- advise that a complaint has been received from the complainant and who the complaint is against
- provide a copy of the complaint (or relevant sections of the complaint) and in situations where the actual written complaint may be unclear, also provide a summary of the allegations
- provide copies of any relevant supporting information provided by the complainant
- identify the law/sections of the law that appear relevant to the complaint and provide links to, or hard copy versions of, these sections
- set out the role and authority of the President to conduct the inquiry
- summarise the complaint process and provide links to, or hard copy versions of, documents which outline the process in more detail
- provide a link to, or a hard copy version of, the Commission's Charter of Service
- advise that it is the Commission's usual practice to provide a copy of any written response to the complainant
- seek a specific reply from the respondent which may take the form of a request to contact the Commission to discuss the matter, with the option of also providing a written response,³³ or a request to answer specific questions and/or provide documents

³³ This approach may be appropriate for the type of matters set out in section 5.1 above.

- provide a timeframe for reply
- invite participation in conciliation
- provide the name and contact details of the officer who has carriage of the matter.

It is standard practice that a complainant's address, phone number and email address are redacted from the copy of the complaint that is sent to the respondent.

Officers should also consider if any other information in the complaint or supporting documents should be redacted before conveyance to the respondent. For example, personal information about a third party should not be conveyed to the respondent unless that information is directly relevant to the respondent's ability to understand and respond to the allegations. If an officer is unsure about what information should be included in material provided to the respondent, they should discuss the matter with their manager.

In some cases, a complaint may include allegations that do not fall within the scope of the Commission's jurisdiction and have not been accepted as part of the complaint. In these situations, the written notification to the respondent should make clear what subject matter is, and is not, part of the President's inquiry.

The wording of the correspondence to the respondent should demonstrate that an impartial position has been taken in the inquiry. Where there is nothing before the Commission to corroborate a complainant's allegations, the wording of questions to the respondent should not infer that the Commission has accepted the complainant's claims as fact.

It is the Commission's usual practice, where a written response to the complaint or documents have been requested, to ask respondents to reply within 14 or 21 days of the date of the letter. In some situations, a respondent may contact the Commission to seek an extension of time to respond and this may be appropriate where there is a valid reason for the request. In a situation where a respondent requests a significant extension of time to reply, the officer with carriage of the matter should bring the request to their manager's attention.

At the notification stage of the process, the officer with carriage of the matter should, wherever possible, also attempt to contact the respondent to provide information about the process and answer any questions. In some situations, a respondent may have a mistaken view that the Commission acts as an advocate for complainants. It is therefore important for officers take time to explain the President's complaint functions and their role as early as possible in the process.

(ii) Notification of persons subject to adverse allegations

It is the Commission's standard practice that a person who is the subject of an adverse allegation is notified about a complaint and provided with details of the allegation(s) against them. The notification should:

- advise that a complaint has been received from the complainant and who the complaint is against
- set out the legislative requirements for the President to notify a person who is the subject of an adverse allegation
- summarise the adverse allegation and/or provide a copy of relevant parts of the complaint
- note that the person is not named as a respondent to the complaint and therefore cannot be the subject of an application to the court
- confirm that the Commission is not asking them to reply to the allegations
- provide the name and contact details of the officer who has carriage of the matter.

In some situations, for example where a complaint is against an employer and an adverse allegation is made against a co-worker, personal contact details for the co-worker may not be available. In such cases, the Commission will notify the employer about the complaint and at the same time seek the employer's assistance to contact the person who is the subject of the adverse allegation.

(iii) Notification of complainants

At the time the respondent is notified in writing about the complaint, it is the Commission's standard practice to also advise the complainant in writing that the inquiry has commenced and that the Commission will be in contact again when the respondent's reply is received.

This correspondence to the complainant should also seek any additional supporting information that was not readily available on lodgement of the complaint.

Complainants should be provided with a reasonable timeframe for the provision of information, with reference to the nature of the information requested and other relevant circumstances.

5.4 Compelling the provision of information

Where a respondent has not replied to the Commission's request for information within the given time period and has not sought an extension of time to reply, the officer with carriage of the matter should contact the respondent by phone to clarify the reason(s).

Where a respondent refuses to provide information, or continues to not reply or engage with the Commission, the option of compelling the information should be considered. The legislative provisions and standard procedures regarding compulsion of information are summarised below.

(a) Legislative provisions

(i) Complaints of unlawful discrimination

Section [46PI](#) of the AHRCA provides that if the President has reason to believe that a person is capable of providing information or producing documents relevant to an inquiry:

The President may serve³⁴ a written notice on the person, requiring the person to do either or both of the following within a reasonable period specified in the notice, or on a reasonable date and at a reasonable time specified in the notice:

- (a) give the President a signed document containing relevant information required by the notice
- (b) produce to the President such relevant documents as are specified in the notice.³⁵

Section [46PM](#) of the AHRCA states that a person must not refuse or fail to give information or produce documents when required to do so under section 46PI, except if they have a reasonable excuse. A breach of this provision is unlawful with a penalty of 10 penalty units.³⁶ Case law indicates that what would constitute a reasonable excuse for non-compliance cannot be defined in advance but would extend to an excuse that a reasonable person would accept as

³⁴ Section 46PI(3) of the AHRCA provides further requirements in relation to serving a notice on a body corporate. Requirements relating to serving a document on a person are set out in section [28A](#) of the *Acts Interpretation Act, 1901* (Cth).

³⁵ Subsections 41PI(4) & (5) of the AHRCA set out the actions the President may take and must allow, where a document is produced under this section.

³⁶ As at 1 July 2017 one penalty unit is equivalent to \$210. See [Crimes Amendment \(Penalty Unit\) Act 2017](#) (Cth).

justifying non-compliance in the circumstances³⁷. Section 46PM(3) states that it is a reasonable excuse if the answer or the production of the document might tend to incriminate the individual or expose the individual to a penalty.

(ii) Complaints about breaches of human rights and discrimination (ILO)

Section 21 of the AHRCA sets out the President's power to obtain information and documents in an inquiry relating to a complaint about a breach of human rights and discrimination (ILO). These powers are generally similar to those explained above. However, in these matters the President can also require a person to attend to answer questions, administer an oath or affirmation to a person who is required to attend³⁸ and examine the person under oath or affirmation.³⁹ The consequences for failure to comply with these requirements are set out in section 23 of the AHRCA.

It is important to note that in relation to complaints about breaches of human rights and discrimination (ILO), there are limitations on the Commission's power to compel the production of information and documents and require attendance. Specifically, the power does not exist in the following circumstances:

- where the Attorney-General provides the Commission with a certificate certifying that providing such information or documentation would be contrary to the public interest (see sections 24 and 26) and
- in relation to complaints about discrimination (ILO), where the complaint relates to an act or practice done 'by or on behalf of a state⁴⁰ or an authority of a state, under a law of a state, or wholly or partly within a state'.⁴¹

³⁷ See for example Hely J in *Bank of Valletta PLC v National Crime Authority* (1999) ALR 45 at [36]ff.

³⁸ See section 21(5) of the AHRCA.

³⁹ See section 22 of the AHRCA. Section 21(6) provides that where a person is required to attend a particular place, they are entitled to be paid by the Commonwealth a reasonable sum for their attendance at that place. A 'reasonable sum' should be understood as an amount consistent with what a reasonable person would occur if attending in the same circumstances - See *Hall v Busst* (1960) 104 CLR 206.

⁴⁰ 'State' is defined in section 3 of the AHRCA to include the Australian Capital Territory and the Northern Territory.

⁴¹ This is because section 33(c) states that section 21, which is the human rights power to compel information and documents, applies to discrimination (ILO) matters with the exception that it does not apply to 'acts' or 'practices' as defined in section 30(1)(a)(b)(c) or (d). The definition of cts'

(b) Procedures

A matter should only be referred to the President to consider issuing a notice under sections 46PI or 21, where the material being sought is central to the President's decision making and reasonable efforts to obtain the material without compulsion have failed.

For any such notice to be valid, the required material must be relevant to the inquiry and the requested information and/or documents should be clearly identified in the written notice.

What constitutes a 'reasonable period' for production of the information will need to be assessed on a case-by-case basis with reference to the amount and nature of material that is requested.

A failure to comply with a notice should be followed up immediately by telephone to ascertain the reason(s). Where the person subject to the notice indicates that the required information will not be provided or refuses to engage with the Commission, the matter should be referred to the President for consideration of possible further action.

5.5 File review

On receipt of the respondent's reply to the written notification and any additional supporting information from the complainant, the officer should review all the information and recommend what the next step should be. Generally, the recommendation will be either that the complaint be considered for termination/ decline or the parties contacted to discuss conciliation.

In some situations, an officer may recommend limited further inquiry to assist the President's decision making. For example, this may be appropriate where there are gaps in the information provided or the information raises further questions or refers to the existence of other useful documents.

An officer's file review should be discussed with, and approved by, their manager.

and 'practices' in 30(1) includes acts done by or on behalf of a state or an authority of a state; under a law of a state; or wholly or partly within a state.

(a) Termination/decline

Where it appears that a ground of termination/decline is applicable, the officer should, in consultation with their manager or the President as required, draft a letter to the complainant that provides an assessment of the material before the Commission to date. The letter should:

- provide a copy of the respondent's reply, where this has been obtained (with personal contact details and irrelevant third-party information redacted, as appropriate), if this has not already been provided
- set out the possible ground(s) of termination/decline and explain the reason(s) why the President may consider terminating or declining the complaint
- set out the possible further action that may be taken in relation to complaints of unlawful discrimination
- invite the complainant to provide further supporting information within a given timeframe, if they wish to pursue the matter
- advise that if they do not respond to the letter in the allocated timeframe, the matter may be passed to the President to consider finalising the complaint under section(s) [20\(2\)\(b\)](#), [32\(3\)\(b\)](#) and/or [46PF\(5\)\(a\)](#) of the AHRCA on the basis that the President is satisfied that they do not wish to pursue the matter and
- invite the complainant to contact the officer if they have any questions.

Complainants may also be contacted by phone, where appropriate.

Where the complainant does not respond to the letter or indicates that they wish to withdraw the complaint, the matter may be referred to the President for closure under sections [20\(2\)\(b\)](#), [32\(3\)\(b\)](#), [46PF\(5\)\(a\)](#) or [46PG](#).

Where a complainant provides further submissions or information in support of the complaint, the officer should review the file again in consultation with their manager. Where the provided information does not change the initial assessment, the matter should be referred to the President to consider termination or decline. Where referral for termination or decline is no longer considered appropriate, the officer should commence conciliation discussions with the parties.

(b) Conciliation

Where there is no basis for a recommendation that the complaint be terminated or declined, the option of conciliation should be explored. This would include a discussion with the respondent about why the matter is not being referred to the President for termination/decline and discussions with both the complainant and respondent about the apparent strengths and weakness of the complaint at law.

In having such discussions, officers should remind the parties that they cannot provide legal advice. If a party is seeking legal advice, they may be referred to an appropriate legal or other advocacy service/organisation.

Guidance on facilitating a conciliation process is provided in [Conciliation Practice Guidelines](#).

Where a respondent and/or complainant is adamant that they have no interest in conciliation, the matter may be referred to the President to consider termination or decline under section(s) [20\(2\)\(c\)\(iib\)](#), [32 \(3\)\(c\)\(iib\)](#) and/or [46PH\(1B\)\(b\)](#) on the ground that the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation.

In relation to complaints of unlawful discrimination, officers should ensure, as far as possible, that parties are aware of the termination process, the possibility of a subsequent application to the Federal Court or Federal Circuit and Family Court and the potential for costs to be awarded in court, before the matter is passed to the President.

In relation to complaints about breaches of human rights and discrimination (ILO), where conciliation is not considered appropriate or is unsuccessful, a further level of inquiry may be conducted (see section 5.7 below).

5.6 Information from third parties

Due to the nature and limits of the President's inquiry functions, it is only in some very specific situations that the Commission will actively seek information from third parties. For example, as the President has no power to determine if unlawful discrimination has occurred, the focus of the inquiry is to obtain information to assist the President's consideration of whether a complaint should be terminated or conciliation attempted. Therefore, information from a third party would only be sought where it was deemed central to the President's decision making in that regard.

A circumstance in which this may occur is where information from another agency is central to the President's consideration of whether the subject matter

of a complaint has already been adequately dealt with or whether a possible alternative remedy is available to the complainant. It is noted that in the latter situation, the third-party information may be obtained without the need to disclose the details of the complaint before the Commission.

Situations in which the Commission actively seeks information from individual witnesses will be rare.⁴² However, in the course of an inquiry, complainants and respondents may provide the Commission with information from a witness. The value of such information will depend on many factors. Information from a witness will be most persuasive where:

- the person has provided the information in full knowledge of the context and of how the information may be used
- the person appears to be impartial in that they appear to have nothing to lose or gain from providing the information
- the person is able to provide information which is directly relevant to the issue(s) in dispute and
- the information is about what the person saw, heard or otherwise experienced first-hand.

Where information from a witness is provided by a complainant or respondent and the information appears directly relevant to the inquiry, it is important for officers to clarify that the witness is aware of the context in which the information is provided and how their information may be used. If it is not apparent that this has been explained to the witness, the officer should contact the person directly to confirm this.

5.7 Inquiry for determination

As previously discussed, in relation to complaints about breaches of human rights and discrimination (ILO) the President has the power to determine that an act or practice is, on the balance of probabilities, inconsistent with or contrary to any human right or constitutes discrimination.

It is the Commission's general practice to undertake the inquiry and conciliation of these complaints in a similar manner to complaints of unlawful discrimination.

⁴² It is only in relation to complaints about breaches of human rights and discrimination (ILO), that the President has a specific power to administer an oath and examine a person, including a witness – see section [22](#) of the AHRCA.

This means that the initial focus of the inquiry is to obtain sufficient information to assist the President consider if the complaint should be declined and where appropriate, assist possible conciliation of the complaint. Where conciliation does not appear to be appropriate or attempted conciliation is unsuccessful, the President may, if considered appropriate, undertake further inquiry with a view to making an administrative determination and possibly reporting the findings to the Attorney-General.

This further inquiry may include obtaining additional documents, obtaining information from witnesses and/or conducting an oral hearing. This additional level of inquiry is usually undertaken with the assistance of the Commission's Legal Section.