



Immigration and
Refugee Board of Canada

Commission de l'immigration
et du statut de réfugié du Canada

Immigration and Refugee Board of Canada

Review of the implementation of the Sexual Orientation and Gender Identity and Expression (SOGIE) Guideline

Aussi disponible en français sous le titre : Examen de la mise en œuvre des directives sur l’Orientation sexuelle, l’identité de genre et l’expression de genre (OSIGEG)

For more information, contact

Immigration and Refugee Board of Canada
Minto Place, Canada Building
344 Slater Street, 12th floor
Ottawa, Ontario
Canada
K1A 0K1
lrb-cisr.gc.ca

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1. Executive summary

The Immigration and Refugee Board of Canada (IRB) has published a review of the implementation of Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression (SOGIE).

Context

Chairperson's Guidelines are non-binding tools that serve as a source of guidance on the adjudication and management of cases. They are used primarily by decision-makers but are also intended for the personnel supporting adjudicative functions.

Chairperson's Guideline 9 was introduced on May 1, 2017, with the purpose of promoting greater understanding of cases involving SOGIE and the harm individuals may face due to their nonconformity with socially accepted SOGIE norms. It addresses the particular challenges these individuals may face in presenting their cases before the IRB and establishes guiding principles for decision-makers in adjudicating SOGIE cases.

In the spring of 2019, the IRB began reviewing Chairperson's Guideline 9 as a best practice for policy instruments, ensuring that they are being applied effectively in a manner that supports high quality decision-making. The review's objectives were to assess if and how Guideline 9 was being applied and to develop recommendations to further strengthen its implementation. The review is part of the IRB's dedicated efforts to ensure the fair and respectful treatment of all those appearing before the Board as well as the correct implementation of its Guidelines.

Methodology

The Methodology followed three complementary streams: analysis of sample IRB and relevant Federal Court cases, a series of consultations conducted via surveys with internal and external stakeholders, and an appraisal of policy, media, and academic sources. This comprehensive approach allowed us to learn from the practical application of the Guideline in a hearing setting, from open dialogue with stakeholders, and from the work of individuals with a range of specialized perspectives and knowledge related to the subject matter.

Case Law Analysis

The case law analysis covered a sample of 93 IRB decisions and 17 Federal Court Case decisions, mostly from 2018. For the majority of cases, paper files (including decisions and other documentation such as IRB- issued letters and forms) were reviewed to assess the implementation of the Guideline by members, registry personnel, interpreters and designated representatives. Audio files of the proceedings of nine cases were also used to assess the use of appropriate language and the sensitivity of questioning.

Survey Results

Consultations with key internal and external stakeholders were conducted through the development and distribution of targeted surveys. These surveys were shared internally with members, registry personnel, interpreters, and designated representatives and externally with stakeholders, including key interdepartmental, non-governmental partners and subject-matter experts. A total of 94 survey responses were received and analyzed.

Environmental scan

The environmental scan consisted of reviews in three fields: academic and other research literature; national and international governmental policies; and national and international media coverage.

Results

Overall, the review shows widespread approval of the Guideline and a marked improvement of the IRB's approach to cases involving SOGIE individuals since the Guideline's introduction. It also identifies some areas of ambiguity within the Guideline and opportunities for improvement in terms of the consistency of its application.

To ensure that this review translates into the continued and consistent optimization of the implementation of Guideline 9, a series of 11 recommendations were developed. These recommendations centre around four themes:

- credibility assessments
- training and accessibility of resources
- language and terminology
- data capturing

These recommendations propose a practical way forward to ensure that the Guideline and its implementation continue to reflect the latest practices and approaches.

2. Introduction

As part of the Immigration and Refugee Board of Canada (IRB)'s commitment to ensure high quality decision-making, a best practice for policy instruments, as well as in response to a commitment to stakeholders and the House of Commons Standing Committee on Citizenship and Immigration (CIMM) ¹ the Policy, Outreach and Engagement Division (POED) undertook a review of the implementation of Chairperson's Guideline 9: Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression ² (SOGIE Guideline, Guideline 9, or Guideline). The review process started in spring 2019, about two years after the Guideline's introduction on May 1, 2017, and was finalized in December 2019.

2.1 Background

In 2015, the IRB acknowledged that there was a need to provide decision-makers with clear and consistent guidance on matters related to sexual orientation and gender identity and expression (SOGIE) given the complexity associated with the adjudication of such cases. The Guideline was developed by POED over a period of two years, with the support of an internal Working Group (WG) that included representatives from all Divisions and Branches as well as from Legal Services. In addition to the advice and expertise obtained by WG members, POED led a significant internal and external consultation process along with reviews of national and international research, decisions and case law as well as other jurisdictions' tools and best practices on the topic.

The Guideline was developed by enshrining the IRB's best practices and considering the evolving jurisprudence, in a manner that is transparent to those appearing before the IRB. It aims to provide IRB members and personnel with a better understanding of the particular challenges SOGIE-diverse individuals ³ may face when appearing before the Board, and serves as a guiding tool to decisionmakers

of all four divisions. The Guideline also serves as an awareness-raising tool to support registry personnel and interpreters carrying out their duties in accordance with the IRB's mandate.

Upon the Guideline's introduction, IRB members and personnel were provided with training either in person, by videoconferencing or online. All new members and new registry personnel are also trained on its proper use. SOGIE-related materials (e.g. a glossary and a "quick-tips" document) are also included in training available for all IRB personnel and new employees on Atlas ⁴. Interpreters who were with the IRB at the time of the publication of the Guideline received the document, an updated Interpreter Handbook and a glossary, whereas for interpreters hired after May 2017, Guideline-specific information was included in their orientation package. ⁵

2.2 Approach to the review

The purpose of the review is two-fold: 1) to assess if and how Guideline 9 is being used; and 2) to develop recommendations in areas where gaps are found to strengthen the Guideline and its application.

The review process was led by POED with the support of an internal WG consisting of representatives from Legal Services, the Divisions, Tribunal Services and Planning/Corporate Affairs as well as a legal consultant. It included three key steps:

- a case law analysis of 93 IRB cases, primarily decided between January 1, and December 31, 2018 ⁶ as well as any relevant higher court decisions related to IRB cases involving SOGIE-diverse individuals;
- A consultation, in the form of surveys, with internal and external stakeholders; and
- An environmental scan of academic and non-governmental organizations' research, domestic (provincial and territorial) and international policies and practices, as well as national and international media coverage.

3. Case law analysis

Sampling and methodology

The case law analysis covered a sample of 93 decisions (60 RPD, 20 RAD, four ID and nine IAD) mostly from 2018. Originally, the aim was to randomly select a sample from lists of cases that indicated in NOVA ⁷ that the SOGIE Guideline had been considered. However, when trying to compile these lists, it became apparent that consideration of the SOGIE Guideline was not always captured. As a result, the following alternative sampling methods were required and adapted based on each Division's reality (Annex 1 provides additional information on sampling methods):

Refugee Protection Division (RPD)

- Samples were selected from a list of cases in NOVA where there was a note to indicate that Guideline 9 had been considered.
- The resulting sample was complemented by a randomly-selected number of cases from a list that had SOGIE as the basis of claim.

Refugee Appeal Division (RAD)

- Samples were randomly selected from a list of cases with SOGIE as the basis of claim

Immigration Division (ID) and Immigration Appeal Division (IAD)

- Samples were identified by the Divisions.

A legal consultant was hired to review these cases and determine how the Guideline was applied by decision-makers and other personnel. This work was guided by a “case law review checklist” (Annex 2).

For the majority of cases, paper files (including decisions and other documentation such as IRB issued letters and forms) were reviewed to assess the implementation of the Guideline by members, registry personnel, interpreters and designated representatives. In some cases, only electronic decisions were reviewed as little or no information was available on how other IRB personnel had handled these cases.

The reviewer also listened to the audio files of the proceedings of seven of the sampled RPD and two IAD cases to assess the use of appropriate language and the sensitivity of questioning, given that these elements cannot be assessed in written decisions and paper files. The audio evidence was selected by the legal consultant and the WG based on cases that were identified as particularly interesting in the initial paper-based review. This process entailed listening to 42 hours of audio material, with the shortest hearing being 1 hour and 20 minutes, and the longest just over eight hours.

In addition, the legal consultant carried out a study of higher court decisions related to SOGIE cases with a similar checklist as the one developed for the IRB case review (Annex 3). In total, 45 judicial review applications at the Federal Court related to SOGIE were identified in a search.⁹ Most of these applications were evaluated on issues other than the SOGIE nature of the claim (e.g. on issues of identity, abandonment or procedural questions), but 17 cases involved an examination pertaining to the SOGIE Guideline (see Annex 4). No relevant Federal Court of Appeal or Supreme Court cases were identified.

3.1 Analysis: Application of Guideline 9 in Proceedings

IRB cases

In the cases reviewed, most IRB decision-makers demonstrated that they are aware of Guideline 9.

¹⁰ Consideration and application of Guideline 9 in their written decisions varied from a comprehensive analysis to an acknowledgment of the Guideline (e.g. inclusion of a sentence such as “I have considered Guideline 9” without further reference to it or application of it in the decision). The decisions of RAD and IAD members demonstrated the most comprehensive understanding and application of Guideline 9. While some RPD members also demonstrated a high level of understanding and application in their decisions, the majority only acknowledged the Guideline in an introductory paragraph, stating they had applied or considered it, without demonstrating how they had done so.¹¹

In a small number of cases, RAD members explicitly stated in their decision that they found that the RPD had not given due consideration to Guideline 9, even though the RPD member stated in their reasons that they had. This demonstrates that simply acknowledging the Guideline at the RPD is not necessarily sufficient for a decision not to be overturned by RAD.

The review showed that members found it challenging to determine the bona fides of an individual’s diverse SOGIE while at the same time ensuring that they did not ask inappropriate or insensitive questions. The vast majority of decisions demonstrated that members struggle to determine the credibility of an individual’s diverse SOGIE, and in a small number of cases, a member’s questions seemed inappropriate and insufficiently aligned with the expectations set out in the Guideline. Sometimes, inappropriate questions entailed questioning done in an insensitive manner and appeared rooted in the member relying upon faulty assumptions.

Guideline 9 explicitly states that members should avoid relying on stereotypes and inappropriate assumptions. In general, most IRB decision-makers did avoid relying on stereotypes, especially if a

stereotype was listed specifically in para 6.1 of the Guideline. However, the understanding of the term “inappropriate assumptions” proved less straightforward, and one of the observations from the review is that some of the key terms in Guideline 9 (e.g., “inappropriate assumptions”, but also “implausible” and “cultural barriers”) are not always understood in the same way by members.

For example, in one case, an RPD member assumed that “keeping the company of men” does not mean the claimant is gay or that he would be perceived as such. However, the RAD found that this was an inappropriate assumption and that the RPD had imposed North American standards and perceptions on incidents occurring outside Canada. In another case, a member tied a credibility assessment to the assumption that a same-sex partner would know the favourite movie and the meal preferences of the claimant. Such examples suggest that the Guideline leaves a “grey area” that may lead to challenges in the consistent, fair adjudication of cases.¹²

This is compounded by the nature of SOGIE cases – where evidence for credibility assessments is not always available – which means that assessing cases may be more reliant on decision-makers’ perceptions and impressions than in cases that focus on other factors than credibility and where evidence is available. As such, members could benefit from further guidance and/or training on the scope or meaning of key terminology used in the document.

The Guideline further indicates that members should avoid references to sensitive information (such as names, birth dates, etc.) when adjudicating cases involving SOGIE-diverse individuals, and in most cases IRB decision-makers were quite successful in avoiding any reference to sensitive information in their decisions.

For example, one RPD member explicitly stated that they would refer to the refugee claimant as the “claimant” in the decision, so that the person’s name would not be repeated multiple times, to “[help] protect the person’s identity.” As per the Guideline, there were some cases in the sample where members issued confidentiality orders when they found this appropriate. However, a small minority of members did disclose personal identifiers in their reasons, including details such as first and last names of same sex partners or other individuals such as affiants (in the country of origin or in Canada) who provided evidence regarding a claimant’s diverse SOGIE.¹³

Section 7.4 of the Guideline requires IRB members to examine whether there are cultural, psychological or other barriers that can reasonably explain inconsistencies in an individual’s evidence. The review found that IRB members only rarely did this, at least explicitly. In many cases, given the context and the issues determinative for the case (most often the credibility of the person’s alleged diverse SOGIE), where no mention of the barriers was made, it could be reasonably inferred that there were no such barriers. Occasionally, a member would make an explicit statement, such as there were “neutral inconsistencies” or inconsistencies unrelated to the barriers mentioned above.

Guideline 9 further asks IRB members to consider intersectionality factors such as race, ethnicity, religion, faith, age, disability, health status, social class or education when deciding a case involving a SOGIE-diverse individual, particularly related to assessing the level of risk the person faces. In the decisions reviewed, decision-makers rarely explicitly considered these factors, which could be explained by the fact that there was little indication in the Basis of Claim forms (BOC) or elsewhere on file that these factors were at issue (as the majority of RPD and RAD decisions focussed on the credibility of the claimant’s diverse SOGIE).

In the nine audio files reviewed, most members were generally very careful to establish appropriate terminology, names and pronouns. Members were also generally quite respectful to persons being questioned and did so in a sensitive matter. However, in two cases and in an apparent approach to determine the bona fides of the claimant’s alleged diverse SOGIE, members asked inappropriate personal or insensitive questions such as asking about sexual experiences, clothing preferences, and

repeatedly ordering the person to look at the decision-maker when answering questions. In some cases, it was the counsel of the person appearing before the IRB or the Minister's counsel who treaded into personal details, by asking about or discussing previous sexual encounters.

Where applicable, IRB decision-makers also considered and granted accommodations under Guideline 8 (Vulnerable Persons), such as a request by claimant's counsel to avoid questions on the treatment a claimant received by her family members as to her sexual orientation, in order to prevent panic attacks. Members also considered the application of Guideline 3 (Child Refugee Claimants) and Guideline 4 (Women Refugee Claimants) where appropriate.

Credibility

In most of the reviewed SOGIE cases, it was found that the determination of credibility plays a key role in the decision-making process. For both RPD and RAD, credibility is usually at the very core of SOGIE-related refugee claims, as members are required to determine whether a refugee claimant is, in fact, an individual with, or perceived to be an individual with, the alleged diverse SOGIE. In a number of cases where this was discussed, the RPD and RAD members determined that the claimants were not SOGIE diverse individuals as per the breakdown below:

- Of the 60 RPD cases, more than half (35) had the issue of the bona fides of the claimant's diverse SOGIE raised as central to the decision. Of these 35 cases, the RPD determined that 17 claimants were not individuals with diverse SOGIE.
- Of the 20 RAD cases, the vast majority (17) had the issue of the bona fides of the claimant's diverse SOGIE. In 13 of these 17 cases, the RAD confirmed the RPD decision that the claimant was not an individual with diverse SOGIE, whereas in the other four RAD overturned the RPD's credibility finding and determined that the claimant was, in fact, an individual with diverse SOGIE.¹⁴

With respect to claimants who are nationals of certain countries, such as Nigeria, Cameroon and Haiti, a SOGIE claim deemed credible almost always led to the refugee claim being accepted. In these cases, unlike claims from some other countries (e.g. Albania or Croatia), key issues such as persecution, state protection and internal flight alternative are usually not extensively assessed or analysed in a decision. This is due to the fact that the objective evidence in the relevant National Documentation Package regarding the realities faced by SOGIE individuals (including criminal sanctions) is sufficiently strong. In other words, whether or not the member believes that a claimant from these countries is, in fact, a SOGIE-diverse individual is often the key determining factor in these cases.

In addition to the IRB cases, credibility was also the determinative issue in over two-thirds (12 of 17) of the SOGIE cases judicially reviewed by the Federal Court. In most of these credibility cases, the RPD or RAD had determined, on a balance of probabilities, that the refugee claimant was not a SOGIE-diverse individual. When judicial review was allowed (eight cases), credibility was the determinative issue in five of them. When judicial review was dismissed (nine cases), credibility was the determinative issue in seven of them.

It appears that determinations with respect to diverse SOGIE are often quite difficult. In fact, some members stated this explicitly in their reasons, indicating that SOGIE credibility determinations may even be more difficult than in other refugee cases, and others indicating that it is both an onerous and delicate task to assess the diverse SOGIE of a claimant.

Registry

It was found that registry staff had very little input in capturing the SOGIE nature of the file in IRB documentation. Some forms, such as the New File Review form or the Member File Instructions, often

contained a handwritten reference to SOGIE but it appeared that these notes were completed and signed by the decision-maker. There was one case where there appeared to be some confusion at the registry (as well as among members) on how to address a transgender individual. In this case, multiple names and different ways of referring to the person were used in documentation on several occasions, including in form letters such as Notices to Appear. Although not apparent from the review of case files, information obtained through other means (i.e. informal discussions, survey results, WG member contributions), also suggest that hearing schedulers are not always aware of the SOGIE diversity of the person involved, which could result in errors in the use of pronouns.

Federal court cases

Of the 17 applications for Judicial Review at the Federal Court related to SOGIE, eight applications for judicial review were granted and nine were dismissed. In the judgments, the Federal Court recognizes the importance of the Guideline, while at the same time acknowledging it is not law. The review showed that mere reference to Guideline 9 – i.e. a member simply stating they had considered the Guideline in a SOGIE case – does not insulate an IRB decision from being set aside by the Federal Court (or an RPD decision from being set aside by the RAD). At the same time, a lack of reference to Guideline 9 does not necessarily mean that the Federal Court will find that the decision is faulty if the Reasons are consistent with the principles of the Guideline. As such, it appears that the Court considers whether a decision-maker applied the fundamental principles reflected in the Guideline.

There were also three Immigration, Refugees and Citizenship Canada (IRCC) cases (two for PreRemoval Risk Assessment (PRRA) decisions and one from an immigration officer decision) where the applicability of Guideline 9 was raised. In the PRRA cases (IMM-4815-17, IMM-751-18), the Federal Court indicated that the Guideline was not applicable. However, in the IMM-310-18 case, an immigration officer's decision was questioned in a sponsorship matter, and it was discussed whether the Guideline had been applied correctly. As such, all parties, as well as the Court, seemed to assume that the Guideline could be applied in an immigration officer's decision. It is interesting to note that at the Federal Court level, there have been cases where consideration of Guideline 9 by organizations other than the IRB has been discussed.

4. Survey results

In order to gain insight on the application of Guideline 9, surveys were developed and distributed internally to members, registry personnel, interpreters, and designated representatives as well as externally to stakeholders, including key interdepartmental, non-governmental partners and subjectmatter experts.

Survey questions were tailored towards the specific respondents and covered topics included in the Guideline such as sensitive use of terminology, issues to consider for credibility assessments, training, related work tools (quick reference guides, glossaries etc.), and areas for improvement.¹⁵ Respondents were originally given four weeks to respond, but this timeline had to be extended by three weeks in order to maximize the response rate from members and external stakeholders.

Table 1. Overview of SOGIE Guideline implementation review survey responses

Respondent Group	Number of Responses
Members – Total	48
Refugee Protection Division (RPD) and Legacy Task Force ¹⁶	15
Refugee Appeal Division (RAD)	10
Immigration Division (ID)	6
Immigration Appeal Division (IAD)	11
Multiple Divisions	1
Not specified	5
Registry	2
Interpreters	22
Designated Representatives	5
Stakeholders	17
Non-governmental Partners	10
Portfolio Partners	7
Total	94

Given the response rate, a qualitative approach was deemed appropriate in order to capture the most pertinent information for assessing the implementation of the Guideline.

4.1 Members

Respondents at the RPD and RAD reported having significant experience in adjudicating cases involving individuals with, or perceived to have, diverse SOGIE. ¹⁷ All indicated they had worked on multiple such cases, including some who stated they had adjudicated more than 100 cases. Experience was much less extensive at the IAD, where members who responded stated they had presided over one or two SOGIE cases, and at ID, where only one respondent reported having had a proceeding where SOGIE played a role.

In most cases, members responded that they had become aware of the fact that SOGIE played a role in a case through the BOC form (for RPD and RAD), while looking at case materials during hearing preparation or as it was raised by counsel during the hearing (for ID and IAD).

Just over half of the members who responded to the survey indicated that they felt the Guideline had a beneficial impact on how they approach and adjudicate cases involving individuals with, or perceived to have, diverse SOGIE. They stated, for example, that it had raised their awareness of the issues that SOGIE-diverse individuals may face, increased their understanding and facilitated the use of appropriate terminology and sensitive questioning approaches, and supported their assessments of credibility and evidence. IAD members in particular often indicated that, in their experience, the Guideline (and the associated training) had been helpful. Many of these members indicated that the Guideline had been very helpful for developing and writing their Reasons and by supporting their analysis for their decisions.

Conversely, slightly less than half of members ¹⁸ who responded to the survey indicated that the Guideline had not changed how they adjudicated SOGIE cases. Some explained that they had already been aware of the issues the Guideline raises and therefore it did not change how they worked. Some indicated that they felt they did not need the Guideline ¹⁹, as it would be “selfevident” how to proceed in SOGIE cases, and one member indicated that they found the Guideline to be “excessively complex and difficult to apply consistently”.

A few members, particularly in the refugee tribunals, indicated that the Guideline had created some challenges to carrying out credibility assessments. These members stated they would like to see clarifications in the Guideline regarding how to practically approach credibility findings in SOGIE cases. There is also an impression that the Guideline is used by claimants and counsel to argue that certain questions cannot be asked or to explain away all inconsistencies. Some members went further and suggested this may be increasing the number of fraudulent claims, and an additional burden as they have to explain in a decision why there is still a negative credibility finding following the argument from the claimant that their case is SOGIE-based.

With regards to training, most members felt that the theory part had been sufficient; however, many suggested the need for more applied coaching (i.e. case studies, group discussions or experiential learning on questioning and analyzing credibility findings). Given the rapid changes in the LGBTQ+ field, decision-makers also expressed the importance that the Guideline be reviewed periodically to ensure it contains the most up-to-date terminology.

4.2 Registry

Respondents indicated they had taken efforts to ensure files were treated appropriately and carefully. One respondent also indicated that they had ensured that other staff were aware that a counsel had requested that they be addressed with the pronoun “they” as they identified as nonbinary. The other indicated that they were not sure they were applying the Guideline appropriately, and that there had been a lack of training, as the provided online videos were “too long, and there [was] no time to watch them at work”. They strongly recommended that training be provided in person, rather than through online video.

4.3 Interpreters and designated representatives

Twenty-two interpreters and five Designated Representatives (DRs) completed the survey. Eleven interpreters indicated they had interacted with SOGIE-diverse individuals as part of their work, and of these, five said they had actually applied Guideline 9. Those who said they had interacted with SOGIE diverse individuals but did not apply the Guideline indicated that instead they “interpreted faithfully” what was being said at a hearing, or that they used the same terminology as the member. Some indicated they ensured they were sensitive, respectful, and professional and had used common sense, and one mentioned that they followed the Interpreter’s Code of Conduct.

The majority of interpreters who responded to the survey indicated they received no training, orientation or material pertaining to Guideline 9, and many indicated that this would be beneficial to them.²⁰ Some even requested to receive information as a result of the survey, and one recommended that interpreters be given paid hours to engage in training on the Guideline. One of the interpreters who indicated that they had received materials stated that they found the information provided on Guideline 9 “handy” for their work.

One respondent highlighted that sometimes, translating terms correctly and in a sensitive manner is challenging as they may not always be aware of the appropriate terminology (if it exists) in the interpretive language. Indicative of this challenge is the fact that one interpreter indicated they had used Google to find respectful terms in the interpretive language, but that they could not be sure of whether terms might change from region to region. These results are corroborated by information collected through the WG to the effect that interpreters often resort to using the word “gay” (or another LGBTQ+ term) in English because no equivalent exists in their language or the terms that exist are derogatory. It was also reported through the WG that some interpreters have also used derogatory words or expressions in the interpretative language.

Of the five respondents who provided feedback in their capacity as DRs, most indicated that they felt that the IRB approaches proceedings involving SOGIE individuals in a respectful manner, and that the Guideline is applied when it should be. They also found that staff use the appropriate language, and that decision-makers do not rely on stereotypes or inappropriate assumptions when adjudicating cases involving SOGIE-diverse individuals.

One DR respondent, however, indicated that IRB personnel appear to be more comfortable engaging with SOGIE individuals than decision-makers are, stating that members continue to rely on stereotypes or to make inappropriate assumptions. The same respondent also highlighted that they did not see a change in approaches to proceedings involving SOGIE-diverse individuals since the introduction of Guideline 9.

Regarding training, one respondent suggested that, because not all DRs have easy access to training (i.e. if they are not lawyers or immigration consultants who have access to resources through their professional associations), they should be included in IRB training when new policies or Guidelines are introduced.

4.4 External perspectives

Feedback was received from Immigration, Refugees and Citizenship Canada (IRCC), the Canada Border Services Agency (CBSA) and nine stakeholder organizations, associations, and individuals (including academic experts, individual lawyers and immigration consultants). Most of these stakeholders have participated in proceedings or provided services to SOGIE-diverse individuals appearing before the IRB.

The majority of respondents were positive about the implementation of the Guideline and its impact. Key feedback included that stakeholders had observed a notable improvement in the way members and other IRB personnel approached SOGIE cases, including the use of appropriate terminology, a more sensible approach to questioning and a decreased reliance on stereotypes and inappropriate assumptions.

While there was mostly consensus on the positive impact of the Guideline, respondents indicated that the improvement lacked consistency, in that there is variation in its application both between individual members and between divisions. They also raised concerns that, on occasion, the Guideline was cited as considered in the decision but did not appear to be fully applied in practice.

Another key observation related to credibility and evidentiary assessments, and more particularly how some members' approaches still negatively affect SOGIE-diverse individuals appearing before the Board. For example, some members allegedly asked for inappropriate evidence (or ignored the fact that certain evidence may not exist), such as sexually explicit evidence due to the member's stereotypical understanding of same-sex relationships ²¹; required evidence that the person was involved with the Canadian LGBTQ+ community after arriving in Canada; or used inappropriate terminology.

Other respondents felt that too much credence was given to reference letters or trips home, which, in the SOGIE context, are not necessarily relevant for determining credibility. ²² Stakeholders recommended further training on assessments in the hearing room, and specific sections of the guideline (such as section 8.5) and they specifically recommended clarification and further training on:

- how to assess a situation where a SOGIE-based refugee claimant has returned to their home country, whether it be during, before or after the refugee claim process (which, they note, should not be treated in the same way as reavallment in non-SOGIE cases, but is currently still often negatively used in credibility findings);
- the necessity of evidence of homophobic assaults (e.g. police reports) in a context where such evidence may not be available; and
- the existence of pro-equality laws compared to discriminatory realities facing SOGIE claimants in society.

One stakeholder highlighted the need for further clarification on how to apply "intersectionality" ²³ in assessments, as in their experience this was not properly done.

By contrast, Portfolio partners felt that the Guideline creates a situation in which some members are becoming overcautious in credibility assessments. They recommended that the Guideline be strengthened to clarify that it does not preclude members from thoroughly assessing credibility. ²⁴

Respondents further noted that interpreters may not always be helpful to individuals with diverse SOGIE who are appearing before the IRB. Stakeholders stated that even when members are using appropriate terminology and sensitive language, this was sometimes undermined by the interpreter, who appeared to be uncomfortable or was believed to be using pejorative language in the translation. ²⁵ They also highlighted how in some cases Minister's Representatives were not fully aware of the Guideline and its role.

Stakeholders and portfolio partners recommended continuous or strengthened training for members, and, in some cases, for interpreters and minister's representatives who may not have been sufficiently aware of the Guideline. Some respondents pointed to the need for more clarity in the Guideline on transgender persons, particularly their family rights as well as the need for a more specific policy around the use of pronouns and names in transgender situations. Finally, one stakeholder pointed out that there may be a need for developing an approach for unrepresented SOGIE diverse individuals appearing before the IRB, particularly in refugee determination and appeal proceedings. Given their fear of authorities and hesitancy to share information with IRB members, such unrepresented SOGIE refugee claimants may otherwise not receive an appropriate hearing.

5. Environmental scan

The environmental scan consisted of reviews in three fields: academic and other research literature; national and international governmental policies; and national and international media coverage. The research review identified and analyzed articles that evaluated the Guideline after its introduction. The

scan of national and international governmental policies focused on whether the landscape has evolved since the introduction of the Guideline in 2017, internationally and nationally.²⁶

The media monitoring analysis was done through ongoing media monitoring via Newsdesk, as well as a Google media search of web-based, radio, and written media, from 2016 (when the Guideline was developed) onwards until late fall 2019. Ten media sources – nine articles and one transcript of a radio interview - were found that discussed the Guideline and its impact (see Annex 5 for a list of the articles). Two articles were in French, the remaining eight in English. They are all national in scope although some were published in local or provincial newspapers, specifically in Manitoba, Ontario and Quebec.

5.1 Academic review

Given the relatively recent publication of the SOGIE Guideline, the academic literature found on the Guideline was limited. Within the existing articles, many focused on the experience of SOGIEDiverse refugee claimants in Canada as opposed to the IRB's proceedings.²⁷

Some articles argue that the Guideline still emphasizes the cisgender heterosexual norm in the use of its terminology, such as "individuals with diverse SOGIE".²⁸ They suggest this language be changed either to "individuals who claim asylum on the basis of their SOGIE" or, for the sake of linguistic simplicity, "SOGIE asylum seekers".²⁹

Others contend that the Guideline still leaves too much space for the belief systems and cultural attitudes of individual decision-makers and that these consequently play a key role in decisionmaking, influencing the determination of credibility.³⁰ They further argue that the influence of cultural attitudes is compounded by jurisprudence which defines sexual orientation as a ground for refugee status based on persecution as a member of a particular social group, which is defined as being innate or unchangeable.³¹ This, according to the authors, is particularly problematic for transgender, queer or non-binary claimants, who have a more fluid understanding of gender identity, but who may feel forced to adopt an identity to satisfy the notions of SOGIE internalized by those involved in the asylum system, including decision-makers.³²

Some academics also criticize the Guideline with regards to its evidentiary standards, in that it does not plainly prohibit the request or submission of explicit materials as evidence in SOGIE-related cases.³³ This may contribute to the perpetuation of claimants' beliefs that such evidence must be submitted in support of a SOGIE claim. These authors, therefore, call for an explicit preclusion of such evidence in the Guideline.³⁴

Another evidentiary dilemma raised in academic publications is the question of objective documentary evidence, which is often disregarded as self-serving.³⁵ Similarly, some argue that reference letters are not valuable and should be precluded, as should the circumstances under which a claimant arrives in Canada.³⁶

Finally, some recommend an adjustment of the terminology regarding what constitutes persecution in SOGIE cases, calling for an explicit inclusion of the criminalization of same-sex conduct in this definition.³⁷ Similarly, they state that the language used in the Guideline to refer to "forced medical treatments" obscures the fact that some of the practices described constitute torture or cruel, inhuman or degrading treatment or punishment, and they should be qualified as such in the Guideline.³⁸

5.2 National and International Governmental Policy Review

Provinces and Territories

Given the provincial and territorial mandates to provide settlement services to refugees and immigrants, a review of government and civil society websites related to immigration, refugee and LGBTQ+ support was undertaken. There were no references to the Guideline in any of the 10 provinces and three territories and only two Ontario-based organizations (Ontario Council of Agencies Serving Immigrants (OCASI) and Egale) offered general information for LGBTQ+ asylum seekers, referencing documents dated before May 2017.

Other countries

Although almost all countries – particularly IGC and Five Eyes³⁹ members – in the international comparison have some form of SOGIE-related guidance for decision-making in asylum claims, most of those documents were issued prior to May 2017. Some countries (United Kingdom, New Zealand, Finland, Sweden, and Ireland) have also adopted the Difference, Stigma, Shame, Harm (DSSH) model, which was developed by a UK-based barrister and endorsed by the United Nations High Commissioner for Refugees (UNHCR).

This model helps the claimant provide a detailed narrative and guides decision-makers on sensitive and appropriate ways of assessing credibility in SOGIE-related asylum claims.⁴⁰ Of note, the United Kingdom is currently reviewing its instructions and is considering the IRB Guideline as part of this review.⁴¹ New Zealand also indicated it may use the IRB's SOGIE Guideline in its future training on the topic.⁴² These developments in the UK and New Zealand will be monitored to identify any potential lessons-learned for the IRB's SOGIE Guideline.

In July 2018, the Netherlands issued instructions to improve the way the credibility assessment is done in SOGIE cases. These instructions shifted the emphasis for credibility assessments from a focus on the claimant's awareness of their sexual orientation and self-acceptance, to an emphasis on their personal story and experiences. The government also invested in additional training for decision-makers and appointed coordinating employees who act as contact points for questions concerning LGBTQ+ cases.

Similarly, Germany indicated they are training their decision-makers on credibility issues using the European Asylum Support Office's (EASO) training module. These instructions and training materials could be considered if the IRB chooses to develop additional tools (such as a job aid for credibility assessments) or hands-on training on credibility assessment approaches.⁴³

Turkey has very specific asylum regulations. It only takes full legal responsibility for refugees originating from European countries, while the vast majority of asylum seekers (including close to 3.7 million Syrians⁴⁴) are only granted temporary protection in order to seek resettlement in a third country. The UNHCR conducts assessments for resettlement and is responsible for conducting refugee status determination interviews for this purpose. In SOGIE-related asylum claims, the UNHCR is guided by its Guidelines on International Protection 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity, which were published in 2012.⁴⁵ As for Costa Rica and Mexico, while they have recently dealt with large groups of asylum seekers, they currently do not have any guidance for SOGIE cases.

5.3 National and international media scan

Overall, the IRB Guideline received moderate national media attention which peaked in May 2017, coinciding with its introduction, when six articles were published and one radio interview was aired. The overall response was laudatory. The Guideline was described as "revolutionary" and "groundbreaking". However, these endorsements were accompanied, first, by comparison to criticized former practices and,

second, by cautionary words about the application of the Guideline and the fact that “it can only be as good as its implementation”. An international media review of French and English language sources did not identify any media coverage on this topic.

From June 2017 to October 2019, media attention was low with articles mentioning the Guideline appearing very infrequently and primarily in specialized publications, such as the Lawyer’s Daily. In these sources, the Guideline is of peripheral importance, mentioned relatively briefly as an example of an approach to emulate. A November 2019 article by Global News acknowledged the value of the IRB’s Guidelines, including SOGIE, in dealing with persons with particular vulnerabilities or certain types of claims, but questioned the way Guidelines have been applied by some members.

6. Recommendations

6.1 Credibility assessments

The case law review, the environmental scan analysis, the responses to the surveys and discussions within the WG all pointed to credibility assessments (i.e. whether the member believes the individual) as being at the centre of determinations in SOGIE-related cases.

Although Section 7 of the Guideline is devoted to credibility and provides some assistance to members, it is general in nature and does not focus on the difficult issue of determining whether the person appearing before the Board is, in fact, a SOGIE-diverse individual, nor does it provide guidance on the how to carry out credibility assessments. At the same time, guidance in assessing credibility needs to be balanced with the independence of members’ decision-making, the fact that each case must be decided on its particular facts and that Guidelines cannot be prescriptive.

Relatedly, both members and Portfolio partners mentioned the risk that the Guideline could make members overcautious in their approach to credibility assessments, or provided opportunities for claimants or counsel to explain away all inconsistencies or credibility issues. Sections 7.4.1, 7.6.1 and 7.7.1 emphasize that members can draw negative inferences, while considering that there may be explanations related to a person’s diverse SOGIE that could explain inconsistencies, vagueness or omissions.

Given the indications that it can be challenging for members to do this without being challenged by counsel or claimants, some additional guidance may be required to support the IRB’s mandate to assess the credibility of claimants in order to achieve a fair decision. Any measures should provide additional information to guide members’ reflection and decision-making while also providing more clarity to prevent potential misuse of the Guideline. As such, there are three recommended actions:

Recommendation 1. Provide additional guidance and clarity for members on carrying out determinations and credibility assessments in SOGIE cases, by:

- strengthening section 7 of the Guideline, specifically by clarifying the definition of ‘inappropriate assumptions’, and by providing more examples of approaches to assist members in identifying their own biases and assumptions, as well as appropriate ways to assess credibility;
- making other tools available to assist members in carrying out credibility assessments in SOGIE cases.*

* Other tools could include updating the IRB resource paper entitled “Assessment of Credibility in Claims for Refugee Protection”, which dates from January 31, 2004 ⁴⁶; and adding further

guidance on SOGIE in the RPD's knowledge management tool. The exact form of these tools would be developed during the implementation of the recommendations.

6.2 Training and information resources

Members

Training and accessibility of information resources were recurring themes that came up during the review. In the case of members, while many felt the training they received was sufficient, the case law review and the survey results raised some concerns around inconsistencies in the application of the Guideline.

For instance, some members referenced the Guideline and applied it while others referenced it but did not apply it in the proceeding and/or the writing of their Reasons. While many members carefully used appropriate wording and avoided stereotypes, some used insensitive language, stereotypes, or inappropriate lines of questioning. Moreover, members felt they needed additional training on credibility assessments and that content should be delivered in an experiential manner (e.g. case studies, group discussions, or even role play) as opposed to theoretical and in lecture format.

Recommendation 2. Develop additional in-person experiential, interactive and practical training for members on the application of the Guideline (e.g. new modules including casestudies and workshops) – specifically on sensitive questioning approaches and credibility assessments, avoidance of stereotypes and inappropriate assumptions, and application of the Guideline in the Reasons' analysis.*

*Any changes should be based on an in-depth comparison of new and existing member training of all Divisions to identify best practices, and a focus on potential need for national standardization of trainings. Training should also be updated every time the Guideline is amended.

Given the particularities in SOGIE cases, additional safeguards should be put in place to ensure access to natural justice for self-represented SOGIE diverse individuals appearing before an IRB Division where necessary.⁴⁷

Recommendation 3. In collaboration with Divisions, identify the appropriate procedural tool where a section could be added to ensure that the following steps are taken for SOGIE-related self-represented cases:

- the member schedules a pre-hearing conference with the self-represented claimant, where the process can be discussed, and a paper summary of the SOGIE Guideline and link to the full Guideline can be provided⁴⁸;
- at the outset of the hearing, go through the SOGIE Guideline and the appropriate terminology to be used during the proceeding.

Registry

Evidence on how registry personnel have been applying the Guideline was scarce. Nevertheless, it appears that some of the training materials may be too lengthy to be effectively used, and, although there are some quick reference tools, not all staff seem to be familiar with them. This poses a risk that SOGIE-diverse individuals not be treated appropriately.

Recommendation 4. In collaboration with Regional Registry Support Services (RRSS) and the RPD Registry, review existing training materials to make them more accessible, and ensure training is offered to registry personnel to ensure they are aware of support tools available to them on the appropriate ways to use names and pronouns.

Interpreters and designated representatives

The review also identified areas for improvement in terms of the services offered by interpreters. Although there have been no formal complaints regarding interpretation of SOGIE diverse cases, the review found evidence that interpreters may not always have the appropriate information to accurately interpret proceedings involving SOGIE-diverse individuals and sometimes did not know how to translate as the terminology did not exist in the interpretive language. In some cases (through audio or paper review of proceedings), it was evident that interpreters were uncomfortable with the terminology and/or the SOGIE nature of the case. This situation presents a risk for the individual's access to natural justice and procedural fairness.

Recommendation 5. Develop voluntary tailored online training for interpreters on the SOGIE Guideline as well as procedures to be followed before and during hearings:

- When scheduling an interpreter for a SOGIE hearing, send them the link to the Guideline, the voluntary online training, the relevant sections in the handbook and any existing glossaries. Ask interpreters to raise any concerns about the hearing well in advance, so that solutions can be found;
- Allow interpreters to self-identify as specialized for SOGIE cases so that they can be scheduled for these types of hearings;
- At the outset of a hearing involving a SOGIE diverse individual, when discussing the interpretation with the interpreter (e.g. making sure the language is indeed understood), members should also confirm with interpreters that they are familiar with the SOGIE Guideline and comfortable interpreting the proceeding.

Recommendation 6. When updating foreign language glossaries, at least for the most common languages ⁴⁹ of interpretation, develop specific, easily found lexicons of translated SOGIE terminology. ⁵⁰

Given that not all DRs may have the ability to stay apprised of developments in the Guideline, the following actions are also recommended:

Recommendation 7. As the DR program is being reviewed, incorporate information on the Guideline in the tools (e.g. job aids, quick reference materials etc.) that are developed for DRs, and develop procedures to ensure that when a DR is appointed in a SOGIE case they receive the Guideline and the tools.

Minister's representatives

Based on the case law review, and comments from stakeholders and some members, it appears that Minister's representatives – from CBSA and IRCC – do not always understand the Guideline and the role it plays in IRB proceedings. This can negatively impact their approach at hearings.

Recommendation 8. Ensure – through the existing trilateral governance mechanisms – that partners inform those who represent the Minister in IRB proceedings about the Guideline and its role in guiding decision-making.

6.3 Language and terminology

The review found that some of the terminology used in the Guideline, including “inappropriate assumption,” “implausible” and “cultural barrier”, were not consistently interpreted. This led to some inconsistency in the assessment of cases. Moreover, societal norms, and consequently terminology and language, on SOGIE-diverse individuals are rapidly evolving. Terminology in the Guideline, such as the definitions set out in section 2, may quickly become outdated.

In addition, stakeholders and academic reviewers found that there may be elements in the language and terminology used in the Guideline that may be harmful to SOGIE persons appearing before the IRB, as they may perpetuate a Western, heteronormative understanding of SOGIE. Some SOGIEdiverse individuals, especially those with more fluid gender identities, may feel obliged to adopt an identity that may not be authentic, in order to satisfy IRB guidance.

More practically, the review also highlighted how there is a certain lack of clarity around how to address transgender, or non-binary individuals. Although section 4.1 in the Guideline states that “[i]ndividuals should be addressed and referred to by their chosen name, terminology, and pronouns”, in practice, there were examples where this was not applied. In at least one instance, the registry addressed correspondence for a transgender individual using both their female and male names; while on other occasions members did not respect the request by a non-binary counsel to be addressed with their preferred pronoun when not physically present in the hearing room. For all these reasons, the following should be considered:

Recommendation 9. In collaboration with Divisions, Legal Services, the Research Directorate, RRSS and RPD Registry, and in consultation with LGBTQ+ experts (including NGOs), proceed with annual “soft” reviews of the Guideline’s terminology and definitions section, and commit to fulsome reviews every three years.

Recommendation 10. In consultation with stakeholders and LGBTQ+ experts, review the need to adapt language and policies on transgender, transsexual, intersex and other SOGIEfluid individuals to ensure it does not force identities on them; recognizes more explicitly the fluidity of gender identity and sexual orientation; and clarifies procedures around the use of preferred names, terminology and pronouns for members and registry personnel. In collaboration with RRSS and RPD Registry, ensure standard form letters are reviewed to include the appropriate terminology for non-binary, intersex, and transgender individuals. ⁵¹

6.4 Data capturing

When identifying the cases to be included in the case law sample, it became clear that there were inconsistent practices in filling out the existing NOVA field related to SOGIE, making the IRB’s data regarding the use of Guideline 9 unreliable.

Recommendation 11. In collaboration with the Standards, Analysis and Monitoring (SAM), RRSS, Divisions and the Information Management and IT (IMIT) teams, improve data capturing of Guideline use, by reviewing the current dedicated NOVA field and ensuring a user-friendly approach.

7. Conclusion

Overall, the review found that the IRB's SOGIE Guideline has been positively received by external and internal partners, and has improved the way the IRB approaches SOGIE-diverse individuals who appear or participate in its proceedings.

For the most part, members and registry personnel reported that the Guideline is a useful tool that has helped them in their tasks. The case law review found that by and large, members and others participating in proceedings demonstrate they are familiar with the principles of the Guideline.

Stakeholders similarly indicated that they have seen a positive change since the introduction of the Guideline in terms of how the IRB approaches SOGIE-diverse individuals.

Nevertheless, the review also found that there are areas for improvement. Implementing the eleven recommendations outlined in this report would ensure that the IRB further strengthens the way it carries out its mandate of fair and efficient adjudication involving SOGIE-diverse individuals. It would also ensure that the IRB maintains its reputation as an international leader in the adjudication of immigration and refugee matters for SOGIE-diverse individuals.

Annex 1 - IRB case law review selection methods

The case law review aimed to evaluate how Guideline 9 is applied by members, as well as other IRB personnel. Initially, the review aimed to include 100 cases that were finalized in 2018: 60 from RPD, 20 from RAD, and 10 from both IAD and ID. The initial plan was to create sampling frames including lists of all cases in NOVA with an indication that Guideline 9 was considered, and then randomly select the cases from these lists. However, this information was captured inconsistently – some members or registry staff checked the box that they had considered Guideline 9, others did not; RAD had disabled the field – and obtaining a list of cases relevant to the SOGIE Guideline that could serve as a sampling frame proved challenging. In the end, cases were selected as follows:

- **RPD:** 2018 decisions that were identified in NOVA as having considered Guideline 9 (identified by Standards Analysis and Monitoring (SAM)), supplemented by a random sample from a list of 1851 cases finalized in 2018 that had Sexual Orientation as the basis of claim provided by SAM. The sample was weighted to be representative of regional levels of finalizations, and included both positive and negative decisions. As such, cases were selected by region, by dividing the total number of cases in each region by the number of cases required for the sample, and selecting cases based on the resulting intervals. Cases that were open before a higher court were excluded (but cases that had been before a higher court but were finalized with no certified questions were included). If any of the selected cases was open before a higher court, they were replaced by the nearest case on the list with the same type of decision that was not open before a higher court. Abandonments and other administrative decisions were excluded and replaced with a near decision that was not open before a higher court. All cases included in the review were, therefore, relevant to the SOGIE Guideline review. **Total number included: 60**
- **RAD:** random selection (starting at number 88 – generated through a random number generator), from a list provided by RAD of 398 decisions from 2018 that had sexual orientation as the basis of claim, including both positive and negative decisions, selecting every 20th case. If a selected case was open before a higher court, it was excluded (but cases that had been before a higher court but were finalized were included). If any of the randomly selected cases was open before

the court, it was replaced by the nearest case on the list with the same type of decision that was not open before a higher court.

Abandonments and other administrative decisions were excluded and replaced with a near decision that was not open before a higher court. All cases included in the review were, therefore, relevant to the SOGIE Guideline review. **Total number included: 20**

- **ID:** The Division identified relevant 2018 decisions and provided six cases; four were included in the review; and the other two were used for the purpose of understanding how to work with counsel with diverse SOGIE. **Total number included: 4**
- **IAD:** The Division provided cases through a Reasons and Decisions search on Atlas. Legal Services and the IAD WG member also provided cases. **Total number included: 9**

Annex 2 - Review Checklist IRB cases and Summary of observations

Division: File number:

Query (<u>SOGIE Guideline</u>)	G9 reference	Observations
<p>1 Application: If the decision-maker considered but decided not to apply Guideline 9 to this case, did the decisionmaker provide reasoned justification for not doing so?</p>		<p>There were no IRB decisions where the member explicitly stated that Guideline 9 was considered but would not be applied. In other words, members would either reference Guideline 9 and state that they would be applying it, or they would not reference Guideline 9 at all.</p>
<p>2 Accommodation: Did the decision-maker consider any accommodations under the Chairperson’s Guideline 8: Procedures with Respect to Vulnerable Persons, if appropriate, whether requested by a party or on the decision-maker’s own initiative?</p>	3.7	<p>IRB decision-makers considered and granted appropriate accommodations to vulnerable persons in virtually all cases.</p>
<p>3 Protection of sensitive information: Whenever possible, did the decisionmaker avoid the use of personal identifiers or sensitive information that is not necessary to explain the reasoning in the decision?</p>	5.3	<p>IRB decision-makers were generally quite careful in avoiding any reference to sensitive information in their decisions. The one exception concerns personal identifiers, where some members would disclose first and last names of same sex partners or other individuals such as affiants (in country of origin or in Canada) providing evidence regarding a claimant’s diverse SOGIE.</p>

4	<p>Appropriate language:</p> <ul style="list-style-type: none"> a. Did the decisionmaker establish appropriate pronouns when referring to the individual? b. Did the member address and refer to the individual by their chosen name, terminology, and pronouns? c. Did the decisionmaker address issues or misunderstandings around the use of appropriate language as soon as they arose? 	4.1	<p>In the audio files that were reviewed, in general members were careful to use appropriate pronouns, names, terminology.</p>
5	<p>Questioning an individual: Was questioning done in a sensitive manner? For example, did the decisionmaker ask for too much personal detail or information from the individual, including details about sexual relationships?</p>	7.3.1	<p>In general, in the audio files listened to, members were careful to approach people appearing before the Board in a careful and sensitive manner. In some cases, however, 2 out of 9) the member strayed into very detailed or personal questions, and inappropriate lines of questioning.</p>
6	<p>Stereotypes: Did the decision-maker avoid relying on stereotypes or inappropriate assumptions?</p>	6.1	<p>In general, most IRB decision-makers were quite successful to avoid relying on stereotypes and inappropriate assumptions.</p>
7	<p>Inconsistencies, vagueness, material omissions: If there were inconsistencies or omissions in the individual’s evidence, did the decision-maker examine whether there were cultural, psychological or other barriers that may reasonably explain them?</p>	7.4; 7.7	<p>Only rarely did an IRB decision-maker examine whether there were cultural, psychological or other barriers that could reasonably explain inconsistencies or omissions in an individual’s evidence. In many cases, given the context and the issues (i.e. credibility of claimant’s diverse SOGIE), it could have been implied that there were no such barriers. In some instances, the analysis was elevated, such as where a RAD member determined that the inconsistency findings were “neutral inconsistencies” stemming from the narrative that “do not relate to issues of stigma and stereotypes.”</p>

8	<p>Intersectionality: In addition to the individual's SOGIE, did the decisionmaker consider whether race, ethnicity, religion, faith or belief system, age, disability, health status, social class or education was an additional factor?</p>	8.5.2.3	<p>Only rarely did an IRB decision-maker consider intersectionality factors – such as race, ethnicity, religion, faith, age, disability, health status, social class or education – in addition to the individual's SOGIE. This is likely explained by predominant focus on credibility of claimant's diverse SOGIE.</p>
9	<p>Trans and intersex individuals: Did the decision-maker exercise caution before drawing negative inferences from discrepancies in gender identification documents?</p>	8.5.4.4	<p>IRB decision-makers exercised caution before drawing negative inferences from any discrepancies in gender identification documents with respect to trans and intersex individuals. These files were few in number.</p>
10	<p>Minors: If the case involves a minor with diverse SOGIE did the decision-maker consider the application of Chairperson's Guideline 3: Child Refugee Claimants —Procedural and Evidentiary Issues, if appropriate?</p>	8.5.5.2	<p>IRB decision-makers usually would also consider the application of Guideline 3 (Child Refugee Claimants) if a case involved a minor with diverse SOGIE.</p>
11	<p>Country documentation: Did the decision-maker deal with the scarcity of reported information/documentation on the treatment of SOGIE-diverse individuals in countries of reference where this is an issue?</p>	8.5.10.2	<p>There was no reported scarcity of country of origin documentation or information on the treatment of SOGIE-diverse individuals. Most members relied upon the National Documentation Packages, in some cases extensively.</p>

12	<p>Registry: Did the Registry</p> <p>a. capture the SOGIE nature of the file in its documentation?</p> <p>b. use appropriate language in its correspondence and other interactions with the SOGIE individual?</p>	n.a.	It appeared that Registry staff had very little input in capturing the SOGIE nature of the file in its documentation. Some forms, such as the New File Review form or the Member File Instructions form, often contained a hand-written reference to the SOGIE nature of the file, but it appeared that these forms were completed and signed by the member.
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Annex 3 - Review Checklist – higher court treatment of SOGIE decisions

Decision name:

	Query (<u>SOGIE Guideline</u>)	Y/N/NA	Observations
1	Nature of Judicial Review or Appeal: Was the appropriate application of Guideline 9 an issue in this appeal?		
2	Reasoned justification: Did the court find that Guideline 9 was not properly applied?		
3	Credibility at issue in the Judicial Review or Appeal: Did the court find that the decision-maker erred in their assessment of the claimant's/appellant's credibility?		
4	Decision: Was the IRB decision upheld?		
Other observations / remarks:			

Annex 4 - Federal Court Cases - overview

Judicial review dismissed		
File number	Country of citizenship	Determinative issue
1. IMM-4391-17	Mongolia	Credibility
2. IMM-4538-17	Croatia	State Protection
3. IMM-4738-17	Croatia	IFA (Zagreb)
4. IMM-3298-18	Nigeria	Credibility
5. IMM-4742-17	Uganda	Credibility
6. IMM-4190-17	Kenya	Credibility
7. IMM-4588-17	D.R. of Congo	Credibility
8. IMM-3862-18	Nigeria	Credibility
9. IMM-5288-17	Nigeria	Credibility
Judicial review allowed		
1. IMM-200-18	Nigeria	IFA (Lagos)
2. IMM-4268-18	Burkina Faso	Credibility
3. IMM-1735-17	Afghanistan	Unreasonable assessment of evidence
4. IMM-3196-17	Nigeria	Credibility
5. IMM-3700-17	Albania	State Protection
6. IMM-4862-17	Jamaica	Credibility
7. IMM-3178-17	Nigeria	Credibility
8. IMM-5059-17	Nigeria	Credibility

Annex 5 - Media sources

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Allard, Sophie. July 13, 2016. "Demandeurs d'asile LGBTI: bientôt des lignes directrices". *La Presse*. [Available online](#) (last accessed: Sept. 5, 2019)

Bielski, Zosia. May 5, 2017. "Burden of Proof", *The Globe and Mail*.

https://www.theglobeandmail.com/life/relationships/after-lifetime-of-hiding-gay-refugees-to-canadaexpected-to-prove-theiridentity/article34858343/?click=sf_globe&fb (last accessed: Sept. 5, 2019)

Busby, Karen. 15 May 2017. "Queering refugee claims: IRB gets rid of problematic stereotypes and impossible paradoxes", *Canadian Lawyer*. [Available online](#) (last accessed: Sept. 5, 2019)

CBC. 26 April 2017 (web: May 2017). "'It's a crapshoot': Asylum seekers fret over fateful day at Canada's immigration board", *CBC: Out in the Open*. [Available online](#) (last accessed: Sept. 5, 2019)

Coubrough, Jill. May 3, 2017. "'Their sexuality is not put on trial': New guidelines promote informed evaluation of LGBTQ refugee claims". *CBC.ca Manitoba*. [Available online](#) (last accessed: Sept. 5, 2019)

Hill, Brian and Jamie Mauracher. November 27, 2019. "Refugee Judge Asks Woman Why Her Husband Wouldn't 'Just Kill' Her." *Global News*. [Available online](#) (last accessed: Dec. 12, 2019).

Howden, Chris and Carol Off. 9 May 2017. "Until this week, Canada's refugee board frequently subjected gay asylum seekers to intimate questions about their sex lives. Now, that will change and lawyer Bashir Khan says it's about time", *CBC Radio: As It Happens*, 5 May 2017. Newsdesk.

Keung, Nicholas. May 5, 2017. "Refugee board creates guidelines for deciding LGBTQ claims", *The Toronto Star*. [Available online](#) (last accessed: September 5, 2019)

Sanders, Carol, "Advocates praise new guidelines for LGBTQ refugee claims", *The Winnipeg Free Press*, 4 May 2017. [Available online](#) (last accessed: Sept. 5, 2019)

Silcoff, Maureen. March 16, 2018 "Guidelines: A benchmark for the conduct of refugee board members". *The Lawyer's Daily*. [Available online](#) (last accessed: Sept. 5, 2019)

Footnotes

- 1 In September 2018, CIMM published *Responding to Public Complaints: A Review of the Appointment, Training and Complaint Processes of the Immigration and Refugee Board*. Recommendation 4 focused on improving training at the IRB, including that IRB "review, on a periodic basis, the effectiveness of the board's training guidelines, including the Sexual Orientation Gender Identity Expression Guideline, as education and training tools."
- 2 This report uses SOGIE Guideline, Guideline 9, or the Guideline interchangeably.
- 3 While some sources use "SOGIE-diverse individuals", others use a variety of acronyms,

such as LGBT, LGBTI, LGBTQ2IS, and others. Similar to the explanation on the website of “End of the Rainbow” (an LGBTQ+ organization supporting LGBTQ+ refugees in Calgary), this paper uses the acronym LGBTQ+, and SOGIE-diverse individual interchangeably, to include lesbian, gay, bisexual, transgender, two-spirit, queer, questioning, and plus to indicate: intersex, asexual, demisexual, pansexual, omnisexual, gender neutral, gender queer, pangender, men who have sex with men (MSM), women who have sex with women (WSW), and all the other sexual and gender diversities that may be omitted.

- 4 Atlas is the IRB’s intranet site.
- 5 An estimated one quarter of interpreters have received information during their orientation, the other 75% received the updated handbook and the Guideline.
- 6 It was decided to primarily focus on 2018, as this gave a clear sampling frame for a period where the SOGIE Guideline had been established for at least 7 months. For RPD and RAD, cases that were decided in 2018 were included in the sample. Given that cases were more limited at ID and IAD, for those Divisions some cases decided in 2017 (after introduction of the Guideline) and 2019 were included in this review.
- 7 NOVA is the case management system of the IRB.
- 8 A quality assessment study of RAD decisions was undertaken by PEPM and finalized in July 2019. It included a focus on the SOGIE Guideline. Many of the findings were similar to the findings in this report.
- 9 Databases searched included CanLii, the Federal Court website, the Supreme Court website, and the Higher Court Decisions on Atlas. Search terms used included “SOGIE”, “Guideline 9”, “Sexual Orientation”, “Gay”, “Lesbian”, and “Bisexual”.
- 10 According to the IRB’s Policy on the Use of Chairperson’s Guidelines: “Although not binding, members are expected to follow guidelines, unless compelling or exceptional reasons exist to depart from them. A member must explain in his or her reasoning why he or she is not following a set of guidelines when, based on the facts or circumstances of the case, they would otherwise be expected to follow them.” <https://irb-cisr.gc.ca/en/legalpolicy/policies/pages/PolGuideDir.aspx> In this case-sample, there were no decisions where the member explicitly stated that Guideline 9 was considered but not applied with a reasoned justification.
- 11 Although it could be assumed that this could be partly explained by the difference in positive and negative decisions, with the Guideline being more often only acknowledged in positive decisions compared to negative decisions, the case law review did not bear this out. There were negative decisions that only acknowledged the Guideline, and in some cases

positive decisions referenced the Guideline extensively. Other decisions (positive and negative) did not reference the Guideline, while still applying its principles in the analysis.

- 12 This may be due to the Guideline itself which, in section 6.1 appears to include the stereotypes listed in section 6.1 as inappropriate assumption but later draws a distinction between the two (i.e. stereotypes and inappropriate assumption) in para 7.4 of Guideline 9 (e.g., see case law footnoted to relevant sentence in para 7.4 which does not deal with stereotypes).
- 13 Noted by the Working Group, this may be indicative of a potentially wider issue: referencing specific names in reasons is considered poor practice in non-SOGIE claims too. Reinforcing the importance of not including names in the body of decisions during training could be considered.
- 14 For both RPD and RAD, other determinative issues included exclusion under 1E or 1F, state protection (including in third countries), identity, or persecution.
- 15 Survey tools are available upon request to POED.
- 16 Following reforms to the refugee protection system in 2012, close to 32,000 refugee claimants remained pending from the former system, which became known as “legacy” claims. By spring, 2017, some 5,500 legacy claims remained. Recognizing the challenges that these delays posed for claimants and their families, the IRB established the Legacy Task Force with the mandate to finalize all remaining legacy claims within two years.
- 17 Although lengthy, this language is used, rather than the shorter “SOGIE cases”, because the latter could suggest that all cases were decided based on SOGIE considerations. However, some involved SOGIE individuals involved in other types of proceedings (e.g. removals), where the case involved a SOGIE individual, but was looking at other factors, or where the case may have involved a SOGIE diverse counsel.
- 18 This included the majority of respondents from the ID as well as a number of RPD and RAD.
- 19 As a broader comment, some members argued that it is a member’s duty to adjudicate cases fairly, and Guidelines should not be required to achieve that.
- 20 Materials such as the Guideline and the Interpreters handbook, as well as glossaries are shared with interpreters and made available on the website. As such, it appears that although materials are available and shared, not all interpreters are fully apprised of the information.
- 21 However, the Guideline’s language is rather strong, in that section 7.2.4 states that persons appearing are “not expected” to provide such evidence.

- 22 Although these are valuable observations, more prescriptive direction in the Guideline regarding specific types of evidence such as reference letters or explicit materials could risk fettering with the independence of decision-makers. As such, it is not recommended to make any adjustments in this area at this moment.
- 23 Section 8.5.2.1 of the Guideline describes intersectionality as follows: “Some individuals with diverse SOGIE may face differential risk due to additional factors such as race, ethnicity, religion, faith or belief system, age, disability, health status, social class and education. Where appropriate, these intersectional factors should be considered when determining whether an individual has established a well-founded fear of persecution.” ²⁴ IRCC’s guidance for oral hearings for Pre-Removal Risk Assessments (PRRA) references IRB Guidelines, including the SOGIE Guideline, as information PRRA officers may consult. See: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugeeprotection/removal-risk-assessment/applications-oral-hearings.html> (last accessed Feb. 12, 2020).
- 25 However, to date, no formal complaints about interpreters undermining terminology used by the member have been received by the IRB.
- 26 The review included all provinces and territories in Canada, as well as the United Kingdom, Australia, the United States and New Zealand as well as Germany, Sweden, Norway, Mexico, Costa Rica and Turkey. These countries were selected based on their close cooperation with Canada on border, migration and intelligence issues, large developments in refugee or migration situations, and/or training ties to Canada on migration and refugee issues. A survey of the members of the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC) was also conducted, with feedback received from ten (out of a possible 16) countries (Finland, Germany, Ireland, Netherlands, New Zealand, Norway, Poland, Sweden, Switzerland, and United Kingdom).
- 27 Lee, Edward O., Hafford Lechfield, T., Pullen Sansfaçon, Kamgain, O., Gleeson, H., Luu, F. (2017). *The state of knowledge about LGBTQI migrants living in Canada in relation to the global LGBTQI rights agenda*. Montréal: Université de Montréal. [Available online](#) (last accessed: Sept. 5, 2019); Liew, Jamie C.Y. 2017. “Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law.” *Canadian Journal of Women and the Law*, Vol. 29, No. 2. p. 290-316; Hersh, Nicholas. 2017. “Refugee Claims and Criminalization of Same-Sex Intimacy: the Case of Sebastiao.” *Canadian Journal of Women and the Law*, Vol. 29, No. 2, p. 227-258.

- 28 Dustin, Moira & Ferreira N. (October 2017). "Canada's Guideline 9: Improving SOGIE Claims Assessment?". *Forced Migration Review*, Vol. 56. p. 80-83.
- 29 Ibid. p. 82. As the authors only focus on the refugee spectrum, it seems that this language would have to be extrapolated to include Immigration cases.
- 30 Hodge, Edwin, Hallgrimsdottir, H. and Much, M. (2019). "Performing Borders: Queer and Trans Experiences at the Canadian Border". *Social Sciences* Vol. 8.
- 31 Ibid.
- 32 Ibid.
- 33 See Section 7.2.4 of the Guideline, which uses the language that this evidence is not "expected" to be used: "It is not expected that an individual establishes their SOGIE through the use of sexually explicit photographs, videos or other visual material."
- 34 Dustin, Moira & Ferreira N. (October 2017).
- 35 Hodge et. al, 2019
- 36 Bahliby, N. July 2017. "Evaluation of the SOGIE Refugee Claim and Hearing Process." Alberta Association of Immigration Serving Agencies (aaisa). Available online (last accessed: Sept. 5, 2019) 37 Dustin and Ferreira, 2017.
- 38 Ibid.
- 39 The Five Eyes is an alliance of 5 countries who have agreed to share intelligence and information. They include Canada, the USA, United Kingdom, Australia, and New Zealand.
- 40 It was developed in 2014.
- 41 The results of this review were not available at the time of writing, and therefore could not be compared to Guideline 9, to determine whether there are insights that should be included in the IRB Guideline.

- 42 How they would use it alongside the DHSS model, was not specified.
- 43 POED reached out to EASO to request the training materials, but had not received them prior to the finalization of this report.
- 44 Data from November 2019; UNHCR. N.d. *Syria Regional Refugee Response*. [Available online](#) (Last accessed: Dec. 19, 2019)
- 45 This document was considered during the development of the IRB's Guideline.
- 46 The Yeates report also noted the fact that the paper on credibility is from 2004, and is very technical. It recommends a greater reliance on Jurisprudential Guides (see: Yeates, N. April 20, 2018. *Report of the Independent Review of the Immigration and Refugee Board: A Systems Management Approach to Asylum*, Recommendation 42; [Available online](#)). For SOGIE cases, that may be helpful, but might not solve a more general challenge for decisionmakers regarding how to go about credibility assessments in cases involving SOGIE-diverse individuals.
- 47 In addition, given that many SOGIE claimants are also vulnerable, consideration should be given to Guideline 8 as well where appropriate.
- 48 It could be contemplated to make this standard practice for any cases with self-represented persons where other Guidelines – such as the Guideline 4 on Women Claimants facing gender-based persecution – apply.
- 49 The top 10 most spoken languages are Spanish, Arabic; Haitian Creole, Mandarin, Punjabi, Lingala, Farsi, Yoruba, Urdu and Somali, which combined cover approximately 64percent of people appearing before the IRB.
- 50 Foreign language glossaries are currently being updated and will include specific “mini-glossaries” related to specific subjects, including SOGIE.
- 51 This dovetails with the Government-wide policy on offering inclusive services.