Breach of standard claims

Agency guide

[Breach of standard claims 1](#_Toc43204286)

[Agency guide 1](#_Toc43204287)

[Overview 2](#_Toc43204288)

[Informing employees 9](#_Toc43204289)

[Lodging a claim 13](#_Toc43204290)

[Processing and referral 16](#_Toc43204291)

[Conciliation 19](#_Toc43204292)

[Review and report 23](#_Toc43204293)

[Determination and relief 25](#_Toc43204294)

This publication can be copied in whole or part with due acknowledgement. It is on [www.wa.gov.au](http://www.wa.gov.au). Copies are available in alternative formats on request.

Disclaimer: While every attempt is made to ensure the accuracy, currency and reliability of the information in this publication, changes in circumstances over time may impact on the veracity of the information.

Overview

# Legislative framework

The [*Public Sector Management Act 1994*](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a647.html) (PSM Act) establishes the role of the Public Sector Commissioner. The Commissioner’s functions include:

* establishing [Public Sector Standards in Human Resource Management](https://www.wa.gov.au/organisation/public-sector-commission/public-sector-standards-human-resource-management)
* administering and monitoring compliance with the [Public Sector Management (Breaches of Public Sector Standards) Regulations 2005](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s37434.html) to provide relief for a breach of the standards.

The standards and regulations form the legislative framework for breach of standard claims.

# An agency guide

This guide provides information to assist agencies to deal with breach of standard claims in accordance with the regulations, and work towards a constructive resolution of claims where possible.

|  |  |
| --- | --- |
| Terms | |
| Agency | The public sector body or employing authority as referred to in the regulations |
| Breach claim | A claim of a breach of standard made in accordance with the regulations |
| Commission | Public Sector Commission |
| Commissioner | Public Sector Commissioner |
| Conciliation and Review Officer (CRO) | A person appointed by the Commissioner to conciliate or review a breach claim. This role can be undertaken by a Commission employee |
| PSM Act | *Public Sector Management Act 1994* |
| Standards | The public sector standards in human resource management established by the Commissioner under the provisions of the PSM Act |
| Regulations | Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 |

# The Public Sector Standards in Human Resource Management

Public sector agencies must comply with the standards when they make human resource decisions. There are six standards:

1. Employment (applies when filling a vacancy by way of recruitment, selection and appointment, secondment, transfer and temporary deployment (acting))
2. Performance Management
3. Grievance Resolution
4. Redeployment
5. Termination
6. Discipline.

Under the regulations, breach of standard claims can only be made for decisions relating to a standard other than the Discipline Standard, because other legislation applies.

The standards are based on principles rather than rules. This allows public sector agencies to design human resource practices that are consistent with the relevant standard and suit their operational requirements.

# Regulations governing breach of standard claims

The regulations came into effect on 1 September 2005 and provide a legislative base for the handling of a breach of standard claim. The regulations were amended in February 2011 to facilitate changes to the standards and the release of Commissioner’s Instruction No. 2 – Filling a public sector vacancy. The regulations were further amended in March 2014 to reflect changes to the regulatory role of the Commissioner.

The regulations provide for:

* people to lodge a breach of standard claim if they believe a standard has been breached and they have been adversely affected by that breach
* the impartial handling of the claim, resolution where possible and, where resolution does not occur, an independent determination by the Commissioner on whether there has been a breach of a standard
* the Commissioner to recommend, and in some circumstances direct, what relief, if any, is to be provided when a breach of a standard is determined.

## Agencies covered by the regulations

All Western Australian public sector agencies are covered by the regulations governing breach of standard claims, except for those agencies named in Schedule 1 of the PSM Act. These organisations are not covered by the standards or the Code of Ethics. Breach of standard claims cannot be made about the decisions of Schedule 1 agencies.

## Underlying principles of the regulations

The regulations are designed to be practical and flexible. They allow for cooperation, in the sense that parties can actively engage in the process when the claim is lodged in the agency, have any issues conciliated or where required, have a claim reviewed by the Commission.

The key underlying principles are to provide:

### Balance

A balance between the agency’s need to manage human resource processes in the context of their operational requirements and the need for people to seek relief where human resource processes covered by the standards do not comply with the standards.

### Clarification of the issues

Claimants and agencies have the opportunity to clarify the issues related to the claim after the claim is forwarded to the Commissioner.

### Choices for both parties

When a claim is lodged, the agency must make reasonable attempts to resolve the claim. A claimant may consider that an explanation or other action resolves their claim and may withdraw their claim in writing.

### Opportunity for resolution

If the claimant and agency agree to participate in conciliation, an impartial person will undertake the conciliation process. This may be a Commission employee or an external Conciliation and Review Officer (CRO) appointed by the Commissioner. The person undertaking conciliation works with the parties to resolve the claim. Conciliation can facilitate a better understanding of the claim by both parties and a fair and prompt resolution.

### Procedural fairness

If conciliation is not an option, or an agreement is not reached during conciliation, the claim is reviewed. The review may be undertaken by a Commission employee or an external CRO may be appointed. Both parties have an opportunity during the review process to provide information relevant to the claim.

### Impartial and open decisions

The Commissioner makes an independent determination on whether there has been a breach of a standard and notifies both parties, giving reasons for the decision. This approach helps both parties to understand the decision.

### An independent view of the relief that should be provided

If there has been a breach of a standard, the Commissioner may recommend relief, or may direct that relief, or no relief, be provided by the agency to the claimant. This approach ensures both the agency and the claimant have someone independent to make the determination about the appropriate relief.

# Breach of standard claims

A breach of standard claim allows a person to seek relief if they believe a decision by an agency has breached a standard and they have been adversely affected by that breach. A breach of standard claim can be made once an agency has completed a process and made a ‘reviewable decision’ to which a standard applies.

| An overview of the breach of standard claim process | |
| --- | --- |
| **Informing employees** | The agency must take reasonable steps to inform employees about the standards and regulations. Agencies are also to notify relevant persons for some employment decisions and completed grievance processes, in accordance with the regulations. |
| **Lodging a claim** | A person may lodge a breach of standard claim by writing to the agency concerned, setting out the reasons why they consider the standard has been breached and how they have been adversely affected by that breach (see template ‘Form for breach claim lodgement’). Timeframes apply. The Commissioner may approve the lodgement of a claim outside these timeframes where the Commissioner is satisfied there are reasonable grounds for making a claim. |
| **Processing and referral** | The agency must make reasonable attempts to resolve the claim when it is lodged. If a written withdrawal from the claimant is not received within 15 working days, the agency must forward the claim to the Commissioner. |
| **Declining claims** | The regulations allow the Commissioner to decline to deal with claims for reasons including: the claim is vexatious, frivolous or lacks substance; the claim relates to matters with which the Commissioner cannot deal; or where the claim is solely about competitive merit. |
| **Conciliation and review** | If the claim has been accepted and both parties agree, the claim is conciliated to encourage a prompt and mutually agreeable resolution.  If conciliation is not possible, the claim is reviewed and a report provided to the Commissioner. Further attempts to conciliate may be made at any time (including during the review phase) until the Commissioner makes a determination. |
| **Determination** | The Commissioner determines whether there has been a breach of the standard. The Commissioner advises the agency and the claimant of the determination and gives reasons for that determination. If the Commissioner determines that the agency has breached the standard the Commissioner may recommend relief (if any), or may direct that relief or no relief be given by the agency to the claimant. The Commissioner cannot recommend or direct that the relief to be given by the agency is the appointment of the claimant or another person, but may direct that a specified person is not to be appointed. |
| **Relief** | Within 10 working days of the Commissioner’s determination and/ or relief recommendations, the agency advises the Commissioner and the claimant of its proposed action. The agency also advises the Commissioner 10 working days after it has implemented relief.  Where the agency does not follow the recommendation within the period specified in the notice, or proposes action the Commissioner does not consider appropriate, the Commissioner may direct the agency to give the claimant relief specified in the direction. |
| **Reporting** | Under the regulations, the Commissioner may report to the relevant Minister or to Parliament if the Commissioner determines an agency has not given the claimant the directed relief and/or the agency has not complied with any of the regulations. |

# Possible outcomes of breach of standard claims

Claims are finalised when one of the following occurs:

* the claimant withdraws their claim in writing with the agency or the Commissioner
* the Commissioner declines to deal with a claim or decides to stop dealing with a claim
* the Commissioner determines a claim is lapsed. This occurs where the Commissioner considers that the claimant is not participating in the process
* both the claimant and the nominated officer from the agency sign a conciliation agreement
* the claim is reviewed and the Commissioner determines no breach has occurred
* the Commissioner determines that a breach has occurred and recommends or directs that relief, or no relief, is to be provided.

## Process for withdrawing claims

A claimant may withdraw a claim by giving written notice to the agency with which the claim was lodged, or the Commissioner. This may happen at any time before the Commissioner makes the final determination.

If an agency receives a withdrawal after a claim has been referred to the Commissioner, the agency will need to notify the Commissioner in writing that the claim has been withdrawn. If the Commissioner receives a withdrawal from a claimant then the Commissioner will provide written notice to the agency, advising the claimant has withdrawn their claim.

The breach of standard claim is concluded when the Commissioner receives notice of the withdrawal.

## Process for declining claims

If the Commissioner decides not to deal with a claim, the Commissioner will advise the claimant and the agency where the claim was lodged in writing of the decision not to deal with the claim and the reasons for this.

## Process for lapsing claims

In some circumstances, the Commissioner may form the view that the claimant is not participating in the process. This may occur if they are not contactable or not responding to requests for information by the Commission employee.

If this happens, the Commissioner will write to the claimant giving them 5 working days to respond. If there is no response the Commissioner will advise the claimant and the agency that the claim has lapsed and the breach of standard claim is concluded.

# Tips for reducing breach of standard claims

|  |
| --- |
| Clearly communicate policies and practices |
| Agencies should take steps to communicate to employees, and in the case of employment decisions, to applicants, the policies and practices that apply to the decision making process. If there are unavoidable delays or changes to the process, agencies should inform relevant parties. |

|  |
| --- |
| Document decisions |
| Agencies should ensure clear and concise records are made about the process undertaken and reasons for decisions made. Records made should allow an independent person to understand:   * how and why a decision was made * what management strategies were taken to effectively manage any conflicts of interest * whether the requirements of the relevant standard have been met * reasons for delays or deviation from usual practices, where applicable. |

|  |
| --- |
| Give reasons for decisions to affected people |
| When agencies make final decisions relating to a standard, they should inform the people affected by the decision of the reasons why.  Agencies should provide the name and contact details of a suitable person who can explain the process and the decision. This person should be reasonably available during any specified breach period to provide an explanation or feedback, if sought. |

# Tips for reducing breach of the Employment Standard claims

|  |
| --- |
| Provide quality feedback for selection decisions |
| If applicants understand the reasons behind an agency’s decision and believe the process has been reasonable and fair, they may be less likely to lodge a breach of standard claim.  Agencies may reduce their number of breach claims by:   * ensuring the person providing feedback is available during the specified time period and understands the process used to make the decision * providing honest, objective and constructive comments about an applicant’s assessment * providing information that may assist an applicant to understand their strengths and areas for further development against the position’s requirements. |

# Tips for reducing breach of the Grievance Resolution Standard claims

|  |
| --- |
| Inform people about grievance decisions |
| Failing to keep people informed about the progress of their grievance process and its outcome can result in an increased likelihood of receiving breach of standard claims. It is important that agencies:   * keep the parties informed as grievances move through various stages of the process * inform the parties of any delays and the reasons for those delays * advise the parties when the grievance process has been completed, the outcome of the process (even if the decision is to take no action) and the reasons for that decision. |

Informing employees

The regulations require agencies to take reasonable steps to ensure information regarding the standards and regulations is available to employees.

This section provides information about:

* informing employees about the standards and regulations
* notifying relevant people when a decision is made about employment processes and grievances.

|  |
| --- |
| Tips for informing employees |
| It is up to the agency to decide how to make information available to employees about the standards and regulations. Some examples are outlined below.   * Placing information on the agency’s intranet. * Providing a link from the agency’s intranet to [WA.gov.au](https://www.wa.gov.au/organisation/public-sector-commission/breach-of-standard-claims). * Providing a link from the agency’s intranet to the [regulations](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s37434.html). * Including information in induction programs and training sessions for management and staff. * Including information in policy documents that are accessible to employees. * Circulating the Commission’s claimant guide to employees and job applicants and placing the guides in areas accessible to employees, for example, lunchrooms and reception areas. The guides can be downloaded from [WA.gov.au](https://www.wa.gov.au/organisation/public-sector-commission/breach-of-standard-claims). |

# Requirements to notify employees of certain decisions

## Employment Standard

The regulations establish when notification must be provided for decisions relating to the Employment Standard.

Notifiable employment decisions include:

* appointments to fill a vacancy of more than 6 months
* appointments to fill a vacancy of 6 months or less if the vacancy was advertised on the basis that the period of the appointment could later be extended to more than 6 months or made permanent
* selection to form part of an appointment pool.

While an employee may be able to lodge a breach of standard claim about other decisions that relate to the Employment Standard, they are not ‘notifiable’. Notifiable employment decisions do not include transfers. Acting appointments are not notifiable unless the vacancy was advertised on the basis that the person appointed could later become permanent. See the table on the next page of this guide for information about when notification is required for decisions relating to the Employment Standard.

## Grievance Resolution Standard

While the standard does not define ‘grievance’, the term is to be given its ordinary meaning, being a complaint or concern about a workplace matter which the employee wants resolved.

An agency policy or procedure cannot override the standard. This means that how an agency manages a particular matter will not inform whether the Grievance Resolution standard applies. If any agency undertakes additional processes as a result of the grievance, those processes will be subject to any applicable standards (for example, Discipline or Performance Management).

Notification must be provided to employees in accordance with the regulations at completion of the grievance process. This includes where an agency decides that no action will be taken. People to be notified include the employee who made the grievance and any employee who was the subject of the grievance.

Where an agency has procedures for moving from an informal to a formal grievance process, the reviewable decision to which the standard applies is the decision that ends the formal grievance process.

## Other standards

There is no requirement to notify employees about decisions covered by the other standards.

However, as discussed above, the regulations require reasonable steps are taken to inform employees of the standards and the operation and effect of the regulations. It is suggested that agencies communicate the reasons for these decisions to the relevant parties. This may assist the affected person(s) to understand the process undertaken and how the agency made the decision. It may also reduce the number of breach of standard claims being made.

| Human resource transactions: The Employment Standard applies to all of the following transactions | What advertising can be undertaken? |
| --- | --- |
| A vacancy is advertised on the basis it is for more than 6 months or for 6 months or less if there is the possibility of an extension or permanency.  The purpose of advertising is to recruit to the vacancy. | General or targeted advertising |
| A vacancy is advertised on the basis it is for 6 months or less with no possibility of extension.  The purpose of advertising is to recruit to the vacancy. | General or targeted advertising |
| An expression of interest is circulated for an acting opportunity for 6 months or less, with no possibility of an extension or permanency.  The purpose of advertising is to provide existing employees with an internal acting opportunity. | Expression of interest (internal) |
| An expression of interest is circulated for an acting opportunity for more than 6 months, with no possibility of permanency.  The purpose of advertising is to provide existing employees with an internal acting opportunity. | Expression of interest (internal) |
| Quarantined advertising is an invitation for permanent employees to apply for particular vacancies at their substantive level.  This is used to minimise the potential for displacement of existing permanent Public Sector employees which may result from a restructure or amalgamation. | Internal  An invitation for existing permanent employees to apply at level |
| A vacancy is not advertised and is filled by an individual assessment of merit in accordance with Part 4 Commissioner’s Instruction No. 2 - Filling a public sector vacancy. Applies where one person only is assessed and appointed to a vacancy. | Not applicable |
| A transfer occurs for a permanent employee at level, with no right of return. | No advertising required |
| A secondment or acting opportunity is advertised on the basis it could later become permanent. | General or targeted advertising |
| A fixed term contract opportunity is advertised on the basis it could later become permanent. | General or targeted advertising  For the permanent appointment of a fixed term contract employee to a public service vacancy (employed under Part 3 of the PSM Act) the vacancy must have been advertised on [Jobs WA](https://www.wa.gov.au/service/employment/human-resources-development/find-job-government) (s.64.4 of the Act). |

| Do breach claim rights apply? | Is notification of breach claim rights required? | Does the breach claim stop the decision from being implemented? |
| --- | --- | --- |
| Yes | Notification is provided to unsuccessful applicants | Yes |
| No | Not applicable | Not applicable |
| No | Not applicable | Not applicable |
| Yes | No | No |
| No | No | No |
| No | Not applicable | Not applicable |
| Only where the employee has had a transfer request declined, or has been told they will be transferred at the initiative of the agency. | No | Yes |
| Yes | Yes. Notification is provided to unsuccessful applicants. | Yes |
| Yes | Yes. Notification is provided to unsuccessful applicants. | Yes |

|  |  |
| --- | --- |
| Checklist of information to be included when notifying people of certain decisions | |
| When providing notification for an employment decision (under the Employment Standard) or a reviewable decision (under the Grievance Resolution Standard), the following information should be included: | |
|  | a person may lodge a claim if they believe the agency has breached a standard and they have been adversely affected by that breach |
|  | the claim should be made in writing and outline how the standard has been breached and how they have been adversely affected by the breach |
|  | the claimant should include relevant information or documents to support their claim |
|  | where in the agency the claim is to be lodged (eg. HR) |
|  | who in the agency they should contact if they wish to seek further information about the process undertaken or the breach claim process |
|  | the date by which a claim is to be lodged with the agency (this depends on the process conducted). This should be a minimum of 4\* or 10 working days after the date the claimant could reasonably be expected to have received the notification. |
| For notifiable employment decisions under the Employment Standard a minimum of 4 working days is required. The agency may consider more than 4 working days when setting the lodgement period. For grievances, the prescribed lodgement period is 10 working days. Agencies should consider reasonable postal delivery times when setting a lodgement date for breach of standard claims. | |

Lodging a claim

Decisions made by agencies that complete a process to which a standard applies are ‘reviewable decisions’ for the purposes of the regulations. They may enable a person or employee to lodge a breach of standard claim against the process used by an agency to make that decision.

This section provides information about:

* reviewable decisions
* key aspects of claim lodgement, including eligibility and prescribed lodgement timeframes
* the Commissioner’s discretion to approve the lodgement of claims after the prescribed lodgement period or before a reviewable decision is made.

# Eligibility to lodge a claim

When a reviewable decision is made, a person may lodge a claim if they believe the agency has breached the standard and they have been adversely affected by that breach.

## Limits on eligibility to lodge a claim

There are some limitations on the right to lodge a breach of standard claim.

For some employment decisions, a person must have been an unsuccessful applicant to lodge a claim.

In the following situations, a person is **not eligible** to lodge a claim.

* Claims cannot be lodged for appointments to fill vacancies of 6 months or less, unless the advertisement indicated there was a possibility of permanency or an extension beyond 6 months.
* An unsuccessful applicant can lodge a breach claim about the process to select people to form part of an appointment pool. However, a successful applicant to an appointment pool cannot lodge a claim about decisions to appoint people to fill a vacancy from the pool.
* The breach of standard claim process does not apply to the Discipline Standard because other legislation applies.
* Employees who are registered as redeployees under the Public Sector Management (Redeployment and Redundancy) Regulations 1994 cannot lodge claims against the Redeployment Standard. However, people can lodge a claim before they are registered as a redeployee or transferred to another position.

# Prescribed timeframes for lodgement

The regulations prescribe timeframes for lodging a claim.

|  |  |
| --- | --- |
| Decisions requiring notification under the Employment Standard | The date given in the notification will be a minimum of 4 working days. The agency may provide a longer lodgement period. |
| Decisions requiring notification under the Grievance Resolution Standard | The date given in the notification will be 10 working days after it is reasonable to expect the notification would be received. |
| All other reviewable decisions to which standards apply | 10 working days after a person becomes aware of the reviewable decision, or  30 working days after the decision was made, whichever period expires first. |

# Commissioner’s discretion to approve late or early claims

The Commissioner can approve the lodgement of claims after the prescribed lodgement period or before a reviewable decision is made.

The person who is seeking to lodge the claim must make an application to the Commissioner.

Approval is at the Commissioner’s discretion and will depend on the Commissioner being satisfied there are reasonable grounds for making the claim. Generally, the Commissioner will provide the agency with an opportunity to comment before giving approval.

If approval is given to lodge a late or early claim, the Commissioner will provide approval to lodge a claim within a specified period and will give a copy of this approval to the agency.

Processing and referral

When an agency receives a claim it should check whether the person is eligible to lodge the claim, has included all the required information and has lodged the claim in the required timeframe.

This section provides information about:

* key actions and options for agencies when a claim is lodged
* the impact of claims on human resource transactions
* attempting a resolution
* referring the claim to the Commission, including information to include when forwarding
* the Commission’s assessment of the claim and appointment of a Commission employee (Conciliation and Review Officer) by the Commissioner.

# Receiving a claim

Once an agency receives a claim it should check to see whether:

* the person is eligible to lodge a claim

If there are any doubts about eligibility, the claim should be referred to the Commission for assessment.

* the required information has been included

The agency may seek further information from the claimant if necessary.

* the claim has been lodged

Within the required timeframe.

# Actions delayed by a breach claim

## Effect of claims on transfer decisions

Once a breach of standard claim has been lodged against the Employment Standard in relation to a transfer, the transfer cannot proceed until the claim has been finalised.

## Effect of claims on appointments

Under the regulations, some notifiable employment decisions cannot proceed until any breach of standard claims are finalised. The table on pages 16 and 17 of this guide provides further details of the processes covered by the Employment Standard where actions cannot proceed until the claim is finalised.

## Effect of claims on appointments from an appointment pool

The agency may only appoint people from the pool, provided sufficient vacancies are available to allow people who have made a claim to have access to relief if their claim is upheld.

For appointment pools, retaining some appropriate vacancies will allow relief for a claimant if it is required but will still allow the agency to use the pool for operational effectiveness.

However, given the Commissioner can direct that a person not be appointed it is suggested agencies consult with the Commission employee managing the relevant claim before proceeding to select from the appointment pool.

## Actions that can proceed despite the lodgement of a claim

For other standards, the agency may choose to proceed with the relevant actions despite the lodgement of a breach of standard claim.

## Approval for appointment or transfer to proceed during a claim

The Commissioner may give written approval to the agency to appoint or transfer despite the claim having been made. This approval is at the Commissioner’s discretion.

If the agency is seeking to proceed with an appointment or transfer, a written submission must be made to the Commissioner that sets out the reasons why the employing authority should make the proposed appointment or give effect to the proposed transfer.

## Options for addressing a breach claim

When a breach of standard claim is lodged, an agency:

* should endeavour to resolve the claim with the claimant by providing an explanation of why and how the decision was made or proposing action to resolve the matter
* must forward the claim to the Commission if it is not resolved (withdrawn in writing by the claimant) within 15 working days.

## Annual reporting data to be maintained

If the claimant considers the claim is resolved, they can withdraw their claim in writing to the agency where lodged. Claims withdrawn within 15 working days after lodgement do not need to referred to the Commission. However, records of all claims, including those withdrawn, need to be made to assist the agency’s annual reporting requirements to the Commission.

If the claim is not withdrawn in writing within 15 working days after lodgement, the claim must be forwarded to the Commission.

## Referring a claim to the Commission and informing the claimant

If the agency does not resolve the claim it must be forwarded to the Commission no later than 15 working days after the claim was lodged.

Once the claim is forwarded to the Commission, the agency must write to the claimant informing them the claim has been sent.

|  |  |
| --- | --- |
| Checklist: information to be forwarded to the Commission with the claim | |
| Agencies may use the [referral of breach of standard claim form](https://www.wa.gov.au/organisation/public-sector-commission/breach-of-standard-claims) to assist them to refer claims to the Commission. When referring a claim to the Commission, the agency should provide: | |
|  | the notification letter to the claimant (if applicable) |
|  | the claim and any documentation provided by the claimant |
|  | the date the claim was lodged |
|  | the contact details of the claimant |
|  | the name and contact details of the person who is to act on behalf of the agency (the nominated officer) |
|  | an outline of the agency’s view of the claim and any attempts at resolution |
|  | any information or document the agency considers relevant to the claim. |

# Initial action by the Commission

## Assessment of the claim

When the claim is referred to the Commission it will be assessed to ensure it is within jurisdiction and the reviewable decision is covered by one of the standards.

The claim will also be assessed to establish its basis and whether it is a claim the Commissioner will accept. In certain circumstances, the Commissioner can decline to deal with a claim, including where the claim:

* does not relate to a matter the Commissioner has the power to deal with
* is considered vexatious, frivolous or to lack substance
* is solely about the competitive merit of the claimant, or
* the subject matter of the claim is being dealt with, or has already been dealt with adequately by the Commissioner or another entity.

If the Commissioner decides not to deal with the claim, or to stop dealing with the claim, the Commissioner will inform the person in writing of the decision and the reason for the decision.

## Options for dealing with the claim

The regulations provide for claims to be dealt with through conciliation or review.

If the claimant and the agency agree to participate in conciliation, the Commission employee will attempt to conciliate the claim. Both parties must agree to participate for conciliation to occur.

Where either party does not wish to participate in conciliation, or conciliation has failed to resolve the claim, the claim will be reviewed.

Conciliation

Conciliation is a process where an impartial Commission employee, or an external Conciliation and Review Officer (CRO) appointed by the Commissioner, encourages the nominated officer and claimant to discuss the claim with a view to resolving it. Conciliation assists both parties to identify the parts of the claim that are in dispute and any possible areas of agreement.

This section provides information about:

* the role of the parties including the:
  + Commission employee or Conciliation and Review Officer
  + nominated officer from the agency
  + claimant
  + support person for the claimant
  + person who can assist the nominated officer with the conciliation process.
* the conciliation process.

# Obtaining agreement to conciliate

When referring a claim to the Commission the agency may indicate whether they are willing to participate in conciliation.

If the agency is willing to participate, the Commission employee managing the claim will discuss the option of conciliation with the claimant. If both parties agree, conciliation will be arranged.

If an initial attempt to conciliate is not successful, further attempts to conciliate may occur at any time prior to the Commissioner’s final determination of the claim.

Conciliation will only proceed where both parties agree.

|  |
| --- |
| The benefits of conciliation |
| With the assistance of an impartial person, conciliation can provide the opportunity for:   * frank and open discussions which may lead to an early resolution of the claim * both parties to gain an understanding about each other’s perspective on the claim * an agreement to be reached that is acceptable to both parties * preserving / improving the relationship between the parties, particularly if there is an ongoing employment relationship. |

If conciliation does not result in agreement, the claim proceeds to review.

# Roles of the parties in conciliation

The conciliation process involves the:

* Commission employee or Conciliation and Review Officer
* nominated officer acting on behalf of the agency
* claimant
* support person for the claimant
* person who can assist the nominated officer with the conciliation process.

It is generally in the interests of both the agency and claimant to attempt to resolve the claim by conciliation.

## Commission employee (Conciliation and Review Officer)

Commission employees are impartial and do not act on behalf of any party. In conciliation, the Commission employee’s role is to:

* assist the claimant and nominated officer identify the matters of the claim as they relate to the standard involved
* provide independent advice on the application of the standards and regulations
* encourage the parties to reach an agreement.

If the Commission employee believes one party is not participating in the process, or agreement is unlikely to be reached within a reasonable timeframe, they may recommend to the Commissioner that conciliation is discontinued and the claim is reviewed.

## Nominated officer and the claimant

To assist the resolution of the claim, the nominated officer and claimant should:

* be available for conciliation
* listen to each other and talk about the claim
* keep an open mind and be prepared to consider a range of options that may resolve the claim.

## Representation

Neither party is entitled to be represented (by a lawyer or advocate) unless the CRO or Commission employee decides the process cannot proceed effectively without representation.

## Support persons

During conciliation, claimants are entitled to be accompanied by a support person of their choosing (for example, a family member, friend, union officer or delegate or colleague), unless the Commission employee decides otherwise. This may be on the grounds that the process cannot proceed effectively with the person being accompanied by the support person.

The role of the claimant’s support person is only to support the claimant. They do not act on behalf of a claimant by putting forward their point of view or any counter arguments, nor do they act as a witness to events surrounding the claim. However, they may assist the claimant to clarify matters or may prompt the claimant to ask questions.

The nominated officer is also entitled to be accompanied by another person who can provide relevant information if needed, unless the Commission employee decides otherwise. This may be on the grounds that the process cannot proceed effectively with the nominated officer being accompanied by the other person. While this person may provide information to assist the nominated officer during conciliation, only the nominated officer is entitled to act for the agency.

The Commission employee should be given the names of any support persons or persons assisting the nominated officer before the conciliation process starts.

|  |  |
| --- | --- |
| Checklist: preparing for conciliation | |
| Agencies can prepare for conciliation by: | |
|  | allocating a nominated officer who has the authority to make decisions during the conciliation process about how the claim may be resolved |
|  | allocating a nominated officer who understands and is able to talk about the claim, and will genuinely consider options for agreement |
|  | ensuring the nominated officer is prepared for the conciliation process by having a copy of the claim and other relevant documents and information they may wish to refer to |
|  | identifying if the nominated officer needs to be accompanied by another officer who can assist in the conciliation process. |

# The conciliation process

## Invitation to participate in conciliation

If both parties agree to conciliate the Commission employee will:

* discuss the most appropriate way to conduct conciliation
* arrange where and when conciliation will take place
* clarify any particular requirements that the nominated officer or claimant may have, such as communication aids or access requirements
* advise both parties of the conciliation arrangements.

## Requests for information

Prior to conciliation, the Commission employee may seek information about the claim and request relevant documents.

This may include:

* contacting the claimant to clarify the claim as it relates to the standard. Any changes to the claim as a result of this clarification may be referred to the agency for their information prior to conciliation
* seeking clarification of any information provided by the agency
* obtaining any documentation from the claimant or the agency considered relevant. The agency and claimant must comply with any request for documentation.

## Conducting conciliation

The conciliation process may involve a meeting between the Commission employee, the claimant, the nominated officer, another officer and a support person.

Conciliation may be conducted in a number of ways, including:

* face-to-face with all parties involved
* by teleconference or videoconference
* having one-to-one meetings or telephone conversations with the claimant/support person and nominated officer/offer assisting separately.

## Discussion and agreement

A Commission employee may encourage open and frank discussion by:

* asking the claimant to talk about their claim
* asking the nominated officer to respond to the claim
* reminding parties that anything that is confidential in conciliation cannot be later used in a review process
* encouraging discussion about what the claimant and the nominated officer believe would resolve the claim and facilitating an agreement where possible.

## Documenting a conciliated agreement

If agreement is reached through conciliation, the Commission employee will:

* set out the terms of the agreement in writing
* arrange for both parties and the Commission employee to sign the agreement
* give a copy of the agreement to the nominated officer, the claimant and the Commissioner.

A signed agreement concludes the claim.

## Proceeding to review

Where either the claimant or nominated officer from the agency does not agree to conciliation, or the conciliation process does not lead to an agreement, the claim will proceed to review.

Review and report

In a review, the Commission employee identifies the facts and circumstances that gave rise to the claim as they relate to the relevant standard. They may consider any relevant documentation and, where necessary, interview people who they consider have information relevant to the claim.

Following the review, the Commission employee prepares a report. The Commissioner considers this report and any other documents or information the Commissioner obtains and considers relevant.

This section provides information about:

* the review process and what may be required
* the role of a Commission employee.

# Proceeding to review

Claims can proceed to review when:

* one or both parties do not agree to conciliate
* agreement is not reached at conciliation
* one or both parties are not fully participating in conciliation
* the Commission employee considers an agreement by conciliation is unlikely to be reached within a reasonable timeframe.

# Clarifying the claim

Reviews of breach of standard claims are undertaken by a Commission employee or an external Conciliation and Review Officer (CRO) appointed by the Commissioner.

If the review is undertaken by an external CRO the Commissioner will determine the remuneration and terms and conditions of appointment.

The Commission employee will contact the claimant to clarify the claim as it relates to the relevant standard.

# Agency and claimant given opportunity to respond to claim

The agency and claimant will be given the opportunity to make any submissions to the Commission employee in writing or otherwise in support of or in response to the claim.

# Information provided in conciliation not used in a review

Any information or documents obtained during conciliation are considered confidential because they were provided for the purpose of achieving an agreement. They will not be used during the review. For example, agency admissions of concern about a process or suggested wording of an apology provided during conciliation cannot be used as evidence in the review.

# Conducting the review

The Commission employee will gather the relevant facts and circumstances and provide a report to the Commissioner.

The Commission employee cannot make a finding about whether there has been a breach of a standard. This determination is reserved for the Commissioner.

The review process includes:

* requesting the claimant and the agency to provide information relevant to the claim
* interviewing any person the Commission employee considers may have information relevant to the claim
* considering information and documents provided by the claimant or the employing authority and any other information and documents that the Commission employee considers relevant to the claim
* preparing a report setting out the facts and circumstances that gave rise to the claim and explaining their relevance to the standard. This report is considered by the Commissioner when making a determination.

|  |
| --- |
| Tips for preparing for review interviews |
| Agencies can assist with the review process by ensuring nominated officers and employees being interviewed:   * are available to discuss the claim with the Commission employee * bring copies of any relevant documents to refer to during the interview. |

# Report to the Commissioner

When the Commission employee completes the review, they provide a report to the Commissioner. This report:

* contains the facts and circumstances that gave rise to the claim
* explains the relevance of those facts and circumstances to the standard to which the claim relates
* outlines suggestions for relief proposed by the parties, if any, for consideration by the Commissioner if a breach is found
* states whether or not the claimant and the agency have complied with the regulations and the facts and circumstances that gave rise to that opinion.

Only the Commissioner can determine whether a standard has been breached.

Determination and relief

The Commissioner determines whether or not a standard has been breached by considering the facts and circumstances in the report and any other information or document that the Commissioner obtains and considers relevant to the claim.

If a breach is found the Commissioner recommends relief, if any, and in some instances directs the relief to be provided by the agency to the claimant.

This section provides information about:

* the Commissioner’s role to determine a breach and to recommend and direct relief
* an agency’s role once a determination is made
* the Commissioner’s reporting role.

# Possible determinations by the Commissioner

Considering all the facts and circumstances, the Commissioner may determine that:

* a claim is dismissed.

Where no breach is determined, the Commissioner writes to the claimant and the agency informing them the claim is dismissed and giving reasons for the determination. The Commissioner may choose to raise areas for practice improvement with the agency, where no breach is determined. This finalises the claim.

* a breach has occurred.

If the Commissioner determines there has been a breach of the standard, the Commissioner writes to the claimant and the agency advising of the breach and giving reasons for that determination. The Commissioner will also recommend or direct what relief, if any, is to be provided to the claimant.

# Relief

The relief, either recommended or directed by the Commissioner, will vary depending on the circumstances. Relief may include:

* recommencing a process either from the start or from the point where the breach occurred
* changes to the agency’s policies or practices to minimise breaches of the standard in the future.

If the Commissioner directs relief, the Commissioner will specify the period by which this relief is to be provided.

The Commissioner cannot recommend or direct that the claimant be appointed to a position as relief for a breach determination. The Commissioner may, however, direct that a specified person is not to be appointed.

# Agency response to Commissioner’s recommendations

The agency must consider the Commissioner’s recommendation for relief and provide a response to the Commissioner within 10 working days of receiving that recommendation.

The response from the agency must provide one of the following outcomes:

* the agency intends to give the recommended relief to the claimant
* the agency intends to give the claimant alternative relief. The response to the Commissioner must specify what that relief will be and give reasons for providing the alternative relief
* the agency does not intend to give any relief and the reasons why they do not intend to give relief.

# Agency informs Commissioner when relief is implemented

Once the employing authority has implemented relief, they must inform the Commissioner within 10 working days that the relief has been given to claimant.

Employing authority must inform the Commissioner within 10 working days of implementation of relief.

# Response to Commissioner’s direction

The Commissioner may direct relief if the agency does not follow a recommendation within the specified period, or if the agency proposes relief the Commissioner does not consider appropriate.

# Reporting to relevant Minister or Parliament

Under the regulations, the Commissioner may report the following to the relevant Minister or Parliament:

* if an agency does not give the relief directed by the Commissioner
* if an agency has not complied with any of the regulations.

# Agency records and annual reporting to the Commission

Agencies should maintain appropriate records of breach claims lodged with the agency. These include claims that are subsequently withdrawn in writing within the 15 working days after lodgement, so they were not referred to the Commission. The Commission will report on any claims that it has received that are subsequently withdrawn.

Agencies are to maintain records for annual reporting.