



Royal Commission into the Protection and Detention of Children in the Northern Territory

Policy and Procedure for Vulnerable Witnesses

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1 Introduction

- 1.1 The Royal Commission wishes to hear from people who are or were in care or detention in the last 10 years and their families. The Commission recognises that people who have been in those systems are likely to be vulnerable.
- 1.2 The Commission has a responsibility:
 - a. to manage any risk to the safety and wellbeing of Vulnerable Witnesses engaging with the Commission,
 - b. to provide procedural fairness to people and organisations named by Vulnerable Witnesses, and
 - c. to conduct its work openly within the restrictions imposed by the Commission's other responsibilities.
- 1.3 This Policy and Procedure sets out how the Commission will engage with Vulnerable Witnesses and outlines the protections available to Vulnerable Witnesses.

2 Application of the Policy and Procedure

- 2.1 This Policy and Procedure applies to Vulnerable Witnesses.
- 2.2 In this Policy and Procedure, **Vulnerable Witness** means:
 - a. a child or young person under 21 years of age,
 - b. a person, regardless of age, who is or was in a juvenile justice detention centre, correctional centre or other secure residential facility,
 - c. a person who is or was a Child in Care,
 - d. a person:
 - a. who is a parent, step-parent, sibling, or a grandparent of the Child in Care,
 - b. who is or was acting as or regarded as the parent of the Child in Care,in relation to information or evidence they provide to the Commission regarding the Child in Care,
 - e. a person with cognitive disability or mental illness, and
 - f. any other person the Secretary to the Royal Commission determines is a Vulnerable Witness on application in writing by the person or of the Commission's own volition.

Child in Care means a person who is or was the subject of child protection arrangements under the *Care and Protection of Children Act* (NT) or its antecedent law.

- 2.3 The Commission may require proof that a person is a Vulnerable Witness as defined.



Royal Commission into the Protection and Detention of Children in the Northern Territory

- 2.4 If a person applies to be a Vulnerable Witness under 2.2(f) and their application is refused, that person may apply in writing to the Commissioners to be a Vulnerable Witness prior to providing information to the Commission or giving evidence before the Commission. The application should be sent by email to ChildDetentionNT@royalcommission.gov.au.
- 2.5 This Policy and Procedure should be read with Practice Guidelines 1, 2 and 3.

3 General principles

Consent

- 3.1 Subject to 3.2 and 3.3 the Commission will not compel a Vulnerable Witness to provide information to the Commission. The Commission will only receive information from a Vulnerable Witness, including taking evidence in hearing, with the consent of the Vulnerable Witness.
- 3.2 The Commission may compel a Vulnerable Witness to provide information and/or to give evidence to the Commission where that information or evidence arises from their employment.
- 3.3 In exceptional circumstances the Commission may also compel a Vulnerable Witness to provide information and/or to give evidence if:
- the Commission considers the Vulnerable Witness can provide material information about the treatment of another person which is relevant to the Commission's Terms of Reference,
 - that information cannot reasonably be obtained elsewhere, and
 - the Commission considers the information so important to the Commission's inquiry as to warrant departing from the general principle that Vulnerable Witnesses will not be compelled to give evidence.

Identification

- 3.4 By operation of Practice Guideline 3, confidentiality automatically attaches to any 'Vulnerable Witness Identifying Information' (as defined in Practice Guideline 3 at clause 5).
- 3.5 Where a witness's identity is kept confidential, the witness will be identified by use of a pseudonym.
- 3.6 A Vulnerable Witness may waive confidentiality regarding their identity by notice to the Commission in writing if that witness is an adult, has capacity to consent to the disclosure of their identity and does consent to the disclosure of their identity.
- 3.7 The identity of a Vulnerable Witness may be disclosed by the Commission to an adverse party on a confidential basis if disclosure is necessary to provide that party with procedural fairness. If the witness does not consent to disclosure of their identity but the Commission decides that disclosure is necessary to provide procedural fairness, no findings will be made against the adverse party. The allegations against the adverse party will be kept confidential unless the Commission decides otherwise.



Royal Commission into the Protection and Detention of Children in the Northern Territory

Other confidential information

- 3.8 A Vulnerable Witness may request that information provided to the Commission in addition to identifying information be kept confidential where that information is of a private or sensitive nature.
- 3.9 The Commission will consult with the Vulnerable Witness or their lawyer with respect to the redaction of additional information.
- 3.10 If the redactions required by the witness are not agreed by the Commission, the Commission will not generally compel the witness to provide that information. Practice Guideline 3 paragraph 14 sets out the circumstances in which a witness may be compelled to provide that information.
- 3.11 Further guidance on the redaction of other confidential information is set out in Part 5 of this Policy.

Adverse findings

- 3.12 The Commission will not make adverse findings against a person or organisation on the basis of evidence provided by a Vulnerable Witness unless the Commission considers the person or organisation has been afforded procedural fairness.

4 Information accepted by the Commission and how that information will be used

- 4.1 The Commission will accept information provided by a Vulnerable Witness in the following ways:

a. Group consultations

How information obtained: The Commission will meet with groups of Vulnerable Witnesses and their families who wish to discuss their experience of the care and detention systems.

Confidentiality: Closed sessions
Identity of participants and content of the sessions is to be confidential and must not be published¹

Ground adverse findings?: No

How information used: To identify issues for further investigation

b. Informal statements

How information obtained: Statement in writing or by audio-visual recording
May be provided to the Commission or taken by the

¹ Subject to mandatory reporting obligations under the *Care and Protection of Children Act 2007* and the *Domestic and Family Violence Act 2007* and information that a person is at threat of imminent serious physical harm.



Royal Commission into the Protection and Detention of Children in the Northern Territory

	Commission
Confidentiality:	Identity of author and content of statement is to be confidential and must not be published ²
Ground adverse findings?:	No
How information used:	To identify issues for further investigation
c. Formal statements	
How information obtained:	Statement in writing or by audio-visual recording produced to the Commission under a Notice to Produce May be provided to the Commission or taken by the Commission
Confidentiality:	If received into evidence the statement will generally be published subject to the following redactions: <ul style="list-style-type: none">• 'Vulnerable Witness Identifying Information' (as defined in Practice Guideline 3 at clause 3) unless the information relates to an adult, and the adult can and does consent to the disclosure of their identity, and• information identifying people and organisations whose interests are likely to be adversely affected by the publication of that information unless they are afforded procedural fairness The Commission may also, on request by a Vulnerable Witness, on the recommendation of the witness's welfare or health worker or of its own volition, keep other information in the statement confidential Redacted audio-visual statements will be published in pixellated, voice-disguised form unless the witness is an adult who can and does consent to the disclosure of their identity
Ground adverse findings?:	Yes if accepted into evidence, subject to procedural fairness
How information used:	Subject to confidentiality and procedural fairness, evidence may be cited in the Commission's Report and ground findings
d. Appearance before the Royal Commission	

² Subject to mandatory reporting obligations under the *Care and Protection of Children Act 2007* and the *Domestic and Family Violence Act 2007* and information that a person is at threat of imminent serious physical harm.



Royal Commission into the Protection and Detention of Children in the Northern Territory

How information obtained:	<p>Evidence given before the Commission in hearing on invitation by the Commission</p> <p>Appearance subject to assessment by an appropriately qualified medical practitioner, psychologist or counsellor to determine whether the witness can and does consent to appear and any measures the Commission should take to manage any risk to the safety and welfare of the witness from their appearance before the Commission (unless the person is over 18, in which case whether assessment is required would be determined on a case by case basis).</p>
Confidentiality:	<p>Evidence will be given in closed hearing unless the witness is an adult and can and does consent to give evidence in open hearing³</p> <p>‘Vulnerable Witness Identifying Information’ (as defined in Practice Guideline 3 at clause 3) will be redacted from the transcript of evidence unless the information relates to an adult, and the adult can and does consent to the disclosure of their identity</p> <p>The Commission may, on request by a Vulnerable Witness, on the recommendation of the witness’s welfare or health worker or of its own volition, keep other information in the evidence confidential</p> <p>Where evidence is given in closed hearing a redacted, de-identified transcript of the evidence will generally be published</p>
Adverse findings:	<p>Yes, subject to procedural fairness</p>
How information used:	<p>Subject to confidentiality and procedural fairness evidence may be cited in the Commission’s Report and ground findings.</p>

4.2 A Vulnerable Witness may provide information to the Commission in any or all of the above ways.

4.3 Further measures that may be put in place to protect the safety and welfare of a Vulnerable Witness giving evidence before the Commission are set out below.

³ The effect of a closed hearing is to exclude all persons from the hearing except:

- the Commissioners, Counsel Assisting, Royal Commission staff, transcribers and other technical support staff,
- the witness,
- any support person or people nominated by the vulnerable witness and approved by the Commission,
- the legal representatives of the witness, and
- the legal representatives of people and organisations given leave to appear against whom the witness has made allegations in any document provided

to the Commission by the witness unless the Commission otherwise orders or directs.



Royal Commission into the Protection and Detention of Children in the Northern Territory

5 Redaction of formal statements

- 5.1 If a witness wants information in their formal statement or the evidence they intend to give in hearing to be confidential (other than Vulnerable Witness Identifying Information), the witness should make a request in accordance with Practice Guideline 3 Part C when their statement is submitted to the Commission.
- 5.2 If the Commission grants the request for confidentiality or determines of its own volition that the whole or a part of the information should be confidential the Commission will issue a direction to that effect and will redact the evidence.
- 5.3 If the Commission refuses an application for confidentiality by a vulnerable witness, the witness will be given a reasonable period to decide whether or not they wish to provide the information to the Commission regardless. If the Vulnerable Witness does not give written consent to provide the information if their request for confidentiality is refused, subject to the circumstances set out in 3.2 and 3.3 of this document and Practice Guideline 3 at paragraph 14 the witness will not be compelled to provide the information and the information they have provided to the Commission will not be used by the Commission nor will it be published to any person.

6 Procedure for hearing

Directions on how evidence will be heard

- 6.1 Prior to a Vulnerable Witness giving evidence, Counsel Assisting may seek directions on how the witness's evidence will be heard. Vulnerable Witnesses may also request directions on how their evidence will be heard.
- 6.2 Such directions are aimed at managing any risk to the witness's safety and welfare from appearing before the Commission. Directions may include the location from which the witness will give evidence, who may be present in the hearing room and whether and how their testimony will be webcast. Examples of the arrangements the Commission may put in place are set out at clause 8 of Practice Guideline 2.
- 6.3 If the Commission refuses a request for directions by a Vulnerable Witness, the witness will be given a reasonable period to decide whether or not they consent to give evidence before the Commission regardless.
- 6.4 If the Vulnerable Witness does not consent to give evidence if their request for directions is refused, subject to 3.2 and 3.3 of this document the witness will not be compelled to give evidence before the Commission.
- 6.5 The evidence of a Vulnerable Witness will generally be heard in closed hearing and will not be broadcast unless the witness is over 18 and can and does consent to give evidence in open hearing or by special arrangement.⁴

⁴ The effect of a closed hearing is to exclude all persons from the hearing except:

- the Commissioners, Counsel Assisting, Royal Commission staff, transcribers and other technical support staff,
- the witness,
- any support person or people nominated by the Vulnerable Witness and approved by the Commission,
- the legal representatives of the witness, and
- the legal representatives of people and organisations given leave to appear against whom the witness has made allegations in any document provided to the Commission by the witness unless the Commission otherwise orders or directs.



Royal Commission into the Protection and Detention of Children in the Northern Territory

Cross-examination

- 6.6 A Vulnerable Witness may only be cross-examined with leave and only as allowed in Practice Guidelines 1 and 2.
- 6.7 Counsel Assisting will ordinarily conduct any cross-examination of a Vulnerable Witness and will always conduct cross-examination of anyone under 18 appearing before the Commission.

Additional confidentiality orders

- 6.8 At the conclusion of a Vulnerable Witness's evidence, Counsel Assisting may seek additional orders regarding confidentiality of all or part of the witness's evidence.

7 Publication of evidence given in hearing

Publication to parties the subject of adverse comment

- 7.1 The Commission will provide the Vulnerable Witness's statement in a de-identified, redacted form (with a short description of the relevant redacted content) to parties the subject of adverse comment in the statement. That statement will be subject to a non-publication order unless and until the statement is accepted into evidence by the Commission.
- 7.2 If a party the subject of adverse comment wishes to challenge or seek further detail of any redaction they must raise the matter with Counsel Assisting and may raise the matter with the Commissioners if dissatisfied with the response from Counsel Assisting.
- 7.3 The Commission will provide to any party the subject of adverse comment, such of the redacted content sufficient to provide procedural fairness to that party, including, where necessary, the name of the witness.

Publication to media

- 7.4 At the commencement of the day on which a Vulnerable Witness will be called to appear before the Commission, the Commission will generally provide the media with the witness's de-identified, redacted statement.
- 7.5 Where the statement was made by audio-visual recording, a pixellated, voice-disguised, redacted version of the recording and a redacted, de-identified transcript will generally be provided, unless the witness is an adult and can and does consent to their unredacted audio-visual recording being provided.
- 7.6 The statement or recording will be subject to a non-publication order unless and until the statement or recording is accepted into evidence by the Commission.
- 7.7 The Commission will only provide the de-identified redacted statement or recording to media representatives who have signed an undertaking not to disclose the statement or recording to any person unless and until the statement or recording is accepted into evidence by the Commission.
- 7.8 If the Commission decides that the risk to the safety and welfare of a Vulnerable Witness



Royal Commission into the Protection and Detention of Children in the Northern Territory

from the publication of all or part of their evidence cannot be appropriately safeguarded through restrictions on the material published, the Commission may direct that neither the identity nor any part of the evidence of that witness can be published at all. In that circumstance the Commission may be unable to inform the media or public of the reasons why the witness's evidence cannot be published.

Publication on the Commission website

- 7.9 De-identified and redacted statements accepted into evidence by the Royal Commission will generally be published on the Commission's website as soon as practicable after the conclusion of the witness's evidence.
- 7.10 Where a Vulnerable Witness has made a statement in audio-visual form, a de-identified and redacted transcript of that statement will generally be published, not the audio-visual recording itself.
- 7.11 Upon the conclusion of the Vulnerable Witness's oral evidence in a closed hearing, the Commission will generally publish a de-identified, redacted transcript of the evidence. The Commission will consult with the witness or their legal representatives on any redactions sought by the witness prior to publishing the transcript.

8 Procedure for Vulnerable Witnesses who consent to give evidence

Days in this procedure refer to business days.

Notice of appearance

- 8.1 A lawyer representing a Vulnerable Witness must advise the Commission in writing that they act for the Vulnerable Witness within two days of being retained by the person. Notice should be sent by email to ChildDetentionNT@royalcommission.gov.au.

Draft statement

- 8.2 The witness or their legal representative must provide the Commission with a draft statement setting out the evidence of the witness as relevant to the Terms of Reference. The draft statement should be provided within two weeks of the lawyer notifying the Commission they act for the Vulnerable Witness. The draft statement should be sent by email to ChildDetentionNT@royalcommission.gov.au. The Commission will, from time to time, publish cut off dates for draft statements from witnesses relevant to forthcoming hearings. The draft statement will be treated as an 'Informal Statement' under Direction NPD01/17.
- 8.3 Within one week of being provided with a draft statement (or within such extended period the Commission deems necessary) the Commission:
- will provide to the witness or their legal representative any comments on the draft and any further questions to the legal representative, and
 - may provide to the witness or their legal representative material held by the Commission that is relevant to the evidence of the witness (subject to any necessary consents).



Royal Commission into the Protection and Detention of Children in the Northern Territory

Signed statement

- 8.4 Within five days of receiving the Commission's comments and the material the witness or their legal representative must provide to the Commission:
- a. the witness's signed statement,
 - b. any applications for confidentiality, and
 - c. a version of the statement redacted consistent with any claims for confidentiality.
- 8.5 Within ten days of receipt of the signed statement, the Commission will advise the legal representative whether or not it intends to call evidence from the witness and will issue a Notice to Produce for the witness's statement.

Assessment of witness

- 8.6 If the Commission intends to call evidence from a Vulnerable Witness and the Vulnerable Witness is under 18 or the Commission determines that the Vulnerable Witness should be assessed, the Commission will arrange for the witness to be assessed by Relationships Australia or another appropriately qualified person or service to determine whether or not the witness can and does consent to give evidence, freely and knowingly, and any support they require to give evidence.

Confidentiality directions

- 8.7 If the witness is assessed as able to consent to give evidence and does consent, the Commission will make any confidentiality directions it considers appropriate. As far as possible the directions will be made at least two days before the sittings in which the witness will give evidence.

Other special arrangements

- 8.8 If the witness requests special arrangements for their court hearing such as evidence being heard in a closed session, the presence of a support person or being permitted to give their evidence from a different location, the witness or their legal representative must apply to the Commission in writing at least five days before the witness is scheduled to give evidence.

Provision of statement to adverse parties

- 8.9 Subject to any confidentiality and non-publication direction, the Commission will publish the statement or relevant parts of the statement to third parties the Commission considers require notice of potentially adverse material in the statement. The statement will generally be provided at least two weeks before the commencement of the sittings in which the witness is to be called. The statement (or part thereof) provided to the adverse party must be kept confidential unless and until it is accepted into evidence.

Cross examination

- 8.10 Parties must seek leave for a Vulnerable Witness to be cross-examined and must provide Counsel Assisting with written notice of all questions the party wants Counsel Assisting to put to the Vulnerable Witness in accordance with Practice Guideline 2. Additional questions may be proposed following the person's oral evidence with respect to any oral evidence that was not included in the statement.