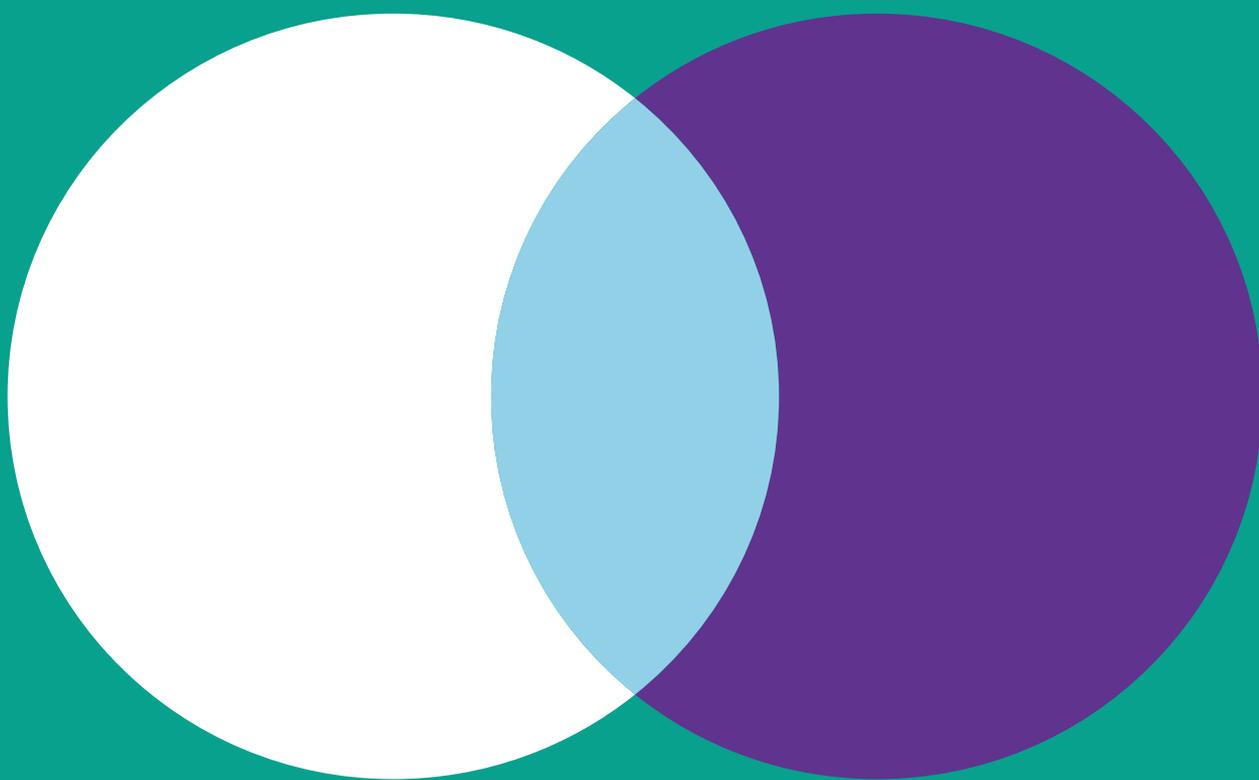


Dispute Resolution Function

Guidance Note



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Overview



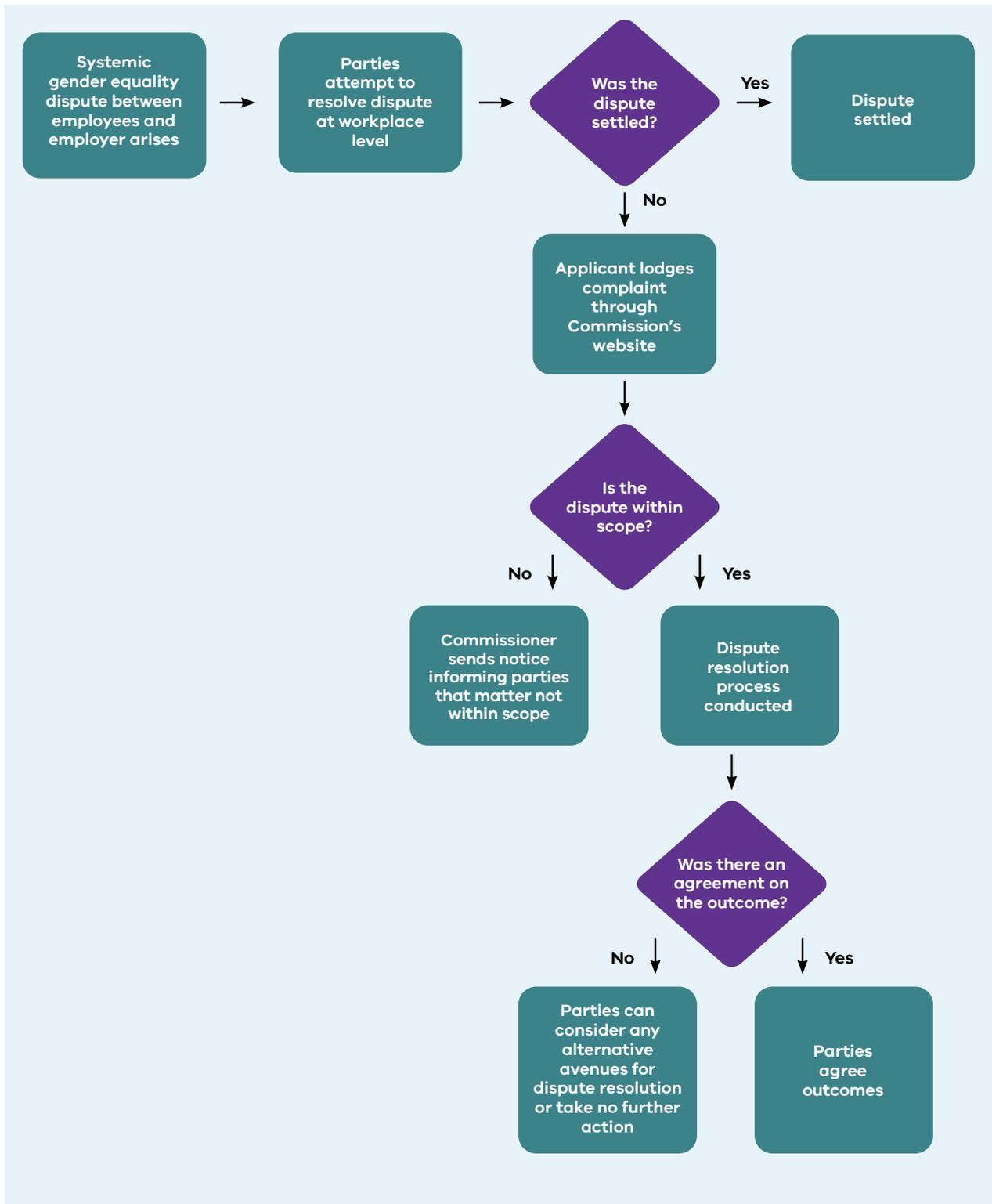
The *Gender Equality Act 2020* (the Act) establishes the office of Public Sector Gender Equality Commissioner (Commissioner) to promote and advance the objects of the Act.

The Act provides the Commissioner with certain powers to help Victorian public sector employers and local councils deal with disputes about systemic gender equality issues. Disputes can only be referred to the Commissioner in accordance with

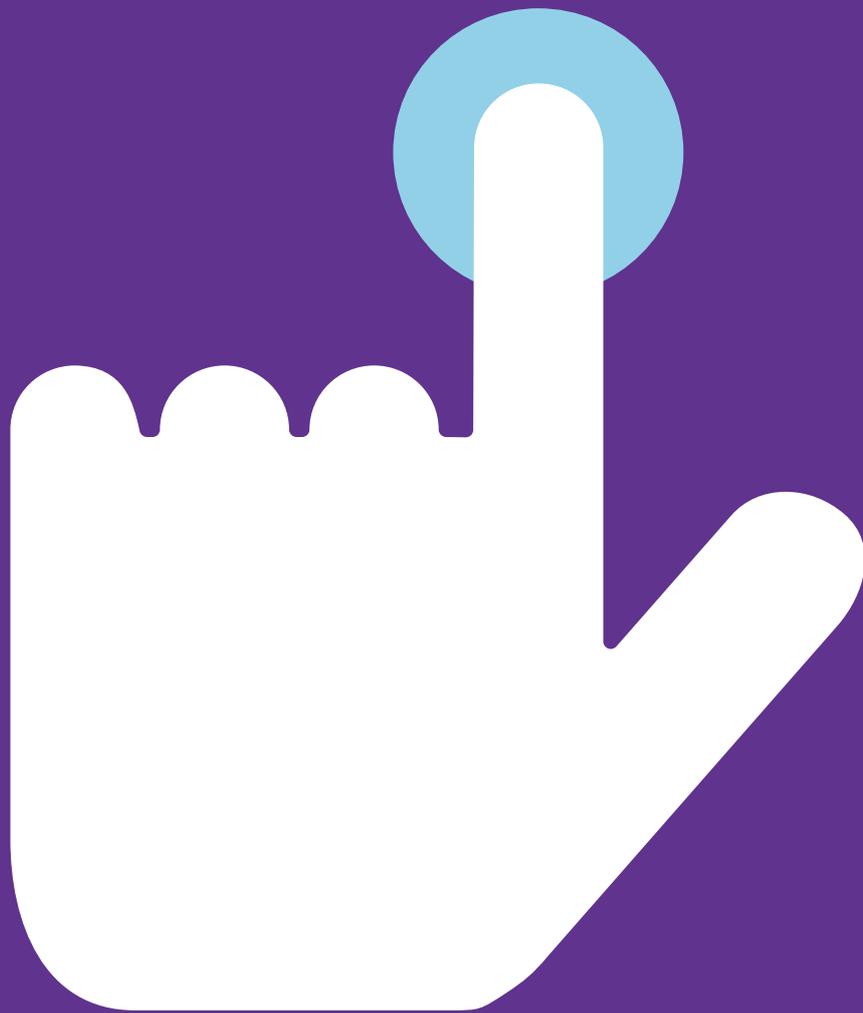
a term of an enterprise agreement or workplace determination. These powers commenced operation on 31 March 2021.

This document has been developed in accordance with section 41 of the Act. It specifically outlines the Commissioner's dispute resolution functions and provides further guidance on the manner in which disputes should be dealt with under the Act.

Figure 1: The process for resolving systemic gender equality issues



Application



When can a matter be referred to the Commissioner?

A systemic gender equality dispute may be referred to the Commissioner if:

- ▶ The Designated Body is covered by a relevant enterprise agreement or workplace determination, and
- ▶ The class or group of employees subject to the dispute are covered by that enterprise agreement or workplace determination, and
- ▶ That enterprise agreement or workplace determination contains a provision which expressly enables the Commissioner's involvement.

A Designated Body means the following:

- ▶ A public sector body,
- ▶ Court Services Victoria,
- ▶ The Office of Public Prosecutions, or
- ▶ A defined entity prescribed by the regulations.

Note that the definition of Designated Body means that a broader range of entities (e.g. entities with less than 50 employees) are captured by the Commissioner's dispute resolution function than those otherwise subject to the Act.

What type of disputes can be referred to the Commissioner?

Disputes that may be referred to the Commissioner

A dispute may be raised with the Commissioner if it is an issue which arises under an enterprise agreement or workplace determination that covers a Designated Body and relates to a systemic gender equality issue.

A systemic gender equality issue means an issue of a systemic nature which relates to one or more of the workplace gender equality indicators in the Act and adversely affects a class or group of employees. The workplace gender equality indicators are:

- ▶ Gender composition of all levels of the workforce
- ▶ Gender composition of governing bodies
- ▶ Equal remuneration for work of equal or comparable value across all levels of the workforce, irrespective of gender
- ▶ Sexual harassment in the workplace
- ▶ Recruitment and promotion practices in the workplace
- ▶ Availability and utilisation of terms, conditions and practices relating to family violence leave, flexible working arrangements and working arrangements supporting workers with family or caring responsibilities
- ▶ Gendered segregation within the workplace
- ▶ Any other prescribed matters



To be a systemic gender equality issue, the issue must extend beyond an individual dispute about pay and conditions, or individual allegations of inappropriate workplace behaviour. A systemic gender equality issue will extend to a class or group of employees and demonstrate a pattern of behaviour, operational practice or workplace culture within an employer, that leads to systemic disparity or a culture of inappropriate behaviour based on gender. **Table 1** below provides some examples of issues which may constitute a systemic gender equality issue.

Table 1: Examples of systemic gender equality issues

The following may be examples of systemic gender equality issues:

- ▶ practices or policies that disproportionately promote people of a certain gender to specific roles
- ▶ rostering practices that have unequal impact on people of different genders or with caring responsibilities
- ▶ pay inequality based on gender
- ▶ unreasonable limitations on flexible working arrangements that have unequal impact on people of different genders or with caring responsibilities
- ▶ inadequate organisational policies or practices to deal with allegations of sexual harassment
- ▶ gender inequality in types of employment, for example disproportionate gender representation in fixed term or casual positions

Disputes that cannot be referred to the Commissioner

Individual disputes about the application of an enterprise agreement to your employment, grievances over individual decisions made by the employer, or investigations of instances of inappropriate workplace behaviour cannot be dealt with by the Commissioner. **Table 2** provides some examples of issues which cannot be dealt with by the Commissioner.

Table 2: Examples of issues which cannot be dealt with by the Commissioner

The following are examples of issues which cannot be dealt with by the Commissioner's dispute resolution function:

- ▶ differences in ordinary rates of pay between individual employees based on experience, performance and progression, classification or duties
- ▶ disputes of an individual nature about the correct application of the enterprise agreement
- ▶ application of pro-rata entitlements for part-time employees
- ▶ individual allegations of sexual harassment, misconduct or inappropriate workplace behaviours against another employee or manager
- ▶ individual disputes about a recruitment process
- ▶ individual disparity in starting salaries between employees of different genders for employees performing non-comparable roles or with different qualifications, experience and role expectations

Employees should seek the assistance of their immediate manager, People and Culture/Human Resources area or relevant union (if they are a member) for assistance with individual issues or disputes in the first instance.

Depending on the nature of the individual matter, employees may also seek the assistance of the Victorian Equal Opportunity and Human Rights Commission (www.humanrights.vic.gov.au), the Australian Human Rights Commission (www.humanrights.gov.au) and/or the Fair Work Commission (www.fwc.gov.au).

Who can refer a matter to the Commissioner?

An enterprise agreement or workplace determination will detail who can refer a dispute about systemic gender inequality to the Commissioner.

Generally, a dispute may be referred to the Commissioner by:

- ▶ a class or group of employees who are adversely affected by a systemic gender equality issue
- ▶ a union covered by the enterprise agreement or workplace determination
- ▶ an employer covered by the enterprise agreement or workplace determination

An applicant may have certain protections under the Fair Work Act 2009 as a result of referring a dispute to the Commissioner under their relevant enterprise agreement or industrial instrument. Further information regarding an applicant's legal rights can be found on the Fair Work Commission's website (www.fwc.gov.au).

What steps should I take before raising a matter with the Commissioner for dispute resolution?

The enterprise agreement or workplace determination covering the Designated Body will detail the steps, if any, an applicant must have taken to resolve their dispute at the local level prior to seeking the Commissioner's assistance.

If a party lodges a dispute with the Commissioner without taking the steps described in the enterprise agreement or workplace determination, the Commissioner will not be able to consider the complaint.

Process for employees / employee representatives

Generally, it is recommended that prior to referring the matter to the Commissioner, a class or group of employees who are adversely affected by a systemic gender equality issue, or a union covered by the enterprise agreement or workplace determination, at a minimum have:

1. Written to the employer and provided sufficient detail of the alleged systemic gender inequality issue for the employer to make a reasonable assessment of the issue

A written submission to the employer should include the following:

- ▶ The members of the class or group of employees who are the subject of the dispute;
 - ▶ The adverse impact on the class or group;
 - ▶ The systemic gender equality issue or issue(s) to which the dispute relates;
 - ▶ The factual basis for the dispute; and
 - ▶ The proposed resolution of the dispute.
2. Given the employer a reasonable opportunity to investigate and respond
 3. Genuinely considered any reasonable proposals put forward by the employer to resolve the dispute

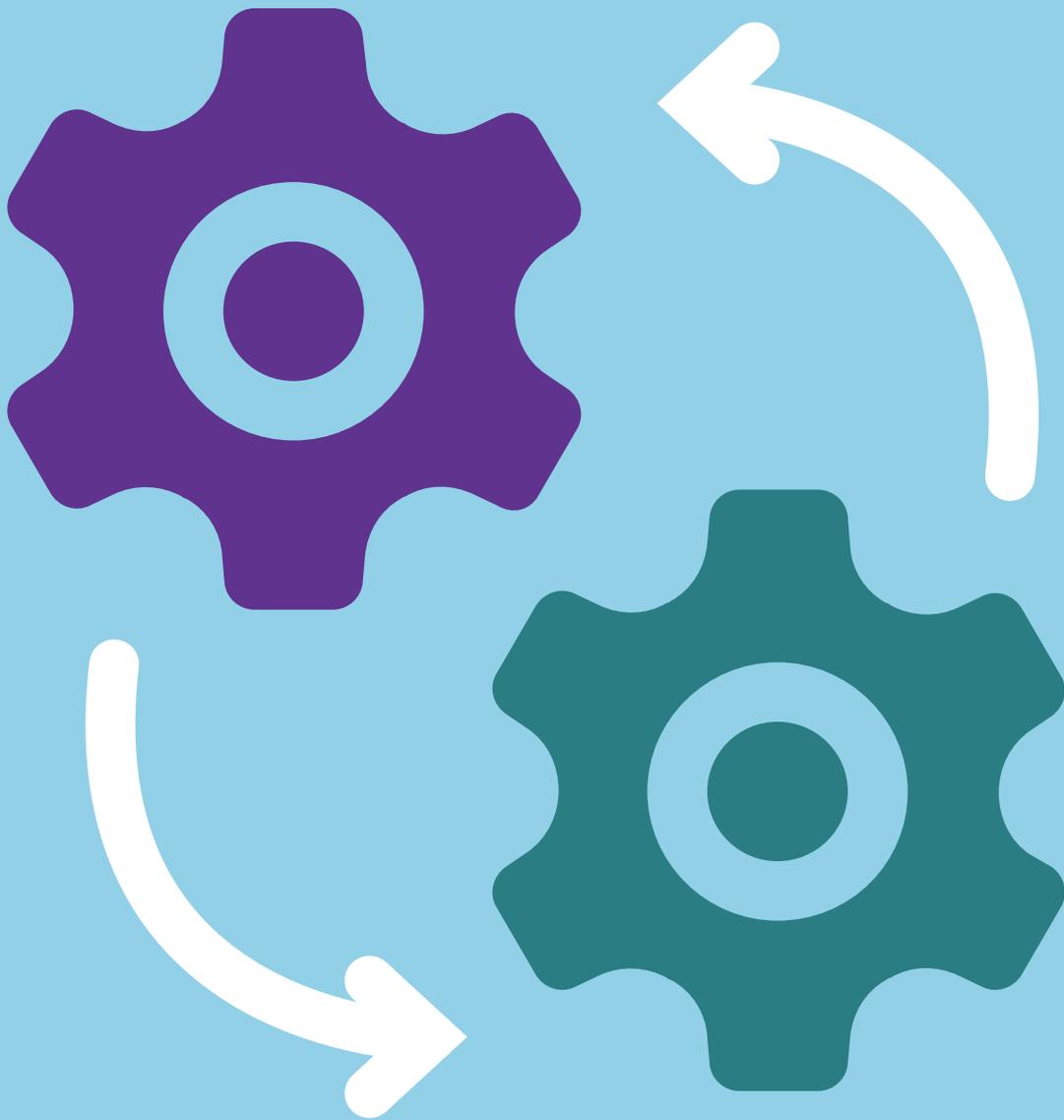
The above information is intended as a guide only and is not an exclusive list of the types of information the applicant may (or must) provide to their employer in order to make a claim. A template dispute form to provide to the employer is provided on our website. While not compulsory, applicants are encouraged to use this format when lodging a dispute with their employer.

Process for employers

Where the employer refers the matter to the Commissioner, it is recommended that the following steps be undertaken prior to making an application:

- ▶ identify which employees are affected,
- ▶ consult with the affected employees or employee representatives, and
- ▶ make genuine attempts to resolve the matter in accordance with the relevant terms of their enterprise agreement or workplace determination.

Process



How do I refer a matter to the Commissioner?

If you have taken the steps outlined above in accordance with your enterprise agreement, and the dispute remains unresolved, you may seek the assistance of the Commissioner to resolve your dispute. You can do so by filling in the online application form or by completing the PDF application form by hand or electronically and emailing it to disputes@genderequalitycommission.vic.gov.au.

Both the online application form and the downloadable PDF application form can be found at www.genderequalitycommission.vic.gov.au/what-disputes-can-commissioner-resolve.

The application form will allow the Commissioner to consider whether the dispute is one that they have jurisdiction to assist you to resolve.

What will the Commissioner do upon receiving a referred dispute?

Once the Commissioner receives a completed form, they will review and assess whether the matter falls within scope of the provision. Prior to accepting the dispute, the Commissioner will ensure:

- ▶ the dispute relates to an employer who is a Designated Body;
- ▶ the dispute relates to a systemic gender equality issue;
- ▶ there have been reasonable, genuine attempts to resolve the matter at the workplace level between parties; and
- ▶ the parties are covered by an enterprise agreement or workplace determination, which allows for the Commissioner's involvement.

If the dispute referral is accepted, the applicant may be contacted by a Commission staff member regarding the next steps in the dispute resolution process. The Commission will then notify the respondent of the dispute, send them a copy of the applicant's completed form and give them an opportunity to provide information relevant to the dispute.

Consistent with section 39 of the Act, the Commissioner may decline to deal with a dispute if they consider it is appropriate in the circumstances to do so. A dispute referral may be rejected if:

- ▶ the dispute does not relate to a systemic gender equality issue, or does not relate to the workplace gender equality indicators outlined in the Act,
- ▶ the applicant is not part of the class or group of employees or relevant union which has members who are adversely affected by the systemic gender equality issue,
- ▶ the enterprise agreement or workplace determination does not expressly confer power on the Commissioner to deal with disputes about systemic gender equality issues,
- ▶ the applicant has failed to make genuine attempts to raise and resolve the matter directly with the employer prior to seeking to refer the dispute to the Commissioner,
- ▶ the dispute is being handled through another process (e.g. Fair Work Commission) and it is not appropriate or practical for the Commissioner to deal with the dispute, or
- ▶ Any other reason deemed appropriate by the Commissioner.

If it is not clear from the application form whether the Commissioner has jurisdiction to accept the referral, further information may be sought from the applicant to inform this decision.

If the Commissioner is unable to accept the referral, applicants may be provided with information about other organisations or services that may be able to assist in resolving the dispute.

How should parties conduct themselves during the process?

The Commission's dispute resolution function is an informal process to examine possible systemic gender equality issues and collaboratively consider ways to resolve them. Parties to the dispute will be provided with a set of guidelines for how the management of the dispute will be conducted.

Parties (and those acting on behalf of parties) are expected to:

- ▶ be genuinely interested in reaching a resolution to the dispute,
- ▶ actively participate in the dispute resolution process,
- ▶ share information (confidentially if required) which might assist the Commissioner and other parties to better understand the extent of a systemic gender equality issue,
- ▶ work cooperatively with the Commissioner and other parties to identify and resolve possible systemic gender equality issues, including identifying areas of potential gender-based bias,
- ▶ attend the dispute resolution process with the authority to resolve the dispute, and the willingness to do so,
- ▶ be open minded and collaborative about possible solutions, and
- ▶ implement any agreed outcomes.

The dispute resolution process will be focused on taking a collaborative approach to identifying and addressing systemic gender equality issues. It is not the Commissioner's role to determine the outcome or take sides and advocate on behalf of either party in a particular dispute, however, the Commissioner may make non-binding recommendations (see below for further information).

As a general guide, parties will, as part of their participation in the dispute resolution process be expected to:

- ▶ be able to clearly outline the matters in dispute,
- ▶ summarise the steps that have been taken to date to resolve the matter at the organisational level,
- ▶ articulate their position on each element of the dispute and provide supporting information or data which supports their view,
- ▶ collaboratively work with the Commissioner to identify and consider all possible resolutions.

Can I be represented by a lawyer?

The Commissioner may allow a party to have legal representation where the Commissioner is of the view that doing so may assist the parties to resolve the dispute over a systemic gender equality issue more expeditiously, or that failure to allow a party to have legal representation may lead to an unfair outcome.

Will parties be subject to confidentiality obligations while they participate in the Commissioner's dispute resolution process?

The dispute resolution process is intended to be a collaborative space for parties to identify and work on ways for resolving disputes about systemic gender equality issues.

Parties will be required to keep the process confidential, to facilitate an environment where all parties can discuss and share information openly and freely.

However, provided confidentiality is not breached, this does not preclude communication with relevant members, employees or decision-makers via normal communication channels. Further, the parties as a part of the dispute resolution may agree on key messaging for any communications as part of the collaborative approach to resolving the dispute.



Outcomes



How will the Commissioner deal with the dispute?

The Commissioner has the power to deal with a referred dispute in any way they consider appropriate. After a dispute has been accepted, the Commissioner will consult with the parties to identify the most appropriate way to assist them going forward.

The Commissioner's dispute resolution function aims to assist employers, employees or unions to work collaboratively to resolve systemic gender equality disputes. The dispute resolution function aims to bring both sides together to find an outcome which both parties agree on. Given this, the Commissioner has the power to:

- ▶ Conduct conciliation, mediation, or any other dispute resolution process and/or
- ▶ Make recommendations, or express views or opinions.

The Commissioner cannot conduct arbitrations or make a binding determination.

What is involved in making a recommendation?

Depending on the nature of the dispute and the matters at issue between the parties, the Commissioner may make recommendations or express a view or opinion on:

- ▶ the nature of the dispute and process to investigate a systemic gender equality issue,
- ▶ the position or approach of the parties,
- ▶ possible resolutions, or
- ▶ suggested next steps for the parties to undertake in order to assist them to continue to collaborate on the identification or resolution of a systemic gender equality issue.

Recommendations are non-binding and are intended to guide the parties on matters which they may wish to consider. The Commissioner may also recommend the parties report back at a future date on progress towards achieving recommended or agreed actions or steps.

What does conciliation entail?

Conciliation is an informal, confidential process aimed at assisting the parties to discuss issues and identify potential ways to resolve their dispute. Conciliation conferences may be held in person, or via an online meeting platform. Under the Commissioner's delegation power under section 45 of the Act, the Commissioner may appoint an individual to conduct this process.

The role of the conciliator is to:

- ▶ Lead the discussion in an informal manner to help the parties articulate and develop a common understanding of the systemic gender equality issue(s) in dispute,
- ▶ Work with the parties to explore the systemic gender equality issue(s) and its underlying causes,
- ▶ Work with and encourage the parties to identify possible resolutions,
- ▶ Provide an advisory role on the content of the dispute or the outcome of its resolution,
- ▶ Make suggestions for terms of settlement, and give expert advice on likely settlement terms,
- ▶ Ensure the discussion remains respectful and productive.

It is not the role of the conciliator to take sides, argue on behalf of either party or make binding decisions about the merits of each party's argument. Rather the conciliator will facilitate discussion, seek to understand the parties' perspective on the issues and work collaboratively with the parties to identify solutions. While the conciliator will work with the parties to try to identify possible resolutions, and in doing so may express a view or make suggestions or non-binding recommendations, the parties are under no obligation to reach a settlement.

Parties who participate in conciliation will be asked to agree to keep the conciliation proceedings confidential. This is so parties feel they can speak frankly and privately explore options without stating a public position.

What are the possible outcomes?

Some possible outcomes of the dispute resolution process include:

- ▶ The Commissioner may make a recommendation to the parties about how the parties should resolve the dispute and/or any possible next steps the parties may wish to take.
- ▶ The Commissioner may request that the employer include the agreed measures in their four-yearly Gender Equality Action Plan (if applicable), or report back after a reasonable time on their progress towards implementing the recommendations.
- ▶ The parties may reach agreement during the dispute resolution process on the steps for resolution.

Note the Commissioner does not have the power to make binding determinations to resolve a dispute.

Where agreement is reached between the parties, the Commissioner may circulate a settlement agreement, which will articulate agreed outcomes and will require parties to sign. The settlement agreement is binding on the parties. In the event that one party fails to comply, the other party may seek to have it enforced via a court order.

When will the dispute resolution process be complete?

Generally, the Commissioner will consider a dispute resolution process to have been completed when one of the following occurs:

- ▶ The parties reach agreement on the issue and the proposed steps for resolution, or
- ▶ The Commissioner issues a recommendation to the parties about the dispute, next steps and/or proposed steps for resolution, which may be signed by both parties, or
- ▶ There is no agreement between the parties and in the view of the Commissioner there is no reasonable prospect that further conciliation by the Commissioner would result in the parties being able to reach agreement.

The Commissioner may terminate a dispute before it is resolved if the Commissioner considers it appropriate to do so.

What if the Commissioner is unable to resolve a dispute?

A relevant enterprise agreement or workplace determination which applies to the parties may contain additional dispute resolution procedures, depending on its terms. If the enterprise agreement or workplace determination provides for the Fair Work Commission's involvement, parties may be able to make an application to the Fair Work Commission for help in resolving the dispute.

Any matters raised, or outcomes delivered during the Commissioner's dispute resolution process will be inadmissible in other jurisdictions in the event the dispute proceeds to a court, tribunal or another commission for resolution.



Appendix



Case Study One.

Equal remuneration for work of equal or comparable value across all levels of the workforce, irrespective of gender

An employee named Sam who works at a public entity has been speaking to their colleagues and has learnt that the men in their organisation in similar roles are earning between 2-5% more than some of the women and non-binary people at the same level.

Sam approaches HR and their line manager about this disparity who advises that salaries are based entirely on merit and suggests that this inequality is a coincidence.

Sam and a group of their colleagues (the applicants) make a claim in writing to their employer outlining that they are being paid less than the men for comparable work. They follow the processes outlined in their enterprise agreement to raise the matter with their employer. The claim proposes that senior leadership examine the organisation's remuneration processes.

The employer makes an assessment of the claim but does not comprehensively review their operational processes or speak to the affected employees to gather further information. The employer meets with the applicants and advises they have not found a gender pay gap within the organisation. They advise that any disparity in pay outcomes on gendered lines in their view is based on merit and is a coincidence.

The applicants don't agree with their employer's assessment and believe their employer has failed to comprehensively assess whether their organisation's policies and practices are contributing to a disparity in pay outcomes based on gender. The dispute remains unresolved.

The enterprise agreement covering the applicants and the employer includes a provision which expressly provides for unresolved disputes on systemic gender equality issues to be referred to the Public Sector Gender Equality Commissioner.

The applicants lodge the dispute with the Commissioner through the Commission's website.

The Commissioner determines that the organisation is:

- ▶ a designated body covered by the Gender Equality Act 2020 (Act), and
- ▶ is covered by an enterprise agreement which allows for the dispute to be referred to the Commissioner, and
- ▶ that the parties have made reasonable genuine attempts to resolve the matter at the workplace level, and
- ▶ that the issue is that of systemic gender inequality.

On this basis the Commissioner accepts the referral.

The Commissioner notifies the employer of the allegations and requests further information to resolve the dispute. The Commissioner, in consultation with the parties, determines that conciliation would be an appropriate means to resolve the matter.

Conciliation takes place and the parties agree on an outcome – that the employer seeks an independent review into their remuneration processes and includes this information as well as strategies to reduce remuneration inequality in their next Gender Equality Action Plan (as they are a defined entity under the Act). The parties' agreed outcome is documented and signed by both parties to the dispute.

Case Study Two.

Availability and utilisation of terms, conditions and practices relating to flexible working arrangements

Bo works at a public sector body with a flexible working policy. The policy states that all employees should have some meaningful control over when, where and how their work is performed and that a request can only be refused on reasonable business grounds.

Bo has requested a flexible working arrangement so he is able to work around childcare pick up times. His employer considers the request but rejects it on operational grounds. Bo suggests an alternative arrangement which attempts to address the operational concerns but this request is also rejected by his employer.

Bo speaks to some other colleagues at his workplace and hears that many of his colleagues with caring responsibilities have also had requests for flexible working arrangements rejected.

Bo approaches his union for advice about what options he might have under his enterprise agreement. For example, to seek to have the decision reviewed or to further investigate his employer's application of its flexible work policy.

With the assistance of their union, Bo and four of his colleagues (the applicants) who are similarly impacted outline the claim and raise it with their employer, consistent with the requirements under their enterprise agreement. The claim proposes that the employer examine the application and implementation of their flexible work policy.

The employer makes an assessment of the claim by reviewing their flexible work practices and uptake, including meeting with the impacted employees, reviewing the application of their flexible working policy and considering available data on the number of flexible work arrangements in place within the employer. After considering the claim, the employer provides a written response rejecting the elements of the claim.

The applicants are unsatisfied with the employer's initial assessment and decide to refer the matter to the Commissioner in line with the referral clause in their enterprise agreement. The applicants submit the claim and all relevant documentation to the Commissioner through the Commission website.

The Commissioner makes an assessment of the referral and determines:

- ▶ that the employer is a designated body covered by the Gender Equality Act 2020, and
- ▶ is covered by an enterprise agreement which expressly allows for the dispute to be referred to the Commissioner, and
- ▶ that the parties have made reasonable genuine attempts to resolve the matter at the workplace level, and
- ▶ that the issue is that of systemic gender inequality.

On this basis the Commissioner accepts the referral.

After a discussion with the parties, the Commissioner makes a recommendation that the employer make operational changes to the application of its flexible working policy. Where an employer cannot reasonably accommodate an employee's request, they should work together to identify other types of flexibility which could be provided to the employee and/or mitigate the operational concerns of the employer. The recommendation also includes implementing mandatory training for managers on how to apply the policy appropriately to ensure greater consistency in the application of the policy across the organisation.



Case Study Three.

Sexual harassment in the workplace

Erin works at a Victorian public service organisation.

Erin was recently appointed a new manager, Ari, who repeatedly makes inappropriate comments on her appearance. Ari also frequently sends winking emoji's in his emails and in his work instant messenger application to Erin. Once at an after work function he asked her whether she has a boyfriend and whether she would date 'someone like him'.

Erin is feeling increasingly uncomfortable around her manager and speaks to some of her colleagues about his comments and behaviour. Her colleagues advise her that this is unacceptable and that they have found their own managers uphold a high standard of professionalism and have never acted in this way. The organisation has spoken openly about their commitment to gender equality, to creating a safe workplace and eradicating any sexual harassment if it takes place. Erin's colleagues encourage her to report Ari's behaviour to her employer's human resources area or a more senior manager within her work area, so her concerns can be appropriately addressed.

With the support of one of her colleagues, Erin approaches a senior manager within her work area to make a complaint regarding her experience of sexual harassment with her manager.

The senior manager does not seek guidance from the employer's human resources area about how to handle allegations of this nature appropriately, and tells Erin she is being overly sensitive and she should just ignore her manager's advances if she was not interested. The senior manager decides Erin's claim is not substantiated and advises her that he will not be taking any further action to investigate her complaints.

Erin has heard of the Public Sector Gender Equality Commissioner (Commissioner) in the news recently.

Given she works in a public service employer and her issue is one of gender inequality, Erin decides to lodge a complaint with the Commissioner. She reviews the Commissioner's website but quickly realises that she doesn't meet the criteria for the dispute to be referred to the Commissioner as it is an individual complaint and therefore the matter does not relate to a systemic gender equality issue.

Erin instead decides to raise the matter, including the response to her initial complaint by the senior manager, with her employer's human resources area. The human resources team investigate the matter in a manner consistent with their existing policies, and take disciplinary action to suspend her manager. They also ensure Erin is receiving appropriate support and counselling throughout the process.

Erin could also consider making a complaint with the Victorian Equal Opportunity and Human Rights Commission (www.humanrights.vic.gov.au) and/or the Australian Human Rights Commission (www.humanrights.gov.au) which have jurisdiction to deal with individual complaints of sexual harassment.

