



Human Rights Violations of Adolescents in Chile

Shadow Report

October 2007

Acknowledgements

This Shadow Report on Human Rights Violations of adolescents in Chile was coordinated by
Yolanda Orozco as a volunteer for
the International Gay and Lesbian Human Rights Commission (IGLHRC)
The MOVILH - Movimiento de Integración y Liberación Homosexual from Chile, represented by
Juan Hernandez, contributed to this report.

**Submitted to the Committee on the Rights of Child in relation to the consideration of the
Chilean State Report under article 12 of the Optional Protocol of the Convention on the
Rights of the Child on the sale of children, child prostitution and child pornography**

47th SESSION

JANUARY - FEBRUARY 2008

INTRODUCTION

The Chilean Republic signed the International Convention on Rights of the Child on June 26th 1990 and ratified it on August 13th 1990. Besides, it ratified the Optional Protocols regarding child involved in armed conflicts (June 21st, 2003) and the sale of children, child prostitution and child pornography (February 6th 2006). As a result, Chile committed to applying the treaty provisions in its domestic law and policies. At the beginning of 2007, Chile presented to the Committee its 3rd periodic report, which was evaluated during the 44th Session of the Committee of CRC. The examination of the report has been done in the Committee's Plenary Sessions 1218 and 1219 (CRC/C/SR.1218 y CRC/C/SR.1219) in Geneva on January 26th and February 2nd, after which the Committee issued its Final Observations (CRC/C/CHL/3). For the elaboration of this report we have started from these Final Observations and from the Initial Report presented by Chile (CRC/C/OPSC/CHL/1), to be considered in the current Session No. 47 according to the stipulations in Article 12 (1) of the Optional Protocol of the Convention on Rights of the Child regarding the sale of children, child prostitution, and child pornography.

The International Gay and Lesbian Human Rights Commission (IGLHRC), working in cooperation with MOVILH, Movimiento de Integración y Liberación Homosexual from Chile, has drafted this Shadow Report with the intention that the information and the observations presented in it be useful to reaching better protection, promotion and accomplishment of the rights of LGTTB people (lesbian, gay, transgender, transsexual, and bisexual people) who live in the Chilean Republic. We also hope that this report may be valuable for the Committee on the Rights of Child also for future efforts related to the promotion of the Rights of the Child.

Executive Summary

The current Criminal Code in Chile was adopted on November 12, 1874. Until 1999, through its Article 365, it penalized—as sodomy—sexual relations between same-sex adults, irrespective of whether they took place in public or private places and with mutual consent. For eight years MOVILH from Chile fought for the elimination of that rule, since the rule considered sexual relations between consenting adult men as a crime, crystallizing a legal vulnerability that allowed many abuses, as was the case, for example, in police custody. The repeal of these provisions received support from parliamentarians from various political factions and was also prompted by a complaint against Chile before the Inter-American Commission on Human Rights.

Law 19.617 promulgated on July 2, 1999 by the Chilean National Congress amended the Penal Code, the Criminal Procedure Code, and other laws on issues relating to the crime of rape. Item number 10 of the law 19.617 amended Article 365 of the Penal Code, marking a major victory against discrimination, since sexual relations between adults of the same sex now ceased to be considered a crime since the amendment came into effect. However, the amended law continues being discriminatory, because, at present, the Article 365 states: *"Anyone who sexually engages a minor under eighteen of the same sex without mediating circumstances of the crimes of rape or statutory rape, will be punished with minimum to medium grade imprisonment"*.

The discriminatory treatment and violations of human rights of young homosexuals in Chile have been reported to the UN on several occasions, through reports presented by the MOVILH. Among other ramifications, the Committee on the Rights of the Child of the United Nations expressed both during plenary sessions 1218 and 1219 and in its Concluding Observations of April 23, 2007,¹ its concern about the existence of this legislation. Specifically, the Committee expressed concern *"that homosexual relations, including those of persons under 18, continue to be criminalized, indicating discrimination on the basis of sexual orientation."*² It was in this context that the Committee recommended *"that the State party increase its efforts to review, monitor and ensure implementation of legislation guaranteeing the principle of non-discrimination and full compliance with article 2 of the Convention, and adopt a proactive and*

¹ CRC/C/CHL/3.

² CRC/C/CHL/CO 3, para. 29.

*comprehensive strategy to eliminate discrimination on gender, ethnic, religious or any other grounds and against all vulnerable groups throughout the country."*³

Also during the plenary session 1.218, the Committee noted that *"punishing consensual sexual relations between youths of the same sex is a discriminatory measure, which ignores the fact that adolescents are in the exploration of their sexual identity."*⁴ On the other hand, the Committee recommended the State *"promote and ensure access to sexual and reproductive health services for all adolescents, including sex and reproductive health education in schools, as well as youth-sensitive and confidential counseling and health care services, taking into account the Committee's general comment No. 4. on adolescent health and development in the context of the Convention."*⁵ The Committee expressly requested to the Chilean State that in its third report on Human Rights, scheduled for September 12, 2012, it should include detailed information on measures and programs relevant to the Convention on the Rights of the Child, which has applied to offer a special protection to vulnerable groups.

The first publicly known case for the application of revised Art. 365 took place on August 10th, 2007 when a worker, J.A.P.L., 47 years old, was sentenced in Antofagasta (II Region of Northern Chile) to 41 days in prison—released under court supervision—for having sex with a minor who was only 12 days from the age of majority. They met through an Internet chat and had been together on previous occasions. Although the minor clarified in court that he had sex without being pressured and on his own initiative, the court (Tribunal de Juicio Oral en Penal de Antofagasta) convicted the older partner. It should be noted that, the prosecutor on Sexual Offences of the Public Ministry (Cristian Aguilar) had requested a sentence of 541 days in prison. Such a penalty, in the opinion of the prosecutor, is justified because the older ***"corrupted the sexual moral of the minor. While no immediate harm was produced, one could occur later."***

The Public Defender (Cristina Gallegos) managed to reduce the sentence to 41 days in prison—released under court supervision. However, in Chile there are no public transparent data to allow

³ CRC/C/CHL/CO 3, para. 30.

⁴ CRC/C/SR 1218.

⁵ CRC/C/CHL/CO 3, para. 56.

access to the details of this case, nor statistics about other such sentences under article 365, because the authorities do not have specific and actualized records.

It should be noted that the last report submitted by Chile to the Committee explicitly includes "sodomy" among the "crimes involving the sexual freedom or indemnity" of adolescents, along with rape, incest, statutory rape, sexual abuse, child pornography, and prostitution of boys and girls.⁶ In the same way, **in the Initial Report on the application of the Optional Protocol regarding the sale of children, child prostitution, and child pornography,**⁷ paragraph 35 refers to article 365 as a measure to protect minors.

It is a contradiction to identify as protective a provision that directly violates the adolescent's rights to health and development, rights which include the full development of sexuality, including sexual orientation and the construction of their identity.⁸ This way discrimination based on sexual orientation is legalized, which is a grave departure from the principles of the Convention.

Despite the Committee's recommendations as cited above, in relation to the perpetuation of discriminatory measures in the area of sexuality, so far the Chilean State and their representatives have shown no willingness to change their position, since they support a measure that reinforces discrimination and violates the sexual rights and the freedom of conscience of adolescents.

Substantive Violations of the Convention

General Principles (Art. 2, 3, 6, 12) Article 365 of the Criminal Code of the Republic of Chile, among others, violates the four general principles emphasized by the Committee and has an impact on other articles of the Convention, namely articles 2, 3, 6 and 12, which include the right to non-discrimination, the interests of the child, the right to life, and the right to be heard and to be respected in their views.

⁶ CRC/C/58, para. 88, lines 109 and 116.

⁷ CRC/C/OPSC/CHL/1.

⁸ CRC/GC/2003/4; lines 2 y 6.

Article 2 (Right to Non-Discrimination)

Article 2 states that the rights of adolescents will be respected without any discrimination and commits the State to take the necessary steps to ensure that their rights are protected against all forms of discrimination.

The problem with Article 365 is that the state has adopted a discriminatory measure, which identifies as criminal a sexual practice that in itself does not imply violence, rape, statutory rape, or sexual abuse of any kind. In order to better understand art. 365, here are the provisions of other relevant articles of the same Penal Code:

Article 361 criminalizes rape of people older than 14

Article 362 criminalizes rape/statutory rape of people under 14

Article 363 criminalizes statutory rape of people older than 14

Article 366 criminalizes sexual abuse without sexual intercourse against people older than 14

Article 366 bis criminalizes sexual abuse without sexual intercourse against people under 14

Articles 366 quarter and 366 d criminalize various forms of sexual abuse against persons under 18.

Taking into account also that the age prescribed in Chile for sexual consent is 14, we can conclude that the act that is being considered a sexual offence in Article 365 is anal penetration, conducted between two people of the same sex, where at least one of them is an adolescent between 14 and 18 years old. Therefore, sex between homosexuals is punished if involving adolescents less than 18 years.

Obviously this is a provision that censors, inhibits, and attributes blame to adolescents with a homosexual orientation when they exercise their right to sexuality. The provision allows, for example, for the punishment of a sexual relation between a homosexual person who is 19 and another who is 17. In addition, the implications go beyond the law, since beliefs and ideologies that lasted for decades in Chilean society are therefore way strengthened. "Sodomy" has strong religious and condemning connotations, as defined in the dictionary of the Spanish language Espasa Calpe (2000): "intercourse between males or against the natural order." The origin of the word comes from Sodom, the city of Palestine, which, as per the story in the Bible, God

destroyed as a punishment for the sin of its inhabitants. Therefore, through article 365, relations between people of same sex would be sinful or outside the natural order, a precept that Chilean law continues to maintain for teenagers. From this point of view, the provision responds to religious mandates within a State, which has been defined as secular.

The principle of non-discrimination is enshrined in the constitution of the country. However, in practice, non-discrimination for "sexual minorities" is not really established. An example is the 18 cases of gay and lesbian students who have been victims of expulsion, ridicule, harassment, blackmail, and sanctions in high schools. Such discrimination cases have been documented by MOVILH between 2002 and 2006, along with 8 other cases of neglect and/or family expulsion of gay, lesbian and transsexual teenagers.

While MOVILH got the Ministry of Education to include the grounds of "sexual orientation" and "gender" as protected categories within the National Plan for Sex Education in 2005, such protection is not respected in practice.⁹ The Chilean society has strong conservative values and norms from religious and political establishments, which lead to the stigmatization of any practice, conduct, or speech that transgresses the parameters of heterosexuality. Indeed, the Catholic precepts and morals argue a conception of sexuality away from the current scientific parameters, since they reduce it to the "natural" heterosexual model, in the service of reproduction. In this regard, the state is facing a huge challenge that needs to be overcome. Moreover, having repealed the provision criminalizing sodomy between same-sex adults, a gap has been established between teenagers and adults, ignoring that both deserve the same rights and guarantees as subjects of law. In this regard, we refer to the General Comment Number 10 (2007) on the "Rights of the Child in Juvenile Justice"¹⁰, in which, in order to ensure equal treatment of adolescents and adults before the law, the Committee mentions article 56 of the Guidelines the RIAD which states: "In order to prevent further stigmatization, victimization, and criminalization of the youth, laws should be enacted to ensure that any action that is not considered a crime or is not punished when committed by an adult crime, is not a crime nor punished when committed by a young person."¹¹

⁹ Annual Reports of "Human Rights of Chilean Sexual Minorities," MOVILH.

¹⁰ CRC/C/GC/10.

¹¹ CRC/C/GC/10, Section III, line 8.

Articles 3, 6 and 12. Best interest of the child, the right to life, and the right to be heard and respected in their views.

The best interest of the child is the paramount consideration for children and adolescents in all the measures that are adopted, and in all areas in which they develop: social, institutional and family. It is a matter of both private and public interest. This translates into the consideration that adolescents have an inherent right to life, which includes the promotion of their vitality and their development to the maximum extent possible; development is understood "with a holistic sense that covers physical, mental, spiritual, moral, psychological and social" dimensions¹² without discrimination of any kind. Article 12 asserts that the State must guarantee respect for the views of adolescents and their right to express those views freely, particularly in matters that concern them, depending on their age and maturity. The aforementioned article 365 does not respect the status of adolescents as subjects of law, nor takes into account their potential cognitive ability, critical thinking, and creativity. It responds to a guardianship conception, which is still in force in the case of Chile and many other Latin American countries, where the will of the adolescents is not taken into account most of the time, and is replaced by that of their legal representatives. In the case of Article 365, this means that the State plays the role of a guardian, leaving aside the respect for the rights of young homosexuals to think and decide about one core personal issue: one's sexuality.

From the paternalistic perspective, often legality overlaps with discipline and morality. This responds to traditional and historic precepts, which need to be identified in this and many other situations in order to re-affirm the universal validity of law and ethics, beyond the morality that is subject to historical contingencies.

Civil rights and freedoms

Article 16 Right to privacy and respect for human dignity

Article 16 states that "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or correspondence, or to unlawful attacks on his or her honour and

¹² CRC/GC/2003/5.

reputation." However, Article 365—pretending to be a protecting measure—paradoxically involves a direct attack on privacy, as it criminalizes an adolescent's sexual practice which—as is—belongs to the domain of privacy. Moreover, criminalizing the sexual practice (only) when it occurs between two people of same sex degrades an aspect of personality that, especially in the case of adolescents, can lead to serious harm from the mental and moral points of view, while calling into question a basic aspect like sexual orientation, which combines subjectivity and corporality.

Article 24: Right to Health

Article 24, along with Article 6, guarantees the right to health and to development. As reflected widely in the general comments on the health and development of adolescents in the context of the Convention on the Rights of the Child,¹³ adolescence is a time of life marked by profound changes that, among other issues, leads to sexual maturity, to the gradual acquisition of the ability to take on adult behaviours and roles, and which pose new challenges as the "development of an individual identity and the management of their own sexuality." The adolescent's possibility of growing and developing a creative subjectivity, the chance of building a healthy psyche so as to the achievement of the famous "bio-psycho-social" welfare and balance characterized as "health", depend to a large extent on the "environmental and functional conditions" that surround and cross their lives. The wording of Article 365, as well as its scope and the ideology that has enabled its enactment involve an unavoidable impact on the subjectivity of adolescents who are identified within the spectrum LGTTBI, with implied stigmatization, feelings of guilt, lower value and/or a pathological perspective of what is being established as sexual orientation and/or gender identity. This impact affects the potential subjective growth and therefore threatens their well-being and affects their future as a human being. There is also the violation of the right to the full bio-psycho-social development previously mentioned, while it is known that the prohibitions placed on basic aspects of subjectivity have a strong impact and lead to inhibitions and disturbances which affect the relationship with oneself, with the environment, and with the whole society.

¹³ CRC/GC/2003/4.

Recommendations

We ask the honourable Committee on the Rights of the Child to encourage and recommend to the Chilean State to:

- Conduct a further review of its judicial system regarding the protection of the rights of adolescents in Chile and—in the framework of legislative, administrative, and institutional reforms towards this end—to abolish article 365 of the Criminal Code, taking into consideration the comments and recommendations of the Committee and in accordance with Article 4 on the general measures of implementation of the Convention.
- Strengthen training for the members of the Judiciary on the provisions of the Convention on the Rights of the Child, as well as the on importance and validity of the other Treaties and International Conventions on Human Rights ratified by Chile, as to the scope of its application by the courts, especially in the sense of respecting the best interest of young persons, without discrimination of any kind.
- Promote through educational institutions, the media, and through awareness programs—directed at politicians, judges, and other civil servants and government officials—the gradual development of an understanding of equality in regards to the exercise of rights and freedoms by adolescents, without distinction of any kind, aiming at the integration of diversity in regards to gender and sexuality in order to promote the exercise of the rights and freedoms and respect towards GLTTBI people.
- Ensure the right to dignity and the health of adolescents, as a subject of rights and of human development. It is essential for the Chilean state to undertake a comprehensive and thorough monitoring of the existing plans towards this end and pay attention to the transformation of public policy in order to ensure the physical, sexual, psychological and moral integrity, especially of the current vulnerable groups, such as adolescent GLTTBI. It may be recalled here that, as stated in paragraph IV of the General Comment Number 5 on the General Measures of the implementation of the Convention, "the principle of non-discrimination does not preclude special measures to diminish discrimination."¹⁴

¹⁴ CRC/GC/2003/5.

- Promote in all courts, especially in the courts for minors, the respect for the opinion of adolescents in order to prevent the violation of their rights, according to the principle of respecting the child's best interest and their right to be heard. In addition, the state should evaluate—through independent agencies—the way the juvenile justice works, particularly with regard to discrimination against GLTTBI youth.
- Implement the necessary actions in order to promote awareness and education for health care professionals and related government officials, especially those who work with adolescents, on sexual and reproductive rights with a perspective of gender and sexual diversity, in order to provide adequate care and information for all adolescents to develop their sexuality freely, responsibly, and with dignity. In addition, the Ministry of Education, Ministry of Health, National Service for Women and the National Institute for Youth should incorporate into their program "Towards a Responsible Sexuality" the perspective of law and sex education informed by diversity and free from religious and ideological prejudice.
- Promote in the areas of training, education, and mass communication some programs to provide children and adolescents with education based on respect for human rights and freedoms.
- Take particular account of the Committee's General Comments on the health and development of adolescents in the context of the Convention on the Rights of the Child¹⁵ as regards concepts and observations on overriding rights and interests which should be ensured to adolescents, especially in the area of health and the development of their potential. A relevant paragraph of the document summarizes much of the basis of these recommendations: "The Committee draws the attention of States Parties on General Comment No. 14 of the Committee on Economic, Social and Cultural Rights which said that 'States parties should provide teenagers a safe and supportive environment that enables them to participate in decisions that affect their health, gain experience, have access to appropriate information, to receive counselling and negotiate on issues affecting their health. Exercise the right to adolescent health care depends on a respectful youth health, which takes into account the confidentiality and privacy and provides for the establishment of appropriate sexual and reproductive health.'"

¹⁵ CRC/GC/2003/5.

Questions for the Government of Chile

- Has the Government of Chile assessed why GLTTBI are historically the most invisible (and therefore ignored) among the vulnerable groups of adolescents, and what measures should be taken to change this situation?
- How and when does the Government of Chile evaluate the status of the Juvenile Justice?
- What programs and actions have been taken by the Government of Chile to sensitize its civil servants, educators, and health workers in regards to health and sexual rights, especially for adolescents, as well as in regards to the content and application of the Convention?
- Has the Government of Chile considered introducing new policies and modifying existing ones in order to eliminate the conditions that lead to discrimination against adolescent GLTTBI in the fields of law, as well as social and cultural rights?