



**ASIA PACIFIC FORUM**  
ADVANCING HUMAN RIGHTS IN OUR REGION

# Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics



*Empowered lives.  
Resilient nations.*

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*Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*

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*Bottom:* Participants at the *Being LGBTI in Asia*, Asia-Pacific Consultation on LGBTI Bullying. Photo by UNESCO/UNDP/V. Dithajohn.

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The manual was written by Chris Sidoti, APF senior consultant and Jack Byrne, APF consultant.

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# Foreword

National human rights institutions (NHRIs) are official, independent, legal institutions established by the State and exercising the powers of the State to promote and protect human rights. In every country where they are established, they should be the principal mechanisms for human rights promotion and protection. They are concerned for the human rights of everyone within the jurisdiction of the State but they should have a particular concern for those who experience human rights violations or are most at risk of human rights violations.

Because of this particular concern for those most at risk, NHRIs need to ensure that their work includes lesbian, gay, bisexual, transgender and intersex people. The United Nations High Commissioner for Human Rights, the United Nations Development Programme (UNDP), the Asia Pacific Forum of National Human Rights Institutions (APF), individual NHRIs and non-government organisations have consistently found and reported that human rights violations based on sexual orientation, gender identity and sex characteristics occur in every country and that people are at risk of violations based on these attributes. NHRIs therefore have a responsibility to respond with effective action to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people. Many NHRIs in the Asia Pacific region have already accepted this responsibility and have implemented significant activities and programs. This manual contains many excellent examples of their work.

The APF has worked for almost ten years on human rights issues relating to sexual orientation and gender identity and more recently on human rights issues relating to sex characteristics. It has taken seriously the recommendation in the *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) that “[n]ational human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities”. It has developed this manual to assist NHRIs further to respond more effectively to this responsibility.

The manual has been produced as part of a longstanding partnership between the APF and UNDP. In recent years that partnership has included collaboration on a number of individual activities concerning human rights in relation to sexual orientation, gender identity and sex characteristics. Now the partnership is moving to a new level of collaboration in a two-year integrated program of activities on these issues. The program will build on this manual with:

- a regional conference to mark the tenth anniversary of the adoption of the Yogyakarta Principles
- training courses in the South Asia, South East Asia and Pacific sub-regions
- support for NHRIs to mainstream into their strategic plans and work programs human rights issues concerning lesbian, gay, bisexual, transgender and intersex people
- promotion of national level projects and activities by NHRIs
- assistance for closer consultation between NHRIs and lesbian, gay, bisexual, transgender and intersex communities.

We look forward to our organisations continuing to support NHRIs in this work. We are confident that NHRIs will find the manual a very useful resource that not only increases knowledge and understanding but also enables them to learn from the experiences of each other.



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**United National Development Programme**  
**Bangkok Regional Hub**

## List of abbreviations

<b>ACJ</b>	Asia Pacific Forum Advisory Council of Jurists
<b>APF</b>	Asia Pacific Forum of National Human Rights Institutions
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>CPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>CRC</b>	Convention on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>LGBT</b>	lesbian, gay, bisexual and transgender
<b>LGBTI</b>	lesbian, gay, bisexual, transgender and intersex
<b>NGO(s)</b>	non-governmental organisation(s)
<b>NHRI(s)</b>	national human rights institution(s)
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>SOGI</b>	sexual orientation and gender identity
<b>SOGIE</b>	sexual orientation and gender identity and expression
<b>SOGII</b>	sexual orientation, gender identity and intersex
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNESCO</b>	United National Educational, Scientific and Cultural Organisation
<b>UPR</b>	Universal Periodic Review

# Glossary

<b>Asexual</b>	A person who does not experience sexual attraction to others.
<b>Assigned sex</b>	The sex recorded when a child's birth is registered. Usually the sex assigned at birth is also used in social interactions.
<b>Biological sex</b>	One use of the term 'sex' when referring to a person's biological characteristics. These may be genetic, hormonal or anatomical and typically are used to categorise people into two distinct categories, as either male or female. The term 'sex characteristics' is a more precise framing of biological sex.
<b>Bisexual</b>	A person who is attracted to other persons regardless of their sex.
<b>Cisgender</b>	An opposite term to transgender. It describes people who are not transgender, because their assigned sex at birth matches their gender identity.
<b>Gay</b>	A person who identifies as homosexual.
<b>Gender expression</b>	A person's ways of communicating masculinity or femininity (or both or neither) externally. This is done through physical appearance – including clothing, hair styles and the use of cosmetics – mannerisms, ways of speaking and behavioural patterns when interacting with others.
<b>Gender identity</b>	A person's internal sense of being a man or a woman or a third or other alternative gender, or a combination of genders.
<b>Gender non-conforming</b>	A person whose gender identity is not limited to binary concepts of being either a man or a woman and/or whose gender expression is not limited to being either masculine or feminine.
<b>Heterosexual</b>	A person who is attracted solely to people of a different sex.
<b>Homophobia</b>	Dislike or prejudice against people because they are lesbian, gay or bisexual or are assumed to be not heterosexual.
<b>Homosexual</b>	A person who is attracted solely to people of the same sex.
<b>Intersectionality</b>	The exacerbated experience of human rights violations when based on more than one ground; for example, violations perpetrated against lesbian, gay, bisexual, transgender and intersex people can be exacerbated by other factors, such as gender, race, ethnicity, class, economic status and religion.
<b>Intersex</b>	An umbrella term used to describe people born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.
<b>Legal sex</b>	The sex recorded when a child's birth is registered. Usually the sex assigned at birth is also used in social interactions.
<b>Lesbian</b>	A woman who is attracted solely to other women.

<b>Pansexual</b>	A person who is attracted to other persons regardless of their sex; an alternative term to bisexual.
<b>Paris Principles</b>	The <i>Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights</i> , in UN Commission on Human Rights resolution 1992/54 and General Assembly resolution 48/134.
<b>Sex characteristics</b>	A person's physical characteristics relating to sex, including genitalia, chromosomes or hormones and also secondary sex characteristics that emerge at puberty.
<b>Sexual orientation</b>	Each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, another person.
<b>Trans</b>	An umbrella term to describe people whose gender identity does not match the sex they were assigned at birth.
<b>Transgender</b>	An umbrella term to describe people whose gender identity does not match the sex they were assigned at birth.
<b>Transitioning</b>	The process that a transgender person undergoes to live in their self-defined gender identity. It may involve social, legal and/or medical steps.
<b>Transphobia</b>	Dislike of or prejudice against someone because they are, or are assumed to be, transgender.
<b>Yogyakarta Principles</b>	The <i>Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity</i>

# Introduction for users

## THREE FOUNDATIONS

This manual is based on three facts:

1. National human rights institutions (NHRIs) work to promote and protect the human rights of everyone, but especially the human rights of those who experience violations or are most at risk of violations.
2. Persons who are lesbian, gay, bisexual, transgender or intersex (LGBTI) experience human rights violations or are at risk of violations because of their sexual orientation or gender identity or expression (SOGIE) or sex characteristics.
3. NHRIs should be particularly concerned to promote and protect the human rights of lesbian, gay, bisexual, transgender or intersex people.

This manual focuses on the second and third points: the human rights experiences of lesbian, gay, bisexual, transgender or intersex people and the work of NHRIs to promote and protect their human rights.<sup>1</sup> It will not deal in detail with the role of NHRIs. The Asia Pacific Forum of National Human Rights Institutions (APF) has already produced a manual that discusses the nature, roles, functions, powers and activities of NHRIs.<sup>2</sup>

This manual is a response to the recommendation to NHRIs in the *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) that:

... [n]ational human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.<sup>3</sup>

It responds as well to the recommendation of the High Commissioner for Human Rights in 2015 that:

... national human rights institutions address violence and discrimination against LGBT and intersex persons in the context of their respective mandates to promote and monitor effective implementation of international human rights standards at the national level.<sup>4</sup>

It is also the implementation of a commitment made by the APF under the 2015 APF-UNDP Programme of Action and Support to:

Engage with regional and sub-regional SOGI CSOs to seek their contributions to (i) an APF manual on the role of NHRIs in promoting and protecting the rights of LGBTI and (ii) further develop a pilot blended learning program (comprising of online and face-to-face adult learning) for its members on the role of NHRIs in promoting and protecting the rights of people of diverse SOGI. This will be undertaken in the next APF strategic cycle of 2015–2020.<sup>5</sup>

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1 Terms used in this manual are defined in the glossary and discussed in further detail in Chapter 1.

2 APF, *Manual on National Human Rights Institutions*, 2015; at [www.asiapacificforum.net/resources/manual-on-nhris/](http://www.asiapacificforum.net/resources/manual-on-nhris/).

3 Yogyakarta Principles, Additional Recommendation L.

4 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 80; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

5 APF and UNDP, *Programme of Action and Support: The role of national human rights institutions in promoting and protecting human rights in relation to sexual orientations and gender identity including health rights in the Asia and the Pacific 2015*, Action 33; at [www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/](http://www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/).

## NATIONAL HUMAN RIGHTS INSTITUTIONS

NHRIs are official, independent legal institutions established by the State and exercising the powers of the State to promote and protect human rights. They are established by national constitutions or acts of legislatures, guaranteeing their independence from political direction or interference, both governmental and non-governmental. They have broad mandates for the promotion and protection of human rights. They comply with the international minimum standards for NHRIs, the *Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (the Paris Principles).<sup>6</sup>

NHRIs are new kinds of institutions, occupying space within the State structure among the three primary institutions of government, parliament and judiciary. They lie between the State and civil society; they are State institutions but independent of government. Because they are a new type of State institution, their natures, roles and responsibilities are still being explored and developed.

NHRIs have responsibility for the promotion and protection of all human rights for all people. Their mandates are based on international human rights law that recognises and proclaims the universality of all human rights. On matters relating to international and domestic human rights law, they have broad functions to undertake:

- advice
- education and awareness raising
- research
- advocacy
- complaint investigation and resolution
- monitoring.

## NHRIs AND PERSONS OF DIVERSE SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS

NHRIs work for the human rights of all people. Often an NHRI will identify specific population groups within its country that are especially vulnerable to actual human rights violations or the risk of human rights violations. Many NHRIs identify lesbian, gay, bisexual, transgender and intersex people as being among those groups most at risk. Certainly international reports by United Nations (UN) agencies and mechanisms consistently reveal widespread patterns of human rights violations affecting lesbian, gay, bisexual, transgender and intersex people.<sup>7</sup> Reports of civil society organisations point consistently to the same conclusions.<sup>8</sup>

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6 Commission on Human Rights resolution 1992/54 and General Assembly resolution 48/134.

7 See, for example, High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, November 2011, A/HRC/19/41; at <http://daccess-ods.un.org/TMP/9525419.47364807.html>; OHCHR, *Born free and equal*, 2012; at [www.asiapacificforum.net/resources/born-free-and-equal/](http://www.asiapacificforum.net/resources/born-free-and-equal/); High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, May 2015, A/HRC/29/23; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

8 See, for example, International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*; at [www.icj.org/sogi-casebook-introduction](http://www.icj.org/sogi-casebook-introduction); Human Rights Watch, *Together, Apart: Organizing around Sexual Orientation and Gender Identity Worldwide*, June 2009; at [www.hrw.org/report/2009/06/11/together-apart/organizing-around-sexual-orientation-and-gender-identity-worldwide](http://www.hrw.org/report/2009/06/11/together-apart/organizing-around-sexual-orientation-and-gender-identity-worldwide); International Gay and Lesbian Human Rights Commission (now Outright Action International) *Violence: Through the lens of lesbians, bisexual women and trans people in Asia*, 2014; at [www.outrightinternational.org/content/violence-through-lens-lbt-people-asia](http://www.outrightinternational.org/content/violence-through-lens-lbt-people-asia).

## THE ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS

The APF is a network of NHRIs in the Asia and Pacific region. It has 22 members – 15 full members and seven associate members.<sup>9</sup> It provides advisory, networking and capacity-building services to its members to support them in their efforts to comply with international standards and to promote and protect human rights.

The **2015–2020 Strategic Plan** identifies six functions:

- 1. Providing advice and expertise:** the APF provides expert advice to our members, other NHRIs, governments and civil society in the region
- 2. Building stronger national human rights institutions:** the APF strengthens the capacity of our members through training, capacity assessments and high level dialogues
- 3. Collaborating and sharing knowledge:** the APF exchanges information and experiences, builds cooperation and develops professional human rights networks to encourage peer-to-peer learning
- 4. Promoting gender equality:** the APF promotes gender equality and integrates gender considerations across all our work
- 5. Contributing at the national, regional and international level:** the APF engages nationally, regionally and internationally to promote our members' participation and views and to share their expertise with others
- 6. Strengthening organisational leadership and governance:** the APF is diverse, effectively governed and sustainably resourced.<sup>10</sup>



As part of its work the APF has produced a series of manuals to assist NHRIs and others to understand the particular roles of NHRIs on key human rights issues and functions and to promote learning among its members from their varied experiences. To date, the APF's manuals have dealt with:

- *Preventing Torture: An Operational Guide for National Human Rights Institutions* (2010; also available in Arabic, Spanish and French), published jointly with the Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights (OHCHR)
- *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions* (2012)
- *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation* (2012; also available in Arabic and Indonesian), published jointly with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law
- *Promoting and Protecting the Rights of Migrant Workers: A Manual for National Human Rights Institutions* (2012; also available in Arabic), published with input from the Diplomacy Training Program
- *Human Rights Education: A Manual for National Human Rights Institutions* (2013)

<sup>9</sup> As at 31 December 2015.

<sup>10</sup> APF, *Strategic Plan 2015-2020*; at [www.asiapacificforum.net/resources/apf-strategic-plan-2015-2020/](http://www.asiapacificforum.net/resources/apf-strategic-plan-2015-2020/).

- *Undertaking Effective Investigations: A Guide for National Human Rights Institutions* (2013; also available in Arabic)
- *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (2013), published jointly with OHCHR
- *Promoting and Protecting the Rights of Women and Girls: A Manual for National Human Rights Institutions* (2014; also available in Arabic and in Tetum)
- *Media Handbook for National Human Rights Institutions* (2014; also available in Tetum)
- *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights* (2015), published jointly with the Center for Economic and Social Rights
- *A Manual on National Human Rights Institutions* (2015; also available in Arabic).

All these manuals are available on the APF website.<sup>11</sup> This manual is part of that series.

## UN DEVELOPMENT PROGRAMME AND BEING LGBTI IN ASIA

In producing this manual the APF has been assisted by the United Nations Development Programme (UNDP), in particular through Phase 2 of its project *Being LGBTI in Asia*.

*Being LGBT in Asia* Phase 1 was undertaken as a partnership between Asian lesbian, gay, bisexual and transgender organisations and community leaders in the period 2012–2015.<sup>12</sup> The purpose of the partnership was to conduct a participatory review and analysis of the legal and social environment for lesbian, gay, bisexual and transgender persons in Asia.

National reports were published in eight countries that included recommendations based on contributions to the dialogues and additional research and analysis.<sup>13</sup> An Asia-wide literature review was also conducted and further data, resources and experiences were drawn from civil society organisations, academic institutions and private sector partners.

In February 2015, a Regional Dialogue on LGBTI Human Rights and Health in Asia-Pacific was convened by UNDP, with support from the Embassy of Sweden in Bangkok, USAID and other partners. The Regional Dialogue gathered over 200 participants from the Asia Pacific region, including community representatives, government experts, representatives of NHRIs and development partners. Inclusion of intersex people in the Regional Dialogue enabled discussion of specific issues relating to sex characteristics. A regional meeting of NHRIs was convened by APF and UNDP to coincide with the Regional Dialogue.

Through these various activities, *Being LGBT in Asia* Phase 1 established an evidence base on issues of sexual orientation, gender identity and sex characteristics in the Asia Pacific region and produced the following reports:

- *Being LGBT in Asia* country reports for Cambodia, China, Indonesia, Mongolia, Nepal, the Philippines, Thailand and Viet Nam
- *Report of the Regional Dialogue on LGBTI Human Rights and Health in Asia-Pacific*

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11 At [www.asiapacificforum.net/support/professional-resources/](http://www.asiapacificforum.net/support/professional-resources/).

12 Supported by UNDP and USAID.

13 Cambodia, China, Indonesia, Mongolia, Nepal, the Philippines, Thailand, Viet Nam. *Being LGBT in Asia* country reports are available at [www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html](http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html).

- *Report of the Workshop on the Role of NHRIs in Promoting and Protecting the Rights, including Health, of LGBTI People in Asia and the Pacific*
- *Meeting Report: Asia-Pacific Consultation on School Bullying Based on Sexual Orientation and Gender Identity/Expression, 15-17 June 2015 Bangkok, Thailand.*<sup>14</sup>

Phase 2, now called *Being LGBTI in Asia*, commenced in 2015 and is aimed at addressing inequality, violence and discrimination on the basis of sexual orientation, gender identity or intersex status. The regional programme is supported by UNDP, the Swedish Embassy in Bangkok and USAID, and also promotes universal access to health and social services. It is a collaboration between governments, civil society, regional institutions and other stakeholders.



Photo by UNDP/W. Field.

<sup>14</sup> All these reports are available at [www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html](http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html).

## THIS MANUAL

This manual deals with experience, law and action.

**Part I discusses the experience of being lesbian, gay, bisexual, transgender and intersex.** It begins by building understanding of diverse sexual orientation, gender identity and sex characteristics. It then looks at the specific experiences of lesbian, gay, bisexual, transgender and intersex people in the Asia Pacific region. Their experiences demonstrate that, throughout the region, lesbian, gay, bisexual, transgender and intersex people experience human rights violations. They also point to changes that have occurred in recent decades and the progress still to be made.

**Part II discusses the law.** It describes how international human rights law applies in relation to sexual orientation, gender identity and sex characteristics. It shows how the inclusion of lesbian, gay, bisexual, transgender and intersex people within the coverage of international human rights law has been a gradual process of recognition, acknowledgement and application. Part II then presents the Yogyakarta Principles, the most comprehensive statement on this subject in the form of legal principles.

**Part III discusses the role of the NHRIs,** both individually and jointly. It describes what the APF has done since the adoption of the Yogyakarta Principles and the current APF program of action. It also presents possible areas for action that APF members can take in exercising their own responsibilities and through their participation in the APF regional program.

The manual provides many **case studies** of the work of NHRIs on human rights issues affecting lesbian, gay, bisexual, transgender and intersex people. Some are short examples of activities undertaken. Others are longer descriptions of comprehensive programs. The case studies provide information on past and present activities of individual NHRIs and offer inspiration to all NHRIs for future projects. They assist NHRIs to learn from each other.

The final chapter of the manual offers **possible actions** for NHRIs – 50 of them. These are actions NHRIs can take, under each of their functions, to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people.

The manual was prepared with the advice and assistance of a reference group drawn from APF members and lesbian, gay, bisexual, transgender and intersex activists and scholars. The members of the reference group are listed in Appendix 7.



# Part I: Experiences of being lesbian, gay, bisexual, transgender and intersex in the Asia Pacific



**Chapter 1: Understanding sexual orientation, gender identity and sex characteristics**

**Chapter 2: Being lesbian, gay and bisexual in the Asia Pacific**

**Chapter 3: Being transgender in Asia and the Pacific**

**Chapter 4: Being intersex in Asia and the Pacific**

# Chapter 1:

## Understanding sexual orientation, gender identity and sex characteristics

### KEY QUESTIONS

- What do sexual orientation, gender identity and sex characteristics mean?
- Why are these terms important for the work of NHRIs?
- How well do these terms convey regional identities of lesbian, gay, bisexual, transgender and intersex people?
- Are sexual orientation, gender identity and sex characteristics always the most appropriate umbrella terms to use?
- What has been the human rights impact of viewing sexual orientation, gender identity and sex characteristics through a medical lens?
- Is it necessary for people to disclose their sexual orientation, gender identity and sex characteristics?



### 1.1. INTRODUCTION

This chapter provides background information about three distinct but related concepts: sexual orientation, gender identity and sex characteristics. Each describes important and fundamental parts of a person's life.

Sexual orientation and gender identity are both integral parts of each person's personality or identity. Human rights experts have described them as some of the most basic aspects of self-determination, dignity and freedom.<sup>15</sup>

Whether someone is intersex is equally intrinsic to who a person is but for different reasons. As the definition later in this chapter describes, sex characteristics refer to physical, bodily diversity. Intersex traits are common and encompass a wide spectrum of physical sex characteristics. UN treaty monitoring bodies have spoken out many times against violations of intersex people's right to physical and bodily integrity, self-determination and autonomy.<sup>16</sup> Most of the discussion to date about human rights issues for intersex people uses the term 'intersex people' or 'intersex persons', rather than a prohibited ground of discrimination. In very recent times, a consensus has started to emerge on using the term 'sex characteristics' as the prohibited ground of unlawful discrimination. This manual uses both approaches as appropriate to the context.

15 Yogyakarta Principles, Principle 3.

16 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 26 February 2015, CRC/C/CHE/CO/2-4, para. 43b; Committee on Economic, Social and Cultural Rights, *Concluding Observations: Germany*, 12 July 2011, E/C.12/DEU/CO/5, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations: Germany*, 13 May 2015, CRPD/C/DEU/CO/1, paras. 37-38. See Chapter 4 for more details.

In every region of the world, there are examples of a wide diversity of sexual orientations, gender identities and sex characteristics. In this region, as in others, this is reflected in traditional terms and descriptions of people who today might be known as sexual or gender minorities or as intersex.<sup>17</sup> Some religious and faith traditions have encompassed such diversity; in other contexts and traditions, lesbian, gay, bisexual, transgender and intersex people have been ostracised or punished. There is also a history of medical diagnoses framing sexual and gender diversity and intersex variations as illnesses that could or should be cured or fixed. This approach is no longer tenable according either to medical ethics or to human rights standards. Human rights are universal. They are the rights of all people, whatever their sexual orientation, gender identity or sex characteristics.

To varying degrees, many lesbian, gay, bisexual, transgender and intersex people share a common experience of being outside dominant sex and gender norms and rigid stereotypes about what it means to be ‘a real woman’ or ‘a real man’. In many societies, a person’s physical sex characteristics are assumed to dictate that individual’s gender identity, gender expression and sexual orientation. Specifically, there is an assumption people are born either male or female and are then attracted to someone of ‘the opposite’ sex. Someone born with what is considered to be a ‘male body’ is expected to grow up and identify as a man, have a masculine gender expression and be solely attracted to women. Someone born with a ‘female body’ is expected to identify as a woman, be feminine and only be attracted to men. This fails to reflect the lived realities of lesbian, gay, bisexual, transgender and intersex people or to uphold their human rights to dignity, equality and freedom.

These norms also create rigid stereotypes about how women and men should behave. They perpetuate gender inequalities. When these distinctions define heterosexuality as superior (heteronormativity), they contribute to the marginalisation of lesbian, gay and bisexual people. Similarly, transgender people are vulnerable to stigmatisation when social norms dictate that someone’s gender identity should match their sex assigned at birth (cisnormativity). Stereotypes, including medical norms, about what constitutes a female or a male body are also used to justify medically unnecessary surgeries and other interventions on intersex people.<sup>18</sup>

## 1.2. CONCEPTS AND TERMINOLOGY

### 1.2.1. The importance of terminology

**I want to acknowledge that terminology can have a profound impact on a person’s identity, self-worth and inherent dignity. The use of inclusive and acceptable terminology empowers individuals and enables visibility of important issues. The [Australian Human Rights] Commission supports the right of people to identify their sexual orientation, sex and gender as they choose. The Commission also recognises that terminology is strongly contested.**

*Susan Ryan, Age Discrimination Commissioner, Australian Human Rights Commission*<sup>19</sup>

Terminology that describes such intrinsic parts of a person’s identity or characteristics carries a heavy weight and significance. This is particularly so for groups that have been stigmatised and whose existence has been denied. In those circumstances, terms validate who someone is and may help them to feel connected to others who share that identity or those characteristics.

17 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016.

18 Commissioner for Human Rights of the Council of Europe, *Issue Paper: Human rights and intersex people*, 2015, p. 7.

19 Presentation to the Homosexual Histories Conference 2014 – Pride History Group, November 2014; at [www.humanrights.gov.au/news/speeches/homosexual-histories-conference-2014-pride-history-group-0](http://www.humanrights.gov.au/news/speeches/homosexual-histories-conference-2014-pride-history-group-0).

It can often feel daunting for people wanting to know the appropriate, respectful terms to use, especially as terminology in this area continues to evolve. This chapter provides an overview of key concepts and terms used in this region. This includes emphasising that many traditional terms combine or conflate elements of sexual orientation and gender identity and, to some extent, intersex status. Having some shared knowledge of these terms enables NHRIs and community groups to communicate more clearly about the common and distinct human rights issues that are faced by lesbian, gay, bisexual, transgender and intersex people in their country and across the region. This chapter closes with some practical advice for NHRIs on using umbrella terms and ways to respect people's identities, characteristics and privacy.

Terminology evolves over time. What remains constant is the importance of treating each person with dignity, in a way that protects the person from discrimination and violence.

### 1.2.2. Relevance of terms to NHRIs in this region

The provisions of international law extend in full to all people and prohibit discrimination against anyone, including because of sexual orientation, gender identity or sex characteristics.<sup>20</sup>

There is growing understanding of how international human rights law applies to these issues. This understanding was enhanced by the *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) released in 2007.<sup>21</sup> Subsequently, UN treaty bodies and Special Rapporteurs have more strongly articulated how these human rights standards also apply to specific human rights violations against intersex people.

Increasingly, domestic laws are making it explicit that sexual orientation, gender identity and expression, and intersex status are prohibited grounds of unlawful discrimination. In this region, Fiji's 2013 constitution includes anti-discrimination protections for people based on their sexual orientation, gender identity or expression.<sup>22</sup> In the same year, Australia became the first country in the world to specify 'intersex status' as a separate, prohibited ground of discrimination.<sup>23</sup> Malta introduced more comprehensive equality protections for intersex people in 2015, under the ground of 'sex characteristics'.<sup>24</sup>

Across the Asia Pacific region, NGOs working on human rights issues in relation to sexual orientation, gender identity and expression, and sex characteristics use a range of terms to describe their work, including in their submissions to national, regional and international human rights bodies. For example, many lesbian, gay, bisexual and transgender groups in ASEAN member states have come together to form the ASEAN Sexual Orientation, Gender Identity and Expression (SOGIE) Caucus.<sup>25</sup> NGOs in New Zealand created a Sexual Orientation, Gender Identity and Intersex (SOGII) Coalition to develop a joint submission to New Zealand's second Universal Periodic Review.<sup>26</sup>

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20 See Chapter 5.

21 See Chapter 6.

22 Section 26(3)(a) of the 2013 Constitution of the Republic of Fiji. Sexual orientation had been protected under Fiji's previous 1997 Constitution. Fiji was the second country to introduce such constitutional protection, after South Africa.

23 Section 5C of the *Sex Discrimination Act 1984*. Sexual orientation and gender identity were also added as specific prohibited grounds at the same time. The New Zealand Human Rights Commission accepts complaints of unlawful discrimination against either intersex or transgender people under the ground of sex. It has recommended that section 21 of the *Human Rights Act 1993* state explicitly that gender identity is covered.

24 *Gender Identity, Gender Expression and Sex Characteristics Act 2015*.

25 See <https://aseansogie.wordpress.com>.

26 Aotearoa/NZ SOGII Coalition's submission to New Zealand's second Universal Periodic Review June 2013; at [www.hrc.co.nz/your-rights/human-rights/our-work/universal-periodic-review/civil-society-and-ngo-submissions/](http://www.hrc.co.nz/your-rights/human-rights/our-work/universal-periodic-review/civil-society-and-ngo-submissions/).

### 1.3. DEFINITIONS

Sexual orientation, gender identity and gender expression are each a spectrum. They are not limited to two, binary options, such as heterosexual or homosexual, male or female, or masculine or feminine. Similarly, the umbrella term ‘intersex’ encompasses a broad range of variations in sex characteristics.

Each of these concepts is distinct from the other. For example, someone’s intersex trait does not disclose anything about the person’s sexual orientation, sex or gender identity. Similarly, transgender people have the same range of sexual orientations as the population as a whole; they are heterosexual, homosexual and bisexual. Most lesbians, gay men and bisexual people are neither transgender nor intersex – and some are either or both.

Every person has the right to choose what terms best describe them. The examples provided here form a small proportion of the very large number of terms used in the Asia Pacific. They include terms specific to particular countries, cultures and/or languages in this region.<sup>27</sup>

**Sexual orientation refers to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, another person.**



Sexual orientation itself has three separate components: who someone is attracted to (sexual attraction), who the person is sexual with (sexual behaviour) and how the person identifies (sexual identity).<sup>28</sup> Each of these elements can be described as occurring on a spectrum, from heterosexual (opposite sex) at one end to homosexual (same sex) at the other.

If someone is attracted solely to people of a different sex they are often described as ‘heterosexual’. A person who is attracted solely to someone of the same sex might be called ‘homosexual’ or ‘gay’ or, if female, ‘lesbian’. Someone who is attracted to another person regardless of their sex might use the term ‘bisexual’ or ‘pansexual’.<sup>29</sup> ‘Asexual’ typically refers to a person who does not experience sexual attraction to others.

Collectively, the abbreviation ‘LGB’ is often used to describe sexual orientations other than heterosexuality. In some parts of the region, the term ‘queer’ has been reclaimed as an umbrella term for lesbian, gay and bisexual people, particularly young people.<sup>30</sup>

The assumption that all people are heterosexual – and the design of laws, policies and practices based on that assumption – is called ‘heteronormativity’. Dislike or prejudice against people because they are lesbian, gay or bisexual, or are assumed to be not heterosexual, is called ‘homophobia’. Homophobic discrimination or violence breaches lesbian, gay and bisexual people’s right to equality and security.

27 The lists of terms identified through the *Being LGBT in Asia* consultations in Cambodia, China, Indonesia, Mongolia, Nepal, the Philippines, Thailand and Viet Nam in 2013 and 2014 can be found in each of the respective country reports; [www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html](http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html).

28 F. Pega, A. Gray, J.F. Veale, D. Binson and R.L. Sell, ‘Toward Global Comparability of Sexual Orientation Data in Official Statistics: A Conceptual Framework of Sexual Orientation for Health Data Collection in New Zealand’s Official Statistics System’, *Journal of Environmental and Public Health*, 2013:473451, doi:10.1155/2013/473451.

29 The term ‘bisexual’ commonly refers to someone who may be attracted to either men or women. An alternative word, ‘pansexual’, recognises that a person may also be attracted to someone who identifies as a third or non-binary gender.

30 The ‘Q’ in the longer abbreviation ‘LGBTQI’ sometimes refers to ‘queer’, though more commonly it denotes ‘questioning’. This acknowledges that people exploring their identity, including young people, may not identify with specific labels about their sexual orientation or gender identity.

**Gender identity** is a person's internal sense of being a man or a woman or a third or other alternative gender, or a combination of genders.

**Transgender and trans** are umbrella terms to describe people whose gender identity does not match the sex they were assigned at birth.



This manual uses the umbrella term 'transgender' to encompass a wide range of gender diversity, including people who identify as transsexual, transgender, third gender, gender non-conforming, Female to Male (FtM) or trans men, Male to Female (MtF) or trans women, or using one of the many culturally specific terms across the Asia Pacific region that describe gender diversity. In addition, there are many transgender women in the region who simply identify as women and transgender men who identify as men. Both Asia and the Pacific have long traditions of 'non-binary' or 'third gender' identities. Non-binary English language terms such as 'gender non-conforming' or 'genderqueer' are less common in the region, except for Australia and New Zealand. These terms are used by people whose identity is not limited to being either a man or a woman and/or whose gender expression is not limited to either masculine or feminine.

**Cisgender** is an opposite term to transgender. It describes people who are not transgender, because their assigned sex at birth matches their gender identity.

**Transitioning** is the process that a transgender person undergoes to live in their self-defined gender identity. It may involve social, legal and/or medical steps.

- Social transition steps may include changes to clothing, hairstyle, mannerisms and/or the name or pronoun someone uses in everyday interactions.
- Legal transition steps involve formally changing the person's name, title, sex or gender on official identification documents.
- Medical transition steps that affirm a transgender person's gender identity include, for example, hormone treatment and a range of surgeries.

The great majority of transgender people in this region are unable to gain legal recognition or access to most gender affirming health services.<sup>31</sup>

Dislike of or prejudice against someone because they are, or are assumed to be, transgender is called 'transphobia'. It is often an underlying cause of discrimination and violence against transgender people.

**Gender expression** is a person's ways of communicating masculinity or femininity (or both or neither) externally. This is done through physical appearance – including clothing, hair styles and the use of cosmetics – and mannerisms, ways of speaking and behavioural patterns when interacting with others.



31 See Chapter 3.

When a man has a feminine gender expression he is often assumed to be gay and the word ‘effeminate’ is frequently used as a negative term. Similarly, a woman with a masculine gender expression is often assumed to be lesbian. However sexual orientation and gender expression are separate and distinct. For example, there are also many masculine gay men and feminine lesbians.

In a comparable way, someone’s outward gender expression does not indicate whether the person is transgender or not. Many transgender women are very feminine but others may prefer more gender-neutral or masculine clothes or hairstyles. Similarly, not all transgender men want to be hyper-masculine.

**Biological sex** is one of many uses of the term ‘sex’, employed when referring to a person’s biological characteristics. These may be genetic, hormonal or anatomical and typically are used to categorise people into two distinct categories as either male or female. The term ‘sex characteristics’ is an alternative, more precise way of framing biological sex.

**Sex characteristics** refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics, such as reproductive organs and genitalia and/or in chromosomal structures and hormones, and secondary characteristics, such as muscle mass, hair distribution, breasts and/or structure.<sup>32</sup>



The terms male and female and the phrase ‘opposite sex’ imply that male and female are the only two (binary) options. Yet all biological sex characteristics occur naturally in different combinations and to various degrees.

**Intersex** is an umbrella term used to describe people born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.



‘Intersex’ is an umbrella term that covers a broad range of congenital physical variations. People with intersex variations are born with bodies, chromosomes or hormones that do not match a stereotypical ideal of what it means to be male or female.

Preferred terms that NHRIs may wish to use include ‘intersex people’ or ‘people born with intersex variations/traits’. When talking about the relevant ground of discrimination, the terms most commonly used are ‘intersex status’ or ‘sex characteristics’.<sup>33</sup>

32 *Gender Identity, Gender Expression and Sex Characteristics Act 2015* (Malta); see <http://justiceservices.gov.mt/DownloadDocument.aspx?app=ip&itemid=26805&l=1>.

33 Chapter 4 provides more details about recent use of the term ‘sex characteristics’.

This manual primarily uses the terms ‘intersex people’ and ‘sex characteristics’, in line with shifts in the terms used by UN bodies. However, terminology is evolving. Not all intersex people may like, know or understand the term ‘intersex’ but there is no other term that has widespread support or acceptance.<sup>34</sup>

There is no commonly used term to describe dislike of or prejudice against someone because the person is intersex. However, sexist, heteronormative and/or transphobic motives are driving forces behind much of the discrimination against intersex people and the human rights breaches they face. They are used as rationales for surgeries on intersex infants and children, based on the belief that atypical sex characteristics may lead to homosexuality or gender non-conformity.<sup>35</sup>

Individual intersex people have the right to choose whatever terms they wish to describe what it means to them to have an intersex variation. When NHRIs are discussing human rights issues for intersex people it is important to use accurate terms that do not describe intersex traits in a negative way.

An older term that may be more familiar to the general public is the biological term ‘hermaphrodite’. Its specific biological meaning refers to plants and creatures that possess fully functional, fertile, ‘female’ and ‘male’ sex organs. As this combination is not possible for humans, it is inaccurate and can be misleading to use the term ‘hermaphrodite’ to describe people. While some intersex people have reclaimed the word ‘hermaphrodite’, many find it stigmatising.<sup>36</sup>

The term ‘disorders of sex development’ is commonly used in medical settings but is rejected by the majority of intersex people. Intersex-led organisations have criticised the term as it implies that intersex traits are a ‘disorder’.<sup>37</sup>

The term ‘intersexual’ may create the mistaken impression that there is an automatic link between someone’s intersex status and traits and their sexual orientation. Similarly, the term ‘intersex identity’ may imply that people choose to identify as having an intersex variation. This underplays the very physical element of intersex variations.<sup>38</sup>

**Assigned or legal sex refers to the sex recorded when a child’s birth is registered. Typically this will be written on hospital records, on a birth certificate or on another form of identification. Usually the sex assigned at birth is also used in social interactions.**



One of the demands from the 2013 International Intersex Forum was that intersex children should be registered as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.<sup>39</sup>

34 Many misconceptions contribute to a lack of understanding of the term. For example, some people may associate the word with non-binary gender identities.

35 Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People: an Issue Paper*, 2015.

36 M. Carpenter and D. Hough, *Employers’ Guide to Intersex Inclusion*, 2014, Pride in Diversity and Organisation Intersex International Australia.

37 T. Jones, B. Hart, M. Carpenter, G. Ansara, W. Leonard, and J. Lucke, *Intersex: Stories and Statistics from Australia*, 2016. This recent research shows only three per cent of intersex people in Australia use the term ‘disorders of sex development’ to describe themselves, although 21 per cent use the term in order to access medical services.

38 Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People: an Issue Paper*, 2015.

39 Third International Intersex Forum, Malta, December 2013; at <https://oii.org.au/24241/public-statement-by-the-third-international-intersex-forum/>. This includes a link to a Chinese language version of the statement.

## 1.4. REGIONAL-SPECIFIC TERMS

There are many specific terms used in the Asia Pacific region to describe people based on their sexual orientation and/or gender identity. These terms may be used in one country only or in a number of countries. There are few known regionally-specific terms for intersex status.

Some lesbian, gay, bisexual and transgender communities are more visible than others. Visibility can mean either relatively more acceptance or heightened vulnerability to discrimination. Less visible groups may not face as much direct discrimination in public places. However, they are at equal risk of rejection or violence from family or community members who may attempt to suppress or erase any form of diversity in sexual orientation and gender identity or intersex variation.<sup>40</sup>

### 1.4.1. More visible identities

In all parts of the Asia Pacific region, the most visible culturally or regionally specific identities relating to sexual orientation and gender identity describe people assigned a male sex at birth who identify as a third gender or as transgender women. In South Asia, these include identities such as *hijra* in India and Bangladesh, *thirunangai* and *aravani* in India, *khwaja sira* in Pakistan and *meti* in Nepal. Each of these identities is frequently described as a 'third gender'.

In South East Asia, some common terms used by transgender women are *kathoey* in Thailand, *waria* in Indonesia and the reclaimed term *mak nyah* in Malaysia. In the Philippines, the term *bakla* is often used to describe people assigned a male sex at birth who identify as a third gender or are effeminate. Many transgender women prefer the hybrid term, *transpinay*, as it is a word created specifically by their community. In East Asia, a term used in Hong Kong is *kwaa-sing-bit*.

The words *whakawahine* and *Sistergirl* are used by indigenous transgender women in New Zealand and Australia respectively.

In the Pacific, terms used by transgender women do not exclusively describe a person's gender identity. Often the terms are used by some men who have sex with men too, particularly those whose gender expression incorporates some feminine elements. Terms include *fa'afafine* in Samoa and Tokelau, *fakaleiti* or *leiti* in Tonga, *fakafifine* in Niue, *akava'ine* in Cook Islands and *palopa* in Papua New Guinea. These words are not limited to a person's individual identity but also describe their gender role within their extended family. In Samoa, for example, *fa'afafine* are known for their hard work and dedication to the family in carrying out roles and responsibilities both for men and women.<sup>41</sup>

In Asia, local terms used by men who have sex with men usually focus on a person's gender expression, including visible personality traits, that are more feminine than the norm. In this way any divergence from the majority norms is described in gender identity or gender expression terms, rather than as a person's sexual orientation.<sup>42</sup> For example, terms such as *sak klay* (short hair) and *pros saat* (handsome man) in Cambodia describe men who are considered less masculine or to have female traits, such as gentleness.<sup>43</sup> Some terms in Asia also link feminine gender expression with a preference for being a receptive sexual partner. One example is the distinction in South Asia between feminine *kothis* and their sexual partners, *panthis*. Most *panthis*, and many *kothis*, are married to women.<sup>44</sup>

40 Questions of visibility and invisibility, and human rights violations in public and private spheres, are discussed in Chapters 2, 3 and 4.

41 Office of the Ombudsman of Samoa, *State of Human Rights Report*, 2015, p. 23.

42 D. Oetomo 'Masculinity in Indonesia: Genders, Sexualities and Identities in a Changing Society' in R. Parker et al. (eds) *Framing the Sexual Subject: The Politics of Gender, Sexuality, and Power*, 2000, pp. 46–59; D. Sanders, 'Myanmar: These Gay Days', 2015.

43 Cambodia Center for Human Rights, *Coming Out In The Kingdom: Lesbian, Gay, Bisexual and Transgender People in Cambodia*, 2010.

44 Naz Foundation International, *Briefing Paper 3: Developing community-based sexual health services for males who have sex with males in South Asia*, 1999.

In many countries there are few, if any, local words that describe someone's identity based on their sexual orientation. For example, in Cambodia there are no words in the Khmer language that specifically describe sexual preferences and behaviour, such as heterosexual, homosexual, lesbian, gay or bisexual. In Sri Lanka it is difficult to convey the concepts of sexual orientation and heteronormativity (or gender identity or gender expression) in the Sinhala and Tamil languages.<sup>45</sup>

In some parts of Asia, including Nepal and the Philippines, the terms 'third gender' and 'third sex' are used by the general public to refer to all lesbian, gay, bisexual and transgender people.<sup>46</sup> This is despite the fact that these terms predominantly describe transgender women and, to a lesser extent, men who have sex with men. This perpetuates the invisibility of some communities, particularly lesbians and bisexual women, transgender men and intersex people.



Photo by Carla LaGata.

45 International Gay and Lesbian Human Rights Commission (now OutRight Action International), *Violence: Through the Lens of Lesbians, Bisexual Women and Trans People in Asia*, 2014.

46 UNDP and Williams Institute, *Surveying Nepal's Sexual and Gender Minorities: An Inclusive Approach – Executive Summary*, 2014.

### 1.4.2. Less visible identities or populations

... in my country, Timor-Leste, we recognise the presence of gay and transgender only, not bisexual, lesbian and even intersex ... most Timorese people do not know about these issues. We have a programme to conduct training for police officers, community leaders, [defence] forces etc. During my presentation, the participants realised ... that in Timor-Leste, intersex [people] exist. They shared their stories and experiences about intersex [people].

*SOGII focal point, Office of the Provedor for Human Rights and Justice, Timor-Leste, 2015*

There is much less regional information available about the experiences of specific groups among the lesbian, gay, bisexual, transgender and intersex populations, especially:

- people assigned a female sex at birth who do not have a female gender identity; for example, transgender men
- women who are solely or sometimes attracted to women; for example, lesbians and bisexual women
- women who have a masculine gender expression; for example, 'butch' women, who may or may not be lesbian
- intersex people.

Unlike the abundance of gender identity terms for transgender women, traditional local terms that refer to transgender men are unusual. Those that do exist are more likely to be of recent origin, though they may attempt to frame transgender men's identities within an historical or cultural context. Examples include *thirunambi* in Malaysia and India, *kua xing nan* in Malaysia, *laki-laki trans* in Indonesia, *transpinoy* in the Philippines, *bandhu* in Bangladesh, *Brotherboy* in Australia and *tangata ira tane* in New Zealand. Even where these terms exist, transgender men may find it difficult to be acknowledged as male, as frequently others refer to them using more common terms that describe butch lesbians.

Many other regional terms encompass both women who are attracted to other women (a sexual orientation issue) and women who appear butch or relatively masculine (a gender expression issue). These terms may be self-chosen or imposed on someone who is perceived to not be conforming to social norms of femininity and/or heterosexuality.

The words *tomboy*, *tomboy* and *toms* are used frequently in South East Asian countries, including Indonesia, the Philippines and Thailand, and also in China where the term for a butch lesbian is *tomboy* or *T*.<sup>47</sup> Other terms used in the Philippines are *tibo*, *tiboli*, *tibam* and *pars*.

In some countries, local terms may be used predominantly within one ethnic community. For example, in Malaysia *pengkid* and *peng* are heard almost exclusively within the Malay community. These terms encompass anyone born female who steps outside gender and sexuality norms. They include "Malay girls or women who: dress in a masculine way and take on 'masculine roles'; use gender neutral or ambiguous names; bind their chests; are in romantic relationships with women; and/or are butch lesbians and transgender men".<sup>48</sup>

In the Pacific, the Samoan term *fa'afatama* describes both lesbians and transgender men, while a heterosexual woman or girl who has a masculine gender expression might be referred to as *fa'atama*. Recently 'trans masculine' has been used by some butch lesbians in Fiji.<sup>49</sup>

47 UNDP and USAID, *Being LGBT in Asia: China Country Report*, 2014.

48 International Gay and Lesbian Human Rights Commission (now OutRight Action International), 2014.

49 For example, see the work of Diverse Voices and Action for Equality, Fiji, at [www.divafiji.com/about](http://www.divafiji.com/about).

These terms typically assume that being a lesbian implies a masculine gender expression. Local words that describe feminine lesbians tend to focus on their behaviour or identity as the partner of a butch lesbian, as this is what marks them out from majority social norms. For example, the Chinese term for a feminine lesbian means ‘tomboy’s wife’.<sup>50</sup> Some South East Asia terms for feminine women who have sex with butch lesbians are *cewek* in Indonesia, *dees* in Thailand and *mars* in the Philippines.

### 1.4.3. Regional terms for people with intersex traits

Culturally-specific terms to describe intersex people are rare in the Asia Pacific region. This may be because intersex variations are more likely to be described in medical terms and are frequently cloaked in stigma and secrecy. In South Asia, terms used to describe third gender people who have undergone a traditional castration process are sometimes applied to intersex people too.

**Naming intersex itself has been difficult. The preferred term for intersex in Taiwan, 陰陽人, doesn’t work in Hong Kong or mainland China. No intersex people here like to be called 陰陽人 and this affects how we come together for peer support and advocacy work. Now we use 雙性人 to mean intersex in Hong Kong, Macau, China and Taiwan and so more intersex people and their families are coming to seek help and join together. The new UN fact sheet uses the same term, 雙性人.**

**Small Luk, intersex activist, Hong Kong<sup>51</sup>**

In Nepal the term for intersex is अन्तरलिंगी or *arntarlingi*.<sup>52</sup>

In New Zealand, the indigenous term *te ruarua taha wahine, taha tane* was developed by former Human Rights Commissioner Merimeri Penfold in 2007 as a positive description of intersex variations. It uses the imagery of intertwining male and female eels, as they move across each other in a narrow stream, as a way to convey the diverse combinations of male and female sex characteristics.<sup>53</sup>

### 1.4.4. Other groups

There is considerable diversity within all lesbian, gay, bisexual, transgender and intersex communities. Some people face additional human rights challenges or are less visible or insufficiently acknowledged in those communities; for example, those who are indigenous or live with disabilities or come from a refugee or migrant background. A 2011 Australian research report described the effects of both homophobia and racism on same-sex attracted people from Arabic-speaking backgrounds.<sup>54</sup>

Indigenous *tākatāpui* (Maori lesbian, gay, bisexual, transgender and intersex people) in New Zealand have published a resource on identity and well-being. It describes how *takatāpui* identity is based on and affirms traditional indigenous concepts.<sup>55</sup>

50 UNDP, *Being LGBT in Asia: China Country Report*, 2014.

51 See <http://intersexday.org/en/beyond-boundaries-intersex-hk-china/>.

52 Personal communication with Nepal intersex human rights activist Esan Regmi, 21 February 2016.

53 This term appeared in the 2008 report of the New Zealand Human Rights Commission’s Transgender Inquiry.

54 ACON and Arab Council of Australia, *We’re Family Too: a report into the effects of homophobia in Arabic-speaking communities in NSW*, 2011.

55 E. Kerekere, *Takatāpui: Part of the Whānau*, 2015 Auckland Tiwhanawhana Trust and Mental Health Foundation.

### GOOD PRACTICE: SEEK ADVICE AND BE INCLUSIVE

- Consult with local lesbian, gay, bisexual, transgender and intersex organisations to identify the positive local terms they use to describe themselves.
- Avoid using derogatory terms, even if they are still used by some lesbian, gay, bisexual, transgender and intersex people.
- Become aware of the lesbian, gay, bisexual, transgender and intersex groups that are less visible in your work and create safe places for them to share their stories. Include their issues and voices in your publications.



Photo by UNDP/W. Field.

## 1.5. UMBRELLA TERMS USED IN THIS MANUAL

Within countries and across the Asia Pacific region, there are no umbrella terms that are universally used to describe people of diverse sexual orientations or gender identities or people with intersex variations. That is to be expected, as the rich diversity of humanity cannot easily be conveyed in a few words. This manual uses the terms ‘communities’ and ‘populations’ rather than ‘community’ and ‘population’ to reflect the multiple lesbian, gay, bisexual, transgender and intersex communities being discussed.

For the purpose of this manual, using consistent terms helps people understand exactly which issues and communities are being discussed. This is important because, while there are some common issues experienced within all lesbian, gay, bisexual, transgender and intersex communities, there are some distinct differences too. Umbrella terms are designed to include anyone who shares a specific characteristic, whatever specific term they use to describe themselves. They do not replace local terms from a specific cultural tradition or language, including terms that have existed for a long time. Umbrella terms make systemic human rights issues more visible, while respecting people’s individual choice to define themselves.<sup>56</sup>

### GOOD PRACTICE: USING UMBRELLA TERMS

**Umbrella terms are shorter than listing all commonly used identity terms. They save time and, in written resources, space. They also reduce the risk of using outdated and possibly contentious terms. However, umbrella terms can still exclude people who do not see their identity reflected in the terms used.**

**When speaking at a public or community meeting, it can be easier to start by using the concepts of sexual orientation, gender identity and sex characteristics rather than specific identity terms. This may avoid any community debates or divisions around particular words. It also conveys an inclusive approach. One example could be welcoming everyone, acknowledging that participants represent the rich diversity of sex characteristics, sexual orientations, gender identities and gender expressions in the community.**

**Before introducing an umbrella term in a written resource, it is useful to:**

- **give examples of the breadth of identities and characteristics that it encompasses**
- **acknowledge that people use a diversity of terms and have the right to identify their sexual orientation, gender identity or expression, or intersex status as they choose, and then**
- **introduce the term or terms chosen for that specific resource.**

**Umbrella terms should be used accurately. Avoid using abbreviations, such as ‘SOGII’ or ‘LGBTI’, if the material you are presenting relates to only one of the concepts or groups of people. For example, a report focused solely on sexual orientation issues for men who have sex with men is not accurately described as a ‘SOGII’ or ‘LGBTI’ resource. Clarifying its narrower scope identifies what material it does provide, as well as information gaps that may signal a need for further research.**



56 Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, 2015.

This manual uses:

- lesbian, gay and bisexual to describe diverse sexual orientations
- transgender to describe diverse gender identities
- intersex to describe people born with diverse intersex traits and sex characteristics.

This manual follows the lead of recent human rights reports in making specific use of the terms ‘sex characteristics’ and ‘intersex people’. Maintaining a distinct focus on the marginalised voices of people with intersex traits is important. It signals that specific intersex concerns are not best understood within a framework focused on sexual orientation and gender identity. For example, some human rights concerns are shared with girls and women, such as in relation to female genital mutilation and cutting, or relate to prenatal screening, sterilisation or other issues that many people with disabilities experience too.<sup>57</sup>

## 1.6. DEFINING DIVERSE SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS AS ILLNESSES

Some of the prejudice against lesbian, gay, bisexual, transgender and intersex people arises because their sexual orientation, gender identity, gender expression or intersex status is considered a mental or physical illness. These types of beliefs are called pathologisation. They can fuel prejudice and discrimination.

Pathologising beliefs have been used to justify reparative or curative or conversion therapies that attempt to change a person’s sexual orientation or gender identity. These therapies have been condemned as unethical by numerous health bodies.<sup>58</sup> In 2011, the Psychological Association of the Philippines spoke out in support of ‘global initiatives to remove the stigma of mental illness’ associated with being transgender or identifying as lesbian, gay or bisexual.<sup>59</sup>

Pathologisation of intersex variations has provided the medical rationale for medically unnecessary genital surgeries and hormone treatment, undertaken on infants or children before they are able to give informed consent.<sup>60</sup> These practices raise significant human rights concerns.<sup>61</sup>

### 1.6.1. Being lesbian, gay or bisexual is not an illness

Homosexuality was officially included in the first classifications of mental disorders. These were the World Health Organization’s *International Classification of Diseases* 6th edition (ICD-6) in 1948 and the *Diagnostic and Statistical Manual of Mental Disorders* 1st edition (DSM-1) of the American Psychiatric Association in 1952.

Over the last half century, both classification systems have gradually removed diagnoses that defined homosexuality as a mental disorder. This reflects the lack of empirical evidence supporting the pathologisation and medicalisation of variations in sexual orientation. It is also consistent with human rights standards. ICD-10, published in 1992, explicitly states that ‘sexual orientation by itself is not to be considered a disorder’. An American Psychiatric Association position statement in 1998 opposed any psychiatric treatment based on the assumption that either homosexuality is a medical disorder or that patients should change their sexual orientation, including through ‘reparative’ or ‘conversion therapies’.<sup>62</sup>

57 Commissioner for Human Rights of the Council of Europe, 2015.

58 S.D. Cochran, J. Drescher, E. Kismödi, A. Giami, C. Garcia-Moreno, E. Atalla, A. Marais, E.M. Vieira and G.M. Reed, ‘Proposed declassification of disease categories related to sexual orientation in the International Statistical Classification of Diseases and Related Health Problems (ICD-11)’, *Bulletin of the WHO*, Vol. 92 No. 9, September 2014, pp. 621-691; E. Coleman, et al, 2011.

59 UNDP, *Being LGBT in Asia: the Philippines Country Report*, 2014.

60 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 30 July 2015, A/70/213, para. 84.

61 See Chapter 4.

62 E. Coleman, W. Bockting, M. Botzer, P. Cohen-Kettenis, G. DeCuypere, J. Feldman, and K. Zucker, *Standards of care for the health of transsexual, transgender, and gender nonconforming people*, 2011.

### 1.6.2. Being transgender is not an illness

Transgender people who medically transition have specific health needs that are related to their gender identity. However, this does not mean that gender diversity is a medical condition or that it requires medical treatment.

Traditional concepts of gender diversity existed long before the introduction of medical terms. Medical terms describing transgender people only emerged in the twentieth century after the development of hormone treatment and gender-affirming surgeries that have enabled transgender people to medically transition.

Specifically, some forms of gender diversity have been defined as a mental health condition in the World Health Organisation's ICD series and in the DSM series of the American Psychiatric Association. These classifications are used by public health systems around the world to code, and thus fund, health services that enable transgender people to access gender-affirming hormone treatment and surgeries. As part of its current revision of ICD-10, the World Health Organisation has proposed removing such diagnoses so they are no longer classed as mental health diagnoses. A remaining challenge is to ensure the continuation of diagnostic codes for the gender-affirming health services that are medically necessary for some transgender people.

The World Professional Association for Transgender Health publishes Standards of Care on the health of transsexual, transgender and gender non-conforming people. In May 2010, its Board of Directors issued a 'de-psychopathologisation' statement emphasising that gender diversity is common across many cultures. It recommended that gender diversity should not be defined by a mental health diagnosis, as part of broader steps needed to eliminate stigma against transgender and gender-variant people.<sup>63</sup> Participants from 19 countries, attending the Trans\* Pre-conference at the 2015 ILGA Asia Conference in Taiwan, unanimously passed a declaration supporting this approach and opposing World Health Organisation proposals to define gender diversity in children as a disease. This declaration was endorsed by the Asia Pacific Transgender Network and the ILGA Asia conference.<sup>64</sup>

In some parts of the region, the perception that gender diversity is an illness is the only mitigating factor reducing violence and discrimination against transgender people. In these circumstances, it is understandable if transgender people argue that they should not be criminalised for a mental health condition and that being transgender is not their choice. NHRIs can play an important role by emphasising that transgender people have the right to freedom from discrimination, whether or not they have a mental health diagnosis such as gender dysphoria.

### 1.6.3. Being intersex is not an illness

Being intersex is about body diversity. It is not inevitably about having a physical illness. Most intersex variations have no impacts on an intersex person's health, yet medical terms are used frequently to describe all intersex variations as 'disorders of sex development'. This contributes to the level of stigma attached to intersex traits and the pressure for medical interventions to 'correct' such disorders. There is emerging evidence that, when parents have access to information describing the lived experiences of intersex people, they are more likely to delay or refuse medical interventions.<sup>65</sup> Parents may not realise that they are consenting to experimental treatments and later parental regret can be high.<sup>66</sup>

63 See [www.wpath.org/uploaded\\_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf](http://www.wpath.org/uploaded_files/140/files/de-psychopathologisation%205-26-10%20on%20letterhead.pdf).

64 The ILGA Trans\* Secretariat and the Asia Pacific Transgender Network, *Statement on Gender Incongruence in Childhood*, Trans\* Pre-conference, 6th ILGA Asia Conference, Taipei, Taiwan, 27 October 2015.

65 G. Davis, *Contesting Intersex, the Dubious Diagnosis*, 2015.

66 L. Liao, D. Wood and S.M. Creighton, 'Parental Choice on Normalising Cosmetic Genital Surgery', *BMJ*, 28 September 2015. .



A recent report from the Commissioner for Human Rights of the Council of Europe recommended that:

... national and international medical classifications which pathologise variations in sex characteristics should be reviewed with a view to eliminating obstacles to the effective enjoyment, by intersex persons, of human rights, including the right to the highest attainable standard of health.<sup>67</sup>

In November 2015, the Inter-American Commission on Human Rights raised similar issues and recommended policies and programs to sensitise medical practitioners about intersex people and the human rights violations they face.<sup>68</sup>

## 1.7. DISCLOSURE ABOUT SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX STATUS

Every person has the right to privacy in choosing whether or when to disclose their sexual orientation, gender identity or intersex status.

### 1.7.1. Disclosing sexual orientation

A lesbian, gay, bisexual or other sexual minority person who does not disclose their sexual orientation is often described as being 'in the closet' or 'closeted'. Telling someone about being lesbian, gay or bisexual is called 'coming out'. Openness can counter myths that lesbian, gay and bisexual people do not exist and makes it possible for others to come out too. Each person has the right to decide how much or how little to disclose about their sexual orientation, gender identity and intersex status.

In this region and internationally, Pride festivals are one way that lesbian, gay, bisexual and transgender communities celebrate their diversity. However, there are still many parts of this region where it is not safe to do this, raising significant concerns about freedom of expression and freedom of assembly.<sup>69</sup> In parts of the region where coming out publically is not a safe option, 'disclosure' may be a more appropriate term for describing how someone makes decisions about when it is safe to tell another person about their sexual orientation.

67 Commissioner for Human Rights of the Council of Europe, 2015.

68 Inter-American Commission on Human Rights, *Violencia contra personas LGBTI*, 2015, p. 257; at [www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf](http://www.oas.org/es/cidh/informes/pdfs/ViolenciaPersonasLGBTI.pdf).

69 See Chapter 2.

### 1.7.2. 'Being stealth' about transgender status

Many transgender women identify as female and many transgender men identify as male. They may want to be able to live as women and men respectively, without disclosing their past. This is called 'being stealth'.<sup>70</sup> Sometimes it is assumed that 'being stealth' is the same as when a lesbian, gay or bisexual person is 'closeted' and that transgender people should be more open about their gender identity. However, the two concepts are very different. A transgender person who is stealth is living in their appropriate gender identity – and choosing not to disclose a previous identity because it does not reflect who they really are. Being stealth may be the only way that a transgender person's gender identity is respected.

### 1.7.3. Disclosure of intersex status

The term 'coming out' is problematic for many intersex people too. Their intersex status describes their body and is often not linked to their sense of identity. Typically, a person is told the facts about their intersex variation by a doctor or a parent. This is very different from the process of self-definition linked to discovering sexual orientation or gender identity. Disclosing intersex status to others can undermine, rather than affirm, intersex people's identities as women or as men or as cisgender.<sup>71</sup> This is particularly an issue when other people mistakenly assume that all intersex people are a third sex or are transgender.



Photo by Rebecca Swan.

70 When other people are not aware that a person is transgender, the transgender person is sometimes described as 'passing'. This means that they 'pass' as no different from another woman or another man. Many transgender people are not comfortable with the term 'passing' as it can imply that they are pretending to be women or men and that their gender identity is not genuine.

71 M. Carpenter and D. Hough, *Employers' Guide to Intersex Inclusion*, 2014, Pride in Diversity and Organisation Intersex International Australia.

### **GOOD PRACTICE: ENABLING VISIBILITY AND RESPECTING PRIVACY IN NHRI ACTIVITIES**

The terms described in this chapter describe fundamental and very personal aspects of someone's identity, status or characteristics as a lesbian, gay, bisexual, transgender or intersex person. Many people will not wish to disclose these personal details in a group situation and should never be forced to do so.

Some people may choose to disclose this information in a workshop or community consultation but not outside that venue. This means it is very important to remind participants that information shared in discussions is confidential. This includes taking care what name is used to greet someone in future interactions, following that person's lead. A transgender woman who uses a female name and pronoun at a community consultation may not have disclosed her gender identity to other friends, family or work colleagues. Breaching her privacy could endanger her safety or expose her to discrimination.

At the same time, community consultations are a valuable way to increase the visibility of marginalised groups. In this region, many strategies have been used to promote the visibility of lesbian, gay, bisexual, transgender and intersex groups, without disclosing people's identities. These include photographing some participants from behind or with placards or balloons in front of their faces.

During community consultations or workshops, it is often useful to start with an introductory round where each person says one or two things about who they are. This can demonstrate the wide diversity in the room, including if people share other aspects of their lives beyond their lesbian, gay, bisexual or transgender identity or intersex status. It also enables people to choose how much, if anything, they wish to disclose.

In parts of the region where the local language has different pronouns or terms for women and men, it can be very helpful to ask each person to share their preferred word. This demonstrates awareness that people's pronouns and gender identity are not always obvious and may change. It can reduce the chance that people will make incorrect assumptions about another participant's gender identity. This can particularly be an issue for gender non-conforming people, those who have recently started to transition or those who are less visible within a community. For example, in many parts of this region, the invisibility of transgender men is compounded when they are referred to incorrectly as lesbians or by using female terms or the pronoun 'she'.



### KEY POINTS: CHAPTER 1

- Sexual orientation and gender identity are fundamental elements of a person's identity, while sex characteristics are intrinsic parts of a person's physical make-up.
- These distinct concepts help to differentiate the impact of discrimination against lesbian, gay and bisexual people because of their sexual orientation, against transgender people because of their gender identity or against intersex people because of their sex characteristics.
- Increasingly, the terms 'sexual orientation', 'gender identity' and 'sex characteristics' are being used by human rights bodies and civil society and listed explicitly as prohibited grounds of discrimination. 'Gender expression' is a separate, but related, term that refers to people's outward expression of masculinity and/or femininity.
- Many regional identities combine elements of sexual orientation, gender identity, gender expression or, to a limited extent, sex characteristics. Using these concepts acknowledges both traditional and evolving identities in this region and the common and distinct human rights issues faced by lesbian, gay, bisexual, transgender and intersex people.
- By understanding these concepts and how they apply to lesbian, gay, bisexual, transgender and intersex people, NHRIs can choose the most appropriate individual and umbrella terms to use in specific pieces of work.
- Being lesbian, gay, bisexual, transgender or intersex is not a medical illness. Viewing people this way (pathologisation) has increased stigma, discrimination and violence against people, including in medical settings, because of their sexual orientation, gender identity or sex characteristics,
- Every person has the right to choose whether, when and how they disclose their sexual orientation, gender identity or intersex status. By enabling lesbian, gay, bisexual, transgender and intersex people to choose how much they disclose, NHRIs respect people's privacy and help to create an inclusive environment.



# Chapter 2:

## Being lesbian, gay and bisexual in the Asia Pacific

### KEY QUESTIONS

- Who are lesbian, gay and bisexual people in the Asia Pacific?
- How do people experience living and relating as lesbian, gay and bisexual?
- What are the issues and concerns for lesbian, gay and bisexual people?
- How does the law treat them?
- Are they able to live their lives in dignity, safety and equality?
- Are they able to enjoy all their human rights?



### 2.1. INTRODUCTION

Lesbian, gay and bisexual people live in the Asia Pacific region as they live in any other region. Some identify as 'lesbian' or 'gay' or 'bisexual' but many do not. Many simply live their lives, feeling attracted to others of the same sex or having one or more same sex relationships but not identifying with any particular sexual orientation or any particular sexual identity. Others may use a variety of different terms to describe their sexual orientation. These may include reclaimed terms that have previously been considered to be derogatory (such as 'queer') and/or culturally or linguistically specific terms. In the region, 'gay' is sometimes used to refer to both gay men and lesbians. This usage can make women invisible and ignore their distinctive experiences. In some countries there is no word for 'gay' and in other cultures being 'gay' or 'lesbian' is seen as a Western phenomenon.<sup>72</sup> In this chapter, we use 'lesbian, gay and bisexual' in reference not only to those who identify as gay or lesbian or bisexual but also to those who are attracted to or have a sexual relationship with someone of the same sex. That person may also be transgender or intersex.<sup>73</sup>

There is no reliable data to indicate what proportion of the world's population or the Asia Pacific's population is lesbian, gay or bisexual. Many studies have been undertaken but the results vary widely due to different definitions, measures and research methodologies.<sup>74</sup> There is no evidence that lesbian, gay and bisexual people constitute a greater or lesser proportion of the total population in the Asia Pacific region than in any other region and there is no reason to believe that they do.

72 Pacific Sexual Diversity Network, *Diverse Voices for Action and Equality* and ARC International "Our Voices, our Communities, our Rights: Advancing Human Rights related to Sexual Orientation, Gender Identity & Expression in the Pacific", Report of the Pacific LGBTQI Human Rights Conference, Nuku'alofa, Tonga, 11-14 May 2015, p. 16; at <http://arc-international.net/wp-content/uploads/2015/09/SOGIHR-Report-final.pdf>.

73 Some lesbian, gay and bisexual people, including those who are transgender or intersex, prefer to use broader sexual orientation terms that recognise there are more than two 'opposite' sexes or gender identities. Examples include the generic word 'queer' or the term 'pansexual'.

74 In statistical research on the number or proportion of people who are lesbian, gay and bisexual, the results depend on whether the question asks about sexual attraction, sexual behaviour or sexual identity, with attraction levels being higher than those who act on that attraction and identity being the lowest figure. See F. Pega, A. Gray, J. F. Veale, D. Binson and R.L. Sell, 'Toward Global Comparability of Sexual Orientation Data in Official Statistics: A Conceptual Framework of Sexual Orientation for Health Data Collection in New Zealand's Official Statistics System', *Journal of Environmental and Public Health*, 2013: 473451; at [www.ncbi.nlm.nih.gov/pmc/articles/PMC3694548/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3694548/). The results in a number of studies vary from two per cent to 17% of the population, a very large range: Statistics New Zealand, *Considering Sexual Orientation as a Potential Official Statistic: Discussion paper*, July 2008, p. 7.

If an estimate from the lower end of the range is taken and it is assumed that lesbian, gay and bisexual people constitute about five per cent of any population, then the Asia Pacific region, with 4.4 billion people, would have about 220 million lesbian, gay and bisexual people.

... variation in sexual orientation is ubiquitous, with the great majority identifying as heterosexual and a significant minority reporting other identities. ... patterns of reported sexual identity and behaviour vary with sociodemographic characteristics, such as sex, age and race or ethnicity. For example, men are more likely to identify as gay rather than bisexual, whereas the reverse is the case for women. ... sexual orientation identity is not fixed for everyone and changes that occur throughout life do not always follow a linear pathway in or out of heterosexuality or homosexuality.<sup>75</sup>

The lack of good data about the numbers and experiences of lesbian, gay and bisexual people is an issue with human rights implications in itself.

Official estimates of populations defined by sexual orientation ... and relevant data on discrimination and social wellbeing are needed to monitor human rights status and to evaluate the economic, social, cultural and other impacts of policy and legislation on sexual and gender minorities. For example, the limited statistical information available about the lesbian population limits the health sector's ability to monitor the health risks that lesbians face. Reliable data is also often required when agencies are seeking funding to provide services to target specific needs within the community. Lack of data may therefore lead to a lack of funding for community services.

No official data is collected about sexual orientation.<sup>76</sup>

The chapter looks at some of the particular experiences of lesbian, gay and bisexual people in the Asia Pacific region. Three initial comments are required.

First, the region is enormous, stretching from the Pacific Island States to the Arab States of West Asia. It is diverse, containing many different political and economic systems and greatly different cultural and religious traditions. Its peoples are at very different stages of economic development, ranging from some of the richest States in the world to some of the poorest. They are also at very different stages of political development. The diversity of the region is reflected in the diversity of experiences of lesbian, gay and bisexual people.

Second, the experiences of lesbian, gay and bisexual people differ. Nonetheless, in spite of the great diversity within the region, many aspects of those experiences are common to gay men, lesbians and bisexual people. They experience human rights violations on the basis of their same-sex attraction and activity.

A Pacific conference reported:

There was commonality across the region about the complete invisibility of lesbians, and how they experience silencing: "everyone knowing but no one talking about it". Likewise [men who have sex with men] are forced by their families to get married and have children. This experience was common across Melanesian countries. Situations might arise where a man was forced to get married, and so would get married but continue to have sex with other men secretly.<sup>77</sup>

75 S.D. Cochran, J. Drescher, E. Kismödi, A. Giami, C. Garcia-Moreno, E. Atalla, A. Marais, E. Meloni Vieira and G.M. Reed, 'Proposed declassification of disease categories related to sexual orientation in the *International Statistical Classification of Diseases and Related Health Problems* (ICD-11)' in *Bulletin of the World Health Organization*, 2014, 92:672-679; at [www.who.int/bulletin/volumes/92/9/14-135541/en/](http://www.who.int/bulletin/volumes/92/9/14-135541/en/).

76 New Zealand Human Rights Commission, *Human Rights in New Zealand 2010*, pp. 313-314; at [www.hrc.co.nz/files/1914/2388/0525/HRNZ\\_10\\_rights\\_of\\_sexual\\_and\\_gender\\_minorities.pdf](http://www.hrc.co.nz/files/1914/2388/0525/HRNZ_10_rights_of_sexual_and_gender_minorities.pdf).

77 Pacific Sexual Diversity Network, *Diverse Voices for Action and Equality* and ARC International, "Our Voices, our Communities, our Rights: Advancing Human Rights related to Sexual Orientation, Gender Identity & Expression in the Pacific", Report of the Pacific LGBTIQ Human Rights Conference, Nuku'alofa, Tonga, 11-14 May 2015, p. 15; at <http://arc-international.net/wp-content/uploads/2015/09/SOGIHR-Report-final.pdf>.

Third, as in many other areas of human rights violations, violations perpetrated against lesbian, gay and bisexual people are exacerbated by other factors, such as gender, race, ethnicity, class, economic status and religion.<sup>78</sup> This is called ‘intersectionality’. The nature and severity of the violations can be different where they are based not only on sexual orientation but also on other types of identity or status. The violations can be especially severe where a gay or lesbian or bisexual person is also transgender or intersex.

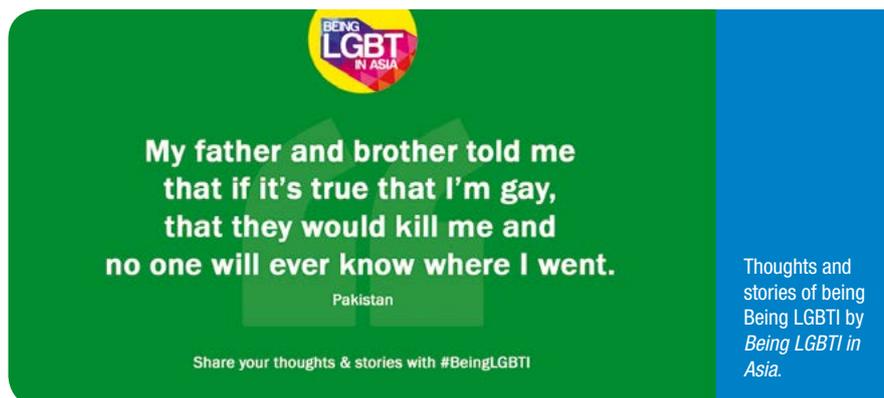
The APF’s Advisory Council of Jurists (ACJ) noted that:

... the identity of each individual is made up of a multitude of components. In addition to sexual orientation and gender identity, other factors include gender, age, nationality, profession, political opinion, religious affiliation and social origin. Minority groups therefore often face the cumulative effects of discrimination on a variety of grounds. This is often the case for persons of diverse sexual orientations and gender identities, where the impact of discrimination is felt more acutely when experienced in association with other forms of this form of discrimination or exclusion.<sup>79</sup>

Lesbians and bisexual women, on the basis both of their sexual orientation and of being women, can experience compounded discrimination. For that reason, lesbians and bisexual women are confronted by treatment that is quite specific to them. Violence in particular is experienced differently by women. Lesbians and bisexual women are especially subjected to sexual violence from men because of their sexual orientation.

In the *Ang Ladlad* case, the Chief Justice of the Philippines Supreme Court identified the violence and discrimination experienced by lesbian, gay and bisexual people in the Philippines, which included:

- the murders of gay men
- parents or guardians beating effeminate or gay youth to ensure gender conformity
- fathers allowing lesbian daughters to be raped to cure them
- the use of an anti-kidnapping law to break up adult consensual same sex partnerships
- the performance of exorcisms and other religious practices to cure lesbian, gay and bisexual persons
- forced psychiatric therapy and counselling to ‘cure’ young gays and lesbians.<sup>80</sup>



78 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42; International Gay and Lesbian Human Rights Commission (now OutRight Action International), *Violence Through the Lens of Lesbians, Bisexual Women and Trans People in Asia*, 2014, p. 2.

79 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, pp. 22-23; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/).

80 *Ang Ladlad LGBT Party vs. Commission On Elections*, G.R. No. 190582, 8 April 2010; at <http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/190582.htm>.

The ACJ commented that:

... while these examples were specific to the Philippines, there is no doubt that similar forms of discriminatory treatment occur in many other countries.<sup>81</sup>

Similarly, OHCHR reported:

Pacific islanders of all ages who are perceived to be LGBTI suffer from human rights violations ... There have been reports in the region of punitive rape of women perceived to be lesbian. Homophobic ... bullying in schools denies young people safe access to education and often leads to students dropping out of school. A disproportionate number of LGBTI youth commit suicide due to physical and psychological abuse. These issues often result in LGBTI people not being able to reach their full potentials with reduced access to health care, education and stable employment keeping them from being integrated members of their societies. Many LGBTI associations find it exceedingly hard to be officially recognized.<sup>82</sup>



Photo by the APF.

81 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, p. 26; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/).

82 OHCHR, *Information sheet: Frequently Asked Questions: Sexual orientation, gender identity and intersex status in the Pacific*, August 2015, p. 3; at [www.ohchr.org/Documents/Publications/UNFE\\_PacificCampaignInfoSheet-Aug2015.pdf](http://www.ohchr.org/Documents/Publications/UNFE_PacificCampaignInfoSheet-Aug2015.pdf).

## 2.2. DIGNITY AND CRIMINALISATION

In May 2015, 75 UN member States still criminalised consensual adult same-sex activity.<sup>83</sup> That is more than a third of the UN's membership. The number of criminalising States has been decreasing slowly over the past two or three decades.<sup>84</sup> In the Asia Pacific region consensual adult same-sex activity is not criminalised in 25 States and the larger parts of another two States.<sup>85</sup> In some it has never been criminalised and in others it has been part of a gradual process of decriminalisation spanning many decades, with Palau the most recent to decriminalise.<sup>86</sup> Fiji has moved the furthest, including in its Constitution a specific prohibition of discrimination on the basis of sexual orientation.<sup>87</sup> Nonetheless, 31 States and the remaining parts of the other two States in the region continue to criminalise consensual adult same-sex activity.<sup>88</sup> Some States are enacting new, more severe legislation in this area.<sup>89</sup>

Criminalisation today can take many forms. It can be directed to punish:

- certain sexual behaviour, usually same-sex activity
- acting or dressing in ways that do not conform to dominant cultural expectations, including cross dressing, based on an assumption that a feminine man is gay and a masculine woman is lesbian<sup>90</sup>
- statements or publications or actions that discuss or refer to lesbian, gay and bisexual people and 'gay lifestyles', often described as 'gay propaganda'.

Foundational texts in Judaism, Christianity and Islam have passages that have been interpreted as absolute condemnations of consenting sexual acts between men, imposing the death penalty.<sup>91</sup> This interpretation passed into the legal systems in European States, initially as part of religious law, then as part of regular criminal law systems. The Napoleonic Penal Code in the early 19th century spread throughout half of Europe, ending any prohibition of same-sex acts in the laws of France, the Netherlands, Spain and Portugal. As a result, their colonies in Asia also had no prohibition. The United Kingdom reformulated its criminal prohibition in the Indian Penal Code in 1860, which was copied for its colonies in Asia, Africa, Oceania and the Caribbean. Those colonial-era prohibitions continue in force in all former British colonies in Asia and the Pacific, with the exceptions of Australia, Fiji, Hong Kong and New Zealand, and a modification in Singapore. The same interpretation is reflected in the law in many States with majority Muslim populations, although it is notable that the State with the largest Muslim

83 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) (A Carroll and LP Itaborahy) *State Sponsored Homophobia 2015: A world survey of laws: criminalisation, protection and recognition of same-sex love*, May 2015, p. 8; at <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>. Also available in Arabic at the same web address.

84 The number of States with criminal penalties for consensual adult same sexual acts was 92 in 2006. See ILGA report, *State Sponsored Homophobia 2015*, p. 8.

85 Australia (various dates between 1972 and 1997 in different Australian states and territories), Bahrain (1976), Cambodia, China (1912 and 1997), East Timor (1975), Fiji (2010), most parts of Indonesia, Israel (1988), Japan (1882), Jordan (1951), Kazakhstan (1998), Kyrgyzstan (1998), Laos, Marshall Islands (2005), Micronesia, Mongolia (1961), Nepal (2008), New Zealand (1986), North Korea, Palau (2014), Palestine (West Bank 1951), Philippines, South Korea, Tajikistan (1998), Thailand (1957), Vanuatu and Vietnam. See ILGA report, *State Sponsored Homophobia 2015*, pp. 26-27; at <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>.

86 States that were once French, Dutch, Portuguese or Spanish colonies have never had criminal sanctions for consensual adult same-sex activity.

87 Article 26(3).

88 Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, Cook Islands, India, Indonesia (South Sumatra and Aceh Province), Iraq, Iran, Kiribati, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Nauru, Oman, Pakistan, Palestine (Gaza), Papua New Guinea, Qatar, Samoa, Saudi Arabia, Singapore, Solomon Islands, Sri Lanka, Syria, Tonga, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan and Yemen. See ILGA report, *State Sponsored Homophobia 2015*, p. 28; at <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>.

89 In 2014, particularly harsh new laws were enacted in Brunei Darussalam and also, outside the Asia Pacific region, in Kenya, Nigeria, Russia and Uganda. Only phase 1 of the Brunei law has been implemented and so its harshness has not yet been felt and may never be. The law in Uganda was struck down by the courts.

90 As cross-dressing laws are most frequently used to prosecute transgender people, particularly transgender women, they are discussed in greater depth in Chapter 3.

91 For example, in the Judaeo-Christian tradition, the Book of Leviticus 18:22 and 20:13; in Islam, Qur'an Sura 7:80-84 and Sunan Abu-Dawud 38:4447.

population, Indonesia, has never criminalised consensual adult same-sex conduct.<sup>92</sup> The meaning of the religious texts and traditions in question are being re-assessed, with no single interpretation now given full acceptance. Universal human rights law has been a very important factor in encouraging this re-assessment and re-interpretation.

The National Human Rights Commission of Korea reported:

The notoriously obstinate prejudice and mal-understanding among protestant churches (30% of the Korean folks are protestant church-goers) in Korea over the human rights for the minority with diverse sexual orientation and gender identities still constitutes a challenging context in promoting and protecting human rights for LGBTI who had to live as invisible citizens, not disclosing their sexual and gender identities for fear of being discriminated or being the targets of hate speech in daily life; in fact, all the efforts of our Commission and human rights community to legislate anti-discrimination act and human rights education law (both bills prohibits discrimination on the grounds of sexual orientation) has failed, in large part, with the objection of Korean protestant churches.<sup>93</sup>

The Commission on Human Rights of the Philippines has had a similar experience when the Catholic Bishops' Conference opposed an anti-discrimination bill on the basis that the bill would provide protection for lesbian, gay, bisexual and transgender people.<sup>94</sup> However, a gay activist from Timor Leste noted:

The Church is not systematically discriminating against LGBT. However, members of the Church would be very against LGBTs due to Church doctrine. Despite this, some priests and nuns cooperate and work together with the LGBT community. As well as this, many of the LGBT community go to church and receive communion without any problems.

The criminal laws have been uneven in their terminology and scope. Sometimes they refer to same-sex activity indirectly, through use of terms like 'unnatural acts' or 'unnatural sex'<sup>95</sup> or 'acts against the order of nature'<sup>96</sup> or 'acts of gross indecency'.<sup>97</sup> Some laws use the terms 'sodomy'<sup>98</sup> or 'buggery'<sup>99</sup>. Sometimes they apply to male same-sex activity but not female.<sup>100</sup> Sometimes they specifically cover 'homosexual and lesbian intercourses'.<sup>101</sup>

Where same-sex activity remains criminalised, penalties are very severe, including the death penalty in some States. Three States in the Asia Pacific region continue to implement the death penalty for consensual adult same-sex activities: Iran, Saudi Arabia and Yemen. In three others, the death penalty is provided but does not appear to be implemented officially: Afghanistan, Pakistan and Qatar. The death penalty is implemented outside the law by armed groups in parts of Iraq and Syria.<sup>102</sup> Where the death penalty is not imposed, the crime of consensual adult same-sex activity is punished by imprisonment or whipping or both.

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92 Recently, however, Islamic religious law (*shari'a*) has been applied in the province of Aceh in Indonesia.

93 APF, 'National Human Rights Commission of Korea', *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific*, 24-25 February 2015, p. 13; at [www.asiapacificforum.net/resources/workshop-briefing-paper-nhris-sogi-2015/](http://www.asiapacificforum.net/resources/workshop-briefing-paper-nhris-sogi-2015/).

94 APF, 'Philippines Commission on Human Rights', *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific*, 24-25 February 2015, p. 23.

95 For example, *Bhutan Penal Code 2004*, s. 213.

96 For example, *Indian Penal Code*, s. 377.

97 For example, *Singapore Penal Code (Revised) 2008*, s. 377A.

98 For example, *Samoa Crimes Act 2013*, s. 67; *Iran Islamic Penal Code of Iran 1991*, Part 2.

99 *Kiribati Penal Code 1977*, s. 153. See ILGA report, *State Sponsored Homophobia 2015*, p. 93; at <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>. The earliest United Kingdom law on same-sex activity was the *Buggery Act 1533*. Later laws referred to "the abominable crime of buggery": *UK Offences against the Person Act 1861*, s. 61. This term was used in laws in some colonies, including in Australia; for example, the *NSW Crimes Act*, s. 79.

100 The United Kingdom law that was the origin of most colonial laws never imposed criminal penalties on female same-sex activity.

101 For example, article 33 of the *Omani Penal Code 1974*.

102 International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State Sponsored Homophobia 2015: A world survey of laws: criminalisation, protection and recognition of same-sex love*, May 2015, p. 29; at <http://ilga.org/what-we-do/state-sponsored-homophobia-report/>.

### CASE STUDY: DECRIMINALISATION OF CONSENTING ADULT SAME-SEX CONDUCT

Under the old *Crimes Act 1961*, indecency between males and sodomy were offences. However in 2009, the Crimes Act underwent its first review by the **Law Reform Commission of Samoa**. In the review, the Commission supported repealing all criminal penalties attaching to sodomy and related acts conducted in private between consenting adult males. The Commission was of the view that such legalisation was essential to meet a number of international human rights, including non-discrimination on the basis of gender and sexual preference, and respect for personal privacy. The review resulted in the current *Crimes Act 2013*. Sodomy still remains an offence, however its provision was redrafted in a way not to criminalise acts conducted in private between consenting adult males. Furthermore, the offence of indecency between males was repealed.<sup>103</sup>



The Asia Pacific region has not yet seen the emergence of ‘gay and lesbian propaganda laws’, such as those enacted in Russia and promoted elsewhere by Russia. In 2014, a draft law was proposed in Kyrgyzstan – *Law on the formation of a positive attitude toward non-traditional forms of sexual relations* – but it has still not been enacted.<sup>104</sup> In 2015, the Kazakhstan Senate passed two draft laws: *On Protecting Children from Information Harmful to Their Health and Development* and *On Amendments and Additions to Several Legal Acts of the Republic of Kazakhstan Concerning the Protection of Children from Information Harmful to Their Health and Development*. The draft laws were rejected by the Constitutional Council. These developments in Kyrgyzstan and Kazakhstan, though unsuccessful, reflect a worrying extension to the Asia Pacific region of hostile attitudes towards lesbian, gay and bisexual people found in Russia and some States in Africa.

In addition, other criminal laws can be misused to target lesbian, gay and bisexual people. The ACJ, in its report on human rights in relation to sexual orientation and gender identity in the Asia Pacific region, found that, in addition to laws directly criminalising same-sex sexual conduct between consenting adults, a range of other laws containing criminal sanctions have been used to target people of diverse sexual orientations. The ACJ highlighted laws relating to vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order.

The existence of some such laws, or their discriminatory application, breach rights to equality and non-discrimination.<sup>105</sup>

Criminal laws targeting lesbian, gay and bisexual people have both direct and indirect effects on human rights. Directly, they impose treatment and punishments that violate human rights, including arbitrary detention, torture and cruel, inhuman and degrading punishment, and arbitrary execution. Criminal laws provide a legal basis for police to detain lesbian, gay and bisexual people and, when detained, lesbian, gay and bisexual people are at greater risk of sexual assault. Lesbians particularly report frequent rape while in police custody. Both gay men and lesbians are at significantly greater risk of rape in prison than heterosexual prisoners.

103 APF, ‘Office of the Ombudsman of Samoa’, *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific*, 24-25 February 2015, p. 26.

104 *Communications report of Special Procedures*, 20 August 2014, A/HRC/27/72, p. 55; and *Communications report of Special Procedures*, 2 June 2015, A/HRC/29/50, p. 78.

105 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010; p. 20; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/).

According to the High Commissioner for Human Rights:

States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination. Arrests and the detention of individuals on charges relating to sexual orientation and gender identity – including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called “public scandal” – are discriminatory and arbitrary.<sup>106</sup>

Indirectly, these laws have a ‘chilling’ effect, even if not enforced, by oppressing lesbian, gay and bisexual people and suppressing their enjoyment of their human rights. They place lesbian, gay and bisexual people at risk of harassment, intimidation and exploitation and they expose them to violence from others.

Human rights mechanisms continue to emphasize links between criminalization and homophobic ... hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization put on the work of human rights defenders. The Special Rapporteur on freedom of religion or belief has noted that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence.<sup>107</sup>

The laws have these effects whether or not they are enforced. The Human Rights Committee made this point in *Toonen v Australia* when it found in favour of Mr Toonen, even though Australia, in its defence, said that the law was not enforced.<sup>108</sup>

The ACJ reported:

... even where such laws are not regularly enforced, their very existence continues to affect adversely the enjoyment of rights by people of diverse sexual orientations ... As the Delhi High Court stated:

“The criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hand of the law enforcement machinery ... Even without actual enforcement, [such] laws serve to stigmatise an entire section of society, thereby violating their dignity as citizens”.<sup>109</sup>

The continued existence of the law also leads to violation of other human rights.

The United Nations has frequently expressed concern about the criminalization of same-sex relationships. In addition to violating basic rights, criminalization legitimizes prejudice in society at large and exposes people to hate crimes, police abuse, torture and family violence.

As the World Health Organization (WHO) and The Joint United Nations Programme on HIV/AIDS (UNAIDS) have shown, criminalization also has a dire effect on public health, especially on efforts to prevent the spread of HIV. It can, for example, deter some of those most at risk of infection from coming forward for testing and treatment out of fear of being deemed a criminal.<sup>110</sup>

Criminalisation can also endanger the work of those who defend the human rights of lesbian, gay and bisexual people, by exposing them to attacks and intimidation. For that reason, the High Commissioner for Human Rights has called for States to fulfil their legal duty to protect lesbian, gay and bisexual people from violence and discrimination by repealing laws that criminalise same-sex conduct and other laws used to punish lesbian, gay and bisexual people.<sup>111</sup>

106 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 43; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

107 Ibid, para. 45.

108 Human Rights Committee, *Toonen v Australia*, 4 April 1994, CCPR/C/50/D/488/1992, para. 8.2.

109 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, p. 20 at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/). The quote from the Delhi High Court is from *Naz Foundation v. NCT Delhi*, 2009, 160 DLT 277, para. 52.

110 OHCHR, *Fact sheet: Criminalisation*, p. 2; at [www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-30-UN\\_Fact\\_Sheets\\_Criminalization\\_English.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-30-UN_Fact_Sheets_Criminalization_English.pdf).

111 Ibid.

States have the legal obligation under international human rights law to safeguard the human rights of all persons, regardless of sexual orientation, gender identity or intersex status. Criminalizing private sexual relationships between consenting adults, whether the relationships are same-sex or different-sex, is a violation of the right to privacy and a form of discrimination. In addition to violating basic rights, this criminalization legitimizes hostile attitudes towards LGBTI people, feeding stigma, violence and discrimination in areas such as education, employment, housing and health care.<sup>112</sup>

## 2.3. SAFETY AND VIOLENCE

The existence of criminal laws against lesbian, gay and bisexual people increases the risk of violence but, even where there are no criminal laws, lesbian, gay and bisexual people encounter significantly greater risks of being subjected to violence than other people. Individually and as a group, lesbian, gay and bisexual people are marginalised and often targeted for violence on the basis of their sexual orientation alone.

The High Commissioner for Human Rights has reported that UN human rights mechanisms continue to receive reports from all regions of homophobic violence: both physical violence, including murder, beatings, kidnapping and sexual assault; and psychological violence, including threats, coercion and the arbitrary deprivation of liberty, such as forced psychiatric incarceration. Violence can occur in public settings, including by religious extremists, paramilitary groups and extreme nationalists, or in family and community settings. The High Commissioner for Human Rights reported that homophobic violence:

... is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes. Violent acts include deep knife cuts, anal rape and genital mutilation, as well as stoning and dismemberment.<sup>113</sup>

Well-documented studies in many countries and regions have revealed high levels of murder based on sexual orientation. The Government of Brazil, which reports annually on homophobic violence, recorded 310 murders in 2012 alone.<sup>114</sup> The Inter-American Commission on Human Rights reported 594 hate-related killings of lesbian, gay, bisexual and transgender persons in the 25 States members of the Organization of American States between January 2013 and March 2014.<sup>115</sup> The High Commissioner for Human Rights reported that 'hate-motivated killings' of lesbian, gay and bisexual people have been documented in all regions.<sup>116</sup> He instanced the report on a visit to Mexico by the Special Rapporteur on extrajudicial, summary or arbitrary executions who noted 'grotesque homicides' perpetrated with broad impunity, allegedly at times 'with the suspected complicity of investigative authorities'.<sup>117</sup>

112 OHCHR, *Information sheet: Frequently Asked Questions: Sexual orientation, gender identity and intersex status in the Pacific*, August 2015, p. 2; at [www.ohchr.org/Documents/Publications/UNFE\\_PacificCampaignInfoSheet-Aug2015.pdf](http://www.ohchr.org/Documents/Publications/UNFE_PacificCampaignInfoSheet-Aug2015.pdf).

113 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras. 21-23; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E). See Chapter 3 for discussion of the differences between what is often public violence against gay men and transgender women and frequent private violence against lesbian and bisexual women and transgender men.

114 Brazil, Department of Human Rights, *Second report on homophobic violence in Brazil (2012)*, June 2013; referred to in High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para 27.

115 Inter-American Commission on Human Rights, Press release 153/14, 2014, p. 1; referred to in High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 27.

116 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 26.

117 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, April 2014, A/HRC/26/36/Add.1 1, para. 85.



The High Commissioner for Human Rights also reported:

- ‘alarmingly high rates of homicidal violence’<sup>118</sup>
- ‘so-called “honour” killings, carried out against those seen by family or community members to have brought shame on a family’<sup>119</sup>
- ‘gay men who have been kidnapped, beaten and humiliated, with film clips of their abuse shared on social media’<sup>120</sup>
- ‘lesbians assaulted and raped because of their sexual orientation’<sup>121</sup>
- ‘the risk to human rights defenders working to uphold the rights of [lesbian, gay and bisexual] persons, some of whom have been subjected to violence, threats and verbal denigration’.<sup>122</sup>

In Indonesia, violence against lesbian and bisexual women has included:

- forced marriage
- ‘corrective rape’, where women are forced to have sex with a man to ‘cure them’
- forced institutionalisation in psychiatric or religious facilities
- verbal abuse and bullying in schools by students or teachers
- street harassment
- harassment and intimidation by police.

Violence intervention and prevention are difficult, particularly for lesbian, gay and bisexual young people who can be trapped by age, economic dependence, lack of agency and lack of mobility.<sup>123</sup> Much of this violence is perpetrated by public officials, in particular by law enforcement officials, especially the police.<sup>124</sup> However, an extensive five-country study of violence against lesbians and bisexual women, which also included violence against transgender people, found that:

118 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 27.

119 Ibid, para. 30.

120 Ibid, para 30, referring to A/HRC/26/50, para 14.

121 Ibid, para 30, referring to CEDAW/C/GUY/CO/7-8, para. 22 and A/HRC/20/16, paras. 55, 71, 73, 76.

122 Ibid, para. 31, referring to A/HRC/25/55/Add.3 paras. 433-435 and 480-482.

123 International Gay and Lesbian Human Rights Commission (now Outright Action International), *Violence on the basis of Sexual Orientation, Gender Identity and Gender Expression Against Non-Heteronormative Women in Asia 2012*; at [http://iglhr.org/sites/default/files/386-1\\_0.pdf](http://iglhr.org/sites/default/files/386-1_0.pdf).

124 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, p. 27; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/); High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015; A/HRC/29/23, para. 34, referring to A/HRC/19/61/Add.4 paras 168 and 172 and CAT/C/KGZ/CO/2, para. 19.

The family was the primary perpetrator of violence according to LBT people in Asia. Family members carried out emotional, verbal, physical and sexual violence against LBT people. This violence occurred regularly and had greater and longer lasting impact than violence perpetrated by nonfamily members.

LBT people in Asia reported an unexpectedly high occurrence of intimate partner violence, including physical and sexual violence. Perpetrators of partner violence were same-sex partners, dating partners, and heterosexual and cisgender partners of transgender individuals. There were also reports of spousal violence by heterosexual husbands of lesbians in forced marriages.<sup>125</sup>

Women in the Pacific also reported experiences of violence.

... there are specific challenges faced by women, particularly silence within Pacific communities about lesbians, and violence towards lesbian women, often in the family sphere or domestic sphere. We remind Governments of Pacific Island Countries and Territories that they have responsibility to protect [lesbian, gay and bisexual] communities from human rights abuses like physical and sexual violation, and discrimination.<sup>126</sup>

Bullying of lesbian, gay and bisexual children is a form of violence. It is a particular concern because of the long-term impact it can have on them. Delegates to a Pacific conference gave accounts of serious bullying of lesbian, gay and bisexual students in secondary school.

This led to young people leaving the education system before completing their qualification and included ongoing verbal, sexual and physical assault. The outcomes of this bullying range from driving young people to engage in sex work, as they lack qualifications for other employment, or worse, they commit suicide.<sup>127</sup>

Bullying of lesbian, gay and bisexual students seems to be endemic throughout the Asia Pacific region.

Evidence from India and Bangladesh indicates 50 percent of homosexual men experienced harassment in school or college. In a 2012 survey conducted in China, 77 percent of [lesbian, gay and bisexual] students suffered at least one form of bullying. In Thailand, a survey found one-third of [lesbian, gay and bisexual] students had been physically harassed and one-quarter sexually harassed. Seven percent had attempted suicide. In Japan, 83 percent of gay and bisexual men had experienced homophobic bullying at school. In Mongolia, 7 percent of students reported having been physically assaulted because of their perceived sexual orientation or gender identity. In Viet Nam, a survey found that 44 percent of [lesbian, gay and bisexual] students had experienced at least one form of bullying during their 12 years in school, with the most common being verbal harassment. Sixteen percent of them faced physical harassment and 19 percent faced sexual harassment.<sup>128</sup>

In New Zealand, a report on bullying in schools found:

Lesbian, gay, bisexual, transgender, intersex and questioning (LGBTIQ) young people are overrepresented in bullying statistics. An online survey of LGBTIQ young people in schools, conducted by the Ministry of Youth Development, highlighted the importance of schools leading by example through:

- acknowledging and normalising LGBTIQ young people
- having strong anti-bullying policies for all LGBTIQ students
- educating students and teachers on sexuality and gender diversity
- establishing support networks and guidance channels for LGBTIQ students
- offering facilities and clothing options that are not gender specific (eg, school uniforms and unisex bathrooms).<sup>129</sup>

125 International Gay and Lesbian Human Rights Commission (now OutRight Action International), *Violence Through the Lens of Lesbians, Bisexual Women and Trans People in Asia*, 2014, p. 17 at [www.outrightinternational.org/content/violence-through-lens-lbt-people-asia](http://www.outrightinternational.org/content/violence-through-lens-lbt-people-asia).

126 Pacific Sexual Diversity Network, Diverse Voices for Action and Equality and ARC International, "Our Voices, our Communities, our Rights: Advancing Human Rights related to Sexual Orientation, Gender Identity & Expression in the Pacific", Report of the Pacific LGBTIQ Human Rights Conference, Nuku'alofa, Tonga, 11-14 May 2015, p. 47; at <http://arc-international.net/wp-content/uploads/2015/09/SOGIHR-Report-final.pdf>.

127 Ibid, p. 46.

128 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016 forthcoming.

129 New Zealand Ministry of Education, *Bullying prevention and response: a guide for schools*, 2015, p. 22; at [www.hrc.co.nz/files/5714/3226/0531/MOEBullyingGuide2015Web.pdf](http://www.hrc.co.nz/files/5714/3226/0531/MOEBullyingGuide2015Web.pdf).

*Being LGBT in Asia* identified significant gaps in laws protecting gay, lesbian and bisexual people from violence.<sup>130</sup>

Domestic violence and sexual assault laws were often drafted to address violence against women perpetrated by men, but may not apply to violence perpetrated against men by other men [or] against women by other women ...

The *Being LGBT in Asia* China and Viet Nam country reports noted that same-sex rape is not considered a specific offence in these countries.<sup>131</sup> Similarly, sexual assault laws in India, Japan, Nepal and Pakistan only apply where the perpetrator is male and the victim is female. The Mongolia report expressed the concern that the law on domestic violence would not cover same-sex couples. It also described reports of assaults against [lesbian, gay and bisexual] people perpetrated by police authorities.<sup>132</sup> The Thailand report described the lack of protective laws, despite a high level of violent incidents corrective rape of lesbians by female relatives and brutal murders of lesbians in the 2000s.<sup>133</sup>

State obligations under international human rights law include the obligation to protect human rights. International human rights mechanisms have said repeatedly that the State bears responsibility for human rights violations perpetrated by non-State actors where the State has failed to provide an adequate level of protection. Family and relationship violence has been signalled out repeatedly for specific mention in this respect. Lesbian, gay and bisexual people are more reluctant than most to report violence to the police because of the fear of exposure of their sexual orientation or even worse treatment on the basis of their sexual orientation. These concerns are likely to be heightened for lesbians and bisexual women, including in communities where women are blamed for violence against them. Similarly, lesbian, gay and bisexual sex workers may be very reluctant to approach police about sexual assaults, particularly if sex work is criminalised.



Photo by UNDP/H. Nhan

130 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016 forthcoming.

131 UNDP and USAID, *Being LGBT in Asia: China Country Report*, p. 8; UNDP, *Being LGBT in Asia: Viet Nam Country Report*, p. 36.

132 UNDP and USAID, *Being LGBT in Asia: Mongolia Country Report*, pp 19 and 21.

133 UNDP and USAID, *Being LGBT in Asia: Thailand Country Report*, p. 43.

## 2.4. EQUALITY AND DISCRIMINATION

Violence is connected with discrimination. First, it is a form of discrimination, the most extreme form of discrimination. Second, it leads to other forms of discrimination, making lesbian, gay and bisexual people more vulnerable to discrimination because of the effect of violence on them.

Discrimination based on sexual orientation is evident in all countries. The High Commissioner for Human Rights has reported that lesbian, gay and bisexual people are:

... deprived of access to such basic rights as employment, health, education and housing find themselves in poverty, cut off from economic opportunity. Studies undertaken in several countries suggest that rates of poverty, homelessness and food insecurity are higher ... than in the wider community.<sup>134</sup>

Discriminatory practices are commonly encountered by lesbian, gay and bisexual people in relation to:

- health care
- education
- employment
- housing
- freedom of expression, association and assembly
- asylum and migration
- family and community
- relationship recognition.<sup>135</sup>

Discriminatory treatment in **health care** includes not only the refusal of needed health services but to treatment that can amount to abusive treatment. Lesbian, gay and bisexual people can be subjected, without their full, free and informed consent, to medical treatment that is degrading and damaging.

There is mounting concern about so-called “conversion therapies” intended to “cure” homosexual attraction. Such therapies have been found to be unethical, unscientific and ineffective and, in some instances, tantamount to torture.<sup>136</sup>

*Being LGBT in Asia* identified the mental health threats to lesbian, gay and bisexual people and their mental health needs.<sup>137</sup>

Negative factors impacting the mental health of [lesbian, gay and bisexual] people include criminalization, corrective counselling, intrusive psychological therapies ... pressure to marry including arranged marriages, family rejection, and religious and cultural ... homophobia. As a result of these factors, [lesbian, gay and bisexual] people are at increased risk of numerous mental health problems, including anxiety disorders, depression, substance use disorders, self-harm and suicide. In some countries [lesbian, gay and bisexual] groups provide peer support and counselling, but most countries have few or no services with specific expertise in [lesbian, gay and bisexual] mental health needs.

134 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 31; referring to A/HRC/27/55, paras. 64-66 and E/C.12/PER/CO/2-4, para. 5; Lucas Paoli Itaborahy, *LGBT people living in poverty in Rio de Janeiro*, 2014, and G.J. Gates, *Food Insecurity and SNAP (Food Stamps) Participation in LGBT Communities*, February 2014; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

135 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras 50-68.

136 Ibid, para 52.

137 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016 forthcoming, p. 36.

The *Being LGBT in Asia* country reports from Cambodia and Viet Nam described case studies of [lesbian, gay and bisexual] people sent to traditional healers to ‘cure’ their homosexuality or forced to receive psychiatric treatment intended to convert them to heterosexuality.<sup>138</sup> Participants at the regional dialogue from India and Malaysia also raised concerns regarding ‘conversion therapy’. The China country report noted that “many mental health practitioners, often pushed by the families of [lesbian, gay and bisexual] people, recommend or impose ‘corrective treatment’ on [lesbian, gay and bisexual] people, sometimes involving involuntary committal to psychiatric hospital wards.”<sup>139</sup>

The Indonesia report refers to a regulation of the Ministry of Social Affairs that authorizes welfare authorities to round up people whose sexual behaviour is considered to cause them to be unable to function socially (including ... gay men and lesbians) for the purposes of ‘rehabilitation’ and integration into society.<sup>140</sup>

These practices are discriminatory on the basis of sexual orientation because a heterosexual person would not be subjected to them. Medical experts, including psychiatric experts, now accept that homosexuality or same-sex attraction is not an illness and should not be treated as an illness. Those who are subjected to so-called ‘curative’ therapies for their same-sex attraction are subjected to treatment to which people attracted to the opposite sex would not be subjected. Further, ‘conversion’ therapies are now accepted to ‘have no scientific basis and are rejected by medical authorities’.<sup>141</sup>

*Being LGBT in Asia* also identified the specific health care needs of lesbians and bisexual women:

Lesbian and bisexual women experience health inequalities, largely related to experiences of discrimination and homophobia. These issues can lead to avoidance of routine healthcare and screening and reduced disclosure of sexual orientation within consultations.

... It is apparent that lesbian women’s health issues are systematically ignored and there is a clear need for further research to inform improved understanding of health needs and appropriate approaches to service delivery. Lesbian and bisexual women have specific healthcare needs in areas of sexual and cervical health, reproductive health and parenting, mental health, substance use, and ageing.<sup>142</sup>

In relation to **family and community**, the High Commissioner for Human Rights has noted that State obligation extends to protection from human rights violations, including from violations by non-State actors. Failure to ensure the same protection to lesbian, gay and bisexual people as is provided to other people is discrimination on the basis of sexual orientation. Rejection, discriminatory treatment and violence by family members can have serious, negative consequences for the enjoyment of human rights.

Examples include individuals being physically assaulted, raped, excluded from family homes, disinherited, prevented from going to school, sent to psychiatric institutions, forced to marry, forced to give up custody of their children, punished for activist work and subjected to attacks on personal reputation. In States where homosexuality is criminalized, victims may be reluctant to report violence perpetrated by a family member for fear of the criminal ramifications of revealing their sexual orientation.<sup>143</sup>

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138 UNDP and USAID, *Being LGBT in Asia: Cambodia Country Report*, p. 50; and UNDP, *Being LGBT in Asia: Viet Nam Country Report*, p. 29.

139 UNDP and USAID, *Being LGBT in Asia: Country Report China*, p. 10.

140 *Regulation of the Ministry of Social Affairs No. 8/2012*. See UNDP and USAID, *Being LGBT in Asia: Indonesia Country Report*, p. 9.

141 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016 forthcoming, referencing J. Serovich, S. Craft, P. Toviessi, R. Gangamma, T McDowell and E. Gafsky, ‘A Systematic Review of the Research Base on Sexual Reorientation Therapies’ in *Journal of Marital and Family Therapy* 34(2), 227–238; American Psychological Association (APA) Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*.

142 UNDP, *Leave no one behind: Advancing social, economic, cultural, and political inclusion of LGBTI people in Asia and the Pacific*, 2016 forthcoming.

143 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 66, referring to A/68/290, para. 38, A/HRC/20/16/Add.4, para 20, A/HRC/22/56, para. 70 and A/HRC/26/38/Add.1, para 19.

Lesbians and bisexual women were said to be often:

... especially at risk owing to gender inequalities and restrictions on autonomy in decision-making about sexuality, reproduction and family life.<sup>144</sup>

Family rejection can also be associated with broader discrimination in the right to adequate **housing**. Lesbian, gay and bisexual people can suffer violations of their rights at the hands of their families, by being confined to the home, isolated socially and subjected to violence, or by being evicted from the family home and so deprived of housing. They then encounter discrimination in seeking and retaining housing.<sup>145</sup> Landlords can discriminate by refusing rental accommodation and financial institutions may refuse loans to purchase housing. Discrimination based on sexual orientation can lead to **poverty** for lesbian, gay and bisexual people and can trap them in poverty.

Different treatment in relation to **relationship recognition** is a more complex issue and international law is not clear on the issue.<sup>146</sup> Domestic laws in this region take a variety of approaches, including to:

- authorise marriage between two persons of the same sex on the same basis as between two persons of opposite sexes
- recognise same-sex relationships civilly for certain purposes, such as property ownership, guardianship of children, next of kin status and inheritance
- deny any form of recognition of or legal status to same-sex relationships.



Photo by UNESCO/UNDP/V. Dithajohn.

144 Ibid, para. 66.

145 International Gay and Lesbian Human Rights Commission (now OutRight Action International), *Violence on the basis of Sexual Orientation, Gender Identity and Gender Expression Against Non-Heteronormative Women in Asia 2012*; at [http://iglhrc.org/sites/default/files/386-1\\_0.pdf](http://iglhrc.org/sites/default/files/386-1_0.pdf).

146 The international legal issues are discussed in Chapter 6 in the context of the Yogyakarta Principles.

Of the 17 States globally that in May 2015 authorised same-sex marriage, only one State, New Zealand, is in the Asia Pacific region.<sup>147</sup> Of the 12 States globally that recognised same-sex relationships civilly, only one State, Australia, was in the Asia Pacific region.<sup>148</sup> All other States in the Asia Pacific region deny any form of recognition of or legal status to same-sex relationships.

The High Commissioner for Human Rights has said:

While States are not required under international law to recognize same-sex marriage ... [w]herever States provide benefits such as pension and inheritance entitlements for unmarried heterosexual couples, the same benefits should be available to unmarried homosexual couples.<sup>149</sup>

## 2.5. EXPRESSION, ASSEMBLY AND ASSOCIATION

The fundamental freedoms of expression, assembly and association have been identified as areas in which the human rights of lesbian, gay and bisexual people are curtailed and violated. These rights concern their ability to:

- speak freely about their lives, their experiences and their needs, in publications, the arts and literature and in public forums
- form and participate in lesbian, gay and bisexual advocacy and social groups
- associate with similar people.

These rights are especially relevant for the work of lesbian, gay and bisexual human rights defenders and activists. Acting to promote and protect the human rights of lesbian, gay and bisexual people, these defenders often have higher visibility than other lesbian, gay and bisexual people and are therefore more vulnerable to retributive action when they exercise their rights to expression, assembly and association.

The ACJ has pointed to the importance of these rights for lesbian, gay and bisexual people and to their restriction in the Asia Pacific region:

Freedom of expression, assembly and association are of fundamental importance to people of diverse sexual orientation and gender identity as they facilitate participation and recognition within the body politic, as well as access to information about their rights within the community. Such rights are also crucial in supporting human rights defenders promoting the rights of [lesbian, gay and bisexual] people. They are also fundamental to the success of governmental and community programs that promote and support basic human rights such as the rights to employment, education and health.

Within the Asia Pacific region, police and security forces, as well as religious and community groups have sought to limit the ability of [lesbian, gay and bisexual] people to enjoy such rights particularly through the use of laws dealing with public order, public nuisance and public morality, but also through harassment and intimidation.<sup>150</sup>

147 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA); *State Sponsored Homophobia 2015: A world survey of laws: criminalisation, protection and recognition of same-sex love*, May 2015, p. 41. The United States of America has since extended same sex marriage authorisation nationally as a result of a Supreme Court decision on 26 June 2015 in *Obergefell v Hodges*; see [www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf). The New Zealand law is based on broader marriage equality than same-sex marriage alone, legalising marriage between people of any sex, gender identity or sexual orientation.

148 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), *State Sponsored Homophobia 2015: A world survey of laws: criminalisation, protection and recognition of same-sex love*, May 2015, p. 42. Civil recognition extends to same-sex relationships all or most of the rights associated with marriage without permitting marriage. Some parts of Australia have enacted this limited form of recognition.

149 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 67, referring to CCPR/C/CHN/HKG/CO/3, para. 23, CCPR/C/78/D/941/2000, para 10.4 and CEDAW/C/SRB/CO/2-3 para. 39(d).

150 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, p. 29; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/).

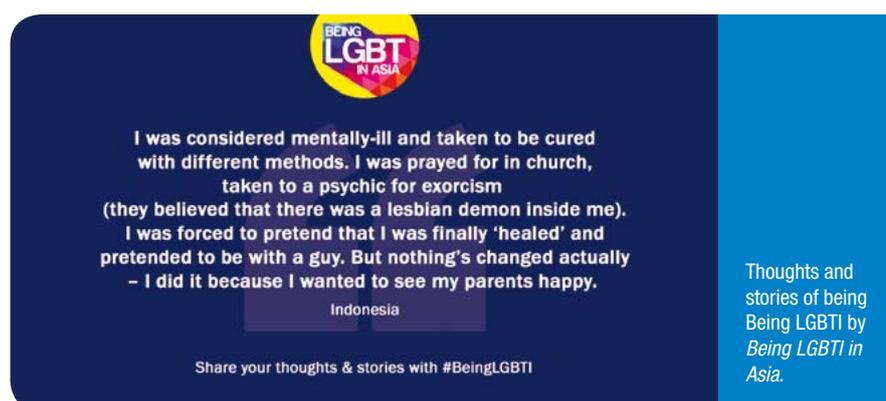
The High Commissioner for Human Rights has identified many areas in which these fundamental freedoms of lesbian, gay and bisexual people are curtailed in many States, including through:

- direct censorship
- bans on dissemination of information
- restrictions on advocacy
- denial or revocation of registration of organisations
- denial of permission to hold meetings and events to suppress expression
- disruption of meetings and events
- raiding offices
- vandalising offices and burglary and arson
- harassing and arresting staff and volunteers
- confiscating materials and equipment, such as computers
- denial of permission for gay pride marches and events
- violence and harassment at gay pride marches and events
- lack of proper and adequate police protection from violence, harassment and other forms of harm to lesbian, gay and bisexual people, especially activists, and their groups and property.<sup>151</sup>

Lesbian, gay and bisexual people and their organisations in the Asia Pacific region have experienced violation of all these kinds at one time or another in one State or another. Even in States that are more respectful of human rights for lesbian, gay and bisexual people, there have been very disturbing incidents of violations of these fundamental freedoms.<sup>152</sup>

The High Commissioner for Human Rights has also identified the particular situation of lesbian and women bisexual activists and the risks to them:

Women defenders and those advocating for gender- and sexuality-related rights are often at particular risk because they are seen as challenging traditional assumptions about the role and status of women in society.<sup>153</sup>



151 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras 60-62.

152 For example, the disruption of the fourth Asia regional conference of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) by an extremist mob in the Indonesian city of Surabaya in March 2010, resulting in the abandonment of the conference due to the refusal of the police to provide adequate protection for participants. See <https://iglhrc.wordpress.com/2010/04/01/threats-to-lgbt-in-surabaya-part-1/>.

153 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 63, referring to A/HRC/22/47/Add.1, para. 88; Special Rapporteur on human rights defenders of the African Commission on Human and Peoples' Rights, *Study on the situation of women human rights defenders in Africa*, 2015; at [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/29/23&referer=/english/&Lang=E).

## KEY POINTS: CHAPTER 2

- There may be 220 million lesbian, gay and bisexual people in the Asia Pacific region.
- Lesbian, gay and bisexual people in the region have many common experiences. In addition, lesbians and bisexual women have distinct experiences, arising from their situation as women that must be taken into account in ensuring respect for their human rights.
- Criminal laws targeting lesbian, gay and bisexual people have both direct and indirect effects on their enjoyment of their human rights. Whether enforced or not, they undermine the dignity of lesbian, gay and bisexual people.
- Individually and as a group, lesbian, gay and bisexual people are marginalised and often targeted for violence on the basis of their sexual orientation. The State often fails to ensure their safety.
- Discrimination based on sexual orientation is evident in all countries. It denies the equality of lesbian, gay and bisexual people.
- Lesbian, gay and bisexual human rights defenders are often targeted because of their advocacy. They experience violations of their rights to expression, assembly and association.



# Chapter 3: Being transgender in Asia and the Pacific

## KEY QUESTIONS

- Are there many transgender people in the Asia Pacific region?
- What types of discrimination do they experience?
- Are transgender people criminalised?
- What are the types of violence directed at transgender people?
- What is legal gender recognition and why does it matter?
- Are gender-affirming health services a human rights issue?



## 3.1. INTRODUCTION

Transgender people exist in all parts of the Asia Pacific region, though they may use culturally specific, traditional, indigenous or local terms to describe their identity.<sup>154</sup>

In some parts of the region, there is a long history of celebrating gender diversity, with transgender people given specific roles in spiritual, ceremonial or healing rituals. These roles typically recognise someone born male who embodies the spirit of a woman or of both sexes. In all parts of the region, transgender women and/or *hijras*, *warias*, *metis* and others who identify as a third gender remain the most visible within transgender communities.

In a number of Pacific countries, there are local cultures that allow persons assigned to the male sex at birth to identify as women. Many agree that the term ‘transgender’ is often a too narrow concept to embrace the full-lived experiences in the Pacific cultures. The *fa’afafine* of Samoa, American Samoa and Tokelau, the *leiti* of Tonga, the *fakafifine* of Niue, the *pinapinaaine* of Tuvalu and Kiribati, the *vakasalewalewa* of Fiji, the *palopa* of Papua New Guinea, and the *akava’ine* of the Cook Islands are diverse gender identities that existed long before the Pacific was colonised and they are important parts of the cultural treasure of the region.<sup>155</sup>

Until relatively recently, transgender men, or those who identify on a trans masculine spectrum, were invisible in this region. However, in many countries in Asia, the number of transgender men has grown dramatically over the last five years and community groups have been established, particularly online. Yet their overall visibility remains low within both transgender organisations and in the wider community. In the Pacific, the term ‘trans masculine’ is only just emerging.

154 See Chapter 1.

155 OHCHR, Information Sheet, *FAQs: Sexual Orientation, Gender Identity and Intersex Status in the Pacific*, August 2015; at [www.ohchr.org/Documents/Publications/UNFE\\_PacificCampaignInfoSheet-Aug2015.pdf](http://www.ohchr.org/Documents/Publications/UNFE_PacificCampaignInfoSheet-Aug2015.pdf).

There are no accurate data on the number of transgender people in this region. One 2012 estimate is that transgender people make up 0.3 percent of the adult population in the Asia Pacific.<sup>156</sup> Using 2010 United Nations population data, this equates to at least nine million transgender people. This proportion broadly matches some community-based estimates of the number of *hijras* or transgender women in some parts of Asia. However, the number and proportion of young people describing themselves as transgender or gender questioning is growing at a fast rate in many parts of the region, suggesting that this estimate is increasingly conservative. For example, a 2012 nationally representative survey of 8,166 high school students in New Zealand found that 1.2 percent reported being transgender and 2.5 percent reported not being sure about their gender.<sup>157</sup>

## 3.2. VIOLENCE

All people, including transgender people, have the right to security of the person and to protection by the State against violence. Internationally, including across this region, transgender people face high levels of violence.

Gender-based violence provides a useful lens to understand violence directed against transgender people, whether they identify as female or male or as a third gender. Like other forms of gender-based violence, transphobic violence stems from gender norms and stereotypes, enforced by unequal power dynamics.

In a climate of criminalisation, where law enforcement agencies themselves perpetrate violence with impunity, it is not surprising that violence against transgender people goes unreported or is inadequately investigated. In this region and globally, transgender organisations have attempted to monitor the most extreme forms of violence, when transgender people have been killed because of their gender identity. The vast majority of those murdered are transgender women.

The global Trans Murder Monitoring project has identified 174 transgender people killed because of their gender identity, across 16 countries in Asia, in the seven years between January 2008 and September 2015.<sup>158</sup> Lack of monitoring means these publically reported cases represent a fraction of such hate crimes. The highest numbers of identified deaths were in India (53), the Philippines (37), Pakistan (34) and Thailand (14). The per capita rate of reported killings is particularly high in the Philippines, where civil society groups actively monitor these murders, including the high-profile killing of transgender woman Jennifer Laude on 11 October 2014. In 2013, the Philippines Commission on Human Rights signed a Memorandum of Understanding with lesbian, gay, bisexual and transgender community organisations that included a commitment to address these killings.<sup>159</sup>

Most studies in this region have focused on violence against transgender women, including *hijras*, *metis* and *kathoeys*. They have documented high rates of sexual and physical violence, including in Cambodia, Bangladesh, Thailand, Mongolia, Fiji and Papua New Guinea.<sup>160</sup> Researchers have noted atrocious levels of brutality, including mutilation of transgender women's bodies.<sup>161</sup>

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156 S. Winter, *Lost in Transition: Transgender People, Rights and Vulnerability in the Asia-Pacific Region*, 2012, UNDP.

157 T.C. Clark, M.F.G. Lucassen, P. Bullen, S.J. Denny, T.M. Fleming, E.M. Robinson, and F.V. Rossen, 'The Health and Well-Being of Transgender High School Students: Results from the New Zealand Adolescent Health Survey (Youth'12)' in *Journal of Adolescent Health*, 55 (1) 2014, pp. 93-95 at [www.jahonline.org/article/S1054-139X\(13\)00753-2/fulltext](http://www.jahonline.org/article/S1054-139X(13)00753-2/fulltext).

158 TvT research project, 'Trans Murder Monitoring results: TMM TDOR 2015 Update' 2015; at [http://transrespect.org/wp-content/uploads/2015/11/TvT-TMM-Tables\\_2008-2015\\_EN.pdf](http://transrespect.org/wp-content/uploads/2015/11/TvT-TMM-Tables_2008-2015_EN.pdf). There were a further two transgender people killed in both the Pacific and Australia and one in New Zealand.

159 UNDP and USAID, *Being LGBT in Asia: the Philippines Country Report*, 2014.

160 Health Policy Project, Asia Pacific Transgender Network, UNDP, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities*, p. 2.

161 C. Balzer and J. Hutta, 'Transrespect versus transphobia worldwide: A comparative review of the human rights situation of gender-variant/trans people', *TvT Publication Series*, Vol. 6, 2012; UNDP and USAID, *Being LGBT in Asia: Mongolia Country Report*, 2014.

### CASE STUDY: INVESTIGATING AND MONITORING HATE CRIMES

Jennifer Laude, a 26-year-old Filipina transgender woman, was killed on 11 October 11 2014 in Olongapo, Philippines.

The **Commission on Human Rights of the Philippines** conducted a human rights investigation and monitoring of this case, in addition to attending other public forums seeking justice for Jennifer Laude. The Commission issued statements expressing grave concern over this brutal killing and called on the Government of the Philippines to:

- investigate promptly the serious incident of violence
- hold perpetrators accountable
- ensure the sensitive handling and reporting of the case by the police and by the media
- give due respect to Jennifer's chosen gender identity and ensure her right to dignity
- establish a system of recording and reporting of cases of violence committed on the basis of a person's perceived or actual sexual orientation or gender identity.<sup>162</sup>



On 1 December 2015, Private First Class Joseph Scott Pemberton, a United States Marine stationed in the Philippines, was convicted of her homicide.



Photo by OutRight Action International.

162 APF, 'Philippines Commission on Human Rights' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific*, 24-25 February 2015, pp. 24-25.

Emerging research in this region and internationally suggests that people who are born female and grow up to identify as gender non-confirming or trans masculine face high levels of violence and abuse within the family. This abuse is directed at both masculine lesbians and transgender boys and young men and includes corrective rape and forced marriage.<sup>163</sup> It remains invisible and unreported when States do not legislate against family and domestic violence and leave families to enforce social norms, standards of respectability and morality.

There are, however, examples of courts providing legal redress for transgender people escaping violence. An October 2015 Delhi High Court decision upheld the rights of a 19 year old Indian transgender man to self-determination and dignity. Shivy Bhat had been abused by his family in California and then on a visit to India was detained by other family members who confiscated his passport and United States green card.<sup>164</sup>

A 2014 study on violence against transgender people, lesbians, and bisexual women in Japan, Malaysia, Pakistan, the Philippines and Sri Lanka included four specific recommendations for NHRIs. These called on NHRIs to:

- investigate and document this violence
- ensure that complaints mechanisms and reporting procedures are safe and do not result in recriminations, including criminalisation
- report violence to UN entities
- recommend preventive and reparative action to redress it.<sup>165</sup>

### 3.3. DISCRIMINATION

#### 3.3.1. Direct discrimination

Transphobia is the dislike of or prejudice against someone who is, or is assumed to be, transgender.<sup>166</sup> Transphobia fuels discrimination and stigma against transgender people, based on their actual or perceived gender identity or expression.

**There is a lot of discrimination against transgender people in Timor-Leste. Every day we face discrimination from people because of the clothes that we wear and the way people perceive our behaviour.**

***Richella, transgender member of Casa da Rosa***<sup>167</sup>

Direct discrimination against transgender people is very high and often unquestioned. In many communities, it is commonplace for transgender people to be ridiculed. This is reinforced by their portrayal in the media, derogatory terms used to describe transgender people and inappropriate references made to intimate parts of their bodies. Many of these terms and references dehumanise transgender people and are an invasion of their privacy.

163 Common Language Summary Report: Domestic Violence against Lesbian and Bisexual Women in China, 2009; International Gay and Lesbian Human Rights Commission (now Outright Action International), 2014; M. Pitts, A. Smith, A. Mitchell and S. Patel, *Private lives: a report on the health and wellbeing of gay lesbian bisexual transgender and intersex Australians*, Monograph Series No. 57, 2006: The Australian Research Centre in Sex, Health & Society, La Trobe University.

164 *Bhat vs. NCT of Delhi and ors*; at <http://orinam.net/transman-rights-bhat-vs-delhi-2015/>. 'Trans man' is the term used in this case summary.

165 International Gay and Lesbian Human Rights Commission (now OutRight Action International), 2014.

166 See Chapter 1.

167 Notes from discussion with Feliciano da Costa Araujo, Interim Programme Manager CODIVA NGO.

Stereotypes against transgender people typically describe transgender people as ‘less than’ male or female and segregate them to the margins of society. By doing so, stereotypes can be self-perpetuating as people struggle to imagine a better future than the narrow options made available to them.

A person’s gender identity affects all aspects of their life. On any given day, people are referred to repeatedly using a name, title or other term that identifies them as either male or female. If people go to use public toilets or baths, to pray, to cut their hair or to try on clothes in a shop, they are routinely required to choose between female or male facilities. In many parts of the region, security checkpoints in shops, public buildings and airports are frequently sex-segregated. For transgender people, especially those who are very visible, each of those interactions is potentially a place where their gender identity will be questioned and they may face discrimination.

Transgender people fear discrimination if their past identity is disclosed. They are caught between two hard situations. On the one hand, they can disclose their past and not have their self-defined identity acknowledged and respected. On the other, they can choose to be ‘stealth’ and be accused of deceit if details of their past are revealed. Many transgender people do not have a choice, as they are unable to amend their name or sex details on documents, or they may not be free to change their appearance so that they are recognised in their appropriate gender identity.

**NHRIs can make it clear that transgender people have the right to freedom from discrimination whether or not they disclose their past, are stealth or live openly as a transgender, third gender or gender non-conforming person.**



Transgender people are routinely rejected by their families and excluded from participating in their cultural or religious communities. Discrimination impacts severely on their rights to education, work, adequate housing and access to health and other social services. Many live in poverty on the margins of society. As a result, transgender women are much more likely than the general adult population to be living with HIV. In this region, the term social exclusion has been used to describe the cumulative impact of this marginalisation.<sup>168</sup>

School is not safe for many transgender young people. Initial attention to homophobic school bullying has helped draw attention to the specific nature of transphobic bullying directed at transgender or gender non-conforming students.<sup>169</sup> This includes concerns about the often undocumented vulnerability of both gender non-conforming female students and transgender boys.<sup>170</sup> In May 2012, the Philippines Department of Education issued an order to protect children from any violence, abuse or exploitation at school because of their gender identity or sexual orientation.

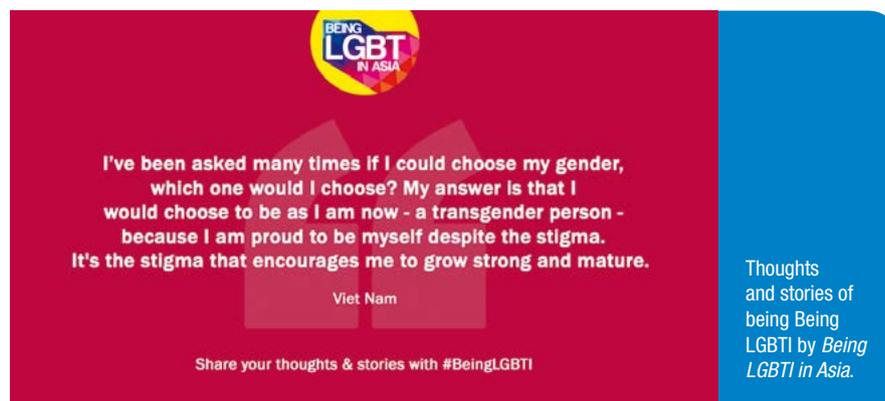
A recent international study found that 35 of 100 transgender people surveyed in the Philippines had been sexually harassed or attacked in school. Of the approximately 200 transgender people surveyed both in West Bengal, India, and in Thailand, 48 per cent and 29 per cent respectively had experienced sexual violence from other students. Even in Tonga, where there is a wider community acceptance, 28 per cent of the 102 *leiti* surveyed had experienced violence and 13 per cent reported sexual violence.<sup>171</sup>

168 UNDP, *Hijras / Transgender Women in India: HIV, Human Rights and Social Exclusion*, 2010.

169 UNESCO, *From Insult to Inclusion: Asia-Pacific report on school bullying, violence and discrimination on the basis of sexual orientation and gender identity*, 2015; at <http://unesdoc.unesco.org/images/0023/002354/235414E.pdf>.

170 UNESCO, *Asia-Pacific Consultation on School Bullying based on Sexual Orientation and Gender Identity/Expression: Meeting Report*, 15-17 June 2015, Bangkok, Thailand.

171 C. Balzer, C. LaGata and J.S. Hutta (eds) *Transrespect versus Transphobia: The social experiences of trans and gender-diverse people in Colombia, India, the Philippines, Serbia, Thailand, Tonga, Turkey and Venezuela*, TvT Publication Series Vol. 9, 2015.



Violence is one of the main factors forcing transgender people out of school or home at a young age, leaving them to look for ways to survive. In some parts of South Asia, there are traditional entertainment or ritualistic roles for *hijras* and other third sex communities. However these do not necessarily provide a livelihood.

Even transgender people who complete their schooling frequently struggle to get a job, either because they do not fit gender norms for men and women or their school qualifications, job references or identity documents disclose their gender identity. There are very high rates of unemployment, under-employment and occupational segregation among transgender people. They face barriers at all stages of the employment cycle, from initial education and training, pre-employment discrimination, limited career opportunities and advancement, and inferior employment conditions.

For example, research in Thailand has found discrimination based on gender identity and expression is common for transgender people and also for masculine lesbians (*toms*).<sup>172</sup> These groups are often excluded from mainstream employment, especially in the civil service. Transgender women are ghettoised in a limited number of stereotypical jobs, such as cabaret performers, makeup artists, cosmetics sales assistants and public relations. This occupational segregation is reinforced when transgender people leave the formal labour market to find jobs where they can be themselves, working in NGOs or running their own small business.

Across the Asia Pacific region, many transgender women describe sex work as one of the very few employment options available to them. There is less research on the employment experiences of transgender men. However, many will have been raised as females, which may mean less access to formal education and greater unpaid caring responsibilities within the family. This may include being forced to marry at a young age to lighten the demands on limited family resources. All these factors are likely to limit their ability to access decent work.

### 3.3.2. Indirect discrimination

Indirect discrimination against transgender people occurs when an apparently neutral policy or practice has the effect of disadvantaging transgender people. It is a common experience for transgender people.

#### Changing name details

Many organisations have a blanket policy that documents, such as academic qualifications or citizenship certificates, will not be reissued if someone changes their name. Often the rationale is that a requirement to do so would be prohibitively expensive because of the number of women who change

<sup>172</sup> International Labour Organization, *Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE) Project*, 2014.

their name when they marry. These policies have a disproportionate negative impact on transgender people. Transgender people who are unable to update their name on their school or tertiary qualifications are forced to choose between having no academic qualifications and disclosing their gender identity.

### School policies and practices

In this region, schools commonly require students to wear distinct school uniforms, including hairstyle, with different requirements for boys and girls. These policies can indirectly discriminate against transgender students when they are disciplined for wearing a uniform that matches their gender identity or expression. This punishment includes being excluded from school or denied the right to sit exams. Girls-only and boys-only toilets and changing rooms are often particularly unsafe spaces for transgender students. In response, anecdotal evidence includes examples of transgender students self-medicating to prevent themselves from needing to urinate during school hours. These policies and practices create significant barriers for transgender students, with implications for their future educational choices and employment options.<sup>173</sup>

Changes in some countries across the region have been forthcoming. In 2008, a secondary school in Thailand introduced a unisex toilet after a survey found 200 students at the school were *kathoey* or transgender.<sup>174</sup> Education officials in India and Japan have made policy commitments to address some of the barriers faced by transgender learners and to support higher education through tertiary scholarships for transgender students.<sup>175</sup> School anti-bullying guidelines in New Zealand emphasise the vulnerability and support needed by transgender students, including the importance of offering gender-neutral school uniforms and unisex bathrooms.<sup>176</sup>

### Conscription

Thailand, Singapore and South Korea require all males to be available for military service. This policy can have a disproportionate impact on transgender women's safety and dignity, both during the selection process and if they are selected for military service.<sup>177</sup> While exemption processes exist in each country, concerns have been raised that they are applied in a discretionary way and may undermine transgender people's right to privacy. This is particularly the case when chest examinations are undertaken in public, including for transgender women who have had breast surgery.

Exemption categories are typically based on psychiatric diagnoses and have been criticised as stigmatising, with implications for transgender people's future employment record. In South Korea a diagnosis of gender dysphoria on its own may not be sufficient to gain an exemption and proof of surgery may be required. Fear of military service has driven some transgender women to undergo early orchiectomies (removal of testicles) to avoid conscription. It is against human rights standards to require or coerce anyone to undergo medical procedures, including those that result in sterilisation, without their consent. In Thailand, transgender women can obtain an exemption based on having Gender Identity Disorder. The Asia Pacific Transgender Network and the Thai Transgender Alliance have developed a video and an accessible illustrated manual for transgender people and recruitment officers about military conscription, based on human rights standards.<sup>178</sup>

173 UNESCO, *Asia-Pacific Consultation on School Bullying based on Sexual Orientation and Gender Identity/Expression: Meeting Report*, 15-17 June 2015, Bangkok, Thailand.

174 P. Likhitpreechakul, 'Thailand: The tale of the pink toilet – Transgender rights in Thailand: A report to the International Gay and Lesbian Human Rights Commission', 2008; at [www.outrightinternational.org/content/thailand-tale-pink-toilet-transgender-rights-thailand](http://www.outrightinternational.org/content/thailand-tale-pink-toilet-transgender-rights-thailand).

175 Health Policy Project et al, 2015.

176 Ministry of Education, *Bullying Prevention and Response: A guide for schools*, 2015.

177 Transgender men under the age of 40 may be called up for military service in Singapore once the gender marker on their identification card is changed to male. Anecdotal evidence suggests that they are also offered an exemption. In other countries in Asia, transgender men are commonly excluded from conscription as they are not recognised as male.

178 Available from Thai Transgender Alliance at [www.thaitga.com/](http://www.thaitga.com/).

### 3.3.3. Anti-discrimination laws

Few countries in the Asia Pacific region explicitly prohibit discrimination on the grounds of gender identity or gender expression. This leaves transgender people vulnerable to exclusion, violence and extortion.

In 2012, Tonga agreed to a recommendation of the Human Rights Council's Universal Periodic Review to "examine the possibility of strengthening measures to eliminate discriminatory treatment" based on gender identity or sexual orientation. In 2013, Fiji introduced the first anti-discrimination protections for transgender people in the Pacific, with gender identity and expression included in the new Constitution.<sup>179</sup>

In 2013, Australia added gender identity as a prohibited ground of discrimination under its federal law on sex discrimination.<sup>180</sup> In September 2015, Thailand passed the Gender Equality Act.<sup>181</sup> Section 3 of the Act defines unfair gender discrimination to include discrimination based on a person being 'of a different appearance from his or her own sex by birth'. While gender identity is not a separate prohibited ground of discrimination in New Zealand, the Human Rights Commission accepts complaints from transgender people under the ground of sex.<sup>182</sup>

In Mongolia, revisions to Criminal Code in December 2015 specifically include sexual orientation and gender identity as prohibited grounds of discrimination. These provisions come into effect from September 2016.

In the Philippines, strong civil society efforts have resulted in a series of local ordinances, starting in Cebu City in 2012, that include gender identity and sexual orientation as prohibited grounds of discrimination. The Philippines Commission on Human Rights has expressed its support for a national anti-discrimination bill to address these issues.<sup>183</sup> In the absence of such a law, the Commission has not been able to hold private companies accountable for discrimination against transgender employees or job applicants.

In India, anti-discrimination provisions for transgender people have been proposed in both the 2014 Rights of Transgender Persons Bill and in the Government's December 2015 revised bill.

In September 2015, the Nepal's new Constitution was finalised. Gender and sexual minorities are listed as disadvantaged groups recognised by the Constitution under article 18 that sets out the right to equality.<sup>184</sup> This inclusion follows a 2007 Supreme Court ruling that called for anti-discrimination laws.

Many countries in this region have no dedicated agency to tackle employment discrimination on the basis of gender identity. In countries with anti-discrimination laws, NHRIs can usefully clarify how these apply to transgender people. For example, as a result of its Transgender Inquiry, the New Zealand Human Rights Commission worked with government officials to produce a 2011 resource for employers and workers on transgender people's rights at work.<sup>185</sup>

179 Section 26(3)(a) of the 2013 *Constitution of the Republic of Fiji*. Sexual orientation is also listed as a prohibited ground of discrimination.

180 The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* added gender identity, intersex status and sexual orientation as prohibited grounds of discrimination under the *Sex Discrimination Act 1984*. This was in addition to a range of existing provisions in states and territories prohibiting discrimination based on sexual orientation and gender identity.

181 *Gender Equality Act BE 2558 (2015)*. An informal English language translation is available at [www.hrw.org/news/2015/09/21/thailand-gender-equality-act](http://www.hrw.org/news/2015/09/21/thailand-gender-equality-act).

182 This is supported by a 2006 Crown Law opinion. The New Zealand Human Rights Commission's Transgender Inquiry recommended that the *Human Rights Act 1993* should be amended to state clearly that 'sex' includes gender identity.

183 UNDP, *Report of the Regional Dialogue on LGBTI Human Rights and Health in Asia and the Pacific*, 2015.

184 Unofficial translation provided by Blue Diamond Society, Nepal. Article 42 (Social Justice) also lists 'gender and sexual minorities' among groups that will have the right to participate in state mechanisms and public services based on the 'principle of inclusion'.

185 Ministry of Business, Innovation and Employment, *Transgender People at Work*, 2011; at <http://employment.govt.nz/er/minimumrights/transgender/Transgenderpeople.pdf>.

### CASE STUDY: RESPONDING TO DISCRIMINATION IN EMPLOYMENT

In 2013, the Bandhu Social Welfare Society worked closely with the **National Human Rights Commission of Bangladesh (JAMAKON)** to initiate a telephone legal help service. JAMAKON has developed a manual for gender and sexual minorities, explaining its role and work on sexual orientation and gender identity issues, and encouraging people to file complaints if they face discrimination.<sup>186</sup> In January 2015, JAMAKON succeeded in securing legal redress for Sohel Rana, a transgender woman who had been terminated from her job at the Bangladesh Medical Studies and Research Institute in May 2013 because of her gender identity. Following JAMAKON's finding of unlawful dismissal, Sohel Rana was compensated for lost salary and reinstated to her former position.<sup>187</sup>



In 2015, the Government of Bangladesh unveiled a series of special measures for *hijras*, including jobs as traffic police officers and loans for members of the community. However, implementation of the job quota scheme has been ineffective and heavily criticised. *Hijras* were required to take physical medical tests and disqualified if they were deemed 'biologically male'.<sup>188</sup>

## 3.4. CRIMINALISATION

In many parts of Asia, including Thailand, Singapore, Cambodia, Nepal and the Philippines, public nuisance, vagrancy or related laws have been used to harass transgender women arbitrarily. In addition, in Indonesia and Malaysia, religious police have authority under religious laws to arrest transgender people under similar provisions.<sup>189</sup> Further, in Malaysia, arrests can also be made under state-level shari'a laws that only apply to Muslims.

The Cambodia Center for Human Rights has documented police extortion of transgender people under the authority of the Village and Commune Safety Policy 2011. There is no guidance for law enforcers or the public about appropriate use of this executive edict from the Ministry of Interior.<sup>190</sup>

Transgender women who have sex with men may still be detained and prosecuted under laws criminalising homosexuality, even though they identify as women. In countries where sex work is criminalised, transgender women are frequently targeted under these provisions.

Laws prohibiting cross-dressing still exist in some countries in the Asia Pacific region. Some have provisions against 'female impersonation' and a minority also prohibit 'male impersonation', including in some states in Malaysia. In other parts of the region there have been recent successes in challenging such laws. In the Pacific, Samoa repealed its cross-dressing provision in March 2013.<sup>191</sup> In November 2014, the Court of Appeal of Malaysia declared that cross-dressing provisions in the shari'a law of Negeri Sembilan state were unconstitutional.<sup>192</sup> The civil society group Justice for Sisters had argued that the provision violated six articles of Malaysia's Constitution, relating to freedom of expression,

186 See [www.nhrc.org.bd/PDF/NHRC%20Manual%20\(English\)%20\(1\).pdf](http://www.nhrc.org.bd/PDF/NHRC%20Manual%20(English)%20(1).pdf).

187 See [www.asia-pacific.undp.org/content/rbap/en/home/ourwork/democratic-governance-and-peacebuilding/successstories/engaging-with-national-human-rights-institutions-key-to-advancin.html](http://www.asia-pacific.undp.org/content/rbap/en/home/ourwork/democratic-governance-and-peacebuilding/successstories/engaging-with-national-human-rights-institutions-key-to-advancin.html).

188 See <http://america.aljazeera.com/articles/2015/7/2/bangladesh-hijras-angry-over-gender-testing-for-government-positions.html>.

189 Human Rights Watch, "I'm Scared to Be a Woman": Human Rights Abuses Against Transgender People in Malaysia, 2014.

190 UNDP and USAID, *Being LGBT in Asia: Cambodia Country Report*, 2014.

191 *Crimes Ordinance Act*, s. 58N.

192 *Syariah Criminal (Negeri Sembilan) Enactment 1992*, s. 66.

non-discrimination, freedom of movement, and the rights to live with dignity, to livelihood and work, and to equality and equal protection of the law.<sup>193</sup> On 8 October 2015, the Federal Court reversed this ruling on procedural grounds, with the result that the shari'a laws prohibiting 'a male person posing as a woman' remain in effect.<sup>194</sup>

In parts of Asia, such as the Philippines, families have made abduction complaints against butch lesbians and transgender men as a way to break up their relationships with women. These charges have been laid under laws to prevent kidnapping, illegal detention and 'crimes against liberty'.<sup>195</sup>

### CASE STUDY: CRIMINALISATION OF TRANSGENDER WOMEN IN MYANMAR

Like other former British colonies in South and South East Asia, Myanmar inherited the Indian Penal Code, including section 377 that severely punishes 'carnal intercourse against the order of nature'. Section 377 is one of the provisions used to arrest transgender women, though convictions are extremely rare. Instead charges may be laid under public nuisance laws and 'after dark' provisions in the Police Act that prevent someone from disguising their face at night.

In July 2013, 12 transgender women and gay men were arrested under allegations of creating a public nuisance on a moat in Mandalay. They were verbally, physically and sexually abused by up to ten police officers. Before being released, the transgender women were forced to sign a statement agreeing to stop dressing as women and visiting this area. Any charges that were laid were under the Police Act provisions. This case was widely publicised through social media and in the report of the UN Special Rapporteur on Myanmar who recommended action by both the NHRI and the government. Despite multiple complaints and an unsuccessful request from the NHRI to the government asking for a response, the charges against the transgender women have not been dropped. No police officers have been held accountable for their actions.<sup>196</sup>

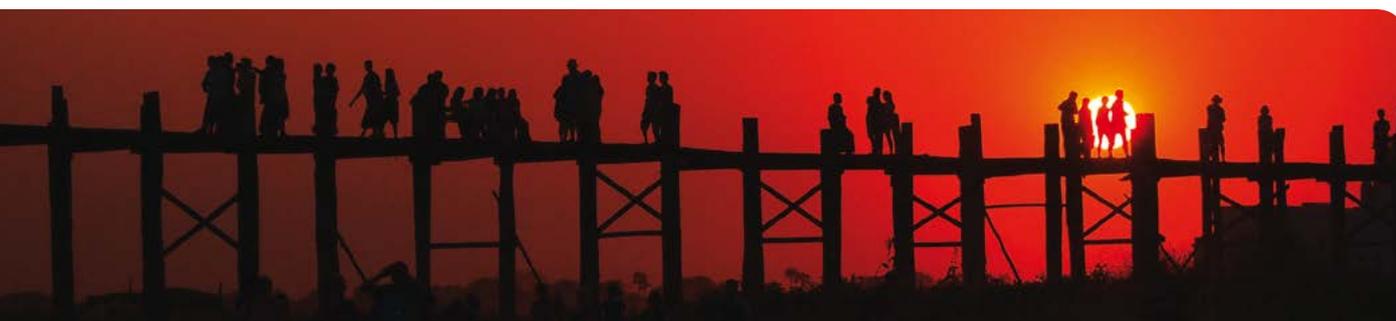


Photo by kudumomo, reproduced under a CC BY 2.0 license.

193 See <https://justiceforsisters.wordpress.com/2015/07/31/apakah-peruntukan-perlembagan-yang-dilanggar-oleh-seksyen-66-negeri-sembilan-1992-which-provisions-of-the-federal-constitution-are-violated-by-section-66-negeri-sembilan-1992/>.

194 Human Rights Watch, 'Malaysia: Court Ruling Sets Back Transgender Rights', 8 October 2015; at [www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights](http://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights); Justice for Sisters, 'Statement: Appeal at the Federal Court'; at <https://justiceforsisters.wordpress.com/>.

195 International Gay and Lesbian Human Rights Commission (now OutRight Action International), 2014.

196 Colors Rainbow, *Facing 377: Discrimination and Human Rights Abuses Against Transgender, Gay and Bisexual Men in Myanmar*, 2013; cited in D. Sanders, *Myanmar: these gay days*, 2015.

In many parts of the region, police and other State actors have been implicated in violence against transgender people, particularly transgender women. This is common in jurisdictions where cross-dressing or sex work is criminalised. When transgender people are detained under these laws, they are vulnerable to abuse under search and detention policies that do not recognise their gender identity. UN human rights mechanisms have highlighted concerns about violence and abuse against transgender people in detention, particularly transgender women held in male prisons. The New Zealand Human Rights Commission and the Australian Human Rights Commission have each called for detention policies within their respective countries to be reviewed to address transgender people's right to safety and their right to access rehabilitation services and medically necessary hormone therapy.<sup>197</sup> In Hong Kong, the Equal Opportunities Commission supported a qualitative study conducted by the Transgender Resource Centre examining transgender people's experiences with security services, including the Police Force, Immigration Department and the Correctional Services Department.<sup>198</sup>

## 3.5. GENDER RECOGNITION

### 3.5.1. Importance of gender recognition

The importance of legal gender recognition is often not easily understood by people who are not transgender. Most people do not have to worry about whether identification documents include sex or gender details and whether it is possible for those details to be changed. However, this issue has a significant impact on the daily lives of transgender people.

Having the correct name and sex or gender identity on official documents is a basic necessity. It is required for transgender people to be recognised as a person before the law.<sup>199</sup>

Transgender people are vulnerable to human rights violations when their name and sex details on official documents, including identification documents, do not match their gender identity or expression. Violations may occur in these circumstances for a number of reasons, including:

- discrimination and violence when documents disclose that someone is transgender
- denial of services, with transgender people being turned away from both 'women-only or 'men only' facilities
- no access to services appropriate to their gender identity; for example, transgender women being detained in male prisons.

In practical terms, inappropriate identity documents can result in transgender people facing high levels of violence, being excluded from school and being unable to find work, a place to live or any economic means of survival. Identity documents take on an even greater level of significance in times of emergency, such as medical emergencies or natural disasters, or when a person's legal status is questioned, particularly when they cross borders.

At times of natural disasters, transgender people have been excluded from relief camps that are segregated by sex or have not received rations because they could not show identification that matched their gender identity. Others have feared for their safety in sex-segregated washrooms or public baths. These were the experiences of transgender people following floods in Pakistan, the tsunami in India and earthquakes in Japan and Nepal.<sup>200</sup>

197 New Zealand Human Rights Commission, *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People*, 2008; New Zealand Human Rights Commission, *Submission to the Human Rights Committee's 6th periodic review of New Zealand's compliance with the International Covenant on Civil and Political Rights*, February 2016; Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, 2015.

198 Speech by Dr York Y.N. Chow, Chairperson, Hong Kong Equal Opportunities Commission, August 2015.

199 Article 6 of the UDHR and article 16 of the ICCPR.

200 UNDP, *Discussion paper: Transgender Health and Human Rights*, 2013; Heath Policy project et al 2015.

### 3.5.2. No gender recognition provisions

The vast majority of transgender people in the Asia Pacific region are unable to obtain official documents issued with their appropriate name and/or sex, matching their gender identity.

In some countries, there are no laws or policies enabling transgender people to amend identity documents. No country in the Pacific allows a transgender person to change sex details on these documents and only a small number, including Fiji, Niue and Tonga, allow someone to change their name legally. In an April 2014 submission on the new Draft Fiji Constitution, and in a discussion about gender identity and the law at the Attorney-General's 2014 conference in Fiji, the Amithi Fiji Project called for legal gender recognition without any medical requirements.<sup>201</sup>

In South East Asia, Thailand, the Philippines and Malaysia have no gender recognition laws or policies. In a May 2015 report, the UN Special Rapporteur on the right to health recommended that Malaysia:

Legally recognize the gender identity of transgender people and prohibit any discrimination on the basis of gender identity in all areas, including health, education, employment and access to public services.<sup>202</sup>

### 3.5.3. Provisions that require medical steps resulting in sterilisation

In some situations, the process for amending details on official documents may lead to subsequent human rights violations. For example, transgender people may be required to undergo gender reassignment surgeries that result in sterilisation. Sterilisation without full, free and prior informed consent has been described by human rights bodies as an involuntary, coercive and/or forced practice. It violates the right to health, the right to information, the right to privacy, the right to decide on the number and spacing of children, the right to found a family and the right to be free from discrimination.<sup>203</sup>

The UN Special Rapporteur on torture has explicitly noted that “in many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender”.<sup>204</sup> In 2013, the Special Rapporteur recommended that all States outlaw forced or coerced sterilisation in all circumstances and provide special protection to marginalised groups, including transgender people.<sup>205</sup> In a January 2016 report, the Special Rapporteur called on States to “adopt transparent and accessible legal gender recognition procedures and abolish requirements for sterilization and other harmful procedures as preconditions”.<sup>206</sup> Other human rights bodies have also recommended removing any compulsory sterilisation requirements from gender recognition laws.<sup>207</sup>

An April 2014 decision from the Indian Supreme Court, *National Legal Services Authority v. Union of India*, cited the provision in the Yogyakarta Principles that “no one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity”.<sup>208</sup> There is uncertainty about the extent to which the judgement

201 A Valenza, 'Call for Legal Recognition for Trans People in Fiji' 2014 at: <http://ilga.org/call-for-the-legal-recognition-of-trans-people-in-fiji/>.

202 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum, Visit to Malaysia* (19 November – 2 December 2014), 2015, A/HRC/29/33/Add.1 para 111(r).

203 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health Organization, *Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement*, 2014.

204 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2013, A/HRC/22/53.

205 *Ibid.*, paras. 78 and 88.

206 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2016, A/HRC/31/57, para. 72(h).

207 Committee against Torture, *General Comment No. 2: Implementation of Article 2 by states parties*, 2008, CAT/C/GC/2, para. 21; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, 2009, E/C.12/GC/20, para. 32; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: the Netherlands*, 2010, CEDAW/C/NLD/CO/5; Human Rights Commissioner of the Council of Europe, *Gender Identity and Human Rights: Issue Paper*, 2009.

208 *National Legal Services Authority v. Union of India*, WP (Civil) No 604 of 2013 at <http://supremecourtindia.nic.in/outtoday/wc40012.pdf>, referring to Yogyakarta Principles, Principle 3.

guarantees the right to self-identify as male or female or as a third gender, given the role it proposes for Screening Committees in determining whether someone is eligible to receive a transgender identity card.<sup>209</sup> In addition, since the decision, some transgender women and transgender men have been required to show proof of ‘sex reassignment surgery’ before gaining legal gender recognition.<sup>210</sup>

In Indonesia, South Korea, Japan, Singapore, mainland China, Taiwan and Hong Kong, legal gender recognition is only possible after undergoing gender reassignment surgeries and sterilisation. In November 2015, the Vietnamese National Assembly approved a bill to legalise ‘sex change surgery’ and introduce the right to legal gender recognition for transgender people who have undergone such surgery.<sup>211</sup>

In 2010, the Kazakhstan Commissioner for Human Rights was alerted to difficulties faced by transgender people approaching government registry offices to change their sex details on identity documents. Their requests were denied, despite a 2003 Ministry of Health directive allowing individuals to change their legally recognised gender.<sup>212</sup> The Commissioner’s investigation identified contradictory provisions and recommended changes. A 2015 Human Rights Watch report has documented the impact of the government’s policy changes, including their adoption of new guidelines in 2011. It has strongly criticised the additional requirement to undergo hormonal therapy and surgeries, at a time when international human rights standards have increasingly spoken out against forced sterilisation and medical interventions as a pre-condition for legal gender recognition.<sup>213</sup>

As the Yogyakarta Principles note, a person’s self-defined gender identity is an integral part of who they are and is one of the most basic aspects of self-determination, dignity and freedom. No part of the Asia Pacific region, apart from one territory in Australia, has gender recognition laws that fully respect transgender people’s right to recognition before the law.<sup>214</sup>

### 3.5.4. Provisions that discriminate on the grounds of age, marital or family status

Even where court decisions, laws or regulations enable some transgender people to obtain legal gender recognition, these provisions often explicitly exclude other transgender people. For example, provisions in Singapore, South Korea and Japan, exclude those under the age of 20, those who are married and those with children under the age of 20 from amending the sex details on their official identity documents. This means that transgender people who are already married are forced to divorce to gain legal gender recognition. The restrictions are even tighter in some countries. For example, transgender people in China are required to inform direct relatives, live and work in their affirmed gender (even if they face discrimination in doing so) and have no criminal record.

The World Professional Association for Transgender Health bases its policy on identity recognition on the principle of self-determination. This principle underpins best practice laws or decrees in Argentina, Malta, Ireland, Denmark and Colombia.<sup>215</sup> The Association urges governments to adopt simple, accessible

209 D Sanyal and N Mukherjee, *The Supreme Court NALSA Judgement: Where Now? A Brief Critique*, West Bengal National University of Juridical Sciences, May 2015; at <http://orinam.net/content/wp-content/uploads/2015/06/25-sc-nlsa-tg-petition-verdict-gap-analysis-wbnujs-fnl.pdf>.

210 Presentation by the Lawyers Collective, Delhi, at the *Being LGBT in Asia* Regional Dialogue, 27 February 2015, Bangkok, Thailand.

211 This provision is planned to come into effect on 1 January 2017 and will require the drafting of specific provisions enabling a transgender person’s legal status to be changed.

212 Order of the Minister of Health of the Republic of Kazakhstan, 3 June 2003, No. 435 *On the Guidelines of Medical Investigations of People with Gender Identification Disorders*; at [www.shb-info.org/sitebuildercontent/sitebuilderfiles/kazakhstan.pdf](http://www.shb-info.org/sitebuildercontent/sitebuilderfiles/kazakhstan.pdf).

213 Human Rights Watch, *‘That’s When I Realized I Was Nobody’: A Climate of fear for LGBT People in Kazakhstan*, 23 July 2015; at [www.hrw.org/node/279496](http://www.hrw.org/node/279496).

214 Health Policy Project et al, 2015.

215 Argentina, *Ley 26743: Derecho a la identidad de género* [Decree No. 773/12 of Law No. 26743: Right to gender identity]; Malta, *Gender Identity, Gender Expression and Sex Characteristics Act 2015*; Ireland, *Gender Recognition Act 2015*; Denmark, *Motion to Law amending the Law on the Central Office (Assigning new personal number for people who experience themselves as belonging to the other sex)*; Colombia, *Decree 1227 of 2015 “By which adds a section to Decree 1069 of 2015, Regulation of the Justice and Law Sector, related to the procedure to correct the sex component in the Civil Status Registry”*.

administrative procedures, opposes any medical requirements and asserts the rights of married people, parents, transgender youth and those in prison to obtain legal gender recognition.<sup>216</sup>

A small number of jurisdictions in this region, including Australia and Hong Kong, have recognised the right of transgender people who have legally changed their sex to legally marry as that sex. In 2001, the Family Court of Australia ruled that a transgender man who had undergone gender-affirming surgeries was recognised as male and his marriage to a woman was valid. The Australian Human Rights Commission intervened before the Full Court of the Family Court in an appeal by the Attorney-General against that judgement. The Commission highlighted the relevance of the principles of international human rights law in considering the interpretation of the word ‘man’ in the *Marriage Act*. These included guarantees of equality before the law and non-discrimination, the right to privacy and the entitlement of the family to protection by society and the State. The Commission also emphasised that recognition of the inherent dignity and worth of the human person underpins each of these rights. The Full Court upheld the original decision and found the marriage valid.<sup>217</sup>

In 2013, Hong Kong’s Court of Final Appeal, in *W v. Registrar of Marriages*, allowed a transgender woman who had undergone ‘sex reassignment surgery’ to marry her male partner. A High Level Roundtable on Gender Identity, Rights and the Law, held in Hong Kong on 2 October 2014, called for progressive gender recognition legislation in line with international and regional human rights.<sup>218</sup>

When marriage equality was introduced in New Zealand in 2013, amendments to the *Marriage Act* clarified that transgender people’s legal sex has no bearing on whether or not they can marry. Marriage is now defined in the Act as “the union of two people, regardless of their sex, sexual orientation, or gender identity”.<sup>219</sup>

### 3.5.5. Recognition of third gender options

The April 2014 decision from the Indian Supreme Court recognises a third gender option, specifically for *hijra*, and also stipulates that all transgender people have the “right to decide their self-identified gender ... such as male, female or a third gender”. This is also the approach in passport policies in Australia and New Zealand and for birth certificates in one Australian jurisdiction.<sup>220</sup>

Three other South Asian countries – Bangladesh, Nepal and Pakistan – have recognised the specific status of *hijras*, *metis*, *khwaja sira* and other transgender people who identify as a third gender. However, implementation has typically been very slow. There are continuing issues across the region about ways to legally recognise and protect the rights of those who identify as third gender, while also providing the choice for transgender women to identify as female and transgender men to identify as male.

216 ‘WPATH Statement on Legal Recognition of Gender Identity’, 19 January 2015 at [www.wpath.org/uploaded\\_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf](http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf).

217 *Re Kevin (Validity of Marriage of a Transsexual)* [2001] FamCA 1074 and [2003] FamCA 94 at [www.austlii.edu.au/au/cases/cth/family\\_ct/2003/94.html](http://www.austlii.edu.au/au/cases/cth/family_ct/2003/94.html).

218 Global Commission on HIV and the Law, ‘High-level Roundtable on Gender Identity, Rights and the Law’, 2 October 2014; at <http://hivlawcommission.org/index.php/follow-up-stories/377-high-level-roundtable-on-gender-identity-rights-and-the-law>. This vote reflected opposition both from those wanting more progressive laws and those who rejected any legal recognition of a transgender person’s marriage.

219 *Marriage (Definition of Marriage) Amendment Act 2013*. At the same time, section 30(2) of the *Births, Deaths, Marriages and Relationships Registration Act 1995* was deleted. This had excluded someone who was married from amending the sex details on their birth certificate, as this would have changed the marriage to a same-sex marriage.

220 Open Society Foundations, *License to Be Yourself: Laws and advocacy for legal gender recognition of trans people*, 2014.

### 3.5.6. Examples of positive action by NHRIs

#### CASE STUDY: CHANGING BIRTH CERTIFICATE DETAILS FOR TRANSGENDER PEOPLE

In March 2015, the **Human Rights Commission of Sri Lanka** received a complaint from a transgender person facing administrative difficulties trying to change details on their birth certificate, national identity card and passport.<sup>221</sup> The complainant had faced discriminatory comments and was harassed throughout the application process.

In Sri Lanka, the Registrar General's Office requires a transgender person to submit a letter from a parent or guardian consenting to a change of gender and documentary evidence from a surgeon of the transgender person's clinical diagnosis and genital reconstruction surgery. It is not currently possible to have such surgeries in Sri Lanka and most people cannot afford to travel overseas for these procedures.

After it received the complaint, the Commission held discussions with civil society groups (Heart to Heart and Equal Grounds) on 22 May 2015 to identify their concerns in relation to transgender people's rights to identity, non-discrimination and dignity. In June 2015 the Commission met with government officials and other concerned individuals to identify and address administrative and medical issues arising from applications by transgender people to change their name and gender on official documents. During the meeting, government officials agreed to develop policy guidelines based on internationally-accepted standards related to gender certification.

The Commission has made recommendations to the Sri Lankan Government to resolve the complaint and ensure respect for the rights of transgender people, including through legislative changes. Specifically, the Commission has developed a proposed gender certificate based on expert local and international guidance, including from the World Professional Association for Transgender Health. The Commission has submitted this gender certificate to the government and recommended that it be officially recognised and that psychiatrists working with transgender people are informed through an official circular.

Given the primary role of birth certificates as an identity document in Sri Lanka, the Commission is planning to conduct training and awareness programs on the rights of transgender people. It is hoped that with increased awareness and improvements in laws, regulations and social perspectives, there will be significant improvements in the lives of transgender people in Sri Lanka.<sup>222</sup>



At the *Being LGBT in Asia* regional dialogue in February 2015, the Philippines Commission on Human Rights indicated that it would support a case under the women's equality law, known as the Magna Carta of Women, to clarify whether transgender women are able to change sex details on their birth certificate.<sup>223</sup>

221 Complaint HRC/1139/15/L-10.

222 Original material available at <http://hrctl.lk/english/2015/06/19/hrctl-intervenes-to-protect-transgender-victims/>; subsequently updated by the Human Rights Commission of Sri Lanka.

223 This was identified as a potential alternative legal avenue after a 2007 Supreme Court decision that removed the right previously held by transgender people to apply to the Regional Trial Court for gender recognition.

Both the Australian Human Rights Commission and the New Zealand Human Rights Commission have undertaken inquiries into legal gender recognition and recommended changes to existing provisions to better reflect international human rights standards for gender recognition. In Australia, this includes recommending that a self-identifying legal declaration, such as a statutory declaration, is sufficient proof to change a person's gender on government records and identity documents. In both countries, this work has influenced policy changes that introduced, or widened access to, third gender options on official identity documents.<sup>224</sup> Both NHRIs have also supported or intervened in cases before the courts to clarify access to legal gender recognition for transgender people.<sup>225</sup>



Photo by Rebecca Swan.

224 In response to the Australian Human Rights Commission's work on legal gender recognition, the Australian Government implemented *Guidelines on the Recognition of Sex and Gender* which clarified evidence requirements for changing sex details to male, female or a third non-binary option: [www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx](http://www.ag.gov.au/Publications/Pages/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.aspx). In response to recommendations from the New Zealand Human Rights Commission's *Inquiry into Discrimination experienced by Transgender People*, New Zealand passport and driver licence policies were revised to enable people to choose between a male, female or non-binary 'X' option on those documents through a simple statutory declaration process.

225 In *AB v Western Australia*, the Australian Human Rights Commission was granted leave to intervene in High Court proceedings when two transgender men who had undergone chest reconstruction and hormone treatment, but not surgery to their reproductive organs or genitals, applied for gender recognition certificates. The Commission's submission cited the right to recognition as a person before the law under articles 16 and 17 of the ICCPR, as understood by the Yogyakarta Principles. The New Zealand Human Rights Commission supported the extension of access to gender recognition for New Zealand citizens and permanent residents born overseas. Subsequently this was enacted as an amendment to the *Births, Deaths, Marriages and Relationships Registration Act 1995*.

## 3.6. ACCESS TO GENDER-AFFIRMING HEALTH SERVICES

### 3.6.1. Human rights standards

The right to the highest attainable standard of health requires that health services are available, accessible, acceptable and of quality. This means that all people, including transgender people, are entitled to be treated with respect and dignity, free from discrimination, when accessing health services.<sup>226</sup> The need for gender-affirming health services has been specifically addressed by international and regional human rights and health professional bodies. However, transgender people worldwide experience substantial health disparities and barriers in accessing appropriate health services.<sup>227</sup> In the Asia Pacific region, these gaps have been documented in a series of reports commissioned by UN agencies.<sup>228</sup>

### 3.6.2. Terminology

The term ‘gender-affirming health services’ covers the full range of procedures a transgender person may require in order to medically transition. It is much broader than commonly known terms such as ‘sex reassignment surgery’ or ‘sex change operation’. Sex reassignment surgery describes the surgeries that transgender people undergo to change their genitals to better match their gender identity. This only focuses on one potential medical intervention that a minority of transgender people in this region are able to access.

‘Gender-affirming *health services*’ is a broader term that recognises that there are many health interventions that can affirm a transgender person’s identity. These include, for example, counselling and peer support, hormone therapy, hair removal, chest or breast reconstruction surgeries and surgeries to modify other parts of the body, including genitals.

One of the unfortunate impacts of the term ‘sex change operation’ is that it takes the focus away from the many other practical ways that mainstream health services can meet better the needs of transgender people. First and foremost, this is by listening to transgender people and understanding their health needs and then following ethical and professional standards to provide them with access to the highest attainable standard of health.

### 3.6.3. Medically necessary treatment

International and national health professional bodies working with transgender people have consistently recognised that gender-affirming health interventions are medically necessary for many transgender people.<sup>229</sup>

The immediate priorities for many transgender people are to have medical interventions that change their outward appearance so they can get on with their lives. This typically involves reversing the masculinising or feminising impacts of naturally occurring hormones in their body by blocking these hormones and replacing them with cross-sex hormone therapy. However, hormones alone will not remove a transgender woman’s facial or body hair or change her voice.

226 Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health* (Article 12 of the Covenant), 2000, E/C.12/2000/4; Committee on the Rights of the Child, *General Comment No. 15: The rights of the child to the highest attainable standard of health*, 2013, CRC/C/GC/15; Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the ICESCR), 2009, E/C.12/GC/20; Committee on the Elimination of Discrimination against Women, *General Recommendation 28: Core obligations of States Parties under Article 2 of the CEDAW*, 2010, CEDAW/C/20107477GC.2.

227 World Health Organisation, *Sexual health, human rights and the law*, 2015.

228 For example, S. Winter, 2012; World Health Organization, *Regional Assessment of HIV, STI and other Health Needs of Transgender People in Asia and the Pacific*, 2013; Health Policy Project et al, 2015.

229 E. Coleman, W. Bockting, M. Botzer, P. Cohen-Kettenis, G. DeCuypere, J. Feldman and K. Zucker, *Standards of care for the health of transsexual, transgender, and gender nonconforming people*, 2011; World Professional Association for Transgender Health, *WPATH clarification on medical necessity of treatment, sex reassignment, and insurance coverage in the USA*, 2008.

Permanent hair removal is frequently a high priority for transgender women, as having coarse facial hair or stubble can be a significant barrier to being recognised as female.<sup>230</sup>

For transgender men, the most common surgery is a mastectomy and chest reconstruction to create a male chest. When transgender men do not have access to this surgery, often they tightly bind their chest to create a flatter contour. In some circumstances, this can result in breathing difficulties, back pain, skin conditions or, less commonly, rib fractures.

### 3.6.4. Regional situation

In the Asia Pacific region, public health systems or private health insurance cover medical transition costs only in Hong Kong, mainland China, parts of India (particularly for *hijras*, *aravani* and *thirunagai*), to a certain extent in Australia and to a very minimal extent in New Zealand. Most transgender people in the region have to pay to access counselling, diagnosis assessment, laboratory tests, hormone treatment, hair removal, surgeries and other treatments.

Self-medication of hormones is common among transgender women in the region, including in the Philippines, Laos, Thailand, Malaysia, China and Nepal. This means they have no prior medical advice in relation to monitoring of doses and potential side effects. In the Pacific, there is often no access to specialist advice and the most commonly used hormones are oral contraceptive pills that are not ideal for transgender women. There is no access to hormones for transgender men in the Pacific.

When they are denied access to existing services or when those services are not available, transgender people are at the mercy of unregulated and potentially unqualified practitioners. Transgender women who cannot obtain hormones or afford surgeries may view injections of silicone and other soft tissue fillers as their only accessible form of body modification. These practices are very dangerous and potentially fatal.

Castration has been the most common surgery for *hijras* in South Asia. It is associated with indigenous rituals and is referred to as *nirvani*. Until recently, it was largely performed outside the formal medical sector and resulted in deaths or serious complications. As a result, in India the *hijra* community is increasingly approaching health professionals to perform the *nirvani* surgery in private clinics and some operations take place in public healthcare settings.<sup>231</sup>

There is very limited research about the health experiences of transgender men in the region. The information that does exist suggests that many have no information about gender-affirming health services and that they may not have the same access as transgender women to peers who can help fill 'information gaps'.

Transgender people are frequently not treated with dignity and respect when they approach health services. Furthermore, health professionals do not have the necessary information and training to assess and respond to the health needs of transgender people. The Asia and Pacific Trans Health Blueprint, published in October 2015, helps to address some of these information gaps and promote good practice.<sup>232</sup>

There are no health professionals specialising in transgender health in the Pacific and limited expertise is available in some parts of Asia. Yet hormone treatment and some surgeries required by transgender people are available for other medical conditions. These means that some transgender health needs could be mainstreamed within other health services. Denying medically necessary treatment to transgender people, when it is available to other population groups, leaves health providers open to potential claims of unlawful discrimination.

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230 Plucking hair with tweezers or traditional implements, such as *chimta* in India, only temporarily removes hair.

231 Health Policy Project et al, 2015, p. 54.

232 Health Policy Project et al 2015.

**BEING LGBT IN ASIA**

The nurses refused to give me injections.  
When I was in hospital for my hysterectomy, after the operation,  
staff and male nurses took off my clothes and looked to see  
what my genitals were. At the time, I was unconscious.  
Some doctors also refused to give me treatments.

Sri Lanka

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Thoughts and stories of being Being LGBTI by Being LGBTI in Asia.

In India, both the April 2014 Supreme Court decision and a proposed Rights of Transgender Persons Bill have prioritised access to gender-affirming health services. This reflects similar good practice in other regions, for example in Argentina and Malta, where comprehensive law reform has addressed gender recognition, protection from discrimination and the right to health.<sup>233</sup>



233 Argentina, *Ley 26743: Derecho a la identidad de género* [Decree No. 773/12 of Law No. 26743: Right to gender identity]. An English-language translation of this Act is available at <https://globaltransaction.files.wordpress.com/2012/05/argentina-gender-identity-law.pdf>. Malta, *Gender Identity, Gender Expression and Sex Characteristics Act 2015*.

### KEY POINTS: CHAPTER 3

- Transgender men, transgender women and those who identify as a third gender or as non-binary exist in all parts of the Asia Pacific region.
- Direct and indirect discrimination affects transgender people in all aspects of their private and public lives and leads to social exclusion. This includes systemic bullying of transgender and gender diverse students at school and discrimination at all stages of the employment cycle.
- Transgender women continue to be criminalised under laws that prohibit cross-dressing and are frequently targeted by laws criminalising homosexuality, even though they are not gay men. Public nuisance and vagrancy laws and criminalisation of sex work also disproportionately affect transgender women.
- Transphobic violence is a form of gender-based violence directed against transgender people. The majority of transgender people killed because of their gender identity are transgender women. There is emerging evidence of high levels of sexual and physical violence against transgender men within their families or in intimate relationships.
- Legal gender recognition is a fundamental civil and political right that is necessary to realise other rights. Having the correct name and sex or gender identity on official documents enables transgender people to be recognised as a person before the law and to have legal protection.
- Gender-affirming health services are medically necessary for many transgender people and are a component of the right to the highest attainable standard of health.



# Chapter 4: Being intersex in Asia and the Pacific

## KEY QUESTIONS

- Are there many intersex people in the Asia Pacific region?
- Is intersex people's right to physical integrity protected adequately?
- Can 'sex-normalising' surgeries and hormone treatment on intersex infants and children be justified as necessary to protect them from discrimination?
- Are intersex infants and children protected under current laws against female genital mutilation?
- What forms of discrimination do intersex people experience?
- Are intersex people legally recognised and protected?
- What remedies and redress should be available for the human rights issues that intersex people face?



## 4.1. INTRODUCTION

Intersex is an umbrella term that describes a wide range of natural bodily variations.<sup>234</sup> What these intersex variations have in common is that a person's physical, hormonal or genetic features do not fit stereotypical notions for male or female bodies. They are naturally occurring variations in humans and are not a medical condition.<sup>235</sup>

Some intersex variations are visible before birth or from birth, including those that are genetic or that can result in ambiguous genitalia. Two of the more common examples are congenital adrenal hyperplasia and androgen insensitivity syndrome. Some other intersex traits are not detected until later in life; for example, when a child does not progress through puberty in the usual manner.<sup>236</sup> A person may not be aware of being intersex until they have a chromosome test or face fertility difficulties. Even then, they may not make a connection between these medical experiences and the term 'intersex' or see themselves as part of an 'intersex community'.

Between 0.05% and 1.7% of the world's population is born with an intersex trait. The lower end of the range relates to where an infant's sex characteristics are ambiguous enough at birth to become the subject of specialist medical attention. The higher end of the range is based on research that includes a wider range of intersex variations.<sup>237</sup> This range is widely accepted, including by human rights bodies.<sup>238</sup>

234 See Chapter 1.

235 Council of Europe Parliamentary Assembly, *Children's right to physical integrity*, 6 September 2013, Doc. 13297; European Union Agency for Fundamental Rights, *The fundamental rights situation of intersex people*, Focus, 04/2015.

236 Department of Health and Human Services, *Decision-making principles for the care of infants, children and adolescents with intersex conditions*, February 2013.

237 M. Blackless, A. Charuvastra, A. Derryck, A. Fausto-Sterling, K. Lauzanne and E. Lee, 'How sexually dimorphic are we? Review and synthesis' in *American Journal of Human Biology: The Official Journal of the Human Biology Council*, 12 (2): 151–166 2000.

238 Commissioner for Human Rights of the Council of Europe, *Human rights and intersex people: Issue Paper*, April 2015; at [www.unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](http://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf).

Based on the higher estimate, there are as many intersex people in the world as people with red hair or people with green eyes.

## 4.2. HUMAN RIGHTS ISSUES

**All human beings are born equal in dignity and rights. Those foundational, bedrock principles of universality and equality mean that all of us, without exception, and regardless of our sex characteristics, are equally entitled to the protections of international human rights law. Unfortunately, the myth that all human beings belong to one of two distinct and separate sexes is deep-rooted, and it contributes to the stigma, and even taboo, attached to being intersex. This is linked to ... very serious human rights violations ... They include ... infanticides of intersex babies; and widespread and life-long discrimination, including in education, employment, health, sports [and] accessing public services ...**

*Zeid Ra'ad Al Hussein, High Commissioner for Human Rights*<sup>239</sup>

At an expert meeting on ending human rights violations against intersex persons held in September 2015, the High Commissioner for Human Rights reflected a more sustained focus on intersex human rights issues within the international human rights mechanisms and UN agencies. His comments also demonstrated the evolution of terms being used to describe discrimination against intersex people. Following on from the April 2014 Malta law, the High Commissioner identified 'sex characteristics' as a prohibited ground of discrimination. This terminology has subsequently been used by the Committee on the Rights of the Child.<sup>240</sup>

### 4.2.1. Invisibility, secrecy and shame

There is typically very limited knowledge and experience, including within NHRIs, of human rights violations against intersex people. In his 2015 statement, the High Commissioner for Human Rights spoke about this relative invisibility, highlighted the seriousness of the human rights issues that intersex people face and called for their bodily diversity to be protected and celebrated:

When I started as High Commissioner a year ago, I knew little about intersex people. I don't think I was alone in this: it reflects a general lack of awareness. Too many people assume, without really thinking about it, that everyone can be fitted into two distinct and mutually exclusive categories: male or female. But in fact, human beings – like most living beings – are more diverse and complex than that. Our diversity – the differences between our experiences and perspectives, as well as the shapes of our bodies – is something that we should celebrate and protect, in all its forms.<sup>241</sup>

Intersex people's experiences of bodily diversity are commonly shrouded in secrecy and shame, due to societal norms and medical practice that treat physical diversity as an abnormality to be fixed. This silence has enabled human rights violations to continue unchecked and has left intersex adults with little or no support for ongoing physical and mental suffering.<sup>242</sup>

239 Opening remarks by High Commissioner for Human Rights at the *Expert meeting on ending human rights violations against intersex persons*, 16 September 2015, Geneva; at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E).

240 Committee on the Rights of the Child, 2015, CRC/C/CHL/CO/4-5, para. 25.

241 Opening remarks by High Commissioner for Human Rights at the *Expert meeting on ending human rights violations against intersex persons*, 16 September 2015, Geneva.

242 OHCHR, *Fact Sheet: Intersex*, 2015.

[In China], information and research on intersexuality is even less available than it is for other LGBT groups. However, while the visibility of intersex people is improving, their public image remains negative. Reports about intersex infants and children in the media are still commonly linked to family shame and the need to perform gender normative surgeries. These reports often use a sensational tone . . . Moreover, as the parents retain ultimate rights on the determination of their children's sex, the voice of intersex children is rarely heard.<sup>243</sup>

However, intersex activists in the Asia Pacific region are part of a small but growing international movement that is challenging the silence. They have participated in the three International Intersex Forums held between 2011 and 2013. The December 2013 statement from the third forum in Malta sets out a comprehensive list of human rights demands “aiming to end discrimination against intersex people and to ensure the right of bodily integrity, physical autonomy and self-determination”.<sup>244</sup> Intersex people from Taiwan and Australia were part of the first United Nations expert meeting convened by OHCHR in Geneva in September 2015.<sup>245</sup> A month later, intersex groups based in Taiwan, Hong Kong, Australia and New Zealand were among the inaugural recipients of grants from the Astraea Intersex Human Rights Fund.<sup>246</sup> That same month saw the first gathering of intersex activists from across Asia at the 2015 ILGA Asia conference in Taipei.<sup>247</sup> With the support of UNDP's *Being LGBTI in Asia* Programme and the Multi-Country South Asia Global Fund HIV Programme, one of the participants at that meeting hosted Nepal's first national intersex workshop in January 2016. The National Human Rights Commission of Nepal and UN agencies also attended the second day of the workshop.

#### 4.2.2. Intersex people and human rights

International human rights standards apply to all people, including intersex people. There has been slow progress from human rights bodies in articulating the specific human rights issues that intersex people face. At first these were seen as coming under a broad definition of gender identity. This has now developed more properly into recognition of either ‘intersex status’ or ‘sex characteristics’ as a prohibited ground of discrimination, distinct from gender identity.

The key human rights issues now more widely understood to impact on the lives of intersex people, including in this region, are:

- the right to physical integrity, and the associated rights to freedom from torture and ill-treatment and to live free from harmful practices
- equality and freedom from discrimination
- recognition before the law
- effective remedies and redress.<sup>248</sup>

For this manual, attempts have been made to collate available information from the Asia Pacific region about intersex people and the human rights issues they face. No information was identified about experiences in Pacific Island States. To date, only a very small number of NHRIs in the region have worked on intersex human rights issues. Therefore, this chapter draws more heavily than others on the experiences of Australia and New Zealand, where intersex NGOs have a longer history and NHRIs have started to work on the issues they have raised.

243 UNDP and USAID, *Being LGBT in Asia: China Country Report*, 2014; pp. 28-29.

244 Public statement by the Third International Intersex Forum, 1 December 2013; at <https://oii.org.au/24241/public-statement-by-the-third-international-intersex-forum/> (English) and at [www.oii.tw/Home/3rd-is-forum-statement](http://www.oii.tw/Home/3rd-is-forum-statement) (Chinese).

245 The International Intersex Forums were held in Brussels in September 2011, Stockholm in December 2012 and Malta in November /December 2013. Hiker Chiu from Taiwan, founder of Oii-Chinese, a platform for Chinese-speaking intersex people, was the only intersex person from Asia at the first two fora.

246 See <http://astraeaintersexfund.tumblr.com/>.

247 See <http://intersexday.org/en/ilga-asia-2015/>.

248 OHCHR, *Fact Sheet: Intersex*, 2015; Commissioner for Human Rights of the Council of Europe, *Human rights and intersex people: Issue Paper*, April 2015.

### 4.3. THE RIGHT TO PHYSICAL INTEGRITY

In all parts of the world, it is common to perform surgeries and other medical treatments on intersex children that aim to make their appearance conform to narrow binary sex stereotypes of male or female bodies.<sup>249</sup> UN experts have criticised cosmetic and other medically unnecessary surgeries on children's genitals and other reproductive organs that occur without the child's views being considered.<sup>250</sup> A 2014 statement from seven UN agencies, including OHCHR and the World Health Organization, highlighted that these so-called 'sex-normalising' procedures have irreversible, lifelong physical and mental health consequences.<sup>251</sup> They can cause 'permanent infertility, pain, incontinence, loss of sexual sensation and ongoing mental suffering, including depression'.<sup>252</sup>

In many instances, surgeries and other medical interventions are performed while an intersex person is too young to be part of the decision-making process. They may be proposed on the basis of weak evidence and parents themselves may have insufficient information or access to alternative options.<sup>253</sup> For example, it is very uncommon for parents to have contact with intersex adults and their families or to have access to positive portrayals of bodily diversity.

In a 2009 report on informed consent, the Special Rapporteur on the right to health called on health care providers to "strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide informed consent".<sup>254</sup> The Special Rapporteur noted that "[surgery on children] is particularly problematic in the case of intersex genital surgery, which is a painful and high-risk procedure with no proven medical benefits", citing decisions from the Colombian Constitutional Court.<sup>255</sup>

In 2013 the Special Rapporteur on torture examined forms of abuse in health care settings that may cross a threshold of mistreatment that "is tantamount to torture or cruel, inhumane or degrading treatment or punishment".<sup>256</sup> He identified intersex people as a marginalised group and criticised non-consensual, medically unnecessary and irreversible surgeries performed on intersex infants and children. The Special Rapporteur called on all States to "repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery... when enforced or administered without the free and informed consent of the person concerned [and] to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups".<sup>257</sup>

249 The routine practice of performing these surgeries or medical interventions on an intersex person's body contrasts with the resistance from some clinicians to enabling any form of medical transition for transgender people. In part this demonstrates the mistaken, contrasting beliefs that intersex bodies are unhealthy or abnormal and should be 'fixed' but that transgender people who transition are 'mutilating' a healthy body. Both views have been criticised severely by ethicists, health professionals and human rights bodies.

250 OHCHR, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 2011, A/HRC/19/41, para. 57; OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization, An Interagency Statement*, 2014; Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 2015, CRC/C/CHE/CO/2-4; Committee against Torture, *Concluding Observations: Germany*, CAT/C/DEU/CO/5; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2013, A/HRC/22/53; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 2009, A/64/272.

251 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization, An Interagency Statement*, 2014. See also World Health Organization, *Sexual health, human rights and the law*, 2015.

252 OHCHR, *Fact Sheet: Intersex*, 2015.

253 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization, An Interagency Statement*, 2014; M. Cabral and M. Carpenter, *Intersex Issues in the International Classification of Diseases: A Revision*, introductory response to the interagency statement prepared by participants at the September 2014 GATE International Initiative on the ICD Reform Process; at [http://transactivists.org/?attachment\\_id=652](http://transactivists.org/?attachment_id=652).

254 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 2009, A/64/272.

255 Colombian Constitutional Court, *Sentencia SU-337/99* and *Sentencia T-551/99*.

256 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2013, A/HRC/22/53.

257 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2013, A/HRC/22/53, para. 88.

A May 2015 statement from the UN and other international human rights experts, including the Committee on the Rights of the Child, noted that these surgeries and treatment “may constitute torture or ill-treatment”.<sup>258</sup> This was reiterated in a July 2015 report by the Special Rapporteur on the right to health.<sup>259</sup>

#### 4.3.1. Evidence in this region

There is limited information available about the human rights issues experienced by intersex people in the Asia Pacific region. Evidence of the continued use of so-called ‘sex-normalising’ surgeries and other medical interventions has been identified through reports from Indonesia, China, Viet Nam, Hong Kong, Thailand, Australia and New Zealand.<sup>260</sup> There is no material identifying any countries in this region where the prevailing medical approach is to prohibit or discourage such practices.

In 2013, an Australian Senate Committee carried out an official inquiry into the involuntary or coerced sterilisation of intersex people. It concluded that ‘sex-assignment surgery’ is still occurring in infancy and childhood and that “normalising appearance goes hand in hand with the stigmatisation of difference”. The Committee stressed that any decision-making around medical treatment of intersex children must take human rights considerations into account.<sup>261</sup>

Surgeries and hormonal interventions to ‘normalise’ intersex bodies currently take place on a routine basis in Australia, such as when girls’ clitorises are deemed too big, or when boys are unable to stand to urinate.<sup>262</sup>

258 Joint statement by a group of United Nations and international human rights experts on the occasion of the International Day against Homophobia, Biphobia and Transphobia, ‘Discriminated and made vulnerable: young LGBT and intersex people need recognition and protection of their rights’, 13 May 2015; at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E).

259 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 2015, A/70/213 paras 84-85.

260 UNDP and USAID, *Being LGBT in Asia: Indonesia Country Report*, 2014; UNDP and USAID, *Being LGBT in Asia: China Country Report*, 2014; UNDP and USAID, *Being LGBT in Asia: Viet Nam Country Report*, 2014; Small Luk, *Intersex Report from Hong Kong*, produced for the *Being LGBT in Asia Regional Dialogue*, February 2015; New Zealand Human Rights Commission’s Intersex Roundtables; Australian Senate, Community Affairs References Committee, *Involuntary or Coerced Sterilisation of Intersex People in Australia*, October 2013; personal communication with Nada Chaiyajit, Thailand, 15 September 2015.

261 Australian Senate, Community Affairs References Committee, *Involuntary or Coerced Sterilisation of Intersex People in Australia*, October 2013, paras. 3.45 and 3.128, pp. 49 and 74.

262 M. Carpenter, ‘Intersex rights and freedoms’ in *Court of Conscience*, *University of New South Wales Law Society Journal*, Issue 9, 2015, pp. 27-33.

It is reportedly common for so-called ‘sex-normalising’ surgeries to be performed on intersex infants and children in China. The exceptions are usually in remote and poor areas where health care resources are scarce and families cannot afford medical costs. These families face barriers accessing the health care that their child may need, including support to deal with discrimination from family members, medical workers or the broader community.<sup>263</sup> In November 2015, the Committee against Torture raised concerns about involuntary, irreversible surgeries on intersex children in its review of China (including Hong Kong and Macau).<sup>264</sup>

In some parts of the region, religious authorities play a role in influencing parents’ attitudes to bodily diversity and decisions about surgeries on intersex infants. In Indonesia, babies born with visibly ambiguous genitals at major hospitals often undergo ‘normalising’ surgeries if parents can afford the cost. Parents frequently make these decisions based on advice from religious authorities.<sup>265</sup>

There are significant gaps in knowledge about practices in other parts of the region. However, there is no evidence to suggest that intersex people’s right to physical integrity is protected explicitly in domestic laws, regulations or practice guidelines in any country in Asia and the Pacific. On the contrary, laws and policies that prohibit female genital mutilation may give explicit permission for genital surgeries to ‘normalise’ the bodies of intersex infants and children.<sup>266</sup>

In Viet Nam, a 2008 decree on sex reassignment provides an insight into how intersex people and their bodies are perceived. The decree legalised sex reassignment surgeries for people with ‘congenital sex deficits’ or whose sex cannot be determined as male or female (based on chromosome analysis or the appearance of the genitals).<sup>267</sup> It encouraged surgeries for intersex people at “the earliest age”.<sup>268</sup> Parents make written requests for surgeries for any child under the age of 16. The *Law on Child Protection, Care and Education* includes no mention of intersex children or protection against surgeries.<sup>269</sup> Decisions about a person’s sex and the required treatment rest with medical practitioners and are based on their assessment of how the intersex person “may best integrate with the society psychologically, physiologically and socially”.<sup>270</sup>

On 24 November 2015, the National Assembly of Viet Nam passed a new *Civil Code* that will come into effect on 1 January 2017. It includes the right of people to reassign their sex if they have a “sex disability or their sex is not defined and requires medical intervention”.<sup>271</sup> This provision reinforces perceptions that intersex people have a disability and continues to enable involuntary surgeries on intersex infants.

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263 UNDP and USAID, *Being LGBT in Asia: China Country Report*, 2014, p. 29.

264 Committee against Torture. ‘Committee against Torture considers report of China’, 18 November 2015; media report at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16774&LangID](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16774&LangID). The Committee’s concluding observations were published in December 2015.

265 UNDP and USAID, *Being LGBT in Asia: Indonesia Country Report*, 2014, p. 21.

266 Examples include exceptions in section 5.1.37 of Australia’s *Criminal Code*, Division 9 – Female Genital Mutilation, and in section 204A of New Zealand’s *Crimes Act 1961*.

267 Government of Viet Nam, *Decree No. 88/2008/ND-CP of August 5, 2008, on Sex Reassignment*, article 1; at <http://kenfoxlaw.com/resources/legal-documents/governmental-decrees/2547-vbpl.html>.

268 Ibid, article 9(3)(b).

269 UNDP and USAID, *Being LGBT in Asia: Viet Nam Country Report*, 2014, p. 21.

270 Government of Viet Nam, *Decree No. 88/2008/ND-CP of August 5, 2008, on Sex Reassignment*, article 9(3)(a).

271 *Civil Code*, article 36 (1). Article 37 removes the legal ban on ‘sex change surgery’ and enables legal gender recognition for people who have undergone such surgeries.

### 4.3.2. Psycho-social rationales

Psycho-social rationales are frequently used to inappropriately justify surgeries and other medical interventions on intersex children. These rationales equate intersex traits and other people's negative reactions to those traits as a psycho-social risk.<sup>272</sup> Examples of these psycho-social risks include:

- the risk of social or cultural disadvantage to the child; for example, reduced opportunities for marriage or intimate relationships or reduced opportunity for meaningful employment and capacity to earn an income
- the risk of social isolation, restrictions or difficulties; for example, caused by embarrassment or social stigma associated with having genitalia that does not match the gender in which the person lives.<sup>273</sup>

Other clinicians have critiqued such an approach, noting that the central challenge is “finding a way to help families (and healthcare professionals) overcome the shame and anxious secrecy that may shape minds and force hands in ways that ultimately harm all involved”.<sup>274</sup>

Pressure to perform medical interventions based on a fear of social stigma, including rejection from parents, raises significant human rights concerns and is not in the best interests of the child. An intersex child may grow up and reject their assigned sex. The implications of such a decision are much greater if the child has undergone medically unnecessary surgeries or hormone treatment. Examples from intersex people in this region demonstrate the power of psycho-social rationales in justifying so-called ‘sex-normalising’ procedures.

**My parent and doctors told me I am a boy, a boy [who] had an illness, a boy [who] will never marry and will never have children! I listened, I believed! It is very very important, I must [be] a boy in the Chinese family system. My parent make the decision [for] the benefit of the family ... The doctors gave me the surgeries since 8 years old ... I have done over 15 ... operations till 13 years old, but [all] failed ... I rejected go[ing] to hospital when I was 14, because I couldn't tolerate the painful experience [any]more.**

**Small Luk, intersex activist, Hong Kong<sup>275</sup>**

In Malaysia, research has shown that decisions about the sex assignments of infants with the same intersex variation differed depending on their parent's culture and attitudes towards dowries.<sup>276</sup> In countries where male children are more highly valued than female children, this can influence decisions about the sex assigned to an intersex infant or child. This has been reported to occur in countries in both East and West Asia.<sup>277</sup> This can result in pressure for ‘sex-normalising’ surgeries or other medical treatments or, where families cannot afford treatments, there is an increased likelihood that intersex children may be killed or abandoned.<sup>278</sup>

272 L. Gillam, J. Hewitt and G. Warne, *Ethical principles for the management of infants with disorders of sex development*, 2012.

273 Ibid.

274 A. Dreger, D.E. Sandberg and E.K. Feder, ‘From Principles to Process in Disorders of Sex Development Care’ in *Hormone Research in Paediatrics*, 2010;74(6):419–20.

275 Small Luk, *Intersex Report from Hong Kong*, produced for the *Being LGBT in Asia Regional Dialogue*, February 2015. Small Luk was raised as a boy in Hong Kong and forced to have multiple surgeries as a child. As an adult, she chose to have reconstructive surgeries and now lives as a female.

276 U. Kuhnle and W. Krahl, ‘The Impact of Culture on Sex Assignment and Gender Development in Intersex Patients’ in *Perspectives in Biology and Medicine*, 45 No. 1 Winter, 2002, pp. 85-103.

277 P.A. Lee et al, ‘Advances in Diagnosis and Care of Persons with DSD over the Last Decade’ in *International Journal of Pediatric Endocrinology*, No. 1, 2014; at [www.ijpeonline.com/content/2014/1/19](http://www.ijpeonline.com/content/2014/1/19).

278 Small Luk, *Beyond Boundaries: intersex in Hong Kong and China*, 20 October 2015; at <http://intersexday.org/en/beyond-boundaries-intersex-hk-china/>.



Photo by UNDP/H. Nhan.

A 2012 opinion from the Swiss National Advisory Commission on Biomedical Ethics sets out clear limitations on the extent to which weight should be given to psycho-social factors:

Decisions are to be guided, above all, by the child's welfare ... The limiting factor in the consideration of family/cultural circumstances will be the physical and psychological integrity of the child. An irreversible sex assignment intervention involving harmful physical and psychological consequences cannot be justified on the grounds that the family, school or social environment has difficulty in accepting the child's natural physical characteristics. ... If such interventions are performed solely with a view to integration of the child into its family and social environment, then they run counter to the child's welfare. In addition, there is no guarantee that the intended purpose (integration) will be achieved.<sup>279</sup>

In its February 2015 concluding observations on Switzerland, the Committee on the Rights of the Child cited the recommendations of the National Advisory Commission on Biomedical Ethics in its discussion of harmful practices. The Committee urged the State Party to:

279 Swiss National Advisory Commission on Biomedical Ethics, *On the Management of Differences of Sex Development. Ethical Issues Relating to "intersexuality"*. Opinion No. 20/2012, p 13; at [www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK\\_Intersexualitaet\\_En.pdf](http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK_Intersexualitaet_En.pdf). Emphasis in original.

... ensure that no-one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to children concerned, and provide families with intersex children with adequate counselling and support.<sup>280</sup>

In October 2015, the Committee on the Rights of the Child criticised medically unnecessary, non-consensual, irreversible surgeries and other medical treatment on intersex children in Chile. This was followed by recommendations to Ireland and France in January and February 2016 respectively,<sup>281</sup> in which the Committee cited its 2014 General Comment on harmful practices, issued jointly with the Committee on the Elimination of Discrimination against Women.<sup>282</sup>

In December 2015, the Chilean Ministry of Health published a circular instructing its national health service to stop performing “unnecessary ‘normalisation’ treatment of intersex children, including irreversible genital surgeries, until they are old enough to decide about their bodies”. The Ministry also announced that a protocol would be developed to regulate health care for intersex children.<sup>283</sup>

The *Gender Identity, Gender Expression and Sex Characteristics Act* passed in Malta on 1 April 2015 introduced a right to bodily integrity and physical autonomy for all Maltese citizens and residents. The Act makes it unlawful to “conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor” that can be deferred until the person being treated is able to give informed consent. The law places additional limitations on the exceptional circumstances where interventions will be permitted when a child is not yet able to give informed consent. These include expressly excluding “medical interventions ... driven by social factors”.<sup>284</sup>

In this region, the Australian Senate Community Affairs References Committee’s conclusions reiterated these concerns:

There is frequent reference to ‘psychosocial’ reasons to conduct normalising surgery. To the extent that this refers to facilitating parental acceptance and bonding, the child’s avoidance of harassment or teasing, and the child’s body self-image, there is great danger of this being a circular argument that avoids the central issues. Those issues include reducing parental anxiety, and ensuring social awareness and acceptance of diversity such as intersex. Surgery is unlikely to be an appropriate response to these kinds of issues.<sup>285</sup>

The Committee’s recommendations included developing human rights-based guidelines that ‘favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons’.<sup>286</sup>

Fear of discriminatory attitudes can never justify human rights abuses, including forced medical treatment and violations of an intersex person’s right to physical integrity. States have a duty to combat harmful stereotypes and discrimination, rather than reinforcing them.<sup>287</sup>

280 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 2015, CRC/C/CHE/CO/2-4.

281 Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee on the Rights of the Child, *Concluding Observations: France*, 2016, para 48. The Committee’s comprehensive recommendations are included in the summary of treaty body recommendations that close this section of this chapter.

282 Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women / General Comment No. 18 of the Committee on the Rights of the Child on harmful practices*, 2014, CEDAW/C/GC/31-CRC/C/GC/18.

283 M. Carpenter, ‘Chilean Ministry of Health issues instructions stopping ‘normalising’ interventions on intersex children’, 11 January 2016; at <https://oii.org.au/30250/chilean-ministry-stops-normalising/>.

284 There is a provision in article 14(2) of the *Gender Identity, Gender Expression and Sex Characteristics Act* for treatment to be agreed in exceptional circumstances. However, ‘medical intervention which is driven by social factors without the consent of the individual concerned will be in violation of this Act’.

285 Australian Senate, Community Affairs References Committee, *Involuntary or Coerced Sterilisation of Intersex People in Australia*, October 2013, p. 74.

286 *Ibid*, p 75.

287 OHCHR, *Fact Sheet: Intersex*, 2015.

### 4.3.3. Female genital mutilation

NGOs in both Australia and New Zealand have made submissions to government agencies, NHRIs and UN treaty monitoring bodies criticising laws that, while rightly prohibiting female genital mutilation, allow similar surgical interventions on intersex girls.<sup>288</sup> In both countries, relevant laws exempt so-called ‘sex-normalising’ surgeries on intersex people because they are regarded as being medically beneficial or therapeutic.<sup>289</sup> This is despite explicit provisions stating that a procedure cannot be justified as necessary, desirable or therapeutic simply because it is part of a social, cultural or religious custom or practice. The NGOs OII Australia and the Intersex Trust Aotearoa New Zealand have argued that surgical alterations to make intersex children’s genitals ‘normal’ or ‘socially acceptable’ amount to genital mutilation and should be legally prohibited.<sup>290</sup>

Human rights concerns about genital surgeries on intersex infants and children, performed for non-medical reasons, are noted in the 2015 report of the High Commissioner for Human Rights on female genital mutilation. They appear in a section highlighting constraints and challenges that States face in their efforts to meet their obligations to respect, protect and fulfil the rights of women and children to live free from female genital mutilation.<sup>291</sup>

### 4.3.4. Defining intersex variations as serious genetic disorders

‘Preimplantation genetic diagnosis’ refers to the process of screening embryos for specific genetic diseases before implanting them in a uterus. The ethics of preimplantation genetic diagnosis to select against intersex traits was the subject of 11 papers in the October 2013 issue of the *American Journal of Bioethics*.<sup>292</sup> A May 2015 report from the Commissioner for Human Rights of the Council of Europe raised concerns that the use of this procedure to identify and reject embryos with intersex variations violates ethical and human rights standards.<sup>293</sup>

In April 2014 and September 2015, OII Australia made submissions to Australia’s National Health and Medical Research Council calling for the prohibition of genetic testing to select against intersex traits.<sup>294</sup> It criticised the assumption that intersex variations are “serious genetic conditions”, identifying this as the underlying rationale for preimplantation diagnosis. OII Australia recommended that testing and diagnosis should be limited to instances where a major physical or mental impairment may severely limit a person’s quality of life.

### 4.3.5. Continuing health issues for intersex people

There are often lifelong physical and emotional implications that follow surgeries and other medical interventions performed on intersex children and infants. These can include sterility, genital insensitivity and impaired sexual function, chronic pain, bleeding or infections, post-surgical depression or trauma (including in response to experiences of rape), significant scarring and metabolic imbalances.<sup>295</sup>

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288 For example, OII Australia, *Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report*, February 2015; Intersex Trust Aotearoa New Zealand, *Alternate NGO Submission on the sixth periodic report to the United Nations on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from New Zealand*, January 2015.

289 *New Zealand Crimes Act 1961*, s. 204A; Attorney General’s Department, *Review of Australia’s Female Genital Mutilation Legal Framework – Final Report*, 2013.

290 This argument directly challenges the psycho-social rationale that surgeries are necessary to improve opportunities for marriage or intimate relationships.

291 OHCHR, *Good practices and major challenges in preventing and eliminating female genital mutilation*, 2015, A/HRC/29/20, para. 62.

292 *American Journal of Bioethics*, Vol. 1 Issue 1, 2013.

293 Commissioner for Human Rights of the Council of Europe, 2015, p. 30.

294 See <https://oii.org.au/29939/nhmrc-genetic-selection-intersex-traits/>.

295 M. Cabral and M. Carpenter, 2015.

Where health systems recommend surgeries on infants and children with intersex variations, these costs are often publically funded. However, intersex adults frequently cannot access any public funding to reduce the physical or emotional impacts of such treatment.

A preliminary survey of intersex advocates in eight countries – including Taiwan, New Zealand and Australia – identified concerns about the lack of research on the long-term impact of surgeries.<sup>296</sup> Institutions do not typically engage in long-term follow-up and have no responsibility to keep historical medical records. Many parents were discouraged from sharing information with their children as they grew up about medical interventions performed when the child was younger. In addition, the fragmentation of health provision into paediatric, adolescent and adult services results in intersex people’s health needs falling through the gaps. More qualitative research is needed to give intersex adults the opportunity to describe the long-term consequences of having, or not having, medical and surgical intervention. Interviews with intersex adults have also informed the development of resources for parents raising intersex infants and children today.<sup>297</sup>



Recent intersex community-led research from Australia provides invaluable insights into these impacts. Sixty per cent of the 272 people who completed the survey reported having had medical treatment interventions related to their intersex variation. Intersex people’s experience of medicalisation was often negative, with poor information, many poor outcomes and “strong evidence” suggesting a pattern of institutionalised shaming and coercive treatment. Over half of the reported treatments occurred when the participants were under 18 years old. The most common treatments were genital surgeries, many of which occurred in infancy, and hormone treatments. Most participants were given no information on the option of declining or deferring treatments; a fifth were given no information at all about any of the treatments they received. The majority of participants listed at least one negative impact from their treatments; for some, these were life-threatening.<sup>298</sup>

296 D.C. Ghattas, *Human rights between the sexes, a preliminary study of the life situations of inter\* individuals*, Heinrich Böll Stiftung publication series on democracy, Vol. 34, 2013.

297 G. Davis, ‘Five things you can do for your intersex child’; at <http://theparentsproject.com/five-things-you-can-do-for-your-intersex-child/>.

298 T. Jones, B. Hart, M. Carpenter, G. Ansara, W. Leonard and J. Lucke, *Intersex: Stories and Statistics from Australia*, 2016.

#### 4.3.6. Recommendations from treaty bodies

Concerns about human rights violations against intersex people have emerged from a growing number of UN treaty monitoring bodies – including the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, the Committee Against Torture, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of Persons with Disabilities – and from Special Rapporteurs. Their recommendations focus predominantly on unnecessary medical or surgical treatment on intersex children, including the lifelong repercussions of such practices. They have urged States to:

- ensure that no-one is subjected to unnecessary medical or surgical treatment during infancy or childhood<sup>299</sup>
- guarantee bodily integrity, autonomy and/or self-determination to intersex children<sup>300</sup>
- ensure that intersex people's personal integrity and sexual and reproductive health rights are respected<sup>301</sup>
- ensure full, free and informed consent to medical and surgical treatment of intersex people, including by properly informing patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people<sup>302</sup>
- 'repeal laws that allow intrusive and irreversible treatments of ... intersex persons, including ... genital-normalizing surgeries ... whenever they are enforced or administered without the free and informed consent of the person concerned'<sup>303</sup>
- 'expedite the development and implementation of a rights-based health care protocol for intersex children, setting the procedures and steps to be followed by health teams'<sup>304</sup>
- provide families with intersex children with adequate counselling and support<sup>305</sup>
- investigate incidents of surgical and other medical treatment of intersex people, undertaken without effective consent<sup>306</sup>

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299 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 2015, CRC/C/CHE/CO/2-4; Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5, paras. 48-49; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee on the Rights of the Child, *Concluding Observations: France*, 2016, CRC/C/FRA/CO/5, para. 48; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: Denmark*, 2016, CAT/C/DNK/CO/6-7, para. 43; Committee against Torture, *Concluding Observations: China Hong Kong*, 2016, CAT/C/CHN-HKG/CO/5, para. 29.

300 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 2015, CRC/C/CHE/CO/2-4; Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5, para. 49; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: China Hong Kong*, 2016, CAT/C/CHN-HKG/CO/5, para. 29; Committee against Torture, *Concluding Observations: China*, 2016, CAT/C/CHN/CO/5, para. 56.

301 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Germany*, 2011, E/C.12/DEU/CO/5, para. 20.

302 Committee against Torture, *Concluding Observations: Germany*, 2011, CAT/C/DEU/CO/5; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: Denmark*, 2016, CAT/C/DNK/CO/6-7, para. 43.

303 *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 2016, A/HRC/31/57, para. 72(i).

304 Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5, para. 49; Committee on the Rights of the Child, *Concluding Observations: France*, 2016, CRC/C/FRA/CO/5, para. 48.

305 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 2015, CRC/C/CHE/CO/2-4; Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5, para. 49; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: Denmark*, 2016, CAT/C/DNK/CO/6-7, para. 43; Committee against Torture, *Concluding Observations: China Hong Kong*, 2016, CAT/C/CHN-HKG/CO/5, para. 29.

306 Committee against Torture, *Concluding Observations: Germany*, 2011, CAT/C/DEU/CO/5; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: China*, 2016, CAT/C/CHN/CO/5, para. 56.

- adopt legal provisions to provide redress to the victims of this treatment, including adequate compensation<sup>307</sup>
- educate and train medical and psychological professionals on the range of sexual and related biological and physical diversity and/or the human rights of intersex people.<sup>308</sup>

More broadly, the treaty monitoring bodies have urged States to fully consult intersex people and enter into dialogue with their NGOs to understand their human rights issues and to take effective active to protect their human rights.<sup>309</sup>

## 4.4. DISCRIMINATION

### 4.4.1. Intersex people experience discrimination

Intersex people frequently experience discrimination when their intersex status or sex characteristics become known or if they are perceived not to conform to gender norms.

**In Guangdong, a young intersex woman can't find a job because of her intersex variation. Although she has the technical ability to fulfil a job, and she has female documents, her gender-neutral appearance meant that she lost her job. She returned to her family but faces discrimination from family and neighbours.**

**Small Luk, intersex activist, Hong Kong<sup>310</sup>**

Discrimination against intersex people may involve harassment, abuse or exclusion from activities or facilities because of their bodily diversity or sex characteristics. People with intersex traits are particularly vulnerable to discrimination in circumstances when their bodies are examined or searched.

In the Asia Pacific region, a major Australian research study has documented how negative perceptions of intersex traits impact on dignity and equality for intersex people in education and employment, and in their intimate lives.<sup>311</sup>

In 2015, the Committee on the Rights of the Child noted its concern about “continuing negative attitudes and discrimination faced by ... intersex children” in its concluding observations to Chile. It recommended that the Chilean government “strengthen its efforts to combat negative attitudes and eliminate discrimination against children on the basis of their actual or perceived ... sex characteristics”.<sup>312</sup>

307 Committee against Torture, 2011, *Concluding Observations: Germany*; CAT/C/DEU/CO/5; Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5, para. 49; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee against Torture, *Concluding Observations: Austria*, 2016, CAT/C/AUT/CO/6, para. 45; Committee against Torture, *Concluding Observations: Denmark*, 2016, CAT/C/DNK/CO/6-7, para. 43; Committee against Torture, *Concluding Observations: China Hong Kong*, 2016, CAT/C/CHN-HKG/CO/5, para. 29; Committee against Torture, *Concluding Observations: China*, 2016, CAT/C/CHN/CO/5, para. 56.

308 Committee against Torture, *Concluding Observations: Germany*, 2011, CAT/C/DEU/CO/5; Committee on the Rights of the Child, *Concluding Observations: Ireland*, 2016, CRC/C/IRL/CO/3-4, para. 40; Committee on the Rights of the Child, *Concluding Observations: France*, 2016, CRC/C/FRA/CO/5, para. 48; Committee against Torture, *Concluding Observations: China*, 2016, CAT/C/CHN/CO/5 para 56.

309 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Germany*, E/C.12/DEU/CO/5; Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Germany*, 2009, CEDAW/C/DEU/CO/6, paras. 61-62.

310 Small Luk, 20 October 2015.

311 T. Jones, B. Hart, M. Carpenter, G. Ansara, W. Leonard and J. Lucke, *Intersex: Stories and Statistics from Australia*, 2016.

312 Committee on the Rights of the Child, *Concluding Observations: Chile*, 2015, CRC/C/CHL/CO/4-5.

#### 4.4.2. Anti-discrimination laws

Intersex people have the same right to freedom from discrimination as other people. However, it is rare for anti-discrimination laws in this or any other region to explicitly prohibit discrimination against intersex people or to clarify that intersex people are covered under other grounds. This leaves intersex people vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports.<sup>313</sup>

Australia is one of only two countries in the world that provides explicit legal protection for intersex people. In 2013, it added 'intersex status' as a prohibited ground of discrimination under the federal *Sex Discrimination Act 1984*.<sup>314</sup> This visibility helps draw attention to the specific human rights issues faced by intersex people. Some other NHRIs in the Asia Pacific region have accepted discrimination complaints against intersex people under the ground of sex.<sup>315</sup>

Viet Nam is one of the many countries in the region that has no explicit anti-discrimination provisions dealing with sexual orientation, gender identity or sex characteristics, despite accepting a 2014 recommendation of the Universal Periodic Review to prohibit discrimination based on sexual orientation or gender identity. Viet Nam's only anti-discrimination protection is for intersex people who have undergone 'sex reassignment'.<sup>316</sup> Intersex activists in other parts of the region have advocated for anti-discrimination protections for intersex people. This includes approaches to the Equal Opportunities Commission in Hong Kong.<sup>317</sup>

OHCHR has identified two priority actions to address discrimination experienced by intersex people:

- prohibit discrimination on the basis of intersex traits, characteristics or status, including in education, health care, employment, sports and access to public services, and address such discrimination through relevant anti-discrimination initiatives
- ensure that members of the judiciary, immigration officers, law enforcement, healthcare, education and other officials and personnel are trained to respect and provide equal treatment to intersex persons.<sup>318</sup>



Photo by Esan Regmi.

313 OHCHR, *Fact Sheet: Intersex*, 2015.

314 The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* added intersex status, gender identity and sexual orientation as prohibited grounds of discrimination. The only other country providing protection is Malta, where the *Gender Identity, Gender Expression and Sex Characteristics Act 2015* prohibits discrimination on the basis of 'sex characteristics'.

315 For example, the New Zealand Human Rights Commission.

316 Government of Viet Nam, *Decree No. 88/2008/ND-CP of August 5, 2008, on Sex Reassignment*, article 4(4).

317 Small Luk, 'Intersex Report from Hong Kong', produced for the *Being LGBT in Asia Regional Dialogue*, February 2015.

318 OHCHR, *Fact Sheet: Intersex*, 2015.

**CASE STUDY: DISCRIMINATION IN SPORT**

Intersex athletes face a specific set of obstacles, with female intersex athletes disqualified from sports competitions and stripped of medals on the basis of their sex characteristics. Intersex traits do not automatically lead to better performance, yet they often result in greater scrutiny and restrictions. This contrasts with other physical variations among female athletes, such as height and muscle development, that do affect performance and are not regulated.

Indian middle distance runner Santhi Soundarajan was stripped of her silver medal won at the 2006 Asian Games after failing a sex verification test. The Indian Olympic Association banned her from competing domestically or internationally. Soundarajan returned to her village where she was shunned, experienced serious depression and attempted suicide. “I am treated as a social outcast, even in my own local place ... People don’t look upon me as an Asian Games medallist, but only speak about when I failed a gender test.”<sup>319</sup>

In 2012, the International Olympic Committee (IOC) and the International Association of Athletics Federations (IAAF) released a new blanket regulation, the Hyperandrogenism Rule.<sup>320</sup> It was designed to regulate individual female athletes’ levels of androgens, the hormones that are present in higher levels in men. The IOC and the IAAF regulation deemed it unfair for a female athlete to compete against other women if her androgen levels were above the lower normal male range.<sup>321</sup> This new regulation has been criticised as arbitrary, unscientific, unrelated to competitive performance or fairness, and for reinforcing western views of femininity.<sup>322</sup> Four South Asian athletes, aged between 18 and 21, were subsequently persuaded by the IAAF to agree to treatment, based on the regulation. They had genital surgeries, including partial clitoridectomy (a form of female genital mutilation) and sterilisation, in order to compete in sport. These surgeries were said not to be medically necessary and would not reduce any real or perceived athletic advantage caused by the athletes’ high androgen levels.<sup>323</sup>

Athlete Dutee Chand’s public removal from India’s 2014 Commonwealth Games team, based on the same IOC/IAAF regulation, was condemned as violating her privacy and human rights.<sup>324</sup> Chand appealed to the Court of Arbitration for Sport, “questioning why she should be forced to have surgery if her condition was natural and she was not ill”.<sup>325</sup>



319 See <http://news.bbc.co.uk/sport2/hi/athletics/8250469.stm>.

320 International Olympic Committee, *IOC Regulations on Female Hyperandrogenism*; at [www.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf).

321 Technically, if she had normal androgen sensitivity and serum T levels above the lower normal male range (10nmol/L).

322 K. Karkazis, R. Jordan-Young, G. Davis and S. Camporesi, ‘Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes’, *American Journal of Bioethics* 12(7): 2012, pp. 3–16; K. Worley, ‘Gender struggles for women to find equality in sport’ in *Catalyst e-newsletter*, August 2014.

323 R. Jordan-Young, P. Sönksen and K. Karkazis, ‘Sex, health, and athletes’ in *British Medical Journal* 2014; 348: g2926. It was unclear whether the four women would have access to the hormone replacement therapy they required after such surgeries.

324 K. Karkazis, R. Jordan-Young, G. Davis and S. Camporesi, ‘Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes’ in *American Journal of Bioethics* 12(7): 2012, pp. 3–16; K. Worley, ‘Gender struggles for women to find equality in sport’ in *Catalyst e-newsletter*, August 2014.

325 J. Branch, ‘Dutee Chand, female sprinter with high testosterone level, wins right to compete’ in *The New York Times*, 27 July 2015; at [www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?\\_r=1](http://www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?_r=1).

In July 2015, the Court found that insufficient evidence had been produced to indicate any link between enhanced androgen levels and improved athletic performance. It suspended the hyperandrogenism regulation for female track and field sports for two years, enabling Chand and other intersex athletes to compete.<sup>326</sup> The Court noted that “there is no single determinant of sex” and ruled it was inappropriate to subject athletes to sex verification, external genitalia examinations or chromosome testing. Any basis used to divide athletes into male and female categories “should be necessary, reasonable and proportionate to the legitimate objective being pursued”.<sup>327</sup> In a brief consensus statement in November 2015, the IOC noted its intention to go back to the Court of Arbitration for Sport seeking to reinstate its hyperandrogenism rules.<sup>328</sup> This decision has been criticised by intersex activists.<sup>329</sup>

NHRIs can play a role in investigating intersex people’s experiences in trying to participate in sport, whether socially or competitively. In August 2015, the Australian Human Rights Commission announced a national online survey on the participation of intersex people in sport to ensure their rights are protected in the policies and practices of sporting codes.<sup>330</sup>

## 4.5. RECOGNITION BEFORE THE LAW

Recognition before the law means having legal personhood and the legal protections that flow from that. For intersex people, this is neither primarily nor solely about amending birth registrations or other official documents. Firstly, it is about intersex people who have been issued a male or a female birth certificate being able to enjoy the same legal rights as other men and women. When intersex people experience discrimination, they are not able to enjoy the same legal rights as others.

Secondly, some intersex people seek to amend their sex or gender details on official documents because those details were either inaccurate at birth and/or no longer reflect their sex or gender identity. In some jurisdictions these details can be corrected, when an error was made at birth.<sup>331</sup> This may be the most appropriate option for some intersex people. Typically, the other legal avenue is where legal gender recognition provisions apply to intersex people as well as to transgender people. Such provisions should recognise the specific experiences of intersex people and should not be framed solely around transgender people or the medical process of transitioning.<sup>332</sup>

Finally, it is important to clarify that recognition before the law for intersex people is not about creating a third, separate category for the registration of people born with an intersex trait.<sup>333</sup> To do so would risk segregating and potentially stigmatising intersex people. It would also remove their right to determine their own sex or gender.

326 The court allowed two further years for convincing evidence to be submitted by the IAAF. The regulation will be automatically revoked if evidence has not been provided within that time period.

327 J. Branch, ‘Dutee Chand, female sprinter with high testosterone level, wins right to compete’ in *The New York Times*, 27 July 2015.

328 International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015*; at [www.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

329 M. Carpenter, ‘IOC policy: no change for athletes with intersex traits’, 2 February 2016; at <https://oii.org.au/30303/ioc-no-change-athletes-intersex/>.

330 Australian Human Rights Commission, ‘Survey on transgender, gender diverse and intersex rights in sport’, 20 August 2015; at [www.humanrights.gov.au/news/media-releases/survey-transgender-gender-diverse-and-intersex-rights-sport](http://www.humanrights.gov.au/news/media-releases/survey-transgender-gender-diverse-and-intersex-rights-sport). This survey also looks at the experiences of transgender and gender diverse people.

331 For example, *Births, Deaths and Marriages Registration Act 1995 NSW* (Australia), s. 45.

332 For example, *Gender Recognition Act 2004* (United Kingdom), s. 2(1)(a) requires that an applicant “has or has had gender dysphoria”. This excludes many intersex people (and also many transgender people).

333 Unfortunately, this type of misunderstanding is common in both gender recognition advocacy campaigns and media reports.

The third International Intersex Forum advocated that intersex infants should be registered as either female or male with the awareness that, like all people, they may grow up to identify with a different sex or gender.<sup>334</sup> At that future point, they should be able to choose from the full range of sex and/or gender options on official documents, including those outside binary, male and female classifications. Like the population as a whole, most intersex people will choose to identify simply as male or as female. For many, that may be a hard fought choice, as either they have been assigned an incorrect sex at birth or they are assumed to be a third sex. The decision to have one's sex listed as a non-binary or third sex must be entirely voluntary for any individual.<sup>335</sup>

In some parts of Asia, intersex people have been allowed to amend sex details on birth certificates or other official documents. However, this is not typically based on principles of self-determination. Instead it is linked to medical requirements to 'normalise' any physical gender ambiguity. Requiring all intersex people to undergo medical or surgical procedures to gain legal recognition undermines the right to recognition before the law and to protection from medical abuses, as well as the right to physical integrity.<sup>336</sup>

Viet Nam's 2008 Decree enabling surgeries on intersex people sets out the process for civil status registration after such procedures.<sup>337</sup> This approach is also reflected in Viet Nam's *Civil Code*.<sup>338</sup> However, the 2008 Decree has been criticised for supporting surgical practices aimed at 'normalising' the bodies of intersex people rather than an affirmative recognition of bodily diversity.<sup>339</sup>

#### CASE STUDY: CHANGING AN INTERSEX PERSON'S TITLE

The **National Human Rights Commission of Thailand** has recently examined government regulations related to changing an intersex person's title in the civil registration records. Following a request from the Commission, the Department of Public Administration has enabled intersex people to 'correct' their honorific titles if they have undergone surgery. This has set a precedent and resulted in guidelines for officials in handling these matters. The Commission has subsequently organised several public fora to promote understanding of how intersex people can change their title in accordance with the operating procedures manual developed by the Department.<sup>340</sup>

Thai intersex activist Nada Chaiyajit has stressed the importance of the Commission's role in raising awareness about intersex people, as distinct from transgender people, and both groups' right to legal recognition. This creates a starting point to push for all intersex people to enjoy these rights, not only those who meet the current restrictive medical requirements.<sup>341</sup>



334 Public statement by the Third International Intersex Forum.

335 Open Society Foundations, *License to Be Yourself: laws and advocacy for legal gender recognition of trans people*, 2014.

336 Yogyakarta Principles, Principles 3 and 18.

337 Government of Viet Nam, *Decree No. 88/2008/ND-CP of August 5 2008 on Sex Reassignment*, Chapter 4, articles 11-14. The Decree uses the term 'sex reassignment' to refer to medical procedures on intersex people and the resulting process for amending sex details on documents.

338 *Civil Code*, article 36, approved November 2015 and to come into effect on 1 January 2017.

339 R. Roca, 'Tentative hope for LGBTI people in Vietnam' in *Star Observer*, 29 July 2015; at [www.starobserver.com.au/news/international-news-news/tentative-hope-for-lgbti-people-in-vietnam/139133](http://www.starobserver.com.au/news/international-news-news/tentative-hope-for-lgbti-people-in-vietnam/139133).

340 National Human Rights Commission of Thailand, *Report of Examination No. 142/255*, 14 May 2014.

341 Personal communication with Nada Chaiyajit, 21 September 2015.

In 2008, the Philippines Supreme Court confirmed the right of an intersex person to change the sex marked on his birth certificate from female to male. This was based on naturally occurring physical changes as this intersex person's body matured.<sup>342</sup> The Court acknowledged a role for self-identification, stating that "where the person is biologically or naturally intersex" it was reasonable to allow them to determine their own gender as their body matured.<sup>343</sup> The Court considered that the intersex man had allowed "nature to take its course" and had not interfered with what "he was born with".<sup>344</sup>

The April 2014 Indian Supreme Court decision affirming the right to gender recognition for *hijras* and transgender people may have relevance to intersex people, at least to the extent that some intersex people in India identify as, or are perceived to be, *hijras*.<sup>345</sup>

Even when identity details are corrected or updated in official documents, laws may place limitations on the circumstances in which those sex or gender details are recognised. The International Intersex Forum has highlighted the need to "to ensure the provision of all human rights and citizenship rights to intersex people, including the right to marry and form a family".<sup>346</sup> In this region, prevailing societal attitudes or other laws may limit the extent to which an intersex person's sex is recognised, including whether they can marry as that sex.

#### CASE STUDY: ADVOCATING FOR AN INTERSEX MAN TO BE RECOGNISED AS MALE

In Indonesia Alter Hofan, an intersex person, was assigned as female as a child. After having surgeries as an adult, his identity on documents was changed to male, without going through a legal process. When Alter married a woman, his wife's parents attempted to annul the wedding by accusing him of document fraud. Alter was detained in a men's prison but, after police-authorised medical checks, was transferred to a women's prison. He was charged with document fraud, which carries a penalty of up to seven years' imprisonment. Eventually he was acquitted because of his intersex status. This decision was upheld on appeal to the Supreme Court.<sup>347</sup> The **National Commission on Human Rights of Indonesia (Komnas HAM)** was one of the bodies advocating on behalf of this intersex man.



The 2013 amendments to New Zealand's *Marriage Act* clarified that a marriage is between two people regardless of their sex, sexual orientation, or gender identity.<sup>348</sup> An intersex person is free to marry someone of any sex and the legality of the marriage cannot be questioned because of either partner's intersex status.

342 *Republic of Philippines v. Jennifer Cagandahan* 2008; see International Commission of Jurists, *Sexual orientation, gender identity and justice: A comparative law casebook*, 2011, Chapter 6.

343 Gender, not sex, is the term used in this case. In this region, and internationally, the terms 'sex' and 'gender' are used interchangeably in many jurisdictions.

344 This contrasts with a 2007 Supreme Court decision in *Silverio v. Philippines*, 537 SCRA 373 (2007), that a transgender woman could not change her birth certificate, even after having undergone gender-affirming surgeries.

345 *National Legal Services Authority v. Union of India*, WP (Civil) No 604 of 2013; at <http://supremecourtindia.nic.in/outtoday/wc40012.pdf>.

346 Public statement by the Third International Intersex Forum, Malta, 1 December 2013; at <http://oiieurope.org/public-statement-by-the-third-international-intersex-forum/>.

347 S.E. Wieringa, 'Discursive contestations concerning intersex in Indonesia: stigma, rights and identities' in L.R. Bennett and S.G. Davies, *Sex and Sexualities in Contemporary Indonesia*, 2014, pp. 169-182.

348 *Marriage (Definition of Marriage) Amendment Act 2013* (New Zealand).

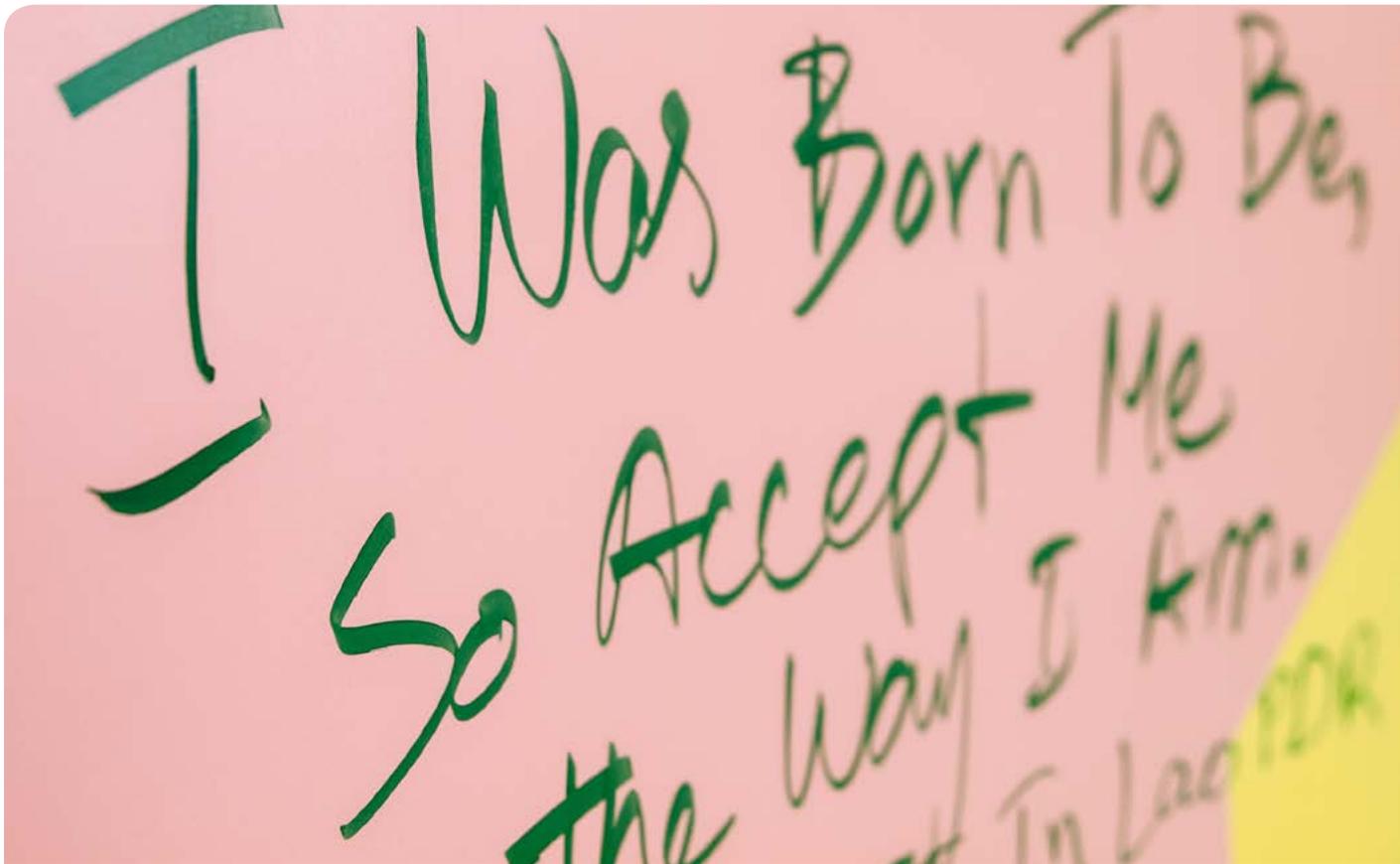


Photo by UNDP/W. Field.

Intersex NGOs have made submissions to UN mechanisms and to NHRIs to advocate for the right to recognition before the law. For example, the Intersex Trust Aotearoa New Zealand made a submission in 2013 as part of New Zealand's Universal Periodic Review. It recommended that intersex adults should have the right to choose to amend sex details on official documents, based solely on self-identification, without any requirements for medical treatment and without the need to resort to a court process. For intersex children, the only additional requirement was that the child should have the support of their parent or legal guardian, taking into account the evolving capacities and best interests of the child.<sup>349</sup>

The Australian intersex organization, Oll Australia, has recommended that:

- third classifications should not include the term 'intersex', to prevent the involuntary assignment of intersex people to a third sex or gender classification
- 'non-binary' is a preferred third sex or gender classification, rather than 'unspecified' or 'indeterminate'
- the policy goal should be that sex or gender, like race and religion, will no longer appear on birth certificates
- in the meantime, people who are able to give voluntary and informed consent should be free to choose a gender marker through a simple administrative procedure.<sup>350</sup>

349 Intersex Trust Aotearoa New Zealand, *Submission to the New Zealand's second Universal Periodic Review*, June 2013.

350 Oll Australia, *Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report*, February 2015; The Sex and Gender Advisory Group, *Submission to the Commonwealth Attorney-General's Department Review of the Australian Government Guidelines on the Recognition of Sex and Gender*, 24 September 2015.

## CASE STUDY: RECOGNISING INTERSEX PEOPLE'S RIGHTS AND NEEDS

In January 2008, the **New Zealand Human Rights Commission** published the report of its Transgender Inquiry. The Inquiry did not intend to encompass the human rights experiences of intersex people but submissions from intersex people raised significant human rights issues. These highlighted the need for greater education and more dialogue about the human rights of intersex people.

As a result, the Commission worked in partnership with the Intersex Trust Aotearoa New Zealand (ITANZ) to run workshops with Commission staff and externally as part of its human rights community development program. Other workshops were held with counsellors, as part of a leadership program for senior school students, and as community sessions in provincial cities and rural communities.

The Commission organised two intersex roundtables in 2009 and 2010 to hear from more intersex people, parents of intersex children and health professionals. It has made submissions and facilitated intersex people's consultation with government agencies on issues such as assisted reproductive technologies, data collection, police search policies, prison placement decisions and legal recognition of sex and gender identity.<sup>351</sup>

There are significant outstanding human rights issues for intersex people in New Zealand, many of which were highlighted in ITANZ and the SOGII Coalition's submissions to New Zealand's Universal Periodic Review. In the absence of any UPR recommendations in this area, the Commission welcomed the government's stated commitment to follow up on intersex people's human rights as part of its continuing engagement with civil society on the UPR.<sup>352</sup>

In 2016, the Commission will work with ITANZ to organise a roundtable discussion with medical professionals focused on ending non-consensual genital surgeries on intersex infants and children. The Commission's February 2016 submission on New Zealand's compliance with the International Covenant on Civil and Political Rights recommends legislation "against non-consensual surgical procedures on children aimed solely at correcting genital ambiguity".<sup>353</sup>

According to Mani Mitchell, ITANZ Executive Director: "ITANZ's relationship with the Commission is a long and valued one ... Two things stand out. One is the Transgender Inquiry that went on to include intersex issues as well. It was a template process that listened to, held and healed a largely invisible, silent community ... Then my coal face work with staff. The second stand out is the road trip we did with a fellow intersex activist, out in remote rural New Zealand – talking, listening, laughing, crying. Human rights where it really matters, in community *with* people."



351 For example, the Department of Corrections has a policy enabling intersex and transgender people to ask for their placement in a sex-segregated facility to be reviewed; see [www.corrections.govt.nz/resources/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html](http://www.corrections.govt.nz/resources/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements/M.03-4.html). In most instances, transgender and intersex people who are detained can choose whether the police officer who searches them is male or female.

352 New Zealand Government, *Response to recommendations arising from its second Universal Periodic Review*, 2014, para. 3; at [www.hrc.co.nz/files/5314/2406/1357/New-Zealand-Government-Response-to-2014-UPR-recommendations.pdf](http://www.hrc.co.nz/files/5314/2406/1357/New-Zealand-Government-Response-to-2014-UPR-recommendations.pdf).

353 New Zealand Human Rights Commission, *Submission to the Human Rights Committee's 6th periodic review of New Zealand's compliance with the International Covenant on Civil and Political Rights*, February 2016, para. 156.

## 4.6. EFFECTIVE REMEDIES AND REDRESS

In a climate of secrecy and shame, human rights violations are seldom discussed and even more rarely investigated or prosecuted. “The result is impunity for the perpetrators; lack of remedy for victims; and a perpetuating cycle of ignorance and abuse.”<sup>354</sup> Invisibility is reinforced in situations where historical records have been destroyed.<sup>355</sup>

Accountability for human rights violations includes access to complaints mechanisms. To be effective in protecting the human rights of all people, NHRIs and other agencies that receive complaints need to demonstrate an understanding of the issues that intersex people face and how they are distinct from discrimination on the basis of gender identity or sexual orientation. Confidentiality is very important, particularly if agencies are seeking to collect and report on complaints received from intersex people.<sup>356</sup>

Accountability includes access to remedies and redress. In 2011, the Committee against Torture urged Germany to investigate incidents of surgical and other medical treatment of intersex people without their consent and to adopt legal provisions to provide redress, including adequate compensation.<sup>357</sup>

Intersex NGOs have called for “adequate acknowledgement of the suffering and injustice caused to intersex people in the past, adequate redress, reparation, access to justice and the right to truth”.<sup>358</sup> Similarly, a 2014 UN interagency statement identified a series of suggested actions to address forced or coerced sterilisation, including against intersex people. One such action is to:

Recognise past or present policies, patterns or practices of coercive sterilization, and issue statements of regret or apology to victims, as components of the right to remedy for these practices.<sup>359</sup>

Accountability also requires effective monitoring and evaluation of human rights situations, particularly for marginalised groups. In September 2015, OHCHR, in its first fact sheet on the human rights issues faced by intersex people, included action points, one of which called on NHRIs to “research and monitor the human rights situation of intersex people”.<sup>360</sup>

NHRIs internationally have already committed to building an evidence base on some of these issues, in the context of their work to promote and protect the human rights of women and girls. At their international conference in 2012, NHRIs committed themselves to the Amman Declaration and Programme of Action, which sets out broad principles and action points to be implemented over the following decade. One of these activities was to encourage and support the compilation of an evidence base on the right to sexual and reproductive health. This would include gathering data, conducting inquiries and undertaking research on “forced sterilization ... female genital mutilation/cutting, biased sex selection and other harmful practices.”<sup>361</sup> This would provide an invaluable opportunity to include the specific experiences of intersex people, whose sterilisation and genital mutilation is impacted by binary sex stereotypes.

At a broader level, accountability also requires participation by intersex people and their organisations in all decision-making processes that affect their human rights. NHRIs are well placed to facilitate dialogue between intersex organisations and state actors.

354 Opening remarks by High Commissioner for Human Rights, *Expert meeting on ending human rights violations against intersex persons*, 16 September 2015, Geneva.

355 New Zealand Human Rights Commission, ‘Intersex People’ in *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Intersex People*, 2008, Chapter 7.

356 M. Carpenter and D. Hough, *Employers’ Guide to Intersex Inclusion*, 2014.

357 Committee against Torture, *Concluding Observations: Germany*, 2011, CAT/C/DEU/CO/5.

358 Public statement by the Third International Intersex Forum.

359 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health Organization, *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization, An Interagency Statement*, 2014, p. 15.

360 OHCHR, *Fact Sheet: Intersex*, 2015.

361 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Amman Declaration and Programme of Action*, 11th International Conference, 4–5 November 2012, Amman, Jordan; at [www.asiapacificforum.net/resources/amman-declaration/](http://www.asiapacificforum.net/resources/amman-declaration/).

Many other human rights agencies and LGBT groups talk about intersex in their reports, but they lack our voices. There are many misunderstandings that need to be corrected.

*Small Luk, intersex activist, Hong Kong and China*<sup>362</sup>

#### KEY POINTS: CHAPTER 4

- Intersex traits are relatively common and intersex people exist in all parts of the Asia Pacific region. Stigma has created an environment where their existence and the human rights violations against them have been largely ignored.
- Intersex people often experience human rights violations because their bodies are different. These include so-called ‘sex-normalising’ surgeries or hormone treatment on infants and children, that are medically unnecessary and typically performed when a child is too young to be involved in the decision-making process. These practices violate the right to physical integrity and have been described by human rights bodies as forms of torture or ill-treatment and as harmful practices.
- Fear and discrimination can never justify human rights abuses, including forced medical treatment. States have a duty to combat harmful stereotypes and discrimination against intersex people.
- Typically, female genital mutilation laws do not apply to surgical interventions on intersex girls. Intersex NGOs have called for so-called ‘sex-normalising’ surgeries on intersex children to be recognised as genital mutilation.
- Intersex people have the same rights as others to freedom from discrimination. There are very few countries in this region that have anti-discrimination laws that specifically prohibit discrimination against intersex people or that clearly state their rights protection under other prohibited grounds. This leaves intersex people vulnerable to discrimination.
- It is good practice for intersex infants to be registered as either female or male at birth with the understanding that, like all people, they may grow up to identify with a different sex or gender. However, in this region, intersex people who have been issued a male or a female birth certificate do not always enjoy the same legal rights as others.
- Some intersex people seek to amend their sex or gender details on official documents because those details were either inaccurate at birth and/or no longer reflect their sex or gender identity. Many face barriers trying to amend these details, which also undermines their right to recognition before the law. Some laws in this region only allow intersex people to change their sex details on official documents if they have had so-called ‘sex-normalising’ surgeries. This erases bodily diversity and undermines intersex people’s human rights.
- Violations of intersex people’s rights should be investigated and alleged perpetrators prosecuted. Intersex people should have access to effective remedies, including redress and compensation. They should be consulted in the development of laws and policies that impact on their rights.



<sup>362</sup> Small Luk, 20 October 2015.



## Part II: International human rights law



**Chapter 5: International and regional developments in human rights law**  
**Chapter 6: The Yogyakarta Principles**

# Chapter 5: International and regional developments in human rights law

## KEY QUESTIONS

- What are human rights?
- Do human rights apply to people of diverse sexual orientations, gender identities and sex characteristics or only to some?
- What does international law say about the human rights of lesbian, gay, bisexual, transgender and intersex people?
- What do the human rights treaty monitoring bodies say?
- What role have the special procedures of the Human Rights Council played?
- How have the UN's political bodies been able to deal with these issues?
- What are the views of regional human rights bodies and mechanisms?



## 5.1. THE UNIVERSALITY OF ALL HUMAN RIGHTS

Human rights are:

- fundamental or foundational, going to the heart of human personhood
- entitlements, not mere claims or requests
- applicable to every human being.

By definition human rights are universal. They are the rights of all people, in all places, at all times. They are different from legal rights, that vary from country to country, and from moral rights, that vary according to moral, ethical or religious beliefs. Human rights are universal. They are inherent standards transcending the State and binding on all States and other actors. In particular, they have been recognised and are endorsed and supported by the international community of nations as a whole, especially through the UN. They are set out as binding obligations in and through international treaties, UN forums and mechanisms, State practice and international customs. They give rise to accountability for violations at the national and international levels.

The first words of the first article of the Universal Declaration of Human Rights (UDHR), adopted in 1948, are:

All human beings are born free and equal in dignity and rights.<sup>363</sup>

The UDHR reiterates the point in the opening words of its second article:

Everyone is entitled to all the rights and freedoms set forth in this Declaration ...

<sup>363</sup> Universal Declaration of Human Rights, article 1.

The UDHR repeatedly uses this universal language. ‘Everyone’ is entitled to rights; ‘no one’ is to be subjected to a violation of a right. From the very beginning, universality has been a fundamental principle of international human rights law.

Universality was challenged in the early 1990s in debates about cultural relativism. Some governments argued that rights varied from culture to culture, either regionally (‘Asian values’, ‘African customs’, ‘European individualism’) or nationally (‘Chinese characteristics’, ‘American exceptionalism’). In June 1993, the Second World Conference on Human Rights brought together the largest assembly of States to discuss human rights. It re-affirmed unambiguously and without dissent that human rights are “the birthright of all human beings”<sup>364</sup> and that “[a]ll human rights are universal, indivisible and interdependent and interrelated”.<sup>365</sup>

The World Conference recognised that there are historical, cultural and religious differences (‘particularities’) that affect the application of human rights but it proclaimed that human rights are nonetheless universal:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>366</sup>

All people are entitled to all human rights. Human rights are not ‘gay rights’ or ‘lesbian rights’ or ‘straight rights’ or ‘transgender rights’ or ‘intersex rights’ but human rights. They are rights to which everyone is entitled, whatever their sexual orientation or gender identity or sex characteristics, because they are human beings.

## 5.2. LEGAL RECOGNITION OF THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX PEOPLE

### 5.2.1. Inclusion in the law

Although from the beginning human rights were recognised as universal, their application to people of diverse sexual orientations, gender identities and sex characteristics was not in the minds of the drafters of the key international human rights instruments. Many other specific categories (or dimensions) of humanity were, however, in their minds and so, when declaring and protecting the right to equality and the right not to be discriminated against, they referred specifically to some of these categories. Therefore, the UDHR provides that:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>367</sup>

There are similar provisions in the two human rights covenants, the foundational human rights treaties. The International Covenant on Civil and Political Rights (ICCPR) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>368</sup>

<sup>364</sup> Vienna Declaration and Programme of Action 1993, Part I, para. 1.

<sup>365</sup> Vienna Declaration and Programme of Action 1993, Part I, para. 5. For discussion of the defining characteristics of human rights, see APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012, pp. 7-8; at [www.asiapacificforum.net/resources/manual-on-international-human-rights-system/](http://www.asiapacificforum.net/resources/manual-on-international-human-rights-system/).

<sup>366</sup> Vienna Declaration and Programme of Action 1993, Part I, para. 5.

<sup>367</sup> Universal Declaration of Human Rights, article 2.

<sup>368</sup> ICCPR, article 2.1.

The ICCPR later goes on to declare:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>369</sup>

Similarly, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>370</sup>

The categories listed in the covenants are the same as those in the UDHR. There is a slight difference in wording, however. The UDHR and ICCPR prohibit ‘distinction of any kind, **such as ...**’ and ‘discrimination on any ground **such as ...**’ and then list the categories.<sup>371</sup> The ICESCR prohibits ‘discrimination of any kind **as to ...**’. The words ‘**such as**’ indicate that the categories that follow are examples of categories of prohibited distinction and that the lists are not intended to be exclusive and closed; that is, the listed categories are not intended to be the only grounds on which distinction is prohibited. The inclusion of ‘**or other status**’ in all the instruments ensures that all are to be interpreted inclusively; that is, as not limiting the areas of prohibited distinction by excluding categories that are not listed. This understanding has been explicitly stated by the Committee on Economic, Social and Cultural Rights:

The inclusion of “other status” indicates that this list is not exhaustive and other grounds may be incorporated in this category.<sup>372</sup>

The failure to include specific reference to the categories of sexual orientation, gender identity and sex characteristics in the instruments does not mean that these categories are not included or that the rights in the instruments do not extend to persons of diverse sexual orientations, gender identities and sex characteristics. On the contrary, the fundamental principle of universality ensures that all human beings are entitled to all human rights.

In December 2008, the then High Commissioner for Human Rights, Navi Pillay, summarised the legal position well in a statement to the UN General Assembly:

The UDHR is not just aspirational – most of the rights are customary law, with universal applicability. Whilst there is clarity in its terms, there has been resistance to its implementation and sadly, 60 years later we are still having to face the contention that whilst it applies to everyone it does not do so equally: the ageless cliché that everyone is equal but some are more equal than others is not acceptable. ...

There has been considerable progress in terms of legal recognition, including the interpretations by treaty bodies, in particular the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. There is now a considerable body of decisions affirming that discrimination on the basis of sexual orientation is contrary to international human rights law.

The position of the human rights courts is becoming similarly homogenous ...

... there are those who argue that because sexual orientation or gender identity are not explicitly mentioned in any of the conventions and covenants, there would be no protection. My response is that such a position is untenable in legal terms, which is confirmed by the evolving jurisprudence. The principle of universality admits no exception. Human rights truly are the birthright of all human beings.<sup>373</sup>

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369 ICCPR, article 26.

370 ICESCR, article 2.2.

371 Here and elsewhere in this paragraph, the emphasis has been added to words in the original texts.

372 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, para. 15.

373 See <http://arc-international.net/global-advocacy/sogi-statements/hc-ga-200>.

Human rights violations based on sexual orientation, gender identity and sex characteristics can affect not only people who are lesbian, gay, bisexual, transgender and intersex in fact but also those who are suspected of being lesbian, gay, bisexual, transgender or intersex or have a particular sexual orientation, gender identity or sex characteristics imputed to them. Violations can be based on both actual and imputed sexual orientation, gender identity and sex characteristics.

The universality of human rights extends human rights protection to all people, whether they have a particular status or not. Human rights law applies for the benefit of all lesbian, gay, bisexual, transgender and intersex people and of those suspected of being or imputed to be lesbian, gay, bisexual, transgender or intersex.

### 5.2.2. Uneven recognition

Over the past 25 years, international human rights mechanisms and forums have come to recognise explicitly what is guaranteed implicitly in human rights instruments: that the universality of all human rights includes lesbian, gay, bisexual, transgender and intersex people. It is the product of an evolving understanding of the law that has developed as serious violations of human rights have been brought to the attention of international human rights bodies and mechanisms. As the distinct experiences of different groups of lesbian, gay, bisexual, transgender and intersex people have been identified, the application of universal human rights law to their experiences has been recognised and affirmed, where it was not previously seen or accepted. This process has been uneven and sometimes it has occurred at unexpected times or in unexpected forums and even now it is incomplete.

This uneven process is seen in the issues that have been addressed. Human rights issues concerning sexual orientation were first raised in the 1990s and started to be recognised then.<sup>374</sup> Gender identity was at first not recognised as raising distinct issues and was not regularly recognised until the mid 2000s. The distinct issues relating to sex characteristics have only been acknowledged in the past few years. The Human Rights Council resolutions of 2011 and 2014 refer only to sexual orientation and gender identity and request studies of human rights issues only in relation to sexual orientation and gender identity.<sup>375</sup> Yet when the High Commissioner for Human Rights produced the second report in 2015 it dealt not only with sexual orientation and gender identity but also violations of the rights of intersex people.<sup>376</sup> The High Commissioner later said:

While our recent report to the Human Rights Council focused – as mandated – on violations based on sexual orientation and gender identity, it also highlighted specific violations faced by intersex people, and made a number of specific recommendations to States.<sup>377</sup>

The unevenness is also reflected in the various international human rights mechanisms. Certainly more and more mechanisms raise human rights issues concerning sexual orientation, gender identity and sex characteristics more frequently. However, some are better at identifying issues associated with one particular category – generally sexual orientation – than the others. For example, the Committee against Torture, the Committee on the Rights of Persons with Disabilities and the Committee on the Rights of the Child have been significant in identifying human rights issues associated with sex characteristics when other mechanisms still do not see these issues.<sup>378</sup>

374 Human Rights Committee, *Toonen v. Australia*, 4 April 1994, CCPR/C/50/D/488/1992.

375 Resolution 17/19, A/HRC/17/L.9/Rev.1, adopted 17 June 2011; and Resolution 27/32, A/HRC/27/L.27/Rev.1, adopted 26 September 2014. See appendices 1 and 2 of this manual.

376 Although that is not reflected in its title: *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23.

377 *Opening remarks by the High Commissioner for Human Rights at the expert meeting on ending human rights violations against intersex persons*, 16 September 2015, Geneva; at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E).

378 Committee against Torture, *Concluding Observations: Germany*, 12 December 2011, CAT/C/DEU/CO/5, para. 20; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Germany*, 13 May 2015, CRDP/C/DEU/CO/1, paras. 37–38.

However, some international human rights mechanisms still fail to address these issues at all. The same unevenness is also seen in the results of the Human Rights Council's Universal Periodic Review (UPR). While human rights issues in relation to sexual orientation and gender identity are now being raised, there has still not been specific recognition of the rights of intersex people in any UPR recommendation.

Further, unevenness is seen in the evolving understandings of the diversity in sexual orientations, gender identities and sex characteristics. Distinct issues arise in each category. Distinct issues also arise in relation to overlapping or multiple categorisation. The international mechanisms are slowly coming to appreciate the diversity of these issues.

This chapter discusses the approaches of international legal mechanisms and political forums. The unevenness is apparent in the record to date. It is also apparent at the regional level, where some regions are far advanced and others are only beginning to address these issues. Nonetheless, globally and regionally, the process of ensuring the protection and promotion of the human rights of lesbian, gay, bisexual, transgender and intersex people is now well underway, continuing and irreversible.

## 5.3. THE INTERPRETATION AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW BY TREATY MONITORING BODIES

### 5.3.1. The treaty monitoring body system

Each of the nine core international human rights treaties has a committee of independent human rights experts to:

- promote ratification and implementation of the treaty
- receive periodic reports from States parties and examine the States parties on the basis of those reports
- issue guidance to States parties on the interpretation and implementation of the treaty
- receive and give advisory opinions on individual complaints of violation of the treaty where the State party has accepted that jurisdiction of the committee
- hold general discussion days on themes arising under the treaty.<sup>379</sup>

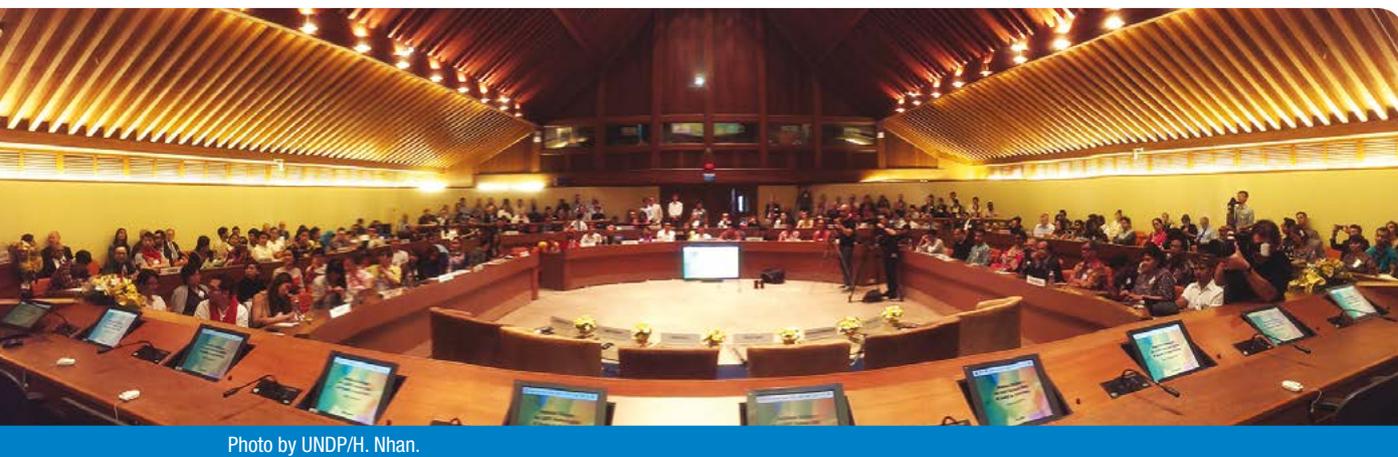


Photo by UNDP/H. Nhan.

<sup>379</sup> For more extensive discussions of the human rights treaty monitoring bodies, see APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012, Chapters 10-12; at [www.asiapacificforum.net/resources/manual-on-international-human-rights-system/](http://www.asiapacificforum.net/resources/manual-on-international-human-rights-system/).

**Table 1: Nine core international human rights treaties and their corresponding treaty monitoring bodies**

International human rights treaty	Treaty monitoring body
International Covenant on Civil and Political Rights	Human Rights Committee
International Covenant on Economic, Social and Cultural Rights	Committee on Economic, Social and Cultural Rights
International Convention on the Elimination of All Forms of Racial Discrimination	Committee on the Elimination of Racial Discrimination
Convention on the Elimination of All Forms of Discrimination against Women	Committee on the Elimination of Discrimination against Women
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Committee against Torture
Convention on the Rights of the Child	Committee on the Rights of the Child
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
Convention on the Rights of Persons with Disabilities	Committee on the Rights of Persons with Disabilities
International Convention for the Protection of All Persons from Enforced Disappearance	Committee on Enforced Disappearances

In their jurisprudence – opinions on individual communications, concluding observations on State reports and interpretative guidance (generally in the form of ‘general comments’ or ‘general recommendations’) – the treaty monitoring bodies have made it clear repeatedly that the treaties for which they are responsible extend to all persons. Most of them have now made specific reference to sexual orientation. Some have now made specific reference to gender identity, usually having first identified sexual orientation as within the scope of the treaty. Only three have referred to sex characteristics (usually as ‘intersex’ or ‘intersex status’) specifically.<sup>380</sup> Some have still made no mention at all to issues within their jurisdictions affecting lesbian, gay, bisexual, transgender and intersex people.

380 The International Commission of Jurists has an excellent resource on its website that summarises and provides links to all treaty monitoring body jurisprudence on sexual orientation and gender identity: see [www.icj.org/sogi-un-database/](http://www.icj.org/sogi-un-database/).

**Table 2: Treaty body references to issues related to sexual orientation, gender identity or sex characteristics<sup>381</sup>**

Committee and first reference in a concluding statement	Number of concluding observations with references in 2013	Number of concluding observations with references in 2014	Number of general comments with references
<b>Committee Against Torture</b> 2001	<b>4</b> All on sexual orientation and gender identity	<b>5</b> 3 on sexual orientation and gender identity 1 on gender identity and sex characteristics 1 on sexual orientation only	<b>2</b> Both on sexual orientation and gender identity
<b>Committee on Economic, Social and Cultural Rights</b> 1998	<b>6</b> 3 on sexual orientation and gender identity 3 on sexual orientation only	<b>8</b> All on sexual orientation and gender identity	<b>5</b> 1 on sexual orientation, gender identity and intersex 4 on sexual orientation only
<b>Committee on the Elimination of Discrimination Against Women</b> 1994	<b>6</b> 1 on sexual orientation and gender identity 5 on sexual orientation only	<b>9</b> 1 on sexual orientation, gender identity and intersex 5 on sexual orientation and gender identity 1 on sexual orientation only 2 on gender identity only	<b>4</b> 3 on sexual orientation and gender identity 1 on sexual orientation only
<b>Committee on the Elimination of Racial Discrimination</b> 2006	-	-	-
<b>Committee on the Rights of the Child</b> 2000	<b>2</b> Both on sexual orientation and gender identity	<b>3</b> 1 on sexual orientation, gender identity and intersex status 2 on sexual orientation and gender identity	<b>5</b> 2 on sexual orientation and gender identity 3 on sexual orientation only
<b>Human Rights Committee</b> 1993	<b>11</b> 9 on sexual orientation and gender identity 2 on sexual orientation only	<b>14</b> 2 on sexual orientation, gender identity and intersex 9 on sexual orientation and gender identity 1 on sexual orientation only 2 on gender identity only	<b>1</b> Sexual orientation and gender identity

<sup>381</sup> See International Commission of Jurists database at [www.icj.org/advanced-search-for-sogi-un-database/?sogiunsource\[\]=1181&page=1](http://www.icj.org/advanced-search-for-sogi-un-database/?sogiunsource[]=1181&page=1). The database has no information about the Committee on the Rights of Persons with Disabilities, the Committee on Migrant Workers and the Committee on Enforced Disappearances and so data from those committees are not included. The important jurisprudence of the Committee on the Rights of Persons with Disabilities is discussed in the text below. That Committee has adopted two general comments, neither of which refers to issues of sexual orientation, gender identity or sex characteristics. The Committee on Migrant Workers has adopted two general comments, neither of which refers to issues of sexual orientation, gender identity or sex characteristics. The Committee on Enforced Disappearances has not adopted any general comments.

Late in 2015, the Committee against Torture referred to sex characteristics ('intersex') in four concluding observations and the Committee on the Rights of the Child in two concluding observations.<sup>382</sup> It appears that, as a result of expert submissions from intersex civil society organisations, these committees have now grasped the significance of these human rights issues. Their insights are now likely to influence the work of the other committees.

The mixed record of the treaty monitoring bodies, evident from the statistics, indicates the need for closer exchange and collaboration among them to ensure that fundamental human rights in relation to sexual orientation, gender identity and sex characteristics are promoted and protected fully.

### 5.3.2. Concluding observations

Every State party to a human rights treaty must submit periodic reports to the treaty monitoring body on its implementation of the treaty, which is then examined by the members of the treaty monitoring body. The treaty monitoring body issues its concluding observations, with findings and recommendations, after the examination of the State. Issues of sexual orientation and gender identity, and more recently of sex characteristics, are now raised during this process and feature in a number of the concluding observations.<sup>383</sup> The Human Rights Committee was the first to raise these issues and has been the most active in doing so.

The **Human Rights Committee** first raised sexual orientation in a concluding observation in 1993, the year before the *Toonen* decision, when it welcomed Norway's legislative steps towards registration of same-sex partnerships.<sup>384</sup> In 2013, it made comments in concluding observations on 12 State reports and, in 2014, in concluding observations on 14 State reports.<sup>385</sup> The practice of other treaty monitoring bodies has been uneven but in most cases similar.

The exception among the six older committees is the **Committee on the Elimination of Racial Discrimination**. That Committee referred to sexual orientation in concluding observations on five State reports between 2006 and 2009 but not since. Those five occasions all consisted of referring to domestic legislation that prohibited discrimination on the ground of sexual orientation, among other grounds.<sup>386</sup> The Committee has provided no views of its own on the issue.

The very recent attention to issues associated with sex characteristics has been significant. A number of treaty monitoring bodies have made specific reference to intersex issues, beginning in 2009.<sup>387</sup> The first observation was relatively minor, concerning dialogue with 'non-governmental organizations of intersexual and transsexual people'.<sup>388</sup> Since then, comments have been stronger and focused on serious human rights issues, including:

- abuse of intersex women<sup>389</sup>
- the right to health of intersex persons<sup>390</sup>

382 These recent decisions are discussed below in this chapter.

383 See Table 2, above.

384 Human Rights Committee, *Concluding Observations: Norway*, 4 November 1993, CCPR/C/79/Add.27, para. 7.

385 See International Commission of Jurists database; at [www.icj.org/advanced-search-for-sogi-un-database/?sogiunsource\[\]=1181&spage=1](http://www.icj.org/advanced-search-for-sogi-un-database/?sogiunsource[]=1181&spage=1).

386 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Denmark*, 19 October 2006, CERD/C/DEN/CO/17; *Concluding Observations: Czech Republic*, 11 April 2007, CERD/C/CZE/CO/7; *Concluding Observations: Germany*, 22 September 2008, CERD/C/DEU/CO/18; *Concluding Observations: Austria*, 22 September 2008, CERD/C/AUT/CO/17; *Concluding Observations: Greece*, 14 September 2009, CERD/C/GRC/CO/16-19.

387 Committee on the Elimination of Discrimination against Women, *Concluding Observations: Germany*, 2009, CEDAW/C/DEU/CO/6.

388 *Ibid.*, paras. 61-62.

389 Committee on the Elimination of Discrimination against Women, *Concluding Observations: Costa Rica*, 2011, CEDAW/C/CRI/CO/5-6.

390 Committee on Economic, Social and Cultural Rights, *Concluding Observations: Germany*, 12 July 2011, E/C.12/DEU/CO/5.

- informed consent to medical and surgical treatment of intersex persons,<sup>391</sup> especially children<sup>392</sup>
- criminalisation of ‘intersex conduct’<sup>393</sup>
- violence against intersex persons<sup>394</sup>
- access to health services for intersex persons.<sup>395</sup>

There has also been comment on the responsibility of NHRIs to “engage in all human rights issues, including those related to the rights of ... intersex persons”.<sup>396</sup>

The fullest discussion of a human rights issue affecting intersex people specifically was by the **Committee against Torture** in 2011.<sup>397</sup> That Committee has followed up its concerns more than any other. At its 56th session in December 2015, it made comments in respect of four States: Austria, China, China (Hong Kong) and Denmark.<sup>398</sup> Other committees have followed the approach of the Committee Against Torture; for example, the **Committee on the Rights of Persons with Disabilities** and the **Committee on the Rights of the Child**.<sup>399</sup> Early in 2016, the Committee on the Rights of the Child raised the issue of surgical procedures on intersex children again in the concluding observations on Ireland and France.<sup>400</sup>

There has only been one treaty body reference to gender expression. That was in the context of the concluding observations on Finland, where the **Committee on the Elimination of Discrimination Against Women** said:

The Committee welcomes the proposed amendment to the Act on Equality between Women and Men, which expands the definition of sex and gender-based discrimination to include discrimination based on gender identity and gender expression.<sup>401</sup>

### 5.3.3. Individual communications

Although the first reference to sexual orientation by a treaty monitoring body was a positive comment in a concluding observation in 1993, the inclusion of violations of the rights of lesbian and gay persons in international human rights jurisprudence first occurred in response to individual communications (complaints). Complainants raised issues of violation that forced the committees to consider the scope of international human rights law and led to the first decisions that recognised the application of the law to violations based on sexual orientation.

The **Human Rights Committee** has the oldest and largest body of jurisprudence arising from individual communications. It was the first to comment specifically, in any way or any context, on the application of

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391 Committee against Torture, *Concluding Observations: Germany*, 12 December 2011, CAT/C/DEU/CO/5.

392 Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 26 February 2015, CRC/C/CHE/CO/2-4.

393 Human Rights Committee, *Concluding Observations: Sri Lanka*, 27 October 2014, CCPR/C/LKA/CO/5, para. 8.

394 Human Rights Committee, *Concluding Observations: Malawi*, 23 July 2014, CCPR/C/MWI/CO/1/Add.1, para. 10.

395 Ibid, para. 10.

396 Ibid, para. 6.

397 Committee against Torture, *Concluding Observations: Germany*, 12 December 2011, CAT/C/DEU/CO/5, para. 20.

398 Committee against Torture, *Concluding Observations: Austria*, 27 January 2016, CAT/C/AUT/CO/6, paras. 44-45; *Concluding Observations: Denmark*, 4 February 2016, CAT/C/DNK/CO/6-7, paras. 42-43; *Concluding Observations: Hong Kong, China*, 3 February 2016, CAT/C/CHN-HKG/CO/5, paras. 28-29; *Concluding Observations: China*, 3 February 2016, CAT/C/CHN/CO/5, paras. 55-56.

399 Committee on the Rights of Persons with Disabilities, *Concluding Observations: Germany*, 13 May 2015, CRPD/C/DEU/CO/1, paras 37-38; Committee on the Rights of the Child, *Concluding Observations: Switzerland*, 26 February 2015, CRC/C/CHE/CO/2-4, paras 42-43.

400 Committee on the Rights of the Child, *Concluding Observations: Ireland*, 29 January 2016, CRC/C/IRL/CO/3-4, paras. 39-40; Committee on the Rights of the Child, *Concluding Observations: France*, 29 January 2016, CRC/C/FRA/CO/5, paras 47-48.

401 Committee on the Elimination of Discrimination against Women, *Concluding Observations: Finland*, 20 February 2014, CEDAW/C/FIN/CO/7, para. 10.

international human rights law in relation to sexual orientation.<sup>402</sup> It did so in an individual communication by Nicholas Toonen, a gay man, objecting to laws in the Australian state of Tasmania that criminalised homosexual conduct.<sup>403</sup> In its conclusions on that communication, the Committee considered a number of legal and factual issues. First, it considered the right to privacy under article 17 of the ICCPR and concluded:

In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy”, and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws.<sup>404</sup>

Second, it considered the anti-discrimination provision in article 2 and the equality provision in article 26 of the ICCPR:

The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.<sup>405</sup>

This position perhaps reflects the limited understanding at the time of the nature of sexual orientation. It would have been far better, and technically more accurate, had the Committee decided that sexual orientation was a ‘status’ comparable in nature to those listed in the ICCPR, rather than finding that sexual orientation could be considered part of the meaning of ‘sex’. However, the Committee decided to consider ‘sex’ as including sexual orientation.<sup>406</sup>

The Human Rights Committee has considered these issues further in several other communications since the *Toonen* case. In these later cases it has not repeated its approach in *Toonen* in defining ‘sex’ to include sexual orientation. On the contrary, it has identified sexual orientation as a ground of prohibited discrimination in itself and it has relied on the broad equality provision in article 26 of the ICCPR in doing so. In *Young v Australia*, the Committee considered a situation in which a same-sex partner was denied a benefit that would have been payable to a different sex partner in the same position. It said in its decision that:

The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced.<sup>407</sup>

The Committee subsequently applied this approach in relation to sexual orientation to other rights under the ICCPR:

- freedom from torture; article 7<sup>408</sup>
- freedom of expression; article 19<sup>409</sup>
- freedom of peaceful assembly; article 21.<sup>410</sup>

402 The facts of the communication did not include gender identity or sex characteristics and so the Committee’s conclusions do not extend directly beyond sexual orientation. However, because of its statements on the universality of human rights and the inclusiveness of the treaty’s scope, the decision has clear implications for the international human rights law’s coverage of gender identity and sex characteristics.

403 Human Rights Committee, *Toonen v Australia*, 4 April 1994, CCPR/C/50/D/488/1992.

404 Ibid, para. 8.2.

405 Ibid, para. 8.7.

406 The Human Rights Committee did not discuss gender identity or sex characteristics. Sex characteristics could be appropriately considered as included within the definition of ‘sex’. The interpretation of ‘sex’ in some domestic laws in the Asia Pacific region is now taken to include sex characteristics.

407 Human Rights Committee, *Young v Australia*, 18 September 2003, CCPR/C/78/D/941/2000, para. 10.4.

408 Human Rights Committee, *M. I. v Sweden*, 25 July 2013, CCPR/C/108/D/2149/2012.

409 Human Rights Committee, *Fedotova v Russian Federation*, 30 November 2012, CCPR/C/106/D/1932/2010.

410 Human Rights Committee, *Alekseev v Russian Federation*, 25 October 2013, CCPR/C/109/D/1873/2009.

Issues of sexual orientation have arisen only very occasionally in the communications jurisprudence of other treaty monitoring bodies.<sup>411</sup> The **Committee against Torture** has accepted that torture on the basis of sexual orientation is a violation of the Convention against Torture. In *Mondal v Sweden*, it found that the deportation of the complainant to Bangladesh would violate the treaty because of the risk of torture on the basis, among other things, of his sexual orientation.<sup>412</sup>

There is no communications jurisprudence on gender identity or intersex status.

#### 5.3.4. General comments

The greater awareness of these issues in the treaty monitoring bodies is also reflected in the inclusion of references to sexual orientation, gender identity and, on two occasions only, sex characteristics in 18 general comments and recommendations.

The **Human Rights Committee** has issued 35 general comments. It has made reference to sexual orientation and gender identity in only one, its most recent one, in 2014: General Comment 35 on liberty and security of the person under article 9 of the ICCPR.

Article 9 guarantees those rights to everyone. “Everyone” includes, among others, ... lesbian, gay, bisexual and transgender persons ...<sup>413</sup>

States parties must respond appropriately to patterns of violence against categories of victims such as ... violence against persons on the basis of their sexual orientation or gender identity ...<sup>414</sup>

In addition, in a recent draft general comment, on the right to life, the Human Rights Committee has included specific reference to lesbian, gay, bisexual, transgender and intersex persons among vulnerable persons needing “exceptional measures of protection”.<sup>415</sup> Coming after General Comment 35, this perhaps indicates that the Committee is now aware of the human rights issues affecting lesbian, gay, bisexual, transgender and intersex people and will include them more regularly in future general comments.

The **Committee on Economic, Social and Cultural Rights** has issued 21 general comments, four of which refer to sexual orientation and one which refers to sexual orientation, gender identity and intersex status. It included sexual orientation as a specific ground of prohibited discrimination in General Comment 14 in 2000.<sup>416</sup> It reiterated this in General Comment 15 in 2002, General Comment 18 in 2006 and General Comment 19 in 2008.<sup>417</sup> In General Comment 20 in 2009, it included transgender and intersex persons specifically for the first time. Importantly, in General Comment 20, it definitively moved away from the original approach of the Human Rights Committee in *Toonen v Australia* that included sexual orientation within the definition of ‘sex’. It discussed prohibited grounds of discrimination and said, in relation to ‘status’:

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411 See OHCHR treaty body jurisprudence database; at <http://juris.ohchr.org/>.

412 Committee against Torture, *Mondal v Sweden*, 7 July 2011, CAT/C/46/D/338/2008. In another case, the Committee found insufficient evidence that the deportation of a gay man from the Netherlands to Iran would give rise to torture and so the deportation would not violate the Convention: Committee against Torture; see *KSY v The Netherlands*, 26 May 2003, CAT/C/30/D/190/2001.

413 Human Rights Committee, *General Comment 35 on liberty and security of the person*, 16 December 2014, CCPR/C/GC/35, para. 3.

414 *Ibid.*, para 9.

415 Human Rights Committee, *Draft General Comment 36 on the right to life*, 2 September 2015, CCPR/C/GC/R.36/Rev.2, para. 26.

416 Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000, E/C.12/2000/4, para. 18.

417 Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (arts. 11 and 12)*, 20 January 2002, E/C.12/2002/11, para. 13; Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work (art. 6)*, 6 February 2006, E/C.12/GC/18, para. 12; Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security*, 4 February 2008, E/C.12/GC/19, para. 29.

The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of “other status” is thus needed to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognised grounds in article 2(2). These additional grounds are commonly recognised when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation. The Committee’s General Comments and Concluding Observations have recognised various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive.<sup>418</sup>

Then it discussed ‘sexual orientation and gender identity’ specifically:<sup>419</sup>

“Other status” as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor’s pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.<sup>420</sup>

Significantly, the Committee gives specific recognition to ‘sexual orientation’, ‘gender identity’ and ‘intersex’. It distinguishes between sexual orientation and gender identity, discussing gender identity ‘in addition’ to sexual orientation. However, intersex status has no separate reference in the heading of the paragraph and ‘persons who are transgender, transsexual or intersex’ are all discussed as an example of gender identity. Intersex status, now increasingly referred to as ‘sex characteristics’, was originally framed in this way in discussions in international human rights bodies. It is now more appropriately seen as another and distinct ‘status’ in its own right and so a distinct ground of prohibited discrimination.

The **Committee on the Elimination of Discrimination against Women** has issued 33 general recommendations, of which one makes specific reference to sexual orientation, gender identity and intersex status, three refer to sexual orientation and gender identity, and one refers to sexual orientation alone.<sup>421</sup>

In two general recommendations issued on the same day in 2010, the Committee referred for the first time in a general recommendation to sexual orientation and gender identity, doing so in the context of ‘intersectionality’; that is, the interaction of two or more factors affecting women’s enjoyment of human rights.<sup>422</sup> Intersectionality is also raised in a later general recommendation relating to refugee status.<sup>423</sup> Discussion of intersectionality incorporated the first reference to ‘intersex person’ in the recent General Recommendation 33 in 2015:

... discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person.<sup>424</sup>

418 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, 2 July 2009, E/C.12/GC/20, para. 27.

419 The heading for this section of the general comment is ‘sexual orientation and gender identity’. There is no specific mention of intersex status in the heading.

420 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, 2 July 2009, E/C.12/GC/20, para 32.

421 The interpretative guidance of the Committee on the Elimination of Discrimination against Women is issued as general recommendations rather than general comments. They are essentially the same kind of document as the general comments issued by other treaty monitoring bodies.

422 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27, para. 13; Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para. 18.

423 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 14 November 2014, CEDAW/C/GC/32, para. 6.

424 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33 on women’s access to justice*, 3 August 2015, CEDAW/C/GC/33, para. 8.



General Recommendation 33 also refers to ‘intersex person’ in the context of criminalisation:

Women are also disproportionately criminalized owing to their situation or status, such as being involved in prostitution, being a migrant, having been accused of adultery, identity as a lesbian, bisexual or transgender woman or intersex person, having undergone an abortion or belonging to other groups that face discrimination.<sup>425</sup>

The Committee also issued a general recommendation on the economic consequences of marriage and family relations, in which it said:

Certain forms of relationships (i.e. same sex relationships) are not legally, socially or culturally accepted in a considerable number of States parties. However, where they are recognized, whether as a de facto union, registered partnership or marriage, the State party should ensure protection of economic rights of the women in these relationships.<sup>426</sup>

In 2014, the Committee on the Elimination of Discrimination against Women issued a joint general recommendation – general comment with the Committee on the Rights of the Child in which the two committees discuss human rights violations arising from “stereotyped sex- and gender-based roles”. In it, they called for “the transformation of traditional cultural attitudes”.<sup>427</sup> There is no specific reference, however, to sexual orientation, gender identity or sex characteristics.

In addition to this general recommendation – general comment, the **Committee on the Rights of the Child** has referred to sexual orientation or gender identity in five other general comments: two refer to sexual orientation and gender identity and three refer to sexual orientation alone. It first expressed concern about discrimination based on sexual orientation in its general comment on HIV/AIDS and the rights of children.<sup>428</sup> Soon afterwards it defined the right to non-discrimination as including a prohibition of discrimination based on “adolescents’ sexual orientation”.<sup>429</sup> In a later general comment in 2013, gender identity was specifically included as well as sexual orientation.<sup>430</sup> In discussing “children in potentially vulnerable situations” in relation to violence, the Committee recognised that:

425 Ibid, para. 49.

426 Committee on the Elimination of Discrimination against Women, *General Recommendation No. 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Economic consequences of marriage, family relations and their dissolution*, 26 February 2013, CEDAW/C/GC/29, para. 24

427 Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint General Recommendation No. 31 of CEDAW and General Comment No. 18 of CRC on harmful practices*, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, para. 17.

428 Committee on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the Rights of the Children*, 17 March 2003, CRC/GC/2003/3, para. 8.

429 Committee on the Rights of the Child, *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 1 July 2003, CRC/GC/2003/4, para. 6.

430 Committee on the Rights of the Child, *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, para. 8.

Groups of children which are likely to be exposed to violence include, but are not limited to, children: ... who are lesbian, gay, transgender or transsexual...<sup>431</sup>

Perhaps the most important statement occurs in the general comment on the best interests of the child. Here the Committee makes clear that the diversity of children must be taken into account in determining the child's best interests. Respect for the child's identity is itself a basic human right. Sexual orientation is included specifically as part of a child's identity. Although there is no specific reference to gender identity, it must by definition be a critical aspect of identity.

Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.<sup>432</sup>

The **Committee against Torture** has issued only three general comments. In two of the three it has raised issues of both sexual orientation and gender identity. In General Comment 2 in 2008 it said:

The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of ... sexual orientation, transgender identity ... States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.<sup>433</sup>

... Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles ...<sup>434</sup>

In General Comment 3 in 2012, the Committee reiterated its inclusion of lesbian, gay, bisexual and transgender people as a group especially vulnerable to torture:

States parties shall ensure that access to justice and to mechanisms for seeking and obtaining redress are readily available and that positive measures ensure that redress is equally accessible to all persons regardless of ... sexual orientation, gender identity, ...<sup>435</sup>

States parties shall ensure due attention to gender in providing all the elements cited above in the process of ensuring that everybody, in particular members of groups made vulnerable, including lesbian, gay, bisexual and transgender (LGBT) people, must be treated fairly and equally and obtain fair and adequate compensation, rehabilitation and other reparative measures which respond to their specific needs.<sup>436</sup>

Through their work in issuing general comments on the interpretation of treaties, concluding observations on State reports of treaty implementation and views on individual communications, treaty monitoring bodies have made it very clear that:

- all the rights contained in human rights treaties apply equally to everyone, including people of diverse sexual orientations and gender identities

431 Committee on the Rights of the Child, *General Comment No. 13: The rights of the child to freedom from all forms of violence*, 18 April 2011, CRC/GC/2011/13, para. 72.

432 Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, para. 55.

433 Committee against Torture, *General Comment No. 2: Implementation of article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, para. 21.

434 Ibid, para 22.

435 Committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, 13 December 2012, CAT/C/GC/3, para. 32.

436 Ibid, para 39.

- the prohibited grounds of discrimination include sexual orientation and gender identity
- lesbian, gay, bisexual, transgender and intersex people are especially vulnerable to human rights violations and so they are entitled to special, targeted measures of protection of their human rights.

Some treaty monitoring bodies have also referred specifically to ‘intersex persons’ in relation both to human rights violations and to discrimination.

## 5.4. THE VIEWS AND APPROACHES OF THE SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL

The Human Rights Council is the UN’s highest body with specialist responsibility for human rights. It has a very broad mandate for the promotion and protection of human rights. One of the functions of the Human Rights Council is the establishment of special procedures, independent human rights experts appointed to:

- study and increase understanding of a particular human rights matter or situation
- receive information and report on particular human rights violations.<sup>437</sup>

Their mandates can relate to a specific human rights issue or theme (‘thematic mandates’) or to the human rights situation in a specific country (‘country mandates’). At the end of March 2015, there were 55 special procedures: 41 with thematic mandates and 14 with country mandates.<sup>438</sup> Each can deal with issues within the scope of the mandate that relate to the human rights of lesbian, gay, bisexual, transgender and intersex people.

Many special procedure mandate holders have taken up human rights issues affecting lesbian, gay, bisexual, transgender and, more recently, intersex people, showing both the range of human rights whose enjoyment is affected by sexual orientation, gender identity or sex characteristics and the breadth of concern among special procedures about the ability of lesbian, gay, bisexual, transgender and intersex people to enjoy their human rights fully. The special procedures who have addressed these issues include those on:

- torture
- extra-judicial, summary or arbitrary executions
- arbitrary detention
- human rights defenders
- minorities
- violence against women
- discrimination against women in law and in practice
- freedom of assembly and association
- freedom of expression
- terrorism
- the right to the highest attainable standard of health
- housing
- cultural rights.<sup>439</sup>

437 For more extensive discussions of the special procedures, see APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012, Chapter 7; at [www.asiapacificforum.net/resources/manual-on-international-human-rights-system/](http://www.asiapacificforum.net/resources/manual-on-international-human-rights-system/).

438 For further information on the special procedures, see [www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx). The full list of thematic mandates is at [http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM) and the full list of country mandates is at [http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx). Both contain links to websites for individual mandates and to reports of the mandate holders.

439 The International Commission of Jurists database summarises and provides links to special procedures’ reports that refer to issues of sexual orientation and gender identity; see [www.icj.org/sogi-un-database/](http://www.icj.org/sogi-un-database/).



UN Photo by Violaine Martin.

In 2015, a special procedure on the right to privacy was established and the first Special Rapporteur appointed.<sup>440</sup> Without doubt, many human rights issues affecting lesbian, gay, bisexual, transgender and intersex people will be raised with this new special procedure.

Persons are generally appointed to special procedures mandates for two terms of three years. The turnover of mandate holders has, however, not affected the level of concern for the human rights of lesbian, gay, bisexual, transgender and, more recently, intersex people. On the contrary, there has been remarkable consistency in the concern and increasing focus on violations based on sexual orientation, gender identity or sex characteristics. The special procedures have addressed these issues in international forums and succeeded in compelling these forums to discuss them, even if reluctant to do so or hostile.

Three mandates can provide examples of how the special procedures pursue issues of sexual orientation, gender identity and sex characteristics: the first relating to extra-judicial, summary or arbitrary executions, the second relating to human rights defenders and the third relating to the right to health. These examples are chosen because they deal with both traditional categories of human rights: civil and political rights and economic, social and cultural rights.

The mandate of the **Special Rapporteur on extra-judicial, summary or arbitrary executions** was established in 1982.<sup>441</sup> It was most recently renewed by the Human Rights Council in 2014.<sup>442</sup>

440 Human Rights Council resolution 28/16, A/HRC/RES/28/16.

441 Economic and Social Council resolution 1982/35, E/RES/1982/35. The work of the Special Rapporteur on extra-judicial, summary or arbitrary executions is reported at [www2.ohchr.org/english/issues/executions/index.htm](http://www2.ohchr.org/english/issues/executions/index.htm). The work of the Special Rapporteur between 2005 and 2010 is also featured at [www.extrajudicialexecutions.org/Home.html](http://www.extrajudicialexecutions.org/Home.html).

442 Human Rights Council resolution 26/12, A/HRC/RES/26/12.

The resolutions of the Human Rights Council (and formerly the Commission on Human Rights) and the General Assembly on extra-judicial killings are among the earliest to reference sexual orientation specifically. More recently, they have also referred to gender identity. The most recent resolution of the General Assembly, in 2014, urges States to:

... ensure the effective protection of the right to life of all persons, to conduct, when required by obligations under international law, prompt, exhaustive and impartial investigations into all killings, including those targeted at specific groups of persons, such as ... because of their sexual orientation or gender identity ...<sup>443</sup>

The work of this Special Rapporteur has included significant reference to the human rights of gay and lesbian people since 1995, when the Special Rapporteur made a joint visit to Colombia with the Special Rapporteur on torture. The two rapporteurs reported:

In addition to criminals, persons from other sectors of the population whose presence was considered undesirable became the targets of such killings: prostitutes, homosexuals, beggars, drug consumers and street children. The killings are often preceded by torture, allegedly with the purpose of making it impossible to identify the victim (and therefore to carry out an investigation) and sending an intimidatory message to the above sectors. Several sources expressed their concern to the Special Rapporteurs that, over the years, “social cleansing” had become more and more accepted and acceptable, as a solution to the question of how to deal with marginalized sectors of the population. The qualification “desechables” (disposable) for those regarded as undesirable has gained legitimacy.<sup>444</sup>

The annual report of the Special Rapporteur in 1999 discussed, for the first time, executions based on sexual orientation and gender identity generally as a widespread problem in many States. It also commented on the imposition of the death penalty for same-sex conduct under national criminal laws:

The Special Rapporteur is deeply concerned by numerous and continuing reports of persons having been killed or sentenced to death because of their sexual orientation. She is particularly disturbed by reports from Brazil, Colombia and Mexico, where so-called “death-squads” have over the last years reportedly murdered a large number of persons belonging to sexual minorities. The Special Rapporteur has been informed that in the period from 1991 to 1994, 12 homosexual men were killed by armed groups in the city of Tuxtla Gutiérrez, Mexico. It appears that the perpetrators of these killings were never identified, and it is alleged that the authorities failed to carry out thorough and complete investigations into these crimes. The Special Rapporteur has also received reports that in the last several years hundreds of so-called “social undesirables”, including many homosexuals and transvestites, have been killed by armed groups in Colombia. In Brazil it is reported that hundreds of persons belonging to sexual minorities have been murdered in the last 10 years. It is alleged that the Brazilian and Colombian authorities have not taken adequate action to find and prosecute the persons responsible for these crimes.

The Special Rapporteur regrets that in some States homosexual relationships are still punishable by death. In this regard she wishes to recall that under article 6 of the International Covenant on Civil and Political Rights, death sentences may only be imposed for the most serious crimes. As discussed above in chapter V, section A (3), this restriction clearly excludes matters of sexual orientation. The Special Rapporteur further believes that criminalizing matters of sexual orientation increases the social stigmatization of members of sexual minorities, which in turn makes them more vulnerable to violence and human rights abuses, including violations of the right to life. Because of this stigmatization, violent acts directed against persons belonging to sexual minorities are also more likely to be committed in a climate of impunity.<sup>445</sup>

The Special Rapporteur has dealt with executions based on sexual orientation and gender identity in annual reports to the Human Rights Council, in country visits and in communications on individual cases.

443 General Assembly resolution 69/182, A/RES/69/182, para. 6(b).

444 *Joint report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on extrajudicial, summary or arbitrary executions: Colombia*, 16 January 1995, E/CN.4/1995/111.

445 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 6 January 1999, E/CN.4/1999/39, paras. 76-77.

The **Special Rapporteur on the situation of human rights defenders** was established in 2000 and last renewed in 2014.<sup>446</sup> The special procedure has shown a special regard for the human rights of lesbian, gay, bisexual, transgender and intersex defenders. This mandate has referred most often in public reports to issues of sexual orientation, gender identity and sex characteristics ('intersex').<sup>447</sup> Most references are in reports of individual cases taken up by the Special Rapporteur or reports of visits by the Special Rapporteur to specific countries. In both cases the reports relate to those specific countries. Since the establishment of the mandate, the Special Rapporteur has reported on cases or situations of lesbian, gay, bisexual, transgender and intersex defenders in over 50 countries.

The first mandate holder, Hina Jilani, raised issues associated with sexual orientation in her first annual report, saying that they required "special attention":

Greater risks are faced by defenders of the rights of certain groups as their work challenges social structures, traditional practices and interpretations of religious precepts that may have been used over long periods of time to condone and justify violation of the human rights of members of such groups. Of special importance will be women's human rights groups and those who are active on issues of sexuality, especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and to public repudiation, not only by State forces but by other social actors. The Special Representative will undertake or encourage studies of any such phenomena with a view to drawing up a compendium of possible measures to enhance the protection of such human rights defenders.<sup>448</sup>

She frequently discussed issues relating to lesbian, gay, bisexual and transgender defenders in subsequent annual reports.<sup>449</sup> From the beginning of her mandate, she was investigating individual cases of extra-judicial killings of lesbian, gay, bisexual and transgender people.<sup>450</sup> In July 2006, she attended and spoke at the First International Conference on Lesbian, Gay, Bisexual and Transgender Human Rights, held in Montreal, Canada.<sup>451</sup>

The second mandate holder, Margaret Sekaggya, also referred to lesbian, gay, bisexual and transgender defenders in her first annual reports to the General Assembly and to the Human Rights Council.<sup>452</sup> She reported that lesbian, gay, bisexual and transgender defenders "continue to be at particular risk of attacks and violations".<sup>453</sup> She also included in her reports specific reference to intersex people and groups.<sup>454</sup>

446 Respectively, Commission on Human Rights resolution 2000/61, E/CN.4/RES/2000/61; and Human Rights Council resolution 25/18, A/HRC/RES/25/18. The special procedure was originally called 'Special Representative of the Secretary General'. It became 'Special Rapporteur' in 2008 by Human Rights Council resolution 7/8, A/HRC/RES/7/8. There was no significant change in functions and responsibilities as a result of the change in title. The work of the Special Rapporteur on the situation of human rights defenders is reported at [www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx](http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx).

447 According to the ICJ database, 148 references to the end of March 2015. See [www.icj.org/advanced-search-for-sogi-un-database/?sogiuinsource\[\]=1194](http://www.icj.org/advanced-search-for-sogi-un-database/?sogiuinsource[]=1194).

448 *Report of the Special Representative of the Secretary General on Human Rights Defenders, Hina Jilani*, 26 January 2001, E/CN.4/2001/94, para. 89(g).

449 *Report of the Special Representative of the Secretary-General on human rights defenders*, 27 February 2002, E/CN.4/2002/106; *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 13 December 2004, E/CN.4/2005/101; *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 23 January 2006, E/CN.4/2006/95; *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 24 January 2007, A/HRC/4/37; *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 31 January 2008, A/HRC/7/28.

450 *Report submitted by Ms. Hina Jilani, Special Representative of Secretary-General on human rights defenders, pursuant to the Commission on Human Rights resolution 2000/61*, 27 February 2002, E/CN.4/2002/106, para. 146; *Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders, in accordance with Commission on Human Rights resolution 2000/61 Addendum Communications to and from Governments*, 20 February 2003, E/CN.4/2003/104/Add.1, para. 188.

451 *Annual Report of the Special Representative to the General Assembly of the United Nations*, 5 September 2006, A/61/312, para. 25; *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 24 January 2007, A/HRC/4/37, para. 7.

452 Respectively, *Report of the Special Rapporteur on the situation of human rights defenders*, 14 August 2008, A/63/288, and *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 12 February 2009, A/HRC/10/12.

453 *Report of the Special Rapporteur on the situation of human rights defenders*, 14 August 2008, A/63/288, para. 37.

454 *Report of the Special Representative of the Secretary-General on the situation of human rights defenders*, 12 February 2009, A/HRC/10/12, para. 65.

The third person to hold this mandate, Michel Forst, has continued the focus of his two predecessors on lesbian, gay, bisexual, transgender and intersex defenders.<sup>455</sup> He recommended in his first annual report to the Human Rights Council that States should:

Pay particular attention to the most exposed groups: ... defenders of lesbian, gay, bisexual, transgender and intersex rights ...<sup>456</sup>

The **Special Rapporteur on the right of everyone to the enjoyment of highest attainable standard of physical and mental health** was established in 2002 and last renewed in 2013.<sup>457</sup> In his first annual report the Special Rapporteur adopted the view of the Committee on Economic, Social and Cultural Rights on prohibited grounds of discrimination:

According to CESCR, ICESCR “proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health”.<sup>458</sup>

He commented in his 2004 report on the links between sexual orientation and gender identity and the enjoyment of the right to health:

... discrimination on the grounds of sexual orientation is impermissible under international human rights law. The legal prohibition of same-sex relations in many countries, in conjunction with a widespread lack of support or protection for sexual minorities against violence and discrimination, impedes the enjoyment of sexual and reproductive health by many people with lesbian, gay, bisexual and transgender identities or conduct.<sup>459</sup>

He also spoke more directly about sexual rights as human rights and their link to sexual orientation:

... the Special Rapporteur has no doubt that the correct understanding of fundamental human rights principles, as well as existing human rights norms, leads ineluctably to the recognition of sexual rights as human rights.

Sexual rights include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.<sup>460</sup>

The 2010 report considers at some length “issues relating to the criminalization of private, consensual sexual behaviour between adults, and the impact of such criminalization on the enjoyment of the right to health”. Introducing the discussion the Special Rapporteur says:

The Special Rapporteur believes that the criminalization of private, consensual sexual interaction between adults represents a significant impediment to the realization of the right to health of all persons, particularly those against whom the law is directed. He emphasizes that all human rights are universal, indivisible, interdependent and interrelated. The criminalization of private, consensual sexual conduct between adults infringes on not only the right to health, but also various other human rights, including the rights to privacy and equality. In turn, infringement of these human rights impacts indirectly on the right to health.

...

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455 *Report of the Special Rapporteur on the situation of human rights defenders*, 29 December 2014, A/HRC/28/63.

456 *Ibid.*, para 124(f).

457 Respectively Commission on Human Rights resolution 2002/31, E/CN.4/RES/2002/31; and Human Rights Council resolution 24/6, A/HRC/RES/24/6. The work of the Special Rapporteur on the Right to Health is reported at [www.ohchr.org/EN/Issues/Health/Pages/SRRRightHealthIndex.aspx](http://www.ohchr.org/EN/Issues/Health/Pages/SRRRightHealthIndex.aspx).

458 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 13 February 2003, E/CN.4/2003/58, para. 60.

459 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 16 February 2004, E/CN.4/2004/49, para. 38.

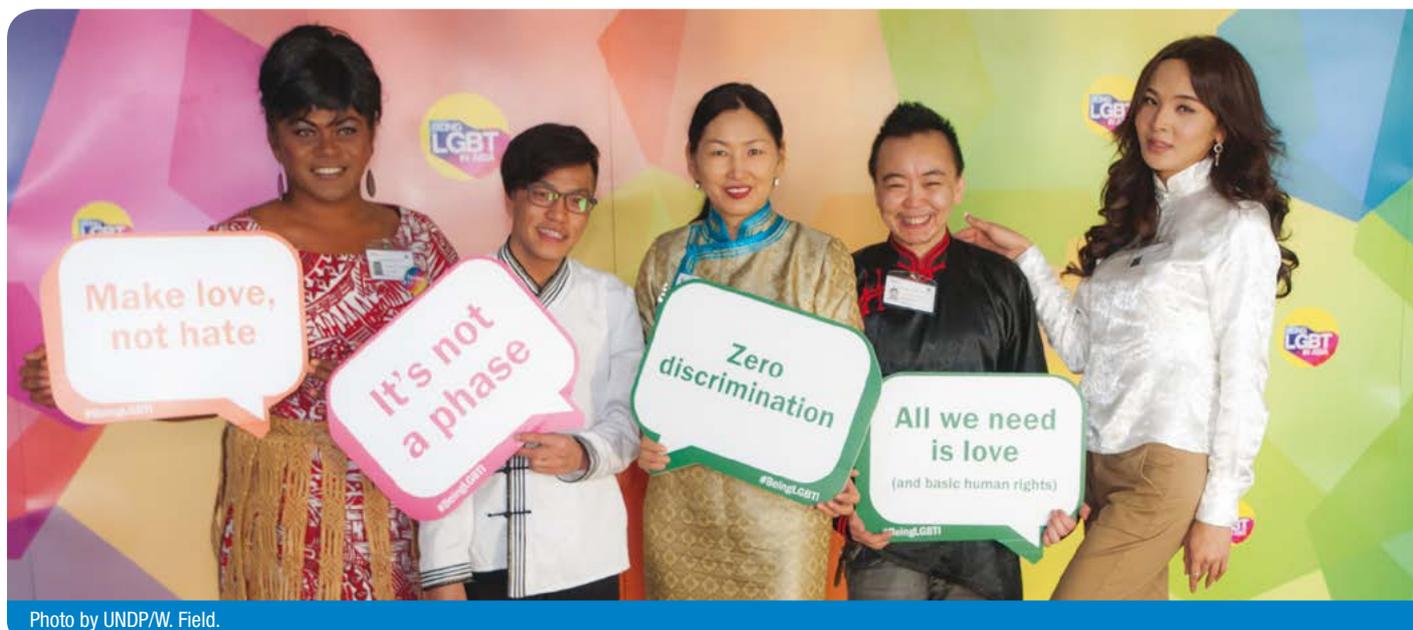
460 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 16 February 2004, E/CN.4/2004/49, para. 54.

Criminal laws concerning consensual same-sex conduct, sexual orientation and gender identity often infringe on various human rights, including the right to health. These laws are generally inherently discriminatory and, as such, breach the requirements of a right-to-health approach, which requires equality in access for all people. The health related impact of discrimination based on sexual conduct and orientation is far-reaching, and prevents affected individuals from gaining access to other economic, social and cultural rights. In turn, the infringement of other human rights impacts on the realization of the right to health, such as by impeding access to employment or housing.

These infringements ultimately undermine the inherent dignity of persons upon which the international human rights framework is based. Denying the dignity of individuals through the criminalization of certain conducts substantially diminishes their self-worth and, in doing so, prevents the realization of the right to health. The decriminalization of such conduct is necessary to address the disempowerment that affected individuals and communities face, and to enable full realization of the right to health.<sup>461</sup>

These comments on criminalisation are applicable beyond sexual relationships. Transgender people can encounter criminal penalties for expressing their gender identity; for example, cross-dressing. They can also be punished through the unfair application of other criminal laws, such as public order laws. This has consequences in broader discrimination and denial of rights. The Special Rapporteur made reference to this in the report of a visit to Malaysia in 2014. He highlighted a number of issues of concern for transgender persons, including:

- criminalisation of ‘cross-dressing’ that forces transgender persons underground
- religious prohibition of transgender surgery that makes such surgery difficult to obtain
- refusal to permit changes to gender on identity cards
- barriers to health care
- negative social attitudes
- discrimination
- forced HIV/AIDS testing.<sup>462</sup>



461 *Report of the Special Rapporteur on the right to health*, 27 April 2010, A/HRC/14/20, paras. 2, 6 and 7.

462 *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum Visit to Malaysia (19 November–2 December 2014)*, May 2015, A/HRC/29/33/Add.1, paras 83-90.



The Special Rapporteur on the right to health is one of the few special procedures to make specific reference to issues relating to sex characteristics. In his 2009 report on informed consent and the right to health, he stressed:

... the importance of safeguarding informed consent of sexual minorities. Health-care providers must be cognizant of and adapt to the specific needs of lesbian, gay, bisexual, transgender and intersex persons. Such elements of vulnerability significantly overlap and exacerbate inequalities ...<sup>463</sup>

He also discussed the situation of intersex children specifically:

Health-care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide informed consent. [This is particularly problematic in the case of intersex genital surgery, which is a painful and high-risk procedure with no proven medical benefits...]<sup>464</sup>

The **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment** has also discussed human rights issues affecting intersex people. In his 2013 report on abuse in health care settings, he identified lesbian, gay, bisexual, transgender and intersex persons as marginalised groups at particular risk of this abuse. He discussed the particular situation of intersex children:

Children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital normalizing surgery, performed without their informed consent, or that of their parents, “in an attempt to fix their sex”, leaving them with permanent, irreversible infertility and causing severe mental suffering.<sup>465</sup>

The Special Rapporteur, in the same report, also made comments specific to gender identity in the context of abuse in health care settings:

In many countries transgender persons are required to undergo often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender. ... Some domestic courts have found that not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, it also amounts to a severe and irreversible intrusion into a person's physical integrity.<sup>466</sup>

463 *Report of the Special Rapporteur on the right to health*, 10 August 2009, A/64/272, para. 46.

464 *Ibid.*, para. 49.

465 *Report of the Special Rapporteur on torture*, 1 February 2013, A/HRC/22/53, para. 77.

466 *Ibid.*, para. 78.

Arising from these comments on intersex and transgender people, the Special Rapporteur recommended that:

... all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, “reparative therapies” or “conversion therapies”, when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.<sup>467</sup>

This remains one of the few recommendations from a special procedure that refers specifically to the treatment of transgender and intersex people.

One special procedure, the **Independent Expert on minority issues**, has referred to gender expression specifically. In her 2006 report the Independent Expert said:

Finally, the independent expert recognizes that some individuals within ethnic, religious, linguistic or national minority groups may experience multiple forms of discrimination because of other factors including gender, gender expression, gender identity, sexual orientation, disability, age or health status. This means that, within minority communities, some individuals who are already struggling against intolerable levels of generalized exclusion also face compounded forms of discrimination or violence based on their gender, personal identity or expression. As a result, the independent expert intends to consider the compounded and often negatively reinforcing nature of multiple forms of exclusion as she undertakes her work, while also highlighting the importance of protecting diverse forms of personal expression.<sup>468</sup>

While this discussion has focused particularly on three special procedures in particular, many others have been very active on human rights issues affecting lesbian, gay, bisexual, transgender and intersex people. The Special Rapporteur on the right to adequate housing has reported repeatedly on these issues within the housing area.<sup>469</sup> The Special Rapporteur on violence against women has also been very active.<sup>470</sup>

The special procedures generally are now far more conscious of the experience and risk of human violations based on sexual orientation, gender identity and, to a lesser extent, sex characteristics. Many have been vocal in asserting repeatedly and consistently that international human rights law extends to lesbian, gay, bisexual, transgender and intersex people and that lesbian, gay, bisexual, transgender and intersex people are entitled to the protection and promotion of their human rights. Nonetheless, some special procedures have still not recognised the significance of these human rights issues and the need for their mandates to address these issues.

467 Ibid, para. 88.

468 *Report of the Independent Expert on Minority Issues*, 2006, E/CN.4/2006/74, para. 28.

469 See, for example, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context*, 26 December 2011, A/HRC/19/53; *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, United States, 12 February 2010, A/HRC/13/20/Add.4; *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Addendum: *Summary of Communication sent and replies received by Governments and other actors [Greece]*, 17 February 2009, A/HRC/10/7/Add.1; *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Canada, 17 February 2009, A/HRC/10/7/Add.3; *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 13 February 2008, A/HRC/7/16; *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, Australia, 11 May 2007, A/HRC/4/18/Add.2; *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, “Women and adequate housing”*, 25 February 2005, E/CN.4/2005/43.

470 See, for example, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 23 May 2012, A/HRC/20/16; *Report of the Special Rapporteur on violence against women, its causes and consequences*, 26 May 2009, A/HRC/11/6/Add.1; *Report of the Special Rapporteur on violence against women, its causes and consequences*, 27 May 2009, A/HRC/11/6/Add.5; *Report of the Special Rapporteur on violence against women, its causes and consequences*, Addendum: *Communications to and from Governments [South Africa]*, 19 March 2007, A/HRC/4/34/Add.1; *Report of the Special Rapporteur on violence against women, its causes and consequences*, 17 January 2005, E/CN.4/2005/72; *Report of the Special Rapporteur on violence against women, its causes and consequences: “Cultural practices in the family that are violent towards women”*, 31 January 2002, E/CN.4/2002/83; *Report of the Special Rapporteur on violence against women, its causes and consequences*, 24 February 2000, E/CN.4/2000/68/Add.5.

## 5.5. SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS IN UN POLITICAL FORUMS

For two decades, legal experts in the international human rights system – the treaty monitoring bodies and the special procedures – have recognised and responded to human rights violations based on sexual orientation, gender identity and sex characteristics. The UN's political bodies – the General Assembly and the Human Rights Council – have, however, been far slower to accept that lesbian, gay, bisexual, transgender and intersex people have human rights and experience violations of those rights.

In these forums, the members are States, not human rights or legal experts, and votes are taken, at times, on the basis of international and domestic political ideologies, not international law. Harmful traditional cultural beliefs and practices are often built on ignorance and prejudice. That has been evident historically in many areas of human rights concern, including in relation to women and children. It is especially evident today in relation to the rights of lesbian, gay, bisexual, transgender and intersex people. Nonetheless, even the UN's political forums are now recognising these human rights issues.

The leadership of the UN Secretary General and the High Commissioners for Human Rights has been important in securing advances in these political forums. Secretary-General Ban Ki-moon has spoken repeatedly of human rights as extending to everyone, including to lesbian, gay, bisexual, transgender and intersex people. On Human Rights Day in 2010, he said:

As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. When individuals are attacked, abused or imprisoned because of their sexual orientation, we must speak out. We cannot stand by. We cannot be silent.

... homosexuality is considered a crime in more than 70 countries. This is not right.<sup>471</sup>

In 2014 the Secretary General has made his position very clear:

I strongly support equal rights for lesbian, gay, bisexual, transgender and intersex people everywhere.<sup>472</sup>

Successive High Commissioners for Human Rights have also repeatedly called for recognition of and respect for the human rights of lesbian, gay, bisexual, transgender and intersex people. In 2008, Navi Pillay told the General Assembly:

No human being should be denied their human rights, simply because of their perceived sexual orientation or gender identity. No human being should be subject to discrimination, violence, criminal sanctions, or abuse, simply because of their perceived sexual orientation or gender identity...

The protection of the rights of those who identify as lesbian, gay or bisexual, and those who are transgender, transsexual or intersex, has attracted extremities of thought and passions...

My response is that such a position is untenable in legal terms, which is confirmed by the evolving jurisprudence. The principle of universality admits no exception. Human rights truly are the birthright of all human beings.<sup>473</sup>

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471 See [www.un.org/press/en/2010/sgsm13311.doc.htm](http://www.un.org/press/en/2010/sgsm13311.doc.htm).

472 'UN Secretary General Ban Ki-moon Message to Lesbian, Gay, Bisexual and Transgender (LGBT) Core Group Ministerial Event' 25 September 2014, New York; at [www.un.org/sg/statements/index.asp?nid=8055](http://www.un.org/sg/statements/index.asp?nid=8055).

473 See <http://arc-international.net/global-advocacy/sogi-statements/hc-ga-200>.

### 5.5.1. UN international conferences

The first forums in which human rights issues in relation to sexual orientation were raised were UN international conferences. These forums are far more open than the official UN bodies and there are more opportunities for statements to canvass relevant issues widely.<sup>474</sup>

The first international human rights forum in which human rights issues relating to sexual orientation were raised is thought to have been the Third World Conference on Women, in Nairobi, Kenya, in 1985. At that conference, a junior minister in the Netherlands Government called for recognition of the rights of lesbians.<sup>475</sup>

There was substantially more discussion of sexual orientation at the Second World Conference on Human Rights, in Vienna, Austria, in 1993. It was the first at which there was a significant presence of lesbian and gay human rights defenders. There was little or no awareness of transgender issues and none of intersex issues, however.

Three LGBT NGOs were accredited at the UN human rights conference in Vienna in 1993. None had existing 'consultative' status at the UN. Six statements were made by lesbian and gay activists either in the plenary session or in the main committee. In addition they participated in the meetings of the NGO parallel conference. Five governments made positive references to lesbian and gay issues in their speeches to the plenary sessions of the conference: Australia, Austria, Canada, Germany and the Netherlands. Singapore was the only state to make a negative comment ...

The draft final conference statement had an equality paragraph condemning discrimination on listed grounds. In the drafting committee Canada proposed adding "sexual orientation" to the list. In response the paragraph was quickly rewritten as a general, open-ended prohibition of discrimination, without a list. Sexual orientation was not to be named.<sup>476</sup>

At the Fourth World Conference on Women, in Beijing, China, in 1995, there were 11 accredited lesbian or lesbian and gay NGOs. The Conference's drafting committee also had the first substantive debate on sexual orientation.

In preparatory meetings leading up to the Conference, several delegations, including South Africa, Canada, Israel and the EU proposed wording that referred to "sexual orientation." One proposal addressed discrimination against women on multiple grounds, such as sex and race, sex and disability, sex and sexual orientation. The four references to "sexual orientation" in the draft Platform of Action were considered together in a drafting committee meeting that stretched into the early morning of the final day, Friday, September 15th, ending after 4 a.m. After an hour of debate on sexual orientation, the chair, Ms Patricia Licuanan of the Philippines, commented that this had been the first substantive discussion of the subject in any United Nations forum. She said it required much more discussion, but given the division, the references would be omitted. Thirty-three States indicated their support for the references. Twenty States indicated opposition. The diplomatic preference for consensus decision making prevailed. A fight on the floor during the closing plenary was avoided.<sup>477</sup>

474 D. Sanders, *Out at the UN*, 2010. This report provides a comprehensive account of the introduction and then increasing discussion of issues relating to sexual orientation, gender identity and sex characteristics in UN forums, and of the gradually increasing presence of lesbian, gay, bisexual, transgender and intersex organisations and advocates in those forums. See also D. Karsey with J. Byrne and L.P. Itaborahy, *So how far as SOGI advocacy come at the UN and where is it heading? Assessing sexual orientation, gender identity, and intersex activism and key developments at the UN 2003–2014*, September 2014; at <http://arc-international.net/wp-content/uploads/2013/09/How-far-has-SOGI-for-web.pdf>.

475 D. Sanders, *Out at the UN*, 2010, p. 23.

476 *Ibid.*, pp. 23–24.

477 *Ibid.*, p. 25. States supporting inclusion were Australia, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Cook Islands, Cuba, European Union (15 States), Israel, Jamaica, Latvia, New Zealand, Norway, Slovenia, South Africa, Switzerland and the United States. States opposing were Algeria, Bangladesh, Belize, Benin, Cote d'Ivoire, Egypt, Ghana, Guatemala, Iran, Jordan, Kuwait, Libya, Nigeria, Senegal, Sudan, Syria, Uganda, United Arab Emirates, Venezuela and Yemen.

The increasing interest in sexual orientation at world conferences found its way into the UN General Assembly Special Sessions. A UN General Assembly Special Session in 2000, five years after the Beijing Women's Conference, repeated the debate in Beijing about the inclusion of reference to sexual orientation in the concluding statement. Again, in the interest of consensus, the reference was not included.<sup>478</sup> The following year, at another UN General Assembly Special Session on HIV/AIDS, a further attempt was made to include specific reference to sexual orientation but again it failed. While at the time these must have seemed like permanent obstacles, in fact the tide was turning.

### 5.5.2. The Human Rights Council and its predecessor, the Commission on Human Rights

The Commission on Human Rights was established in 1946 as the pre-eminent UN forum with specialised responsibility for human rights. It was succeeded by the Human Rights Council in 2006, pursuant to a resolution of the UN General Assembly.<sup>479</sup>

The Commission on Human Rights first acknowledged sexual orientation in a resolution in 2000, in relation to extra-judicial, summary and arbitrary executions. The Commission noted:

... with concern the large number of cases in various parts of the world of ... persons killed because of their sexual orientation ... and calls upon Governments concerned to investigate such killings promptly and thoroughly, to bring those responsible to justice and to ensure that such killings are neither condoned nor sanctioned by government officials or personnel.<sup>480</sup>

Resolutions of the Commission relating to extrajudicial, summary and arbitrary executions in subsequent years always referred to "all killings committed for any discriminatory reason, including sexual orientation".<sup>481</sup> The Human Rights Council has not passed general resolutions on extrajudicial, summary and arbitrary executions but it has renewed the Special Rapporteur's mandate as required.

A turning point in Commission and Council consideration of these issues came in 2003 when, with little notice or preparation, Brazil proposed the first resolution on human rights and sexual orientation at the annual session of the Commission on Human Rights.<sup>482</sup> The proposal caused uproar and dominated the session, with a variety of procedural manoeuvres to prevent discussion of and voting on the proposal itself.<sup>483</sup> Twenty-seven States, including Canada, New Zealand and the member States of the European Union, co-sponsored the proposed resolution.<sup>484</sup> Egypt, Libya, Malaysia, Pakistan and Saudi Arabia moved dozens of amendments and threatened to move many more.<sup>485</sup> Pakistan tried but failed to close off debate on the proposed resolution.<sup>486</sup> Eventually, after further procedural moves and votes, the Commission decided to postpone discussion of the proposed resolution until the next session of the Commission a year later.<sup>487</sup> In 2004, Brazil did not pursue its resolution but sought and obtained Commission postponement for a further year.<sup>488</sup> In 2005, it allowed the proposal to lapse without further Commission decision.

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478 Ibid, pp. 25-26.

479 General Assembly resolution 60/251, 15 March 2006, A/RES/60/251.

480 Commission on Human Rights resolution 2000/31, 20 April 2000, E/CN.4/RES/2000/31.

481 See for example, Commission on Human Rights resolution 2002/36, 22 April 2002, E/CN.4/RES/2002/36, resolution 2003/53, 24 April 2003, E/CN.4/RES/2003/53; resolution 2004/37, 19 April 2004, E/CN.4/RES/2004/37; resolution 2005/34 20, April 2004, E/CN.4/RES/2005/34.

482 E/CN.4/2003/L.92. The draft resolution dealt only with sexual orientation, not gender identity or sex characteristics.

483 See Commission on Human Rights, *Report on the 59th session*, E/CN.4/2003/135, paras. 575-585.

484 Ibid, para. 575.

485 D. Sanders, *Out at the UN*, 2010, p. 34.

486 The 'no-action' resolution was defeated by a vote of 24 to 22 with six abstentions: Commission on Human Rights, *Report on the 59th session*, E/CN.4/2003/135, para. 578.

487 Resolution 2003/118. The postponement resolution was carried by a vote of 24 to 17 with ten abstentions: Commission on Human Rights, *Report on the 59th session*, E/CN.4/2003/135, para. 584.

488 Decision 2004/104, Commission on Human Rights, *Report on the 60th session*, E/CN.4/2004/127, paras. 544-546. The words 'sexual orientation' do not appear at all in the report of the session.

In spite of the failure of this first attempt to have sexual orientation addressed, there could be no turning back. About 50 gay and lesbian activists attended the 2004 session of the Commission on Human Rights, their first strong presence in Geneva, for the anticipated debate on the postponed Brazilian proposed resolution.<sup>489</sup> They were disappointed when the debate was again postponed but they remained committed to pursuing these issues in the Commission. Late in 2004, an international NGO, ARC International, convened a forum in Geneva with gay and lesbian, and some transgender and intersex, activists and generalist international human rights NGOs to discuss ways forward. The strategies adopted then were pursued successfully over the following years.

First, State support for the protection and promotion of the human rights of gay, lesbian, bisexual and transgender people was progressively built. This growing support was reflected in a series of joint statements at sessions of the Commission on Human Rights and then its successor, the Human Rights Council: 31 States joined the first statement in 2005, 54 States the next in 2006, then 67 States in a joint statement to the General Assembly in 2008.<sup>490</sup> In 2011, 85 States joined the joint statement in the Human Rights Council.<sup>491</sup>

The first joint statement, led by New Zealand, provided the basic argument of these statements for many years:

Sexual orientation is a fundamental aspect of every individual's identity and an immutable part of self. It is contrary to human dignity to force an individual to change their sexual orientation, or to discriminate against them on this basis. And, it is repugnant for the State to tolerate violence committed against individuals because of their sexual orientation. ... we recognize that sexuality is a sensitive and complex issue. But we are not prepared to compromise on the principle that all people are equal in dignity, rights and freedoms. The Commission must uphold the principle of non-discrimination. We urge all States to recognize this common ground and to participate in debate. We hope this Commission will not be silent for too much longer.<sup>492</sup>

The statements during this early period continued to focus on sexual orientation alone but, over time, there was also explicit recognition of human rights issues associated with gender identity and expression and, finally, with issues affecting intersex people, including explicit mention of prohibiting discrimination based on the ground of sex characteristics.

Second, support for a resolution on human rights and sexual orientation and gender identity was progressively built. These efforts led in 2011 to the Human Rights Council passing the UN's first resolution on human rights and sexual orientation and gender identity.<sup>493</sup> The proposed resolution was introduced jointly by South Africa and Brazil and was co-sponsored by 42 other States.<sup>494</sup> It was adopted by 23 votes to 19 with 3 abstentions and so an absolute majority.<sup>495</sup> South Africa's leadership on the proposed resolution was critical to its success.

The resolution began with a re-affirmation of the universality of all human rights. It expressed "grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity".<sup>496</sup> It decided on specific actions to ensure Human Rights Council and general UN engagement on the issues, including a study and report by the High Commissioner for Human Rights on violence and discrimination affecting lesbian, gay, bisexual and transgender people and a special panel discussion at a later session of the Council.

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489 D. Sanders, *Out at the UN*, 2010, p. 35.

490 *Ibid.*, p. 38.

491 See <http://arc-international.net/global-advocacy/human-rights-council/hrc16/joint-statement>.

492 Quoted in D. Sanders, *Out at the UN*, 2010, p. 38.

493 See Appendix 1 of this manual. Resolution 17/19, 17 June 2011, A/HRC/17/L.9/Rev.1 adopted.

494 *Report of the Human Rights Council on its 17th session, A/HRC/17/2*, para. 722.

495 *Ibid.*, p. 57.

496 Human Rights Council Resolution 17/19, 17 June 2011, A/HRC/17/L.9/Rev.1.

It decided that the Council would “remain seized of this priority issue”.<sup>497</sup> Pursuant to the resolution the High Commissioner reported as requested,<sup>498</sup> the panel discussion took place at the 19th session of the Council in March 2012.<sup>499</sup>

The Human Rights Council adopted its second resolution on human rights and sexual orientation and gender identity in 2014.<sup>500</sup> This resolution was supported by a larger number of States, though it still went to a vote due to the intensity of the opposition from a minority of Council members. The blocking tactic on this occasion was to move seven sets of amendments to the proposed resolution.<sup>501</sup> Each set of amendments was voted on individually, resulting in each being defeated. The unamended proposed resolution was then put to the vote and adopted by 25 to 14 votes with 7 abstentions.<sup>502</sup>

The 2014 resolution continued the path charted by the first resolution in 2011, reiterating the main themes of the earlier resolution. It also asked the High Commissioner for Human Rights to update the 2011 report “with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards”.<sup>503</sup> The High Commissioner published the updated report in 2015.<sup>504</sup>

Regrettably the resolutions passed to date do not deal with human rights issues in relation to sex characteristics. The former High Commissioner for Human Rights, Navi Pillay, did, however, incorporate some issues in her reports responding to the resolutions, along with issues relating to gender identity. Her 2011 report noted:

In many countries, transgender persons face particular difficulties in their access to health care. Gender reassignment therapy, where available, is often prohibitively expensive and State funding or insurance coverage is rarely available. Health-care professionals are often insensitive to the needs of transgender persons and lack necessary professional training. In addition, intersex children, who are born with atypical sex characteristics, are often subjected to discrimination and medically unnecessary surgery, performed without their informed consent, or that of their parents, in an attempt to fix their sex.<sup>505</sup>

The 2015 report of the High Commissioner for Human Rights has a much fuller discussion of issues relating to sex characteristics, even though the resolution requesting the report referred only to sexual orientation and gender identity. Early in the report the High Commissioner indicates:

References are also included to violations against intersex persons, who may have any sexual orientation or gender identity.<sup>506</sup>

The report refers throughout to “LGBT and intersex persons”. It also raises issues specific to intersex people, including “medically unnecessary surgery and treatment performed on intersex children”.<sup>507</sup>

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497 Ibid.

498 High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity*, 17 November 2011, A/HRC/19/41.

499 *Report of the Human Rights Council on its 19th session*, A/HRC/19/2, paras. 101-106. A summary of the panel discussion is at [www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf).

500 See Appendix 2 of this manual. Resolution 27/32, A/HRC/27/L.27/Rev.1, adopted 26 September 2014.

501 Egypt introduced amendments A/HRC/27/L.45, A/HRC/27/L.46, A/HRC/27/L.47, A/HRC/27/L.48, A/HRC/27/L.49, A/HRC/27/L.50 and A/HRC/27/L.51. Amendments A/HRC/27/L.45, A/HRC/27/L.46, A/HRC/27/L.49, A/HRC/27/L.50 and A/HRC/27/L.51 were sponsored by the Congo, Djibouti, Egypt, Malaysia, Nigeria, South Sudan, the Sudan, Uganda and the United Arab Emirates. Amendments A/HRC/27/L.47 and A/HRC/27/L.48 were sponsored by Djibouti, Egypt, Malaysia, Nigeria, South Sudan, the Sudan, Uganda and the United Arab Emirates.

502 *Report of the Human Rights Council on its 27th session*, A/HRC/27/2, paras. 931-959.

503 Resolution 27/32 26, September 2014, A/HRC/27/L.27/Rev.1.

504 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23.

505 Ibid, para. 57. The High Commissioner also deals with some intersex human rights issues in OHCHR, *Born free and equal*, 2012.

506 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, footnote 3.

507 Ibid, paras 14 and 38.

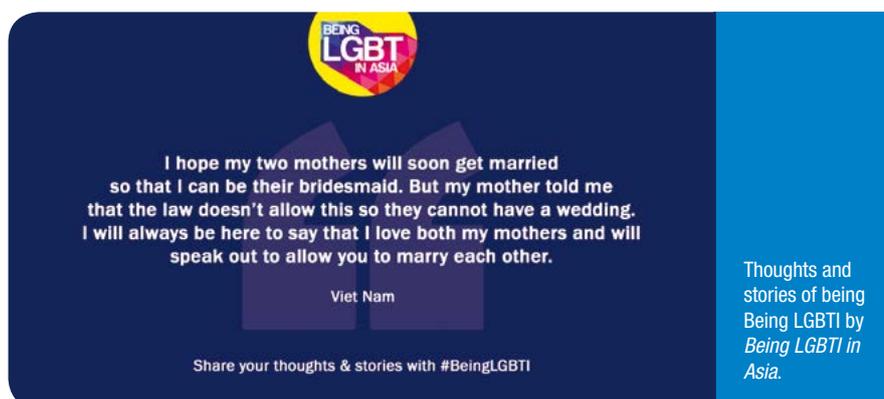
Many intersex children, born with atypical sex characteristics, are subjected to medically unnecessary surgery and treatment in an attempt to force their physical appearance to align with binary sex stereotypes. Such procedures are typically irreversible and can cause severe, long-term physical and psychological suffering.<sup>508</sup>

The High Commissioner recommended that States address violence by “[p]rohibiting medically unnecessary procedures on intersex children”.<sup>509</sup>

NGOs have also begun to address the inclusion of intersex status issues in contributions to the Human Rights Council and advocate for their inclusion in Council and UN activities.

Throughout these years of progress in the Human Rights Council, NGOs and, to a lesser extent, NHRIs have been active in support of the human rights of lesbian, gay, bisexual and transgender people and, more recently, intersex people. In fact, the developments of these years would not have been possible without their active participation, strategising and advocacy. Lesbian, gay, bisexual, transgender and intersex advocates have attended all Council sessions in Geneva since 2003 and do so in large numbers. They receive the support of even larger numbers of organisations and individuals unable to travel to Geneva. At the 29th session of the Council in June 2015, a joint statement by NGOs on human rights and sexual orientation, gender identity and intersex was endorsed by 417 NGOs from 105 countries.<sup>510</sup>

NHRIs have also been active on these issues, including by pursuing them in the Human Rights Council. Since the 16th session of the Council in March 2011, a large number of NHRIs have made an annual joint statement to the Council on sexual orientation and gender identity: 19 NHRIs in 2011, 12 in 2012, 29 in 2013 and 22 in 2014.<sup>511</sup> The most substantive statement was that of 2013.<sup>512</sup> It expressed concern for the systemic and continuing human rights violations on the basis of sexual orientation, gender identity and intersex status in all regions. It also stressed that NHRIs play a crucial role in protecting and promoting the rights of gay, lesbian, bisexual, transgender and intersex people. The statement at the 27th session in September 2014 was made in the context of the proposed resolution on human rights and sexual orientation and gender identity.<sup>513</sup> It urged the Council to pass a second resolution on the subject.



508 Ibid, para. 53.

509 Ibid, para. 78(h).

510 The statement is at <http://arc-international.net/wp-content/uploads/2015/07/Item-8-Ngo-Joint-Statement-Hrc29.pdf>.

511 All four statements are on the APF website at [www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2011/](http://www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2011/), [www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2012/](http://www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2012/), [www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2013/](http://www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2013/) and [www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2014/](http://www.asiapacificforum.net/resources/joint-nhri-statement-un-hrc-2014/). See also Appendix 3 of this manual for the 2103 statement.

512 See Appendix 3 for the statement.

513 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report of the 27th session of the Human Rights Council, 26 September 2015*; at <http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/27/Pages/default.aspx>.

### 5.5.3. The Human Rights Council's Universal Periodic Review

The General Assembly resolution establishing the Human Rights Council provides that the Council shall:

... [u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies...<sup>514</sup>

Under the Universal Periodic Review (UPR) the Human Rights Council reviews the human rights performance of each UN member State individually over a cycle of four and a half years.<sup>515</sup> It is now nearing completion of its second cycle, covering the period from 2012 until 2016. By the end of the period, all 193 member States will have been reviewed. The review is based on:

- the UN Charter
- the Universal Declaration of Human Rights
- human rights instruments to which the State is party
- voluntary pledges and commitments made by the State.

In addition, given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review takes into account applicable international humanitarian law.<sup>516</sup> The process involves:

- the collection of reports and information from the State under review, UN agencies and other stakeholders, including NHRIs and NGOs
- an interactive dialogue with the State under review in a working group consisting of all Human Rights Council member States, during which other States can ask questions and make recommendations to the State under review
- a report on the dialogue in the working group, including all recommendations made to the State under review
- the adoption of the report in a plenary session of the Human Rights Council, during which "A status" NHRIs and accredited NGOs can comment on the report
- a response from the State under review, indicating which recommendations in the report it accepts fully or partly and which it rejects.<sup>517</sup>

The UPR report on a State contains every recommendation made by other States. The recommendations are recommendations of individual States and not of the Human Rights Council itself. The State under review can accept a recommendation fully or partly, it can keep it 'under consideration' or it can reject it.

By the end of 2015, the UPR process had resulted in 1,110 recommendations to States on issues of human rights in relation to sexual orientation and gender identity – 502 in the first cycle and 608 already in the second cycle with 39 States – more than 20 per cent of the total number – still to be reviewed.

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514 General Assembly resolution 60/251, 15 March 2006, A/RES/60/251, para. 5(e).

515 The first cycle was four years, from 2008 till 2011.

516 Human Rights Council resolution 5/1, section 1 A, 'Basis of the review', 18 June 2007. See A/HRC/5/21, chap. III, paras. 60-62. International humanitarian law is the law governing armed conflict. It seeks to limit and control armed conflict and protect civilians and sick and injured soldiers in armed conflict. It also prohibits the use of certain weapons.

517 Human Rights Council resolution 5/1, section 1 D, 'Process and modalities of the review', 18 June 2007, as modified by Human Rights Council resolution 16/21, A/HRC/RES/16/21.

Over both cycles to the end of 2015, 159 States had received recommendations on these issues.<sup>518</sup> All the recommendations concerned sexual orientation. Many also raised issues of gender identity but none raised issues related to sex characteristics. The comments, questions and recommendations have commonly dealt with:

- criminalisation of sexual conduct between consenting adults of the same sex
- other criminal penalties directly related to sexual orientation or gender identity
- acts of violence and discrimination against persons based on their sexual orientation or gender identity
- freedom of expression, assembly and association for lesbian, gay, bisexual and transgender persons
- the right to the highest attainable standard of physical and mental health
- recognition of same-sex relationships
- recognition of transgender people's gender identity in official documents
- homophobic vilification and hate speech.<sup>519</sup>



UN Photo by Jean-Marc Ferré.

518 All statistics in relation to the UPR are drawn from the UPR Info database, at [www.upr-info.org/database/statistics/](http://www.upr-info.org/database/statistics/). UPR Info, a non-government organisation based in Geneva, has the most comprehensive database concerning the UPR and is a very useful source of information across all issues.

519 The website of ARC International provides information on all references to issues of sexual orientation and gender identity in UPR reviews on a country-by-country basis. See <http://arc-international.net/global-advocacy/universal-periodic-review>. The database covers the reviews of all States in the first cycle but at this stage only some States in the second cycle. UPR Info has a more comprehensive database that covers all reviews in both cycles to date.

Many States have accepted recommendations relating to sexual orientation and, where they arise, gender identity but others have rejected them firmly. There is now rarely a review of a State where recommendations on these issues are not made. As a result, every State's record of protecting and promoting the human rights of lesbian, gay, bisexual and transgender people is now the subject of regular international scrutiny and comment and these human rights issues are raised in all sessions of the UPR working group and of the Human Rights Council itself.

Human rights issues arising from sex characteristics, however, remain largely unknown in the UPR process. This significant gap in the human rights coverage of the UPR remains to be filled.

#### 5.5.4. The General Assembly

The General Assembly is yet to pass a resolution dealing specifically and comprehensively with human rights in relation to sexual orientation, gender identity and sex characteristics. It lags behind developments in the Human Rights Council. But it has not been entirely silent on these issues. For many years now, one resolution – the resolution on extra-judicial, summary and arbitrary executions – has included specific reference to sexual orientation. In 2012, it added reference to gender identity for the first time.<sup>520</sup> In 2014, the General Assembly adopted the resolution with 122 States in favour, none against and 66 abstentions.<sup>521</sup> The inclusion of sexual orientation and, more recently, gender identity has not been unanimously accepted. On the contrary, each time the resolution is proposed an attempt is made in the General Assembly's Third Committee to delete the reference. That attempt is defeated each time but it has significant support nonetheless.<sup>522</sup>

In 2008, following the strategy adopted in the Human Rights Council, 66 States made the first joint statement in the General Assembly on human rights and sexual orientation and gender identity.<sup>523</sup> The statement affirmed the universality of all human rights, the right of everyone to the enjoyment of all human rights without distinction and the principle of non-discrimination.<sup>524</sup> It expressed concern at violations of human rights, in particular "violence, harassment, discrimination, exclusion, stigmatisation and prejudice ... directed against persons in all countries in the world because of sexual orientation or gender identity".

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520 General Assembly resolution 67/168, 20 December 2012, A/RES/67/168.

521 General Assembly resolution 69/182, 18 December 2014, A/RES/69/182.

522 In 2012, the amendment to delete reference to sexual orientation attracted 44 States in favour, 86 against and 31 abstentions. In 2014 the amendment attracted stronger support, 53 States in favour, 82 against and 24 abstentions. See [www.ishr.ch/news/third-committee-holds-course-death-penalty-makes-historic-gains-sogi-rights#sthash.INbnbdaO.pdf](http://www.ishr.ch/news/third-committee-holds-course-death-penalty-makes-historic-gains-sogi-rights#sthash.INbnbdaO.pdf) and [www.ishr.ch/news/killings-any-human-being-cannot-be-justified](http://www.ishr.ch/news/killings-any-human-being-cannot-be-justified).

523 A/63/635, 22 December 2008. The 66 endorsing States were Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela. The statement was subsequently endorsed by Costa Rica and the United States of America.

524 See [http://arc-international.net/global-advocacy/general-assembly/ga\\_jointstatement\\_en](http://arc-international.net/global-advocacy/general-assembly/ga_jointstatement_en). See also <http://arc-international.net/global-advocacy/general-assembly/ga-joint-statement-ngo-press-release>.

### 5.5.5. Other international forums

Lesbian, gay, bisexual, transgender and intersex advocates and their supporters in NHRIs and NGOs have successfully raised human rights issues relating to sexual orientation and gender identity in other important international forums. As has occurred elsewhere, intersex issues have been largely invisible.

In August 2015, the UN's most powerful body, the **Security Council**, discussed a peace and security issue concerning sexual orientation for the first time, in an informal 'Arria Formula' meeting.<sup>525</sup> The meeting was focused on the persecution of gay men and lesbians by Daesh in Iraq and Syria.<sup>526</sup> For the first time, two gay men, Subhi Nahas and 'Adnan', addressed the Security Council to describe their experiences in Daesh-controlled areas and the situation there for lesbians and gay men generally. The session was called by the United States and Chile. Thirteen of the 15 members of the Security Council, including all five permanent members, attended the session; Angola and Chad did not attend. In her opening remarks, the co-chair of the Security Council meeting, US Ambassador Samantha Power, said:

This year we mark seventy years since the creation of the United Nations. It is fair to say that in writing the charter, the drafters did not consider LGBT rights part of their conception of equal rights. But if we read the Charter today – and in particular its call to “reaffirm faith... in the dignity and worth of the human person” – it is impossible not to see a call for all of us to affirm LGBT rights. It is impossible not to see individuals like Adnan and Subhi as having the same inherent dignity and worth. And it is impossible not to take up the struggle for their rights as our own, as we have other great human rights struggles over the last seven decades. Today, we take a small but important step in assuming that work. It must not be our last step.<sup>527</sup>

The meeting was an important, though limited, first step that the Security Council needs to follow up formally, both specifically in relation to Daesh controlled territory and generally in relation to all persecution based on sexual orientation, gender identity or intersex status.

The **Commission on the Status of Women** has a longer history of discussing issues affecting lesbians and transgender people. Lesbian and transgender activists have been active in the Commission for many years, consistently raising their issues in sessions of the Commission. However, the concluding statements of the Commission have not made any reference to sexual orientation, gender identity or sex characteristics. There is much work to be done to achieve an appropriate statement by the Commission on lesbian, transgender and intersex issues.

Great difficulty remains in having international bodies and forums recognise and respond to human rights in relation to sexual orientation, gender identity and sex characteristics. Certainly many UN agencies, including UNDP, OHCHR and UNAIDS, give attention to these issues in their programs and work. The jurisdictions of other bodies too certainly cover these issues. For example, the International Criminal Court could and should be active in pursuing crimes against humanity and war crimes that are based on sexual orientation, gender identity or sex characteristics. There is a great deal of room for improvement in the responsiveness of the international system.

525 “The “Arria-formula meetings” are very informal, confidential gatherings which enable Security Council members to have a frank and private exchange of views, within a flexible procedural framework, with persons whom the inviting member or members of the Council (who also act as the facilitators or convenors) believe it would be beneficial to hear and/or to whom they may wish to convey a message.” See [www.un.org/en/sc/about/methods/bgariaformula.shtml](http://www.un.org/en/sc/about/methods/bgariaformula.shtml).

526 Daesh is also known as Islamic State in Iraq and the Levant (ISIL) or Islamic State in Iraq and Syria (ISIS) or Islamic State (IS).

527 See <http://usun.state.gov/remarks/6799>.

## THE SUSTAINABLE DEVELOPMENT GOALS AND SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS

On 25 September 2015, the UN General Assembly adopted the following 17 Sustainable Development Goals (SDGs), with targets to be achieved by 2030, as part of the 2030 Agenda for Sustainable Development.<sup>528</sup>

- Goal 1** End poverty in all its forms everywhere
- Goal 2** End hunger, achieve food security and improved nutrition and promote sustainable agriculture
- Goal 3** Ensure healthy lives and promote well-being for all at all ages
- Goal 4** Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
- Goal 5** Achieve gender equality and empower all women and girls
- Goal 6** Ensure availability and sustainable management of water and sanitation for all
- Goal 7** Ensure access to affordable, reliable, sustainable and modern energy for all
- Goal 8** Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
- Goal 9** Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation
- Goal 10** Reduce inequality within and among countries
- Goal 11** Make cities and human settlements inclusive, safe, resilient and sustainable
- Goal 12** Ensure sustainable consumption and production patterns
- Goal 13** Take urgent action to combat climate change and its impacts
- Goal 14** Conserve and sustainably use the oceans, seas and marine resources for sustainable development
- Goal 15** Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
- Goal 16** Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels
- Goal 17** Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

States committed to implement the SDGs but the SDGs do not constitute binding obligations. They are not part of international law. Nonetheless, they are very influential. They have followed the Millennium Development Goals (MDGs) that set targets to be achieved by 2015. Although not all those targets were met, many were met in full and all were met at least in part.

The SDGs are important because States will develop new policies and programs directed towards them and will change or abolish existing policies and programs that are not sufficiently focused on them. They will lead to the allocation of additional funds to areas covered by the SDGs. Their implementation, and progress towards meeting the various specific targets, will be monitored and reported at national and international levels.



<sup>528</sup> UN General Assembly resolution 70/1 25, September 2015, A/RES/70/1.

Like the MDGs, the SDGs offer opportunities for the advancement of the human rights of all people, including lesbian, gay, bisexual, transgender and intersex people.<sup>529</sup> The General Assembly resolution does not refer specifically to lesbian, gay, bisexual, transgender and intersex people but it does incorporate a paragraph on human rights and non-discrimination.

“We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.”<sup>530</sup>

The language of this paragraph incorporates the language of the foundation human rights treaties and so the interpretation is the same. It is now well established that “other status” includes sexual orientation, gender identity and sex characteristics. The SDGs apply for the benefit of lesbian, gay, bisexual, transgender and intersex people as much as for anyone else. Goals 10 (the equality goal) and 16 (the inclusion goal) are especially relevant but are not the only relevant goals. Lesbian, gay, bisexual, transgender and intersex people have interests and concerns in relation to all the SDGs because they experience:

“... social exclusion of populations on the basis of SOGIE in seven development priority areas: (1) poverty; (2) health; (3) education; (4) gender equality and women’s empowerment; (5) economic growth and opportunity; (6) safe, resilient and sustainable cities and human settlements; and (7) justice and accountability.”<sup>531</sup>

The SDGs offer opportunities for education and advocacy in relation to the human rights of lesbian, gay, bisexual, transgender and intersex people. They also provide a framework for accountability for State performance of human rights obligations towards lesbian, gay, bisexual, transgender and intersex people.



UN Photo by Nikoleta Haffar.

529 E. Mills, ‘Leave no one behind’: gender, sexuality and the Sustainable Development Goals, Institute of Development Studies Evidence Report 154, October 2015; at [http://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/7104/ER154\\_LeaveNoOneBehindGenderSexualityandtheSDGs.pdf?sequence=8](http://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/7104/ER154_LeaveNoOneBehindGenderSexualityandtheSDGs.pdf?sequence=8).

530 UN General Assembly resolution 70/1, 25 September 2015, A/RES/70/1, para 19.

531 E. Mills, ‘Leave no one behind’: gender, sexuality and the Sustainable Development Goals, Institute of Development Studies Evidence Report 154, October 2015, p. 5.

## 5.6. REGIONAL PERSPECTIVES ON LAW

Regional human rights systems have taken up the human rights issues associated with sexual orientation, gender identity and sex characteristics to varying degrees, from region to region and from issue to issue. The European system has been the most active on these issues over the longest period of time but there have also been extensive responses in the inter-American system. The African system is also now beginning to address them.

All regional systems have faced significant sensitivity in dealing with human rights in relation to sexual orientation, gender identity and sex characteristics. Although sexual relations between individuals of the same sex have a long history in all cultures, religious and cultural traditions have refused to acknowledge this form of sexual behaviour and denied recognition to same-sex relationships. NGOs have challenged these attitudes but even today many States apply harsh laws against lesbian, gay, bisexual, transgender and intersex people. There are notable exceptions, both historically and today, and in many countries the law now prohibits violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, protects their human rights and recognises their relationships.<sup>532</sup> Elsewhere, however, there are increasingly repressive laws and policies. Regional human rights systems without exception are extending their work to promote and protect these human rights.

### 5.6.1. Europe

The European human rights system is founded on a number of regional treaties, including the European Convention on Human Rights, a Europe-wide treaty, and the Charter of Fundamental Rights of the European Union, which is limited to European Union member States, currently 28 States. Both treaties have broad statements of human rights of general, inclusive application. The Convention does not specifically mention sexual orientation, gender identity or sex characteristics. The Charter specifically forbids discrimination on the ground of sexual orientation but makes no specific mention of gender identity or sex characteristics.<sup>533</sup>

The Council of Europe is a political body of representatives of all 47 European States. It is the institution through which the European Convention and other Europe-wide human rights instruments were developed. It supports the European Court of Human Rights and, in addition, has an independent Human Rights Commissioner.

The European Court of Human Rights is established under the European Convention on Human Rights.<sup>534</sup> It gave its first decision on a case involving sexual orientation in 1981, *Dudgeon v United Kingdom*.<sup>535</sup> That case involved the criminalisation of adult consenting sexual relations. The Court found for the applicant, ruling that a law criminalising same-sex relations was a violation of the European Convention on Human Rights:

... the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) ... In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life ... either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.<sup>536</sup>

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532 Constitution of the Republic of South Africa, section 9(3).

533 Charter of Fundamental Rights of the European Union, article 21.1.

534 European Convention on Human Rights, article 19.

535 *Dudgeon v. United Kingdom*, Application No. 7525/76, Judgment of 22 October 1981.

536 *Ibid.*, para. 41.

The first decision of the European Court of Human Rights to deal with gender identity came more than a decade after *Dudgeon*.<sup>537</sup> In *B v France*, the applicant had had gender surgery and demonstrated a manifest determination to abandon her original sex. The Court held that the State's refusal to issue new identity documents showing the new gender was a violation of the right to private life.<sup>538</sup> In *Goodwin and I v UK*, the Court held that the denial of legal recognition of the post-operative gender of transgender persons violated their right to private life. Further, the failure to permit a person to marry in accordance with post-operative gender violated the right to marry.<sup>539</sup>

Since *Dudgeon*, the European Court of Human Rights has decided cases concerning sexual orientation or gender identity on more than 30 occasions.<sup>540</sup> Many of these cases concern the balance required between the rights to freedom of religion and freedom of conscience, on the one hand, and the rights of lesbian and gay persons to equality and not to experience discrimination, on the other hand. The European Court has tended to avoid definitive statements on striking the correct balance, preferring to leave that difficult task to consideration at the national level in national parliaments and courts.<sup>541</sup>

The Human Rights Commissioner of the Council of Europe has identified the human rights issues affecting lesbian, gay, bisexual, transgender and intersex persons as a priority area of concern.<sup>542</sup> In 2011, the Commissioner released a report on discrimination on the grounds of sexual orientation and gender identity in Europe.<sup>543</sup> He published issue papers on human rights and gender identity in 2009<sup>544</sup> and on human rights and intersex people in 2015.<sup>545</sup>

The Human Rights Commissioner has been one of the first international or regional independent human rights mechanisms to address human rights issues relating to sex characteristics specifically and comprehensively. In May 2014, the Commissioner published a Human Rights Comment – *A boy or a girl or a person – intersex people lack recognition in Europe* – that highlighted the human rights challenges faced by intersex people. In 2015, he published the issues paper *Human rights and intersex people*.<sup>546</sup> The issues paper discusses human rights in terms of universality:

In spite of the fact that no specific provision currently refers to intersex people, the rights contained in international human rights treaties apply to all people, and thus to intersex people through the conventions' open-ended non-discrimination clauses.<sup>547</sup>

The issues paper identifies four “key human rights at stake”: the right to life, the prohibition of torture and inhuman or degrading treatment, the right to respect for private life, and the right to health. It also draws attention to the rights of the child. It deals with the critical issues of medicalisation, legal recognition, non-discrimination and equality, and access to justice and accountability and makes recommendations in relation to them.

537 For a discussion of the key cases in the European regional system, see R. Köhler, A. Recher and J. Ehrh, *Legal gender recognition in Europe toolkit*, December 2013.

538 *B v France*, Application No. 13343/87, Judgement of 25 March 1992.

539 *Goodwin and I v UK*, Application No. 28957/95, Judgement of 11 July 2002.

540 The ECHR Sexual Orientation Blog follows the jurisprudence of the European Court of Human Rights in relation to sexual orientation closely, with scholarly articles and papers on Court decisions as they are given; see <http://echrso.blogspot.ba/>.

541 See the decision in the four cases collected as *Eweida and Others v United Kingdom*, Applications 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013; at [http://hudoc.echr.coe.int/eng/?i=001-115881#{"itemid":\["001-115881"\]}](http://hudoc.echr.coe.int/eng/?i=001-115881#{).

542 See [www.coe.int/en/web/commissioner/thematic-work/LGBTI](http://www.coe.int/en/web/commissioner/thematic-work/LGBTI).

543 See [www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf).

544 See <https://wcd.coe.int/ViewDoc.jsp?id=1476365>.

545 See [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish).

546 See [www.coe.int/hu/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1](http://www.coe.int/hu/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1).

547 Human Rights Commissioner of the Council of Europe, *Human rights and intersex people*, 2015, p. 29; at [https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper\(2015\)1&Language=lanEnglish](https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish).

Two of the significant recommendations are:

Member states should end medically unnecessary “normalising” treatment of intersex persons, including irreversible genital surgery and sterilisation, when it is enforced or administered without the free and fully informed consent of the person concerned. Sex assignment treatment should be available to intersex individuals at an age when they can express their free and fully informed consent. Intersex persons’ right not to undergo sex assignment treatment must be respected.<sup>548</sup>

Member states should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons’ right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents.<sup>549</sup>

The work of the Human Rights Commissioner and the decisions of the European Court for Human Rights have promoted strong commitment in the Council of Europe to the human rights of lesbian, gay and bisexual people and, more recently, transgender and intersex people. In 2010, the Committee of Ministers of the Council of Europe adopted a recommendation to member States on “measures to combat discrimination on grounds of sexual orientation or gender identity”.<sup>550</sup> The recommendation is based on the principle of universality of all human rights:

... human rights are universal and shall apply to all individuals, and stressing therefore its commitment to guarantee the equal dignity of all human beings and the enjoyment of rights and freedoms of all individuals without discrimination on any ground.<sup>551</sup>

The recommendation recognises that:

... lesbian, gay, bisexual and transgender persons have been for centuries and are still subjected to homophobia, transphobia and other forms of intolerance and discrimination even within their family – including criminalisation, marginalisation, social exclusion and violence – on grounds of sexual orientation or gender identity, and that specific action is required in order to ensure the full enjoyment of the human rights of these persons.<sup>552</sup>

It made four substantive recommendations to Council of Europe member States:

1. Examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
2. Ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;
3. Ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;
4. Be guided in their legislation, policies and practices by the principles and measures contained in the appendix to this recommendation.<sup>553</sup>

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548 Ibid, Recommendation 1, p. 9.

549 Ibid, Recommendation 4, p. 9.

550 Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010; at <https://wcd.coe.int/ViewDoc.jsp?id=1606669&Site=COE&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

551 Ibid, Preambular Paragraph 2.

552 Ibid, Preambular Paragraph.

553 Ibid, Operative Paragraphs 1-4.



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The other European regional system, the European Union, established the Fundamental Rights Agency in 2007 “to provide independent, evidence-based assistance and expertise on fundamental rights to EU institutions and Member States”.<sup>554</sup> The Fundamental Rights Agency undertakes surveys, conducts research and prepares legal handbooks for practitioners. It has a program on human rights in relation to sexual orientation, gender identity and intersex status and, since 2008, has conducted quantitative and legal research on these issues.<sup>555</sup> In recent years, it has looked at and reported on the distinct issues relating to each area:

- lesbian, gay, bisexual and transgender survey – main results<sup>556</sup>
- *Being trans in the EU – comparative analysis of the EU LGBT survey data*, December 2014<sup>557</sup>
- *The fundamental rights situation of intersex people*, May 2015.<sup>558</sup>

554 See <http://fra.europa.eu/en/about-fra/introducing-fra>.

555 See <http://fra.europa.eu/en/theme/lgbti>.

556 See <http://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main>.

557 See <http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>.

558 See <http://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people>.

## 5.6.2. The Americas

Both the political body and the legal body of the inter-American system – respectively, the Organisation of American States (OAS) and the Inter-American Commission on Human Rights (IACHR) – have addressed human rights issues associated with sexual orientation, gender identity and body diversity, that is, sex characteristics.

In 2008, the General Assembly of the Organisation of American States adopted a resolution on human rights and sexual orientation and gender identity.<sup>559</sup> The resolution affirmed “the principles of universality, indivisibility, and interdependence of human rights” and expressed “concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity”. It placed the issue on the agenda for relevant bodies of the OAS and has been followed by similar resolutions in each subsequent year.

In 2013, the OAS adopted a new Inter-American Convention against All Forms of Discrimination and Intolerance.<sup>560</sup> However, of the 35 member States of the OAS, by October 2015, only eight had signed the Convention and none had ratified or acceded to it.<sup>561</sup> The Convention includes sexual orientation and gender identity and expression among the specifically listed grounds of prohibited discrimination.<sup>562</sup>

The IACHR has given priority to issues of sexual orientation, gender identity and sex characteristics for some years, responding to its identification of widespread violations of human rights based on these grounds. Importantly, the IACHR’s work has included the distinct issues affecting transgender and intersex people. The IACHR states that:

Gay, lesbian, bisexuals, trans and intersex persons have historically been discriminated against on the basis of their sexual orientation, gender identity, gender expression, and body diversity, and continue to be victims of discrimination, violence, persecution and other abuses; which infringes on their human rights protected by international and inter-American instruments.

In performing its mission, particularly during onsite visits to countries and through public hearings, the Commission has received ample information on the situation of the rights of gay, lesbian, bisexuals, trans and intersex persons in the Americas, and in particular, the serious discrimination and violence these persons face on the basis of their sexual orientation, gender identity and gender expression.<sup>563</sup>

In 2011, the IACHR adopted an action plan on lesbian, gay, bisexual, transgender and intersex rights as part of its strategic plan for 2011 to 2015.<sup>564</sup>

Under this Plan of Action, the IACHR will develop reports on sexual identity-derived human rights problems in the American States. The reports will focus on *de jure* and *de facto* discrimination and give visibility to the problems faced by LGBTBI communities at the regional and international level. They will include recommendations for change in the realms of public policy, legislation and judicial interpretation and may be part of a hemispheric “Report on the State of LGBTBI Rights in the Americas” issued at the end of the 24 months process.

As a second element of the Plan of Action, cases alleging of discrimination based on sexual orientation will be prioritized and processed. The Commission will consider and decide cases based on draft reports. The resolution of the cases will provide access to the system for a largely ignored group of victims and, through measures of non-repetition, will promote systemic change. Further, the subject-matter of the cases will contribute as data for the Commission’s overall analysis of the situation.

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559 Resolution AG/RES. 2435 (XXXVIII-O/08).

560 Convention A-69. See [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp). The Convention has not yet entered into force.

561 See [www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp).

562 Article 1(1).

563 See [www.oas.org/en/iachr/lgtbi](http://www.oas.org/en/iachr/lgtbi).

564 ‘Action Plan 2.6.i (2011-2012) LGBTI persons’ under *Strategic Plan 2011–2015*.

Third, building on the OAS General Assembly resolutions since 2008 concerning human rights and sexual orientation, the Commission “as consultative organ of the Organization” will formulate and provide specialized technical advice in relation to the annual resolution, providing comments and recommendations to the political bodies in the process of the preparation and negotiation of the said resolution and its follow-up.<sup>565</sup>

Pursuant to the action plan, the IACHR established within its secretariat a specialised unit on the rights of lesbian, gay, bisexual, transgender and intersex people. In 2012–13, the unit focused on four areas of work:

- (i) preparing thematic, regional or country reports on the situation of LGBTI persons in the Americas;
- (ii) developing standards on the interpretation of the Inter-American human rights instruments with respect to sexual orientation, gender identity, gender expression and body diversity through the individual petition and case system;
- (iii) providing technical advice and input to states and political bodies of the Organization of American States; and
- (iv) monitoring the human rights situation of LGBTI persons and promoting the visibility of violations against their human rights.<sup>566</sup>

Then in 2014, the IACHR established the position of Special Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons, “reflect[ing] the IACHR’s commitment to strengthen and reinforce its work in protecting, promoting and monitoring the human rights of lesbian, gay, bisexual, trans and intersex persons”.<sup>567</sup> The IACHR Special Rapporteur is the first, and still only, specialised mechanism on the rights of lesbian, gay, bisexual, transgender and intersex people in any international or regional human rights system. The role of the Special Rapporteur is to:

- process petitions, alleging human rights violations against all 35 OAS Member States, and requests for precautionary measures
- provide specialized technical assistance to Member States and OAS political organs
- prepare regional and thematic reports on the human rights of LGBTI persons, and
- monitor and promote visibility of human rights violations of LGBTI persons.<sup>568</sup>

### 5.6.3. Africa

Consciousness of human rights violations based on sexual orientation, gender identity and intersex status has developed slowly within the African regional human rights system, more slowly than in other regional systems. Nonetheless, there is clear acknowledgement of the universality of human rights and the entitlement of lesbian, gay, bisexual and transgender people to their enjoyment. There has been no specific reference to intersex people’s human rights issues.

At its 55th ordinary session in April-May 2014, the African Commission on Human and Peoples’ Rights (ACHPR) adopted the Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.<sup>569</sup> The resolution followed some years of reflection of human rights issues affecting lesbian, gay, bisexual and transgender people and strong submissions from African and international NGOs. In the resolution the ACHPR expressed alarm that:

<sup>565</sup> Ibid, pp. 3-4.

<sup>566</sup> See [www.oas.org/en/iachr/media\\_center/PReleases/2014/015.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/015.asp).

<sup>567</sup> See [www.oas.org/en/iachr/lgtbi](http://www.oas.org/en/iachr/lgtbi).

<sup>568</sup> See [www.oas.org/es/cidh/lgtbi/docs/Brochure-Rapporteurship-2014.pdf](http://www.oas.org/es/cidh/lgtbi/docs/Brochure-Rapporteurship-2014.pdf).

<sup>569</sup> Resolution 275; at [www.achpr.org/sessions/55th/resolutions/275/](http://www.achpr.org/sessions/55th/resolutions/275/).

... acts of violence, discrimination and other human rights violations continue to be committed on individuals in many parts of Africa because of their actual or imputed sexual orientation or gender identity.<sup>570</sup>

In addition, the resolution:

1. Condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity;
2. Specifically condemns the situation of systematic attacks by State and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity;
3. Calls on State Parties to ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities; and
4. Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.<sup>571</sup>

The ACHPR now follows up on the resolution at subsequent meetings.

The ACHPR's Rapporteur on Human Rights Defenders, Commissioner Reine Alapini Gansou, has been especially vocal in defence of lesbian, gay, bisexual and transgender defenders by:

- issuing public statements expressing concern for these defenders, for example, in relation to the *Same Sex Marriage (Prohibition) Act 2013* in Nigeria<sup>572</sup> and the *Anti-Homosexuality Act 2014* in Uganda<sup>573</sup>
- speaking at international regional meetings on human rights defenders and on human rights and sexual orientation and gender identity<sup>574</sup>
- highlighting issues in relation to lesbian, gay, bisexual and transgender defenders at the NGO Forum before the sessions of the African Commission.

#### 5.6.4. Asia Pacific

Uniquely among the world's regions, the Asia Pacific has no regional human rights treaty, court or protection system that people can turn to when their human rights are violated.

In the ASEAN sub-region, the ASEAN Inter-Governmental Commission on Human Rights (AICHR) was established in 2009. The AICHR is a "consultative intergovernmental body" that works to promote human rights within the region, including through enhanced regional cooperation.<sup>575</sup> However, it is not comparable to the regional human rights institutions in other regions as it is not an independent body and it is not based on an underlying treaty. It therefore has no function or power to enforce specific rights and obligations, apart from a commitment to upholding universal human rights standards. Its terms of reference require it to "engage in dialogue and consultation" with a range of stakeholders, including

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570 Ibid.

571 Ibid.

572 See [www.achpr.org/press/2014/02/d190/](http://www.achpr.org/press/2014/02/d190/).

573 See [www.achpr.org/press/2014/03/d196/](http://www.achpr.org/press/2014/03/d196/).

574 See [www.achpr.org/files/sessions/56th/inter-act-reps/220/56os\\_intersession\\_report\\_comm\\_gansou\\_en.pdf](http://www.achpr.org/files/sessions/56th/inter-act-reps/220/56os_intersession_report_comm_gansou_en.pdf).

575 Terms of reference, article 3; at <http://aichr.org/about/>.

NGOs and NHRIs.<sup>576</sup> To date, very little collaboration has taken place. The AICHR has not said or done anything directly relevant to the human rights of lesbian, gay, bisexual, transgender and intersex people.

The AICHR drafted an ASEAN Human Rights Declaration, adopted by ASEAN Heads of State and Government on 18 November 2012.<sup>577</sup> The Declaration does not refer specifically to sexual orientation, gender identity or sex characteristics but it has the same universalist and inclusive approach found in international human rights law and its language largely mirrors the language in international human rights instruments. It provides, for example:

Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.<sup>578</sup>

In doing so, it inevitably invites interpretation through existing international jurisprudence, including the interpretation of “other status” as including sexual orientation, gender identity and sex characteristics.

In this regional context, the APF makes a unique contribution. The APF is a coalition of NHRIs from all corners of the Asia and Pacific region. A fundamental goal of the APF is to support the establishment of independent NHRIs in the region and to strengthen its members to do the work of promoting and protecting human rights. The APF brings its members together and builds partnerships with others to tackle some of the most serious and complex human rights challenges facing our region.

The APF has played a leadership role in the Asia Pacific in recognising and addressing human rights issues associated with sexual orientation, gender identity and sex characteristics. The APF’s work on human rights issues of lesbian, gay, bisexual, transgender and intersex people is discussed in Chapter 7 of this manual.



Photo by UN Women/Niels den Hollander, reproduced under a CC BY-NC-ND 2.0 license.

576 Ibid, article 4.8.

577 See [www.asean.org/storage/images/resources/ASEAN%20Publication/2013%20\(7.%20Jul\)%20-%20ASEAN%20Human%20Rights%20Declaration%20\(AHRD\)%20and%20Its%20Translation.pdf](http://www.asean.org/storage/images/resources/ASEAN%20Publication/2013%20(7.%20Jul)%20-%20ASEAN%20Human%20Rights%20Declaration%20(AHRD)%20and%20Its%20Translation.pdf).

578 ASEAN Human Rights Declaration, article 2.

### KEY POINTS: CHAPTER 5

- In all countries in all regions people experience human rights violations based on their sexual orientation, gender identity and sex characteristics.
- Although there is no specific reference to sexual orientation, gender identity or sex characteristics in international human rights instruments, there can no longer be any doubt that the provisions of international human rights law extend in full to all people, including lesbian, gay, bisexual, transgender and intersex people. This is the unanimous view of international human rights experts, expressed by the jurisprudence, general comments and concluding observations of human rights treaty monitoring bodies, the reports of the UN special procedures, resolutions of the Human Rights Council, decisions of regional human rights courts and resolutions of regional human rights commissions and mechanisms.
- The prohibition of discrimination on the basis of 'other status' in international human rights law is properly considered to include sexual orientation, gender identity and expression, and sex characteristics.
- Lesbian, gay, bisexual, transgender and intersex people are as entitled as anyone else to the full protection of their human rights under international and national laws. As with all human rights, every State has legal obligations to respect, protect and fulfil the human rights of lesbian, gay, bisexual, transgender and intersex people.
- There has been uneven but growing recognition of the rights of lesbian, gay, bisexual, transgender and intersex people within UN human rights mechanisms and these mechanisms have called, with increasing frequency and strength, for the promotion and protection of their rights.



# Chapter 6:

## The Yogyakarta Principles

### KEY QUESTIONS

- What are the Yogyakarta Principles?
- What do they say?
- What status do they have in law?
- How widely have they been recognised?
- What do they mean for national human rights institutions?



### 6.1. INTRODUCTION

The *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) are the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities.<sup>579</sup> They are also relevant for persons of diverse sex characteristics as they are based on the principle of the universality of all human rights for everyone, everywhere. They have particular significance for NHRIs.

The Yogyakarta Principles reflect existing international legal obligations under international human rights law.<sup>580</sup> They are not an aspirational statement of what the law should be but a legal statement of what the law is. For that reason there are some issues that the Yogyakarta Principles do not cover because, in 2006, international law itself did not deal with those issues.<sup>581</sup> The Principles recognise that international law continues to develop and that, as a result, the Principles:

... will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.<sup>582</sup>

#### 6.1.1. Why develop principles?

In 2005, representatives of a number of lesbian, gay, bisexual and transgender NGOs and of a few generalist international human rights NGOs discussed strategies to build international support for better promotion and protection for the rights of lesbian, gay, bisexual and transgender people. A very small number of intersex people also participated and contributed. All those involved were concerned that

579 The Yogyakarta Principles are set out in full in Appendix 4. They are available in all six UN languages (Arabic, Chinese, English, French, Spanish and Russian) at [www.yogyakartaprinciples.org/](http://www.yogyakartaprinciples.org/). Unofficial translations are available in other languages, including Catalan, Dutch, Euskara (Basque), Filipino, German, Hungarian, Indonesian, Lithuanian, Nepali, Persian (Farsi), Portuguese, Sinhala, Slovak and Tamil. These translations are all accessible at [www.ypinaction.org/content/Principles\\_Unofficial\\_Translation](http://www.ypinaction.org/content/Principles_Unofficial_Translation). There may be other unofficial translations too. *An activists' guide to the Yogyakarta Principles*, 2010, available in English, French, German and Spanish, is at [www.ypinaction.org/content/activists\\_guide](http://www.ypinaction.org/content/activists_guide).

580 See M. O'Flaherty and J. Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' in *Human Rights Law Review* 8:2, 2008, pp. 207-248.

581 One example is same-sex marriage. The Yogyakarta Experts in 2006 considered that international law did not deal with this issue and so it is not incorporated in the Principles. Some issues relating to equal treatment of relationships are dealt with, however, because the Experts considered that those aspects were covered by existing international law at the time; see Principle 24.

582 Preambular Paragraph 9.

there was no authoritative statement of how existing international human rights law extended to lesbian, gay, bisexual and transgender people and applied to the situations and experiences of lesbian, gay, bisexual and transgender people. They discussed this concern with the then High Commissioner for Human Rights, Louise Arbour, who considered current international legal understanding inadequate and encouraged them to seek to develop it further. They decided that it would be helpful to convene a group of experts in international human rights law and in issues of sexual orientation and gender identity to develop an authoritative statement of international law's application to human rights issues in relation to sexual orientation and gender identity.

It was proposed that the Principles have a tri-partite function. In the first place they should constitute a 'mapping' of the experiences of human rights violations experienced by people of diverse sexual orientations and gender identities. This exercise should be as inclusive and wide ranging as possible, taking account of the distinct ways in which human rights violations may be experienced in different regions of the world. Second, the application of international human rights law to such experiences should be articulated in as clear and precise a manner as possible. Finally, the Principles should spell out in some detail the nature of the obligation on States for effective implementation of each of the human rights obligations.<sup>583</sup>

The International Service for Human Rights (ISHR), a generalist international human rights NGO, agreed to lead and coordinate the project, with the support of the International Commission of Jurists (ICJ), another generalist international human rights NGO. The Experts' Group was co-chaired by Sonia Onufer Correa of Brazil and Professor Vitit Muntarbhorn of Thailand. The rapporteur was Professor Michael O'Flaherty of Ireland.

In their introduction to the Yogyakarta Principles the co-chairs presented the basis for the development of the Principles.

[H]uman rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality.

... the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent.

To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary. It is critical to collate and clarify State obligations under existing international human rights law, in order to promote and protect all human rights for all persons on the basis of equality and without discrimination.<sup>584</sup>

### 6.1.2. The Yogyakarta Experts' Group

The Experts' Group included both legal expertise and expertise in lesbian, gay, bisexual and transgender experiences. It had 29 members: lesbian, gay, bisexual and transgender activists and advocates, one intersex activist, UN special procedures and treaty monitoring body members, judges, academics and

583 M. O'Flaherty and J. Fisher 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' in *Human Rights Law Review* 8:2, 2008, pp. 232-233.

584 S. Correa and V. Muntarbhorn, 'Introduction to the Yogyakarta Principles', *The Yogyakarta Principles*, 2007, pp. 6-7.

members of NHRIs.<sup>585</sup> They came from 27 countries in all regions. Of the 29 members of the Experts' Group, 17 were women. The group met at Gadjah Mada University in Yogyakarta, Indonesia, from 6-9 November 2006. They had worked on a draft of the Principles prior to the meeting, discussed the draft and developed it further over the four days of the meeting, and then refined it and finalised it afterwards. The Yogyakarta Principles were released in Geneva on 26 March 2007, at an event parallel to the fourth regular session of the UN Human Rights Council.

### 6.1.3. Coverage and definitions

Unlike most discussions in international forums and by international mechanisms in 2006–07, the Yogyakarta Principles refer specifically to both sexual orientation and gender identity. They do so, however, within the framework of universality, speaking about the rights of all people in relation to sexual orientation and gender identity, not the rights of particular groups of people.

The Yogyakarta Principles articulate universal rights for all people, but they do not suggest specific standards for particular groups. In the wording of the Principles themselves, the drafters sought to uphold the universal nature of human rights by avoiding wording that would limit rights to particular groups. Thus, instead of speaking about the rights of heterosexuals, homosexuals, lesbians, gay men, bisexuals, or transgender people, each Principle is said to apply to all people regardless of the characteristic of actual or perceived sexual orientation or gender identity. By expressing the rights in this way, the drafters have also sought to avoid the necessity of requiring individuals to absolutely categorise themselves by identity labels that may not be appropriate for all cultural contexts. The notions of sexual orientation and gender identity are fluid. Requiring a person to subscribe to a particular identity group would only perpetuate the oppression that the rights are seeking to combat. None of the rights in the Principles can be considered particular or unique to one group, but rather are enjoyed by all.<sup>586</sup>

The Yogyakarta Experts' Group thought it necessary to define clearly what they meant by 'sexual orientation' and 'gender identity'. These terms had not previously been defined in international law. There had been many comments in international forums, such as the UN Commission on Human Rights, that the terms were unclear and so should not be used in international resolutions and other official documents. However, States making such comments did so more to obstruct reference to sexual orientation and gender identity than to seek to clarify the terms. The Experts therefore thought it necessary to end this argument by providing definitions. In the Preamble they say that they understand:

... 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender<sup>587</sup>

... 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>588</sup>

The definition of gender identity is wide enough to include gender expression. In fact, it specifically includes "expressions of gender, including dress, speech and mannerisms".<sup>589</sup>

The Yogyakarta Principles do not specifically distinguish intersex status or sex characteristics in their application. They do not deal with the full range of human rights issues affecting intersex people.

585 The full list of the 29 members of the Experts' Group is at Appendix 5.

586 *An activists' guide to the Yogyakarta Principles*, 2010, p. 23; at [www.ypinaction.org/content/activists\\_guide](http://www.ypinaction.org/content/activists_guide).

587 Preambular Paragraph 4.

588 Preambular Paragraph 5.

589 *Ibid.*

## 6.2. THE CONTENT: WHAT DO THE YOGYAKARTA PRINCIPLES SAY?

The Yogyakarta Principles contain a Preamble of nine paragraphs and then 29 individual principles.

### THE YOGYAKARTA PRINCIPLES

#### Preamble

- Principle 1** The right to the universal enjoyment of human rights
- Principle 2** The rights to equality and non-discrimination
- Principle 3** The right to recognition before the law
- Principle 4** The right to life
- Principle 5** The right to security of the person
- Principle 6** The right to privacy
- Principle 7** The right to freedom from arbitrary deprivation of liberty
- Principle 8** The right to a fair trial
- Principle 9** The right to treatment with humanity while in detention
- Principle 10** The right to freedom from torture and cruel, inhuman, or degrading treatment or punishment
- Principle 11** The right to protection from all forms of exploitation, sale, and trafficking of human beings
- Principle 12** The right to work
- Principle 13** The right to social security and to other social protection measures
- Principle 14** The right to an adequate standard of living
- Principle 15** The right to adequate housing
- Principle 16** The right to education
- Principle 17** The right to the highest attainable standard of health
- Principle 18** Protection from medical abuses
- Principle 19** The right to freedom of opinion and expression
- Principle 20** The right to freedom of peaceful assembly and association
- Principle 21** The right to freedom of thought, conscience and religion
- Principle 22** The right to freedom of movement
- Principle 23** The right to seek asylum
- Principle 24** The right to found a family
- Principle 25** The right to participate in public life
- Principle 26** The right to participate in cultural life
- Principle 27** The right to promote human rights
- Principle 28** The right to effective remedies and redress
- Principle 29** Accountability



### 6.2.1. The Preamble

The nine preambular paragraphs provide the context for the 29 principles that follow. These paragraphs:

- affirm the universality of all human rights<sup>590</sup>
- refer to human rights violations based on sexual orientation and gender identity<sup>591</sup>
- see the historical basis for these violations in actual or perceived sexual orientation or gender identity<sup>592</sup>
- define ‘sexual orientation’ and ‘gender identity’<sup>593</sup>
- state that the application of human rights entitlements should take into account sexual orientation and gender identity and the human rights of children<sup>594</sup>
- assert rights to equality, non-discrimination and self determination on matters related to sexuality.<sup>595</sup>

The Preamble states clearly that the articulation:

... in a systematic manner [of] international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities ... must rely on the current state of international human rights law.<sup>596</sup>

The Yogyakarta Principles attempt to do that. They were ground-breaking in that this had not been attempted previously. However, they did not seek to make new law or to assert what the law should be.

### 6.2.2. The 29 principles

The 29 principles can be grouped into eight broad areas of human rights.

**Rights to universal enjoyment of human rights, non-discrimination and recognition before the law:** Principles 1 to 3 set out the principles of the universality of human rights and their application to all persons without discrimination, as well as the right of all people to recognition before the law.

**Rights to human and personal security:** Principles 4 to 11 address fundamental rights to life, freedom from violence and torture, privacy, access to justice and freedom from arbitrary detention.

**Economic, social and cultural rights:** Principles 12 to 18 set out the importance of non-discrimination in the enjoyment of economic, social and cultural rights, including employment, accommodation, social security, education and health.

**Rights to expression, opinion and association:** Principles 19 to 21 emphasise the importance of the freedom to express oneself, one’s identity and one’s sexuality, without State interference based on sexual orientation or gender identity, including the rights to participate peacefully in public assemblies and events and otherwise associate in community with others.

**Freedom of movement and asylum:** Principles 22 and 23 highlight the rights of persons to seek asylum from persecution based on sexual orientation or gender identity.

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590 Preambular Paragraph 1.

591 Preambular Paragraph 2.

592 Preambular Paragraph 3.

593 Preambular Paragraphs 4 and 5.

594 Preambular Paragraph 6.

595 Preambular Paragraph 7.

596 Preambular Paragraphs 8 and 9.

**Rights of participation in cultural and family life:** Principles 24 to 26 address the rights of persons to participate in family life, public affairs and the cultural life of their community, without discrimination based on sexual orientation or gender identity.

**Rights of human rights defenders:** Principle 27 recognises the right to defend and promote human rights without discrimination based on sexual orientation and gender identity, and the obligation of States to ensure the protection of human rights defenders working in these areas.

**Rights of redress and accountability:** Principles 28 and 29 affirm the importance of holding rights violators accountable and ensuring appropriate redress for those who face rights violations.<sup>597</sup>

Each principle takes a common form. Principle 3, which expresses the right to recognition before the law, provides an example of this common form.

First, each principle expresses the relevant international human rights law. In doing so, it expresses the law in terms of its application in relation to sexual orientation and gender identity. Through its universality and inclusiveness, each principle also applies to intersex persons. Principle 3 begins with a general statement of the right to recognition before the law as found in international human rights law.

Everyone has the right to recognition everywhere as a person before the law.<sup>598</sup>

Second, each principle describes how this right applies in relation to relevant issues of sexual orientation and gender identity. Principle 3 says, in relation to the right to recognition before the law:

Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.<sup>599</sup>

Third, each principle sets out the obligations of States in respect of that aspect of international human rights law. In listing State obligations as part of each principle, the Yogyakarta Principles recognise that international law is directed first and foremost to the actions and obligations of States. Some parts of international law impose obligations on individuals or actors that are not States but, predominantly, international law imposes obligations on States. Principle 3 lists six State obligations relating to the right to recognition before the law.

States shall:

- A. Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- B. Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- C. Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity;

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597 *The Yogyakarta Principles – an overview*; at [www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

598 Principle 3.

599 Ibid.

- D. Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- E. Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- F. Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.<sup>600</sup>

### 6.2.3. The additional recommendations

Having recognised the obligations of States as the principal duty bearers in international human rights law, the Yogyakarta Experts assert:

All members of society and of the international community have responsibilities regarding the realisation of human rights.<sup>601</sup>

Therefore, after setting out the 29 principles, they make 16 'additional recommendations' directed to these other actors:

- United Nations officials, agencies and mechanisms, including the High Commissioner for Human Rights, the Human Rights Council, the special procedures, the Economic and Social Council, the treaty monitoring bodies, the World Health Organization, UNAIDS and the High Commissioner for Refugees
- regional and sub-regional inter-governmental organisations, human rights treaty bodies and courts
- human rights NGOs
- humanitarian organisations
- NHRIs
- professional and commercial organisations
- mass media
- governmental and private funders.<sup>602</sup>

In addressing NHRIs, the Yogyakarta Experts recommend that:

National human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.<sup>603</sup>

## 6.3. WHAT THE YOGYAKARTA PRINCIPLES DO NOT SAY

The Yogyakarta Principles are not the last word on human rights in relation to sexual orientation, gender identity and sex characteristics. On the contrary, there were gaps and deficiencies in their coverage at the time; for example, in the absence of proper discussion of human rights issues affecting intersex people. The Principles themselves acknowledge too that international law is still developing. They reflect the state of the law when they were drafted and adopted in late 2006. As a result, the Yogyakarta Principles:

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600 Ibid.

601 Additional Recommendations.

602 Ibid.

603 Ibid, para L.

... will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries.<sup>604</sup>

### 6.3.1. Sex characteristics

The Yogyakarta Principles do not deal appropriately or adequately with the application of international human rights law in relation to intersex people. They do not specifically distinguish sex characteristics. They do not deal with the full range of human rights issues affecting intersex people. They make one reference to ‘intersex’ in relation to human rights violations, listing intersex people among the groups of concern to the Yogyakarta Experts.

... historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity.<sup>605</sup>

There is also one principle that deals specifically with one critical human rights issue for intersex people. It says that States shall:

Take all necessary legislative, administrative and other measures to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.<sup>606</sup>

This criticises irreversible medical procedures on children that attempt to impose a gender identity, without the child’s full, free and informed consent. Terminology today is more likely to refer to “unnecessary surgical and other procedures for the purpose of trying to make their appearance conform to binary sex stereotypes”, rather than to “medical procedures ... to impose a gender identity”.<sup>607</sup>

These inclusions reflect the fact that, at the time of drafting the Yogyakarta Principles, the Experts saw the Principles as covering intersex people. The terminology used was sexual orientation and gender identity but gender identity was defined broadly, to include “each person’s deeply felt internal and individual experience of gender”, a person’s “personal sense of the body” and “other expressions of gender”.<sup>608</sup> Arguably this was an attempt, however inadequate, to incorporate human rights violations beyond those experienced by transgender and transsexual people.

Understanding, and consequently terminology, has evolved since the Yogyakarta Principles were drafted. It is clearer today that the human rights issues that intersex people face are distinct from those experienced by transgender people. While there are some overlaps, being intersex is about physical, bodily difference, not gender identity. Similarly, the jurisprudence of human rights treaty monitoring bodies and the UN special procedures has evolved since the Yogyakarta Principles were drafted.<sup>609</sup> There is now more material to draw on to articulate the most pressing human rights violations affecting intersex people. These include violations of the right to physical integrity, freedom from torture and ill-treatment, and the right to live free from harmful practices.

The framework of universality ensures that human rights apply to all people and that the Yogyakarta Principles have important application to intersex people, in addition to lesbian, gay, bisexual and transgender people. However, the inadequacy of the Yogyakarta Principles for intersex people requires that more work be done to address the application of human rights law in relation to sex characteristics.

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604 Preambular Paragraph 9.

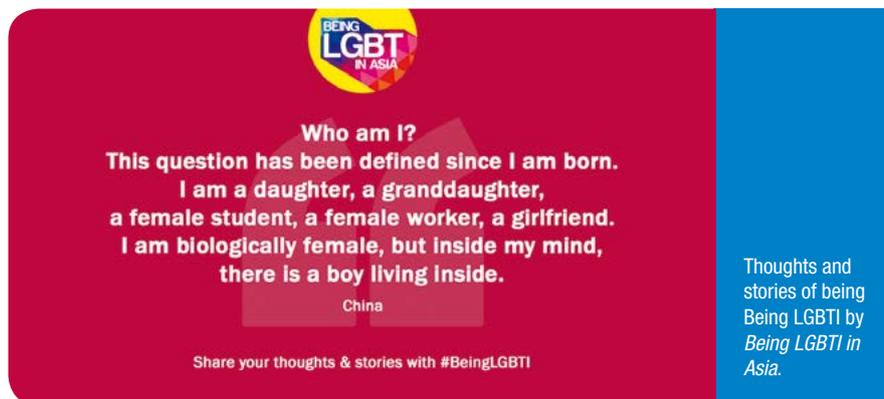
605 Preambular Paragraph 3.

606 Principle 18(b).

607 OHCHR *Factsheet Intersex*, 2015, p. 1.

608 Preambular Paragraph 5.

609 See Chapter 4 of this manual.



### 6.3.2. Gender identity

An academic review refers to the success of the Yogyakarta Principles in securing international legal recognition of gender identity, which, it said, ‘might well be the greatest success of the Yogyakarta Principles’.

Before the Yogyakarta Principles’ launch, there was not a single mention of the term in any soft law instrument or treaty body opinion. Interpretation of regional instruments was limited to Europe. Since the launch of the Yogyakarta Principles, international lawmakers have referenced gender identity with greater frequency. For example, every UN agency handbook containing a reference to gender identity cites the Principles. The term gender identity was added to the Draft OAS Convention against Racism and all Forms of Discrimination and Intolerance at the behest of Brazil, after it adopted the Principles as part of its Brazil Without Homophobia campaign. The Principles may have been an impetus for the recent OAS Declaration on Human Rights, Sexual Orientation, and Gender Identity, as well as a statement read at the UN General Assembly in December by the Argentine ambassador on behalf of sixty-six nations, both of which contain references to gender identity. Since the launch of the Yogyakarta Principles, gender identity has also appeared for the first time in a national constitution, a supreme court decision, and national human rights policies. The addition of gender identity into the international human rights lexicon may prove, with time, to have been the Yogyakarta Principles’ greatest accomplishment.<sup>610</sup>

However, the Yogyakarta Principles do not provide comprehensive, specific coverage of human rights in relation to all aspects of gender identity as they define it. There is recognition of issues relating to gender expression, for example, but comprehensive discussion remains to be done.

### 6.3.3. Marriage and family

Principle 24 deals with the right to found a family. It does not deal with the right to marry because the Experts did not consider that international human rights law in 2006 extended to same-sex marriage. They were familiar with the provision on the right to marry in the International Covenant on Civil and Political Rights, which says:

The right of men and women of marriageable age to marry and to found a family shall be recognized.<sup>611</sup>

In 2006, this was interpreted as applying only to marriage between a man and a woman because of the use of “men and women” in the provision. Principle 24 therefore focused on the right to found a family, while including one provision for non-discrimination against same-sex couples where non-marital relationships were recognised in domestic law.

610 D. Brown, ‘Making room for sexual orientation and gender identity in international human rights law: an introduction to the Yogyakarta Principles’ in *Michigan Journal of International Law*, Vol. 31:821-879, pp 873-874. Footnotes in the Brown paper have been removed from the text quoted here.

611 ICCPR article 23(2).

Principle 24 first affirms the right to found a family, without discrimination on the basis of sexual orientation or gender identity. It reflects and affirms the diversity of family forms and says that States must act to recognise and protect families in all that diversity.<sup>612</sup> It makes a number of specific statements on the obligations of States, including in relation to adoption and access to assisted procreation.<sup>613</sup> It acknowledges, consistent with the Convention on the Rights of the Child, that, in all actions and decisions affecting children, the best interests of the child shall be a primary consideration.<sup>614</sup>

The statements on family diversity tend to be non-specific. There is no specific reference, for example, to families consisting of a same-sex couple with or without children, or of the particular issues affecting families in which one or both adults are transgender or intersex. Although the provision is very inclusive, more specific treatment of the diversity of family forms would assist better understanding and application of international law in this area.

Principle 24 makes three statements on the obligations of States concerning same sex relationships:

- e) Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
- f) Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
- g) Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

The statements are based on jurisprudence at the time.<sup>615</sup> Principle 24 does not assert a right to marriage for same-sex couples. Rather, it says that, where a same-sex relationship is granted some form of State recognition, then the couple should have the same entitlements as a different-sex couple in the same kind of relationship. That is, the same kind of recognised relationship should give the same kind of entitlements. This means that:

- if a State recognises same-sex marriage, then a married same-sex couple must have the same entitlements as a married different-sex couple
- if a State recognises same-sex registered partnership, then a registered same-sex couple must have the same entitlements as a registered different-sex couple
- if a State grants entitlements to an unmarried different-sex couple, then it must grant the same entitlements to an unmarried same-sex couple.

Since the Yogyakarta Principles were adopted, the application of the principle of equality and non-discrimination in relation to same-sex relationships has been considered frequently, especially in national courts. There is now substantial jurisprudence holding that human rights law, in particular the principle of equality and non-discrimination, requires the recognition of marriage between two persons of the same sex. There were early decisions in the Constitutional Court of South Africa and in superior courts in Canada.<sup>616</sup> In 2015, the Supreme Court of the United States also held that laws denying same-sex marriage were unconstitutional because they infringed the guarantee of equality.<sup>617</sup>

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612 Principle 24(b).

613 Principle 24(a).

614 Principle 24(c).

615 See for example Human Rights Committee, *X v. Colombia: Communication No. 1361/2005*, 14 May 2007, CCPR/C/89/D/1361/2005; *Young v. Australia: Communication No. 941/2000*, 18 September 2003, CCPR/C/78/D/941/2000.

616 Constitutional Court of South Africa, *Minister of Home Affairs v Fourie et al* 2005; Court of Appeal for Ontario, *Halpern et al. v Attorney General of Canada et al.*, 2003; British Columbia Court of Appeal, *Barbeau v. British Columbia*, 2003.

617 Supreme Court of the United States, *Obergefell v. Hodges*, 2015.



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International law is yet to adopt the view expressed so strongly at national level and so the issue is not yet resolved in international law. However, there is now a firmer basis for a position supporting same-sex marriage than the Yogyakarta Principles state.

#### 6.3.4. Non-State actors

The Yogyakarta Principles also need to be updated to reflect developments in international law on the human rights obligations of non-State actors. International law predominantly concerns State responsibility and the Yogyakarta Principles reflect that. The 29 principles are all addressed to State obligations. Nonetheless, the Yogyakarta Principles also contain 16 'additional recommendations' addressed to a variety of international organisations and agencies and non-State actors.

Only one of the 'additional recommendations' was addressed to business. Its scope is very limited, directed principally towards the workforce:

Commercial organisations acknowledge and act upon the important role they have in both ensuring respect for these Principles with regard to their own workforces and in promoting these Principles nationally and internationally.<sup>618</sup>

618 Additional Recommendation N.

In the ten years since the Yogyakarta Principles were adopted, international law has articulated more effective provisions on the human rights responsibilities of business. In 2011, the Human Rights Council adopted the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework.<sup>619</sup> The Framework provides ample opportunity for business to be active implementers and advocates of human rights in relation to lesbian, gay, bisexual, transgender and intersex people.

The additional recommendations are similarly limited in scope in addressing other actors. The one recommendation addressed to NGOs says:

Non-governmental organisations working on human rights at the national, regional and international levels promote respect for these Principles within the framework of their specific mandates.<sup>620</sup>

Principle 16, on the right to education, lists state obligations but does not address schools directly.

Pointing to these gaps and deficiencies does not detract in any way from the significance of the Yogyakarta Principles. They remain the most important and the most authoritative statement of the application of international human rights law in relation to sexual orientation and gender identity and, by extension, in relation to sex characteristics. But they are not the last word on the subject.

## 6.4. THE YOGYAKARTA PRINCIPLES SINCE YOGYAKARTA

The Yogyakarta Principles were adopted almost ten years ago. Since then, they have been cited frequently by human rights treaty monitoring bodies, UN special procedures, senior UN officials, regional human rights mechanisms and national courts. Many States have made public policy statements of acceptance of the Yogyakarta Principles and have referred to them in statements to the Human Rights Council and in other international human rights forums. Most importantly, there has been no expert legal challenge to their accuracy as a statement of the applicable international human rights law in relation to sexual orientation and gender identity. However, the Yogyakarta Principles have not yet been referred to specifically in resolutions of any UN political forum, such as the Human Rights Council or the General Assembly.

### 6.4.1. References by international human rights mechanisms

The first significant reference to the Yogyakarta Principles came in 2009, only two years after their release, when the Committee on Economic, Social and Cultural Rights adopted the definitions of sexual orientation and gender identity in the Yogyakarta Principles for the purposes of its General Comment 20 on non-discrimination in economic, social and cultural rights.<sup>621</sup> Soon after, they were cited in annual reports of the special procedures on the promotion and protection of human rights and fundamental freedoms while countering terrorism,<sup>622</sup> on the right to health,<sup>623</sup> on the right to education,<sup>624</sup> and on torture.<sup>625</sup> These special procedures referred approvingly to specific provisions in the Yogyakarta Principles in support of the points they were making in their reports. They expressly endorsed specific principles relevant to their own mandates. For example, the Special Rapporteur on the right to education said:

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619 Adopted by Human Rights Council resolution 17/4, 16 June 2011, A/HRC/17/31.

620 Additional Recommendation K.

621 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, 2 July 2009, E/C.12/GC/20, para. 32.

622 Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 3 August 2009, A/64/211.

623 Special Rapporteur on the right to health, 10 August 2009, A/64/272.

624 Special Rapporteur on the right to education, 23 July 2010, A/65/162.

625 Special Rapporteur on torture, 1 February 2013, A/HRC/22/53; and 9 August 2013, A/68/295.

A very important contribution to thinking in this area was made by the 2006 Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity. The Special Rapporteur fully endorses the precepts of Principle 16, referring specifically to the right to education.<sup>626</sup>

In 2011, the Committee against Torture referred to the Yogyakarta Principles for the first time in its concluding observations on State reports and made recommendations to States relating to compliance with provisions of the Yogyakarta Principles. In reviewing Finland, the Committee recommended that Finland:

... consider using the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* as a guide to assist in the development of its policies.<sup>627</sup>

The Committee against Torture also recommended to Mongolia:

The State party should ensure the protection of vulnerable groups such as sexual minorities, persons living with HIV/AIDS, and some foreigners. The State party should establish effective policing, enforcement and complaints mechanisms with a view to ensuring prompt, thorough and impartial investigations into allegations of attacks against persons on the basis of their sexual orientation or gender identity in line with the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.<sup>628</sup>



#### 6.4.2. References at regional and national levels

The Yogyakarta Principles have also been cited positively in decisions of national courts, including, in the Asia Pacific region, those of Australia,<sup>629</sup> India<sup>630</sup> and Nepal.<sup>631</sup> The High Commissioner for Human Rights commented in 2011 that:

Some States, including Brazil, Ecuador, Germany, the Netherlands and Uruguay, have used the Yogyakarta Principles to help guide policy responses to incidents of violence and discrimination.<sup>632</sup>

626 Special Rapporteur on the right to education, 23 July 2010, A/65/162, para. 23.

627 Committee against Torture, *Concluding Observations: Finland*, 30 May 2011, CAT/C/FIN/CO/5-6 2011, para. 24.

628 Committee against Torture, *Concluding Observations: Mongolia*, 20 January 2011, CAT/C/MNG/CO/1, para. 25.

629 *In re Alex*, Family Court of Australia, 6 May 2009.

630 *Naz Foundation v. NCT Delhi*, 2009, 160 DLT 277.

631 Supreme Court of Nepal, *Sunil Babu Pant and Others v. Nepal Government and Others*, 21 December 2007.

632 High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 75.

The High Commissioner for Human Rights also noted that:

In the universal periodic review process, several Governments have committed to using the Principles in future policy development.<sup>633</sup>

In 2011, an academic review of the Yogyakarta Principles reported:

The Principles have already had significant success as a standard setting document. The Council of Europe's Human Rights Commissioner's Office is now using them for "country and thematic monitoring related to discrimination and human rights violations based on sexual orientation and gender identity." The High Human Rights Authorities of Mercosur "now consider [the Yogyakarta Principles] a reference document for Mercosur." The Asia Pacific Forum of National Human Rights Institutions has requested its members to report on their activities in relation to human rights and sexual orientation and gender identity, with reference to the Yogyakarta Principles. In the UNHCR Handbook for the Protection of Women and Girls, published the discussion of "risk factors faced by women and girls" notes that "[w]ith regard to sexual orientation, the 2007 Yogyakarta Principles . . . affirm the binding international legal standards on this issue as derived from key fundamental human rights instruments." The UN Office on Drugs and Crime has recently published a handbook on prisoners with special needs, which contains a chapter on LGBT prisoners that draws heavily on the Yogyakarta Principles, citing them variously to call for the decriminalization of same-sex sexual relations and to reiterate that the right to human treatment while in detention – Principle 9 – requires states to address LGBT prisoners' risk for rape, HIV infection, violence, and isolation. The Committee on Economic, Social and Cultural rights has adopted the Yogyakarta Principles' definitions of sexual orientation and gender identity in its general comments on discrimination. The Human Rights Committee uses them as terms of reference in consideration of states' reports under Article 40 of the ICCPR. They have become a fixture in the Human Rights Council with several nations, notably Slovenia and the Netherlands, inquiring as to states' compliance with them, and a number of states, including Brazil, Canada, Chile, the Czech Republic, Ecuador and Finland, committing themselves to using them as guidelines or standards in policymaking.<sup>634</sup>

### 6.4.3. The Yogyakarta Principles and NHRIs

NHRIs have taken up the Yogyakarta Principles as seriously as any other sector in the global human rights system. The APF and NHRIs in the Asia Pacific region responded very quickly to the recommendation in the Yogyakarta Principles addressed to NHRIs.<sup>635</sup>

- In May 2009, the APF and the Indonesian National Commission on Human Rights (Komnas HAM) convened a workshop of member NHRIs in Yogyakarta to discuss the response of Asia Pacific NHRIs to the recommendation and to develop a program of activities at the regional and national levels.<sup>636</sup>
- In 2010, the APF's Advisory Council of Jurists completed its major report on human rights and sexual orientation and gender identity in the Asia Pacific region.<sup>637</sup>
- Also in 2010, the APF provided financial support to assist four member NHRIs (those of Australia, Mongolia, New Zealand and the Philippines) to implement a range of targeted activities to raise awareness and bolster protection for the rights of lesbian, gay, bisexual and transgender people.<sup>638</sup> Separately, in the same year, the Human Rights Commission of Malaysia (SUHAKAM) completed a study on the rights of lesbian, gay, bisexual and transgender people.

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633 Ibid, footnote 137.

634 D. Brown, 'Making room for sexual orientation and gender identity in international human rights law: an introduction to the Yogyakarta Principles' in *Michigan Journal of International Law*, Vol. 31:821–879, p. 870. Footnotes in the Brown paper have been removed from the text quoted here.

635 Additional Recommendations para L.

636 See Chapter 7 of this manual.

637 See Chapter 7 of this manual.

638 See [www.asiapacificforum.net/human-rights/sogi/supporting-APF-member-initiatives/](http://www.asiapacificforum.net/human-rights/sogi/supporting-APF-member-initiatives/).

- In 2012–13, the APF, the International Development Law Organization, UNDP and SAARCLAW (the legal apex body of the South Asian Association for Regional Cooperation) worked with NHRIs in Bangladesh, India, Indonesia, Nepal, the Philippines, Sri Lanka and Timor Leste to document their capacity to promote the rights of people of diverse sexual orientation and gender identity and to respond to human rights violations.<sup>639</sup>
- In 2015, the APF, in conjunction with UNDP and the Asia Pacific Network on Male Sexual Health, convened a workshop on ‘The Role of NHRIs in Promoting and Protecting the Rights and Health of LGBTI in Asia and the Pacific’, developing an APF-UNDP Programme of Action and Support for APF members on human rights in relation to sexual orientation, gender identity and sex characteristics, including health rights, in the Asia Pacific region.<sup>640</sup>
- In August 2015 the APF funded two of its member institutions, the New Zealand Human Rights Commission and the Ombudsman of Samoa, to attend the UN Free and Equal Launch in Fiji.<sup>641</sup>

A number of APF members have been active on these issues for many years but, without doubt, the level of activity has increased across the region, involving more and more NHRIs since the APF Yogyakarta workshop of 2009.<sup>642</sup>



Photo by UNDP/H. Nhan.

639 This project resulted in a regional reports and individual reports on each participating NHRI. All reports are at [www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/](http://www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/).

640 See Chapter 7 of this manual. The APF-UNDP Programme of Action and Support is at Appendix 6 of this manual and at [www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/](http://www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/).

641 See [www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=16298&LangID=E](http://www.ohchr.org/CH/NewsEvents/Pages/DisplayNews.aspx?NewsID=16298&LangID=E).

642 See the case studies in this manual and also Chapter 8.

## KEY POINTS: CHAPTER 6

- The *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) are the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities.
- The Yogyakarta Principles reflect existing international legal obligations under international human rights law as it was in 2006. They are not an aspirational statement of what the law should be but a legal statement of what the law then was.
- The Yogyakarta Principles refer specifically to both sexual orientation and gender identity. In fact, they represent one of the earliest statements recognising the separate human rights issues associated with gender identity. They do so, however, within the framework of universality, speaking about the rights of all people in relation to sexual orientation and gender identity, not the rights of particular groups of people.
- The Yogyakarta Principles refer specifically to human rights issues associated with sex characteristics on only two occasions. They do not deal with the full range of human rights issues affecting intersex people. However, within the framework of the universality of all human rights, they apply for the benefit of intersex people.
- The Yogyakarta Principles contain nine preambular paragraphs and 29 principles, as well as additional recommendations addressed to many human rights actors, including NHRIs.
- The Yogyakarta Principles were quickly accepted and cited by international human rights mechanisms, senior UN officials, regional human rights mechanisms and many States, NHRIs and NGOs. They have not yet been officially recognised in resolutions of UN political forums.
- Asia Pacific NHRIs and the APF have responded quickly to the recommendation in the Yogyakarta Principles addressed to them. Their activities are increasing in number and scope. The APF-UNDP Programme of Action and Support adopted in February 2015 provides the framework for activities over the coming years.





## Part III: What national human rights institutions can do



**Chapter 7: The APF's response to the Yogyakarta Principles**  
**Chapter 8: What more national human rights institutions can do**

# Chapter 7:

## The APF's response to the Yogyakarta Principles

### KEY QUESTIONS

- **When and why did the APF become so active on issues of human rights and sexual orientation and gender identity and, more recently, sex characteristics?**
- **What was the APF Yogyakarta Workshop?**
- **What was the first program of activities in this area for the APF and its members acting together?**
- **What did the APF Advisory Council of Jurists say?**
- **What have individual NHRIs done?**
- **What will be done under the APF-UNDP Programme of Action and Support over the next few years?**



### 7.1. INTRODUCTION

The Yogyakarta Principles addressed one recommendation specifically to NHRIs. The recommendation was that:

[n]ational human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.<sup>643</sup>

NHRIs in the Asia Pacific region and the APF have responded positively to this recommendation.

Human rights issues relating to sexual orientation and gender identity had first been raised in an APF forum at the 11<sup>th</sup> Annual Meeting in 2006 in Fiji. In 2008, at the 13<sup>th</sup> Annual Meeting, APF Forum Councillors agreed to include sexual orientation and gender identity in the APF work plan, beginning with a regional workshop. Since then, the APF and its member NHRIs have been active in addressing human rights issues in relation to sexual orientation and gender identity. More recently they have begun to address issues relating to sex characteristics.

These activities of the APF and its member NHRIs are consistent with the recommendation of the High Commissioner for Human Rights in 2015 that:

... national human rights institutions address violence and discrimination against LGBT and intersex persons in the context of their respective mandates to promote and monitor effective implementation of international human rights standards at the national level.<sup>644</sup>

643 Additional Principles para L.

644 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 80.

## 7.2. THE APF YOGYAKARTA WORKSHOP, 2009

### 7.2.1. Introduction

In May 2009, the APF and the Indonesian National Commission on Human Rights (Komnas HAM) convened the first workshop, in this region or anywhere, for NHRIs to discuss human rights issues in relation to sexual orientation and gender identity.<sup>645</sup> The workshop focused on the role of NHRIs in the promotion and implementation of the Yogyakarta Principles. Fittingly, it was held in Yogyakarta, Indonesia, where the Experts' Meeting for the Yogyakarta Principles had been held.

The objectives of the workshop were:

- to learn how NHRIs are using their mandate and powers to promote and protect the human rights of people of diverse sexual orientation and gender identities
- to build understanding of the Yogyakarta Principles
- to consider the regional political and social contexts and any specific challenges
- to consider the relevance of the Yogyakarta Principles to the work of NHRIs
- to deepen knowledge and build better understanding of country specific terms for people of diverse sexual orientation and gender identities.<sup>646</sup>

### 7.2.2. The participants

The workshop was attended by representatives of the host NHRI, the chair and deputy chairs of the APF and one APF member from each of the five sub-regions of the Asia Pacific; nine APF member institutions in all.<sup>647</sup> A number of experts participated in the discussions and assisted NHRIs to understand better the human rights issues arising from the experiences of lesbian, gay, bisexual and transgender people. These experts included:

- Professor Vitit Muntarbhorn (Thailand) and Ms Sonia Correa (Brazil), the co-chairs of the Yogyakarta Experts' Group that developed the Yogyakarta Principles
- Professor Michael O'Flaherty (Ireland), the Rapporteur of the Yogyakarta Experts' Group
- John Fisher (New Zealand-Canada), of ARC International, an expert in human rights in relation to sexual orientation and gender identity
- Bapak Marzuki Darusman (Indonesia), formerly Chairperson of Komnas HAM and formerly Attorney General of Indonesia
- Ibu Siti Musdah Mulia (Indonesia), a highly regarded Islamic scholar and expert in human rights and Chairperson of the Indonesian Conference on Religion and Peace.

645 The workshop papers, including the Conclusions and the individual NHRI reports, are at [www.asiapacificforum.net/human-rights/sogi/apf-regional-workshop-yogyakarta-principles/](http://www.asiapacificforum.net/human-rights/sogi/apf-regional-workshop-yogyakarta-principles/).

646 *Conclusions of the workshop on the role of national human rights institutions in the promotion and implementation of Yogyakarta Principles*, p. 2; at [www.asiapacificforum.net/resources/conclusions-2009-yogyakarta-principles-workshop/](http://www.asiapacificforum.net/resources/conclusions-2009-yogyakarta-principles-workshop/).

647 The National Commission on Human Rights of Indonesia (host institution), the Human Rights Commission of Malaysia (APF chair), the Australian Human Rights Commission (APF deputy chair), the Jordan National Centre for Human Rights (APF deputy chair), the National Human Rights Commission of Nepal (South Asia sub-region), the New Zealand Human Rights Commission (Pacific sub-region), the Palestinian Independent Commission for Human Rights (West Asia sub-region), the National Human Rights Commission of Korea (North Asia sub-region) and the National Human Rights Commission of Thailand (South East Asia sub-region).

### 7.2.3. The program

The workshop had the benefit of significant presentations from the invited experts. Ms Correa and Professors Muntarbhorn and O’Flaherty guided the participants through the Yogyakarta Principles and discussed what they meant for NHRIs. Ibu Musdah Mulia presented a challenging paper on ‘Understanding sexuality in Islam – promoting the appreciation of human dignity’.<sup>648</sup> Mr Fisher and Ms Correa spoke about western and Latin American experiences of human rights in relation to sexual orientation and gender identity. Professor Muntarbhorn also spoke about Asian culture and issues of sexual orientation and gender identity. Bapak Marzuki addressed issues associated with ASEAN politics.

Individual NHRIs reported on their work on these issues.<sup>649</sup> They also discussed the sensitivity of the issues in many societies and the difficulties they faced in raising and responding to human rights violations based on sexual orientation and gender identity. Some NHRIs described a broad program of activities on the issues, while others said that they could do little at that stage. The participants did not ignore these difficulties but grappled with them openly and honestly.

### 7.2.4. The Conclusions

The participants adopted Conclusions at the end of the workshop. The Conclusions began by affirming the universality of all human rights and condemning “stereotyping, exclusion, stigmatisation, prejudice, intolerance, discrimination and violence”.<sup>650</sup> They described the mandate of NHRIs and said this mandate “extends to those who suffer human rights violations based on their actual or perceived sexual orientation or gender identity”. They recognised the frequent experience of serious human rights violations in the Asia Pacific region on the basis of sexual orientation and gender identity. They realistically accepted the limitations of the NHRIs’ responses to date and the sensitivities in dealing with the issues.

The workshop recognised that this was the first occasion on which some national human rights institutions had discussed these issues ... It also recognised that the national human rights institutions are at different points in relation to them.<sup>651</sup>

The Conclusions then proposed a number of possible actions, for the consideration of NHRIs, by which they could respond to the Yogyakarta Principles and address these violations:

- a. recognising persons of diverse sexual orientations and gender identities as groups that are vulnerable to human rights violations
- b. ensuring that persons of diverse sexual orientations and gender identities are groups included in the national human rights institution’s human rights work
- c. disseminating and promoting the Yogyakarta Principles, especially to those whose rights they affirm, including in local languages
- d. monitoring the enjoyment of human rights by persons of diverse sexual orientations and gender identities
- e. providing forums and other mechanisms through which the national human rights institutions can consult and collaborate with persons of diverse sexual orientations and gender identities in the work of the promotion and protection of human rights

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648 See [www.asiapacificforum.net/resources/understanding-sexuality-islam-background-paper/](http://www.asiapacificforum.net/resources/understanding-sexuality-islam-background-paper/).

649 The report from each participating NHRI is on the APF website at [www.asiapacificforum.net/human-rights/sogi/apf-regional-workshop-yogyakarta-principles/](http://www.asiapacificforum.net/human-rights/sogi/apf-regional-workshop-yogyakarta-principles/).

650 *Conclusions of the workshop on the role of national human rights institutions in the promotion and implementation of Yogyakarta Principles*, p. 2.

651 *Ibid*, p. 4.

- f. ensuring that the national human rights institution's complaints mechanisms are accessible to those who suffer human rights violations on the basis of their actual or perceived sexual orientation or gender identity
- g. undertaking research, including through inquiries and consultation with persons of diverse sexual orientations and gender identities, to identify the nature and incidence of human rights violations in the country based on sexual orientation and gender identity
- h. on the basis of that research, developing programs and projects that address human rights violations based on sexual orientation or gender identity, including by providing human rights education and information about remedies for human rights violations and including persons of diverse sexual orientations and gender identities in outreach programs
- i. reviewing existing laws and recommending law reform to remove provisions that violate human rights on the basis of sexual orientation or gender identity and to enact provisions that ensure protection and promotion of the human rights of persons of diverse sexual orientations and gender identities, including by prohibiting discrimination on these grounds
- j. promoting the consideration of human rights issues in relation to sexual orientation and gender identity at the international level, including through inclusion of these issues where relevant in reports to treaty monitoring bodies, Special Procedures, the Universal Periodic Review and the Human Rights Council and by encouraging governments to support serious discussion of these issues in international human rights forums.<sup>652</sup>

Finally, the Conclusions made specific recommendations to the APF and its secretariat:

- a. distribute the Conclusions to all APF member institutions
- b. establish a webpage on its website for information and exchange on issues and work in relation to human rights and sexual orientation and gender identity, including the reports, papers and Conclusions of this workshop
- c. facilitate the exchange of information among member institutions on their work on human rights in relation to sexual orientation and gender diversity
- d. assist member institutions to increase the knowledge and awareness of human rights in relation to sexual orientation and gender identity, including through training programs and staff exchanges
- e. include in the Secretariat's work plan follow up to this workshop through a project to assist member institutions in their work on human rights in relation to sexual orientation and gender identity
- f. develop and provide a reference to the Advisory Council of Jurists to review and advise whether laws in States whose national human rights institutions are members of the APF are consistent with international human rights law in their application in relation to sexual orientation and gender identity and what amendments to existing laws or what new laws are required to ensure consistency, with a report to be made for discussion at the APF's 15th Annual Meeting in 2010
- g. include the Yogyakarta workshop as an agenda item for APF 15 in 2010 and invite each APF member institution to provide a report on its activities in relation to human rights and sexual orientation and gender identity at that meeting.<sup>653</sup>

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652 Ibid, pp. 4-5.

653 Ibid, p 5.

These Conclusions provided the framework for the APF's activities on human rights in relation to sexual orientation, and gender identity for the following few years. There is no specific reference to sex characteristics in the Conclusions, though the workshop included some discussion of specific human rights violations against intersex people.<sup>654</sup>

Importantly, the Conclusions led to the decision of the APF's 14th Annual Meeting in 2009 to give a reference to its Advisory Council of Jurists to review laws of countries in the region for their consistency with international human rights law in their application in relation to sexual orientation and gender identity and to make recommendations for law reform.

The use of the term 'sexual orientation and gender identity' to refer to human rights violations against lesbian, gay, bisexual and transgender people has continued through the APF's work to date. This manual is the first time that the APF has incorporated specific material about human rights issues for intersex people, including examples of the specific actions NHRIs have taken in this area. It also provides an opportunity to consider how the terminology that the APF and NHRIs use in their work can enable better understanding of distinct human rights issues for different groups of lesbian, gay, bisexual, transgender and intersex people, based on their sexual orientation, gender identity or sex characteristics.<sup>655</sup>

## 7.3. THE APF ADVISORY COUNCIL OF JURISTS ADVISORY OPINION, 2010

### 7.3.1. Introduction

The Advisory Council of Jurists (ACJ) was established by the APF at its 3rd Annual Meeting in 1998.<sup>656</sup>

The establishment of the ACJ reflects our recognition of the need for access to independent, authoritative advice on international human rights issues and to develop regional jurisprudence relating to the interpretation and application of international human rights standards.<sup>657</sup>

The ACJ consists of one eminent jurist – a serving or retired senior judge or senior academic – from each full (or A status) APF member's country, nominated by that member for election by the APF Annual Meeting. It therefore brings together the breadth of jurisprudence from legal systems in the Asia Pacific region, with their divergent traditions and cultures. It undertakes studies and research and develops conclusions and recommendations on references from the APF Annual Meeting. It proceeds by consensus.

Acting on the recommendation of the APF Yogyakarta Workshop on human rights in relation to sexual orientation and gender identity, the 9<sup>th</sup> Annual Meeting in 2009 provided a reference to the ACJ to report, in relation to each State of a member institution of the APF, on:

- (i) Whether, and in what respects, that State's criminal law is consistent with international human rights law in its application to and effect on persons on the basis of sexual orientation and gender identity;
- (ii) Whether, and in what respects, that State's anti-discrimination law applies to protect the human rights of persons on the basis of sexual orientation and gender identity and the adequacy of that protection;

654 The report of the New Zealand Human Rights Commission made reference specifically to human rights issues affecting intersex people in New Zealand and to the Commission's work on these issues. See [www.asiapacificforum.net/resources/new-zealand-2009-yogyakarta-principles-workshop/](http://www.asiapacificforum.net/resources/new-zealand-2009-yogyakarta-principles-workshop/).

655 See Chapter 1.

656 *Statement of conclusions*, Third APF Annual Meeting, 7-9 September 1998, Jakarta, Indonesia, p. 2; at [www.asiapacificforum.net/resources/apf-3-concluding-statement/](http://www.asiapacificforum.net/resources/apf-3-concluding-statement/).

657 See [www.asiapacificforum.net/support/advice-and-expertise/acj/](http://www.asiapacificforum.net/support/advice-and-expertise/acj/).

- (iii) Whether, and in what respects, that State's laws enable the official recognition of changes of gender identity from that assigned to a person at birth and the consistency of those laws with international human rights law;
- (iv) Whether, in the course of undertaking the reference, the ACJ has identified other laws, policies, acts or practices that impact adversely persons on the basis of sexual orientation and gender identity, and, if so, the extent to which those laws, policies, acts or practices are inconsistent with international human rights law and the nature of the inconsistency; and
- (v) Whether the law, policy and practice in a State is adequate to ensure the protection of the rights of persons and organisations that defend the human rights of persons of diverse sexual orientation and gender identity.<sup>658</sup>

The ACJ provided an initial report on its reference at the Annual Meeting in August 2009, where the draft report was discussed by ACJ members and with the APF Forum Council. It issued its final report in December 2010.<sup>659</sup>

### 7.3.2. Findings

The ACJ reported:

The interpretations by UN Treaty Bodies, Special Procedures and regional human rights mechanisms evince a clear acknowledgment that sexual orientation and gender identity are among the grounds of discrimination proscribed by international human rights law.

The authoritative pronouncements of the HRC demonstrate how anti-sodomy laws violate Article 17 of the ICCPR, are a violation of the prohibition against discrimination in Article 2 and are in violation of the equality requirements in Article 26. Conversely, their pronouncements clearly reject the assertion that sexual orientation or gender identity cannot be protected simply because sexual orientation and gender identity are not 'expressly' mentioned in the grounds of discrimination enumerated in international human rights treaties.

...

This approach has begun to find favour in the domestic courts of the Asia Pacific region, with the judiciary a pro-active force in ensuring that universal human rights apply to persons of diverse sexual orientation and gender identity. Key decisions by the Superior Courts in Australia, Philippines, Korea, Nepal, Fiji and India are illustrative of greater domestic and regional recognition of the rights of lesbian, gay, bisexual and transgender persons.<sup>660</sup>

It then applied this understanding of international human rights law in its review of laws in the Asia Pacific region.

The ACJ examined each of its terms of reference in turn. It began with the criminal law and with the criminalisation of same-sex relations.

Perhaps the most egregious violation of international human rights law with regard to persons of diverse sexual orientation and gender is the existence of laws criminalising same sex sexual conduct between consenting adults.

...

658 APF, *ACJ Report: Human rights, sexual orientation and gender identity*, 2010, p. 7; at [www.asiapacificforum.net/resources/acj-report-sogi/](http://www.asiapacificforum.net/resources/acj-report-sogi/).

659 Ibid.

660 Ibid, pp. 17-18. Footnotes deleted.

The ACJ is of the view that such laws are an invasion of the rights of privacy, non-discrimination and to freedom of expression. Such laws also express a profound contempt for the fundamental right to equality before, and protection of, the law. Equally, such laws often serve to stigmatise persons of diverse sexual orientation and gender identity by referring to same sex sexual conduct as ‘unnatural carnal intercourse’, ‘intercourse against the order of nature’, ‘unnatural desire’, ‘gross indecency’ etcetera.<sup>661</sup>

It identified other criminal laws applied unfairly against lesbian, gay, bisexual and transgender people.

In addition to laws directly criminalising same sex sexual conduct between consenting adults, a range of other laws containing criminal sanctions have been used to target people of diverse sexual orientations and gender identities. These include laws relating to: vagrancy, public nuisance, national security, public morality, obscenity, indecency and public order. The existence of some such laws, or their discriminatory application, breach rights to equality and non-discrimination.<sup>662</sup>

The second term of reference looked at the existence and effectiveness of anti-discrimination laws to protect the rights of lesbian, gay, bisexual and transgender people. The ACJ recognised that, in most countries, these laws do not include sexual orientation and gender identity specifically as prohibited grounds of discrimination, leaving lesbian, gay, bisexual and transgender people “strangers to the guarantees of equality”.<sup>663</sup> It commented positively that some States have specific constitutional or statutory provisions that apply to lesbian, gay, bisexual and transgender people and that courts in many States have “made favourable determinations based on the principle of non-discrimination and equality”.<sup>664</sup>

[T]he ACJ is of the view that fundamental to any improvement in the human rights situation of persons of diverse sexual orientation and gender identity is the implementation of strong anti-discrimination and anti-vilification legislation which, in order to remove any doubt, should include specific reference to non-discrimination on grounds of sexual orientation and gender identity.<sup>665</sup>

The third term of reference dealt with recognition of change of gender identity.

The ACJ is of the view that the denial of recognition of changes to one’s gender identity is in breach of international human rights law.<sup>666</sup>

In relation to other laws, policies and practices, the fourth term of reference, the ACJ reported that:

... a wide range of laws, policies and practices continue to undermine the capacity of persons of diverse sexual orientation and gender identity to enjoy the full range of human rights.<sup>667</sup>

The last term of reference addressed the protection of the rights of those who defend the human rights of lesbian, gay, bisexual and transgender people. It focused principally on the rights to freedom of assembly association and expression. The ACJ referred to:

... a litany of human rights violations directed at the defenders of the rights of lesbian, gay, bisexual, transgender and intersex persons. These include: being subjected to threats of violence and death threats; the arbitrary invasion of their privacy by raiding houses and offices; physical violence; torture; sexual abuse; and murder.<sup>668</sup>

The ACJ did not refer specifically to the situation of children but noted:

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661 Ibid, p. 19.  
662 Ibid, p. 20.  
663 Ibid, p. 21.  
664 Ibid, p. 22.  
665 Ibid, p. 22.  
666 Ibid, p. 23.  
667 Ibid, p. 25.  
668 Ibid, p. 30.



... in particular the experiences of children who identify as, or whose parents are, lesbian, gay, bisexual or transgender. Such children face discrimination and the abuse of their rights in a wide variety of circumstances.<sup>669</sup>

... intersex children's right to protection from medical abuses, citing the Yogyakarta Principles and a 2008 Colombian judgement prohibiting irreversible medical procedures undertaken to impose a gender identity or sex without the full, free and informed consent of the child.<sup>670</sup>

The ACJ report contains a very useful overview of key laws relating to criminalisation of same-sex sexual conduct between consenting adults, coverage of anti-discrimination legislation and legal recognition of changes of gender identity. The listing covers each of the countries of the then 17 APF member NHRIs.

The ACJ's findings of widespread human rights violations based on sexual orientation and gender identity were not surprising. Its response was a series of strong statements that establish that all international human rights law applies to all persons of diverse sexual orientation and gender identity and that the obligations of States under international human rights law to promote and protect all human rights of all people extends to the rights of people of diverse sexual orientation and gender identity. The universality of human rights that the ACJ asserted and promoted applies equally to intersex people.

### 7.3.3. Recommendations

The ACJ was asked not only to make findings but to develop recommendations. The report makes 54 recommendations addressed to NHRIs individually and six recommendations addressed to the APF. It states generally that the recommendations should be implemented through processes that include consultation and participation.

The recommendations to NHRIs, arranged functionally, address:

- capacity building
- research
- monitor and document violations
- education
- promotion
- dialogue
- advocacy
- reform of law and law enforcement.

669 Ibid, p. 30.

670 Ibid, p. 31. The Yogyakarta Principles refer to how such medical procedures attempt to impose a *gender identity* on a child. As a 2015 fact sheet from the OHCHR describes, this is better understood today as attempts to make an intersex child's appearance conform to binary sex stereotypes. See OHCHR, *Fact sheet: Intersex*, 2015.

They provided a comprehensive framework for NHRI action to promote and protect the rights of lesbian, gay, bisexual, transgender and intersex people.

The six recommendations to the APF encouraged the continuation of APF work in facilitating the exchange of information, expertise and experiences among APF members and with NHRIs outside the Asia Pacific region. The ACJ also requested the APF to review the progress of the implementation of the recommendations at regular intervals. There is no doubt that the ACJ report has had a substantial effect on the work of NHRIs.

In the years following the Yogyakarta Principles and the ACJ Report, we have seen a growing number of initiatives from NHRIs in Asia to tackle the rights violations and discrimination faced by people of diverse [sexual orientation and gender identity].<sup>671</sup>

## 7.4. ACJ-INITIATED PROJECTS, 2011

In 2010, in response to the ACJ recommendations, the APF secured funding to support four member NHRIs to implement projects to raise awareness and strengthen protection for the rights of lesbian, gay, bisexual and transgender people. The projects were completed in 2011.

The **Australian Human Rights Commission** held consultations and prepared a report for the Australian Government on developing specific legal protection against discrimination on the basis of sexual orientation or gender identity, as well as ensuring that the Government's Human Rights Framework leads to greater equality for people of all sexual orientations and gender identities.<sup>672</sup>

The **National Human Rights Commission of Mongolia** undertook an analysis of the national legal framework to identify discriminatory elements, as well as helped raise awareness among the estimated 80,000 lesbian, gay, bisexual and transgender people in the country of their rights, the Yogyakarta Principles and existing mechanisms to address human rights violations.<sup>673</sup> It also translated the Yogyakarta Principles into Mongolian.

The **New Zealand Human Rights Commission** supported a major regional human rights workshop in March 2011 as part of the 2nd Asia Pacific OutGames, to draw attention to the role that NHRIs can play in promoting the Yogyakarta Principles.<sup>674</sup> Several other APF members participated in the workshop.

The **Commission on Human Rights of the Philippines** established partnerships with lesbian, gay, bisexual and transgender groups, examined and assessed existing national laws and policies, advocated on the rights of lesbian, gay, bisexual and transgender people and developed a human rights education module for local government and community groups which, following a formal evaluation, could be delivered in a broader range of settings.<sup>675</sup>

Separately the **Human Rights Commission of Malaysia** (SUHAKAM) completed a study on the rights of lesbian, gay, bisexual and transgender people. The study included consultations with lesbian, gay, bisexual and transgender groups, religious groups and others to understand the range of perspectives that exist.<sup>676</sup>

These activities are not an exhaustive list of the work that these institutions have undertaken in relation to sexual orientation and gender identity. They are rather the activities directly connected to the ACJ report.

671 APF, UNDP and IDLO, *Regional Report: The Capacity of National Human Rights Institutions to Address Human Rights in Relation to Sexual Orientation, Gender Identity and HIV*, 2013, p. 37; at [www.asiapacificforum.net/resources/capacity-nhris-sogi-and-hiv/](http://www.asiapacificforum.net/resources/capacity-nhris-sogi-and-hiv/).

672 See [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/addressing-sexual-orientation-and-sex](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/addressing-sexual-orientation-and-sex).

673 See [www.asiapacificforum.net/resources/2013-annual-report-mongolia-nhrc/](http://www.asiapacificforum.net/resources/2013-annual-report-mongolia-nhrc/).

674 See [www.asiapacificforum.net/news/regional-forum-explores-rights-sexual-orientation-and-gender-identity/](http://www.asiapacificforum.net/news/regional-forum-explores-rights-sexual-orientation-and-gender-identity/).

675 See [www.asiapacificforum.net/resources/philippines-nhri-partnership-lgbt-partner/](http://www.asiapacificforum.net/resources/philippines-nhri-partnership-lgbt-partner/).

676 See [www.asiapacificforum.net/resources/study-lgbt-rights-malaysia/](http://www.asiapacificforum.net/resources/study-lgbt-rights-malaysia/).

## 7.5. THE IDLO-UNDP-APF NHRI SOGI PROJECT, 2012–13

In 2012–13 the APF, the International Development Law Organization (IDLO), UNDP and SAARCLAW (the legal apex body of the South Asian Association for Regional Cooperation) worked with NHRIs in Bangladesh, India, Indonesia, Nepal, the Philippines, Sri Lanka and Timor Leste to document their capacity to address human rights in relation to sexual orientation, gender identity and HIV.<sup>677</sup> It was proposed that, at the end of the project, NHRIs and NHRI staff would have:

- strengthened appreciation and understanding of the rights and vulnerabilities of people of diverse sexual orientation and gender identity
- identified institutional capacity and mechanisms, and institutional strengths, weaknesses and opportunities to effectively address rights issues faced by people of diverse sexual orientation and gender identity
- enhanced networks and partnerships with communities of people of diverse sexual orientation and gender identity.<sup>678</sup>

The project's final report commented on the sensitivities NHRIs encounter in working to promote and protect the rights of lesbian, gay, bisexual and transgender people.<sup>679</sup> It also identified common factors of NHRIs with well-developed capacity to address these human rights issues, which include:

- strong and open leadership to mobilise institutional will and build institutional capacity on sexual orientation and gender identity
- an institutional focal point on sexual orientation and gender identity
- an institutional commitment to engage and communicate with civil society.<sup>680</sup>

The project also looked for factors outside the NHRI and found:

A final and critical factor for catalyzing change is the role of the community of people of diverse SOGI. The experiences of this Project indicate that community unity and leadership, combined with diplomatic and persistent advocacy on LGBTI rights, gives rise to productive relationships with NHRIs, and fosters ongoing collaboration and partnership. The impact and importance of the efforts of the LGBTI community: lobbying and advocating on not only rights, but stigma, social and cultural issues, cannot be understated.<sup>681</sup>

The final report of the project indicated that:

As a result of this Project, NHRIs and NHRI staff have a greater appreciation and understanding of the rights and vulnerabilities of people of diverse SOGI. Through the National Report process and community engagement, participating NHRIs successfully documented their engagement on SOGI and utilized their involvement in the Project to identify institutional capacity and institutional mechanisms through which they could address SOGI-related rights. In Bangladesh, Nepal, Pakistan, Indonesia, the Philippines and Timor-Leste, Project consultations and dialogues also enhanced networks and partnerships between NHRIs and communities of people of diverse SOGI.<sup>682</sup>

677 This project resulted in a regional report and individual reports on each participating NHRI. All reports are at [www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/](http://www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/).

678 APF, UNDP and IDLO, *Regional Report: The Capacity of National Human Rights Institutions to Address Human Rights in Relation to Sexual Orientation, Gender Identity and HIV*, 2013, p. 15.

679 Ibid, p. 8. The report used the terms 'SOGI' and 'LGBTI' interchangeably. However, its focus was on sexual orientation and gender identity and it did not include analysis of the specific human rights issues faced by intersex people.

680 Ibid, p. 35.

681 Ibid, p. 35.

682 Ibid, p 37.

The report also identified the priorities for NHRIs as:

- building institutional capacity and sensitising NHRI staff
- continuing to engage, liaise with and partner with lesbian, gay, bisexual and transgender groups and NGOs
- planning, strategising and implementing activities designed to utilise the convening and advocacy powers of NHRIs
- increasing human rights education for lesbian, gay, bisexual and transgender communities, the broader community and the media.<sup>683</sup>

The individual reports of the seven participating NHRIs complement the regional report and provide valuable insights into each national situation and the challenges for the respective NHRIs.<sup>684</sup>

## 7.6. THE APF-UNDP PROGRAMME OF ACTION AND SUPPORT, 2015

### 7.6.1. Introduction

In February 2015, the APF, UNDP and the Asia Pacific Network on Male Sexual Health convened a workshop in Bangkok, Thailand, on the role of NHRIs in promoting and protecting the rights and health of lesbian, gay, bisexual, transgender and intersex people in Asia and the Pacific.<sup>685</sup> It developed an APF-UNDP Programme of Action and Support for APF member NHRIs.<sup>686</sup>

The objectives of the Workshop were to:

1. discuss the engagement of NHRIs in the region in the promotion and protection of the human rights of populations of diverse sexual orientation and gender identity (SOGI) in the light of
  - a. the Yogyakarta Principles
  - b. the progress achieved in implementing the recommendations of the APF's 2009 Yogyakarta Principles Meeting
  - c. the progress achieved in implementing the recommendations of the Advisory Council of Jurists (ACJ) *Report on Sexual Orientation and Gender Identity* of 2010
  - d. the recommendations of the 2013 *Regional Report on the Capacity of National Human Rights Institutions to Address Human Rights in Relation to Sexual Orientation, Gender Identity (SOGI) and HIV*
2. agree on priorities for strengthened engagement by NHRIs on human rights and health issues in relation to SOGI in the period 2015–2017
3. identify needs for capacity-building, training, regional exchanges of experiences and other support that may be included in forthcoming regional development programming, and to make recommendations to UN bodies and other development partners accordingly.<sup>687</sup>

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683 Ibid, p. 37.

684 All reports are at [www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/](http://www.asiapacificforum.net/human-rights/sogi/documenting-nhri-capacity/).

685 APF and UNDP, *Report of the workshop on the role of National Human Rights Institutions in promoting and protecting the rights, including health, of LGBTI people in Asia and the Pacific, 2015*; at [www.asiapacificforum.net/resources/workshop-report-nhris-sogi-2015/](http://www.asiapacificforum.net/resources/workshop-report-nhris-sogi-2015/). All the reports and papers of the workshop and the concluding APF-UNDP Programme of Action and Support are accessible at [www.asiapacificforum.net/human-rights/sogi/2015-workshop-role-nhri-lgbti-asia-pacific/](http://www.asiapacificforum.net/human-rights/sogi/2015-workshop-role-nhri-lgbti-asia-pacific/). APCOM is a coalition of members – governments, UN partners, non-profits and community based organisations – from Asia and the Pacific. It represents a diverse range of interests working together to advocate on, highlight and prioritise HIV issues that affect the lives of men who have sex with men and transgender people, including rights, health and well-being. See [www.apcom.org/](http://www.apcom.org/).

686 See [www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/](http://www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/).

687 APF and UNDP, *Report of the workshop on the role of National Human Rights Institutions in promoting and protecting the rights, including health, of LGBTI people in Asia and the Pacific, 2015*, p. 3..

### 7.6.2. The participants

The workshop brought together representatives of 16 APF member NHRIs, Indonesia's National Commission on Violence against Women (Komnas Perempuan), Asia Pacific lesbian, gay, bisexual, transgender and intersex activists and NGOs, and UNDP and other UN agencies, and human rights experts. There were 46 participants in all.<sup>688</sup> The NHRI representatives were all senior officeholders, including some chairpersons and commissioners.

### 7.6.3. The program

The program of the workshop gave a central place to reports from the participating NHRIs on their work on human rights in relation to sexual orientation and gender identity. Each representative had prepared a report in advance and presented it during the sessions.<sup>689</sup> NHRI representatives were also invited to lead discussions on specific functional areas, including research, education and promotion, monitoring and advocacy. The reports demonstrated a high level of commitment to these issues, often in spite of very difficult cultural and traditional contexts in which the NHRIs were working.

The workshop also heard the experiences of other official or semi-official organisations and other regions, including the Inter-American Commission on Human Rights, the ASEAN Intergovernmental Commission on Human Rights and SAARCLaw. NGO representatives spoke about their work, especially in association with NHRIs.



Photo by the APF/Pip Dargan.

688 The 16 NHRIs represented were those of Afghanistan, Australia, Bangladesh, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Myanmar, Nepal, the Philippines, the Republic of Korea, Samoa, Sri Lanka, Thailand and Timor-Leste.

689 APF and UNDP, *Report of the workshop on the role of National Human Rights Institutions in promoting and protecting the rights, including health, of LGBTI people in Asia and the Pacific*, 2015, pp. 12-16.

#### 7.6.4. Programme of Action and Support

The workshop developed and adopted a Programme of Action and Support that will be the focus of APF-UNDP collaboration over the next few years.<sup>690</sup> It addresses individual NHRIs, as well as the APF collectively and UNDP. The recommendations seek to advance work for the promotion and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people.

The Programme of Action and Support contains 32 recommendations to NHRIs, dealing with specific NHRI functions:

- capacity building; five recommendations
- research; five recommendations
- education, promotion and dialogue; nine recommendations
- monitoring; five recommendations
- advocacy; eight recommendations.

The first three recommendations, under capacity building, take up the principal findings of the NHRI project of 2012–13:

1. Build the capacity of NHRIs (members and staff) in central and regional offices to provide an accessible and safe space for people of diverse sexual orientation and gender identity, where their rights are protected and promoted
2. Establish focal points within NHRIs for sexual orientation and gender identity and establish clear work plans for them
3. Build relationships with civil society organizations (CSOs) and networks in order to inform the work of the NHRI and to ensure effective communication outreach to communities of diverse sexual orientation and gender identity.<sup>691</sup>

APF member institutions will be invited to report annually, beginning in 2016, on their progress in implementing the recommendations addressed to them.

The Programme of Action and Support addressed four recommendations to the APF:

33. Engage with regional and sub-regional SOGI CSOs to seek their contributions to
  - (i) an APF manual on the role of NHRIs in promoting and protecting the rights of LGBTI and
  - (ii) further develop a pilot blended learning programme (comprising of online and face-to-face adult learning) for APF members on the role of NHRIs in promoting and protecting the rights of people of diverse SOGI. This will be undertaken in the next APF strategic cycle of 2015–2020.
34. Organize meetings for South–South sharing of best practices, lessons learned and research by NHRIs in promoting and protecting the human rights of people of diverse SOGI.
35. Continue to cooperate with UN and other stakeholders to promote the role of NHRIs in promoting and protecting the human rights of people of diverse SOGI.
36. Distribute the workshop’s Programme of Action and Support to the APF membership and post it to the APF website ([www.asiapacificforum.net](http://www.asiapacificforum.net)).<sup>692</sup>

The APF is already well advanced in implementing these recommendations.

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690 See Appendix 6 of this manual. Also at [www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/](http://www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/).

691 See Appendix 6 of this manual.

692 See Appendix 6 of this manual.

- The Programme of Action and Support was on the APF website within days of the conclusion of the workshop.<sup>693</sup>
- Within months the APF had entered a strategic partnership with UNDP for implementation of the Programme of Action and Support.<sup>694</sup>
- This manual is the product of an APF commitment at the workshop. It is the fruit of close consultation and cooperation among APF member institutions and lesbian, gay, bisexual, transgender and intersex activists and civil society organisations.<sup>695</sup>
- The first APF blended learning course for APF member institutions on human rights in relation to sexual orientation, gender identity and sex characteristics will be conducted in 2016.<sup>696</sup>

The Programme of Action and Support addressed one recommendation to UNDP:

37. Provide technical support and financial support, through 'Being LGBT in Asia' and through other related programmes, for implementation of the above actions.<sup>697</sup>

The partnership with APF will be one of the vehicles through which this is accomplished.

Finally, the Programme of Action and Support asked NHRIs to:

... report annually to the APF on the status and implementation of the above actions including where relevant the challenges and achievements in that implementation. The APF will include a consolidated report on implementation of the Programme of Action and Support through its annual reporting.<sup>698</sup>

The APF will seek these reports from its member institutions each year, commencing in 2016. The Yogyakarta Workshop planned for 2017 will provide an opportunity after the first year to discuss those reports individually and to review progress in implementation generally.

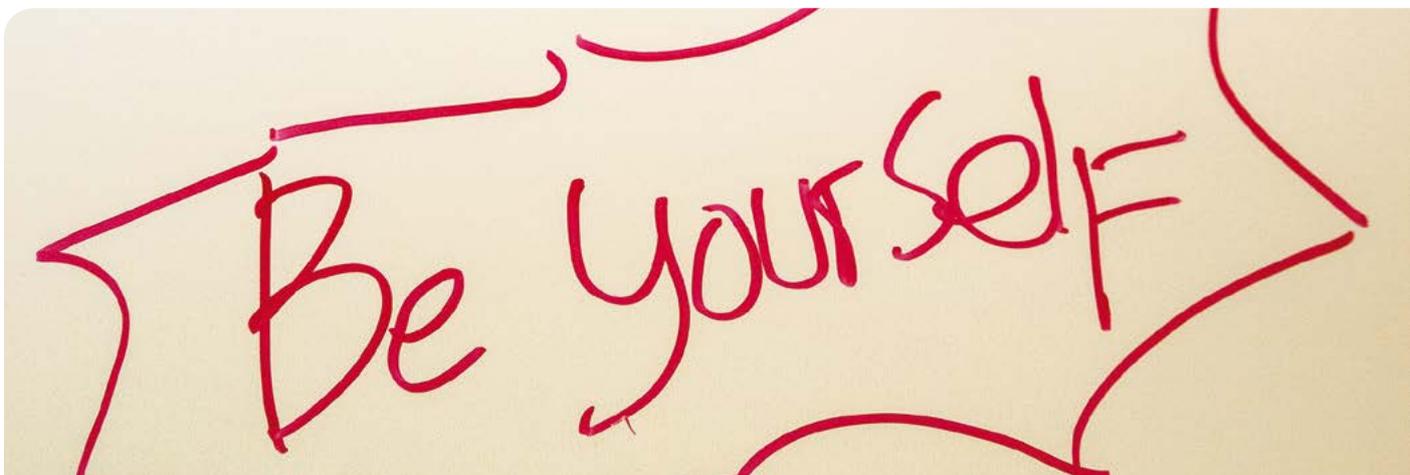


Photo by UNDP/W. Field.

693 See [www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/](http://www.asiapacificforum.net/resources/programme-action-and-support-nhri-sogi-2015/).

694 See [www.asiapacificforum.net](http://www.asiapacificforum.net).

695 See membership of the manual reference group at Appendix 7.

696 The blended learning course will include both online learning and a workshop of participants from APF member NHRIs. It will be directed towards providing information, increasing awareness and understanding, and assisting APF member NHRIs to develop and implement programs and projects in support of the human rights of lesbian, gay, bisexual, transgender and intersex people. In particular, it will seek to assist member NHRIs to include intersex issues better within their work programs.

697 See Appendix 6 of this manual.

698 APF and UNDP, *Report of the workshop on the role of National Human Rights Institutions in promoting and protecting the rights, including health, of LGBTI people in Asia and the Pacific*, 2015, p. 33. See also Appendix 6 of this manual.

## CASE STUDY: RESPONDING COMPREHENSIVELY TO THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE

There is little knowledge and awareness in Mongolia among civil servants, including health professionals and law enforcement officers, and the general community about the human rights of lesbian, gay, bisexual and transgender people and preventing discrimination based on sexual orientation and gender identity. Lesbian, gay, bisexual and transgender people report discrimination and human rights violations, including abuse by law enforcement officials, blackmail and violence due to their sexual orientation or gender identity. The **National Human Rights Commission of Mongolia** has sought to work closely with these communities to understand their human rights issues, to raise awareness and to promote legislation to prohibit discrimination based on sexual orientation and gender identity.

Since its establishment in 2001, the Commission has been a robust advocate for the rights of lesbian, gay, bisexual and transgender people. This work has expanded significantly since 2010, when the APF provided financial support to the Commission for a project to raise public awareness on the rights of lesbian, gay, bisexual and transgender people in Mongolia. The project began with consultations with lesbian, gay, bisexual and transgender people on their human rights concerns, experiences and needs. The Commission met with 80 participants from lesbian, gay, bisexual and transgender organisations to discuss:

- fundamental human rights
- the rights of lesbian, gay, bisexual and transgender people
- the Yogyakarta Principles
- lodging complaints with the Commission and seeking remedies
- how people can protect their human rights.

At the end of the workshop, participants concluded that the main reason their rights were commonly violated was because of negative community attitudes, based on prejudice and stereotypes. They wanted to enlarge the target group for Commission activities to include their family members and young people. They identified the priorities as training and workshops for police officers and advocacy activities for the general public. The workshop both cemented the collaboration between the Commission and lesbian, gay, bisexual and transgender organisations and provided the framework for a program of activities in Mongolia.

Since that time, Commission activities have included:

- a workshop for 71 police officers on the human rights of lesbian, gay, bisexual and transgender people
- data collection on human rights violations experienced by lesbian, gay, bisexual and transgender people, to analyse common forms of violations, identify frequent violators within the Mongolian context and develop strategies to resolve these issues
- creating an information exchange point on the Commission's website for lesbian, gay, bisexual and transgender people, their family members, public officials and the general public
- producing and distributing publicity materials on the rights of lesbian, gay, bisexual and transgender people, including a brochure on lodging a complaint with the Commission, material on "LGBT people: Common Prejudice and Reality" and translation of the Yogyakarta Principles into Mongolian.



In 2012, having completed the initial program, the Commission continued its work on human rights affecting lesbian, gay, bisexual and transgender people through a further program to “raise public awareness of the rights of sexual minorities”. It produced a ten-minute television program, *Neither Out Nor Closeted*, broadcast four times on each of three television channels in the capital and in regional areas.<sup>699</sup> It also promoted implementation of recommendations made to Mongolia through the UPR and by the Committee against Torture concerning sexual minorities through a public service announcement broadcast 30 times on each of three television channels. In addition, the Commission collaborated with the LGBT Centre in Ulaanbaatar in the observance of the International Day against Homophobia and Transphobia.

With the support of the UNDP project, in 2012 the Commission and the LGBT Centre conducted a quantitative and qualitative survey on the implementation of the civil, political, economic, social and cultural rights of lesbian, gay, bisexual and transgender people. The survey obtained the views of 138 persons from many of the 21 *aimag* (provinces) of Mongolia, including 60 lesbian, gay, bisexual or transgender people. As a by-product of its work with the LGBT Centre, the Commission was able to assist the LGBT Centre to obtain official registration with the National Registration Office.

As a result of that survey, the Commission’s 2012 *Annual Report on Status of Human Rights and Freedom in Mongolia* included a chapter on the situation for the human rights of lesbian, gay, bisexual and transgender people in Mongolia.<sup>700</sup> The report drew attention to serious violations of these human rights, including the right to non-discrimination; the right to found a family; the rights of children of lesbian, gay, bisexual and transgender people; and the rights to employment, health services, education and personal security. The problem of security ranges from a lack of support from law enforcement after reporting a criminal offence to incidents of violence perpetrated in public against lesbian, gay, bisexual and transgender persons. This was the first time an official report on these human rights issues had been published in Mongolia and the first time they had been discussed in the parliament. Upon review of the report, the Parliamentary Standing Committee on Legal Affairs passed Resolution No.13 (2013), which urged the Government to take effective measures to implement the recommendations by the UN Human Rights Council and the Committee against Torture related to the rights of lesbian, gay, bisexual and transgender people.<sup>701</sup>

The Commission now regularly receives complaints related to violations of the human rights of lesbian, gay, bisexual and transgender people. In May 2015, for example, a transgender woman complained that police officers had breached the public service ethical code of conduct by discriminating against transgender people and abusing them verbally. Although the Commission did not find the complaint proved, it recommended that the Chief of the General Police Department organise training courses for police officers to raise awareness on the rights of sexual minorities. The recommendation was accepted and is being implemented.

One of the 19 members of the Commission’s Advisory Board is a representative of lesbian, gay, bisexual and transgender community organisations, ensuring that those organisations have a formal channel through which they can contribute to the Commission’s work, programs and policies.<sup>702</sup>

699 APF, ‘National Human Rights Commission of Mongolia’ in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, pp 17-21.

700 National Human Rights Commission of Mongolia, *12th Report on Human Rights and Freedoms in Mongolia*, 2013; at [www.mn-nhrc.org/eng/main2/188/](http://www.mn-nhrc.org/eng/main2/188/).

701 UNDP and USAID, *Being LGBT In Asia: Mongolia Country Report*.

702 See [www.mn-nhrc.org/eng/main/5/](http://www.mn-nhrc.org/eng/main/5/).

### KEY POINTS: CHAPTER 7

- The Yogyakarta Principles recommended that NHRIs promote respect for the Principles by State and non-State actors and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.
- At the APF Yogyakarta Workshop in 2009, representatives of APF member institutions affirmed the universality of all human rights and declared that NHRI mandates extended to those who suffer human rights violations based on their actual or perceived sexual orientation or gender identity. They agreed on a set of actions to promote and protect the human rights of lesbian, gay, bisexual and transgender people. They initiated the first APF program of work on these human rights issues.
- The APF Advisory Council of Jurists reported in 2010 that sexual orientation and gender identity are among the grounds of discrimination proscribed by international human rights law. However, they found many national laws in the countries of APF member institutions violated the human rights of lesbian, gay, bisexual and transgender people. They set out a number of recommended actions that NHRIs should take, within their mandates, to address these violations.
- Many NHRIs in the Asia Pacific region have been very active on human rights issues in relation to sexual orientation and gender identity. They are now beginning to recognise and work on human rights issues in relation to intersex status. They are becoming even more active. The work they have undertaken provides good examples of positive experiences and lessons learnt that can increase their own effectiveness and that of other NHRIs in the region.
- The APF-UNDP Programme of Action and Support, developed and adopted at the Bangkok Workshop in 2015, provides a firm basis for both organisations and for individual NHRIs to develop this work further in coming years. It provides the basis of the APF work plan on human rights in relation to lesbian, gay, bisexual, transgender and intersex people for the 2015–20 period.



# Chapter 8: What more national human rights institutions can do

## KEY QUESTIONS

- How can NHRIs ensure appropriate recognition for lesbian, gay, bisexual, transgender and intersex people and their human rights?
- How can this recognition be reflected in the activities of NHRIs under each functional area of NHRI responsibility?
- What structures, programs and activities should NHRIs develop in order to meet the needs of lesbian, gay, bisexual, transgender and intersex people for better promotion and protection of their human right?



## 8.1. INTRODUCTION

The Yogyakarta Principles urge NHRIs to ‘integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities’.<sup>703</sup> The High Commissioner for Human Rights has also recommended that NHRIs ‘address violence and discrimination against LGBT and intersex persons in the context of their respective mandates to promote and monitor effective implementation of international human rights standards at the national level’.<sup>704</sup> Many NHRIs in the Asia Pacific region have been doing this for many years and are expanding their work. Increasing numbers of others are taking up the issues for the first time. The APF-UNDP Programme of Action and Support provides a useful framework for future activity on these human rights issues.<sup>705</sup>

This chapter looks at what NHRIs can do. It draws on the recommendations of the Programme of Action and Support and how individual NHRIs can contribute to its implementation. It discusses seven functional areas of NHRI activities but first looks at recognition. In each area it provides a list of possible actions NHRIs can take, within their existing mandates, to protect and promote the human rights of lesbian, gay, bisexual, transgender and intersex people.

703 Additional Recommendation L. The Yogyakarta Principles make only two specific references to intersex status but, under the framework of the universality of human rights affirmed by the Yogyakarta Principles, intersex people have the same entitlements to all human rights as all other human beings have. NHRIs can and should apply the Yogyakarta Principles for the benefit of intersex people, as well as gay, lesbian, bisexual and transgender people.

704 High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 80.

705 See Appendix 6.

### CASE STUDY: PROMOTING AWARENESS THROUGH ANNUAL REPORTS

According to the 2013 Annual Report of the **National Human Rights Commission of Thailand**, Thai society has a growing understanding and acceptance of the rights, liberty and equality of lesbian, gay, bisexual, and transgender people. However, there is still a need to drive concrete changes to promote and protect the human rights of the LGBT people in a range of areas, such as encouraging family members to have more understanding and acceptance of LGBT people, encouraging educational institutions to treat LGBT people with equality and non-discrimination, encouraging employers to respect the rights, freedom and equality of LGBT people without discrimination, advocating for legislation to permit legal marriage for same sex couples, and advocating for legislation to allow a person to change their gender identity on official documents.<sup>706</sup>



NHRIs work in very different contexts. In most societies, the human rights dimensions of sexual orientation, gender identity and sex characteristics have come to public attention only in recent years. They can still be very sensitive issues. NHRIs in these societies may require support and assistance in raising and working on these human rights issues. Peer support, especially through associations such as the APF, will be very important to them.

### CASE STUDY: PROMOTING THE RIGHTS OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER PEOPLE IN CHALLENGING CONTEXTS

Tan Sri Hasmy Agam, retiring Chairperson of the **Human Rights Commission of Malaysia (SUHAKAM)** has said LGBT rights is a challenging issue that Malaysian society will need to deal with seriously and carefully.

A national discussion has to be had to understand and promote a degree of tolerance towards the community, he said.

“This is highly sensitive issue in Malaysia, which must be handled with great care and prudence so as not to affect the progression of human rights agenda in the country.

“The Commission will continue to handle this challenge through greater dialogue and engagement with the parties concerned in the hope that over time, there would be greater understanding or tolerance resulting in fewer, if not zero incidence of harassment and intimidation and better respect for personal liberties and privacy.

“I must admit this is one of the most difficult issues to be handled by the Commission, with no easy solution in sight.”<sup>707</sup>



706 National Human Rights Commission of Thailand, *Reports on the Appraisal of Human Rights Situations in Thailand and on the Performance of NHRCT in the year 2013*, p. 17; at [www.nhrc.or.th/en/file/HumanRightsSituation\\_AnnualReport/hrsituation-and-performance-nhrct2013.pdf](http://www.nhrc.or.th/en/file/HumanRightsSituation_AnnualReport/hrsituation-and-performance-nhrct2013.pdf).

707 See *The Malaysian Insider*, 3 January 2016; at [www.themalaysianinsider.com/malaysia/article/were-turning-back-human-rights-clock-if-nsc-bill-becomes-law-says-hasmy](http://www.themalaysianinsider.com/malaysia/article/were-turning-back-human-rights-clock-if-nsc-bill-becomes-law-says-hasmy).

In each of the areas discussed in this chapter, NHRI engagement and collaboration with lesbian, gay, bisexual, transgender and intersex communities and organisations is essential. These communities are diverse and the experiences and situations of lesbian, gay, bisexual, transgender and intersex people are diverse. NHRIs should be conscious of this diversity. The human rights issues for them differ greatly from individual to individual and from group to group. NHRIs must be careful to identify those differences and respond to them. This issue is discussed later in this chapter in the context of cooperation and engagement.

## 8.2. RECOGNITION

The first step is recognising that lesbian, gay, bisexual, transgender and intersex people are entitled to the full range of human rights and that they experience human rights violations and are at risk of further violations on the basis of sexual orientation, gender identity or sex characteristics. Many political and cultural factors stand in the way of recognition. Many societies as a whole fail to extend recognition to the experiences of lesbian, gay, bisexual, transgender and intersex people or deny the legitimacy of these experiences. NHRIs often encounter social, cultural and political pressure, direct or indirect, in recognising the human rights of lesbian, gay, bisexual, transgender and intersex people and in undertaking activities in relation to their human rights.

### CASE STUDY: RECOGNISING THE HUMAN RIGHTS OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER PEOPLE

In October 2012, the **National Human Rights Commission of Bangladesh (JAMAKON)** stated in its submission to the Human Rights Council's Universal Periodic Review of Bangladesh: "Excluded groups (including Dalits and transgender) remain some of the poorest people in Bangladesh and face marginalization and discrimination. In addition the NHRC notes that the Government of Bangladesh did not respect the recommendation with respect to sexual minorities. The NHRC understands the need for the law to be in harmony with the cultural and social mores of the people. Nevertheless, the NHRC believes that it is now time to ensure that all groups, including those who are transgender, intersex or sexual minority, are protected from discrimination."

In 2013, JAMAKON started receiving complaints of violations of human rights on the basis of sexual orientation and gender identity. Due to its intervention, a victim who was sacked by his employer in 2014 because of his sexual orientation returned to his job and received monetary compensation.

In 2014, JAMAKON, in collaboration with the Law Commission, drafted Bangladesh's first anti-discrimination law and submitted it to the Government for enactment. This law includes protection of the rights of lesbian, gay, bisexual and transgender people.

JAMAKON's Strategic Plan for 2016–2020 includes a vision, mission, long-term goals, key strategies and focal areas to protect marginalised and vulnerable populations, including lesbian, gay, bisexual and transgender people. JAMAKON has successfully been engaged with NGOs and civil society organisations working with the lesbian, gay, bisexual and transgender communities.<sup>708</sup>



708 APF, 'National Human Rights Commission of Bangladesh (JAMAKON)' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, pp. 7-9.

## POSSIBLE ACTIONS

1. **Recognise lesbian, gay, bisexual, transgender and intersex people in the NHRI strategic plan as priority groups for NHRI programs and activities, because of their experience of violations and the risk of further violations.**
2. **Appoint a staff focal point on human rights issues affecting lesbian, gay, bisexual, transgender and intersex people – if possible, with a Commissioner responsible for the area – and develop a clear work plan for the focal point under the institutional strategic plan.<sup>709</sup>**
3. **Build the institutional capacity of the NHRI, including its members and staff, to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people, especially through internal training and sensitisation programs and through the recruitment of staff who have had direct personal experience in human rights work for and on behalf of lesbian, gay, bisexual, transgender or intersex people.<sup>710</sup>**
4. **Build relationships with lesbian, gay, bisexual, transgender and intersex organisations and networks to inform the work of the NHRI and to ensure effective communication outreach to communities of people of diverse sexual orientations, gender identities and sex characteristics.<sup>711</sup>**



## 8.3. ADVICE

The Paris Principles list advising government and parliament as responsibilities of NHRIs.<sup>712</sup> It is the first, longest and most detailed responsibility in the list. The Paris Principles provide that an NHRI shall have responsibility:

To submit to the Government, Parliament and any other competent body, on an advisory basis ..., opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

- (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
- (ii) Any situation of violation of human rights which it decides to take up;
- (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
- (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government.<sup>713</sup>

709 APF-UNDP Programme of Action and Support, Recommendation 2.

710 Ibid, Recommendation 1.

711 Ibid, Recommendation 3.

712 The advisory function of NHRIs is discussed in APF, *Manual on National Human Rights Institutions*, 2015, Chapter 12; at [www.asiapacificforum.net/resources/manual-on-nhris/](http://www.asiapacificforum.net/resources/manual-on-nhris/).

713 Paris Principles, 'Competence and responsibilities', para. 3(a).

Other responsibilities listed in the Paris Principles have advisory dimensions.<sup>714</sup> Publicising the NHRI's advice and views is important for reasons of transparency but it is also important strategically. It enables pressure to be brought to bear on those receiving the advice to consider it carefully and to accept it. Publicity encourages a response and in that way promotes accountability.

These provisions apply as much to the NHRI's work on human rights in relation to sexual orientation, gender identity and sex characteristics as to any other area of the NHRI's work.

### CASE STUDY: ADVISING ON LAW TO PROTECT THE HUMAN RIGHTS OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX PEOPLE

Many NHRIs in the Asia Pacific region have provided advice to governments and parliaments on the need for laws to ensure effective protection of the human rights of lesbian, gay, bisexual, transgender and intersex people. These are some examples.

- The **Australian Human Rights Commission** proposed the incorporation of sexual orientation, gender identity and intersex status as prohibited grounds of discrimination in national law and also proposed the removal of all legal provisions that discriminate against same-sex couples and their children.
- The **Commission on Human Rights of the Philippines** has proposed national and local anti-discrimination laws that include coverage of lesbian, gay, bisexual and transgender people.
- The **Human Rights Commission of Sri Lanka** has proposed amendments to laws concerning changing identity documents to reflect gender identity.
- The **National Human Rights Commission of Bangladesh (JAMAKON)** has put forward a draft anti-discrimination law to provide protection from discrimination for all groups, including those who are transgender, intersex or sexual minority.
- The **Indonesian National Commission on Human Rights (Komnas HAM)** has proposed a law on the treatment of lesbian, gay, bisexual and transgender people as citizens of Indonesia.
- The **National Human Rights Commission of Korea** has recommended the enactment of a comprehensive anti-discrimination law that includes sexual orientation and gender identity as prohibited grounds of discrimination and the removal of provisions in the Military Criminal Law that punish same-sex conduct.
- The **National Human Rights Commission of Thailand** has recommended law reform to permit legal marriage for same-sex couples.
- The **New Zealand Human Rights Commission** has recommended marriage equality laws and law reform to remove discrimination against same-sex couples.



714 For example, Paris Principles, 'Competence and responsibilities', paras. 3(b), (c) and (d).

Advisory work should be undertaken in consultation with lesbian, gay, bisexual, transgender and intersex organisations.<sup>715</sup> These organisations often have greater knowledge and expertise in relation to the diverse experiences of lesbian, gay, bisexual, transgender and intersex people. They can assist in providing the facts and the evidence while the NHRI provides the analysis and an understanding of the law. The expertise of the NHRI lies in its knowledge of international human rights law and the application of that law to the facts and circumstances in the country.

A key component of advisory work is good research. In many areas associated with sexual orientation, gender identity and sex characteristics, there may be little or no research at the national level that is relevant to developing human rights advice. This may be especially so in lesser known areas, such as sex characteristics. Research should then lead to the development of good advice and related services and support. For example, in 2013, the Council of Europe recommended that States:

... undertake further research to increase knowledge about the specific situation of intersex people, ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support.<sup>716</sup>

## POSSIBLE ACTIONS

5. **Audit domestic laws, policies and programs affecting lesbian, gay, bisexual, transgender and intersex people to identify any areas of inconsistency with international human rights law and advise the Government and the parliament on necessary changes to laws to ensure human rights compliance.**<sup>717</sup>
6. **Publicise the results of the review of laws, policies and programs and seek to build support for reform in accordance with the NHRI's recommendations.**
7. **Undertake research on the specific situation of intersex people, leading to good advice, protection from unnecessary medical or surgical treatment and guarantees of physical integrity, autonomy and self-determination.**
8. **Undertake a study of the national situation of human rights of lesbian, gay, bisexual and transgender people and prepare a report on that situation with recommendations to ensure better promotion and protection of their human rights.**



715 See also APF-UNDP Programme of Action and Support, Recommendation 6.

716 Council of Europe, *Resolution 1952 (2013) on Children's Right to physical integrity*, 1 October 2013; at [www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20174&lang=en](http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20174&lang=en).

717 See also APF-UNDP Programme of Action and Support, Recommendation 8.

## 8.4. EDUCATION AND AWARENESS RAISING

The Paris Principles list both education and awareness raising as among the responsibilities of NHRIs. They are required:

- to assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles
- to publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.<sup>718</sup>

In this way, the Paris Principles distinguish between raising awareness about human rights and educating on human rights. They also provide that NHRIs shall:

... [a]ddress public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations.<sup>719</sup>

The APF has published a manual on human rights education for NHRIs and has included human rights education in its manual on NHRIs.<sup>720</sup>

The three dimensions of human rights education drawn from the international instruments focus on:

- **knowledge:** provision of information about human rights and mechanisms for their protection and building understanding of human rights through an analysis of situations of human rights violations and of what steps are required to address them
- **values, beliefs and attitudes:** promotion of a human rights culture through the development of values and attitudes which uphold human rights
- **action:** education which enables the individual to defend human rights and prevent human rights abuses within their context and community, including through the promotion of knowledge and understanding of human rights and of values, attitudes and action that build human rights cultures and societies.<sup>721</sup>

These three dimensions are very appropriate in human rights education for lesbian, gay, bisexual, transgender and intersex people (especially the knowledge and action dimensions) and for the broader community about human rights issues in relation to sexual orientation, gender identity and sex characteristics (especially the values, beliefs and attitudes dimension).

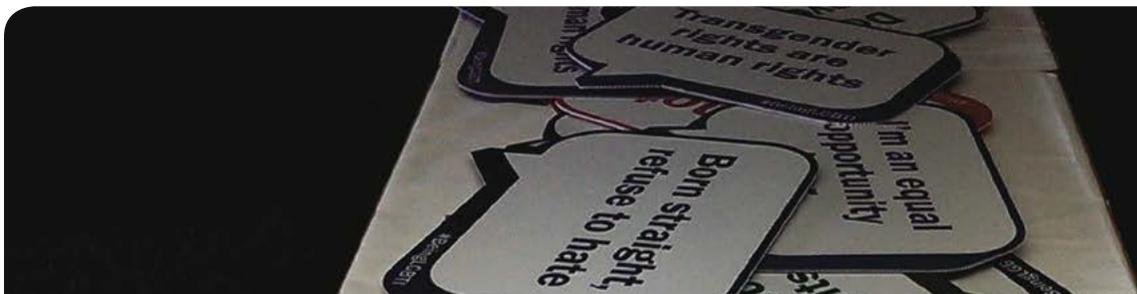


Photo by UNDP/H. Nhan.

718 Paris Principles, 'Competence and responsibilities', paras. 3(f) and (g).

719 Paris Principles, 'Methods of operation', para. (c).

720 APF, *Human Rights Education: A Manual for National Human Rights Institutions*, 2013; at [www.asiapacificforum.net/resources/human-rights-education-manual/](http://www.asiapacificforum.net/resources/human-rights-education-manual/).

721 OHCHR, *Guidelines for national plans of action for human rights education*, 27 October 1977, A/52/469/Add.1, para. 13.

## CASE STUDY: ENGAGING WITH THE PUBLIC MEDIA TO RAISE AWARENESS

In June 2015, the Chairperson of the **Indonesian National Commission on Human Rights** (Komnas HAM) Hafid Abbas called for an end to discrimination and stigma against the lesbian, gay, bisexual, and transgender community and urged the Government to issue more supportive regulations.

“They have been marginalized, inflicted with violence, isolation. It cannot be justified. [...] We can’t build this country with persistent stigmatization of and discrimination against the LGBT community”.

He also said the Government had a lot of work to do, one task of which was to have an operational regulation on the treatment of LGBT people as citizens of this country.

“There should be a more technical procedure on the protection of the LGBT community because much of the violence they have suffered is inflicted by legal authorities”.

Komnas HAM has also called for a widespread public information campaign to build understanding that promoting and protecting the rights of LGBT people is the responsibility of the entire society and to provide programs for LGBT people to heal physical and psychological wounds suffered from past abuse.<sup>722</sup>



## CASE STUDY: EDUCATION THROUGH SOGI'S STORY

The **Australian Human Rights Commission** prepared *SOGI's Story* on behalf of the Commonwealth Forum of National Human Rights Institutions.

*SOGI's Story* is an educational resource on human rights, sexual orientation and gender identity. Its aim is to tackle discrimination and violence against lesbian, gay, bisexual, trans and intersex persons in its various forms by addressing misinformation, dispelling harmful myths and stigmas and providing possible options for resolution and remedy.

*SOGI's Story* has been designed in consultation with, and for use primarily by African national human rights institutions, civil society organisations and local community groups to encourage learning and awareness through interactive dialogue.<sup>723</sup>



### WHAT IS SOGI'S STORY?

*SOGI's Story* is an educational resource on human rights, sexual orientation and gender identity. The aim of this resource is to tackle discrimination and violence against lesbian, gay, bisexual, trans and intersex (LGBTI) persons in its various forms by addressing misinformation, dispelling harmful myths and stigmas and providing possible options for resolution and remedy.

*SOGI's Story* has been designed in consultation with, and for use primarily by African national human rights institutions, civil society organisations and local community groups to encourage learning and awareness through interactive dialogue.

It is a work of fiction. Names, characters, businesses, places, events and incidents are either the products of the author's imagination or used in a fictitious manner. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.

Read *SOGI's Story* or watch the video.

Photo by the Australian Human Rights Commission.

722 See *Jakarta Post*, 30 June 2015; at [www.thejakartapost.com/news/2015/06/30/ri-won-t-progress-because-persistent-stigma-discrimination-against-lgbt-commission.h#sthash.JYiLHall.pdf](http://www.thejakartapost.com/news/2015/06/30/ri-won-t-progress-because-persistent-stigma-discrimination-against-lgbt-commission.h#sthash.JYiLHall.pdf); and other sources.

723 See [www.sogistory.com/home](http://www.sogistory.com/home).

## POSSIBLE ACTIONS

9. Mainstream sexual orientation, gender identity and intersex issues in all human rights education and awareness raising activities conducted by the NHRI, especially for young people.<sup>724</sup>
10. Promote greater understanding of human rights, especially in relation to sexual orientation, gender identity and sex characteristics, among lesbian, gay, bisexual, transgender and intersex people, their families and the wider community.<sup>725</sup>
11. Provide human rights education and information about remedies for human rights violations to lesbian, gay, bisexual, transgender and intersex people, including the role of NHRIs and complaint mechanisms, if possible in partnerships with lesbian, gay, bisexual, transgender and organisations and other civil society organisations.<sup>726</sup>
12. Build the capacity of law enforcement officers, government service providers, members of the judiciary and religious leaders to interact appropriately with lesbian, gay, bisexual, transgender and intersex persons, in conjunction with lesbian, gay, bisexual, transgender and intersex people and organisations.<sup>727</sup>
13. Develop training manuals and conduct awareness raising on issues concerning sexual orientation, gender identity and sex characteristics for schools and universities, in consultation with lesbian, gay, bisexual, transgender and intersex people and organisations.<sup>728</sup>
14. Engage with and educate the media on sexual orientation, gender identity and intersex issues and work with them to raise awareness about the role of NHRIs and the availability of complaint mechanisms.<sup>729</sup>
15. Reach out to parental and family associations to encourage understanding of sexual orientation, gender identity and intersex issues and build support systems that reach out effectively to parents and families.<sup>730</sup>



Because of cultural and political sensitivities associated with sexual orientation, gender identity and sex characteristics, the APF-UNDP Programme of Action and Support gave priority to dialogue, particularly with religious and community leaders, in the NHRI's human rights education activities in relation to sexual orientation, gender identity and sex characteristics. Education through increasing understanding, built on exchanges and dialogue, is an important and effective methodology for human rights education. Dialogue can break down stereotypes, raise awareness of actual experiences of human rights violations and build acceptance of people as people. At its most effective, it can lead to joint action to address and overcome the obstacles to full enjoyment of human rights. Certainly, engaging those who lead community opinion is critical in changing community opinion.

724 APF-UNDP Programme of Action and Support, Recommendation 16.

725 Ibid, Recommendation 13.

726 Ibid, Recommendation 14.

727 Ibid, Recommendation 15.

728 Ibid, Recommendation 17.

729 Ibid, Recommendation 18.

730 Ibid, Recommendation 19.

## POSSIBLE ACTIONS

16. Provide a platform for persons of diverse sexual orientations, gender identities and sex characteristics to engage in dialogue with all relevant groups, including parliamentarians, the judiciary, the security/law enforcement sector, medical practitioners and community and religious leaders.<sup>731</sup>
17. Promote dialogue among community and religious leaders on the relationship between faith, religion, custom and tradition and sexual orientation, gender identity and sex characteristics.<sup>732</sup>



## 8.5. MONITORING

Monitoring is a process of continuing oversight and review.<sup>733</sup> It has been defined as “the activity of observing, collecting, cataloguing and analysing data and reporting on a situation or event”.<sup>734</sup> Human rights monitoring commonly has two dimensions:

- oversight of the human rights situation within the State, either generally or in relation to a particular category of rights; for example, under a specific human rights treaty
- on-site inspection of places where the risk of human rights violation is high or at least relatively higher than elsewhere; for example, places where persons are detained or forced to reside.

NHRIs have important roles in both dimensions of human rights monitoring. All NHRIs undertake monitoring functions, through research, investigation and reporting. On the basis of their monitoring, they provide information to international human rights mechanisms, including the UPR and treaty monitoring bodies.<sup>735</sup> Some NHRIs have specific statutory obligations to prepare and submit to the Head of State or parliament an annual report on the human rights situation in their country. Some NHRIs have specific statutory responsibility for monitoring places of detention; for example, as designated National Preventive Mechanisms (NPMs) under the Optional Protocol to the Convention against Torture and All Forms of Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT).

In all cases, NHRI monitoring should include monitoring of the human rights of lesbian, gay, bisexual, transgender and intersex people, taking account of their diversity and the diversity of their experiences and situations. As groups at particular risk of human rights violations, their rights require particular and specific attention. They experience human rights violations on the basis of their sexual orientation, gender identity or sex characteristics and so these factors need to be made explicit – recognised, identified and acknowledged. These factors should not be hidden or ignored. Reports to international human rights mechanisms should include specific discussion of the situations of lesbian, gay, bisexual, transgender and intersex people. National ‘state of human rights’ reports should do the same.

731 Ibid, Recommendation 11.

732 Ibid, Recommendation 12.

733 See APF, *Manual on National Human Rights Institutions*, 2015, Chapter 14.

734 OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1), 2010, p. 113.

735 See APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012; at [www.asiapacificforum.net/resources/manual-on-international-human-rights-system/](http://www.asiapacificforum.net/resources/manual-on-international-human-rights-system/).

Lesbian, gay, bisexual, transgender and intersex people in detention have particular needs and their situations require close monitoring, whether as part of the NHRI's general function of monitoring places of detention or as part of the NHRI's role as NPM where OPCAT has been ratified. The imposition of criminal penalties for many aspects of sexual orientation, gender identity and intersex activity – for example, same-sex relationships or cross dressing – results in people being imprisoned simply because they are lesbian, gay, bisexual, transgender or intersex. They may face particularly serious risks when in detention, including the risk of rape and other forms of assault, because of their sexual orientation, gender identity or sex characteristics. Trans women detained in male prisons are particularly vulnerable to abuse. Unless an NHRI ensures a specific focus on lesbian, gay, bisexual, transgender and intersex detainees, it may not see the human rights violations inflicted on them.

### CASE STUDY: MONITORING THE RIGHT TO HEALTH IN PRISON

Late in 2014, the **Human Rights Commission of Malaysia (SUHAKAM)** adopted the right to health in prison as one out of its two thematic priorities. It is working towards ensuring that the conditions of confinement in Malaysia are constitutional and consistent with rights to health, safety and human dignity, to achieve a criminal justice system that respects individual rights. SUHAKAM has established a monitoring program, including making visits to prisons and places of detention. Among other things, it examines the treatment of transgender people in detention. During SUHAKAM's visit to one of the prisons in the Selangor state, it was informed that inmates with diverse gender identity would be placed in the same cell, separate from the other inmates. SUHAKAM is preparing its outcome report for the thematic project and will address this issue in a general manner.<sup>736</sup>



Monitoring other places of restricted or confined residence, such as hospitals and children's homes, is also important. In these environments, lesbian, gay, bisexual, transgender and intersex people can be subjected to violence and discrimination. At the very least there may be serious privacy concerns when lesbian, gay, bisexual, transgender and intersex people are accommodated inappropriately.

**BEING LGBT IN ASIA**

A teacher walked by and didn't end the fight.  
I could see through the sweat of blood  
slipping through my eyelashes, that the teacher  
just nodded and the fighting continued.

Vanuatu

Share your thoughts & stories with #BeingLGBTI

Thoughts and stories of being Being LGBTI by Being LGBTI in Asia.

<sup>736</sup> Asia Pacific Forum, 'National Human Rights Commission of Malaysia (SUHAKAM)' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, p 15.

## POSSIBLE ACTIONS

18. Ensure that all NHRI monitoring activities include a specific focus on the human rights of lesbian, gay, bisexual, transgender and intersex people, including, for example, in projects on trafficking, access to justice, health, housing, education and poverty reduction.<sup>737</sup>
19. Ensure that reports to international human rights mechanisms include specific discussion of the particular human rights situations of lesbian, gay, bisexual, transgender and intersex people.
20. Undertake special monitoring projects, in conjunction with lesbian, gay, bisexual, transgender and intersex organisations, on the experience of human rights violations and discrimination on the basis of sexual orientation, gender identity or sex characteristics, including the collection of disaggregated data on violence based on perpetrators, victims and impact.<sup>738</sup>
21. Identify and monitor the specific circumstances of lesbian, gay, bisexual, transgender and intersex persons in detention or in restricted residence, including prisons, remand centres, police cells, hospitals, children's homes and schools, looking in particular at actual or potential assaults, discriminatory and abusive treatment, the appropriateness of assignment to gender-specific facilities, adequate access to appropriate health care services and protection of personal privacy.<sup>739</sup>
22. Develop guidelines on best practices for lesbian, gay, bisexual, transgender and intersex people in these and other kinds of places of detention and restricted residence, based on South-South exchanges.<sup>740</sup>



## 8.6. COMPLAINT HANDLING

All NHRIs in the Asia Pacific region have complaint handling responsibilities.<sup>741</sup> Within the terms of the Paris Principles, they are “commissions with quasi-judicial competence”.<sup>742</sup> The investigation and resolution of complaints is central to their functions but NHRI investigation and resolution of complaints is different from that of law enforcement officials and courts. NHRI complaint handling is “not a substitute for law enforcement officials or a properly functioning judiciary”.<sup>743</sup>

In handling complaints, NHRIs are required to apply the rules of natural justice or procedural fairness. They may be advocates for human rights and for the human rights legislation they administer but they must be impartial and objective in their complaint handling, not pre-judging the allegations. They must collect and assess the evidence and apply the law.<sup>744</sup> They must handle complaints “fairly, transparently, efficiently, expeditiously, and with consistency”.<sup>745</sup>

737 APF-UNDP Programme of Action and Support, Recommendation 20.

738 Ibid, Recommendations 21 and 24.

739 Ibid, Recommendation 22.

740 Ibid, Recommendation 23.

741 See APF, *Manual on National Human Rights Institutions*, 2015, Chapter 15.

742 The phrase is a mistranslation of the original French document. It should be “quasi-judicial competence”. See APF, *Manual on National Human Rights Institutions*, 2015, p. 151.

743 OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, Professional Training Series No. 4 (Rev. 1), 2010, p. 77.

744 APF, *Manual on National Human Rights Institutions*, 2015, p. 153.

745 ICC SCA *General Observations as adopted in Geneva in May 2013*, GO 2.10; at [www.asiapacificforum.net/resources/icc-general-observations/](http://www.asiapacificforum.net/resources/icc-general-observations/).

### CASE STUDY: COMPLAINT ABOUT DISCRIMINATION BASED ON GENDER IDENTITY

Lucy, a transgender woman, and her partner applied for life insurance when they took out a mortgage. Lucy's partner's application was approved almost immediately but Lucy had no response after six weeks. She suspected that her application was taking longer to process because she disclosed that she had had gender reassignment surgery. Lucy had experienced discrimination previously because of her gender identity and was concerned that it could be affecting such an important part of her life.

Lucy approached the **New Zealand Human Rights Commission** for information about her human rights in relation to her life insurance application. She then received a letter from the insurance company stating that her application had been deferred for one year because it fell outside the level of risk that could be covered under the company's usual underwriting guidelines. Lucy was very upset about this. She discussed the matter with her doctor who was also distressed about the decision because there did not seem to be any good reason for deferring the application. Her insurance agent and her doctor requested that the insurance company reconsider its decision.

The Commission intervened with the insurance company and, as a result, the company approved Lucy's insurance application. Lucy was happy with the result and said that being able to lodge a complaint with the Commission and discuss the situation with a Commission mediator had helped support her through the process.<sup>746</sup>



Those most in need of an NHRI's assistance in seeking a remedy following a human rights violation are often those least likely to know about the NHRI and its complaint handling functions and powers. Victims of violations are very frequently from marginalised groups with little access to official institutions. They will be unfamiliar and uncomfortable with formal processes of investigation and resolution. They are often poorly educated and so have little knowledge of these mechanisms and limited means to acquire that knowledge. They might also be suspicious of the NHRI unless it reaches out and demonstrates a genuine concern for their human rights. This is especially so where they come from groups that are traditionally and culturally rejected, such as lesbian, gay, bisexual, transgender and intersex people.

NHRIs have a responsibility to reach out actively to victims of human rights violations. They should not sit passively, waiting for victims to come to them. This requires that:

- offices be physically accessible and culturally appropriate
- information be readily available in languages and media that are easily understood
- processes be informal and user friendly, with a minimum of bureaucracy
- staff be sensitive and helpful, while maintaining their impartiality and objectivity.

<sup>746</sup> The New Zealand Human Rights Commission has published guidelines on the relationship between the *Human Rights Act 1993* and the provision of insurance; see *Insurance and the Human Rights Act 1993* at [www.hrc.co.nz/your-rights/people-disabilities/our-work/hra-and-insurance/](http://www.hrc.co.nz/your-rights/people-disabilities/our-work/hra-and-insurance/).

## CASE STUDY: A MANUAL FOR GENDER AND SEXUAL MINORITIES

Appreciating the difficulties that lesbian, gay, bisexual, transgender and intersex people face in knowing their rights and how to lodge complaints, the **National Human Rights Commission of Bangladesh (JAMAKON)** has produced a manual to inform and assist gender and sexual minorities.<sup>747</sup> The manual describes the types of human rights violation lesbian, gay, bisexual, transgender and intersex people can encounter.

- Police physically or sexually assault someone.
- Police arrest someone because they are or are assumed to be a gender or sexual minority (for example, arresting a man because he looks feminine).
- A *hijra* is attacked by *maastans*. When she reports this to police, the officer refuses to investigate.
- Prison authorities threaten someone or physically or sexually assault someone.
- A *hijra* is denied treatment at a government hospital.
- A landlord refuses to rent to someone because they might be a gender or sexual minority.
- A landlord evicts a tenant after finding out that the tenant is a gender or sexual minority.
- *Hijras* are denied their inheritance.
- A transgender person is denied a passport or other official documents that reflect the person's chosen gender (male, female, or third gender).
- An employer fires an employee based on their sexual orientation.
- An employer refuses to hire someone because they are a *hijra*.<sup>748</sup>

It provides examples of complaints previously received and action taken.

- When *hijras* were being harassed by police, they filed a complaint with JAMAKON. JAMAKON wrote to the police and the harassment stopped.
- A *hijra* was denied benefits at her job and was fired. JAMAKON ordered the employer to pay the money that was owed to her and to reinstate her in her job because the employer did not follow the proper procedure when dismissing her.
- A *hijra* filed a complaint with JAMAKON seeking help to change her official documents from male to third gender. The Commission requested the Chairperson of Dhaka Medical College Hospital's forensic department to provide a gender identity certificate through a medical test.<sup>749</sup>

The manual encourages people to lodge complaints and provides a complaints form to make that task easier.



747 A manual for gender and sexual minorities, 2015; at [www.nhrc.org.bd/PDF/NHRC%20Manual%20\(English\)%20\(1\).pdf](http://www.nhrc.org.bd/PDF/NHRC%20Manual%20(English)%20(1).pdf).

748 Ibid, p. 2.

749 Ibid, p. 5.

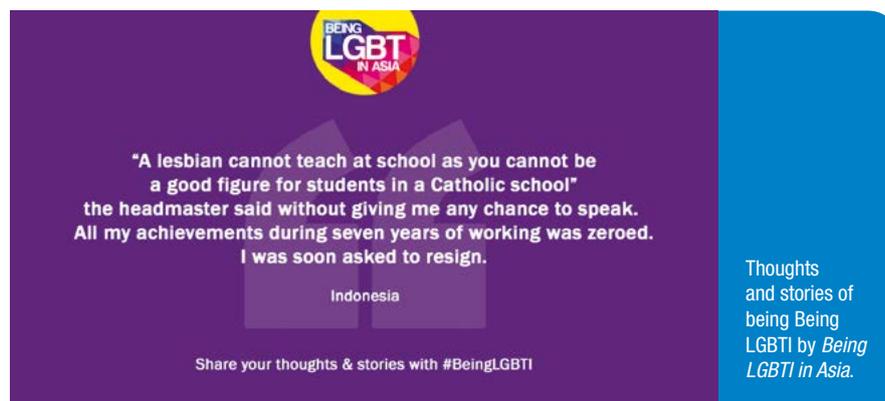
For lesbian, gay, bisexual, transgender and intersex people, confidentiality in complaint handling is a critical issue. Their sexual orientation or gender identity or sex characteristics may not be well known and they might be exposed to many kinds of risks and dangers if it is revealed. They will not approach an NHRI unless they can be confident that their privacy will be protected and they can trust the NHRI to handle their complaint confidentially and sensitively.

### POSSIBLE ACTIONS

23. Train NHRI members and staff to be sensitive and responsive to the needs of victims of human rights violations on the basis of sexual orientation, gender identity or sex characteristics and ensure that these victims have access to members and staff who have undergone this training.
24. Identify an NHRI complaint handling officer who will be a liaison point for lesbian, gay, bisexual, transgender and intersex complainants and who will be responsible for reaching out to the diverse lesbian, gay, bisexual, transgender and intersex communities through their organisations and through community and legal centres and other NGOs connected with the lesbian, gay, bisexual, transgender and intersex communities.
25. Provide an accessible and safe space for lesbian, gay, bisexual, transgender and intersex people in all NHRI offices, where their rights are protected and promoted and their sexual orientation, gender identity and sex characteristics are respected.<sup>750</sup>
26. Provide information, in accessible and understandable languages and formats, to lesbian, gay, bisexual, transgender and intersex individuals and organisations to assist victims of human rights violations to lodge complaints with the NHRI.
27. Ensure that the processes for complaint handling, including forms to be completed, are respectful of the particular circumstances of lesbian, gay, bisexual, transgender and intersex victims of human rights violations and are appropriate for them, including by permitting complainants to identify themselves as they wish.
28. Develop procedures to identify and act on its own initiative to investigate human rights violations based on sexual orientation, gender identity and sex characteristics, through regular engagement with different lesbian, gay, bisexual, transgender and intersex organisations and other civil society organisations.
29. Promote the appointment of a focal point on human rights issues in relation to sexual orientation, gender identity and intersex status in each government ministry, department or agency that has a significant number of complaints of human rights violations based on sexual orientation, gender identity and sex characteristics, as a means of encouraging speedy resolution of complaints and action to prevent future violations.
30. Maintain a database of complaints of human rights violations based on sexual orientation, gender identity and sex characteristics, with the ability to disaggregate the data according to different criteria, to enable the analysis and reporting of the human rights situation of lesbian, gay, bisexual, transgender and intersex people generally and according to status.



<sup>750</sup> See also APF-UNDP Programme of Action and Support, Recommendation 1 in Appendix 6.



## 8.7. COURT INTERVENTIONS AND MONITORING

Many NHRIs have the function of intervening in court proceedings, as a friend of the court, to present submissions on human rights law.<sup>751</sup> In these interventions, the NHRI does not represent one of the parties or advocate the case of one of the parties but acts as adviser to the court. NHRIs are the pre-eminent national experts on human rights law and so it is appropriate that their expertise is made available to the courts.

A number of NHRIs have used this intervention function to present human rights submissions in cases involving sexual orientation, gender identity and sex characteristics. Often courts are not familiar at all with issues associated with sexual orientation, gender identity and sex characteristics and they are completely unaware of the human rights dimensions of those issues. NHRIs have a very valuable role to play in bringing their expertise and experience to the court in these cases.

### CASE STUDY: CHALLENGE TO MILITARY CRIMINAL LAW

The **National Human Rights Commission of Korea** has provided opinions advocating inclusion and equality for the people with diverse sexual orientation to courts dealing with related pending cases. For example, in 2011 the Commission delivered an opinion to the Constitutional Court in a case challenging as unconstitutional a provision in the Military Criminal Law that defines sexual activities among persons of the same sex in the military as indecent sexual assault and criminalises them.<sup>752</sup> The Constitutional Court upheld the provision on the basis of the “distinct characteristics of the military based on hierarchy and control”, at the expense of the rights of sexual and gender minorities. However, the Commission in its own capacity was able to present arguments in accord with the international human rights laws and norms.<sup>753</sup>



On other occasions NHRIs do not formally intervene in the court proceedings but they monitor them by attending and observing particular cases of concern. An NHRI's attendance indicates to the court hearing the case that the case raises important human rights questions.

751 See APF, *Manual on National Human Rights Institutions*, 2015, Chapter 16.

752 Military Criminal Law, article 92, s. 9.

753 APF, 'National Human Rights Commission of Korea' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific 24-25 February 2015*, p. 13.

### CASE STUDY: CASE CHALLENGING LAWS CRIMINALISING CROSS DRESSING AND GENDER IDENTITY

The *Syariah Criminal (Negeri Sembilan) Enactment 1992* of the Malaysian state of Negeri Sembilan criminalises any male person who wears women’s clothing or “poses as a woman”.<sup>754</sup> On 11 October 2012, the High Court of Seremban dismissed an application by Muhammad Juzaili Mohd Khamis and two other Muslim men for a declaration that the provision is invalid due to inconsistency in human rights and due process provisions in Malaysia’s Federal Constitution.<sup>755</sup> The applicants appealed and the Court of Appeal overturned the High Court’s verdict and declared the provision unconstitutional.

On 27 January 2015, the state of Negeri Sembilan applied for a leave to appeal to the Federal Court of Malaysia. The **Human Rights Commission of Malaysia (SUHAKAM)** attended the proceedings as observer, in accordance with its commitment that “all human beings, regardless of their sexual orientation, should be able to enjoy the full range of human rights without exception”.<sup>756</sup> The Federal Court granted leave to appeal and SUHAKAM continued to monitor the case and attended the hearing in August 2015 as an observer.<sup>757</sup>

On 8 October 2015, the Federal Court unanimously overturned the decision by the Court of Appeal on a technical ground, that the legal challenge to the constitutionality of any law has to be made directly to the Federal Court as the matter would involve an interpretation of the Federal Constitution. Therefore, the provision in the state law stands, unless new proceedings are initiated and the Federal Court can decide the substance of the case.



### POSSIBLE ACTIONS

31. Monitor cases coming before the courts that raise human rights issues concerning sexual orientation, gender identity and sex characteristics and seek to intervene in appropriate cases where the NHRI’s expertise would assist the court to understand the human rights issues and the requirements of human rights law.



<sup>754</sup> *Syariah Criminal (Negeri Sembilan) Enactment 1992*, s. 66.

<sup>755</sup> Federal Constitution, articles 5(1), 8(1) and (2), 9(2) and 10(1)(a).

<sup>756</sup> Human Rights Commission of Malaysia (SUHAKAM), *Annual Report 2012*, p. 110.

<sup>757</sup> APF, ‘Human Rights Commission of Malaysia (SUHAKAM)’ in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, pp. 15-16.

## 8.8. ADVOCACY

Advocacy is the result of an NHRI's performance of its other functions. An NHRI advocates for the acceptance and implementation of its advice, of the results of its monitoring and of its recommendations on remedies for violations. Advocacy is also an educational and awareness raising activity as it brings the NHRI and its work to broader public attention and promotes knowledge of the institution and of human rights generally.

NHRI advocacy can be directed towards the Government, the parliament, the judiciary and the civil service. It can also be directed towards other actors in the nation, including private organisations and businesses, religious and civic organisations, educational institutions and educators, and all social and economic sectors that affect the human rights of lesbian, gay, bisexual, transgender and intersex people.

### CASE STUDY: ADVOCACY FOR NATIONAL AND LOCAL ANTI-DISCRIMINATION LAWS

The **Commission on Human Rights of the Philippines** has been a strong advocate for a national anti-discrimination law. It undertakes this work in partnership with LGBT NGOs, conducting discussions and consultations and seeking the support of other stakeholders. The primary challenge is the opposition of conservative officials and their refusal to include sexual orientation and gender identity as protected statuses.

The Commission, through its regional offices, works with local LGBT groups on the passage of local anti-discrimination ordinances. It participates in drafting ordinances, providing advice and building capability on human rights for lesbian, gay, bisexual, transgender and intersex people. The Commission works with Rainbow Rights in the Access to Justice Project which aims for the enactment and/or implementation of local anti-discrimination ordinances. They bring together stakeholders and legal actors to promote ordinances and to ensure implementation.<sup>758</sup>



The APF-UNDP Programme of Action and Support identifies a number of issues of direct relevance to the human rights of lesbian, gay, bisexual, transgender and intersex people that should be the basis of NHRI advocacy. They include:

- law reform<sup>759</sup>
- implementation of international human rights obligations<sup>760</sup>
- application of the UN Declaration on Human Rights Defenders<sup>761</sup>
- national action plans.<sup>762</sup>

758 APF, 'Philippines Commission on Human Rights' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, p. 25.

759 Recommendations 25 and 26.

760 Ibid, Recommendation 26.

761 Ibid, Recommendation 30.

762 Ibid, Recommendation 32.

The Programme of Action and Support also includes recommendations on the process for advocacy:

- partnership with SOGI communities<sup>763</sup>
- engagement with international, regional and sub-regional mechanisms<sup>764</sup>
- sub-regional networks<sup>765</sup>
- attitude and behavioural change.<sup>766</sup>

## POSSIBLE ACTIONS

32. Include specific strategies for advocacy for the human rights of lesbian, gay, bisexual, transgender and intersex people in the NHRI's strategic and activity plans.
33. Include in all NHRI projects and activities dealing with the human rights of lesbian, gay, bisexual, transgender and intersex people an advocacy strategy to promote acceptance and implementation of recommendations for change.
34. Engage lesbian, gay, bisexual, transgender and intersex organisations, other civil society organisations and supportive organisations and individuals in the public, private and community sectors in advocacy of the NHRI's reports and recommendations relevant to the human rights of lesbian, gay, bisexual, transgender and intersex people.
35. Advocate for specific law reform initiatives to provide better promotion and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people, giving priority to laws; to remove criminal penalties associated with sexual orientation, gender identity or intersex status; to prevent forced or involuntary surgical and other medical procedures on intersex or lesbian, gay, bisexual or transgender people, including procedures purporting to impose a specific sex or to change a person's sexual orientation or gender identity; to grant legal gender recognition to the diverse identities and statuses of transgender and intersex people according to their wishes; to protect lesbian, gay, bisexual, transgender and intersex people from violence and mistreatment; and to prohibit discrimination based on sexual orientation, gender identity and sex characteristics.
36. Advocate with specific government ministries, departments and agencies for implementation of policies and programs for the better promotion and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people.
37. Engage with business and professional organisations to encourage them to understand the application of human rights law to issues relating to sexual orientation, gender identity and sex characteristics and to implement policies and programs for the better promotion and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people, in cooperation with lesbian, gay, bisexual, transgender and intersex organisations.



763 Ibid, Recommendation 25.

764 Ibid, Recommendation 28.

765 Ibid, Recommendation 29.

766 Ibid, Recommendation 31.

## 8.9. COOPERATION AND ENGAGEMENT

The Paris Principles require that NHRIs work in cooperation with all elements in a society, including other state institutions and NGOs. Cooperation and engagement are central to the working method of NHRIs. However, in cooperating and engaging, NHRIs must ensure that their independence is apparent and preserved, whether cooperating with government or NGOs and other bodies.

Cooperation and engagement should extend to all national actors. NHRIs should “maintain consultation” with state institutions with responsibility for the promotion and protection of human rights, such as ombudsmen and mediators, sub-national statutory human rights institutions and thematic institutions.<sup>767</sup> They should also relate to judicial bodies, where appropriate, for the promotion and protection of human rights.<sup>768</sup> They should relate closely to parliaments.<sup>769</sup> The Paris Principles do not specify what form these various relationships should take.

NHRIs should also:

... [i]n view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.<sup>770</sup>

They should have “effective cooperation” with “[n]on-governmental organizations responsible for human rights”.<sup>771</sup>

This cooperation can take many forms, including collaboration in human rights education, assistance in investigations and joint advocacy for law reform.



767 Paris Principles, ‘Methods of operation’, para. (f). See also *ICC SCA General Observations as adopted in Geneva in May 2013*, GO. 1.4.

768 The Paris Principles include relationships with ‘jurisdictional’ bodies. See Paris Principles, ‘Methods of operation’, para. (f).

769 Paris Principles, ‘Competence and responsibilities’, para. 3(a). See also *Belgrade Principles on the Relations between NHRIs and Parliaments*, annexed to the UN Secretary General’s Report on NHRIs to the General Assembly and the Human Rights Council, 1 May 2012, A/HRC/20/9.

770 Paris Principles, ‘Methods of operation’, para. (g).

771 Paris Principles, ‘Composition and guarantees of independence and pluralism’, para. 1(a).

### CASE STUDY: ENCOURAGING DIALOGUE, UNDERSTANDING AND COOPERATION

Given the sensitivities surrounding issues relating to LGBTI rights in Malaysia, the **Human Rights Commission of Malaysia (SUHAKAM)** has adopted a step-by-step approach in addressing these issues.

SUHAKAM started engaging with various relevant stakeholders in 2010 in order to obtain their views and perspectives on LGBTI rights, as well as the issues and challenges faced.

In August 2010, SUHAKAM organised a meeting with various Islamic groups with the objectives to gain better understanding of Islamic perspective of sexual orientation and gender identity and substantiate Islamic sensitivities and views regarding LGBTI actions, such as same-sex intercourse, cross dressing, imitation of the opposite gender and gender re-assignment. The application of the principles of non-discrimination under the Federal Constitution with regards to LGBT people was also discussed. The Commission took note of Islam's position in dealing with LGBT rights.

In November 2010, SUHAKAM held a meeting with LGBTI individuals and organisations working with these communities and advocating for their rights. The objective of the meeting was to engage directly with the LGBTI groups and to hear the challenges and violations that they face.

Following its meeting with the Islamic groups, SUHAKAM met with representatives of non-Muslim groups in February 2011 to discuss the rights of the sexual minorities. The views presented by both the Christians and Hindus were noted by the Commission.

In October 2011, SUHAKAM and the Selangor Community Awareness Organisation (EMPOWER) organised a Roundtable Discussion on Gender Equality: Unaddressed Women's Rights Issues. During the discussion, participants raised some issues concerning the sexual minorities. SUHAKAM has also met with various NGOs, at their requests, to discuss about challenges faced by LGBTI groups.

In January 2015, SUHAKAM met with Justice for Sisters, Human Rights Watch and other relevant NGOs to discuss issues related to section 66 of the *Syariah Criminal (Negeri Sembilan) Enactment 1992* (concerning prohibition of males posing as females) and other related issues.<sup>772</sup>



Lesbian, gay, bisexual, transgender and intersex organisations are among those with which NHRIs should cooperate and engage. They are “non-governmental organisation devoted to promoting and protecting human rights ... to protecting particularly vulnerable groups”. They have expertise in the human rights situations and experiences of lesbian, gay, bisexual, transgender and intersex people. They also have the capacity to reach lesbian, gay, bisexual, transgender and intersex people far more effectively than NHRIs do as they come from and are part of those communities. Consultation, joint education and awareness raising activities, and collaborative programs with lesbian, gay, bisexual, transgender and intersex organisations should be a fundamental operating principle for NHRIs.

772 APF, ‘Human Rights Commission of Malaysia (SUHAKAM)’ in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, pp. 14-15.

In developing relationships with lesbian, gay, bisexual, transgender and intersex NGOs, NHRIs should be diligent in recognising the diversity of the experiences and situations of lesbian, gay, bisexual, transgender and intersex people. They should be diligent in engaging with different NGOs that represent and reflect that diversity, with different expertise and experience in different issues and different groups of people. Sometimes an NGO can claim to be representative of the broad populations of lesbian, gay, bisexual, transgender and intersex people, reflecting that claim even in its name, and yet include in fact only one or some of the various diverse groups of people. Lesbian, gay, bisexual, transgender and intersex people have distinct voices and those voices should be heard through the different organisations to which they belong, not submerged into a broader movement. No one organisation can adequately express them all. Accordingly, NHRIs should not see one or a few NGOs as able to reflect the diversity of experiences and situations. They should seek the widest range of partnerships possible.

### CASE STUDY: COLLABORATION WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITY ORGANISATIONS

The **Commission on Human Rights of the Philippines** has developed close working relationships with lesbian, gay, bisexual and transgender NGOs at the national and local levels and undertakes many joint activities with them. It engages actively with them in the protection and promotion of LGBT rights. The Commission has a particularly productive relationship with Rainbow Rights, an NGO that promotes the human rights of LGBT people.

The sharing of research and stories of lesbian, gay, bisexual, transgender and intersex people enriches the appreciation of the Commission's officers as well as other stakeholders. It also strengthens the Commission's advocacy for the passage of the Anti-Discrimination Bill. For example, Rainbow Rights has presented the Commission and other stakeholders with the findings of its research *Kwentong Bebot*, documenting the violence experienced by lesbian, bisexual and transgender women.

In an international forum sponsored by GALANG Philippines on the exclusion of lesbian, gay, bisexual and transgender people in social protection policies, the Commission committed to work with various stakeholders and policy-makers to pursue the amendment of social protection policies, including the Family Code, to make them more inclusive of lesbian, gay, bisexual and transgender people.<sup>773</sup>



Photo by UNDP/W. Field.

773 APF, 'Philippines Commission on Human Rights' in *Briefing document for the workshop on the role of National Human Rights Institutions in promoting and protecting the rights of LGBTI in Asia and the Pacific, 24-25 February 2015*, p. 25.

## POSSIBLE ACTIONS

38. Build and maintain collaborative relationships with diverse lesbian, gay, bisexual, transgender and intersex organisations and networks to inform the work of the NHRI and to ensure an effective communication outreach to lesbian, gay, bisexual, transgender and intersex people.<sup>774</sup>
39. Ensure joint strategising between the NHRI and lesbian, gay, bisexual, transgender and intersex organisations in developing NHRI strategic and activity plans on human rights issues relating to lesbian, gay, bisexual, transgender and intersex people.
40. Develop broader advocacy coalitions with diverse lesbian, gay, bisexual, transgender and intersex organisations and generalist human rights organisations to enable joint efforts on projects to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people.
41. Arrange regular meetings for exchange of views, information and plans between the NHRI's senior leaders and lesbian, gay, bisexual, transgender and intersex organisations.



The engagement required of NHRIs does not stop at the national level but extends internationally.<sup>775</sup> NHRIs should:

... cooperate with the United Nations and any other organizations in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.<sup>776</sup>

There are now many opportunities for NHRIs to cooperate with and support the work of UN bodies and mechanisms, including the Human Rights Council, its UPR process and its special procedures, as well as the treaty monitoring bodies.<sup>777</sup> According to the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) this includes:

- submitting parallel or shadow reports to the Universal Periodic Review, special procedure mechanisms and treaty monitoring bodies;
- making statements during debates before review bodies and the Human Rights Council;
- assisting, facilitating and participating in country visits by United Nations experts, including special procedures mandate holders, treaty bodies, fact finding missions and commissions of inquiry; and
- monitoring and promoting the implementation of relevant recommendations originating from the human rights system.<sup>778</sup>

774 APF-UNDP Programme of Action and Support, Recommendation 3.

775 See APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012.

776 Paris Principles, 'Competence and responsibilities', para. 3(e). See also ICC SCA *General Observations as adopted in Geneva in May 2013*, GO. 1.4.

777 See APF, *International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions*, 2012.

778 ICC SCA *General Observations as adopted in Geneva in May 2013*, GO. 1.4.

NHRIs can use these opportunities to report on their monitoring of the human rights of lesbian, gay, bisexual, transgender and intersex people and to make recommendations for better State promotion and protection of the human rights of lesbian, gay, bisexual, transgender and intersex people. They can also engage with their regional association, the APF, and their international association, the ICC, to ensure that these associations contribute to advancing the human rights of lesbian, gay, bisexual, transgender and intersex people. In particular, Asia Pacific NHRIs can participate in and contribute to the APF's program in support of the human rights of lesbian, gay, bisexual, transgender and intersex people, including implementation of the APF-UNDP Programme of Action and Support.

### POSSIBLE ACTIONS

42. **Include in parallel or shadow reports to the Universal Periodic Review, special procedures and treaty monitoring bodies information about the human rights situation of lesbian, gay, bisexual, transgender and intersex people.**
43. **Make statements during debates before review bodies and the Human Rights Council on human rights relating to sexual orientation, gender identity and sex characteristics.**
44. **Encourage country visits and reports by United Nations experts, including special procedure mandate holders, treaty monitoring bodies, fact-finding missions and commissions of inquiry, to include examination of human rights issues in relation to sexual orientation, gender identity and sex characteristics.**
45. **Promote and monitor the implementation of recommendations from the international human rights system that deal with human rights in relation to sexual orientation, gender identity and sex characteristics.**
46. **Implement recommendations of the APF-UNDP Programme of Action and Support and participate in other APF programs and activities concerning human rights in relation to sexual orientation, gender identity and sex characteristics.**
47. **Share with other NHRIs in other regions, through the ICC and directly, the experience of NHRIs in the Asia Pacific in working to promote and protect the human rights of lesbian, gay, bisexual, transgender and intersex people and encourage those other NHRIs to extend their own work on these issues.**



## 8.10. NATIONAL INQUIRIES

A national inquiry is an investigation into a systemic human rights problem in which the general public is invited to participate.<sup>779</sup> Many NHRIs undertake national inquiries as part of their activities to fulfil their mandates. National inquiries are conducted in a transparent, public manner. They involve gathering public evidence from witnesses and experts, directed towards the investigation of systemic patterns of human rights violation and the identification of findings and recommendations. National inquiries require a wide range of expertise within the NHRI, including researchers, educators, investigators and people with experience in policy development. There are many different ways in which national inquiries can be conducted, according to the resources available to the NHRI.

<sup>779</sup> See APF, *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, 2012; at [www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/](http://www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/).

A national inquiry results in the production of one or more reports that set out the evidence the inquiry received, its analysis of the situation, its findings of fact and its recommendations. The recommendations can be quite wide-ranging, addressed to many within a country with responsibilities in the particular area of human rights examined. They can be addressed to government, private sector corporations, NGOs, academic institutions and other civil society bodies. They can also be addressed to individuals who have significant parts to play within the community, including in relation to the particular issue.

Because of their nature, national inquiries are unlike other functions undertaken by the NHRI, even if they include many of those functions. They involve investigation – but much of the investigation is conducted in a public forum and evidence is provided directly, usually in public, by victims and experts and possibly perpetrators. They have an educational component that is unlike other forms of education undertaken by the NHRI. A national inquiry requires research but much of the research has already been undertaken and the function of the inquiry is to collate and analyse it.

### CASE STUDY: “SAME SEX, SAME ENTITLEMENTS” NATIONAL INQUIRY

The **Australian Human Rights Commission** commenced its “Same-sex: same entitlements” national inquiry in 2006 and reported in 2007. The inquiry sought to

- identify the federal laws which discriminate against same-sex couples and their children in the context of financial and work-related benefits and entitlements
- describe the impact of those discriminatory laws on same-sex couples and their children
- make recommendations as to how to remove that discrimination.

The inquiry focussed on the following areas when conducting its audit of federal laws:

- employment
- workers’ compensation
- tax
- social security
- veterans’ entitlement
- health care
- family law
- superannuation
- aged care
- migration.



The inquiry held seven formal public hearings and convened 18 community forums. It received submissions from 680 individuals and organisations.

The audit identified 58 federal laws that discriminate against same-sex couples and, in some cases, their children.<sup>780</sup> The Commission’s recommendations for amendment to the discriminatory laws were adopted by the Australian Government and enacted in 2008.<sup>781</sup>

780 Australian Human Rights Commission, *Same-sex; same entitlements*, 2007; at [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/same-sex-same-entitlements](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/same-sex-same-entitlements).

781 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Reform) Act 2008*.

The human rights situations of lesbian, gay, bisexual, transgender and intersex people are usually the result of cultural, political and social traditions. They have long histories. They are systemic, often deeply embedded in the structures of a society. These situations, therefore, are often ideal for the national inquiry process. They are appropriately addressed through a process that combines public education and awareness raising, investigation, analysis and recommendations. It is also a process that involves engagement of key civil society organisations and external experts. It can strengthen relationships between the NHRI and lesbian, gay, bisexual, transgender and intersex communities and organisations. It can lead to a comprehensive set of recommendations to address the broad systemic nature of the situation.

In undertaking any form of public inquiry into human rights issues relating to sexual orientation, gender identity or intersex status, NHRI should be careful to ensure adequate protection for witnesses and others making submissions. If necessary, their identities and any identifying information should be suppressed.

Appearing in public before an official inquiry can be a frightening experience for some. It can be especially traumatic for victims who, through the process of telling what happened, will have to re-live the experience of violation. The inquiry team needs to prepare victims properly and sensitively for the hearings...

The team should discuss with each victim ways in which some measure of protection can be provided. Most inquiries can take evidence in confidence if it is necessary for the safety of the witness or to protect the privacy of a witness. In other cases, the inquiry can suppress the name of the witness and all information that does or could lead to identification of the witness. The inquiry team should ascertain in advance whether a witness does not want to give public evidence or wants to give public evidence but with his or her identity kept confidential. Victims and other witnesses should be able to express any fear or concern they have and then seek an appropriate assurance from the inquiry that enables them to give their evidence with the least risk to themselves and their safety.<sup>782</sup>

## POSSIBLE ACTIONS

- 48. Undertake a consultation with lesbian, gay, bisexual, transgender and intersex organisations and other human rights civil society organisations to determine the desirability and appropriateness of conducting a national inquiry into one or more human rights issues relating to sexual orientation, gender identity and sex characteristics.**
- 49. Consider what human rights issues affecting lesbian, gay, bisexual, transgender and intersex people are most appropriately examined through a national inquiry process, with the prospect of increasing public awareness and understanding of the issues and public support for recommendations to address the issues.**
- 50. Undertake a national inquiry if the external consultations and internal deliberations establish support for the appropriateness and likely effectiveness of such an inquiry into human rights issues relating to sexual orientation, gender identity and sex characteristics.**



<sup>782</sup> APF *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, 2012, p. 54 at [www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/](http://www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/).

### CASE STUDY: ADDRESSING HUMAN RIGHTS ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX PEOPLE

Through its advocacy, research and advice work, complaint handling, inquiries and consultations, the **Australian Human Rights Commission** has addressed discrimination and other human rights issues on the basis of sexual orientation, gender identity and sex characteristics, commencing in the early 1990s.<sup>783</sup> Its first advocacy work on these issues concerned the elimination of the ban on gay men and lesbians entering the Australian Defence Forces. Since then it has undertaken many very different but very significant projects in this area.

The Commission's work has resulted in four reports over the past eight years that have led directly to fundamental changes in law, policy and practice in Australia. In particular, its advocacy resulted in the enactment of legislation in 2008 eliminating discrimination against same-sex couples and their children in federal laws, as well as legislation in 2013 prohibiting discrimination on the basis of sexual orientation, gender identity and intersex status.

The **“Same-sex: same entitlements”** inquiry was commenced in 2006 and reported in 2007. It identified 58 federal laws that discriminate against same-sex couples and, in some cases, their children.<sup>784</sup> The Commission's recommendations for amendment to the discriminatory laws were adopted by the Australian Government and enacted in 2008.<sup>785</sup>

The **“Sex files”** project examined the legal recognition of sex in documents and government records, including identity documents such as passports and driving licences. The project began in 2008, consulting with sex and gender diverse people, through individual meetings, forums and online blogs, learning their experiences and most pressing human rights concerns. The consultation led to a focus on sex identification issues and publication of a report in 2009. The report found that Australia's identification systems largely operate on a binary basis where the only options available for sex identity are male or female. The systems needed to change to accommodate people who do not identify as male or female and who wish to have identity documentation that does not note their identity as either male or female.<sup>786</sup>

In 2010, the Commission began a broad consultation on **discrimination based on sexual orientation or sex and/or gender identity**. A report of the consultations was published the following year. Some of the key issues identified by participants included:

- the importance of using appropriate, inclusive and empowering terminology
- the benefits of having consistent and uniform laws across Australia
- the benefits of having federal discrimination laws that would bind Commonwealth agencies



783 In its reports and other publications, the Australian Human Rights Commission usually uses the phrase ‘intersex status’ rather than ‘sex characteristics’.

784 Australian Human Rights Commission, *Same-sex: same entitlements*, 2007.

785 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* and *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Reform) Act 2008*.

786 Australian Human Rights Commission, *Sex files*, 2009; at [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/sex-files-legal-recognition-sex](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/sex-files-legal-recognition-sex).

- the importance of including gender identity and gender expression as protected grounds of discrimination
- the need for government action in other areas, such as health care, education, marriage equality, as well as reform of the requirements for changing a person's legal sex.

The report raised issues of discrimination faced by people diverse sexual orientation and gender identity in accessing employment, participating in sports and in their access to facilities such as toilets and change rooms. It also provided accounts of vilification, discrimination and harassment experienced by individuals on the basis of sex and/or gender identity.<sup>787</sup>

In 2014, the Commission held a **national human rights consultation** concerning sexual orientation, gender identity and sex characteristics. It published the results in 2015 in *Resilient individuals: sexual orientation gender identity and intersex rights*.<sup>788</sup> According to the consultation report, despite progress being made in recent years, lesbian, gay, bisexual, transgender and intersex people continue to face a range of significant challenges in Australia including:

- poor community understanding and visibility of the distinct issues that affect people on the basis of sexual orientation, gender identity and sex characteristics, particularly in relation to gender identity and intersex status
- State-sanctioned structural discrimination on the basis of sexual orientation, gender identity and sex characteristics, which has flow on impacts in legitimising institutional and interpersonal discrimination
- a lack of cultural competency and understanding of the distinct needs of lesbian, gay, bisexual, transgender and intersex people in the provision of public services, including education, health and aged care
- the intersection of the human rights of lesbian, gay, bisexual, transgender and intersex people with the rights of others, notably in relation to religious freedom
- attitudes from people from different cultural backgrounds that have a negative attitude toward issues of sexual orientation, gender identity and sex characteristics and the rights of lesbian, gay, bisexual, transgender and intersex people, especially children during the developmental stage of their life when they need support
- unacceptably high rates of marginalisation, bullying, harassment and violence.

The report said: “The legacy of State-sanctioned discrimination is significant in its legitimisation of institutional and interpersonal discrimination across society. Governments have had a leading role in creating this culture, and so must also take a lead role in undoing it.” The Commission proposed a ‘road map for inclusion’ in the report, involving all levels of government in Australia and with the Commission playing a central role.<sup>789</sup>

Notably, the consultation report included a chapter dealing specifically with human rights issues affecting intersex people.<sup>790</sup>



787 Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender discrimination: consultation report*, 2011; at [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/addressing-sexual-orientation-and-sex](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/addressing-sexual-orientation-and-sex).

788 Australian Human Rights Commission, *Resilient individuals: sexual orientation gender identity and intersex rights*, 2015; at [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/resilient-individuals-sexual).

789 Ibid, pp. 2-4.

790 Ibid, pp. 57-59.

The Commission has accepted and sought to resolve complaints of human rights violation, including discrimination, based on sexual orientation and gender identity since its establishment. Its jurisdiction was widened in 2013 to incorporate sexual orientation, gender identity and intersex status as specific grounds of prohibited discrimination under the *Sex Discrimination Act 1984*.<sup>791</sup> In 2014–15, it received 34 complaints of discrimination based on sexual orientation, 55 based on gender identity and 2 based on intersex status.<sup>792</sup>

The Commission also has a role to intervene in court proceedings that involve human rights issues. It intervened in the High Court of Australia, Australia's highest court, in a case concerning legal requirements for transgender people to obtain a gender recognition certificate and be recognised as their affirmed gender. The law required extensive intrusive surgery to effect the gender change as a condition for the issue of the certificate. The High Court's finding, consistent with the Commission's submissions, was that a person's gender should be considered from a 'social perspective', that is, how they are perceived by other members of society and not by a detailed knowledge of the person's physical (bodily) state.<sup>793</sup>

The Commission has also engaged with the international human rights system, including the UN Human Rights Council and treaty monitoring bodies, on many human rights issues related to sexual orientation, gender identity and sex characteristics. In 2015, it included these issues in its report to the Human Rights Council's Universal Periodic Review of Australia.<sup>794</sup> Among other things, it raised concerns that intersex people face non-essential medical interventions to erase intersex characteristics.<sup>795</sup> Similarly, in its 2010 UPR submission, the Commission recommended that sex or gender diversity be included as grounds of discrimination in federal laws, and that the *Sex files* report be implemented.<sup>796</sup> In 2009, the Commission included the rights of lesbian, gay, bisexual, transgender and intersex people in its report to the Committee on Economic, Cultural and Social Rights.<sup>797</sup> In 2012, it included these rights in its report to the Human Rights Committee.<sup>798</sup> It has also participated in the joint statements on sexual orientation and gender identity presented by NHRIs at the Human Rights Council in 2012, 2013 and 2014.

791 *Sex Discrimination Act 1984*, sections 5A, 5B and 5C.

792 Australian Human Rights Commission, *Annual Report 2014–15*; p. 145; at [www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_Annual%20Report%202014%E2%80%9315\\_Web%20version.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_Annual%20Report%202014%E2%80%9315_Web%20version.pdf).

793 *AB v Western Australia*, 244 CLR 390. See [www.humanrights.gov.au/sites/default/files/document/publication/AB\\_and\\_AH\\_article.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/AB_and_AH_article.pdf).

794 Australian Human Rights Commission, *Australia's second Universal Periodic Review: submission by the Australian Human Rights Commission*, 2015; at [www.humanrights.gov.au/sites/default/files/document/publication/WEB\\_Australia's\\_Second\\_UPR\\_Review\\_2015.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/WEB_Australia's_Second_UPR_Review_2015.pdf).

795 *Ibid.*

796 See [www.humanrights.gov.au/sites/default/files/content/upr/AHRC\\_UPR\\_guide.pdf](http://www.humanrights.gov.au/sites/default/files/content/upr/AHRC_UPR_guide.pdf).

797 See [www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20090417\\_icescr\\_review.pdf](http://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20090417_icescr_review.pdf).

798 See [www.humanrights.gov.au/international-covenant-civil-and-political-rights-list-issues-prior-reporting#Heading127](http://www.humanrights.gov.au/international-covenant-civil-and-political-rights-list-issues-prior-reporting#Heading127).

### KEY POINTS: CHAPTER 8

- The Yogyakarta Principles urge NHRIs to “integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities”. They also assert the principle of universality of all human rights, so that all human rights apply to all persons of diverse sexual orientations, gender identities (including diverse gender expressions) and sex characteristics.
- The first step for NHRIs is to recognise that lesbian, gay, bisexual, transgender and intersex people are entitled to the full range of human rights and that they experience human rights violations and are at risk of further violations on the basis of sexual orientation, gender identity and sex characteristics.
- NHRIs can respond to the human rights experiences of lesbian, gay, bisexual, transgender and intersex people and ensure better promotion and protection of their human rights through activities relating to each of the key functions of NHRIs: advice, education and awareness raising, monitoring, complaint handling, advocacy, and cooperation and engagement, domestically and internationally.
- The national inquiry process can be a very effective mechanism by which NHRIs can address the systemic nature of human rights violations based on sexual orientation, gender identity and sex characteristics, and ensure better promotion and protection of the human right of lesbian, gay, bisexual, transgender and intersex people.



# Summary

## Chapter 1: Understanding sexual orientation, gender identity and sex characteristics

- Sexual orientation and gender identity are fundamental elements of a person's identity, while sex characteristics are intrinsic parts of a person's physical make-up.
- These distinct concepts help to differentiate the impact of discrimination against lesbian, gay and bisexual people because of their sexual orientation, against transgender people because of their gender identity or against intersex people because of their sex characteristics.
- Increasingly, the terms 'sexual orientation', 'gender identity' and 'sex characteristics' are being used by human rights bodies and civil society and listed explicitly as prohibited grounds of discrimination. 'Gender expression' is a separate, but related, term that refers to people's outward expression of masculinity and/or femininity.
- Many regional identities combine elements of sexual orientation, gender identity, gender expression or, to a limited extent, sex characteristics. Using these concepts acknowledges both traditional and evolving identities in this region and the common and distinct human rights issues faced by lesbian, gay, bisexual, transgender and intersex people.
- By understanding these concepts and how they apply to lesbian, gay, bisexual, transgender and intersex people, NHRIs can choose the most appropriate individual and umbrella terms to use in specific pieces of work.
- Being lesbian, gay, bisexual, transgender or intersex is not a medical illness. Viewing people this way (pathologisation) has increased stigma, discrimination and violence against people, including in medical settings, because of their sexual orientation, gender identity or sex characteristics,
- Every person has the right to choose whether, when and how they disclose their sexual orientation, gender identity or intersex status. By enabling lesbian, gay, bisexual, transgender and intersex people to choose how much they disclose, NHRIs respect people's privacy and help to create an inclusive environment.

## Chapter 2: Being lesbian, gay and bisexual in the Asia Pacific

- There may be 220 million lesbian, gay and bisexual people in the Asia Pacific region.
- Lesbian, gay and bisexual people in the region have many common experiences. In addition, lesbians and bisexual women have distinct experiences, arising from their situation as women that must be taken into account in ensuring respect for their human rights.
- Criminal laws targeting lesbian, gay and bisexual people have both direct and indirect effects on their enjoyment of their human rights. Whether enforced or not, they undermine the dignity of lesbian, gay and bisexual people.
- Individually and as a group, lesbian, gay and bisexual people are marginalised and often targeted for violence on the basis of their sexual orientation. The State often fails to ensure their safety.
- Discrimination based on sexual orientation is evident in all countries. It denies the equality of lesbian, gay and bisexual people.
- Lesbian, gay and bisexual human rights defenders are often targeted because of their advocacy. They experience violations of their rights to expression, assembly and association.

### Chapter 3: Being transgender in Asia and the Pacific

- Transgender men, transgender women and those who identify as a third gender or as non-binary exist in all parts of the Asia Pacific region.
- Direct and indirect discrimination affects transgender people in all aspects of their private and public lives and leads to social exclusion. This includes systemic bullying of transgender and gender diverse students at school and discrimination at all stages of the employment cycle.
- Transgender women continue to be criminalised under laws that prohibit cross-dressing and are frequently targeted by laws criminalising homosexuality, even though they are not gay men. Public nuisance and vagrancy laws and criminalisation of sex work also disproportionately affect transgender women.
- Transphobic violence is a form of gender-based violence directed against transgender people. The majority of transgender people killed because of their gender identity are transgender women. There is emerging evidence of high levels of sexual and physical violence against transgender men within their families or in intimate relationships.
- Legal gender recognition is a fundamental civil and political right that is necessary to realise other rights. Having the correct name and sex or gender identity on official documents enables transgender people to be recognised as a person before the law and to have legal protection.
- Gender-affirming health services are medically necessary for many transgender people and are a component of the right to the highest attainable standard of health.

### Chapter 4: Being intersex in Asia and the Pacific

- Intersex traits are relatively common and intersex people exist in all parts of the Asia Pacific region. Stigma has created an environment where their existence and the human rights violations against them have been largely ignored.
- Intersex people often experience human rights violations because their bodies are different. These include so-called 'sex-normalising' surgeries or hormone treatment on infants and children, that are medically unnecessary and typically performed when a child is too young to be involved in the decision-making process. These practices violate the right to physical integrity and have been described by human rights bodies as forms of torture or ill-treatment and as harmful practices.
- Fear and discrimination can never justify human rights abuses, including forced medical treatment. States have a duty to combat harmful stereotypes and discrimination against intersex people.
- Typically, female genital mutilation laws do not apply to surgical interventions on intersex girls. Intersex NGOs have called for so-called 'sex-normalising' surgeries on intersex children to be recognised as genital mutilation.
- Intersex people have the same rights as others to freedom from discrimination. There are very few countries in this region that have anti-discrimination laws that specifically prohibit discrimination against intersex people or that clearly state their rights protection under other prohibited grounds. This leaves intersex people vulnerable to discrimination.
- It is good practice for intersex infants to be registered as either female or male at birth with the understanding that, like all people, they may grow up to identify with a different sex or gender. However, in this region, intersex people who have been issued a male or a female birth certificate do not always enjoy the same legal rights as others.

- Some intersex people seek to amend their sex or gender details on official documents because those details were either inaccurate at birth and/or no longer reflect their sex or gender identity. Many face barriers trying to amend these details, which also undermines their right to recognition before the law. Some laws in this region only allow intersex people to change their sex details on official documents if they have had so-called 'sex-normalising' surgeries. This erases bodily diversity and undermines intersex people's human rights.
- Violations of intersex people's rights should be investigated and alleged perpetrators prosecuted. Intersex people should have access to effective remedies, including redress and compensation. They should be consulted in the development of laws and policies that impact on their rights.

## Chapter 5: International and regional developments in human rights law

- In all countries in all regions people experience human rights violations based on their sexual orientation, gender identity and sex characteristics.
- Although there is no specific reference to sexual orientation, gender identity or sex characteristics in international human rights instruments, there can no longer be any doubt that the provisions of international human rights law extend in full to all people, including lesbian, gay, bisexual, transgender and intersex people. This is the unanimous view of international human rights experts, expressed by the jurisprudence, general comments and concluding observations of human rights treaty monitoring bodies, the reports of the UN special procedures, resolutions of the Human Rights Council, decisions of regional human rights courts and resolutions of regional human rights commissions and mechanisms.
- The prohibition of discrimination on the basis of 'other status' in international human rights law is properly considered to include sexual orientation, gender identity and expression, and sex characteristics.
- Lesbian, gay, bisexual, transgender and intersex people are as entitled as anyone else to the full protection of their human rights under international and national laws. As with all human rights, every State has legal obligations to respect, protect and fulfil the human rights of lesbian, gay, bisexual, transgender and intersex people.
- There has been uneven but growing recognition of the rights of lesbian, gay, bisexual, transgender and intersex people within UN human rights mechanisms and these mechanisms have called, with increasing frequency and strength, for the promotion and protection of their rights.

## Chapter 6: The Yogyakarta Principles

- The *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (the Yogyakarta Principles) are the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities.
- The Yogyakarta Principles reflect existing international legal obligations under international human rights law as it was in 2006. They are not an aspirational statement of what the law should be but a legal statement of what the law then was.
- The Yogyakarta Principles refer specifically to both sexual orientation and gender identity. In fact, they represent one of the earliest statements recognising the separate human rights issues associated with gender identity. They do so, however, within the framework of universality, speaking about the rights of all people in relation to sexual orientation and gender identity, not the rights of particular groups of people.

- The Yogyakarta Principles refer specifically to human rights issues associated with sex characteristics on only two occasions. They do not deal with the full range of human rights issues affecting intersex people. However, within the framework of the universality of all human rights, they apply for the benefit of intersex people.
- The Yogyakarta Principles contain nine preambular paragraphs and 29 principles, as well as additional recommendations addressed to many human rights actors, including NHRIs.
- The Yogyakarta Principles were quickly accepted and cited by international human rights mechanisms, senior UN officials, regional human rights mechanisms and many States, NHRIs and NGOs. They have not yet been officially recognised in resolutions of UN political forums.
- Asia Pacific NHRIs and the APF have responded quickly to the recommendation in the Yogyakarta Principles addressed to them. Their activities are increasing in number and scope. The APF-UNDP Programme of Action and Support adopted in February 2015 provides the framework for activities over the coming years.

## Chapter 7: The APF's response to the Yogyakarta Principles

- The Yogyakarta Principles recommended that NHRIs promote respect for the Principles by State and non-State actors and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities.
- At the APF Yogyakarta Workshop in 2009, representatives of APF member institutions affirmed the universality of all human rights and declared that NHRI mandates extended to those who suffer human rights violations based on their actual or perceived sexual orientation or gender identity. They agreed on a set of actions to promote and protect the human rights of lesbian, gay, bisexual and transgender people. They initiated the first APF program of work on these human rights issues.
- The APF Advisory Council of Jurists reported in 2010 that sexual orientation and gender identity are among the grounds of discrimination proscribed by international human rights law. However, they found many national laws in the countries of APF member institutions violated the human rights of lesbian, gay, bisexual and transgender people. They set out a number of recommended actions that NHRIs should take, within their mandates, to address these violations.
- Many NHRIs in the Asia Pacific region have been very active on human rights issues in relation to sexual orientation and gender identity. They are now beginning to recognise and work on human rights issues in relation to intersex status. They are becoming even more active. The work they have undertaken provides good examples of positive experiences and lessons learnt that can increase their own effectiveness and that of other NHRIs in the region.
- The APF-UNDP Programme of Action and Support, developed and adopted at the Bangkok Workshop in 2015, provides a firm basis for both organisations and for individual NHRIs to develop this work further in coming years. It provides the basis of the APF work plan on human rights in relation to lesbian, gay, bisexual, transgender and intersex people for the 2015–20 period.

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## Chapter 8: What more national human rights institutions can do

- The Yogyakarta Principles urge NHRIs to “integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities”. They also assert the principle of universality of all human rights, so that all human rights apply to all persons of diverse sexual orientations, gender identities (including diverse gender expressions) and sex characteristics.
- The first step for NHRIs is to recognise that lesbian, gay, bisexual, transgender and intersex people are entitled to the full range of human rights and that they experience human rights violations and are at risk of further violations on the basis of sexual orientation, gender identity and sex characteristics.
- NHRIs can respond to the human rights experiences of lesbian, gay, bisexual, transgender and intersex people and ensure better promotion and protection of their human rights through activities relating to each of the key functions of NHRIs: advice, education and awareness raising, monitoring, complaint handling, advocacy, and cooperation and engagement, domestically and internationally.
- The national inquiry process can be a very effective mechanism by which NHRIs can address the systemic nature of human rights violations based on sexual orientation, gender identity and sex characteristics, and ensure better promotion and protection of the human right of lesbian, gay, bisexual, transgender and intersex people.



Photo by Diverse Voices and Action (DIVA) for Equality, Fiji.



Photo by Carla LaGata.



## Appendices



- Appendix 1: Human Rights Council Resolution 17/19**
- Appendix 2: Human Rights Council Resolution 27/32**
- Appendix 3: Joint NHRI statement to the Human Rights Council**
- Appendix 4: The Yogyakarta Principles**
- Appendix 5: Expert signatories to the Yogyakarta Principles**
- Appendix 6: APF-UNDP Programme of Action and Support**
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# Appendix 1:

## Human Rights Council Resolution 17/19

### Human rights, sexual orientation and gender identity

Introduced by South Africa and Brazil and co-sponsored by Albania, Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Honduras, Iceland, Ireland, Israel, Italy, Luxembourg, Montenegro, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland Timor-Leste, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay and Venezuela (Bolivarian Republic of)

*The Human Rights Council,*

*Recalling* the universality, interdependence, indivisibility and interrelatedness of human rights as enshrined in the Universal Declaration of Human Rights and consequently elaborated in other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other relevant core human rights instruments,

*Recalling also* that the Universal Declaration of Human Rights affirms that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

*Recalling further* General Assembly resolution 60/251 of 15 March 2006, in which the Assembly stated that the Human Rights Council should be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner,

*Expressing grave concern* at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity,

1. *Requests* the United Nations High Commissioner for Human Rights to commission a study, to be finalized by December 2011, documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity;
2. *Decides* to convene a panel discussion during the nineteenth session of the Human Rights Council, informed by the facts contained in the study commissioned by the High Commissioner and to have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity;
3. *Also decides* that the panel will also discuss the appropriate follow-up to the recommendations of the study commissioned by the High Commissioner;
4. *Further decides* to remain seized of this priority issue.

17 June 2011

Adopted by a recorded vote of 23 to 19, with 3 abstentions. The voting was as follows:

*In favour:*

Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay

*Against:*

Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda

*Abstaining:*

Burkina Faso, China, Zambia

## Appendix 2: Human Rights Council Resolution 27/32

### Human rights, sexual orientation and gender identity

Introduced by the representatives of Brazil, Chile, Colombia and Uruguay and co-sponsored by Albania, Argentina, Australia, Austria, Belgium, Bolivia (Plurinational State of), Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, the Netherlands, New Zealand, Nicaragua, Norway, Poland, Portugal, Romania, Serbia Slovakia, Slovenia, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America

*The Human Rights Council,*

*Recalling* the universality, interdependence, indivisibility and interrelatedness of human rights as enshrined in the Universal Declaration of Human Rights and consequently elaborated in other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other relevant core human rights instruments,

*Recalling also* that the Universal Declaration of Human Rights affirms that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

*Recalling further* that the Vienna Declaration and Program of Action affirms that all human rights are universal, indivisible and interdependent and interrelated, that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis, and that while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms,

*Recalling* General Assembly resolution 60/251 of 15 March 2006, in which the Assembly stated that the Human Rights Council should be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner,

*Recalling also* all relevant Human Rights Council and General Assembly resolutions on combating all forms of discrimination and violence exercised due to discrimination of any kind, particularly Council resolution 17/19 of 17 June 2011,

*Expressing grave concern* at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity,

*Welcoming* positive developments at the international, regional and national levels in the fight against violence and discrimination based on sexual orientation and gender identity,

*Welcoming also* the efforts of the Office of the United Nations High Commissioner for Human Rights in the fight against violence and discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

1. *Takes note with appreciation* of the report of the United Nations High Commissioner for Human Rights entitled “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (A/HRC/19/41) and of the panel discussion held at the nineteenth session of the Human Rights Council;
2. *Requests* the High Commissioner to update the report (A/HRC/19/41) with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards, and to present it to the Human Rights Council at its twenty-ninth session;
3. *Decides* to remain seized of this issue.

26 September 2014

Adopted by a recorded vote of 25 to 14, with 7 abstentions. The voting was as follows:

*In favour:*

Argentina, Austria, Brazil, Chile, Costa Rica, Cuba, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Romania, South Africa, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam

*Against:*

Algeria, Botswana, Côte d'Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait, Maldives, Morocco, Pakistan, Russian Federation, Saudi Arabia, United Arab Emirates

*Abstaining:*

Burkina Faso, China, Congo, India, Kazakhstan, Namibia, Sierra Leone

## Appendix 3: Joint NHRI statement to the Human Rights Council

### **On discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity**

10 June 2013

Dear Mr President,

This is a joint statement on behalf of the following A status National Human Rights Institutions (NHRI): Republic of Albania People's Advocate, Australian Human Rights Commission, Defensor del Pueblo de Bolivia, Human Rights Ombudsman of Bosnia and Herzegovina, Canadian Human Rights Commission, Instituto Nacional de Derechos Humanos de Chile, Ombudsman of the Republic of Croatia, The Danish Institute for Human Rights, Procuraduría para la Defensa de los Derechos Humanos de El Salvador, French National Consultative Commission for Human Rights, Office of Public Defender Georgia, German Institute for Human Rights, Great Britain Equality and Human Rights Commission, Greek National Commission for Human Rights, Irish Human Rights Commission, Luxembourg Human Rights Commission, The National Human Rights Commission of Mauritius, National Human Rights Commission of Mongolia, National Human Rights Commission of Nepal, New Zealand Human Rights Commission, Procuraduría para la Defensa de los Derechos Humanos de Nicaragua, Northern Ireland Human Rights Commission, Commission on Human Rights of the Philippines, Provedor de Justiça Portugal, Scottish Human Rights Commission, South African Human Rights Commission, El Defensor del Pueblo de España, National Human Rights Commission of Thailand, and Ukrainian Parliament Commissioner for Human Rights.

We, as NHRIs accredited under the Paris Principles,<sup>799</sup> are charged with the obligation to protect and promote human rights of all individuals without prejudice or discrimination.

We recall the previous joint NHRI statement on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, presented at the 19th session of the Human Rights Council in 2012.

Twenty years ago the international community unanimously adopted the Vienna Declaration and Programme of Action. The Vienna Declaration and Programme of Action reinforce the universality of human rights and reaffirm the principles of equality and non-discrimination. The Vienna Declaration and Programme of Action recognise the importance of national and regional particularities and various historical, cultural and religious backgrounds, while noting that 'it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

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<sup>799</sup> Principles relating to the Status of National Institutions (The Paris Principles), adopted by UN General Assembly, *National institutions for the promotion and protection of human rights*, 20 December 1993, A/RES/48/134.

We welcome the United Nations Secretary-General's report *National institutions for the promotion and protection of human rights*.<sup>800</sup> As NHRIs in a diversity of cultures and societies working in regions across the world, we express our concern at the systemic and continuing human rights violations on the basis of sexual orientation, gender identity and of intersex persons in all regions of the world including killings, rape, torture and other forms of cruel, inhumane and degrading treatment, medical abuses, criminalisation of homosexuality, denial of the recognition of relationships and recognition before the law, denial of the freedoms of expression and association, and of the right to the health.

We welcome the ongoing commitment of the Secretary General, the Human Rights Council, the High Commissioner for Human Rights, special procedures, treaty bodies, civil society and human rights defenders worldwide to address the issue of violence and discrimination based on sexual orientation and gender identity and against intersex persons.

We recognise that there is a need to give equitable focus to human rights violations on the basis of gender identity, intersex status and sexual orientation.

We commend the positive action taken by the Human Rights Council to highlight the violence, discrimination and human rights abuses faced by lesbian, gay, bisexual, transgender and intersex (LGBTI)<sup>801</sup> people around the world, by adopting the first UN resolution solely focused on the human rights of LGBTI people.<sup>802</sup> We welcome the report by the High Commissioner for Human Rights<sup>803</sup> and the panel discussion at the Human Rights Council<sup>804</sup> that followed. We further welcome the joint statements made to the Human Rights Council and the General Assembly in 2011, 2008 and 2006.<sup>805</sup>

We support the findings in the High Commissioner for Human Rights' report, and note that on the basis of the information presented within the report 'a pattern of human rights violations emerges that demands a response.' We welcome the acknowledgement in the report of the important role that NHRIs play in addressing violence and discrimination on the basis of sexual orientation and gender identity.

We reflect on the outcomes of the regional seminars held in Paris, Kathmandu and Brasilia, the information gathered through civil society events in Africa and the global dialogue in Oslo in 2013.<sup>806</sup> We welcome the constructive approach taken by States and civil society during these consultations, and hope that the dialogue will pave the way for continuing engagement at the national, regional and international level.

NHRIs play a crucial role in protecting and promoting the rights of LGBTI people. Functions and powers available to NHRIs include the ability to investigate complaints, review laws and policies, hold national inquiries and conduct public education. Given the important and unique role of NHRIs we call on States to ensure that NHRIs have the necessary resources to fulfil their mandates. We also encourage the Human Rights Council and the Office of the High Commissioner for Human Rights to work with NHRIs to strengthen their capacity to address issues affecting LGBTI persons and respond to violations.

800 Human Rights Council, *National institutions for the promotion and protection of human rights: Report of the Secretary-General*, 2 April 2013, A/HRC/23/27.

801 The terms lesbian, gay, bisexual, transgender and intersex are abbreviated to LGBTI. These terms are used to refer to same-sex behaviour, identities or relationships, diverse gender identities and sex characteristics.

802 Human Rights Council, *Human Rights, Sexual Orientation and Gender Identity*, Res 17/19, 17 June 2011, A/HRC/RES/17/19.

803 Human Rights Council, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*, 17 November 2011, A/HRC/19/41.

804 Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity. Geneva, 7 March 2012. Concept note and Summary of discussion available at: [www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx](http://www.ohchr.org/EN/Issues/Discrimination/Pages/PanelSexualOrientation.aspx).

805 *Joint statement on ending acts of violence and related human rights violations based on sexual orientation & gender identity* was delivered to the Human Rights Council on behalf of 85 countries in 2011. This follows previous statements including a 2008 statement by 67 countries at the General Assembly, and a 2006 statement by 54 countries at the Human Rights Council.

806 International Conference on Human Rights Sexual Orientation and Gender Identity, 15-16 April 2013, Oslo, Norway. Outcomes of the International Conference and Regional Seminars available at: [www.hrsogi.org/midleertidighome.cfm](http://www.hrsogi.org/midleertidighome.cfm).

We affirm the High Commissioner's finding that a more comprehensive analysis of the human rights challenges facing LGBTI persons requires a more systematic study and regular reporting. We call on the Human Rights Council to encourage States to improve data collection concerning sexual orientation, gender identity and intersex to better inform the extent to which human rights are being realised by LGBTI persons. This data should be collected in accordance with human rights principles, and in consultation with LGBTI persons.

We call on the Human Rights Council to encourage States to accept recommendations and implement commitments made through the Universal Periodic Review process related to sexual orientation and gender identity.

We support the work of treaty bodies and special mechanisms and we reiterate our call for the continued mainstreaming of protection for individuals discriminated against because of their sexual orientation, gender identity or because they are intersex, through existing international and regional human rights systems.

We call on the Human Rights Council to establish an appropriate mechanism to study, document and report to the Human Rights Council concerning human rights violations, barriers and challenges on the basis of sexual orientation, gender identity and for intersex persons. This mechanism should operate in consultation with LGBTI persons to promote dialogue, identify best practice and provide guidance to States and other UN bodies on human rights.

Whilst a resolution at this session would have been welcomed the decision to host two high level meetings is recognised as an important step towards sustained engagement on these issues. As NHRIs we look forward to participating in those discussions and to the report back of those meetings to the Human Rights Council. We further encourage all Member States to engage in open dialogue and work together constructively with NHRIs and civil society to ensure that a resolution is presented to the Human Rights Council at an upcoming session.

As NHRIs we renew our commitment to promoting and protecting human rights for all, including the rights of LGBTI persons. We will continue to work with States, civil society, the Human Rights Council and other international mechanisms to guarantee the ongoing visibility, protection and promotion of these rights and to ensure human rights violations against LGBTI persons are effectively addressed.

## Appendix 4: The Yogyakarta Principles<sup>807</sup>

We, the International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity:

### Preamble

RECALLING that all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

DISTURBED that violence, harassment, discrimination, exclusion, stigmatisation and prejudice are directed against persons in all regions of the world because of their sexual orientation or gender identity, that these experiences are compounded by discrimination on grounds including gender, race, age, religion, disability, health and economic status, and that such violence, harassment, discrimination, exclusion, stigmatisation and prejudice undermine the integrity and dignity of those subjected to these abuses, may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility;

AWARE that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or intersex or belong to social groups identified in particular societies by sexual orientation or gender identity;

UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;

OBSERVING that international human rights law affirms that all persons, regardless of sexual orientation or gender identity, are entitled to the full enjoyment of all human rights, that the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations and gender identities, and that in all actions concerning children the best interests of the child shall be a primary consideration and a child who is capable of forming personal views has the right to express those views freely, such views being given due weight in accordance with the age and maturity of the child;

807 The Yogyakarta Principles are available in all six UN languages (Arabic, Chinese, English, French, Spanish and Russian) at [www.yogyakartaprinciples.org/](http://www.yogyakartaprinciples.org/). Unofficial translations are available in other languages, including Catalan, Dutch, Euskara (Basque), Filipino, German, Hungarian, Indonesian, Lithuanian, Nepali, Persian (Farsi), Portuguese, Sinhala, Slovak and Tamil. These translations are all accessible at [www.ypinaction.org/content/Principles\\_Unofficial\\_Translatio](http://www.ypinaction.org/content/Principles_Unofficial_Translatio). There may be other unofficial translations too.

NOTING that international human rights law imposes an absolute prohibition of discrimination in regard to the full enjoyment of all human rights, civil, cultural, economic, political and social, that respect for sexual rights, sexual orientation and gender identity is integral to the realisation of equality between men and women and that States must take measures to seek to eliminate prejudices and customs based on the idea of the inferiority or the superiority of one sex or on stereotyped roles for men and women, and noting further that the international community has recognised the right of persons to decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free from coercion, discrimination, and violence;

RECOGNISING that there is significant value in articulating in a systematic manner international human rights law as applicable to the lives and experiences of persons of diverse sexual orientations and gender identities;

ACKNOWLEDGING that this articulation must rely on the current state of international human rights law and will require revision on a regular basis in order to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries;

### Following an experts' meeting held in Yogyakarta, Indonesia, from 6 to 9 November 2006, hereby adopt these principles:

#### **Principle 1: The right to the universal enjoyment of human rights**

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

- a) Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;
- b) Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;
- c) Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
- d) Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

#### **Principle 2: The rights to equality and non-discrimination**

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

- a) Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;
- b) Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- c) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;
- d) Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;
- e) In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;
- f) Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

### **Principle 3: The right to recognition before the law**

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

- a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;
- b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;
- c) Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity;
- d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;
- e) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;
- f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

#### **Principle 4: The right to life**

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

- a) Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;
- b) Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;
- c) Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

#### **Principle 5: The right to security of the person**

Everyone, regardless of sexual orientation or gender identity, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.

States shall:

- a) Take all necessary policing and other measures to prevent and provide protection from all forms of violence and harassment related to sexual orientation and gender identity;
- b) Take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation or gender identity of any person or group of persons, in all spheres of life, including the family;
- c) Take all necessary legislative, administrative and other measures to ensure that the sexual orientation or gender identity of the victim may not be advanced to justify, excuse or mitigate such violence;
- d) Ensure that perpetration of such violence is vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished, and that victims are provided with appropriate remedies and redress, including compensation;
- e) Undertake campaigns of awareness-raising, directed to the general public as well as to actual and potential perpetrators of violence, in order to combat the prejudices that underlie violence related to sexual orientation and gender identity.

#### **Principle 6: The right to privacy**

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;
- b) Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- c) Ensure that criminal and other legal provisions of general application are not applied *de facto* to criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- d) Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;
- e) Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;
- f) Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

#### **Principle 7: The right to freedom from arbitrary deprivation of liberty**

No one shall be subjected to arbitrary arrest or detention. Arrest or detention on the basis of sexual orientation or gender identity, whether pursuant to a court order or otherwise, is arbitrary. All persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention, whether or not charged with any offence.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for arrest or detention, including the elimination of vaguely worded criminal law provisions that invite discriminatory application or otherwise provide scope for arrests based on prejudice;
- b) Take all necessary legislative, administrative and other measures to ensure that all persons under arrest, regardless of their sexual orientation or gender identity, are entitled, on the basis of equality, to be informed of the reasons for arrest and the nature of any charges against them, and whether charged or not, to be brought promptly before a judicial officer and to bring court proceedings to determine the lawfulness of detention;
- c) Undertake programmes of training and awareness-raising to educate police and other law enforcement personnel regarding the arbitrariness of arrest and detention based on a person's sexual orientation or gender identity;
- d) Maintain accurate and up to date records of all arrests and detentions, indicating the date, location and reason for detention, and ensure independent oversight of all places of detention by bodies that are adequately mandated and equipped to identify arrests and detentions that may be motivated by the sexual orientation or gender identity of a person.

### **Principle 8: The right to a fair trial**

Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process, in civil and criminal proceedings and all other judicial and administrative proceedings which determine rights and obligations, and to ensure that no one's credibility or character as a party, witness, advocate or decision-maker is impugned by reason of their sexual orientation or gender identity;
- b) Take all necessary and reasonable steps to protect persons from criminal prosecutions or civil proceedings that are motivated wholly or in part by prejudice regarding sexual orientation or gender identity;
- c) Undertake programmes of training and awareness-raising for judges, court personnel, prosecutors, lawyers and others regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

### **Principle 9: The right to treatment with humanity while in detention**

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

- a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;
- b) Provide adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired;
- c) Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;
- d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;
- e) Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner;
- f) Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;
- g) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

**Principle 10: The right to freedom from torture and cruel, inhuman or degrading treatment or punishment**

Everyone has the right to be free from torture and from cruel, inhuman or degrading treatment or punishment, including for reasons relating to sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to prevent and provide protection from torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to the sexual orientation or gender identity of the victim, as well as the incitement of such acts;
- b) Take all reasonable steps to identify victims of torture and cruel, inhuman or degrading treatment or punishment, perpetrated for reasons relating to sexual orientation or gender identity, and offer appropriate remedies including redress and reparation and, where appropriate, medical and psychological support;
- c) Undertake programmes of training and awareness-raising for police, prison personnel and all other officials in the public and private sector who are in a position to perpetrate or to prevent such acts.

**Principle 11: The right to protection from all forms of exploitation, sale and trafficking of human beings**

Everyone is entitled to protection from trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity. Measures designed to prevent trafficking shall address the factors that increase vulnerability, including various forms of inequality and discrimination on the grounds of actual or perceived sexual orientation or gender identity, or the expression of these or other identities. Such measures must not be inconsistent with the human rights of persons at risk of being trafficked.

States shall:

- a) Take all necessary legislative, administrative and other measures of a preventive and protective nature regarding the trafficking, sale and all forms of exploitation of human beings, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity;
- b) Ensure that any such legislation or measures do not criminalise the behaviour of, stigmatise, or in any other way, exacerbate the disadvantage of those vulnerable to such practices;
- c) Establish legal, educational and social measures, services and programmes to address factors that increase vulnerability to trafficking, sale and all forms of exploitation, including but not limited to sexual exploitation, on the grounds of actual or perceived sexual orientation or gender identity, including such factors as social exclusion, discrimination, rejection by families or cultural communities, lack of financial independence, homelessness, discriminatory social attitudes leading to low self-esteem, and lack of protection from discrimination in access to housing accommodation, employment and social services.

**Principle 12: The right to work**

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;
- b) Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

**Principle 13: The right to social security and to other social protection measures**

Everyone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death;
- b) Ensure that children are not subject to any form of discriminatory treatment within the social security system or in the provision of social or welfare benefits on the basis of their sexual orientation or gender identity, or that of any member of their family;
- c) Take all necessary legislative, administrative and other measures to ensure access to poverty reduction strategies and programmes, without discrimination on the basis of sexual orientation or gender identity.

**Principle 14: The right to an adequate standard of living**

Everyone has the right to an adequate standard of living, including adequate food, safe drinking water, adequate sanitation and clothing, and to the continuous improvement of living conditions, without discrimination on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to adequate food, safe drinking water, adequate sanitation and clothing.

**Principle 15: The right to adequate housing**

Everyone has the right to adequate housing, including protection from eviction, without discrimination on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without discrimination on the basis of sexual orientation, gender identity or marital or family status;

- b) Take all necessary legislative, administrative and other measures to prohibit the execution of evictions that are not in conformity with their international human rights obligations; and ensure that adequate and effective legal or other appropriate remedies are available to any person claiming that a right to protection against forced evictions has been violated or is under threat of violation, including the right to resettlement, which includes the right to alternative land of better or equal quality and to adequate housing, without discrimination on the basis of sexual orientation, gender identity or marital or family status;
- c) Ensure equal rights to land and home ownership and inheritance without discrimination on the basis of sexual orientation or gender identity;
- d) Establish social programmes, including support programmes, to address factors relating to sexual orientation and gender identity that increase vulnerability to homelessness, especially for children and young people, including social exclusion, domestic and other forms of violence, discrimination, lack of financial independence, and rejection by families or cultural communities, as well as to promote schemes of neighbourhood support and security;
- e) Provide training and awareness-raising programmes to ensure that all relevant agencies are aware of and sensitive to the needs of those facing homelessness or social disadvantage as a result of sexual orientation or gender identity.

#### **Principle 16: The right to education**

Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity;
- b) Ensure that education is directed to the development of each student's personality, talents, and mental and physical abilities to their fullest potential, and responds to the needs of students of all sexual orientations and gender identities;
- c) Ensure that education is directed to the development of respect for human rights, and of respect for each child's parents and family members, cultural identity, language and values, in a spirit of understanding, peace, tolerance and equality, taking into account and respecting diverse sexual orientations and gender identities;
- d) Ensure that education methods, curricula and resources serve to enhance understanding of and respect for, *inter alia*, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds;
- e) Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment;
- f) Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection, and that their best interests are identified and respected in a participatory manner;
- g) Take all necessary legislative, administrative and other measures to ensure that discipline in educational institutions is administered in a manner consistent with human dignity, without discrimination or penalty on the basis of a student's sexual orientation or gender identity, or the expression thereof;

- h) Ensure that everyone has access to opportunities and resources for lifelong learning without discrimination on the basis of sexual orientation or gender identity, including adults who have already suffered such forms of discrimination in the educational system.

**Principle 17: The right to the highest attainable standard of health**

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity;
- b) Take all necessary legislative, administrative and other measures to ensure that all persons have access to healthcare facilities, goods and services, including in relation to sexual and reproductive health, and to their own medical records, without discrimination on the basis of sexual orientation or gender identity;
- c) Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality;
- d) Develop and implement programmes to address discrimination, prejudice and other social factors which undermine the health of persons because of their sexual orientation or gender identity;
- e) Ensure that all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity;
- f) Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination;
- g) Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support;
- h) Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin;
- i) Adopt the policies, and programmes of education and training, necessary to enable persons working in the healthcare sector to deliver the highest attainable standard of healthcare to all persons, with full respect for each person's sexual orientation and gender identity.

**Principle 18: Protection from medical abuses**

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;
- b) Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;
- c) Establish child protection mechanisms whereby no child is at risk of, or subjected to, medical abuse;
- d) Ensure protection of persons of diverse sexual orientations and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;
- e) Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;
- f) Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

### **Principle 19: The right to freedom of opinion and expression**

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;
- b) Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;
- c) Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;
- d) Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

- e) Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;
- f) Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

**Principle 20: The right to freedom of peaceful assembly and association**

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity;
- b) Ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities;
- c) Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights;
- d) Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection;
- e) Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members.

**Principle 21: The right to freedom of thought, conscience and religion**

Everyone has the right to freedom of thought, conscience and religion, regardless of sexual orientation or gender identity. These rights may not be invoked by the State to justify laws, policies or practices which deny equal protection of the law, or discriminate, on the basis of sexual orientation or gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or the imposition of beliefs;
- b) Ensure that the expression, practice and promotion of different opinions, convictions and beliefs with regard to issues of sexual orientation or gender identity is not undertaken in a manner incompatible with human rights.

**Principle 22: The right to freedom of movement**

Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, egress or return to or from any State, including that person's own State.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity.

**Principle 23: The right to seek asylum**

Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall:

- a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;
- c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.

**Principle 24: The right to found a family**

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
- b) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;
- c) Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;

- d) In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;
- e) Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
- f) Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
- g) Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

#### **Principle 25: The right to participate in public life**

Every citizen has the right to take part in the conduct of public affairs, including the right to stand for elected office, to participate in the formulation of policies affecting their welfare, and to have equal access to all levels of public service and employment in public functions, including serving in the police and military, without discrimination on the basis of sexual orientation or gender identity.

States should:

- a) Review, amend and enact legislation to ensure the full enjoyment of the right to participate in public and political life and affairs, embracing all levels of government service and employment in public functions, including serving in the police and military, without discrimination on the basis of, and with full respect for, each person's sexual orientation and gender identity;
- b) Take all appropriate measures to eliminate stereotypes and prejudices regarding sexual orientation and gender identity that prevent or restrict participation in public life;
- c) Ensure the right of each person to participate in the formulation of policies affecting their welfare, without discrimination on the basis of, and with full respect for, their sexual orientation and gender identity.

#### **Principle 26: The right to participate in cultural life**

Everyone has the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities;
- b) Foster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for the human rights referred to in these Principles.

**Principle 27: The right to promote human rights**

Everyone has the right, individually and in association with others, to promote the protection and realisation of human rights at the national and international levels, without discrimination on the basis of sexual orientation or gender identity. This includes activities directed towards the promotion and protection of the rights of persons of diverse sexual orientations and gender identities, as well as the right to develop and discuss new human rights norms and to advocate their acceptance.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure a favourable environment for activities directed towards the promotion, protection and realisation of human rights, including rights relevant to sexual orientation and gender identity;
- b) Take all appropriate measures to combat actions or campaigns targeting human rights defenders working on issues of sexual orientation and gender identity, as well as those targeting human rights defenders of diverse sexual orientations and gender identities;
- c) Ensure that human rights defenders, regardless of their sexual orientation or gender identity, and regardless of the human rights issues they advocate, enjoy non-discriminatory access to, participation in, and communication with, national and international human rights organisations and bodies;
- d) Ensure the protection of human rights defenders, working on issues of sexual orientation and gender identity, against any violence, threat, retaliation, *de facto* or *de jure* discrimination, pressure, or any other arbitrary action perpetrated by the State, or by non-State actors, in response to their human rights activities. The same protection should be ensured, to human rights defenders working on any issue, against any such treatment based on their sexual orientation or gender identity;
- e) Support the recognition and accreditation of organisations that promote and protect the human rights of persons of diverse sexual orientations and gender identities at the national and international levels.

**Principle 28: The right to effective remedies and redress**

Every victim of a human rights violation, including of a violation based on sexual orientation or gender identity, has the right to effective, adequate and appropriate remedies. Measures taken for the purpose of providing reparation to, or securing adequate advancement of, persons of diverse sexual orientations and gender identities are integral to the right to effective remedies and redress.

States shall:

- a) Establish the necessary legal procedures, including through the revision of legislation and policies, to ensure that victims of human rights violations on the basis of sexual orientation or gender identity have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-repetition, and/or any other means as appropriate;
- b) Ensure that remedies are enforced and implemented in a timely manner;
- c) Ensure that effective institutions and standards for the provision of remedies and redress are established, and that all personnel are trained in issues of human rights violations based on sexual orientation and gender identity;
- d) Ensure that all persons have access to all necessary information about the processes for seeking remedies and redress;
- e) Ensure that financial aid is provided to those who are unable to afford the cost of securing redress, and that any other obstacles to securing such redress, financial or otherwise, are removed;

- f) Ensure training and awareness-raising programmes, including measures aimed at teachers and students at all levels of public education, at professional bodies, and at potential violators of human rights, to promote respect for and adherence to international human rights standards in accordance with these Principles, as well as to counter discriminatory attitudes based on sexual orientation or gender identity.

### **Principle 29: Accountability**

Everyone whose human rights, including rights addressed in these Principles, are violated is entitled to have those directly or indirectly responsible for the violation, whether they are government officials or not, held accountable for their actions in a manner that is proportionate to the seriousness of the violation. There should be no impunity for perpetrators of human rights violations related to sexual orientation or gender identity.

States shall:

- a) Establish appropriate, accessible and effective criminal, civil, administrative and other procedures, as well as monitoring mechanisms, to ensure the accountability of perpetrators for human rights violations related to sexual orientation or gender identity;
- b) Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity of the victim, including such crimes described in these Principles, are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished;
- c) Establish independent and effective institutions and procedures to monitor the formulation and enforcement of laws and policies to ensure the elimination of discrimination on the basis of sexual orientation or gender identity;
- d) Remove any obstacles preventing persons responsible for human rights violations based on sexual orientation or gender identity from being held accountable.

### **Additional recommendations**

All members of society and of the international community have responsibilities regarding the realisation of human rights. We therefore recommend that:

- A. The United Nations High Commissioner for Human Rights endorse these Principles, promote their implementation worldwide, and integrate them into the work of the Office of the High Commissioner for Human Rights, including at the field-level;
- B. The United Nations Human Rights Council endorse these Principles and give substantive consideration to human rights violations based on sexual orientation or gender identity, with a view to promoting State compliance with these Principles;
- C. The United Nations Human Rights Special Procedures pay due attention to human rights violations based on sexual orientation or gender identity, and integrate these Principles into the implementation of their respective mandates;
- D. The United Nations Economic and Social Council recognise and accredit non-governmental organisations whose aim is to promote and protect the human rights of persons of diverse sexual orientations and gender identities, in accordance with its Resolution 1996/31;
- E. The United Nations Human Rights Treaty Bodies vigorously integrate these Principles into the implementation of their respective mandates, including their case law and the examination of State reports, and, where appropriate, adopt General Comments or other interpretive texts on the application of human rights law to persons of diverse sexual orientations and gender identities;

- F. The World Health Organization and UNAIDS develop guidelines on the provision of appropriate health services and care, responding to the health needs of persons related to their sexual orientation or gender identity, with full respect for their human rights and dignity;
- G. The UN High Commissioner for Refugees integrate these Principles in efforts to protect persons who experience, or have a well-founded fear of, persecution on the basis of sexual orientation or gender identity, and ensure that no person is discriminated against on the basis of sexual orientation or gender identity in relation to the receipt of humanitarian assistance or other services, or the determination of refugee status;
- H. Regional and sub-regional inter-governmental organisations with a commitment to human rights, as well as regional human rights treaty bodies, ensure that the promotion of these Principles is integral to the implementation of the mandates of their various human rights mechanisms, procedures and other arrangements and initiatives;
- I. Regional human rights courts vigorously integrate those Principles that are relevant to the human rights treaties they interpret into their developing case law on sexual orientation and gender identity;
- J. Non-governmental organisations working on human rights at the national, regional and international levels promote respect for these Principles within the framework of their specific mandates;
- K. Humanitarian organisations incorporate these Principles into any humanitarian or relief operations, and refrain from discriminating against persons on the basis of sexual orientation or gender identity in the provision of aid and other services;
- L. National human rights institutions promote respect for these Principles by State and non-State actors, and integrate into their work the promotion and protection of the human rights of persons of diverse sexual orientations or gender identities;
- M. Professional organisations, including those in the medical, criminal or civil justice, and educational sectors, review their practices and guidelines to ensure that they vigorously promote the implementation of these Principles;
- N. Commercial organisations acknowledge and act upon the important role they have in both ensuring respect for these Principles with regard to their own workforces and in promoting these Principles nationally and internationally;
- O. The mass media avoid the use of stereotypes in relation to sexual orientation and gender identity, and promote tolerance and the acceptance of diversity of human sexual orientation and gender identity, and raise awareness around these issues;
- P. Governmental and private funders provide financial assistance, to non-governmental and other organisations, for the promotion and protection of the human rights of persons of diverse sexual orientations and gender identities.

These Principles and Recommendations reflect the application of international human rights law to the lives and experiences of persons of diverse sexual orientations and gender identities, and nothing herein should be interpreted as restricting or in any way limiting the rights and freedoms of such persons as recognised in international, regional or national law or standards.

## Appendix 5: Expert signatories to the Yogyakarta Principles

Philip Alston (Australia), UN Special Rapporteur on extrajudicial, summary and arbitrary executions and Professor of Law, New York University School of Law, USA

Maxim Anmeghichean (Moldova), European Region of the International Lesbian and Gay Association

Mauro Cabral (Argentina), Researcher Universidad Nacional de Córdoba, Argentina, International Gay and Lesbian Human Rights Commission

Edwin Cameron (South Africa), Justice, Supreme Court of Appeal, Bloemfontein, South Africa

Sonia Onufer Corrêa (Brazil), Research Associate at the Brazilian Interdisciplinary AIDS Association (ABIA) and co-chair of Sexuality Policy Watch (Co-Chair of the experts' meeting)

Yakin Ertürk (Turkey), UN Special Rapporteur on Violence against Women, Professor, Department of Sociology, Middle East Technical University, Ankara, Turkey

Elizabeth Evatt (Australia), Former member and chair of the UN Committee on the Elimination of Discrimination Against Women, former member of the UN Human Rights Committee and Commissioner of the International Commission of Jurists

Paul Hunt (New Zealand), UN Special Rapporteur on the right to the highest attainable standard of health and Professor, Department of Law, University of Essex, United Kingdom

Asma Jahangir (Pakistan), Chairperson, Human Rights Commission of Pakistan

Maina Kiai (Kenya), Chairperson, Kenya National Commission on Human Rights

Miloon Kothari (India), UN Special Rapporteur on the right to adequate housing

Judith Mesquita (United Kingdom), Senior Research Officer, Human Rights Centre, University of Essex, United Kingdom

Alice M. Miller (United States of America), Assistant Professor, School of Public Health, Co-Director, Human Rights Program, Columbia University, USA

Sanji Mmasenono Monageng (Botswana), Judge of the High Court (The Republic of the Gambia), Commissioner of the African Commission on Human and Peoples' Rights, Chairperson of the Follow Up Committee on the implementation of the Robben Island Guidelines on prohibition and prevention of Torture and other Cruel, Inhuman or Degrading Treatment (African Commission on Human and Peoples' Rights)

Vitit Muntarbhorn (Thailand), UN Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea and Professor of Law at Chulalongkorn University, Thailand (Co-Chair of the experts' meeting)

Lawrence Mute (Kenya), Commissioner with the Kenya National Commission on Human Rights

Manfred Nowak (Austria), UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; member of the International Commission of Jurists, Professor of Human Rights at Vienna University, Austria and Director of the Ludwig Boltzmann Institute of Human Rights

Ana Elena Obando Mendoza (Costa Rica), feminist attorney, women's human rights activist, and international consultant

Michael O'Flaherty (Ireland), Member of the UN Human Rights Committee and Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre at the University of Nottingham, United Kingdom (Rapporteur for development of the Yogyakarta Principles)

Sunil Pant (Nepal), President of the Blue Diamond Society, Nepal

Dimitrina Petrova (Bulgaria), Executive Director, The Equal Rights Trust

Rudi Mohammed Rizki (Indonesia), UN Special Rapporteur on international solidarity and senior Lecturer and Vice Dean for Academic Affairs of the Faculty of Law at the University of Padjadjaran, Indonesia

Mary Robinson (Ireland), Founder of Realizing Rights: The Ethical Globalization Initiative and former President of Ireland and former United Nations High Commissioner for Human Rights

Nevena Vuckovic Sahovic (Serbia), Member of the UN Committee on the Rights of the Child and President of the Child Rights Centre, Belgrade, Serbia

Martin Scheinin (Finland), UN Special Rapporteur on human rights and counter-terrorism, Professor of Constitutional and International Law and Director of the Institute for Human Rights, Åbo Akademi University, Finland

Wan Yanhai (China), Founder of the AIZHI Action Project and director of Beijing AIZHIXING Institute of Health Education

Stephen Whittle (United Kingdom), Professor in Equalities Law at Manchester Metropolitan University, United Kingdom

Roman Wieruszewski (Poland), Member of the UN Human Rights Committee and head of Poznan Centre for Human Rights, Poland

Robert Wintemute (Canada and United Kingdom), Professor of Human Rights Law, School of Law, King's College London, United Kingdom

## Appendix 6: APF-UNDP Programme of Action and Support

On 24 and 25 February 2015, the United Nations Development Programme (UNDP) and the Asia Pacific Forum of National Human Rights Institutions (APF) organized and co-sponsored a Workshop on the Role of National Human Rights Institutions (NHRIs) in Promoting and Protecting the Rights, including Health, of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People in Asia and the Pacific. The workshop was convened with support from the 'Being LGBT in Asia' programme – funded by UNDP, USAID, the Embassy of Sweden in Bangkok and the Multi-Country South Asia HIV Programme funded by the Global Fund to Fight AIDS, Tuberculosis and Malaria. The workshop was organized in cooperation with the Asia Pacific Coalition on Male Sexual Health (APCOM), and held at the United Nations Convention Centre in Bangkok, Thailand.

The workshop included:

- Representatives of APF members including the NHRIs of Afghanistan, Australia, Bangladesh, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Myanmar, Nepal, the Philippines, the Republic of Korea, Samoa, Sri Lanka, Thailand and Timor-Leste;
- Representatives of UNDP and UNAIDS
- Representatives of civil society including APCOM, ASEAN SOGIE Caucus (ASC), TLF Share Collective, the International Gay and Lesbian Human Rights Commission (IGLHRC now Outright Action International), Transaction and South Asian Association for Regional Cooperation in Law (SAARCLAW)
- Representatives of Komnas Perempuan, Indonesia
- Representatives of governments including the United States of America and Sweden
- Representatives of regional bodies including the ASEAN Intergovernmental Commission on Human Rights
- Expert individuals; and
- Representatives of the APF secretariat.

The workshop was facilitated by two Co-Chairpersons:

- Professor Vitit Muntarbhorn, International Human Rights Expert and Professor of Law, Chulalongkorn University, Thailand
- Adjunct Professor Chris Sidoti, International Human Rights Expert, Australia.

The objectives of the workshop were:

1. To discuss the engagement of NHRIs in the region in the promotion and protection of the human rights of people of diverse sexual orientation and gender identity in light of the Yogyakarta Principles and the progress achieved in implementing the recommendations of the APF's 2009 Yogyakarta Principles Meeting and the Advisory Council of Jurists Report of December 2010, as well as recommendations from the Regional Report on the Capacity of National Human Rights Institutions to Address Human Rights in Relation to Sexual Orientation, Gender Identity (SOGI) and HIV.

2. In the light of that review, to agree on priorities for strengthened engagement by NHRIs on human rights and health issues in relation to SOGI in the period 2015–2017.
3. To identify needs for capacity-building, training, regional exchanges of experiences and other support that may be included in forthcoming regional development programming, and to make recommendations to UN bodies and other development partners accordingly.

The following actions were recommended for careful consideration by NHRIs, recognizing that NHRIs operate in varying cultural, political, social and religious contexts, and that the implementation of recommendations in each country will reflect domestic considerations. UNDP and APF will carefully consider the recommendations directed to them in accordance with their organizational strategic plans and financial resources.

### Capacity-building

1. Build the capacity of NHRIs (members and staff) in central and regional offices to provide an accessible and safe space for people of diverse SOGI, where their rights are protected and promoted.
2. Establish focal points within NHRIs for SOGI and establish clear work plans for them.
3. Build relationships with civil society organizations (CSOs) and networks in order to inform the work of the NHRI and to ensure effective communication outreach to communities of diverse SOGI.
4. Build relationships with diplomatic partners and other allies to strengthen capacity to engage on sensitive issues.
5. Ensure visibility and explicit inclusion of SOGI in internal strategic planning processes.

### Research

6. Engage in research on SOGI with community organizations, CSOs/NGOs, local authorities, and University Research Centres.
7. Document human rights violations and discrimination based on SOGI and use the results to empower communities of diverse SOGI.
8. Review domestic legislation (central and local levels) for compatibility with international standards.
9. Mainstream SOGI issues into human rights research agendas.
10. Share information amongst NHRIs about best practices in other jurisdictions.

### Education, promotion and dialogue

11. Provide a platform for persons of diverse SOGI to engage in dialogue with all relevant groups including parliamentarians, the judiciary, the security/law enforcement sector, medical practitioners and community and religious leaders.
12. Promote dialogue among community and religious leaders on the relationship between faith, religion, customs and tradition and SOGI.
13. Promote greater understanding between people of diverse SOGI, their families and the wider community.
14. Engage in partnerships with CSOs to provide human rights education and information about remedies for human rights violations to people of diverse SOGI, including the role of NHRIs and complaint mechanisms.

15. Build the capacity of law enforcement officers, government service providers, members of the judiciary, and religious leaders to interact appropriately with persons of diverse SOGI.
16. Mainstream SOGI issues in all human rights education conducted by NHRIs, especially of youth.
17. Develop training manuals and conduct awareness-raising on SOGI issues for schools and universities.
18. Engage with and educate the media on SOGI issues and work with them to raise awareness about the role of NHRIs and the availability of complaint mechanisms.
19. Reach out to parental/family associations to encourage understanding of SOGI issues and build support systems to access parents/families accordingly.

### Monitoring

20. Ensure that persons of diverse SOGI are included in NHRI activities, for example, in projects on trafficking, access to justice, health, housing, education and poverty reduction.
21. In partnership with SOGI communities and NGOs, document, report on and respond to issues of discrimination and human rights violations.
22. Conduct periodic monitoring in detention centres, hospitals and schools.
23. Develop guidelines on best practices for LGBTI in detention facilities based on South–South exchanges.
24. Provide disaggregated data on violence for SOGI issues based on perpetrators, victims and impact of violence.

### Advocacy

25. In partnership with SOGI communities, lead advocacy on the reform/repeal of national laws which violate human rights standards and create barriers for SOGI communities.
26. Advocate for domestic legislation incorporating international human rights obligations and eliminating discrimination based on SOGI.
27. Use alternative entry points (such as the CEDAW framework, youth, employment, health and HIV) to advocate for SOGI issues.
28. Engage as far as possible with regional/sub-regional human rights mechanisms, using alternative entry points to address SOGI issues where appropriate.
29. Form sub-regional networks of NHRIs to address SOGI issues.
30. Advocate for the application of the UN Declaration on Human Rights Defenders in relation to SOGI.
31. Advocate for change in the attitudes and behaviours of policymakers, law enforcement officials and society towards people of diverse SOGI.
32. Advocate for visibility and explicit inclusion of SOGI in national action plans.

## APF

33. Engage with regional and sub-regional SOGI CSOs to seek their contributions to
  - (i) an APF manual on the role of NHRIs in promoting and protecting the rights of LGBTI and
  - (ii) further develop a pilot blended learning programme (comprising of online and face-to-face adult learning) for APF members on the role of NHRIs in promoting and protecting the rights of people of diverse SOGI. This will be undertaken in the next APF strategic cycle of 2015–2020.
34. Organize meetings for South–South sharing of best practices, lessons learned and research by NHRIs in promoting and protecting the human rights of people of diverse SOGI.
35. Continue to cooperate with UN and other stakeholders to promote the role of NHRIs in promoting and protecting the human rights of people of diverse SOGI.
36. Distribute the workshop’s Programme of Action and Support to the APF membership and post it to the APF website ([www.asiapacificforum.net](http://www.asiapacificforum.net)).

## UNDP

37. Provide technical support and financial support, through ‘Being LGBT in Asia’ and through other related programmes, for implementation of the above actions.

NHRIs are requested to, where applicable, report annually to the APF on the status and implementation of the above actions including where relevant the challenges and achievements in that implementation. The APF will include a consolidated report on implementation of the Programme of Action and Support through its annual reporting.

# Appendix 7: Members of the reference group for the preparation of this manual

## Individuals

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### **Indian National Human Rights Commission**

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