

# Facilitating evidence by vulnerable witnesses to parliamentary committees - recent Western Australian experiences

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## INTRODUCTION

Effective community engagement assists parliamentary committees gather the best possible evidence for inquiries. This ensures inquiry reports contain factually based and relevant findings and recommendations.

If persons with relevant information, including witnesses regarded as vulnerable, do not or are unable to give evidence, committees may not fulfil their terms of reference and provide the right information to the Parliament. This may adversely affect Parliament's reputation if it does not have the right evidence to address issues the subject of committee inquiries. Therefore, any barriers to obtaining evidence should be minimised as much as possible.

Parliamentary committees have, historically, been quite conservative in their evidence gathering methods. These include holding hearings in formal settings. This can be intimidating for potential witnesses and a disincentive for them giving evidence.

To address this, the Western Australian Parliament is assisting to facilitate vulnerable witnesses giving evidence in committee inquiries.

This article constitutes an edited version of a speech given at the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT) conference in Darwin on 23 January 2024. It discusses who are regarded as vulnerable witnesses; the challenges in

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<sup>1</sup> This is the edited version of a speech Alex Hickman delivered in Darwin on 23 January 2024 at the Australia and New Zealand Association of Clerks-at-the-Table conference hosted by the Northern Territory Parliament.

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obtaining their evidence; what their evidence can offer as well as steps parliamentary committees can take to facilitate receiving this evidence. This is illustrated by examples from recent Western Australian parliamentary committee inquiries.

The article also discusses whether parliaments owe vulnerable witnesses a legal duty of care and the risk of vicarious trauma to parliamentary staff. Further, it provides an overview of some of the guidelines and protocols in place in Australian jurisdictions to manage evidence from vulnerable witnesses.

## WHO IS A VULNERABLE WITNESS?

‘Vulnerable’ is defined in the Macquarie Dictionary as: ‘susceptible to being wounded’, ‘liable to physical hurt’, ‘not protected against emotional hurt’, ‘highly sensitive’.<sup>2</sup>

There is general consensus about who may be a vulnerable witness, regardless of the forum in which they are giving evidence. This is reflected in legislation in various Australian jurisdictions.<sup>3</sup>

People in the following groups may be vulnerable due to challenges in their life circumstances or other relevant factors:

- people who have experienced emotional trauma
- people with a mental illness
- people with a disability
- children and young people
- elderly people

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<sup>2</sup> Macquarie Dictionary, 6th edition, p 1651.

<sup>3</sup> *Evidence Act 1906* (WA), s 106R(3) contains a definition of a ‘special witness’ who is:

A person which the court is satisfied would, by reason of a *physical or mental impairment*, be unlikely to be able to give evidence or to *give evidence satisfactorily* or be likely to suffer *severe emotional trauma* or to be so *intimidated or distressed* as to be unable to give evidence satisfactorily or a complaint to a *serious sexual offence*. Includes protection of alleged victim from direct cross-examination by the offender in certain circumstances.

- First Nations people
- newly arrived migrants and people for whom English is not a first language
- family carers
- victims of crime
- those who, by giving evidence, expose themselves or others to risk.

They may, by giving evidence, experience intimidation, stress and emotional trauma and risk other mental and physical harm. This may result from an inquiry triggering trauma from their lived experience.

Understanding the nature of vulnerability in the context of committee inquiries is paramount. To assist, the characteristics of individual witnesses, the type of issue under inquiry and points of potential risk during the inquiry process can be considered.

However, it is important not to assume a witness is vulnerable merely by falling into any of the recognised groups. An individual assessment of their circumstances should be undertaken. They may, for example, have a great capacity for resilience that enables them to adequately cope with giving evidence. Conversely, someone who does not fall into any of the groups may become vulnerable during an inquiry hearing. This could occur because of the effect of a particular question on them or due to acute stress arising from the experience of giving evidence. This cannot always be anticipated.

Accordingly, a case-by-case approach is most appropriate when assessing whether any vulnerability, caused by challenges in their life circumstances, requires support to enable the witness to fully participate in an inquiry.

## **DUTY OF CARE TO VULNERABLE WITNESSES?**

Do parliaments owe vulnerable witnesses a legal duty of care to prevent physical and psychological harm resulting from them giving evidence?

In her paper to the 2016 ANZACATT conference in Wellington, Teresa McMichael stated that the New South Wales Clerk of the Parliaments sought the Crown Solicitor's

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advice on the liability of Legislative Council staff in adopting a vulnerable witness protocol.<sup>4</sup> While this advice was kept confidential, the author stated:

*In general terms it [the advice] tended toward the view that the adoption of a well prepared policy was preferable to having no policy at all and leaving staff to respond to situations in an ad hoc manner.*

There does not appear to be a direct legal precedent on this question. However, the New South Wales District Court has more recently considered whether there was a duty of care owed by police officers to a witness to a prosecution. This is useful because this relationship is similar to that between a parliamentary officer and a witness to a committee inquiry.

In *Auditore v State of New South Wales*,<sup>5</sup> a witness brought an action for damages for negligence against the State of New South Wales. The alleged negligence resulted in psychiatric injury arising from her having a sexual relationship with a police officer investigating her former boyfriend. The witness referred to grooming and manipulative behaviour to a vulnerable person.

Her Honour Judge Gibson considered whether a duty of care existed:

*There are no decisions on this issue in Australia that I am aware of, but English courts have held that there is no duty to a witness by police officers involved in the case in which they are a witness. In *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, Hallett VP stated this as a general principle:*

*Thus, there can be no doubt: the core principle of Hill remains. At paragraph 30 Lord Steyn observed: "It is, of course, desirable that police officers should treat victims and witnesses properly and with respect: compare the Police (Conduct) Regulations*

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<sup>4</sup> McMichael, T, 'Support for Vulnerable witnesses', paper presented at the ANZACATT conference, New Zealand 2016, p 5.

<sup>5</sup> [2017] NSWDC 150.

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*2004 (SI 2004/645). But to convert that ethical value into general legal duties of care on the police towards victims and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence.*

*In PBD and Another v Chief Constable of Greater Manchester Police, Silber J rejected a claim for psychiatric injury brought by a person in witness protection who had been inadvertently put in the presence of a former associate. His Honour held that (at [36]-[37]) there was a more basic reason why no duty of care would be owed to the plaintiff, in that the police did not owe a duty of care to witnesses and victims. Silber J concluded that it was not possible to see why someone in the plaintiff's position (who was a suspect about to be charged with a money laundering offence), ought to be owed a duty when a witness and a victim did not have such a duty owed to him: see *Brooks v Metropolitan Police Commissioner* [2005] All ER (D) 287 (Apr); *Chief Constable of Hertfordshire Police v Van Colle*; *Smith v Chief Constable of Sussex Police* [2008] 3 All ER 977; *An Informer v A Chief Constable* [2012] All ER (D) 31 (Mar).<sup>6</sup>*

Accordingly, it is unlikely parliamentary staff owe witnesses a specific duty of care. This is because it would be inconsistent with the discharge of their responsibility to the Parliament to assist in gathering the best evidence for committee inquiries. Indeed, the existence of such a duty could have a chilling effect on discharging this responsibility. However, as each inquiry is unique, as is the interaction with vulnerable witnesses,

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<sup>6</sup> *Auditore v State of New South Wales* [2017] NSWDC 150 at [34]-[35].

obtaining legal advice may be necessary. This is supported by the fact that Her Honour recognised the existence of special circumstances that may give rise to a duty of care.<sup>7</sup>

It could be argued, however, that Parliament at least owes vulnerable witnesses a moral duty to ensure steps are taken to reduce the impact of inquiry processes on them. This is because the Parliament has asked for their assistance in providing evidence to its inquiry.

### **CHALLENGES IN OBTAINING EVIDENCE FROM VULNERABLE WITNESSES**

Vulnerable witnesses may avoid engaging in formal inquiry processes because their ability to participate is impaired. This can present numerous challenges in obtaining their evidence. These include:

- securing trust from committee members and staff
- using non-traditional engagement and evidence collecting methods
- disengagement
- managing expectations arising from participating in the inquiry process
- addressing perceptions of giving evidence to Parliament
- a lack of understanding of inquiry procedures, including the status of evidence
- public exposure and media attention
- identifying the appropriate level of required support.

The Western Australian Parliament is addressing these challenges. This has assisted vulnerable witnesses in fully participating in committee inquiries and providing quality evidence. This is illustrated in the case studies discussed below.

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<sup>7</sup> *Auditore v State of New South Wales* at [29].

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## **WHAT VULNERABLE WITNESSES OFFER PARLIAMENTARY COMMITTEE INQUIRIES**

Witnesses who have suffered physical or psychological harm through lived experience often have a unique and compelling insight into issues a parliamentary committee is investigating. Their evidence can illustrate the harm being caused and lead to a better understanding of possible solutions. The case for reform may be stronger when taking their evidence into account. Without it, a committee may not sufficiently appreciate the extent of the seriousness of the issues and the impact it is having on the community.

This underscores the importance of ensuring committee inquiries are accessible to all who have relevant evidence. Customising an approach at each stage of the inquiry process can assist vulnerable witnesses engage with the committee and make a valuable contribution. In turn, they help make the case for reform.

### **The risk of vicarious trauma**

When staff engage with and are exposed to confronting evidence by vulnerable witnesses, there is a risk of them experiencing what is referred to as ‘vicarious trauma’. This has been recognised as a process of change resulting from empathetic engagement with trauma survivors.<sup>8</sup>

Staff may potentially develop post-traumatic stress disorder if this risk is not mitigated by providing appropriate training and support. This may include peer and leadership support programs, rotation of staff on certain inquiries to manage exposure to traumatic evidence and vicarious trauma training.

## **METHODS TO FACILITATE VULNERABLE WITNESSES GIVING EVIDENCE**

At each stage of the inquiry process, parliamentary staff and committee members can adopt strategies and take steps that facilitate receiving evidence.

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<sup>8</sup> British Medical Association: ‘Vicarious trauma: signs and strategies for coping’. Accessed at: <<https://www.bma.org.uk/advice-and-support/your-wellbeing/vicarious-trauma/vicarious-trauma-signs-and-strategies-for-coping>>.

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It is important staff, when developing these strategies, ensure vulnerable witnesses give informed consent and respect and facilitate the choices they make about their evidence. Remember – it is their evidence to give.

Some of these suggested strategies and steps are as follows.

### *Inquiry pre-commencement meeting*

Forward planning is important for any inquiry, but especially so when determining what special measures need to be taken to support vulnerable witnesses.

If a committee inquiry will benefit from evidence from vulnerable witnesses, staff can brainstorm the steps that need to be taken at each stage in the inquiry process. This will help identify risks to witnesses, staff and members and how they should be managed and the resources required.

An important step is to arrange for staff (and members, if they agree) to be briefed on trauma awareness by a suitable organisation and arrange access to counselling when required as early as possible. This will help prepare them for dealing with evidence from vulnerable witnesses.

### *Inquiry commencement*

After the inquiry has commenced, the committee can receive recommendations on how to best obtain evidence from any vulnerable witnesses and manage risks. This may involve, as a first step, including in the first media release a list of support services that potential witnesses can access. Another is identifying which stakeholder groups may contain vulnerable witnesses and how they should be approached.

Some suggested steps when inviting and receiving submissions include:

- consider asking a representative group to assist identify vulnerable witnesses
- considering the submission period and whether an extended timeframe is appropriate, taking into account the challenges faced by witnesses when making a submission about traumatic experiences (see Case Study 1 below)
- considering carefully whether some submissions should be given a private status or if information needs to be redacted
- considering obtaining consent for public/private status in writing for submissions containing sensitive material



- ensuring sensitive material is discussed with the witness and redacted if appropriate, which could also include redacting their name
- ensuring the witness is aware that their submission will be published on the committee's website if given a public status
- informing witnesses they may withdraw their submission at any time up to the point of report finalisation
- preparing a submission summary that identifies whether a submitter is likely to be a vulnerable witness, if possible.

### **Case Study 1: Standing Committee on Environment and Public Affairs inquiry into past forced adoptive policies and practices**

This inquiry arose from a petition tabled in the Legislative Council of Western Australia calling for the Parliament to investigate 'the systematic and systemic removal of newborns from their mothers' care via past adoptive practices from 1939 onwards'.

The Committee posted documents on its website explaining the background to the inquiry, information on making submissions and suggested questions and topics to assist those wishing to make a submission. Also included were a list of counselling and other support services.

The Committee resolved to extend the submission deadline following feedback, given the sensitive nature of the inquiry.

Guidance explained that submissions would not be published without consent and that video and audio submissions would also be accepted. Copies of this guidance can be obtained on the Committee's website.<sup>9</sup>

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<sup>9</sup> See Parliament of Western Australia, 'Parliamentary Business, Committees, Environment and Public Affairs, Inquiry into past forced adoptive policies and practices', Website, Accessed at: <[www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)>.

### *Planning hearings*

When planning hearings to receive evidence from vulnerable witnesses, certain matters can be considered to ensure the best environment possible to secure their evidence and put them at ease.

These matters could include discussing the hearing room layout, which could be modified to provide a less imposing set up for witnesses, such as a round table or outside when obtaining evidence from First Nations people (see Case Study 2 below).

Less formal clothing attire and adopting an appropriate line of questioning from Members to reflect witness vulnerability can also be considered.<sup>10</sup>

Additionally, private hearings to ensure the confidentiality of evidence is recommended, though they could be public at the discretion of the committee and subject to witness feedback (see Case Study 3 below).

A Chair's opening statement (an example that is part of the Western Australian Legislative Council's *Guidelines for engaging with vulnerable witnesses* is attached as the Appendix ) can also be a helpful tool.

#### **Case Study 2: Select Committee into Child Development Services**

The Select Committee was established to examine child development services in Western Australia. This arose from concerns about the long wait times for children's health and development services and its impact on a child's development, health and well-being. The Committee is examining the reasons for these delays and what improvements can be made. Its Interim Report is available on the Western Australian Parliament website.<sup>11</sup>

As part of its evidence gathering, the Committee held informal discussions with 3 indigenous members of the Bidyadanga community at an outside table. Hansard was

<sup>10</sup> A more detailed list can be found in the author's paper submitted to the ANZACATT conference, available on request.

<sup>11</sup> See Parliament of Western Australia, Parliamentary Business, Committees, Select Committee into Child Development Services, Website, Accessed at: <[www.parliament.wa.gov.au](http://www.parliament.wa.gov.au)>. Following the tabling of this committee's final report, it can be found by clicking on Committees, then Past committees.

not present and they were not formally sworn in. The Chair asked questions and the Advisory Officer took notes. Everyone was casually dressed and Committee members and staff were not seated directly facing the witnesses. As English was not their first language and they did not feel comfortable giving evidence at a formal committee hearing, these steps facilitated them telling the Committee their stories.

### *Hearings*

At all stages during inquiry hearings, witnesses should be made to feel as comfortable as possible and reassured their welfare is taken seriously and their attendance valued. Although it is impossible to anticipate everything that may occur, being well organised and as prepared as possible will assist.

Staff should ensure the trauma counsellor is in the waiting/recovery room before the witness arrives. Once they have met the witness at the arranged location, they can be accompanied to this room, speak to the counsellor if they need to and wait to attend the hearing.<sup>12</sup>

When the committee and the witness are ready, they should be escorted into the room (with their counsellor or support person/therapy animal, if they wish). The Chair's opening statement can assist in putting the witness at ease, acknowledging how they must be feeling and that they can take a break at any time.

Once the witness has given any opening statement, the line of questioning from Members should, ideally, reflect their level of vulnerability and avoid placing them under unnecessary pressure or stress.

Escorting the witness to the waiting/recovery room after the hearing enables them to debrief with their counsellor or support person helping to place them in a better frame of mind before they depart.

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<sup>12</sup> The regional and Perth based hearings held as part of the Standing Committee on Environment and Public Affairs' inquiry into past forced adoptive policies and practices were conducted in a sensitive manner and supported by trauma informed counsellors.

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**Case Study 3: Standing Committee on Estimates and Financial Operations Inquiry into the financial administration of homelessness services in Western Australia**

The Committee considered the current funding and delivery of homelessness services in Western Australia, including the Government's 10-Year Strategy on Homelessness 2020-2030 and existing data systems and how they inform service delivery.

The Committee held private and public hearings with people with lived experience of homelessness. While private hearings are often the appropriate forum for lived experience evidence, there were some public hearings that proved empowering for witnesses. They were also reported in the media.<sup>13</sup> This enabled public dissemination of the issues and raising the profile of the Committee's work and the hardships being experienced by those experiencing homelessness.

### *Following the hearing*

Continued contact with the witness by parliamentary staff after the hearing recognises that, although they have given their evidence, the trauma of having done so may not have fully subsided. Indeed, despite the assistance of counsellors and other support, sharing their lived experience may have a lengthy impact. Some of the following steps are appropriate:

- Send a thank you email attaching the draft transcript, which could also attach a list of support services.
- When report writing, send the witness any quotes from their transcripts you wish to use for their approval. They can be assured they won't be personally identified but that the quotes are just being used as examples of lived experiences (see Case Study 4 below).
- When tabling the report:

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<sup>13</sup> Hamish Hastie, 'Perth's rental housing crisis laid bare', *WAtoday*, 18 October 2022.

- inform witnesses by email about the tabling date and include a link to the tabling broadcast, alerting them to what might trigger emotional trauma
- consider inviting witnesses to attend the public gallery to see the report being tabled, if appropriate
- Send the Government response, once tabled, to the witness and ask if they have any questions.

In the author's opinion, these strategies and steps reflect Parliament's moral duty to vulnerable witnesses proposed above.

#### **Case Study 4: Community Development and Justice Standing Committee inquiry into sexual harassment against women in the FIFO mining industry**

The Committee's goal, through this inquiry, was to drive cultural, procedural and legal change in the FIFO mining industry. This was to ensure a renewed approach to defining, monitoring, responding to and reporting workplace safety regarding sexual harassment against women.

The Committee's report contains a selection of quotes from evidence of women who had experienced sexual abuse, harassment and assault. The Committee found this to be 'unlawful and criminal behaviour much of which has been ignored or overlooked by employers.'<sup>14</sup>

All personal, company and site names and any other identifying information was removed from the quotes provided. Each quote was sent to the relevant individual to obtain their consent and give them an opportunity to raise any issues. This was an effective method of obtaining their informed consent and protecting their identity while also enabling their lived experience to be shared in the report.

In her Foreword to the report, Committee Chair Libby Mettam MLA acknowledged the positive experience participating in the inquiry had on those who shared their lived experiences:

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<sup>14</sup> Community Development and Justice Standing Committee, report 2, 'Enough is Enough' Sexual harassment against women in the FIFO mining industry, Western Australia, Legislative Assembly, 23 June 2022.

*Many of the women who made submissions to the inquiry said this was the first time they had told of their experience to anyone. We are glad the inquiry process was trusted and acknowledge their courage in being prepared to share their experiences in the hope it would improve the situation for others. Other inquiries and truth engagement processes have demonstrated that there is a positive healing power for victims of trauma if their experiences are heard in a safe and supportive formal complaint handling process.*

## **SUMMARY OF GUIDELINES/PROTOCOLS IN PLACE IN AUSTRALIAN JURISDICTIONS**

Whether being proactive or reactive, it is a good idea for parliaments, as a first step, to develop guidelines that govern how evidence is best obtained from vulnerable witnesses.

One of the first to do so was the Legislative Assembly for the Australian Capital Territory, which developed a *Vulnerable Witness Protocol* in 2017.<sup>15</sup> This excellent document comprehensively considers:

- characteristics of vulnerable witnesses
- points of potential risk during the inquiry process
- how vulnerable witnesses can be supported and protected, including ensuring they give informed consent
- protecting the health and wellbeing of committee staff and members.

It also contains a protocol for responding to high-risk situations.

The Department of the House of Representatives of the Federal Parliament released a *Guide to managing sensitive and high-risk committee inquiries* in August 2022. This includes recommendations on undertaking risk assessments and putting in place appropriate controls at the start of an inquiry. Part of this is developing a mental health and wellbeing plan to manage potential risks to staff working on an inquiry. It contains

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<sup>15</sup> ACT Legislative Assembly, Office of the Legislative Assembly, *Annual Report 2017-2018*, p 19.

helpful case studies for illustration. An appendix is dedicated to vicarious trauma, which underlines the importance of putting supports in place to manage this risk.

The Victorian Parliament, in an appendix to its *Procedures Manual*, contains *Guidelines for protecting the privacy, safety and wellbeing of inquiry participants at risk*.

The New South Wales Legislative Council's *Practice and Procedure Manual* contains a section on vulnerable witnesses. It lists some steps to 'facilitate a positive experience for vulnerable witnesses giving evidence to a committee at a hearing'. These include checking whether they have support mechanisms in place and arranging for them to wait in a private room before giving evidence.

The Western Australian Legislative Council's *Guidelines for engaging with vulnerable witnesses*, referred to above, was developed in 2023. It contains actions during the inquiry process outlined above to facilitate vulnerable witnesses giving evidence. It also lists available support services for committees to provide as required. These guidelines have been of assistance in ongoing inquiries.

## **CONCLUSION**

Having effective processes in place to facilitate evidence from vulnerable witnesses protects their safety and well-being. This is consistent with what has been suggested is a moral duty parliaments owe to vulnerable witnesses. It also assists parliamentary committees to obtain evidence of lived experience that helps address issues the subject of inquiries. Further, providing care and support for parliamentary staff is consistent with good workplace health and safety practices.

Examples from recent parliamentary inquiries in Western Australia demonstrate a commitment to best practice in gathering evidence from vulnerable witnesses. This will continue to evolve as further experience is obtained in future inquiries. Of course, not all scenarios can be anticipated or catered for, regardless of the quality of guidance material and support.

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## **APPENDIX – CHAIR’S OPENING STATEMENT**

*On behalf of the Committee, I welcome you to the hearing.*

*We acknowledge that you may be feeling uncertain about today’s hearing and the inquiry process, so thank you for attending today.*

*Please take a break any time you need to. Counselling support is available to you if you feel it would help you. Feel free to stay afterwards to utilise that service.*

*The transcript of this hearing will be private evidence, so it won’t be published online and can’t be published unless the committee resolves to do so. We will liaise with you to agree on what can be used as part of the inquiry report.*

*You requested to attend a hearing with us, so this is your opportunity to say what you’d like to say regarding the inquiry and the terms of reference. We have read the written submission you sent to us earlier in the inquiry.*

*[We note that your support person is present here with you today. They are welcome to remain here with you to support you but cannot give evidence or speak on your behalf as they are not a witness.]*

*Do you have any questions?*

*Do you have any opening remarks before we begin questions?*