



## The Situation of Trans and Intersex Children in Chile

Submitted to the United Nations Committee on the Rights of the Child on the Occasion of its Pre-sessional Working Group Meeting to Consider Chile's Joint Fourth and Fifth Periodic Report



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January 2015

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## Introduction

The Convention on the Rights of the Child (the Convention) protects the rights of all children under the age of 18, “without discrimination of any kind.”<sup>1</sup> It is well-established international human rights law that a general prohibition of discrimination, such as the one contained in the Convention, includes a prohibition against discrimination on the grounds of sexual orientation, as well as, increasingly, for gender identity.<sup>2</sup>

For this reason, courts and other adjudicating bodies have been particularly careful in examining the motives for distinctions based on sexual orientation. The Human Rights Committee, for example, has been adamant that distinctions made between those in different-sex and those in same-sex couples must be “reasonable and objective.”<sup>3</sup>

The same logic has increasingly been applied to transgender persons and other whose gender identity does not match that which they were assigned at birth. In early cases involving gender identity, for example, the European Court on Human Rights recognized some discretion for states to decide on regulations related to gender identity, though it also indicated “its consciousness of the serious problems facing transsexuals.”<sup>4</sup> By 2002, the European Court noted that the state no longer had any

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<sup>1</sup> Convention on the Rights of the Child, article 2(1).

<sup>2</sup> See, for example, Human Rights Committee, *Toonen v. Australia*, Views, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) ¶ 8.7; Human Rights Committee, *Young v. Australia*, Views, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/2000 (2003) ¶ 10.4; Human Rights Committee, 105th sess., *Concluding Observations: Armenia*, U.N. Doc. CCPR/C/ARM/CO/2 (advance version) (2012) ¶ 10; Human Rights Committee, 105th sess., *Concluding Observations: Kenya*, U.N. Doc. CCPR/C/KEN/CO/3 (advance version) (2012) ¶¶ 8-9; Human Rights Committee, 105th sess., *Concluding Observations: Lithuania*, U.N. Doc. CCPR/C/LTU/CO/3 (advance version) (2012) ¶ 8; Human Rights Committee, 105th sess., *Concluding Observations: Maldives*, U.N. Doc. CCPR/C/MDV/CO/1 (advance version) (2012) ¶ 8; Human Rights Committee, 103d sess., *Concluding Observations: Jamaica*, U.N. Doc. CCPR/C/JAM/CO/3 (2011) ¶¶ 8-9; Human Rights Committee, 103d sess., *Concluding Observations: Malawi*, U.N. Doc. CCPR/C/MWI/CO/1 (2011) ¶ 7; Human Rights Committee, 100th sess., *Concluding Observations: Poland*, U.N. Doc. CCPR/C/POL/CO/6 (2010) ¶¶ 5, 8; Human Rights Committee, 83d sess., *Concluding Observations: Kenya*, U.N. Doc. CCPR/CO/83/KEN (2005) ¶ 27; Human Rights Committee, 83d sess., *Concluding Observations: Greece*, U.N. Doc. CCPR/CO/83/GRC (2005), paras. 5, 19; Human Rights Committee, 82d sess., *Concluding Observations: Poland*, U.N. Doc. CCPR/CO/82/POL (2004) ¶¶ 5, 18; Human Rights Committee, 81st sess., *Concluding Observations: Namibia*, U.N. Doc. CCPR/CO/81/NAM (2004) ¶ 22; Human Rights Committee, 79th sess., *Concluding Observations: Philippines*, U.N. Doc. CCPR/CO/79/PHL (2003) ¶ 18; Human Rights Committee, 78th sess., *Concluding Observations: El Salvador*, U.N. Doc. CCPR/CO/78/SLV (2003) ¶ 16; Committee on Economic, Social and Cultural Rights, 34th sess., *Concluding Observations: China*, U.N. Doc. E/C.12/1/Add.107 (2005) ¶¶ 73, 78(a) (Hong Kong Special Administrative Region); Committee on Economic, Social and Cultural Rights, 28th sess., *Concluding Observations: Trinidad and Tobago*, U.N. Doc. E/C.12/1/Add.80 (2002) ¶ 14; Committee on Economic, Social and Cultural Rights, 27th sess., *Concluding Observations: Sweden*, U.N. Doc. E/C.12/1/Add.70 (2001) ¶ 8; Committee against Torture, 33d sess., *Concluding Observations: Argentina*, U.N. Doc. CAT/C/CR/33/1 (2004) ¶ 6(g); Committee against Torture, 29th sess., *Concluding Observations: Egypt*, U.N. Doc. CAT/C/CR/29/4 (2002) ¶¶ 5(e), 6(k); Committee against Torture, 29th sess., *Concluding Observations: Venezuela*, U.N. Doc. CAT/C/CR/29/2 (2002) ¶ 10(d); Committee on the Rights of the Child, 49th sess., *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/GBR/CO/4 (2008) ¶¶ 24, 25(b).

<sup>3</sup> See, for example, *Toonen v. Australia* ¶¶ 8.5-8.6.

<sup>4</sup> See for example, *Rees v United Kingdom*, App. No. 0532/81 (Eur. Ct. H.R. (plenary) October 17 1986); *Cossey v United Kingdom*, App. No. 0532/81 (Eur. Ct. H.R. (plenary) September 27, 1990); *X, Y and Z v United Kingdom*, App. No. 21830/93 (Eur. Ct. H.R. Grand Chamber, April 22 1997); *Sheffield and Horsham v United Kingdom*, App Nos 22985/93, 23390/94 (Eur. Ct. H.R. Grand

“margin of appreciation” to decide whether or not it should “enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.”<sup>5</sup>

In the context of children and their sexual orientation or gender identity, state parties to the Convention on the Rights of the Child (the Convention) must, in all matters related to the child, consider the best interests of the child, the right of the child to be heard, and the right of the child to preserve his or her identity. In its commentary on the implementation of the Convention, this Committee has made it clear that a determination of a child’s best interests must be individually assessed<sup>6</sup> and that it cannot be based on discrimination, including discriminatory stereotyping.

Moreover, the Convention affords children, without discrimination of any kind, “the right to express [their] views in all matters affecting [themselves]” and to have their views given “due weight in accordance with the age and maturity of the child.” Finally, this Committee has noted that the identity of the child “is guaranteed by the Convention” and that it “includes characteristics such as sex, sexual orientation, ... [and] personality.”<sup>7</sup>

## **Lack of Protection for Trans Children**

In Chile, children and adolescents whose sexual orientation or gender identity does not match that which is expected of them by their families and society at large often find their rights flouted, and certainly can expect little protection from the state.

Currently, there are no state programs, or legal rights or protections, to guarantee the human rights of lesbian, gay, bisexual, trans, and intersex (LGBTI) children and youth in Chile. This legal invisibility makes of them a vulnerable group in general.

The family and the school are the key institutions for child and youth development and social interaction. But the absence of comprehensive public policies to protect the human rights of LGBTI youth and children, as well as the lack of a specific legal or policy obligation for the education system to address this vacuum contribute to a situation where uninformed teachers, parents, and other family or community members routinely violate the rights of LGBTI children to their identity, and to substantive equal enjoyment of their human rights.

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Chamber July 30, 1998). In the 1992 case of *B v France*, the European Court found that French authorities refusal to update the applicant’s civil status to reflect her gender identity violated article 8. See *B v France* App. No. 13343/87 (Eur. Ct. H.R. (plenary) March 25, 1992, para 63 (concluding that “even having regard to the State’s margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual... has not been attained.”

<sup>5</sup> *Goodwin v United Kingdom*, App. No. 28957/95 (Eur. Ct. H.R. Grand Chamber, July 11, 2002), paras 74, 91, and 92.

<sup>6</sup> Committee on the Rights of the Child, *General Comment No. 5*, ¶ 12.

<sup>7</sup> Committee on the Rights of the Child, *General Comment No. 14*, ¶ 55.

A study by the United Nations Education Scientific and Cultural Organization (UNESCO) placed Chile as the Latin American country with the highest rate of reported homophobic bullying among LGBTI students (68 percent of LGBTI students report to have suffered some kind of bullying).<sup>8</sup> Another study, by the Organisation of Economic Cooperation and Development (OCED) marks Chile as the second country, after South Korea, with the fastest growing rate of suicides among children, generally.<sup>9</sup>

A case that illustrates the lack of institutional protection and its consequences for children is that of Diego, a 13-year-old trans boy in Santiago interviewed by IGLHRC. Diego's teacher mocked him in front of his classmates, saying: "What you see here is not a boy but a girl who thinks she is a boy." After this incident, Diego was bullied every day at school. His classmates repeatedly forced him into the trashcan, and shouted "You are a *maricón* [derogatory term for homosexual male] with breasts!" After two weeks of this treatment, Diego cut his own arms with a sharp object in a case of self-mutilation.<sup>10</sup>

A second example is Antonia, a 5-year-old trans girl. Antonia was not allowed to express her female identity at school, and was compelled to wear the uniform reserved for boys and to carry out boys-only educational activities. One day she came home, picked up a pair of scissors and said to her mother: "If I cut off my penis, will I be allowed to be a girl?"<sup>11</sup>

Antonia has since received expert psychological attention thanks to the support of her mother and of trans activists. Since Antonia's parents are separated, she is in the legal custody of her mother. The mother has told IGLHRC that the personnel at the Family Court dealing with the visitation rights of the father do not appear to have any knowledge of trans issues.

This situation demonstrates the urgent need for Chile to comply with its obligation to train judges and state officials in issues related to sexual diversity and gender identity. This was already highlighted in a case decided by the Inter-American Court on Human Rights in 2012, *Karen Atala and Daughters v. Chile*, in which the Court ordered the state to ensure adequate training of its justice officials in this regard.<sup>12</sup>

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<sup>8</sup> UNESCO, "Respuestas del sector educativo frente al bullying homofóbico," [Responses to Homophobic Bullying from the Education Sector], UNESCO: Santiago, 2011 at <http://unesdoc.unesco.org/images/0022/002229/222918S.pdf> (accessed on January 7, 2015), p. 20.

<sup>9</sup> Study cited in Julio César Dantas, "Bullying y suicidio adolescente" [Adolescent Bullying and Suicide] at <http://www.eldinamo.cl/blog/bullying-y-suicidio-adolescente/> (accessed on January 7, 2015).

<sup>10</sup> Interview with Diego, carried out for IGLHRC by Andrés Rivera Duarte, Santiago, 2014. Diego is not a real name. This case has also been presented in a public hearing at the Inter-American Commission on Human Rights on September 30, 2014.

<sup>11</sup> Interview with Antonia's mother, carried out for IGLHRC by Andrés Rivera Duarte, Santiago, 2014. Antonia is not a real name. This case has also been presented in a public hearing at the Inter-American Commission on Human Rights on September 30, 2014.

<sup>12</sup> Inter-Am. Comm. HR, Case 12.502, para. 271 in particular.

## **Lack of Protection for Intersex Infants**

Intersex infants (infants who are born with both stereotypical “male” and “female” anatomic characteristics or whose external genitalia are considered “ambiguous” by medical professionals) have no legal protections in Chile. Medical professionals operate with discretion as to whether or not intersex infants will be subjected to unnecessary and irreversible surgery to visually resemble “normal” male or female bodies.

## **Recent State Actions**

In 2014, the Chilean government created the National Children’s Council by Supreme Decree No. 21, with a view to advancing towards a more comprehensive fulfillment of state obligations on children’s human rights at the national level. On December 30, 2014, this Council circulated an invitation to civil society organizations working on sexual diversity, for them to participate in a January 2015 meeting on this topic, considering that the National Policy on Childhood and Adolescence is due to be launched in March 2015. It is paramount that this new policy appropriately reflect the needs and rights of LGBTI children in Chile.

## **Conclusion**

It is still considered unusual to talk about gender identity for children, but it is imperative that we do. As the Committee itself has recognized, a child has a defined self-identity, which includes his or her sex as well as sexual orientation.<sup>13</sup> States must ensure that gender identity laws and policies address the needs and rights of children and adolescents.

Chile has an international obligation to ensure proper protection of and respect for children’s right to identity—including gender identity—at school and in educational centers. Public policies on violence and bullying must address the special situation of trans and intersex children. Educational, justice, and health officials must receive proper training and support to enable them to adequately implement state obligations regarding LGBTI children’s human rights.

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<sup>13</sup> Committee on the Rights of the Child, *General Comment No. 14*, ¶ 55

## **Chile's Fourth and Fifth Periodic Reports to the Committee on the Rights of the Child**

Chile's submissions to the Committee do not contemplate trans and intersex children, even though it mentions other subgroups of children in need of special protection. The situation of trans and intersex children—as well as of lesbian, gay, and bisexual children—should be addressed as a cross-cutting issue relevant to substantive rights protection. LGBTI children and youth should also be recognized as a group particularly vulnerable to abuse and thus in specific need of protection.

### **Questions for the Chilean State**

#### Education

- What protection do trans children benefit from at school, and what training and tools are offered to educational professionals for them to fully discharge their obligation towards the trans children in their care?
- What policies exist to counter school bullying, and what remedies are offered to parents, teachers, and trans children to prevent and combat bullying and abuse?
- Does that state gather information about the situation of trans children in schools?

#### Health

- Is the Ministry of Health considering the development of a protocol for respectful attention for intersex infants? If so, what are the guidelines contemplated?
- Is the Ministry creating an appropriate form for registering intersex babies?
- Is the Ministry including the categories “trans” and “intersex” in their compulsory forms for providing adequate health services to children and youth?
- Is the Ministry creating and implementing programs to attend the needs of trans children and youth, in particular, programs for hormonal treatment, psychological support and follow-up?
- Is the Ministry training health professionals to recognize and respond to the needs of trans and intersex children and youth?
- What are the statistics for intersex births and medical responses in the last 5 years?
- What are the statistics for services rendered to trans children and youth in the last 5 years?

## Justice

- From this ministry depends the Tribunal de Familia and the SENAME (Servicio Nacional de Menores)
- Is the Ministry of Justice training judges and other professionals in inclusive practices and interpretations of sexual diversity and gender identity as ordered by the Inter-American Court on Human Rights in 2012?
- Is the National Service for Minors (SENAME) designing and implementing protocols for assisting LGBTI children in all its guidelines and programs: with regard to adoption, street children, and children in conflict with the law, for example?
- Is SENAME offering training on sexual orientation and gender identity to its employees and related programs officials?

## Support to Families

- Does the government offer support to a diversity of families and to LGBTI children who are in conflict with their families?