

## POLICY

### Alternative dispute resolution - conciliation

<b>Date approved</b>	21 February 2022
<b>Last reviewed</b>	N/A
<b>Next review</b>	21 February 2025
<b>Responsible officer</b>	Assistant Ombudsman, Executive Office

Policy statement .....	3
What can VO conciliate? .....	3
VO's approach to conciliation .....	4
Supporting the wellbeing of parties.....	4
Roles and participation in conciliation.....	5
Deciding if a matter is suitable for conciliation.....	6
Before conciliation.....	6
During conciliation .....	7
Conciliation outcomes.....	7
Documentation .....	8
Roles and Responsibilities .....	9
Document Management .....	10
Compliance.....	10
Document approval.....	10
Document review.....	10
APPENDIX A: Related documents.....	11

## POLICY STATEMENT

Part IIIAC of the *Ombudsman Act 1973* (Vic) enables the Ombudsman to engage in the alternative dispute resolution of complaints. Alternative dispute resolution includes conciliation and mediation (s 13E).

VO utilises only conciliation, as the Ombudsman assists and advises parties during the process to try and achieve resolution of the complaint. The Ombudsman must always be mindful that any conciliated resolution of a complaint is fair.

Conciliation is one tool that the Ombudsman may use to informally resolve a complaint before, during or after an enquiry or investigation process.

Consistent with the foundational principles of alternative dispute resolution, conciliation is a voluntary process.

Conciliation can be useful where:

- it may be detrimental for the parties to continue to disagree about the issues in dispute
- there is a notable imbalance of power between the parties
- there is an ongoing relationship between the complainant and the authority, and both parties may benefit from the process.

The conciliation process has regard to the relationship between the parties, and can be empowering for the complainant and enlightening for the authority, and vice versa. It can lead to more meaningful and more sustainable outcome for the parties.

## WHAT CAN VO CONCILIATE?

1. The Ombudsman may conciliate a complaint or part of a complaint before or during an enquiry (s 13A) or investigation under s 15B (s 13G(1)).
2. The Ombudsman is precluded from conciliating:
  - public interest complaints (s 13F(a))
  - matters referred by Parliament (s 13F(b))
  - complaints referred by the Independent Broad-based Anti-corruption Commission ('IBAC') which appear to involve corrupt conduct (s 13F(c)).
3. Matters referred to the VO by IBAC assessed by VO as not appearing to involve corrupt conduct can be conciliated. The VO tailors its approach to conciliating complaints referred by IBAC with regard to the specific circumstances.

## VO'S APPROACH TO CONCILIATION

4. Conciliators use expert judgement to guide, advise and assist the parties to achieve a resolution.
5. Conciliators are authorised by the Ombudsman to conciliate complaints (s 13G(1)). Two conciliators preside over a conciliation, to keep impartiality in check and for training and mentoring purposes.
6. The process of conciliation is tailored to suit the issues in dispute - as the Ombudsman 'sees fit'. It is conducted in private (s 13G(3)).
7. Conciliation is primarily conducted with all parties present, whether physically, online or by telephone, to support open communication with the aim of reaching a meaningful outcome.
8. The Ombudsman may use 'shuttle' conciliation if appropriate and necessary in the circumstances. Shuttle conciliation involves communication and proposals for resolution going via a conciliator, rather than directly between parties.

## SUPPORTING THE WELLBEING OF PARTIES

9. VO's activities can, and do, impact the personal and professional lives of complainants, disclosers, witnesses, subjects and public officers and members of the community. Recognising the potential powers of the office in the Ombudsman Act and the stress or anxiety that people may consequently experience, VO is committed to supporting the wellbeing of people engaged with its service.
10. VO takes a preventative and responsive approach to supporting the wellbeing of parties to a conciliation by:
  - assessing welfare risks and other assistance needs early in our engagement with parties
  - taking steps to mitigate the impact VO activities have on a person's welfare
  - actively responding to acute welfare concerns.
11. More detailed information about VO's approach to supporting the wellbeing of parties is provided for in VO's 'Supporting the wellbeing of VO complainants and witnesses' policy.

## ROLES AND PARTICIPATION IN CONCILIATION

12. Any staff member who is involved in the conciliation of a complaint cannot subsequently be involved in the conduct of an enquiry or investigation into the complaint, without the consent of the parties (s 13H(3)(b)).
13. In addition to conciliators, participants will typically include complainant/s and a representative/s from the relevant authority.
14. The principal officer of an authority is not required to assist in the conciliation but may do so voluntarily (s 13G(8)).
15. The principal officer of an authority may nominate a representative to participate in a conciliation on their behalf. The representative of the principal officer is expected to understand the factual issues and the authority's processes relevant to the complaint, so as to participate fully and effectively and facilitate tailored and timely resolution. The representative is also expected to have appropriate authority to make decisions during the conciliation.
16. Complainants may be accompanied by a support person who is endorsed by VO prior to the conciliation. The VO recognises that support persons can improve the fairness, efficiency and effectiveness of conciliation.
17. Any requests from participants to be joined in a conciliation by a support person or a legal representative will be considered on a case-by-case basis. It is preferable that lawyers do not participate in the process as this can discourage direct communication between parties in dispute.
18. Children under the age of 16, but over the age of 10 may participate in conciliation if they are accompanied by a parent, guardian or an appropriate independent person (s 13G(5)). An appropriate independent person is endorsed by VO prior to the conciliation.
19. Any of the parties may withdraw from a conciliation at any time (s 13G(4)).
20. A conciliator may terminate a conciliation at any time (s 13G(7)).

## **DECIDING IF A MATTER IS SUITABLE FOR CONCILIATION**

21. The VO decides on a case-by-case basis which complaints may be suitable for conciliation.
22. Complaints suitable for conciliation must suggest a reasonable prospect of being informally resolved. For example, the parties should show demonstrable good faith and a resolution mindset.
23. Ombudsman officers are mindful of the conciliation option at all times in the enquiry or investigation process (preferably earlier), and may explore with the parties what resolution and remedial outcomes they wish to achieve.
24. The VO may decide to conciliate a whole complaint, or only certain issues raised in the complaint.
25. Conciliators and the parties must be alert to the legal requirement that any information revealed during conciliation:
  - is not admissible in a court or tribunal, where the subject matter of the proceedings relates to the subject matter of the complaint (s 13G(9))
  - cannot be used as part of the enquiry or investigation into the complaint without the consent of the parties (s 13H(3)(a)). Consent should be obtained in writing.

## **BEFORE CONCILIATION**

26. The decision to attempt resolution of a complaint via conciliation is appropriately documented and case managed in Resolve.
27. Parties provide information and/or documentation relating to the complaint to the VO prior to the conciliation. This assists in retaining the separation of the enquiry/investigation process and the conciliation process – both of which have their own unique confidentiality requirements.
28. The relevant conciliator be involved in an intake discussion with relevant VO officers and each party prior to conciliation.
29. Each party will be provided written confirmation of the decision to conciliate a complaint and relevant rules around the conciliation.

## DURING CONCILIATION

30. Once the parties are present, conciliators confirm the rules regarding how the conciliation will be conducted, including roles and responsibilities and expectations of respectful communication. Parties should agree to the rules prior to the conciliation continuing.
31. Parties are reminded that information provided, or anything done by a party during a conciliation meeting is subject to unique confidentiality requirements (s 13G(9) and 13H(3)(a)).
32. Conciliations are not video, or audio recorded but a written record of what transpired during the conciliation is documented by conciliators.
33. The record of what occurred during conciliation is stored in a manner that reflects the unique confidentiality requirements that apply to any information provided, or anything done, by a party during conciliation (s 13G(9) and 13H(3)(a)).
34. Conciliators facilitate and direct the conciliation process, the objective of which is to informally resolve the complaint in a safe, private environment.
35. Conciliators treat conciliation as a self-contained process and cannot use enquiry or investigative powers within conciliation process to obtain information (s 13G(6)).

## CONCILIATION OUTCOMES

36. If parties agree that the complaint has been resolved by conciliation, conciliation is completed and the complaint, or part of the complaint, may be considered to be resolved informally (s 13H(1)).
37. Complaints that have been successfully conciliated will not be considered further by the Ombudsman, unless there are exceptional circumstances. In this case, the Ombudsman may consider whether further enquiry or investigation, or further conciliation is appropriate.
38. If some, but not all issues have been successfully conciliated, the Ombudsman may consider whether it is appropriate to enquire into, or investigate, the issues that remain unresolved.

39. Conciliation that does not include the parties' agreement that the complaint is resolved is terminated by conciliators.
40. Following the termination of the conciliation, conciliators determine whether the complaint is:
- considered as resolved informally by the conciliation (s 13H(1))
  - not further dealt with by the Ombudsman (s 15 or 15A)
  - dealt with as if conciliation had not been attempted (s 13H(2)), in accordance with VO's Complaints and Approaches, Early resolution, Enquiries and Investigations policies.
41. If the Ombudsman considers it in the public interest to investigate issues which have been discussed in conciliation, then the consent of all parties who participated in the conciliation must be obtained to use information acquired during conciliation and for conciliators to contribute to the ensuing investigation (s 13H(3)).

## DOCUMENTATION

42. All activities during a conciliation will be documented in the Resolve case management system.



## ROLES AND RESPONSIBILITIES

Role	Responsibility
<b>Principal Officer - ADR</b>	<i>Owner</i> – Accountable for maintaining policy drafting, reviews and authorisation from the Executive.
<b>Principal Legal Adviser</b>	<i>Legal compliance</i> – Responsible for ensuring compatibility with the <i>Charter of Human Rights and Responsibilities 2006</i> (Vic) and compliance with other legislation under which VO operates.
<b>Executive Committee</b>	<i>Authorisation</i> – Authorises policies and significant amendments.
<b>All staff, contractors, third parties</b>	<i>Implementation</i> – Responsible for acting in compliance with the policy, standards, procedures and associated documents.

## **DOCUMENT MANAGEMENT**

### **Compliance**

VO maintains a compliance management system. Compliance with this policy, including use of information and systems, is subject to regular monitoring and reporting to the Executive Committee.

### **Document approval**

This document was approved by the Executive Committee on 21 February 2022.

### **Document review**

This document is due for review upon major changes or three years from the date of the last review.

## APPENDIX A: Related documents

Title	Location
<i>Ombudsman Act 1973</i> (Vic)	Available at <a href="http://www.legislation.vic.gov.au/">http://www.legislation.vic.gov.au/</a>