

Equal Opportunity Act

Referral of an equal opportunity complaint to SACAT

Equal opportunity complaints

SACAT has jurisdiction under the *Equal Opportunity Act 1984* (the Act), to hear and determine equal opportunity complaints referred to it by the Commissioner for Equal Opportunity (the Commissioner). SACAT can hear complaints about:

- unlawful discrimination and
- sexual harassment and
- unlawful victimisation

Unlawful discrimination

Discrimination occurs when a person, or a group of people, is treated less favourably than another person, or group, because of their background or certain personal characteristics. Discrimination can also occur when a rule or policy applies to everyone but disadvantages a group of people because of a personal characteristic they share.

Not all kinds of discrimination will be a breach of the Act. SACAT can only hear and determine complaints about behaviour which is considered to be an act of “unlawful discrimination”. Unlawful discrimination is behaviour which is not allowed by the Act.

Discrimination is against the law under the Act if:

- it is based on particular **personal characteristics** or **grounds** specified in the Act and
- it occurs in an **area** or **place** of “public life”

Grounds for discrimination

Under the Act, only particular personal characteristics or “grounds” for discrimination are against the law. A person may be discriminated against based on their:

- age
- association with a child

- being, or having been, subject to domestic abuse;
- caring responsibilities
- disability
- gender identity
- intersex status
- marital or domestic partnership status
- pregnancy
- race
- religious appearance or dress
- sex
- sexual orientation
- spouse or partner’s identity

Places/Circumstances of discrimination

For discrimination to be unlawful under the Act, in addition to being based on a particular personal characteristic or ground, it must also have happened in a specific area or place of **public life** or in the context of a **particular relationship**.

Discrimination is unlawful in the following areas of public life, circumstances or relationships:

- accommodation and selling land
- advertising
- associations
- education and granting qualifications
- employment
- providing ‘goods and services’ (as defined in the Act)
- superannuation schemes

There are some exemptions in the Act.

Sexual harassment

Sexual harassment is any unwanted or unwelcome conduct of a sexual nature where it is

reasonable to expect that the other person would be offended, humiliated, or intimidated.

Sexual harassment can occur by another person of the same sex or of a different sex and is determined from the point of view of the person feeling harassed.

Vicarious liability

In some circumstances a person is, for the purposes of the Act, responsible at law for the discriminatory or unlawful act of their agent (a person acting lawfully on their behalf) or employee where the act is committed during the course of their employment.

Unlawful victimisation

Unlawful victimisation occurs when a person is treated unfairly for complaining about discrimination or harassment. This also applies to people being victimised for helping another person to make such a complaint.

It is also unlawful to treat a person unfairly for making a public interest disclosure under the *Public Interest Disclosure Act 2018* – more commonly known as “whistleblowing”.

Who can bring an equal opportunity complaint to SACAT?

Only the Commissioner may initiate an equal opportunity complaint at SACAT, this is known as a “referral”.

A member of the public may not directly bring equal opportunity complaint proceedings before SACAT. All equal opportunity complaints **must** first be made to the Office for the Commissioner for Equal Opportunity (the Commissioner). If the complaint is accepted, it will usually go through the conciliation process, where both parties will be assisted to try and reach an agreement.

If the complaint cannot be resolved by conciliation, or if the Commissioner declines to recognise the complaint and the complainant still wants to proceed, the complaint may be “referred” to SACAT for resolution.

Once the complaint has been referred to SACAT, the person who made the complaint is known as

“the applicant”. The person who the complaint is about is known as “the respondent”.

What is involved in an equal opportunity complaint matter?

Where an equal opportunity complaint has been referred to the Tribunal, the applicant must be able to:

- identify the legislative provision they wish to rely upon
- state and describe the conduct said to constitute discrimination, sexual harassment, or victimisation
- identify the facts, acts or omissions alleged to constitute the conduct said to constitute discrimination, sexual harassment, or victimisation
- connect the alleged conduct to the relevant personal characteristic or ground of discrimination of the applicant (e.g. disability, race)
- connect the alleged conduct as having occurred in an area or place of public life

Proving the allegations on the complaint

Equal opportunity matters are “adversarial proceedings” and require the participation of both the applicant and respondent to put forward their version of the facts before the Tribunal and to make submissions about the applicable law.

The parties will usually need to give evidence before the Tribunal and may need to call witnesses, including expert witnesses, and provide documents in order to prove or defend the allegations in the complaint. For example, if the allegation is that a person has been discriminated against on the basis of a disability it may be necessary to provide medical evidence to establish the fact of, or extent of, the disability.

The applicant has an obligation to prove the allegations against the person they are bringing an application against. This is known as the “onus of proof”. The allegations must be proved by the applicant on the balance of probabilities.

Process for equal opportunity matters

When a matter is referred to SACAT by the Commissioner, a document, known as the “referral” will be filed with the Tribunal. This describes the complaint and allegations made by the applicant. SACAT will provide a copy of this document, and any documents provided in support, to the parties.

SACAT will schedule a directions hearing shortly after the application is received. The directions hearing will usually be held four to six weeks after the application is first made.

Directions Hearings

At the first directions hearing, the SACAT member hearing the matter may require the person making the complaint to provide further and better particulars (see below) and the person/body that the complaint is about to provide a response to the complaint.

The SACAT member may also require both parties to provide SACAT, and to each other, the evidence they want the Tribunal to consider in making its decision.

At or after the first directions hearing, the Tribunal may decide that a further directions hearing is needed, refer the matter to a conference, or may decide that the matter is ready to go to a final hearing, where it will make a decision about the application.

What does it mean to provide further particulars of the complaint?

The person making the complaint may be asked to provide “further and better particulars” of the complaint to the Tribunal.

“Particulars” is a legal term which refers to the **details** of the complaint (or defence). Consider providing details about the “who, what, why, where and when” of the complaint as well as any other details which might be relevant.

In the equal opportunity area, particulars identify the details of the conduct that may constitute unlawful discrimination, sexual harassment or victimisation.

While complaints made under the Act regarding discrimination, sexual harassment and victimisation can be extremely emotive and distressing for people to make, it is vital that both the Tribunal and the person or organisation you are making a complaint against know the precise details of the complaint.

Particulars can help:

- to inform the parties and the Tribunal of the issues to be dealt with at conferences and hearing
- to avoid surprise at conferences or hearings
- to allow the applicant to focus the documents, witnesses and evidence they present on the specifics they have identified and
- to enable the respondent to know what it is they are alleged to have done so they can prepare their response and organise their own witnesses, documents and evidence

Do I need to be legally represented?

Parties do not need to be legally represented in SACAT, but it can be helpful to at least seek legal advice before instituting or defending an equal opportunity complaint, because the law in this area can sometimes be quite complex. This is especially important in cases where the Commissioner has declined to recognise the complaint as one that should be referred. Various organisations in South Australia provide free legal advice or assistance.

Free legal advice may be available from the **Equal Opportunity Legal Advice Service**, run by the **Adelaide University Law School**. The service is operated by final year law students under the supervision of fully qualified legal practitioners. Please visit ‘Adelaide University Law Clinics’ website for more information. This service can be contacted by email at eolas@adelaide.edu.au.

Find out more about legal representation at SACAT on our webpage, [Preparing for a hearing](#).

Can costs be awarded against a party?

Usually, each party will bear their own costs, but costs can be awarded against an unsuccessful party because the proceedings are adversarial and one or both parties may be legally represented. A relevant issue regarding whether costs will be awarded is if the Commissioner has declined to refer the complaint to SACAT at the outset.

At any time, the person or body that the complaint has been made about, may ask the Tribunal to “strike out” the application. The Tribunal may also do this of its own initiative. The reasons for making this application include that the complaint is misconceived, lacking in substance or involves a trivial matter, amongst other reasons. If an order is made “striking out” an application, it means that the Tribunal will not make a decision about the complaint. It also means that the person bringing the complaint may have an order made requiring them to pay the costs of the other person or body’s legal fees.

What can SACAT do in an equal opportunity matter?

If the complaint appears to amount to a breach or contravention of the Act, SACAT can assist both parties at a conference to reach an agreement about the satisfactory resolution of a complaint (without the need for a final hearing). This may include supporting both parties in coming to an agreement about the conduct, offering an apology and other agreed resolutions.

If the matter progresses to a final hearing and findings are made that the Act has been contravened, the Tribunal may make an order requiring the respondent to:

- pay compensation to a person for loss or damage arising from the contravention;
- to refrain from further contravention of the Act;
- to perform specified acts with a view to redressing loss or damage arising from the contravention.

Contact the Tribunal

If you would like to speak to a staff member about the equal opportunity jurisdiction of the Tribunal, please telephone SACAT on 1800 723 767.

This information sheet does not constitute legal advice and does not relate to the circumstances of any individual matter. If you wish to have legal advice you should seek that independently.