



Special Commission of Inquiry into LGBTIQ hate crimes

PRACTICE GUIDELINE 2 – Applications for non-publication

PART A – INTRODUCTORY MATTERS

1. This Practice Guideline (**PG 2**) relates to applications for non-publication of documents or material produced to the Special Commission of Inquiry into LGBTIQ hate crimes (**Special Commission**). It should be read in conjunction with the *Special Commissions of Inquiry Act 1983* (NSW) (**Act**) and the terms of reference contained in the Letters Patent establishing the Special Commission dated 19 April 2022.
2. This Practice Guideline and any previous or future Practice Guidelines may at any time be varied, changed or replaced as the Special Commission considers appropriate.

PART B – APPLICATION PROCESS

3. Pursuant to s 8 of the Act, the Commissioner has powers to give directions preventing or restricting the publication of evidence given before the Commissioner or of matters contained in documented lodged with the Commissioner.
4. Where a person¹ (the **applicant**) wishes to claim:
 - (a) confidentiality;
 - (b) public interest immunity;
 - (c) parliamentary privilege; or
 - (d) any other basis for non-publication,

in respect of any information or material provided to the Special Commission (including in oral evidence) and wishes to apply for a direction to be made pursuant to s 8 of the Act, the following procedure applies.

Applications in relation to documents, audio-visual material and/or other material

5. A person wishing to obtain a non-publication direction in relation to documents, audio-visual material and/or other materials must provide to the Solicitors Assisting the Special Commission a written application, including
 - (a) written submissions,

¹ A reference to a 'person' in this Practice Guideline includes a body corporate or government agency as well as an individual.

- (b) sworn or other evidence as necessary or appropriate, together with
 - (c) such other relevant supporting materials as set out in this Practice Guideline.
6. The timeframes for making such an application are:
- (a) Where information is being produced to the Special Commission pursuant to a summons or request – prior to or on the date set for production of that material.
 - (b) Where information available to the Inquiry is proposed to be included in a tender bundle to be tendered at a public hearing of the Special Commission, and the applicant did not previously have an opportunity to make an application for non-publication at the time that material was produced in accordance with (a) above – 1 week prior to the commencement of the relevant public hearing.
7. In relation to documents, the applicant must provide the Special Commission with an electronic reference copy of each such document with mark-up which clearly indicates the pages, or the part of the page, containing matter over which non-publication is claimed in the following way as applicable:
- (a) Where non-publication is claimed over an entire document, all pages of the document should be marked clearly with the word ‘Confidential’ and a word or phrase indicating the basis of the non-publication application.
 - (b) Where non-publication is claimed over particular pages in a document, the first page of the document should be marked ‘Partly Confidential’ and the particular pages should be identified to the Special Commission and marked clearly with the word ‘Confidential’ and a word or phrase indicating the basis of the non-publication application.
 - (c) Where non-publication is claimed over part of a page or pages or particular words or phrases in a document, the first page of the document should be marked ‘Partly Confidential’ and the relevant parts of the document should be identified to the Special Commission by way of a red outline, and marked with the word ‘Confidential’ and a word or phrase indicating the basis of the non-publication application in relation to each part of page or pages, phrase or words.

The content of the marked pages must not be obscured. If different bases for non-publication apply to different pages or parts of the document or material, the word or phrase indicating each basis must be able to be clearly associated with the page(s) or parts of the document to which it applies.

8. In addition to the marked-up electronic reference copy described at paragraph 7 above, the applicant must provide a schedule, in table form, summarising the material regarding which non-publication is claimed and the basis or bases for that claim. The schedule should include at least the following columns:
- (a) **Reference:** identifying, in separate rows, the relevant document and each page, group of pages, paragraph or other part of the document the subject of the application, such

that they can be clearly identified in the electronic reference copy provided via the process set out in paragraph 7 above.

- (b) **Basis:** identifying the basis or bases, including bases in the alternative, for which a non-publication direction is sought, in respect of each page, paragraph or other part of the document identified in the “Reference” column. The applicant should be mindful that the claim may be determined on the papers (see paragraph 17(c) below).
- (c) **Availability to public:** identifying the extent to which the information contained on the page, paragraph or other part of the document identified in the “Reference” column is publicly available, including in publicly available material that may not precisely replicate the text or portion of the material in question. In particular, this should include whether the material has been tendered in the course of coronial proceedings, and whether such tender was subject (and/or remains subject) to a non-publication directions or similar order in those proceedings.

An example schedule is **Annexure A** to this Practice Direction. Where an application is made in respect of the entirety of a document without distinction, only one row may be required.

- 9. In relation to audio-visual and other material, including videos and audio recordings, the applicant must provide the Special Commission with the following:
 - (a) A further electronic reference copy of the audio-visual or other material in question; and
 - (b) A schedule in the form set out at paragraph 8 above which identifies in the “Reference” column, by way of timestamps or other appropriate markers available in the electronic reference copy, the portions of the audio-visual or other material regarding which the application for non-publication is made.

Applications in relation to oral evidence

- 10. In relation to oral evidence, an application for non-publication must be made:
 - (a) orally at the time in which the evidence is provided at any public hearing; or
 - (b) in writing, as soon as practicable, following the provision of the oral evidence, and in any case within 24 hours of that evidence being provided.
- 11. An application for non-publication in respect of oral evidence must include a schedule in the form set out at paragraph 8 above which identifies which portions of the oral evidence (by subject matter or other appropriate description) regarding which the application is made.
- 12. Where a transcript of the oral evidence has been published or is otherwise made available to the applicant, the Commissioner may, prior to determining the application, direct that the schedule be updated to identify the relevant evidence by reference to the transcript.
- 13. The Commissioner may, at his discretion, require an applicant who has made an oral application for non-publication in relation to oral evidence to also produce written submissions and/or sworn or other evidence in support of the application.

Applications in incorrect form

14. Oral applications for non-publication in relation to any documents, audio-visual material and/or other material may not be made in the absence of an accompanying written application in accordance with paragraph 5 above. Oral applications for non-publication in relation to oral evidence will only be accepted in the timeframe specified in paragraph 10(a) above.
15. Any claim for non-publication which is not made in accordance with this Practice Guideline will not be considered by the Commissioner.

Modification of application process

16. The above provisions may be modified at the discretion of the Commissioner as necessary, including to accommodate the specific nature or format of the material over which non-publication is sought.

PART C – DETERMINATION OF APPLICATIONS

17. In relation to any application for non-publication (written or oral), the Commissioner:
 - (a) will maintain confidentiality over the subject matter of the application pending the determination of the application;
 - (b) may invite or require Counsel Assisting or Solicitors Assisting the Special Commission to make a submission in response;
 - (c) may decide the application on the papers or notify the person or their representative if a hearing is required prior to a decision being made; and
 - (d) will notify the person or their representative in writing of the decision.
18. An application may be granted in whole or in part.
19. Where an application is granted in relation to a part of a document or audio-visual material, the applicant must take the following steps (as relevant) within such timeframe as specified by the Commissioner on granting the application:
 - (a) **Documents:** the applicant must provide an electronic copy of the documents or material for publication by the Special Commission. That copy will have redactions applied to relevant pages or parts subject to a non-publication direction as determined by the Commissioner.
 - (b) **Audio-visual material:** the applicant must provide an electronic copy of the audio-visual material for publication by the Special Commission. That copy will be edited to remove any portion subject to a non-publication direction as determined by the Commissioner, and in the same place(s) include a short audio or visual notice indicating that that portion of the audio-visual material is subject to such a direction.
20. Nothing in this Practice Guideline should be understood as limiting the powers of the Special Commission, whether at the request of any person or on its own initiative, to treat any

submission, information, document or other material as confidential, and to take any steps to ensure or maintain such confidentiality.

Liaison with the Special Commission

21. All contact with the Special Commission made necessary by this or other Guidelines, or other enquiries in respect of the Inquiry, should be made through the Solicitor Assisting at contact@specialcommission.nsw.gov.au unless otherwise directed by the Commissioner or Solicitor Assisting.

1 February 2023

Schedule of Non-Publication Claims

Reference	Basis	Availability to public
<i>[e.g. Statement of Sergeant John Citizen dated 16 February 1983, paragraph [3]]</i>		
<i>[e.g. Statement of Sergeant John Citizen dated 16 February 1983, Annexure B]</i>		
<i>[e.g. Letter from Sergeant John Citizen to Jane Doe dated 5 February 1983, pages 3-4]</i>		
<i>[e.g. Recording of interview between Sergeant John Citizen and Mark Smith at 01:12 – 02:15]</i>		