

## **Intersex framings within international human rights law**

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Over the last decade, intersex human rights issues have received increasing attention at the international level. Largely thanks to the work of intersex human rights defenders, there is greater understanding by international human rights mechanisms as to the harms facing intersex people performed or condoned by states and other actors. As a consequence, there has been an increased amount of work undertaken to acknowledge how international human rights law relates to the rights of intersex people, including via public awareness campaigns and targeted recommendations directed at states to change practices that violate the rights of intersex people. This paper seeks to outline how international human rights law addresses the rights of intersex people. It further considers how intersex issues are framed by the human rights system.

As part of this research, the author undertook a review of all UN treaty body concluding observations on intersex issues in order to analyse which intersex issues were raised and how they were discussed. How intersex issues are framed in terms of the language used, the aspects of intersex that are considered relevant, and the human rights issues that intersex issues are associated with, can have implications for how states (including Ireland, which is examined as a case study in Section III) understand and respond to intersex issues. The review found that intersex-related recommendations were mostly discussed as 'harmful practices', although different treaty bodies take different approaches, and when discussing substantive intersex issues, intersex was rarely included within broader LGBTI frameworks. The findings from the review are discussed further in Section III. At the international level, how United Nations (UN) mechanisms frame intersex issues can impact what degree of responsibility a state may consider it has to guarantee the human rights of intersex people and can further impact what action a state takes on intersex issues. This question of framing can also present opportunities for civil society to demand action from states, in order to ensure the adequate protection of intersex people.

## Section I: Understanding intersex human rights

The term ‘intersex’ and the issues intersex people can face are often misunderstood. While often conflated with gender and identity, intersex instead refers to innate physical characteristics of the body: specifically, variations in sex characteristics that people may be born with, and which may only become apparent later in life. These can include genitals, gonads or chromosome patterns that may be different to what is considered typical for male and female bodies.<sup>1</sup> Based on descriptions of intersex from the UN and advocacy groups, a simple definition of intersex used in this paper is that intersex people have innate sex characteristics that do not fit medical and social norms for female or male bodies, and that create risks or experiences of stigma, discrimination and harm.<sup>2</sup>

Intersex may be referred to by other names: for example, differences or disorders of sex development (DSD), variations of sex characteristics, or by variation-specific terminology tied to a medical diagnosis.<sup>3</sup> International human rights mechanisms have adopted the language of ‘intersex’ to describe this population as well as ‘sex characteristics’ to describe the physical characteristics relating to sex that all people have. ‘Sex characteristics’ is defined in the Yogyakarta Principles plus 10 as ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty’.<sup>4</sup> It is estimated that at least 0.05% of

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<sup>1</sup> Office of the United Nations High Commissioner for Human Rights, ‘UN Intersex Fact Sheet: Free and Equal Campaign’ (September 2015) <<https://www.unfe.org/intersex-awareness/>> accessed 27 September 2017.

<sup>2</sup> Intersex Human Rights Australia, ‘What Is Intersex? – Intersex Human Rights Australia’ (2 August 2013) <<https://ihra.org.au/18106/what-is-intersex/>> accessed 21 June 2021.

<sup>3</sup> Tove Lundberg, Peter Hegarty and Katrina Roen, ‘Making Sense of “Intersex” and “DSD”’: How Laypeople Understand and Use Terminology’ (2018) 9 *Psychology & Sexuality* 161; Morgan Carpenter, ‘The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change’ (2016) 24 *Reproductive Health Matters* 74; Georgiann Davis, ‘“DSD Is a Perfectly Fine Term”: Reasserting Medical Authority through a Shift in Intersex Terminology’ in PJ McGann and David J Hutson (eds), *Advances in Medical Sociology*, vol 12 (Emerald Group Publishing Limited 2011).

<sup>4</sup> International Commission of Jurists, ‘Yogyakarta Principles plus 10: Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles’ (2017) preamble. The

the population are intersex but that the figure may be up to 1.7%,<sup>5</sup> the broad range indicating the lack of research in this area, as well as competing claims as to which intersex traits should be classified as intersex at all. There are also over 40 different intersex variations.<sup>6</sup> The existence of so many different variations highlights the diversity of intersex bodies. While intersex bodies can look very different from one another and intersex people do not hold a singular identity, intersex people face common risks to their human rights.

Foremost among them is the risk of non-consensual medical interventions to change an individual's sex characteristics without their informed consent. These surgical and hormonal interventions are often rooted in stigma, discriminatory attitudes, and homophobic fears that people with bodies that are different may live as the 'wrong sex' and be involved in same-sex relations, as well as transphobic fears of transcending binary notions of sex.<sup>7</sup> While for centuries intersex people have been subjected to these fears by medical practitioners and by wider society, it was in the 1940s when this began to be translated to medical interventions on intersex people's bodies, with the development of medical techniques that would allow these kinds of interventions to take place.<sup>8</sup> It was during the 1950s and 1960s when psychologist Dr John Money's 'optimum gender of rearing model' was at its most influential. This theory supported medical interventions on intersex infants and children to align them with the sex most surgically feasible (typically, female) and supported hiding from the individual the truth of what had happened, based on the belief that this would help maintain a consistent gender identity in line with their (reformed) bodily anatomy.<sup>9</sup> Decades of this practice has meant that many intersex people may not know they have an intersex variation, may not know what medical interventions they have been subjected to, and can also face

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Yogyakarta Principles clarify how international human rights law relates to sexual orientation and gender identity and are further discussed in Section II.

<sup>5</sup> Office of the United Nations High Commissioner for Human Rights, 'UN Intersex Fact Sheet: Free and Equal Campaign' (n 1); Intersex Human Rights Australia, 'Intersex Population Figures' (28 September 2013) <<https://ihra.org.au/16601/intersex-numbers/>> accessed 18 March 2021.

<sup>6</sup> Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers 2016) 82.

<sup>7</sup> Elizabeth Reis, *Bodies In Doubt: An American History of Intersex* (The John Hopkins University Press 2009).

<sup>8</sup> Elizabeth Reis, 'Impossible Hermaphrodites: Intersex in America, 1620–1960' (2005) *The Journal of American History* 411, ch 5.

<sup>9</sup> *ibid.*

difficulties in accessing their medical records.<sup>10</sup> While medical practitioners may claim that practices have changed, for example, by providing more information to patients (or, at least, their parents) or point towards improvements in surgical techniques,<sup>11</sup> the human rights risks surrounding these treatments remain just as great today. With little transparency by doctors and hospitals over what practices do occur, intersex people in different regions of the world are subject to non-consensual and unnecessary medical interventions which can result in sterilisation, removal of tissue and sensation, life-long reliance on hormone replacement therapy, ongoing medical complications and the need for surgical revisions, and barriers to accessing appropriate health care over the course of their life.<sup>12</sup> The psychological impacts of these interventions and the secrecy and shame associated with having intersex traits are significant, and many intersex people may not be aware that there are other intersex people and groups that they can reach out to, or conversely, that it may be dangerous to do so if there is a risk of being identified.<sup>13</sup>

### **Key human rights concerns**

Current medical practices towards intersex people may contravene a wide range of human rights. Non-consensual interventions which are not medically necessary may contravene the right to bodily integrity in article 17 of the UNCRPD; the right to liberty and security of person in article 3 of the UDHR, article 9 of the ICCPR and article 14 of the UNCRPD; and also the non-derogable prohibition on torture or cruel, inhuman or degrading treatment or punishment as outlined in article 5 of the UDHR, article 7 of the ICCPR, article 37(a) of the UNCRC, article 15 of the UNCRPD, and articles 2 and 16(1) of the UNCAT.<sup>14</sup> These interventions may be

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<sup>10</sup> Council of Europe Commissioner for Human Rights, 'Human Rights and Intersex People: Issue Paper' (2015) 14; Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Open Book Publishers 2016) 105-106.

<sup>11</sup> Peter A Lee et al, 'Global Disorders of Sex Development Update since 2006: Perceptions, Approach and Care' (2016) 85 *Hormone Research in Paediatrics* 158.

<sup>12</sup> Human Rights Watch and InterACT, 'I Want to Be like Nature Made Me': *Medically Unnecessary Surgeries on Intersex Children in the US* (25 July 2017) <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>> accessed 7 November 2020.

<sup>13</sup> Bonnie Hart and Jane Shakespeare-Finch, 'Intersex Lived Experience: Trauma and Posttraumatic Growth in Narratives' (2021) *Psychology & Sexuality* 14; Katrina Roen and Vickie Pasterski, 'Psychological Research and Intersex/DSD: Recent Developments and Future Directions' (2014) 5 *Psychology & Sexuality* 102.

<sup>14</sup> UNHRC, 'General Comment No. 35: Article 9 (Liberty and Security of Person)' (2014) CCPR/C/GC/35 at 3 and 9; UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Mendez' (2013) A/HRC/22/53 at 32 and 39.

consented to by parents, albeit often with limited information and lack of awareness of other options.<sup>15</sup> The UN has made it clear that in relation to these kinds of medical interventions, only the consent of the intersex individual themselves is appropriate.<sup>16</sup> There is limited understanding of the long-term outcomes of these interventions, and what is known is largely through personal testimonies.<sup>17</sup> Where there is a lack of data on the ongoing health outcomes of these interventions,<sup>18</sup> these may also be classified in some instances as medical experimentation and without the consent of the individual may contravene the right to freedom from medical experimentation in article 7 of the ICCPR and article 15 of the UNCRPD.<sup>19</sup> As one of the key issues faced by intersex people, UN statements on intersex regularly raise non-consensual medical interventions,<sup>20</sup> although so far it has led to little change at a national level. In many national laws, parents have a right to make medical decisions on behalf of their child at least up until a certain age or maturity level.<sup>21</sup> Oftentimes, the right of children to bodily autonomy and the need for the child's informed consent in this

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<sup>15</sup> Hart and Shakespeare-Finch (n 13); Halley P Crissman et al, 'Children with Disorders of Sex Development: A Qualitative Study of Early Parental Experience' (2011) *International Journal of Pediatric Endocrinology* 10.

<sup>16</sup> Office of the United Nations High Commissioner for Human Rights, 'Intersex Awareness Day – Wednesday 26 October' (24 October 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E%20viewed%2024>> accessed 30 September 2017.

<sup>17</sup> OII Europe and Janik Bastien-Charlebois, '#MyIntersexStory' (2019) <[https://oiieurope.org/wp-content/uploads/2019/11/testimonial\\_broch\\_21-21cm\\_for\\_web.pdf](https://oiieurope.org/wp-content/uploads/2019/11/testimonial_broch_21-21cm_for_web.pdf)> accessed 7 October 2020.

<sup>18</sup> Amnesty International, 'First, Do No Harm: Ensuring the Rights of Children with Variations of Sex Characteristics in Denmark and Germany' (2017) 39–41; Lee et al (n 11) 170; Sarah M Creighton et al, 'Childhood Surgery for Ambiguous Genitalia: Glimpses of Practice Changes or More of the Same?' (2014) 5 *Psychology & Sexuality* 34.

<sup>19</sup> Tanya Ni Mhuirthile, 'Recent reforms in law on LGBT rights in Ireland: Tightening the tourniquet in the rights of vulnerable intersex people' in James Gallen & Tanya Ni Mhuirthile (eds), *Law, Responsibility and Vulnerability: State Accountability and Responsiveness* (Routledge forthcoming 2021).

<sup>20</sup> See, for example, Office of the United Nations High Commissioner for Human Rights, 'UN Intersex Fact Sheet: Free and Equal Campaign' (n 1); Office of the United Nations High Commissioner, 'Opening Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the 30th Session of the Human Rights Council' (16 September 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>> accessed 20 September 2018.

<sup>21</sup> In Ireland, section 23 of the Non-Fatal Offences Against the Person Act 1997 specifies that children aged 16 or over can give consent to surgical, medical or dental procedures without requiring consent from a parent or guardian. Under the age of 16, children who have sufficient understanding and intelligence to understand the proposed medical treatment ('Gillick competence') may consent to or refuse their own treatment, however determining the Gillick competency of a child must be done on a case-by-case basis (see *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7).

context is perceived to amount to a conflict between the rights of the child and the rights of parents; or, alternatively, children's rights are considered to be synonymous with parental rights (so that informed consent means informed consent of the parent).<sup>22</sup>

Intersex people also face other barriers in accessing appropriate health care, including in appropriate transition from paediatric to adult health care, a general lack of knowledge of intersex variations by medical practitioners, and a history of medical trauma making it difficult to seek out medical care.<sup>23</sup> This results in difficulties in accessing appropriate and affordable expertise. A lack of studies on intersex variations has also resulted in little understanding of how to manage intersex people's health needs, whether related to their intersex variation or not. These issues in accessing appropriate health care contravene the right in article 12 of the ICESCR to the enjoyment of the highest attainable standard of physical and mental health.

Intersex people can face discrimination in education, employment and sport.<sup>24</sup> This is protected against in articles 2 and 7 of the UDHR, articles 2(1) and 26 of the ICCPR, article 2 of the ICESCR and article 2 of the UNCRC. Such discrimination can be direct, due to obvious physical differences and bullying and mistreatment, or indirect, due to environments which are not accommodating for individuals who may need to take extended periods of time away for medical treatments or may require reasonable adjustments. Within sporting contexts, intersex issues have been highly profiled with the contentious regulations imposed by international sporting organisations on elite intersex women athletes.<sup>25</sup> On 18 February 2021, Caster Semenya, a South African athlete singled out by these regulations for having naturally elevated levels of testosterone, lodged an application with the European Court of Human Rights in order to challenge the regulations that prevent her from competing by World

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<sup>22</sup> In Ireland, the Irish Constitution enshrines the rights of the family and education of children in articles 41 and 42.

<sup>23</sup> Amy Rosenwohl-Mack et al, 'A National Study on the Physical and Mental Health of Intersex Adults in the US' (2020) 15 PLOS ONE <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0240088>>; Jones et al (n 6).

<sup>24</sup> European Union Agency for Fundamental Rights, *A Long Way to Go for LGBTI Equality* (Publications Office 2020) <<https://data.europa.eu/doi/10.2811/582502>> accessed 26 February 2021.

<sup>25</sup> Human Rights Watch, "They're Chasing Us Away from Sport" (2020) <<https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>> accessed 5 January 2021.

Athletics, on the grounds of violation of her right to respect for private life, prohibition of discrimination, and prohibition of inhuman or degrading treatment.<sup>26</sup>

Access to accurate legal documentation can also be problematic for some intersex people. While many intersex people's gender aligns with their legal gender documentation, some do not identify with an assignment they were socially or medically forced into, and often face barriers in changing their legal gender.<sup>27</sup> Article 7 of the UNCRC, article 24 of the ICCPR and article 18(2) of the UNCRPD recognise a right to be registered immediately after birth with a name and right to a nationality, but do not require that a sex or gender be recorded.<sup>28</sup> Requirements by many states to register a sex or gender at or shortly after birth, as well as barriers to change documentation, can therefore limit access to accurate documentation.

Intersex people also have a history of being subject to medical photography and may lack privacy in medical spaces, in institutions and during travel.<sup>29</sup> Under article 16 of the UNCRC, all people have the right to privacy, including the right to private life, freedom from arbitrary or unlawful interference with privacy, and a right to the development and preservation of identity. Stigma, shame and superstition regarding intersex variations can result, in some regions, in intersex people being at risk of infanticide,<sup>30</sup> violating the right to life as protected under article 3 of the UDHR, article 6 of the ICCPR, article 10 of the UNCRPD and article 6(1) of the UNCRC. Intersex people also struggle to access justice, including due to statutes of limitations barring claims,<sup>31</sup> and lack access to redress and compensation for harms suffered, as protected in article 14 of the UNCAT.

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<sup>26</sup> *Semenya v Switzerland* App no 10934/21(ECtHR, 18 February 2021).

<sup>27</sup> European Commission Directorate General for Justice and Consumers, 'Trans and Intersex Equality Rights in Europe: A Comparative Analysis' (*Publications Office* 2018) ch 3 <<https://data.europa.eu/doi/10.2838/75428>> accessed 8 February 2021.

<sup>28</sup> Office of the United Nations High Commissioner, 'Background Note Human Rights Violations against Intersex People' (2019).

<sup>29</sup> Alice Dreger, *Hermaphrodites and the medical invention of sex* (Harvard University Press 1998).

<sup>30</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (2016) A/HRC/31/57 at 50.

<sup>31</sup> *M v France (communicated case)* App No 42821/18 (ECtHR, October 2020).

## Section II: The international human rights system

International human rights mechanisms have increasingly considered intersex rights. While none of the international human rights treaties explicitly mention intersex, they have since been interpreted to apply to intersex experiences. The following section outlines how intersex issues raised in the previous section have been considered and framed in the international human rights system, by examining the Yogyakarta Principles and UN human rights mechanisms.

### *Yogyakarta Principles*

The Yogyakarta Principles, published in 2007, are guiding principles that outline how international human rights law relates to sexual orientation and gender identity.<sup>32</sup> As stated by the Co-Chairpersons of the drafting committee, they are designed ‘to be a coherent and comprehensive articulation of the obligations of states and non-state actors to respect, protect, and fulfil the human rights of all persons regardless of sexual orientation and gender identity’.<sup>33</sup> Unlike the international human rights treaties which states sign and agree to be bound by, the Yogyakarta Principles have not been agreed to by states per se. They are not designed to set out new rights, but rather to clarify rights that are already held. Furthermore, in recognition of the universality of rights, the drafters chose to use the neutral, universal language of ‘sexual orientation’ and ‘gender identity’ which applies to all people.<sup>34</sup>

Ten years later, the ‘Yogyakarta Principles plus 10’ were developed to supplement the original Yogyakarta Principles.<sup>35</sup> This document outlines the developments from the preceding ten years since original publication, establishes additional principles and state obligations, and,

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<sup>32</sup> ‘Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity’ (2007) <[http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf)> accessed 29 January 2021.

<sup>33</sup> ‘An Activist’s Guide to the Yogyakarta Principles’ (2010) <[http://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists\\_Guide\\_English\\_nov\\_14\\_2010.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf)> accessed 16 March 2021.

<sup>34</sup> Michael O’Flaherty, ‘The Yogyakarta Principles at Ten’ (2015) 33 *Nordic Journal of Human Rights* 280, 284.

<sup>35</sup> International Commission of Jurists (n 4).



importantly, gives recognition to how international human rights law impacts people on the distinct and intersectional grounds of ‘gender expression’ and ‘sex characteristics’.<sup>36</sup>

The addition of sex characteristics reflects a shift in understanding in the last decade of how sexual orientation and gender identity grounds alone are not enough to adequately cover the experience of intersex. As Morgan Carpenter (drafter to the Yogyakarta Principles plus 10 and intersex advocate) writes, the original Yogyakarta Principles were not suitable to cover diverse bodies rather than just diverse identities.<sup>37</sup> Discussions of sexual orientation and gender identity often presume the agency of individuals to express those identities, whereas young intersex people may not be old enough to express their gender or sexual orientation or preferences for what their body might look like before they are at risk of irreversible medical intervention. This shift to include sex characteristics reflects the commentary from the interim ten years from international bodies to the effect that intersex concerns are intended to be covered under international human rights law.

The Yogyakarta Principles plus 10 introduce a number of additional principles and state obligations directly relevant to intersex issues, including: the right to bodily and mental integrity (principle 32); the right to legal recognition (principle 31); the right to the highest attainable standard of health (principle 17); the right to truth (principle 37); as well as rights relating to equality and non-discrimination (principle 2); privacy (principle 6); and freedom from torture and cruel, inhuman or degrading treatment (principle 10). Considering these rights in relation to sex characteristics extends our interpretation of international human rights law to intersex experiences.

### ***Office of the High Commissioner of Human Rights***

The Office of the High Commissioner of Human Rights (OHCHR) is the department of the UN that works on promoting human rights and supports the UN Human Rights Council and treaty monitoring bodies. Over the past decade, the OHCHR has become increasingly vocal about intersex human rights issues. In a report in 2011 on ‘Discriminatory laws and practices and

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<sup>36</sup> *ibid.*

<sup>37</sup> Morgan Carpenter, ‘Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles plus 10’ (2020) *Culture, Health & Sexuality* 1 at 4.

acts of violence against individuals based on their sexual orientation and gender identity', non-consensual interventions on intersex children were briefly mentioned.<sup>38</sup> This was then expanded upon in a 2014 UN interagency statement lead by the World Health Organization, of which OHCHR was a co-author, on eliminating forced, coercive, and otherwise involuntary sterilization.<sup>39</sup> Former President of Ireland and former UN High Commissioner for Human Rights, Mary Robinson, was one of the signatories to the Yogyakarta Principles.

Since 2015, OHCHR has been more actively engaged with intersex issues. In his opening statement to the 30th session of the Human Rights Council, the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, declared that intersex children and adults are 'frequently subjected to forced sterilization and other unnecessary and irreversible surgery, and suffer discrimination in schools, workplaces and other settings.'<sup>40</sup> In September 2015, the OHCHR convened an expert meeting on ending human rights violations against intersex persons, marking the first time the UN had convened a discussion to solely address intersex human rights issues.<sup>41</sup> In the same month, OHCHR included intersex in its public awareness 'Free and Equal' campaign on the rights of LGBTI people which included a fact sheet and video.<sup>42</sup> In 2016, in advance of Intersex Awareness Day, a group of UN and regional human rights experts made a joint statement speaking out against intersex human rights violations and called on states to prohibit unnecessary medical practices on intersex children without

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<sup>38</sup> UN General Assembly, 'Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity' (2011) A/HRC/19/41 at 57.

<sup>39</sup> Office of the United Nations High Commissioner for Human Rights et al, 'UN Interagency Statement - Eliminating Forced, Coercive and Otherwise Involuntary Sterilization' (2014) <[https://www.who.int/reproductivehealth/publications/gender\\_rights/eliminating-forced-sterilization/en/](https://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/)> accessed 7 October 2017.

<sup>40</sup> Office of the United Nations High Commissioner, 'Opening Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the 30th Session of the Human Rights Council' (16 September 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>> accessed 21 January 2021.

<sup>41</sup> Office of the United Nations High Commissioner for Human Rights, 'Opening Remarks by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at the Expert Meeting on Ending Human Rights Violations against Intersex Persons' <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431&LangID=E>> accessed 21 January 2021.

<sup>42</sup> United Nations Free & Equal, 'Intersex Babies Are Perfect Just as They Are!' (*UN Free & Equal*) <<https://www.unfe.org/intersex-awareness/>> accessed 23 March 2021.

their informed consent.<sup>43</sup> In 2016, OHCHR published 'Living Free and Equal' which outlined a number of harms faced by intersex people on the basis of sex characteristics,<sup>44</sup> and in 2019, OHCHR published a second edition of its report, 'Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights law', which includes recommendations directed at the rights of intersex people,<sup>45</sup> a development from the 2012 version which solely focused on LGBT issues. In 2019 also, the UN published a background note on human rights violations against intersex people, detailing the human rights issues facing intersex people and the work undertaken by the UN and intersex human rights defenders.<sup>46</sup>

These developments reflect the UN's increased engagement and growing understanding of the importance of highlighting intersex issues. While the work of the OHCHR is not law, the visibility the OHCHR gives to intersex issues and its highlighting of the human rights violations towards intersex provides an educative function and reflects a growing awareness within the UN system of these issues.

### ***UN Human Rights Council and Special Procedures***

The UN Human Rights Council is an inter-governmental body made up of 47 Member States elected by the UN General Assembly and responsible for promoting and protecting human rights. One way it does this is through its reports and recommendations to states. In a 2019 resolution on the elimination of discrimination against women and girls in sport, the UN Human Rights Council expressed concern at the discriminatory regulations that impact

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<sup>43</sup> Office of the United Nations High Commissioner for Human Rights, 'Intersex Awareness Day – Wednesday 26 October' (n 16).

<sup>44</sup> UN OHCHR, 'Living Free and Equal' (2016)

<<https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>> accessed 29 April 2021.

<sup>45</sup> Office of the United Nations High Commissioner for Human Rights, 'Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law' (2019)

<[https://www.ohchr.org/Documents/Publications/Born\\_Free\\_and\\_Equal\\_WEB.pdf](https://www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf)> accessed 29 April 2021.

<sup>46</sup> Office of the United Nations High Commissioner, 'Background Note Human Rights Violations against Intersex People' (2019)

<<https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>> accessed 29 April 2021.

women and girls with differences of sex development.<sup>47</sup> In the report that followed, the terminology shifted to variations in sex characteristics, and it outlined how female eligibility regulations contravened the rights of people with variations in sex characteristics to a number of human rights as outlined previously, and also the right to work and to the enjoyment of just and favourable conditions of work.<sup>48</sup>

Another way that the UN Human Rights Council seeks to protect human rights is through its Special Procedures mechanism. The Special Procedures of the Human Rights Council are experts who are independent of governments or organisations. Their role includes reporting and advising on human rights that relate to their thematic or country-specific mandate. As part of their functions, they can send communications to States and organisations in relation to human rights concerns.

A number of Special Procedures have mandates that impact on issues affecting intersex people. In February 2013, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, commenting on LGBTI persons, called upon 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.<sup>49</sup> In 2016, the same Special Rapporteur, reporting on torture towards women, girls and LGBTI persons, focused on the harms caused to intersex people in health care settings, noting that 'discrimination against women, girls, and persons on the basis of sex, gender, real or perceived sexual orientation or gender identity and sex characteristics often underpins their torture and ill-treatment in health-care settings,'<sup>50</sup> and called on states to 'repeal laws that allow intrusive and irreversible treatments of lesbian, gay, bisexual, transgender and intersex persons including,

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<sup>47</sup> UN Human Rights Council, 'Elimination of Discrimination against Women and Girls in Sport' (2019) A/HRC/40/L.10/Rev.1.

<sup>48</sup> Office of the United Nations High Commissioner for Human Rights, 'Intersection of Race and Gender Discrimination in Sport' (2020) A/HRC/44/26 at 34.

<sup>49</sup> UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Mendez' (2013) A/HRC/22/53 at 88.

<sup>50</sup> *ibid* at 42.

*inter alia*, genital-normalizing surgeries and “reparative” or “conversion” therapies, whenever they are enforced or administered without the free and informed consent of the person concerned’.<sup>51</sup>

In 2009, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, outlined that ‘health-care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide informed consent’, and highlighted this was particularly so in relation to intersex surgeries.<sup>52</sup> In July 2015, the subsequent Special Rapporteur, Dainius Puras, made recommendations to states in relation to the health of children, in which he recommended:

To prohibit discrimination against intersex people, including by banning unnecessary medical or surgical treatment, and adopt measures to overcome discriminatory attitudes and practices through awareness-raising, training for public officials and medical professionals and the elaboration of ethical and professional standards that respect the rights of intersex persons, in consultation with intersex people and their organizations.<sup>53</sup>

As noted above, intersex health issues are not solely related to just non-consensual medical interventions. In 2016, the same Special Rapporteur, reporting on sport and healthy lifestyles, made recommendations to:

Protect the physical integrity and dignity of all athletes, including intersex and transgender women athletes, and immediately remove any laws, policies and programmes that restrict their participation or otherwise discriminate or require them

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<sup>51</sup> *ibid* at 72(i).

<sup>52</sup> United Nations General Assembly, ‘Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Anand Grover’ (2009) A/64/272 at 49.

<sup>53</sup> UN General Assembly, ‘Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ (2015) at 112(m).

to undergo intrusive, unnecessary medical examinations, testing and/or procedures in order to participate in sport.<sup>54</sup>

The Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Puras, and on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, also sent joint communications to medical and sporting bodies, calling for the better protection of rights for intersex persons. Two communications were sent in February 2018, one to the American Academy of Pediatrics and the other to the American Medical Association, calling for, *inter alia*, a prohibition on medically unnecessary surgeries and procedures on intersex children and training for health professionals in line with human rights standards.<sup>55</sup> In September 2018, a third communication was sent, jointly also with the Working Group on the issue of discrimination against women in law and practice, to the president of the International Association of Athletics Federations (now World Athletics), calling for the removal of guidelines that unfairly discriminate against intersex athletes.<sup>56</sup> These actions show a willingness to engage non-state actors in the treatment of intersex people. Ultimately however this mechanism has no ability to enforce compliance and it does not appear that these communications have received a response.<sup>57</sup>

The Special Rapporteur on the right to privacy, Joseph A Cannataci, has also recently commented on the human rights issues impacting intersex people as they relate to privacy, noting that birth certificates can create challenges for attaining 'dignity, identity, privacy and

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<sup>54</sup> UN General Assembly, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' (2016) A/HRC/32/33 at 101(i).

<sup>55</sup> 'Communication to Dr Agliano, Chair of American Medical Association Council on Ethical and Judicial Affairs' (1 February 2018) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23617>> accessed 22 February 2021; 'Communication to Dr Kraft, American Academy of Pediatrics' (1 February 2018) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23618>> accessed 22 February 2021.

<sup>56</sup> 'Communication to Mr Coe, President International Association of Athletics Federations' (18 September 2018) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24087>> accessed 21 February 2021.

<sup>57</sup> Replies to communications sent by special procedures are available on the OHCHR public database at <https://spcommreports.ohchr.org/>. No response is listed for these communications.

development for transgender and intersex children’,<sup>58</sup> and further that children with variations in sex characteristics can be subject to violence, discrimination, harassment, pathologisation of their body, and unnecessary medical treatment, as well as publication of details about their genitalia, stigmatisation and withholding of specific health services.<sup>59</sup>

Conversely, the previous Independent Expert on Sexual Orientation and Gender Identity, Vitit Muntarbhorn, whose mandate began in 2016, has also commented on the treatment of intersex people but has been cautious on the extent of the mandate to cover intersex issues. In his inaugural report to the UN General Assembly and to the UN Human Rights Council, he recognised that intersex people face distinct issues,<sup>60</sup> and clarified that the mandate will cover intersex only where there ‘is a link with sexual orientation and gender identity’.<sup>61</sup> Similarly his successor, Victor Madrigal-Borloz, has also been careful not to confuse the issues together and has limited intersex inclusion in his reports, although he has been vocal in his support for intersex issues elsewhere.<sup>62</sup>

### **Section III: Framing of intersex human rights**

#### ***Framing of human rights and treaty body mechanisms***

The framing of intersex human rights can have implications for how the state understands intersex issues and how it responds to them. The role of treaty body mechanisms is particularly important in this regard. This section considers how treaty body mechanisms have framed intersex human rights issues and recommendations to Ireland, as well as how Ireland has responded to intersex concerns.

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<sup>58</sup> UN Human Rights Council, ‘Artificial Intelligence and Privacy, and Children’s Privacy: Report of the Special Rapporteur on the Right to Privacy, Joseph A Cannataci’ (2021) A/HRC/46/37 at 103.

<sup>59</sup> *ibid* at 98(c).

<sup>60</sup> UN General Assembly, ‘Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (2017) A/72/172 at 7.

<sup>61</sup> UN Human Rights Council, ‘Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Vitit Muntarbhorn’ (2017) A/HRC/35/36 at 6.

<sup>62</sup> See, for example, ILGA World, ‘International Intersex Virtual Forum: How to Be a Good Intersex Ally’ (*ILGA*, 13 October 2020) <<https://ilga.org/intersex-forum-webinar-allyship>> accessed 25 March 2021.

States that have signed and ratified UN treaties are subject to review by the UN treaty body committee that is responsible for its oversight (known as treaty body mechanisms). While the process varies amongst treaty bodies, typically states provide periodic reports to the relevant UN treaty body mechanism and on the basis of this report, the committee prepares a list of issues in advance of the session where the treaty body will consider the state report in order to help frame the dialogue with the state. The treaty body then provides a report of concluding observations and recommendations after considering the State party's report.<sup>63</sup> Many treaty bodies also require states to report back to the treaty body on their progress on implementing the recommendations in 'follow-up procedures'.<sup>64</sup>

Intersex issues were first raised in concluding observations by the Committee on the Elimination of Discrimination Against Women (CEDAW) to Germany in 2009, which recommended that Germany engage further with non-government intersex organisations to further understand their claims and to better protect intersex human rights.<sup>65</sup> The rest of this section considers the concluding observations by UN treaty body mechanisms directed at intersex human rights concerns.

In order to have a comprehensive understanding of how UN treaty bodies discussed intersex issues, the author undertook a review of all treaty body concluding observations across all states that mention 'intersex' and 'sex characteristics' in a substantive way since this first observation in 2009. References to 'intersex' or 'sex characteristics' included within references to lesbian, gay, bisexual, transgender and intersex were not considered, given these references typically do not consider how the issues specifically impact intersex people. Instead, this review focused on intersex specific references and recommendations. The review was conducted by searching the UN 'Universal Human Rights Index' database and

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<sup>63</sup> See, for example, the report of the UN Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (2016) CRC/C/IRL/CO/3-4.

<sup>64</sup> Office of the United Nations High Commissioner, 'The United Nations Human Rights Treaty System Fact Sheet No 30/Rev 1' 29 <<https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>> accessed 22 July 2021.

<sup>65</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women' (2009) CEDAW/C/DEU/CO/6 at 62.



cross-checking it against the ILGA World treaty body annual reports (available since 2014) and OII Europe's International Intersex Human Rights Movement resource list.<sup>66</sup> This review captures treaty body concluding observations from 12 December 2011 to 12 February 2021.

Overall, there were 66 reports directed at 32 different states and across six committees that included at least one substantive intersex specific reference. The count is determined by each report to a state that makes at least one intersex reference. For example, if a country made multiple intersex references in the same report, it would be counted as one. It was found that most of the substantive references used 'intersex'. 'Sex characteristics' was not commonly used in these reports and when it was, it was rarely in a substantive way but included alongside sexual orientation and gender identity.<sup>67</sup> The Committee on the Rights of the Child (CRC) had 19 reports with an intersex recommendation (including one directed at Ireland in 2016),<sup>68</sup> and one report in relation to the Optional Protocol on Sale of Children; CEDAW had 18 reports (including one directed at Ireland in 2017);<sup>69</sup> the Committee Against Torture (CAT) had eight reports; the Committee on the Rights of Persons with Disabilities had eight reports; the Human Rights Committee had seven reports; and the Committee on the Economic, Social and Cultural Rights (CESCR) had six reports. Germany is the only country that has twice received recommendations from the same body in relation to intersex concerns, specifically from CEDAW in 2009 (the first recommendation) and again in 2017 recommending, *inter alia*, that the state adopt legislation to prohibit unnecessary surgeries on intersex children until they can provide informed consent.<sup>70</sup> Collectively, the recommendations from the

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<sup>66</sup> The database is available at <https://uhri.ohchr.org/en/>. The search parameters used were: 'all countries'; 'all mechanisms'; 'all human rights themes'; 'all concerned persons/groups'; the text search of 'intersex' and then separately 'sex characteristics'. Document type was limited to 'concluding observations', and the date range was from 12 December 2011 (the first UN treaty body recommendation on intersex) to 12 February 2021 (when the review was undertaken).

<sup>67</sup> With the exception of the UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the sixth periodic report of Australia' (2017) CCPR/C/AUS/CO/6 at 26 which refers to 'infants and children born with variations in sex characteristics'.

<sup>68</sup> UN Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (2016) CRC/C/IRL/CO/3-4.

<sup>69</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the combined sixth and seventh periodic reports of Ireland' (2017) CEDAW/C/IRL/CO/6-7.

<sup>70</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding Observations on the combined seventh and eighth periodic reports of Germany' (2017) CEDAW/C/DEU/CO/7-8 at 23 and 24.

committees were spread geographically with 17 reports directed at states in Europe, six in Asia, four in South America, three in Africa and two in Oceania.

The treaty bodies framed issues impacting intersex people, in order of frequency, under the headings of ‘harmful practices’, ‘intersex persons’, ‘health’, ‘sexual orientation, gender identity and intersex’ and at times by other specific convention rights.

### ***Framing of intersex human rights concerns as ‘harmful practices’***

The review found that intersex human rights concerns are commonly framed as ‘harmful practices’ by the CRC and CEDAW and less commonly as ‘stereotypes and harmful practices’ or ‘discriminatory stereotypes and harmful practices’. This has been a largely consistent framing since the CRC first began commenting on intersex issues in 2015. It has also been the majority of framings for CEDAW since 2016. In their concluding observations, these committees also consistently refer to their joint general recommendation on harmful practices,<sup>71</sup> and intend for intersex to be categorised similarly.

Some of the main recommendations from the CRC and CEDAW under ‘harmful practices’ have been to: prohibit children being subject to unnecessary surgeries;<sup>72</sup> provide families with intersex children with adequate counselling and support;<sup>73</sup> protect the physical and mental integrity, autonomy and self-determination of intersex people;<sup>74</sup> and ensure effective remedy

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<sup>71</sup> UN Committee on the Elimination of Discrimination Against Women and UN Committee on the Rights of the Child (n 70).

<sup>72</sup> See, for example, UN Committee on the Rights of the Child, ‘Concluding observations on the combined fifth and sixth periodic reports to Austria (2020) CRC/C/AUT/CO/5-6 at 27(a); ‘Concluding observations on the combined fifth and sixth periodic reports of Australia’ (2019) CRC/C/AUS/CO/5-6 at 31(b); ‘Concluding observations on the combined third to fifth periodic reports of Nepal’ (2016) CRC/C/NPL/CO/3-5 at 42(c); UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the seventh periodic report of Chile’ (2018) CEDAW/C/CHL/CO/7 at 22(a).

<sup>73</sup> See, for example, UN Committee on the Rights of the Child, ‘Concluding observations on the fifth periodic report of Denmark’ (2017) CRC/C/DNK/CO/5 at 24(a); UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the ninth periodic report of Mexico’ (2018) CEDAW/C/MEX/CO/9 at 22.

<sup>74</sup> See, for example, UN Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic reports of Ireland’ (2016) CRC/C/IRL/CO/3-4 at 40(a).

for victims, including redress and compensation.<sup>75</sup> Other recommendations have included investigating incidents of treatments on intersex children without informed consent;<sup>76</sup> the need to develop a rights-based health care protocol;<sup>77</sup> and the need to educate and train medical and psychological professionals on diversity and the consequences of unnecessary surgery.<sup>78</sup>

Framing of ‘intersex persons’ as a category distinct from other human rights issues

Some committees have chosen to frame intersex issues under its own distinct category of ‘intersex persons’ or ‘intersex children’, most notably CAT and CESCR but also one instance from the Human Rights Committee.

Under this framing, committees have recommended that: all necessary measures need to be undertaken to ensure no child undergoes unnecessary surgery;<sup>79</sup> there is a need to guarantee impartial counselling services for all intersex children and their parents;<sup>80</sup> and there is a need to guarantee that full, free and informed consent is ensured and that a child is sufficiently mature to participate in decision-making and give effective consent.<sup>81</sup>

### ***Framing of intersex issues as health issues***

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<sup>75</sup> See, for example, UN Committee on the Rights of the Child, ‘Concluding observations on the combined third to sixth reports of Malta’ (2019) CRC/C/MLT/CO/3-6 at 29(e); UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the eighth period report of New Zealand’ (2018) CEDAW/C/NZL/CO/8 at 24(c).

<sup>76</sup> See, for example, UN Committee on the Rights of the Child, ‘Concluding observations on the combined third to sixth reports of Malta’ (2019) CRC/C/MLT/CO/3-6 at 29(e).

<sup>77</sup> See, for example, UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the sixth periodic report of the Netherlands’ (2016) CEDAW/C/NLD/CO/6 at 22(f).

<sup>78</sup> See, for example, UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the eighth period report of New Zealand’ (2018) CEDAW/C/NZL/CO/8 at 25(d).

<sup>79</sup> See, for example, UN Human Rights Committee, ‘Concluding observations on the fourth periodic report of Switzerland’ (2017) CCPR/C/CHE/CO/4 at 25(a).

<sup>80</sup> See, for example, UN Committee Against Torture, ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (2019) CAT/C/GBR/CO/6 at 65(a).

<sup>81</sup> See, for example, UN Committee Against Torture, ‘Concluding observations on the sixth periodic report of Austria’ (2016) CAT/C/AUT/CO/6 at 45(c).

CEDAW has mostly framed intersex human rights issues under harmful practices, but has also framed it under 'health' in concluding observations directed at Austria, Bulgaria, Italy, Liechtenstein and the Republic of Korea.

Under this framing, CEDAW has recommended: that states develop and implement a rights-based health-care protocol for intersex people;<sup>82</sup> that no person be subjected to surgery or treatment without their free, informed and prior consent;<sup>83</sup> and that children are involved to the greatest extent possible in decision making about medical interventions and their choices are respected.<sup>84</sup>

Framing of intersex issues in the category of 'sexual orientation, gender identity, and intersex' The Human Rights Committee typically frames intersex issues under 'sexual orientation, gender identity and intersex status',<sup>85</sup> 'sexual orientation, gender identity and intersex status and persons with HIV',<sup>86</sup> 'sexual orientation, gender identity and intersexuality'<sup>87</sup> or, in concluding observations to Mexico, under 'discrimination and violence based on sexual orientation and gender identity'.<sup>88</sup> CAT also has one report to Hong Kong of intersex considered under 'transgender and intersex persons'<sup>89</sup> and CESCR has one report to Germany

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<sup>82</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the eighth periodic report of Bulgaria' (2020) CEDAW/C/BGR/CO/8 at 34(e); 'Concluding observations on the fifth periodic report of Liechtenstein' (2018) CEDAW/C/LIE/CO/5 at 36(c); 'Concluding observations on the seventh periodic report of Italy' (2017) CEDAW/C/ITA/CO/7 at 42(e).

<sup>83</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the ninth periodic report of Austria' (2019) CEDAW/C/AUT/CO/9 at 35(e); 'Concluding observations on the eighth periodic report of Bulgaria' (2020) CEDAW/C/BGR/CO/8 at 34(d).

<sup>84</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the seventh periodic report of Italy' (2017) CEDAW/C/ITA/CO/7 at 42(e).

<sup>85</sup> UN Human Rights Committee, 'Concluding observations on the sixth periodic report of Australia' (2017) CCPR/C/AUS/CO/6.

<sup>86</sup> UN Human Rights Committee, 'Concluding observations on the third periodic report of Viet Nam' (2019) CCPR/C/VNM/CO/3.

<sup>87</sup> UN Human Rights Committee, 'Concluding observations on the fifth periodic report of Portugal' (2020) CCPR/C/PRT/CO/5; 'Concluding observations on the sixth periodic report of Belgium' (2019) CCPR/C/BEL/CO/6.

<sup>88</sup> UN Human Rights Committee, 'Concluding observations on the sixth periodic report of Mexico' (2019) CCPR/C/MEX/CO/6.

<sup>89</sup> UN Committee Against Torture, 'Concluding observations on the fifth periodic report of China with respect to Hong Kong, China' (2016) CAT/C/CHN-HKG/CO/5.

with ‘intersex children and transgender persons’.<sup>90</sup> There was also one instance of framing by CEDAW to Slovakia in 2015 under the heading of ‘disadvantaged and marginalized groups of women’ where intersex was substantively discussed alongside issues facing transgender women.<sup>91</sup>

As outlined, this review only considered references that were intersex-specific. In many concluding observations there are references to LGBTI, with the I meaning intersex. This is often done however without considering how the issues impact intersex people or the issue discussed may not be relevant for intersex people. For example, there are numerous recommendations to decriminalise same-sex relations and this is considered an ‘LGBTI issue’ even though those discussions are about gay, lesbian or bisexual relationships.<sup>92</sup> Where intersex-specific issues are being considered, interestingly across the board there are few instances of intersex being discussed alongside LGBT or sexual orientation and gender identity.

Under this framing, the Human Rights Committee recommended strengthening measures to end the performance of irreversible medical acts, especially surgical operations, on intersex children who are not yet capable of giving their free and informed consent; except in cases where such interventions are absolutely necessary for medical reasons.<sup>93</sup> CAT recommended Hong Kong take legislative, administrative and other measures necessary to respect the physical integrity and autonomy of intersex persons and to ensure that no one is subjected during infancy or childhood to non-urgent medical or surgical procedures intended to decide the sex of the child; guarantee impartial counselling services for all intersex children and their parents; guarantee full, free and informed consent and that non-urgent, irreversible medical

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<sup>90</sup> UN Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Germany’ (2018) E/C.12/DEU/CO/6.

<sup>91</sup> UN Committee on the Elimination of Discrimination Against Women, ‘Concluding observations on the combined fifth and sixth periodic reports of Slovakia’ (2015) CEDAW/C/SVK/CO/5-6 at 37(c).

<sup>92</sup> See, for example, UN Human Rights Committee, ‘Concluding observations on the sixth periodic report of Tunisia’ (2020) CCPR/C/TUN/CO/6 at 19-20 and UN Committee Against Torture, ‘Concluding observations on the sixth periodic report of the Russian Federation’ (2018) CAT/C/RUS/CO/6 at 32-33.

<sup>93</sup> UN Human Rights Committee, ‘Concluding observations on the fifth periodic report of Portugal’ (2020) CCPR/C/PRT/CO/5 at 17; ‘Concluding observations on the sixth periodic report of Belgium’ (2019) CCPR/C/BEL/CO/6 at 22; ‘Concluding observations on the sixth periodic report of Mexico’ (2019) CCPR/C/MEX/CO/6 at 13.

treatments are postponed until a child is sufficiently mature to participate in decision-making and give effective consent; and provide adequate redress to intersex persons.<sup>94</sup> CESCR recommended Germany prohibit medically unnecessary surgery on intersex infants and children and provide an enabling environment in which intersex infants and children can develop and in which their preferred gender identity can be respected. It also recommends that the State party revise its gender laws in accordance with international human rights standards and best practice.<sup>95</sup>

### ***Framing of intersex issues alongside particular rights***

The Committee on the Rights of Persons with Disabilities has favoured discussing intersex issues with reference to particular rights. In six instances it has framed intersex issues under protecting the integrity of the person (art 17),<sup>96</sup> one framing to India under the right to life (art 10),<sup>97</sup> one to India on liberty of movement and nationality (art 18),<sup>98</sup> and one to the United Kingdom of Great Britain and Northern Ireland under freedom from exploitation, violence and abuse (art 16).<sup>99</sup>

The CRC also considered intersex issues under ‘birth registration and nationality’ in relation to Kenya,<sup>100</sup> the Human Rights Committee considered ‘non-discrimination’ in relation to

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<sup>94</sup> UN Committee Against Torture, ‘Concluding observations on the fifth periodic report of China with respect to Hong Kong, China’ (2016) CAT/C/CHN-HKG/CO/5 at 29.

<sup>95</sup> UN Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the sixth periodic report of Germany’ (2018) E/C.12/DEU/CO/6 at 24 and 25.

<sup>96</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of India’ (2019) CRPD/C/IND/CO/1 at 36-37; ‘Concluding observations on the combined second and third reports of Australia’ (2019) CRPD/C/AUS/CO/2-3 at 33-34; ‘Concluding observations on the initial report of Morocco’ (2017) CRPD/C/MAR/CO/1 at 36-37; ‘Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland’ (2017) CRPD/C/GBR/CO/1 at 40-41; ‘Concluding observations on the initial report of Italy’ (2016) CRPD/C/ITA/CO/1 at 45-46; ‘Concluding observations on the initial report of Germany’ (2015) CRPD/C/DEU/CO/1 at 37-38.

<sup>97</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of India’ (2019) CRPD/C/IND/CO/1 at 22-23.

<sup>98</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of India’ (2019) CRPD/C/IND/CO/1 at 38-39.

<sup>99</sup> UN Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland’ (2017) CRPD/C/GBR/CO/1 at 38-39.

<sup>100</sup> UN Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Kenya’ (2016) CRC/C/KEN/CO/3-5 at 29.

Pakistan,<sup>101</sup> and CESCR considered ‘sexual and reproductive rights’ in relation to Argentina.<sup>102</sup> The CRC also gave concluding observations in one instance to India in 2014 regarding the optional protocol to the CRC on the sale of children, child prostitution and child pornography. Under article 9(1) and (2) of the optional protocol, the CRC commented on ‘the inadequate protection of boys and intersex children from sexual abuse and exploitation’ and recommended that ‘prevention strategies incorporate key actions to address protection of boys and intersex children from sexual abuse’.<sup>103</sup>

Many of the recommendations from the committees cover numerous and similar issues, regardless of the committee making the recommendation or the heading under which it is considered. Nevertheless, these recommendations reflect the breadth of concerns that overlap with a number of human rights issues and are directed at many countries from different regions of the world. That so many committees, which consider the rights outlined in different human rights treaties, have all made substantively similar comments and recommendations in relation to intersex issues reflects the degree to which intersex issues intersect with so many fundamental human rights issues and other populations. Further, while the substance of those concerns may be similar, how intersex human rights issues are framed still has important implications for how states might consider intersex concerns, and in turn which national departments and bodies they consider as relevant in this space and what actions they may subsequently take. Where intersex issues are framed under harmful practices, there may be a greater obligation for states to enact protections to prevent harm. Particularly when it comes to harmful practices directed at children, CEDAW and CRC recommend a greater role for states to intervene to protect the intersex child and the child’s future ability to consent to interventions on their body. There is arguably no place for parental consent in cases of harm towards children. This is seen in other examples of state intervention to protect against harmful practices towards children even if a parent or guardian consents

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<sup>101</sup> UN Human Rights Committee, ‘Concluding observations on the initial report of Pakistan’ (2017) CCPR/C/PAK/CO/1 at 11.

<sup>102</sup> UN Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the fourth periodic report of Argentina’ (2018) E/C.12/ARG/CO/4 at 55-56.

<sup>103</sup> UN Committee on the Rights of the Child, ‘Concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography’ (2014) at 21(d) and 22(d).

to the practice, like female genital mutilation or child abuse.<sup>104</sup> Concluding observations by the CAT have also caused particularly emotive reactions by perpetrators, who understand themselves as providing health care rather than being associated with torture or cruel, inhuman or degrading practices, reflecting that the language of human rights can itself be a barrier to change.<sup>105</sup> While this framing risks making discussions regarding these issues more divisive, it may lead the state to recognise the gravity of the practices. Bauer, Truffer and Crocetti see this framing as more likely to guarantee legal repercussions by states and redress for intersex people.<sup>106</sup> Conversely, framing intersex issues under health requires a state to work progressively towards achieving the highest attainable standard of physical and mental health to the maximum of the state's available resources, and may result in greater work by medical professionals to work towards particular health outcomes for intersex people and include parents of intersex children within decision-making processes. Framings under LGBTI or sexual orientation, gender identity, and sex characteristics also have certain implications at a national level for which departments or local groups are considered relevant to be working on intersex issues and can potentially be problematic in some countries where intersex is confused with and considered the same as LGBT, or where being LGBT may be illegal and/or dangerous.

Quite consistently, the UN has adopted the language of 'intersex' to describe the population, even though terminology in this area is highly contested, following the language of intersex human rights defenders who have raised these issues at the international level. Different terminology may be suitable for different contexts, while some framings like 'disorders of sex development' or 'DSD' seek to shift definitions to exclude particular intersex traits and legitimise the medicalisation of intersex bodies. By arguing that people with DSDs are men or women with disorders, and choosing to frame intersex as an identity that is neither male or female, this conceptual shifting allows for the jurisdiction of the medical profession to

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<sup>104</sup> In Ireland, for example, section 2(3) of the Criminal Justice (Female Genital Mutilation) Act 2012 provides that it is not a defence for an offence of female genital mutilation that it was consented to by the parents or guardian of the girl concerned.

<sup>105</sup> Daniela Crocetti et al, "'You're Basically Calling Doctors Torturers': Stakeholder Framing Issues around Naming Intersex Rights Claims as Human Rights Abuses' (2020) 42 *Sociology of Health & Illness* 943, 953-954.

<sup>106</sup> Markus Bauer, Daniela Truffer and Daniela Crocetti, 'Intersex Human Rights' (2020) 24 *The International Journal of Human Rights* 724, 742.



continue 'treating' disordered men and women,<sup>107</sup> as well as legitimising the state to defer its jurisdiction over protecting the rights of intersex people to the medical profession.<sup>108</sup> This lack of medicalised language in UN documentation reflects a recognition at the international level that having an intersex variation is not solely a medical concern but that intersex people are a distinct group in need of human rights protection. It removes responsibility for the treatment of intersex people solely out of the medical jurisdiction and demands that states play a greater role in recognising and addressing the social, legal and medical issues that arise for intersex people.

### ***Framing of intersex issues in Ireland***

Ireland has signed and ratified numerous human rights treaties, agreeing to obligations to protect the human rights of all people, including intersex people.<sup>109</sup> However, there is currently little movement in Ireland to consider intersex issues as human rights concerns. The sparse work undertaken on intersex issues to date has framed intersex alongside gender issues and more broadly within LGBTI frameworks. The 2018 review of the Gender Recognition Act 2015 recommended that 'all measures taken to improve access to gender recognition [...] should also provide access for intersex individuals/people with VSCs.'<sup>110</sup> While important for some intersex people, this is far from the more pressing concerns faced by the intersex population. Intersex has also been included within broader government LGBTI frameworks, as reflected in the LGBTI+ National Youth Strategy (2018-2020),<sup>111</sup> the National

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<sup>107</sup> Morgan Carpenter, 'The "normalisation" of Intersex Bodies and "Othering" of Intersex Identities: The Experience in Australia' in Jens M Scherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia 2018).

<sup>108</sup> Fae Garland and Mitchell Travis, 'Making the State Responsible: Intersex Embodiment, Medical Jurisdiction, and State Responsibility' (2020) 47(2) *Journal of Law and Society* 298, 307-309.

<sup>109</sup> Ireland has signed and ratified the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (IHREC); Convention Against Torture (UNCAT); Convention on the Elimination of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (UNCRC); and the Convention on the Rights of Persons with Disabilities (UNCRPD).

<sup>110</sup> Department of Social Protection, 'Review of the Gender Recognition Act 2015 - Report to the Minister for Employment Affairs and Social Protection' (2018) s 6.8.

<sup>111</sup> Department of Children and Youth Affairs, 'LGBTI+ National Youth Strategy 2018-2020 LGBTI+ Young People: Visible, Valued and Included' (2018)

<<https://assets.gov.ie/24459/9355b474de34447cb9a55261542a39cf.pdf>> accessed 18 March 2021.

LGBTI Inclusion Strategy 2019-2021,<sup>112</sup> and the LGBTI+ Youth in Ireland and across Europe analysis.<sup>113</sup> In these government strategies and reports, it has been repeatedly noted that little is known or understood about intersex,<sup>114</sup> that there needs to be further data collection,<sup>115</sup> and that there is a need to improve understanding of and response to the physical and mental health needs of intersex young people.<sup>116</sup> The work to understand these issues further and collect adequate data is yet to be done. Legal understanding of intersex is also currently limited. There is no explicit inclusion in any domestic legislation or case law and, with the exception of the work of legal scholar Ni Mhuirthile,<sup>117</sup> there has been limited intellectual consideration of how the law may impact intersex people in Ireland. Intersex invisibility in the law again reflects the lack of understanding of intersex issues by government as well as a readiness to consider intersex as a medical issue and outside the scope of state responsibility.

Within the international system, intersex is also framed as a medical responsibility by Irish government representatives. During the CRC review of Ireland in 2016, the Head of Delegation Minister Dr James Reilly, then Minister for Children and Youth Affairs and former Minister for Health, stated that intersex surgeries were a ‘clinical decision’, and ‘very often we are talking about very young babies here, very very young children, who have a serious anatomical, physiological difficulty to be sorted out, and that’s the basis on which these

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<sup>112</sup> Department of Justice, ‘National LGBTI+ Inclusion Strategy 2019-2021’ (2019)

<[http://www.justice.ie/en/JELR/LGBTI+Inclusion\\_Strategy\\_2019-](http://www.justice.ie/en/JELR/LGBTI+Inclusion_Strategy_2019-2021.pdf/Files/LGBTI+Inclusion_Strategy_2019-2021.pdf)

[2021.pdf/Files/LGBTI+Inclusion\\_Strategy\\_2019-2021.pdf](http://www.justice.ie/en/JELR/LGBTI+Inclusion_Strategy_2019-2021.pdf/Files/LGBTI+Inclusion_Strategy_2019-2021.pdf)> accessed 24 November 2020.

<sup>113</sup> Department of Children, Equality, Disability, Integration and Health, NUI Galway and Health Promotion Research Centre, ‘LGBTI+ Youth in Ireland and across Europe: A Two-Phased Landscape and Research Gap Analysis’ (2021) <<https://www.gov.ie/pdf/?file=https://assets.gov.ie/135654/4d466c48-34d9-403a-b48e-fdcfb7931320.pdf#page=null>> accessed 21 June 2021.

<sup>114</sup> Department of Children and Youth Affairs (n 111) 4; Department of Children, Equality, Disability, Integration and Health, NUI Galway and Health Promotion Research Centre (n 113) 129.

<sup>115</sup> Department of Justice (n 112), action 20.

<sup>116</sup> Department of Children and Youth Affairs (n 111) 29.

<sup>117</sup> See, for example, Tanya Ni Mhuirthile, ‘Building Bodies: A Legal History of Intersex in Ireland’, *Sexual Politics in Modern Ireland* (2015); Tanya Ni Mhuirthile, ‘Gender Identity, Intersex and Law in Ireland: Critique and Reform’ in Lynsey Black and Peter Dunne (eds), *Law and Gender in Modern Ireland* (1st edn, Hart Publishing 2019). An ‘Intersex Mapping Project’ is currently being undertaken through Dublin City University to collect data on the experiences of intersex people in Ireland, see: <https://www.dcu.ie/intersex>.

procedures might be carried out.<sup>118</sup> This rhetoric reflects the state's position, whereby intersex is framed as a medical issue and not within the jurisdiction of the state to intervene. Intersex issues are thereby considered anatomical problems which need to be fixed, and it is the clinicians who are determining what is problematic and in need of fixing. Following Ireland's review, the CRC made recommendations to Ireland to prohibit harmful practices to intersex people. It recommended that Ireland:

- (a) 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;
- (b) Undertake investigation of incidents of surgical and other medical treatment of intersex children without informed consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation;
- (c) Educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity and on the consequences of unnecessary surgical and other medical interventions for intersex children.<sup>119</sup>

Similarly, in CEDAW's review of Ireland in 2017, Department of Health Principal Officer Kieran Smyth stated that intersex surgeries took place 'after a unanimous decision of the consultants and of the parents.'<sup>120</sup> No consideration is given to the informed consent of the intersex person, the future ability of an intersex child to consent, or other human rights considerations involved in these interventions. In its concluding observations, CEDAW noted under 'harmful practices' its concern that 'medically irreversible and unnecessary sex assignment surgery and

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<sup>118</sup> Gavan Coleman, Markus Bauer and Daniela Truffer, 'NGO Report to the Second Report of Ireland on the Convention Against Torture' (2017) 8.

<sup>119</sup> UN Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (2016) CRC/C/IRL/CO/3-4 at 40.

<sup>120</sup> Coleman, Bauer and Truffer (n 118) 8.

other treatments are reportedly performed on intersex children'. It recommended that Ireland:

Develop and implement an appropriate rights-based health-care protocol for intersex children, which ensures that children and their parents are properly informed of all options and that children are, to the greatest extent possible, involved in decision-making about medical interventions and that their choices are fully respected.<sup>121</sup>

Evidently Ireland's framing of intersex issues and action to date does not align with how the UN presents intersex human rights. In Ireland, any work directed at intersex issues has so far been considered alongside trans and more broadly LGBTI issues. While government documents and reports show some understanding that intersex is a distinct population, the limited understanding of the issues facing intersex people in Ireland has so far meant that little work is being undertaken to address intersex specific harms and human rights issues. UN treaty bodies have made recommendations to Ireland under a framing of 'harmful practices' and have directed attention to non-consensual intersex surgeries, however Ireland continues to assert at the UN that intersex issues are medical health issues and in other spaces domestically considers intersex issues within broader LGBTI frameworks.

While consideration of intersex within LGBTI is not necessarily a good or a bad approach within the Irish context, similar constructions within the UN show that the ready inclusion of intersex within LGBTI may result in a lack of direct attention being brought on intersex issues and can risk misunderstanding what the key intersex concerns are. Furthermore, while there is an understanding within Ireland that more knowledge and data on intersex issues is required (as acknowledged in the aforementioned government strategies and reports), collecting this data should not come at the expense of guaranteeing the human rights of intersex people in the interim. The framing of intersex issues at the UN has not yet had much impact on how Ireland understands intersex issues as Ireland continues to deny responsibility towards intersex and considers the treatment of intersex people to be a medical health care

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<sup>121</sup> UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the sixth and seventh periodic report of Ireland' (2017) CEDAW/C/IRL/CO/6-7 at 25(b).

issue rather than a human rights concern. Nevertheless, if Ireland shifts to accepting its responsibility over the human rights of intersex people, this framing by the UN offers ways in which it can act. In the meantime, UN statements can help legitimise the concerns of intersex civil society and assist them to pressure Ireland to change its practices.

## **Conclusion**

The UN has increasingly become aware of and condemned intersex human rights abuses over the last decade. Increasing attention has been given to intersex human rights issues at the UN by the OHCHR, special procedures and treaty bodies. While it is common in treaty body concluding observations and in other UN literature for intersex to be included within LGBTI framings, when considering substantive intersex human rights concerns it is notable that intersex is more often distinctly and relevantly separated out and considered under other framings of 'harmful practices', 'intersex persons' or 'health'. Indeed, the first Independent Expert on Sexual Orientation and Gender Identity clarified that intersex persons face distinct issues not specifically covered under his mandate.

It is clear that international human rights law extends to protect intersex people and the UN is working on articulating how intersex people are impacted and increasingly putting pressure on states to respond to address intersex human rights concerns. How intersex issues are framed and presented to states can have implications for how states understand and work towards addressing these issues, though it is first necessary for states to acknowledge their responsibility in guaranteeing the rights of intersex people. Ireland, where it does consider intersex issues, typically considers it within LGBTI frameworks and has acknowledged the lack of data and understanding on the needs of intersex people domestically. However, while there is some commitment to collect more data on intersex in Ireland, this has not yet extending to committing to address human rights concerns. Internationally there is still a denial by Ireland of any wrongdoing or harm towards intersex people, and Ireland continues to defer to medicine for the treatment of intersex people rather than engage with intersex human rights. The increasing moves at the international level to raise intersex concerns with states, as well as work by civil society organisations to leverage those UN statements and

remind states of their international obligations, may ultimately help shift how states understand and respond to intersex issues domestically.