

## **ADDING “GENDER” AS A SIXTH GROUND of ASYLUM**

### **Frequently Asked Questions**

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**Q:** Our laws are based on the international Refugee Convention, which does not name “gender” as a ground of asylum. Doesn’t adding “gender” to our laws put us out of step with other nations that have also adopted the convention?

**A:** No. [Other Convention countries](#) have added gender as a 6th ground of asylum to their domestic laws, despite its lack of mention in the Convention. They include Sweden, Spain, and France. Several other entities, including the European Union, have also updated their laws to name “gender” as an acceptable basis for asylum regardless of the ground asserted.

**Q:** If we add “gender” to our asylum law, can we still argue that international laws and policies recognizing “gender” elements within all claims should guide interpretation of our laws?

**A:** Yes. International law and policy unequivocally state that gender-based asylum claims can be brought under any existing ground of asylum. Explicitly naming “gender” as a basis of asylum does not diminish the fact that depending on the facts of their case, women and other survivors of gender-based violence can choose the ground which best fits their particular claim per international guidance. Passage of our law stating that China’s “one-child” policy is *per se* political persecution did not weaken or otherwise impact the persuasiveness of international law arguments, even though no such provision was included in the Convention or Protocol. More importantly, this carve-out has helped bring safety and justice to those most directly impacted by asylum law - asylum seekers themselves. And, an administration that violates the Convention by disregarding international guidance permitting gender-based claims cannot as easily ignore federal legislation explicitly including “gender” as a ground of asylum.

**Q:** Isn’t a ‘carve-out.’ strategy for recognizing certain claims harmful to those who are not included?

**A:** No. As explained above, our law regarding China’s “one-child” policy has importantly helped asylum seekers in need of protection. The law’s passage explicitly recognizes certain claims; it does not preclude recognition of others. Rejecting laws and policies because they don’t protect everyone who has endured persecution unnecessarily punishes survivors of gender-based persecution. Just as the Convention enumerated 5 specific grounds of asylum and not more, its shortcomings are neither a reason to repudiate it, nor champion it in its current form - rather, its shortcomings are a reason to advocate its improvement.

**Q:** Could adding “gender” lead to narrowed standards for other elements of gender-based asylum, such as the definition of persecution?

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**A:** This risk already exists. Questions such as whether “gender” should be universally considered a particular social group (PSG), whether “gender” can be a “nexus,” or whether gender-based violence is persecution are subject to the whims of decisionmakers right now in the absence of a sixth ground. This has always been the case and will continue to be so regardless of whether a sixth ground is added. However, it is clearer now more than ever that survivors do not have the luxury of relying on hoped-for administrative and even judicial action that can be readily undone by a future administration. A sixth ground does not pretend to be, or even strive to be, a “perfect fix” to ensure protection for all survivors - nothing can be that. But legislating “gender” as a sixth ground provides an additional and important practical measure of protection for gender-based asylum that the *status quo* simply cannot.

**Q:** Wouldn't legislation clarifying the definition of a “particular social group” and “nexus” be enough to fix the problem?

**A:** No. Even with statutory PSG and “nexus” clarifications, *pro se* survivors of gender-based violence, including indigenous individuals and those subject to the expedited removal process, would remain at an unnecessary disadvantage without the sixth ground. The PSG ground is, by its nature, multi-tiered and complex. One must first establish the group itself, and then one's membership in it. As a result, proving that persecution was on account of membership in the group is inherently further complicated. Clearer PSG and nexus definitions are certainly desirable for this reason. But, clearer definitions alone cannot mitigate the additional obstacles survivors face when presenting PSG claims - such as a lack of advanced legal training, and the re-traumatization occasioned by having to explain, in an adversarial process, why one was targeted for sexual or domestic violence beyond the simple fact of being female. The addition of a sixth ground can mitigate those obstacles.

**Q:** Domestic violence is extremely common around the world. Won't adding “gender” as a ground of asylum encourage all victims of domestic violence to come to the U.S. to ask for protection?

**A:** No. By definition, one must be physically present in the U.S. to apply for asylum. It is extremely difficult and dangerous to flee home in search of safe haven abroad; access to a minimum amount of resources is required. Women and girls are among the most vulnerable and isolated refugees. Women and girls have minimal access to family or community resources due to discriminatory employment, property ownership, and inheritance laws, as well as searing social stigmas and ostracization as victims and/or reporters of gender-based violence. Mothers who are the primary caretakers of young children are further challenged to flee safely. Some face legal prohibitions on traveling alone or without male relatives and are at high risk of sexual assault or abduction *en route* to other countries. Adding “gender” as a ground of asylum does nothing to alleviate these obstacles to fleeing and becoming an asylum seeker to begin with.

**Q:** Will all women who flee to the U.S. be granted relief if they ask for asylum on the basis of “gender”?

**A:** No. Each applicant must prove, through credible evidence, every element of her asylum claim including that she faces a high likelihood of persecution if returned home. Adding “gender” as a ground of asylum does not lessen or change these burdens of proof. And, it is well-documented that asylum applicants who are able to hire legal counsel have a [much greater chance of success](#) than those who don't. Women generally have more limited access to resources and support networks for the reasons explained above, and may be less able to afford an attorney. Past developments, eg, cases in both the U.S. and abroad opening the door to asylum based on female genital mutilation/cutting have not led to skyrocketing numbers of asylum grants in their wake.