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Immigration New Zealand  
Refugee Status Branch  
Ministry of Business, Innovation and Employment  
**Auckland**

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### **Draft RSB Guidelines for persons presenting with serious mental health issues**

1. The New Zealand Law Society welcomes the opportunity to comment on the Refugee Status Branch *Draft RSB Guidelines for persons presenting with serious mental health issues (draft Guidelines)*, which are to assist refugee and protection officers (**RPOs**) in assessing the refugee and protection status of people presenting with serious mental health issues.

#### **Status of draft Guidelines**

2. The Law Society supports the statement in the second paragraph of the draft Guidelines that they are not a strict code of procedure. A number of the amendments suggested below are for the purpose of reframing the draft Guidelines to make them more consistent with that approach.

#### **Purpose**

3. As noted, the Guidelines “are to assist refugee and protection officers in assessing the refugee and protection status of people presenting with serious mental health issues.” The Guidelines are an important tool to prevent injustice to psychologically vulnerable applicants and to ensure the merits of their claims are fairly considered.
4. The Law Society submits that the Guidelines would have greater utility if they clearly stated that underlying objective, as expressed in the UNHCR Guidance Notes:<sup>1</sup>

*When an applicant’s psychological abilities are reduced, the fairness and accuracy of ... assessment may be compromised unless each stage of the process is informed by the applicant’s mental state and cognitive abilities ...*

*This Guidance note addresses ways to identify and assist psychologically vulnerable applicants. It presents a framework for ... assessment in light of an applicant’s mental state and it describes a range of procedural modifications to facilitate the fair and accurate assessment of the applicant’s claims.*

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<sup>1</sup> UN High Commission for Refugees (UNHCR), *Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process*, November 2017 at [3] and [6].

## Terminology

### *“Serious mental health issues”*

5. The term “serious mental health issues” is used in the title and throughout the draft Guidelines, but the term is not defined in the Definitions section or elsewhere. The Law Society submits that:
  - a. the Guidelines should not use undefined terminology; and
  - b. for consistency with the UNHCR Guidance Note, the Guidelines should apply to “psychologically vulnerable claimants”.
6. As to the first point, using the undefined term “serious mental health issue” allows for subjective judgment as to what constitutes a “mental issue” and whether it qualifies as “serious”, giving rise to uncertainty and potentially inconsistent application by RPOs and other people using the Guidelines. RPOs are unlikely to be a position to assess the seriousness of an applicant’s mental health issues before undertaking the enquiries that are part of the process that the Guidelines provide for. Claimants who are unable to effectively participate in the process may be unreasonably or unfairly prejudiced if the Guidelines are deemed not to apply to them, as a result of vague and subjective terminology.
7. As to the second point, the UNHCR Guidance Note observes that:<sup>2</sup>

*The psychological abilities required to undertake the protection visa assessment process may be impaired by: mental illness, psychological trauma; acquired brain injury, neurological disorders, intellectual and developmental disabilities; substance abuse; medications affecting mental state and physical illness.*
8. The UNHCR Guidance Note goes on to define people experiencing this wide range of mental states and cognitive abilities as “psychologically vulnerable claimants”.<sup>3</sup>
9. The Law Society recommends that the Guidelines use terminology consistent with the UNHCR Guidance Note. The use of the terms “mental health issues” or “serious mental health issues” should therefore be replaced with “psychological vulnerability” throughout the Guidelines.<sup>4</sup>
10. Although the UNHCR definition is wider than the term “serious mental health issue”, the necessary adjustments to the standard process for claimants at the lower end of the spectrum of psychological vulnerability are likely to be minimal, so the adoption of the more comprehensive terminology is unlikely to materially interfere with the efficacy of the claim determination process.

### *“Medical report”*

11. The draft Guidelines refer to the need for “medical reports” and “medical information”. It would be useful to clarify that this includes psychological evidence so as to avoid the risk that relevant evidence, e.g. from a psychologist, is excluded or given less weight.

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<sup>2</sup> Note 1, at [3].

<sup>3</sup> Note 1, at [5].

<sup>4</sup> This approach was supported by the UNHCR representative, Mr Scott Cosgriff, at the Asylum Forum on 30 May 2019.

## Annexures to the Guidelines

12. The draft Guidelines say at page 1, fourth paragraph: *“Annexed to these guidelines are independent guidance for legal representatives”*. There is no annexure to the draft, but there are links on page 10 to the “UNHCR Guidance Note - Schedule: Mental State And Capacity Assessment, pp 21-26” and to the University of New South Wales *“Managing and understanding psychological issues among refugee applicants - guidelines for best practice”*. It would be appropriate to annex those documents and the UNHCR Guidance Note.

### Section 1 – Definitions section (page 1)

13. There is a minor typographical error: the definition of “claim” should refer to a claim for refugee “and/or” protected person status.
14. It may also be useful to add a definition for the UNHCR Guidance Note.

### Section 2 – Summary

15. The first two bullet points of the draft *“Summary”* should be linked in a single point:
  - a. The first bullet point says: *“It is presumed that all applicants are fit to engage in the refugee and protection status determination process”*.
  - b. The second bullet point says: *“RPOs should be alert to the possibility that a claimant may have mental health issues”*.
16. The UNHCR Guidance Note at Section IV, paragraph 17 appropriately links these two statements as follows: *“While the presumption is that an applicant is fit to engage in the protection visa assessment process, decision-makers (at first instance and upon review) should be alert to the possibility that an applicant is psychologically vulnerable”*.
17. If they are not linked, there is a risk that RPOs might place too much emphasis on the presumption that all applicants are fit to engage.
18. The Law Society questions the fourth bullet point, that: *“Most people, including those who present with mental health issues, are able to establish their claim under the standard process”*. This is footnoted to *“Claiming Refugee and Protection Status in New Zealand”* (June 2015) which sets out details on the claims process. However, we are not aware of any reliable evidence to support this proposition. We recommend this bullet point be deleted or replaced with a statement along the lines that the degree of adjustment from the standard process may vary depending on the severity of the identified psychological vulnerability. This reflects the fact that at the low end of psychological vulnerability it may require very little adjustment to the normal process.
19. The draft then says at the fifth bullet point: *“In cases where the person presents with serious mental health issues, modifications to the usual process may be required”*. That is correct, but the Law Society suggests that it is more appropriate to say that *“the degree of modification to the standard/usual process may vary depending on the severity of the identified psychological vulnerability”*.
20. The final bullet point says: *“A protracted decision-making process is often a stressor for refugee and protection claimants. For those with serious mental health issues, expediting the process may be more appropriate”*. It is acknowledged that a protracted decision-making process is often a stressor for claimants. However, it is not clear on what basis it is said as a general matter that expediting the process may be *“more appropriate”*. A simple proviso,

along the lines of “*provided the applicant’s ability to present their case is not prejudiced*”, would also not be sufficient. In line with the UNHCR Guidance Note at Section VII, paragraph 39, there should be an express statement that “*psychologically vulnerable applicants may require more time than other applicants to prepare an application*”.

21. The Guidelines should also refer, in the Summary section, to the need to accommodate (in the “*timeline*”) the obtaining of a psychologist’s, psychiatrist’s or GP’s report. It is important that this be acknowledged in the Summary section because the more specific points in the Guidelines may be interpreted in light of the Summary section.
22. At present, there is too much emphasis in the Summary, and in the specifics of the Guidelines, on “*expediting*” the current timeframes. The Law Society considers that in most cases involving psychologically vulnerable applicants, the standard/usual timeline will need to be extended, to enable psychologically vulnerable applicants and their counsel to fairly and effectively put the merits of the claim before the RSB.

### **Section 3 – The Act and UNHCR and Tribunal guidance**

23. There is a small typographical error in the first sentence of the second paragraph of the draft: “*Acts*” should be replaced with “*Act*”.
24. The third paragraph should acknowledge that while the RPO does have “*discretion to determine the procedure to be followed in each case*”, as with any discretion, it must be exercised lawfully, fairly and reasonably. The Supreme Court’s decision in *H v Refugee and Protection Officer*<sup>5</sup> has made that clear. This is not an area of “*absolute*” discretion.

### **Section 4 – Shared Inquiry and the Benefit of the Doubt**

25. The fourth sentence says: “*If the claimant has made a genuine effort to substantiate their claim, all available evidence has been obtained ...*”. This should refer to all “*reasonably*” available evidence.

### **Section 7 – Measures that may be adopted**

#### *Sources of information*

26. The second paragraph is correct, but it does not appear to add anything. It seems to be a restatement of an obvious point, so could probably be deleted.

#### *Expedited processes*

27. As noted above, we are not aware of situations where an applicant presenting with “*serious mental health issues*” or any “*psychological vulnerabilities*” would warrant “*expedited processing*” at the preparation stage. We acknowledge that “*expedited processing*” may be appropriate following good faith consultation with the applicant’s counsel but would have grave concerns about it being applied in consultation with an unrepresented applicant. The aim is not to drive “*efficiency*”, but to achieve a process in which the psychologically vulnerable claimant can fairly participate. The timeframes of particular concern are the pre-hearing ones (i.e. the preparation phase). Usually a longer timeframe will be needed to gather the psychologist/psychiatrist/GP evidence, and to accommodate the difficulties (with a psychologically vulnerable applicant) in counsel obtaining the written and documentary evidence to be filed prior to the interview.

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<sup>5</sup> *H v Refugee and Protection Officer* [2019] NZSC 13.

28. The UNHCR Guidance Note does not refer to any “*expedited process*”, and certainly not at the preparation stage of the application. As noted, the Guidance Note states at Section VII paragraph 39: “*Psychologically vulnerable applicants may require more time than other applicants to prepare an application*”. It then refers at paragraph 40 to the importance of legal assistance in preparing the application, and at paragraph 41 to the important role of the psychological or medical report. The draft Guidelines acknowledge the importance of the psychological or medical report but make no reference to the practical problems for counsel (let alone unrepresented applicants) in obtaining such reports. (This is discussed in the next section, “Lengthened processes”.)

#### *Lengthened processes*

29. The Law Society submits that a fifth bullet point should be added, after the reference to the Mental Health Act, referring to difficulties, delays and cost in obtaining psychological and medical evidence. This was discussed at some length at the recent Asylum Forum. In summary, typical problems that arise in obtaining the necessary psychological or medical evidence include:
- a. difficulties in obtaining legal aid for what is typically an expensive report;
  - b. long lead times in obtaining the report once funding has been granted (because of the psychologist/psychiatrist/medical practitioner’s workload); and
  - c. time being required for medications to become effective, delaying the preparation of the claim.

#### *The interview*

30. The fourth bullet point records that one measure that may be helpful for managing interviews is “*Having the claimant attend the RSB in advance to familiarise them with the interview environment and meet the RPO*”. In some circumstances this may not be appropriate. Accordingly, we recommend the Guidelines refer to providing the *opportunity* for the claimant to attend in advance. We also note that at a practical level it is doubtful that legal aid would cover such attendances.
31. We recommend adding a reference to the points made in the UNHCR Guidance Note Section IX paragraphs [52] – [59]. Here the UNHCR correctly states that “*As a general principle, some grounds for making adverse credibility findings are less reliable when considering the claims of the psychologically vulnerable applicant*”. The Guidance Note then refers to “*demeanour*”, “*the specificity and detail of an account*”, an applicant not possessing knowledge which they would be expected to possess, problems with recollection and inconsistencies. We recommend adding a specific reference to this section of the UNHCR Guidance Note.
32. In addition, it may be important for a psychologically vulnerable claimant to have a non-lawyer support person at the interview, or outside the room, or available by phone.

#### *Non-appearance at interview*

33. The issue of non-appearance at interviews has been brought into sharp focus by the recent Supreme Court decision in *H v RPO* [2019] NZSC 13.
34. It is correct that where a person fails to attend the RSB interview, the RPO may determine the claim or matter without conducting the interview (s 149(4), Immigration Act 2009). However, the Guidelines should point out that the phrase “*may determine*” confers a discretion on the RPO, which must be exercised lawfully, fairly and reasonably.

35. There is no objection to the Tribunal’s Practice Note requirement for a medical report in support of a request to reschedule the interview. It can, however, be difficult to get a GP to provide a report which covers all the points (a) – (e).<sup>6</sup> This was the unfortunate position in *H v RPO*. The Guidelines need to acknowledge that it may be difficult for the applicant or their counsel to provide a medical report covering all points, and the RPO should therefore not take a “technical” approach, provided the relevant information is in fact provided in a timely manner, taking into account the impairment the claimant is established to have been suffering from. It would be helpful if, as an adjunct to the Guidelines, the RSB could issue a brief (one page) guide for GPs writing these reports.
36. There is also a small typographical error in the first sentence: “Acts” should be replaced by “Act”.

#### *Cases involving multiple requests to adjourn*

37. We appreciate the frustration for the RSB in these situations. However, the Law Society is concerned that RPOs may misinterpret the Guidelines and use this part to decide genuine claims without conducting an interview. As noted above, section 149(4) of the Act says the RPO “*may*” proceed to determine the claim without conducting an interview. But this confers a discretion which must be exercised lawfully, fairly and reasonably. A statement to that effect should be incorporated in this section of the Guidelines.

#### *Dispensing with the interview*

38. We agree that only in “*rare cases*” should an RPO dispense with an interview.

### **Section 8 – Mental health medical reports**

39. The Law Society generally agrees that reports indicating a claimant may have problems establishing their claim or may not be able to provide coherent evidence because of their mental health condition, would not normally be grounds for adjourning an interview. However, the preparation timeframe has to take into account the funding difficulties and delays involved in applicants and their counsel obtaining the necessary psychological and medical reports, and the potential need to wait for medications to take effect. The Guidelines should expressly state that RPOs should allow reasonable time for these reasons.
40. As to RPOs requiring a claimant to attend an independent medical professional to obtain a second opinion, presumably the cost of doing so would be covered by the RSB. The Guidelines should also expressly state that such independent medical reports are truly “independent”, and that the referral or instruction letter will be provided to the applicant or their counsel along with a copy of the report. Best practice in that regard is for any independent report to follow (or at least substantially follow) the requirements of the High Court Rules, schedule 4, “Code of Conduct for Expert Witnesses”.

#### *The scope of medical evidence*

41. The last paragraph of this section says: “*A claimant’s poor mental health may provide an explanation for credibility issues that arise*”. There is a footnote to Table 1, pp 17-20 of the UNHCR Guidance Note. We recommend the reference to “*credibility issues*” be expanded to include the different types of credibility issue explained at Part X paragraphs [52] – [59] of the UNHCR Guidance Note and referred to above in this submission.

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<sup>6</sup> Immigration and Protection Tribunal *Practice Note 2/2018 (Refugee and Protection)*, at [16.3].

### Section 9 – Information for representatives

42. We recommend a slight change in terminology in the last paragraph of this section. It refers to procedural adjustments the RPO “*may wish to make*”. We consider the better terminology would be “*may need to make*”.

### Section 10 – Incidents

43. This section deals with what the RPO should do if a serious incident occurs during the interview. We recommend the phrase “*terminating the interview*” be clarified. Presumably it means terminating the immediate interview and subsequently making arrangements to adjourn. It may also be appropriate to decide to dispense with the interview, in accordance with that section of the Guidelines.
44. There needs to be a clear statement that the RPO’s overarching obligation is to ensure the safety of the claimant (and if the claimant is assessed to be a risk to others, the safety of those persons). There should be reference to the RPO taking appropriate steps to ensure the claimant has the means and/or support to get home safely and be under appropriate psychological or medical care.

Thank you for the opportunity to comment on the draft Guidelines. If you have any queries arising from these submissions, please do not hesitate to contact the Law Society’s Immigration and Refugee Law Committee convenor Mark Williams, through Law Reform Adviser Dunstan Blay ([dunstan.blay@lawsociety.org.nz](mailto:dunstan.blay@lawsociety.org.nz) / 04 463 2962).

Yours faithfully



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