



Australian Government

Migration Review Tribunal · Refugee Review Tribunal

Guidance on Vulnerable Persons

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1. Introduction

1.1 This Guidance is intended to address the needs of those individuals who face particular difficulties in the review process because their ability to understand and effectively present their case or fully participate in the proceedings is or may be impaired due to their age or physical, mental, psychological or intellectual condition, disability or frailty.

1.2 The objectives of the Guidance are:

- to ensure that vulnerable persons are supported during the review process;
- to ensure that the inherent dignity of vulnerable persons is recognised and respected; and
- to heighten awareness of Members and staff of the need to consider implementation of procedures for dealing with vulnerable persons.

1.4 The Guidance sets out a number of procedural approaches that may be adopted by the Tribunal in relation to vulnerable persons. The approaches are designed to ensure that proper account is taken of the needs of vulnerable persons, be they parties or witnesses, and to ensure no applicant is disadvantaged when the Tribunal conducts a review.

1.5 The procedures may not be appropriate in all cases involving vulnerable persons. The Guidance is intended to complement existing legislation, policy and guidance and should not be applied inflexibly.

1.6 The Guidance replaces Refugee Review Tribunal Guidelines on Children Giving Evidence.

1.7 In this document, unless otherwise indicated:

‘applicant’ means a primary review applicant;

‘child’ means a person under 18 years of age;

‘party’ means a primary or secondary review applicant or visa applicant;

‘the Tribunal’ means the Migration Review Tribunal or the Refugee Review Tribunal or both.

2. Definition of a vulnerable person

- 2.1 A vulnerable person is a person whose ability to understand and effectively present their case or fully participate in the review process may be impaired, due to their age or physical, mental, psychological or intellectual condition, disability or frailty.
- 2.2 All child applicants or child witnesses are to be regarded as vulnerable.
- 2.3 Persons who are parties to or witnesses in reviews may be vulnerable persons.

3. Early identification of vulnerable persons

- 3.1 A person may be identified as vulnerable at any stage during the review process. However, it is preferable that vulnerable persons are identified as early as possible and that appropriate accommodations are made as soon as practicable, including ensuring a flexible approach to the processing of cases involving them.
- 3.2 A person may be identified as vulnerable before the Tribunal has considered or tested the evidence or made an assessment of a person’s claims. A Tribunal Member or staff officer may form a view that a person is a vulnerable person. This view may be based on information contained on the Tribunal or Department of Immigration and Citizenship (Department) files or as a result of communication with the person. A person’s representative or an officer of the Department may provide the Tribunal with reasons why an applicant should be identified as a vulnerable person.
- 3.3 An identification of a person as vulnerable does not indicate the acceptance of underlying facts or predispose the Tribunal to make a particular determination of the case. The Tribunal should make its decision on the merits of a case based on an assessment of all the evidence available to the Tribunal.

4. Priority attention to cases involving vulnerable persons

- 4.1 Priority should be given to cases involving vulnerable persons.
- 4.2 All cases where an applicant has been identified as a vulnerable person will be given Priority 1 (highest priority) status in accordance with the Tribunals’ caseload and constitution policy.¹ However, to ensure a fair and just review it may be necessary to delay the processing of a case, because of issues causing the person to be identified as vulnerable.
- 4.3 The Principal Member or his or her delegate decides who is to constitute the Tribunal for each case. It may be appropriate in cases involving vulnerable persons for the Tribunal to be constituted by a Member of a particular gender or by a particular Member because of that Member’s special knowledge or experience in dealing with cases involving similar issues.

- 4.4 When a case involving a vulnerable person is allocated to a Member, the Tribunal will assign an experienced case officer to assist. The case officer should maintain responsibility for case management issues in the application. The case officer should provide the vulnerable person or his or her representative or support person with information about the Tribunal's processes and procedures and should remain the primary contact for the applicant, his or her representative or support person, the Member and other Tribunal officers throughout the review process.
- 4.5 The Member should consider whether particular procedural arrangements or additional representation or support is desirable in an individual case. The case officer may discuss these considerations with the vulnerable person and his or her representative or support person. If appropriate, the case officer should direct the vulnerable person to a community or government organisation that can offer access to health care, counselling or other assistance that may be required to meet the vulnerable person's needs.²
- 4.6 When considering the type of procedural adjustments, representation or support needed by a child applicant, the Tribunal should take the child's wishes and his or her best interests into consideration.

5. Representatives and support persons

- 5.1 The Tribunal's procedures are designed to provide a review process which is fair and just, and to ensure that applicants can fully put their case to the Tribunal without the assistance of a legal practitioner or migration agent if they so choose.
- 5.2 A representative can assist a vulnerable person with his or her case by providing written submissions and evidence to the Tribunal, contacting the Tribunal on behalf of the vulnerable person and accompanying the vulnerable person to any meeting or hearing arranged by the Tribunal. With limited exceptions,³ a representative must be a registered migration agent. A number of community and government organisations provide advice and assistance in migration matters.⁴ Children may be represented in the review process by a parent or guardian.
- 5.3 At a hearing, the Member may consider it appropriate to permit a representative representing a vulnerable person to present arguments or submissions or to comment on specific matters. If the Member considers it appropriate to allow the representative to participate in the Tribunal hearing, the representative should be informed in sufficient time before the hearing to give him or her adequate time to prepare.
- 5.4 A support person can assist a vulnerable person with his or her case by providing support at a Tribunal hearing and assistance with reading Tribunal correspondence and by contacting the Tribunal on the vulnerable person's behalf. However, a support person may not be able to provide "immigration assistance"⁵ or legal advice and will not be entitled to receive correspondence from the Tribunal unless he or she is an authorised recipient.⁶ Support persons

include friends, relatives or church leaders or medical practitioners, social workers, counsellors or psychologists.

- 5.5 A vulnerable person who is an applicant may choose not to nominate a representative or support person to assist with his or her case. The Tribunal has no power under the *Migration Act 1958* (Cth) to appoint a person to act on behalf of an applicant.⁷ The Tribunal can encourage a vulnerable person to find representation or other assistance but cannot appoint a person to act for the vulnerable person.

6. Competency to give oral evidence at a Tribunal hearing

- 6.1 The Migration Act sets out the circumstances in which the Tribunal must invite an applicant to appear before it to give evidence and present arguments.⁸ The Tribunal may take evidence on oath or affirmation but is not obliged to do so.⁹
- 6.2 A Member may need to determine if a person is competent to give sworn evidence if that person appears to be a vulnerable person. The Member may need to consider making inquiries into the extent and effect of any vulnerability or impairment.¹⁰
- 6.3 Although the Tribunal is not bound by technicalities, legal forms or the rules of evidence,¹¹ the Tribunal can be guided by the rules of evidence when considering the competency of a vulnerable person.¹²
- 6.4 Before taking evidence from a vulnerable person, a Member may need to determine if the person understands the nature of an oath or affirmation to tell the truth and if he or she is able to communicate evidence. An assessment should be made about the evidence the person is able to provide and the best way to elicit that evidence. The Evidence Act provides guidance that the Member may consider helpful. It says that a person may be competent to give evidence about some facts but not all facts and that a person is not competent to give evidence about a fact if he or she is incapable of hearing or understanding, or communicating a reply to, a question about the fact and that incapacity cannot be overcome.¹³
- 6.5 The Tribunal may require medical evidence about the competency of a vulnerable person. This may be in the form of a report from a psychiatrist, psychologist or the vulnerable person's own medical specialist. The report should cover matters including:
- a diagnosis in respect of the vulnerable person;
 - the vulnerable person's ability to understand the nature of Tribunal proceedings;
 - whether the vulnerable person can give evidence under oath or affirmation;
 - whether the vulnerable person can give instructions to his or her representative;

- in the case of a witness, their ability to give evidence; and
 - a prognosis in relation to these issues.
- 6.6 In some circumstances, it may be appropriate for the Tribunal to obtain a medical report itself by arranging for the person to attend a specialist.¹⁴ A Member may also need to consider obtaining evidence from a person closely associated with the vulnerable person who is familiar with the claims. The associate may include a representative, medical professional or close relative. Evidence may be provided orally at a hearing or in writing in the form of a report, submission or statement. The weight to be given to evidence provided by a person closely associated with a vulnerable person is a matter for the Member to determine.
- 6.7 The weight to be given to the oral evidence of a vulnerable person may depend upon the person's understanding of the obligation to be truthful and his or her ability to communicate evidence. Sworn evidence is not required to be given more weight than unsworn evidence. The weight to be given to the evidence is a matter for the Member to determine.

7. Conducting the review

- 7.1 Vulnerable persons may find it difficult to participate in the review process. Depending upon the nature of the vulnerable person's impairment, he or she may find it difficult to compile and present documentary evidence relevant to the claims. A vulnerable person may also find it difficult to give evidence or present arguments at a Tribunal hearing.
- 7.2 Difficulties faced by vulnerable persons may include but are not limited to:
- inability to communicate effectively;
 - impaired memory or behaviour or impaired ability to recount relevant events;
 - symptoms that have an impact on the consistency and coherence of testimony;
 - a fear of persons in a position of authority and associating the Tribunal's review process with that fear (especially in the case of persons who are survivors of torture or trauma);
 - mobility or health issues which may make attending a Tribunal hearing at its premises very difficult;
 - in the case of a child, the inability of the child to present evidence, particularly relating to context, timing, importance and details, with the same degree of precision and specificity as an adult.
- 7.3 The following may assist in relation to the taking of evidence from, or the presenting of claims by, a vulnerable person at a Tribunal hearing:

- encouraging the person and his or her representative to seek access to the Tribunal and Department case files prior to the scheduled hearing;
- requesting an interpreter of a particular gender;
- ensuring that an interpreter is appropriately briefed about the vulnerability issues;
- encouraging the person to be supported during a hearing;
- creating an informal setting for the hearing;
- allowing any other procedural accommodation that may be reasonable in the circumstances;
- conducting a hearing for a Migration Review Tribunal application in private, if appropriate;
- informing the person about whether the hearing will be conducted in public or in private;
- creating an open, reassuring and supportive environment in order to establish a relationship of confidence and trust between the Member and the person and to facilitate the full disclosure of sensitive and personal information;
- ensuring an informal environment for the giving of evidence by a child. It may be appropriate for an adult whom the child trusts to be present when the child is providing evidence. This person may or may not be the child's representative;
- when taking evidence from a child, informing the child that, if they do not know an answer to a question, they should simply say so. A child should be encouraged to request that the question be repeated or explained in a different way;
- questioning should be done in a sensitive and respectful manner and questions should be formulated in a way that the vulnerable person understands;
- consider taking evidence from family members or close friends if a vulnerable person is highly agitated or unable to provide coherent evidence;
- if the vulnerable person has difficulty providing oral evidence in person, allowing the vulnerable person to provide evidence via videoconference or other means;
- monitoring the vulnerable person and providing short breaks or adjournments as appropriate;
- accommodating requests for short breaks or adjournments;
- during the hearing of claims concerning sexual violence or other traumatic incidents, an adjournment or second hearing may be appropriate if a person is becoming or has become emotionally distressed. It is important that a person is not further traumatised by the process of giving evidence;

- encouraging a person to seek appropriate counselling or other support services after a hearing or recommending to the person's representative that such services be sought.

7.4 If at a Tribunal hearing the Tribunal considers it appropriate that a vulnerable person be given the opportunity to obtain assistance or be medically assessed, the Tribunal should adjourn the hearing to enable the assistance or a medical report to be obtained.

8. Tribunal decisions

8.1 Tribunal Members should avoid unnecessary disclosure in Tribunal decisions of information of a sensitive, private or personal nature.

8.2 The published versions of Refugee Review Tribunal decisions must not contain information which may identify an applicant or any relative or other dependant of an applicant.¹⁵ The Migration Act empowers the Migration Review Tribunal to restrict the publication of decisions if the Tribunal is satisfied it is in the public interest to do so.¹⁶

9. Notification of Tribunal decisions

9.1 After the Tribunal has made a determination, a written decision will be given to the applicant, his or her authorised recipient and the Secretary of the Department. Decisions can be provided by fax or post.

9.2 If the Tribunal is concerned that a vulnerable person may find it difficult to understand the Tribunal's decision or may be distressed by the outcome of the review, the Tribunal should endeavour to ensure that the person receives appropriate support at the time they receive the decision.

10. Sources of further guidance

Migration and Refugee Review Tribunals

Guidance on the Assessment of Credibility – August 2008.

Immigration and Refugee Board of Canada

Guideline 8 – Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB – 15 December 2006.

Guideline 4 – Women Refugee Claimants Fearing Gender-Related Persecution – 13 November 1996.

Guideline 3 – Child Refugee Claimants Procedural and Evidentiary Issues – 30 September 1996.

United Nations High Commissioner for Refugees (UNHCR)

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1992.

UNHCR Handbook for the Protection of Women and Girls – January 2008.

UNHCR Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons – Guidelines for Prevention and Response – May 2003.

Refugee Children: Guidelines on Protection and Care – 1994.

Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees – 7 May 2002.

Department of Immigration and Citizenship

Gender Guidelines, 9 August 2008.

(<http://www.immi.gov.au/gateways/agents/legislation-policy.htm>)

International Association of Refugee Law Judges (IARLJ)

Report of IARLJ Working Party on vulnerable persons 2008.

Endnotes

- ¹ The policy is updated every year and is available on the Tribunals' website at <http://www.mrt-rrt.gov.au/newsArchive.asp>.
- ² Refer to Tribunal Fact Sheet MR2 – Immigration Assistance for a list of service providers under the heading of 'Other Assistance'. This fact sheet is available on the Tribunals' website at: <http://www.mrt-rrt.gov.au/forms.asp>.
- ³ Under Part 3 of the Migration Act, apart from a registered migration agent the following persons can represent an applicant before the Tribunals: a spouse, child, parent, brother or sister; the nominator or sponsor of the visa applicant; a member of a diplomatic mission, consular post or office of an international organisation; parliamentarians; and an official (as defined in Part 3 of the Migration Act) in the course of his or her duties.
- ⁴ Refer to Tribunal Fact Sheet MR2 – Immigration Assistance for a list of service providers. This fact sheet is available on the Tribunals' website at: <http://www.mrt-rrt.gov.au/forms.asp>. The Department of Immigration and Citizenship funds the Immigration Advice and Application Assistance Scheme (IAAAS). The IAAAS provides professional assistance, free of charge, to the most vulnerable visa applicants and sponsors. There are 23 IAAAS providers around Australia who are Registered Migration Agents or officers of legal aid commissions. For further information on the IAAAS refer to Fact Sheet 63 available on DIAC's website at: <http://www.immi.gov.au/media/fact-sheets/63advice.htm>.
- ⁵ Under Part 3 of the Migration Act a person provides a visa applicant, a sponsor or nominator, or a cancellation review applicant with 'immigration assistance' if they use their knowledge or experience in migration procedures to: (a) prepare or help prepare an application; (b) provide advice about an application; (c) prepare for proceedings before the Tribunal in relation to an application; or (d) provide representation in proceedings before the Tribunal in relation to an application. 'Immigration assistance' can only be given by registered migration agents or certain other persons as outlined in footnote 3.
- ⁶ Applicants may nominate a person known as an authorised recipient to receive correspondence on their behalf in connection with the review: s. 379G (MRT) and s.441G (RRT) of the Migration Act.
- ⁷ Certain Australian courts may appoint a person to act as the next friend or guardian ad litem of a child or disabled person. See for example (NSW) Supreme Court Rules Pt 1 r 8 and (Cth) Family Law Rules O 23 Div 3. In the Refugee Protection Division of the Immigration and Refugee Board of Canada a representative must be designated by the Refugee Protection Division for any claimant or protected person who is under the age of 18 years or who is unable to appreciate the nature of the proceedings: Immigration and Refugee Protection Act 2001 s.167(2).
- ⁸ Migration Act s. 360 (MRT) and s.425 (RRT).
- ⁹ Migration Act s. 363(1) (a) (MRT) and s.427 (1) (a) (RRT).

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- ¹⁰ In *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR12 the High Court of Australia held that there is no formal competency requirement at the Tribunals. A Member does not need to formally establish that an applicant is legally competent to give evidence before proceeding with a hearing (at [1] and [45]). However, when there is evidence before the Tribunal that the applicant may have a medical condition which would affect his or her capacity to give evidence, it may need to be investigated as not to do so may lead to the conclusion that the applicant has not been given a fair opportunity to be heard under s.425 (1): *SZIWY v Minister for Immigration and Citizenship* [2007] FMCA 1641.
- ¹¹ Migration Act s.353(2) (a) (MRT) and s.420 (2) (a) (RRT).
- ¹² The rules of evidence applying in federal courts have been codified in the *Evidence Act 1995* (Cth). The Evidence Act contains a rebuttable presumption that every person is prima facie competent to give sworn evidence (s.12). This presumption can be rebutted if a person is incapable of understanding that he or she is under an obligation to give truthful evidence (s.13(1)). A person who does not understand the obligation of an oath may give unsworn evidence if the court is satisfied that he or she understands the duty of speaking the truth and is capable of responding rationally to questions about facts in issue (s.13(2)).
- ¹³ Evidence Act ss.13(3) and 13(4).
- ¹⁴ Migration Act s.363(1)(d) (MRT) and s.427(1)(d) (RRT). It should be noted that sections 363(1)(d) and 427(1)(d) of the Migration Act empower the Tribunals to obtain a medical examination; they do not impose an obligation or duty to do so: *Minister for Immigration, Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12 per Gummow and Hayne JJ at [43]; *SZGZH v Minister for Immigration and Citizenship* [2008] FMCA 219 per Emmett FM at [57]; *SZCBB v Minister for Immigration and Multicultural Affairs* [2006] FMCA 210 per Raphael FM at [15].
- ¹⁵ Migration Act s.431(2).
- ¹⁶ Migration Act s.378(1).