



July 9, 2021

Via email: irb.engagement.cisr@irb-cisr.gc.ca

Richard Wex
Chairperson, Immigration and Refugee Board of Canada
Minto Place, Canada Building
344 Slater Street, 12th Floor
Ottawa, ON, K1A 0K1

Dear Mr. Wex:

Re: Guideline on Gender Considerations in Proceedings before the IRB

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the updated *Chairperson's Guideline 4 on Gender Considerations in Proceedings before the Immigration and Refugee Board* (Guideline).

The CBA Section welcomes the Guideline as a step forward for the IRB. We particularly appreciate that the Guideline is framed around gender-based claims rather than focusing only on women as survivors of gender-based violence in need of gender-based considerations.

The CBA Section recommends revisions to the Guideline. Our comments are organized in the same order as the Guideline.

Section 1.5. The word “may” is missing in the second last sentence of this section. That sentence should be revised to: “in certain cases, both Guidelines may be applicable.”

Section 2.1. In describing the context in which this Guideline applies, we recommend adding a reference to “non-gender-specified persons.” The Guideline should explicitly acknowledge the gender inequality, violence and discrimination that non-binary people face.

Section 2.2. Throughout the terminology section, the Guideline uses the terms “mental,” “psychological,” and “emotional” interchangeably to describe harm or suffering that may occur due to gender-based violence. We recommend using consistent terminology. We also note that psychological suffering can follow from both emotional and physical harm.

Section 4.1.1. We recommend removing the text that appears in brackets “(and those who identify as such)” after women and girls. The text it brackets appear as an afterthought and suggests there is a distinction between women and girls and those who identify as such.

We also recommend adding an explanation about the specific circumstances affecting men and boys. While this is in the end notes, it appears many pages later. Including this explanation as part of the text may help the reader better understand the concept. We recommend moving this part of the endnotes to the end of this section: “this violence against males is based on socially constructed ideas of what it means to be a man and exercise male power. It is used by men (and in rare cases by women) to cause harm to other males.”

Section 4.1.3. We suggest rephrasing a portion of the text that is awkwardly worded: “these forms of violence can be condoned and perpetrated by at the individual level”. We recommend revising it to: “these forms of violence can be condoned and perpetrated by individuals.”

Section 4.1.5. We recommend adding a reference to the family in the reference that “the belief that abuse is a private matter.” The revised text would reflect that “the belief that abuse is a private or family matter.”

Section 4.1.6. We recommend adding a sentence to this section stating that “these counter-intuitive behaviours may indicate that the individual is still experiencing harm.” Survivors of violence may not trust that social supports can help them and may see the status quo as the only viable option.

Section 6.1.1. We recommend saying that members need to be mindful of their body language, facial expressions and vocabulary in this section. The Guideline mentions taking a trauma-informed approach to adjudication means “leading the proceeding with compassion and patience to minimize the possibility of re-traumatization.” It would help to add details to that statement to clarify that it includes being mindful of body language and facial expressions and using the same vocabulary as the individual. Vocabulary, facial expressions and body language can impact a claimant’s perception of safety and security, and their comfort in sharing personal information with a stranger.

Additionally, a sentence from the previous version of the Guideline has been removed and we recommend that it be updated and added as an additional bullet: “individuals who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome, and may require extremely sensitive handling.”

Section 6.1.2 We recommend clarifying in the first sentence that not all individuals who experienced gender-based violence will recognize that they have experienced trauma. The IRB should be mindful that not all persons who have been impacted by trauma recognize that. Others may recognize that they are traumatized, but may not know how this has impacted them, including how it effects their memory, recall and self-expression.

We also recommend adding a reference to violence as an example of how culture and worldview can impact individuals. The third sentence should be revised to refer to “personal topics such as their health and experience of violence and/or trauma.”

Section 6.2.2. We recommend mentioning the need to proceed with patience in this section. While that is stated in section 6.1.1, it is important and should be mentioned in this section as well as it is a key consideration for members facilitating hearings. We recommend revising the first sentence to state: “the member should proceed with understanding and patience and aim to respond to the individual’s verbal cues and body language in a way that promotes trust and creates a safe space to facilitate the giving of testimony.”

Section 6.2.3. We recommend adding more detail to this section. We would add this sentence from the text of a referenced article: “over time memory works to edit information, and we lose memories, forget some details of memories we do retain, and modify aspects of other memories as

the result of repeated retrievals.” There are lengthy endnotes that offer this context, but the reader should not need to refer to them to understand this concept.

Section 6.4.2. We recommend including additional examples of myths stereotypes and uninformed assumptions relating to survivors of gender-based violence and trauma that should not inform decision-making:

- A mother in a relationship involving intimate partner violence will leave that relationship to protect her children;
- An individual experiencing intimate partner violence will want to report their partner to the police, so that their partner is held responsible for their conduct;
- An individual who has been in one abusive relationship would not enter into or remain in a subsequent abusive relationship;
- An individual experiencing intimate partner violence will no longer love or care for their partner; and
- A man cannot experience intimate partner violence from a female partner.

Section 6.6.4. We recommend an addition to this section to acknowledge that an individual who has faced gender-based violence may not be quick to trust. They may be anxious or fearful speaking with officers, particularly those acting in an enforcement or policing capacity. We recommend adding the following statement to the end of the paragraph: “members should further consider how the individual would experience this interview. For example, they should consider whether the interview took place at a port of entry immediately after a lengthy and stressful journey to Canada, whether the interview was with uniformed officers, the location and environment of the interview, the gender of the officer and interpreter, and whether the interview took place in private.”

Section 6.6.5. Individuals may not be able to seek further treatment even if they had preliminary treatment, due to barriers such as financial, geographical, psychological or cultural impediments. The ability to attend a medical appointment when suffering serious physical harm is distinct from the ability to obtain follow-up medical or psychological treatment. We recommend adding to “including further treatment, while being mindful of barriers to follow-up treatment including, financial, geographical, psychological or cultural impediments.”

Section 6.6.7. It is unclear why members should disregard a psychologist’s professional opinion on credibility from the outset. The psychologist may have formed an opinion after evaluating the demeanour of a person – possibly based on multiple appointments after a rapport has developed – and may have performed psychological testing. For example, the psychologist may state whether the test results are consistent with their perception of the individual’s statements and demeanour.

While we appreciate that the mere recounting by a psychologist of the individual’s narrative does not corroborate the events set forth, a psychologist’s professional opinion on whether the test results and demeanour are consistent with this narrative has value. It should not be discounted without explanation.

We recommend adding, after the first sentence of this section: “where a member disregards a psychologist’s opinion on credibility, particularly where that opinion is based on clinical testing and/or multiple meetings, an explanation is needed.”

Section 7.3. We recommend adding a new section 7.3 to address two types of witnesses:

- (1) those who are co-claimants, co-appellants, or otherwise co-parties in the proceeding; and
- (2) those who are adverse in interest and called to be witnesses by the Hearings Officer.

The presence and involvement of witnesses requires careful consideration that should be explicitly addressed in the Guideline.

The proposed section 7.3.1, addressing individuals who are co-parties to the hearing, would consider whether testimony should be given in the absence of the other individual. This is consistent with section 166 of the *Immigration and Refugee Protection Act*, which considers circumstances in which the fairness of a proceeding would be jeopardised by disclosure.

We suggest the following wording for section 7.3.1: “co-parties to a proceeding may be aligned or adverse in interest. Gender-based violence may not be known to all members of a family. A person who has experienced gender-based violence may not be comfortable speaking in front of a family member and may even feel that the testimony could jeopardise family relationships. In circumstances where an individual asks a co-party to be excused, this request should be granted. When there is question about the fairness of the proceeding, a conference could be held with the requesting party to ascertain the purpose and reasonableness of this request.”

The proposed section 7.3.2 would address adverse or hostile witnesses who may re-traumatize survivors of gender-based violence or may themselves have caused harm to the individual appearing before the IRB. Our members know of cases in which ex-partners were called as witnesses, where the ex-partners had engaged in intimate partner violence. There are also cases where allegations of violence or harm – later established to be false and a result of an acrimonious termination of the relationship – were presented during hearings.

Our proposed text for this section is: “adverse or hostile witnesses may be asked to provide testimony by a Hearings Officer. When these witnesses appear before the IRB, it is important to consider why they were asked to testify and whether the witness has or had a personal relationship with the party. Where the witness has or had a personal relationship with the party, further enquiry should be made as to the nature of that relationship, whether this witness was approached by the Hearings Officer or proactively contacted immigration authorities, and what the witness may stand to gain by acting as a witness. Factors to consider include whether there is an ongoing child custody dispute or divorce/separation proceedings, whether the witness had sponsored the party to Canada and is seeking to avoid responsibility for the sponsorship debt, whether the police had been called by the party or the witness, and whether there is alleged infidelity. These factors may impact the content of the testimony by the witness and the credibility of that testimony.”

Section 8.2.1. We recommend that the Guideline reference the following international agreements, which were included in the previous version of the Guideline:

- *Universal Declaration of Human Rights*,
- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Right*
- *Convention on the Elimination of All Forms of Discrimination Against Women*
- *Convention on the Political Rights of Women*
- *Convention on the Nationality of Married Women*
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*
- *Declaration on the Elimination of Violence Against Women*

Section 8.5.4. The previous version of the Guideline gave an example that we recommend be added to the end of this section: “for example, where a woman’s fear relates to personal-status laws or where her human rights are being violated by private citizens, an otherwise positive change in

country conditions may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.”

Section 8.6.3. There is a typographical error in the first sentence and the word usual is used instead of unusual. It should say: “risk of cruel and unusual treatment.”

Section 9.2. We recommend revising this section so that it also addresses grounds of admissibility other than misrepresentation. There are other grounds where a gender-based assessment is required. For example, members should consider the particular vulnerabilities of individuals in Canada without any form of family support. These individuals, often women, are more vulnerable to intimate partner violence, including manipulation and coercion to criminal activities. This needs to be carefully considered, particularly where Canadian police forces or crown prosecutors have opted not to lay or proceed with criminal charges.

To address this concern, we recommend adding an additional section as 9.2.3. “When considering organized criminality, members are encouraged to consider the interpersonal relationships between the person concerned and other members of the alleged criminal organization or operation. Members should consider particular vulnerabilities faced by individuals in Canada without any form of family or other support. These individuals, often women, are more vulnerable to intimate partner violence, including manipulation and coercion to criminal activities. This may also impact their ability to ask questions of their partner, to have knowledge of the overall criminal scheme, and to seek assistance from the authorities.”

Section 10.3.1. We recommend adding a reference to abuse to the example in the final sentence in this section. The last sentence should be revised to: “for example, the decision of the person to separate from a spouse after a short period of time may not necessarily indicate that a misrepresentation was made, if the person was subjected to intimate partner violence or abuse.”

The CBA Section is grateful for the opportunity to give feedback on the Guideline. We would be happy to meet with you and discuss our recommendations in more detail.

Yours truly,

(original letter signed by Nadia Sayed for Mark Holthe)

Mark Holthe
Chair, CBA Immigration Law Section