

Submission for the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Submitted by the Child Rights International Network - CRIN (www.crin.org), 5 June 2017.

This submission focuses on the specific rights violations affecting children who identify as lesbian, gay, bisexual, transgender (LGBT) or intersex. It aims to highlight the different forms of discrimination they experience on the basis of their actual or perceived sexuality or gender identity focusing on the worrying trend of restricting children's access to information, violations of their right to bodily integrity, legal recognition, access to sex and relationships education and bullying.

The submission focuses on question 1 of the call for information addressing the rights violations we have been monitoring, relevant laws, policies and practices and legal cases.

Discriminatory sexual consent laws

In most countries an age is established below which children are deemed incapable of consenting to sexual activity. While many laws aim to protect children against sexual abuse, in some States these laws are so broad that they criminalise teenagers for engaging in consensual sexual activity with people of their own age - even kissing and hugging fully clothed.¹ Some laws even establish different ages of consent according to children's sexual orientation.

In at least 15 countries, the law establishes different ages of sexual consent depending on the sexual orientation of the child.² In Benin and Niger for example, while it is legal for persons over 13 years of age to engage in consensual different-sex sexual activity, it is only at age 21 that they can legally have same-sex sexual activity. In the Bahamas, Canada, Indonesia, Rwanda and three States in the US (Alabama, Kansas and Texas) for instance, different-sex sexual activity is legal at 16 while same-sex sexual activity is only legal at 18.

Regional human rights courts have recognised these laws as discriminatory, triggering region wide law reform. In 1997, the European Commission for Human Rights condemned discriminatory ages of consent for the first time in its conclusions in *Sutherland v. UK*.³ At

¹ See South African Constitutional Court judgment on Sections 15 and 16 of the Sexual Offences Act; Peru: Tribunal Constitucional declaró inconstitucional el artículo 1º de la ley 28704 sobre delito de violación sexual contra adolescentes entre 14 y 15 años de edad. Available at: http://www.tc.gob.pe/notas_prensa/notas/2013/nota_2013_003.html.

² International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition*, Geneva, May 2017, available at: http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf.

³ *Sutherland v. The United Kingdom*, 25186/94, European Commission of Human Rights, 1 July 1997, available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-22084&filename=001-22084.pdf>

that time, the age of consent for sexual activity between men was 18, compared with 16 for sexual activity between men and women or between women. In 2003, the European Court for Human Rights approved the Commission's conclusions in two judgements relevant to the Austrian Penal Code (*L. and V. v. Austria* and *S.L. v. Austria*) which provided for an age of consent of 18 for male-male sexual activity, compared with 14 for male-female and female-female sexual activity.⁴

Sexual consent laws should not run counter to children's rights, including by establishing different ages of consent according to sexual orientation which constitute a violation of the principle of non-discrimination recognised in article 2 of the Convention on the Rights of the Child (CRC). While the law should state an age below which children are not deemed capable of sexual consent, the aim of a minimum legal age should be purely protective; it should not aim to control or criminalise children's sexuality. Children should never be criminalised for their sexual orientation or for their consensual sexual activity, otherwise, far from serving its purpose of protection, such laws traumatise children by exposing them to the criminal justice system and in some cases media attention.

Access to information

The rights violations affecting LGBT children are particular in that they arise from discrimination on the basis of their actual or perceived sexuality or gender identity. In some countries discrimination is state-sanctioned, with laws banning the "promotion of information on non-traditional relationships" to children, which is seen as "harmful" to their health and development. Sex education in schools has yet to be fully inclusive of the information needs of LGBT children, which denies them the chance to explore their own health, identity and relationships. This also applies to public services, including sexual and reproductive health services that should cater to the varied needs of people across the LGBT spectrum.

Sex education provided in many countries (where it exists) often refuses to acknowledge the sexuality of specific groups, in particular LGBT children. This can have a profoundly negative impact on children's physical and mental health. Sex and relationships education is one of the most important ways to help children avert risks, make informed decisions about their sexual and reproductive health, and develop the skills to form healthy relationships based on trust and respect: this applies to all children - not just those whose sexuality governments choose to acknowledge.

Increasing numbers of States are censoring children's access to information on spurious grounds of protection - a plain violation of children's rights under the CRC.⁵ Most notably, a swathe of countries have passed or proposed laws that deny children information about

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⁴ *L. and V. v. Austria*, 39392/98 & 39829/98, European Court of Human Rights, 9 January 2003, read a summary here: <https://www.crin.org/en/library/legal-database/l-and-v-v-austria>

S.L. and V. v. Austria, 45330/99, European Court of Human Rights, 9 April 2003, read a summary here: <https://www.crin.org/en/library/legal-database/sl-v-austria>.

⁵ Children's rights to non-discrimination (article 2), freedom of expression (article 13) and access to information (article 17) including that related to health (article 24.2e), and education for the benefit of children's development (article 29).

same-sex relationships and legitimise discrimination against these groups.⁶ This also has serious implications for LGBT children's mental and physical health because they are barred from receiving relevant information and persecuted by teachers, their peers and society alike.

CRIN has become aware of seven States that have passed or proposed laws 'protecting children from information deemed harmful to their health and development'. In particular, a pattern of laws is emerging which criminalise the 'promotion of homosexuality to children'. Lithuania, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan. Lithuania, Moldova, Russia and Ukraine all have explicit prohibitions on the distribution of information about homosexuality to children.⁷

In **Russia** in July 2013, for example, amendments to the Administrative Code and law protecting children from harmful information⁸ entered into force, making 'propaganda' about non-traditional sexual relations among minors unlawful. The law imposes a fine of 5000 roubles (£100) for individuals who infringe this ban. The penalty for schools is 100 times that amount. In September 2014, the country's Constitutional Court confirmed the legality of this provision.⁹

In 2002, **Lithuania** adopted a law,¹⁰ with amendments in 2009, which bans the distribution to minors of any information where 'homosexual, bisexual or polygamous relations are promoted' and where 'family relations are distorted and their values scorned'.

One of the most troubling aspects of this trend is that at least three countries - Kazakhstan,¹¹ Kyrgyzstan¹² and Uzbekistan¹³ - have subverted the meaning of articles of the CRC (13 and

⁶ For more information, see CRIN, *Censorship: Laws restricting children's access to information*, available at: www.crin.org/node/39161.

⁷ A list of these laws is available here:

<https://www.crin.org/en/library/publications/censorship-laws-restricting-childrens-access-information>

⁸ Federal Law No. 135-F3 2013 On Making Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Adoption of the Federal Law on the Child Protection from Information Harmful to their Health and Development. Available at: http://lgbt.net.ru/sites/default/files/russian_federal_draft_law_on_propaganda_of_non-traditional_sexual_relations_2d_reading_eng.pdf

⁹ RT, 'Constitutional Court backs ban on "gay propaganda to minors"', 25 September 2014. Available at: <http://rt.com/politics/190620-court-gay-propaganda-ban/>

¹⁰ Law on the Protection of Minors against the Detrimental Effect of Public Information 2002 (with amendments in 2009). Available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=410367

¹¹ Group of deputies of the Parliament of the Republic of Kazakhstan, 'Expert opinion on the draft Law of the Republic of Kazakhstan "The protection of children from information harmful to their health and development"' (Expert Opinion), April 2013, Available at http://online.zakon.kz/Document/?doc_id=31249501#sub_id=7

¹² Independent Expertise, as in Regulations of Zhogorku, 'Assessment of correspondence of the draft law "The protection of children from information harmful to their health and development" with international treaties and generally accepted principles and norms or law' (Expert Opinion - Specialised Legal Expertise), March/April 2013. Available at <http://talap.kg/ekspertnoe-zaklyuchenie-proekta-zakona-o-zashhite-detej-ot-informacii-prichinyayushh-ej-vred-ix-zdorovyu-ili-razvitiyu-na-sootvetstvii-konstitucii-kyrgyzskoj-respubliki/>

¹³ Agency for Press and Information Uzbekistan, 'On the protection of minors from information harmful

17 on freedom of expression and access to information and 35 on sexual abuse) as a justification for these laws. But the caveats in these articles about protecting children from harmful information arose, at least in part, from the racist ideologies of the apartheid era, so are meant to eliminate prejudice, not spread it.¹⁴

Age appropriate, comprehensive and inclusive sexual and reproductive health education should be part of the mandatory school curriculum, as recommended by the Committee on the Rights of the Child.¹⁵ Sexual and relationships education in school is one of the most important ways to help children avert risks, and make informed decisions regarding their sexual and reproductive health. This applies equally to LGBT children, and limiting access to information on these issues, in the name of protection, can have a profoundly negative effect on children's physical and mental health.¹⁶

“Effective prevention programmes, including measures aimed at changing cultural views about adolescents' need (...) and addressing cultural and other taboos surrounding adolescent sexuality” are also recommended by the Committee.¹⁷ Within this, is an implied need to address the stigmatisation of LGBT children, including in their own family where they are also ostracised; it would help to combat the taboo that surrounds LGBT issues for children.

“Conversion” therapy

LGBT children face being ostracised by their family, and being put under psychological pressure to conform to or ‘convert’ to heterosexuality, including through so-called ‘conversion’ therapy. States and human rights mechanisms have increasingly recognised that “conversion therapy” - an attempt to change a person's sexual orientation through “therapy” - is harmful and abusive. Particularly where this practice involves the involuntary admission for “treatment”, it amounts to a form of violence and may amount to deprivation of liberty where a child is not free to leave.

Children have a right to privacy, respect and confidentiality in seeking medical advice, access to medical records and control of who else can access them. Their opinion should be heard in health-related matters and given due weight based on their capacity. Article 12 of the CRC recognises the value of a child's views and the need to give them weight in accordance with the age and maturity of the child. This approach requires that the individual capacity of the child is taken into account, not just their age.

Non-therapeutic procedures should only ever be carried out with the child's consent,

to their physical and mental development’ (Draft law), 9 July 2013. Available at <http://uzdaily.uz/articles-id-16330.htm>

¹⁴ UN Office of the High Commissioner for Human Rights and Save the Children Sweden, ‘Legislative History of the Convention on the Rights of the Child’, Volume 1. New York and Geneva: 2007, p. 483, para 39. Available at: <http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf>

¹⁵ UN Committee on the Rights of the Child, General Comment No. 20, para. 61

¹⁶ CRIN, “Laws restricting children's access to information”, March 2014. Available at: <https://www.crin.org/en/library/publications/censorship-laws-restricting-childrens-access-information>

¹⁷ UN Committee on the Rights of the Child, General Comment No. 4, para. 30

irrespective of age. The Committee on the Rights of the Child has condemned the imposition of so-called “treatments” to try to change sexual orientation.¹⁸ The Committee Against Torture has also recognised that “conversion therapy” when enforced or administered without free and informed consent is a violation of the rights of LGBT people.¹⁹ States have begun to pass legislation to specifically prohibit “conversion therapy”. In December 2016, Malta became the first European state to ban the practice entirely²⁰ and states in the United States have specifically banned the practice for children.²¹ Courts in the United States have consistently upheld these bans, despite legal challenges.²²

Rights of transgender children

Gender identity is part of any human being’s identity, including children. Failure to recognise a child’s self-identified gender is likely to affect many other rights, such as the right to privacy, to health and education. It also exposes children to stigmatisation, discrimination and violence.

Transgender children face even more difficulties than adults in having their self-identified gender recognised by the State. In countries where adults are able to have their self-identified gender recognised, procedures to do so are often not open to children. Many States require people who wish to change their first name or gender to undergo medical treatment, surgeries or sterilisation, and assume that children are not deemed able to consent to such procedures. Children are thus often *de facto* excluded from gender legal recognition provisions because they cannot meet the conditions.²³ Despite many legal reforms in recent years to allow and facilitate gender self-determination, few countries allow children to change their legal gender according to their self-identified gender, and when they do, a minimum age is normally set.²⁴

¹⁸ Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f20&Lang=en

¹⁹ Committee against Torture, List of issues prior to the submission of the seventh periodic report of Ecuador, CAT/C/EQU/Q/7, 16 January 2014.

²⁰ The Guardian, “Malta becomes first European country to ban ‘gay cure’ therapy”, 7 December 2016. Available at: <https://www.theguardian.com/world/2016/dec/07/malta-becomes-first-european-country-to-ban-gay-cure-therapy>.

²¹ Jurist, “Illinois governor signs law banning gay conversion therapy for minors”, 21 August 2015. Available at: <http://www.jurist.org/paperchase/2015/08/illinois-governor-signs-law-banning-gay-conversion-therapy-for-minors.php>.

²² Jurist, “Supreme Court declines to hear lawsuit against California ban on gay conversion therapy”, 2 May 2017. Available at: <http://www.jurist.org/paperchase/2017/05/supreme-court-declines-to-hear-lawsuit-against-california-ban-on-gay-conversion-therapy.php>.

²³ This is the case in New Zealand, and many European countries. See

²⁴ Ranging from 6 in Norway (with parental consent) to 16 in the Netherlands, Ireland and Belgium (in Belgium, children are now able to change their name from age 12). See more data on legal recognition of gender identity in European countries: <https://rainbow-europe.org/#8661/8701/0>.

Argentina²⁵ and Malta²⁶ allow children's legal representatives to file for a change of their recorded sex, without setting a minimum age, with due consideration given to evolving capacities and best interest of the child. It is not required to undergo reassignment surgery or treatment.

Procedures to change one's name and gender marker should be made available to children, in a child-friendly manner, without a minimum age, and according to their maturity. It should not be contingent on irreversible surgeries or medical treatment.

Most countries set strict age limits for transgender persons to access treatments such as hormone therapies and surgeries. In some States the former are accessible for teenagers while the latter are generally available only to adults. In September 2007, a landmark judgement in Argentina, for the first time recognised a child's right to change her sexual identity. The judge based his decision on a section of the country's civil code on organ transplants, which recognises the psychological capacity of minors to decide on matters affecting their body, and article 12 (right to to be heard) of the CRC.²⁷

Age discrimination is also at play where countries have improved access to legal gender recognition and reassignment treatment for transgender individuals. Transgender identities have been considered like mental illnesses and a diagnosis is therefore widely required to access treatments. In countries where conditions of medical assessments were loosened to decrease stigma,²⁸ legal reforms usually exclude children from the "depathologised" pathway set up for adults.

Rights of intersex children

Intersex children face forms of violence and discrimination that bear similarity, but are distinct from those faced by LGBT children. Anti discrimination laws that only cover sexual orientation and gender identity as discrimination grounds are therefore not sufficient to protect intersex children. Legislation should specifically ban discriminations on the grounds of sex characteristics.

Recognition of sex and gender identity

In most countries, there is a legal requirement to register children upon birth as male or female. Few countries allow for the gender marker to be left void or for a third neutral option

²⁵ Argentina's Gender identity law, 2012, article 5. Available at: <http://tgeu.org/argentina-gender-identity-law/>.

²⁶ Gender Identity, Gender Expression and Sex Characteristics Act, 2015, article 7.

²⁷ "Gender and sexuality: sexual orientation, gender identity and sex education", CRIN, 2009, available at: <https://www.crin.org/en/library/publications/gender-and-sexuality-sexual-orientation-gender-identity-and-sex-education>.

²⁸ For instance, Belgium recently adopted a reform to the gender recognition law: sterilisation and a mental health diagnosis are no longer required for legal gender recognition. Children over 16 need to secure a psychiatrist's statement to change their gender marker, and children over 12 to change their first name. Although these statements are supposed to focus on the child's free and informed decision (rather than on a diagnosis), it remains to be seen how courts will assess them. See: <http://tgeu.org/belgium-new-gender-recognition-law-with-obstacles/>.

to be ticked, but Courts and national legislatures have increasingly applied existing human rights standards to the legal recognition of intersex children. The High Court of Kenya has addressed discrimination against intersex children with regards to birth registration, a ruling that has triggered law reforms to recognise the rights of intersex children.²⁹ The US also issued its first intersex birth certificate following a challenge through New York's courts. In New-Zealand, the "X" option is available to intersex people only, while in other countries such as Australia,³⁰ India, Bangladesh and Nepal, it is available to all persons with a non binary gender identity. In Germany, leaving the gender marker void is compulsory for children with certain types of variations of sex characteristics.

Setting deadlines in registering sex at birth, combined with the impossibility of changing sex registration during childhood are indirectly encouraging forced surgeries or treatments on intersex children. Parents are pressured to "choose" a gender for their child by a certain age, and have the child undergo medical treatment to conform to that gender.

However, legislation that prescribes leaving the gender marker void when registering a child with a variation of sex characteristics may infringe on the child's right to privacy, and lead to further discrimination, especially where this third option is restricted to intersex children.³¹ The solution adopted by Germany in 2013 has thus been criticised by different Intersex organisations.³² As noted in a report by the Council of Europe Commissioner for Human rights: "there is a risk that the lack of freedom of choice on whether to leave the gender marker field blank may increase stigmatisation and "forced outings" of those children whose sex is undetermined."³³ There is also a risk that intersex children whose sex assigned at birth does not fit their gender identity may have to declare themselves as transgender in order to seek a change in their civil status, because of the legal void surrounding their situation.

Laws and policies should take into account the fact that intersex children may or may not feel that the male and female categories reflect their gender identity. Options should remain open for all parents, and procedures to change one's recorded sex made simpler and accessible to children. This is particularly important with regards to the fact that strict laws and policies on sex registration can increase pressure on parents to make crucial decisions without the child's consent.

Non-consensual surgery and bodily integrity

²⁹ Baby 'A' (suing through the mother, E.A.) and The CRADLE-the Children Foundation v. The Attorney General, Kenyatta National Hospital and the Registrar of Births and Deaths, 5 december 2014, case summary available at:

<https://www.crin.org/en/library/legal-database/baby-suing-through-mother-ea-and-cradle-children-foundation-v-attorney>.

³⁰ See:

<https://www.crin.org/en/library/news-archive/australia-govt-approves-new-transgender-and-intersex-law-fight-discrimination>.

³¹ OII Europe, Standing up for the human rights of intersex people, December 2015, p. 22, available at:

<https://oiieurope.org/standing-up-for-the-human-rights-of-intersex-people-how-can-you-help/toolkit/>.

³² See <https://oiieurope.org/bluff-package-for-inter-leaving-sex-entry-open-is-not-an-option/>.

³³ Council of Europe Commissioner for Human Rights, Issue paper: Human rights and intersex people, available at: <https://rm.coe.int/16806da5d4>.

Intersex children are often victims of forced surgeries or treatments, practices which interfere with their physical integrity, when carried out for no therapeutic reason and without their free and informed consent - regardless of age. The Committee Against Torture was the first treaty body to make a recommendation urging States to eliminate the practice during the review of Germany in 2011.³⁴ The Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of Discrimination against Women have all since made similar recommendations in line with their respective treaties.³⁵

Children are especially vulnerable to such practices, as they are usually performed at a very young age when they are unable to speak up for and defend themselves, or give - or refuse - consent. When carried out for no therapeutic reason and without the child's free and informed consent - regardless of age, they constitute a violation of the child's physical integrity and dignity. Forcing a child to undergo non-therapeutic processes which affect their physical integrity also raises questions around the rights to survival and development (art. 6), to protection from violence (art. 19) and to the highest attainable standard of health (art. 24).

Children of same-sex couples

The family is an important social structure, which may take different forms. Children are also affected by discrimination based on their parents' sexuality, including when authorities do not recognise both partners in a same-sex couple as legal parents. The UN Children's Fund (UNICEF), the Committee on the Rights of the Child and the Inter-American Court of Human Rights have expressed concern at discrimination against, and the lack of legal protection of, children of same-sex couples.³⁶

While the preamble of the CRC places emphasis on the primary caring and protective responsibility of the family, it does not refer to a single family structure, instead citing a variety throughout the text. Yet a large number of States have not legally recognised this diversity, leaving children from non-stereotypical family structures often without legal status. In light of the recurring debates around the issue of rights relating to the family at the UN Human Rights Council and the attempt by some States to restrict the definition of the family and limit the rights of individuals within the family, it is important to push States to recognise the existence of various forms of families and families deemed 'untraditional' must be

³⁴ Committee Against Torture, *Concluding Observations on the fifth periodic report of Germany*, CAT/C/DEU/CO/5, 12 December 2011, para. 20.

³⁵ The organisation "Stop Intersex Genital Mutilation monitors and reports on recommendations of the UN Treaty Bodies related to this issue. For more information, see: <http://stop.genitalmutilation.org/post/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilation>. See also CRC/C/CHE/CO/2-4, para. 42, CAT/C/DEU/CO/5, para. 20, A/HRC/22/53, para. 88, A/64/272, para. 49.

³⁶ See CRC/C/GC/15, para.8 and CRC/C/GAM/CO/2-3, paras. 29-30; and "Eliminating discrimination against children and parents based on sexual orientation and/or gender identity", UNICEF, position paper no.9, 2014, and Inter-American Court of Human Rights, *Atala Riffo and daughters v. Chile*, 24 February 2012.

protected against discrimination. Recognition of the diversity of families is important to help design targeted and tailored policies and measures that address the needs of all families and individuals. All relevant UN instruments on human rights consider the different cultural, political and social systems of family life and discussions around the role of the family should not paint it as an abstract holder of rights needing protection; rather they must explicitly position it as a social unit with responsibilities to individual family members, and underline States' obligation to ensure their fulfilment.

Access to justice

Without access to justice - broadly defined to include remedies as well as practicalities such as legal aid - rights are illusory. Children may face hurdles making it virtually impossible for them to obtain an appropriate remedy when a violation has occurred. Where legislations do not give due weight to a child's opinion, violations may even not be considered in breach of the national legislation. Lack of legal capacity, statutes of limitations, and, where this is necessary, lack of capacity to access one's medical records may render the window of time during which one can file a complaint for a violation that occurred during childhood either very narrow, or nonexistent.

In the context of consent to medical treatments, rights violations may occur when there are tensions between children's right to make decisions about their own bodies and what others perceive to be in their best interests. In this respect, access to justice acts as a safeguard against incorrect determinations as to the child's capacity by doctors or other adults.

Children should be empowered to access all appropriate courts, legal, judicial or other complaints mechanisms to enforce their rights. To ensure that children are able to engage with these systems, well developed and free legal aid and assistance should be in place to provide support as well as a free 24-hour helpline to give children a chance to talk to someone and discuss their options. Children should know of the existence of these complaints mechanisms and how to use them. Steps should immediately be taken to protect child victims from further harm and to link them with services they may need to reach a full physical and psychological recovery.