Understanding the conciliation process

External review guide for parties

Introduction

Section 71(1) of the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) provides that:

> *(1) The Commissioner may, at any stage, suspend inquiries, investigations or other proceedings so that efforts can be made to resolve the complaint by conciliation or negotiations between the parties.*
>
> *(2) The Commissioner may give such directions and do such other things as the Commissioner thinks fit in order to facilitate the resolution of a complaint by negotiation or conciliation.*

The Commissioner may nominate a person to act as a conciliator, and that person may require the parties to a complaint to attend a compulsory conference. However they cannot require the production of documents or the provision of information.

Conciliation Process

Conciliation is a confidential dispute resolution process facilitated by a neutral third party. Its purpose is to clarify the issues in dispute, consider possible options for settlement, endeavour to resolve differences by negotiation and agreement, without recourse to litigation or a final administrative review decision.

The conciliator's role is to:

- manage the conference in accordance with a recognised dispute resolution process
- be impartial and non-judgmental
- ensure the parties have the opportunity to participate fully in discussions
- assist the parties to identify issues in dispute and options for resolution
- facilitate resolution of the dispute.

The conciliator does not:

- take sides
- advocate for one party or another
- give legal advice to the parties
- decide who is right or wrong or who is at fault.

The parties' roles are to:

- attend the conference, and be prepared to participate fully
- have authority to settle

- respect any ground rules
- participate in good faith.

The conciliation process is confidential to the extent permitted by law. Nothing said in the conference can bind either party, nor should it be disclosed outside the conference to third parties. This is to ensure frank and open discussion can take place without the risk of prejudicing any future actions by either party.

The conciliator usually, but not always, will have some knowledge of the subject matter in dispute. This is not essential but may assist the process as the conciliator may be able to give feedback to each party about the relative strengths of their cases or their likelihood of success if the matter proceeds.

What will happen at the Conference?

The conciliation process is flexible and can be adapted to the specific needs of the parties and the subject matter. However a broad outline of a typical conciliation process appears below:

1. The conciliator will introduce him or herself and outline the process, establish ground rules if required and introduce the parties, clarifying how the parties wish to be addressed.
2. Usually the complainant will be asked to speak first and make a short statement about the issues as they see them. This may be reading from a prepared statement, or direct speech.
3. Other party/ies will be asked to listen in silence, take notes if necessary for follow up and avoid interrupting or reacting.
4. The agency representative will make a similar statement of the issues as they see them.
5. The conciliator will summarise the issues from both perspectives and check to ensure the views have been accurately summarised.
6. The conciliator will invite the parties to identify options for possible resolution. Note that options are not agreements.
7. Discussion between the parties will be encouraged, to clarify issues, explore possible options and propose solutions.
8. Sometimes the conciliator will split the conference, that is, have confidential private sessions with the parties separately. Nothing disclosed in these private sessions will be conveyed to the other party.
9. If resolution is possible, discussion may turn to agreements or heads of agreement.
10. The heads of agreement or agreement would usually be committed to writing and signed by each party.

What will parties be expected to do in a conciliation conference?

Parties will be expected to attend in person (or by teleconference if access or mobility is an issue) with a one page dot point summary of their issues.

They will be expected to ensure they can be available for the full scheduled duration of the conference, participate in discussions openly, honestly and in good faith and maintain courtesy and respectful communication with the conciliator and other parties.

They will also respect confidentiality to the extent that the law allows, and agree that nothing said in the conciliation conference, unless confirmed in an agreement at the end of the conference, can be disclosed to anyone else or used against a party.

Agencies will need to ensure that they are represented by someone with authority to make decisions on the agency's behalf.

The conference is to focus on the key issues relating to the complaint, options for narrowing the issues in dispute and for possible resolution of the complaint.

Parties will not be expected to go through the disputed documents or address their case in detail.

If the dispute does not resolve

Sometimes disputes do not resolve. This does not mean that the conciliation conference was a waste of time or that the parties have failed in some way. The conference might still succeed in narrowing the issues in dispute, clarifying certain matters for the parties, or providing a chance to reflect, that may result in resolution some time after the conference.

The best results occur when the parties are open to possible solutions, participate fully and in good faith, and genuinely seek to resolve their dispute.

If the dispute does not resolve by conciliation, it will proceed to be dealt with formally by way of external review and, if necessary, published decision.

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