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**‘65 Reasons’**

The Rights Of Intersex People in Canada

**Honourable David Lametti, P.C., M.P.**

Minister of Justice and Attorney General of Canada

House of Commons

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Egale works to improve the lives of LGBTQ2S people in Canada and to enhance the global response to LGBTQ2S issues. Egale will achieve this by informing public policy, inspiring cultural change, and promoting human rights and inclusion through research, education and community engagement.

Égale travaille à améliorer la vie des personnes LGBTQ+ en éclairant l'élaboration des politiques publiques, en inspirant le changement culturel et en promouvant les droits de la personne et l'inclusion grâce à la recherche, à l'éducation et à la mobilisation communautaire.

**Dear Ministers and Special Advisor,**

**INTRODUCTION: IN REGARD TO**

1. Having regard to the sections 2(b)<sup>1</sup>, 2(d)<sup>2</sup> and 15<sup>3</sup> of the Canadian Charter of Rights and Freedoms, that all Canadians deserve to feel safe and to have equal treatment under the law.
2. Having regard to the section 7<sup>4</sup> of the Canadian Charter of Rights and Freedoms, that all Canadians have the right to life, liberty and security and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
3. Having regard to the section 32(1)<sup>5</sup> of the Canadian Charter of Rights and Freedoms, in which the Charter applies to the Parliament and Government of Canada in respect of “all matters within the Authority”, and to the legislature and government of each province.
4. Having regard to the section 2<sup>6</sup> of the Canadian Human Rights Act, that all individuals are entitled to "an opportunity equal with other individuals to make for themselves the lives they are able and wish to have [...]"

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<sup>1</sup> The Canadian Charter of Rights and Freedoms, Fundamental freedoms: 2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

<sup>2</sup> The Canadian Charter of Rights and Freedoms, Fundamental freedoms: 2(d) freedom of association.

<sup>3</sup> The Canadian Charter of Rights and Freedoms, Equality before and under law and equal protection and benefit of law: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Affirmative action programs (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>4</sup> The Canadian Charter of Rights and Freedoms, Life, liberty and security of person, Section 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

<sup>5</sup> The Canadian Charter of Rights and Freedoms, Application of Charter 32. (1) This Charter Applies: (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

<sup>6</sup> The Canadian Human Rights Act, Section 2: The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or

5. Having regard to the section 3(1)<sup>7</sup>, as well as idem 3.1<sup>8</sup> of the Canadian Human Rights Act, which prohibits discrimination based on “[...] sex, sexual orientation, gender identity or expression”, and for greater certainty, including prohibition of multiple grounds of discrimination in a discriminatory practice.

6. Having regard to the Bill C-16<sup>9</sup>, an Act to amend the Canadian Human Rights Act and the Criminal Code, which adds gender expression and gender identity as protected grounds (to the Canadian Human Rights Act), and also to the Criminal Code provisions dealing with hate propaganda, incitement to genocide, and aggravating factors in sentencing.

7. Having regard to the judgement held by the Supreme Court of Canada that the laws must be interpreted in ways that are consistent with the Human Rights Code.<sup>10</sup>

8. Having regard to the judgement held by Supreme Court of Canada in Egan v. Canada<sup>11</sup>, which established that sexual orientation constitutes a prohibited basis of discrimination under section 15 of the Canadian Charter of Rights and Freedoms.

9. Having regard to the judgments held by Quebec Human Rights Tribunal, that transsexualism is included in the scope of the term "sex" in section 10 of the Québec Charter of human rights and freedoms.<sup>12</sup>

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expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

<sup>7</sup> The Canadian Human Rights Act, Prohibited grounds of discrimination, 3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

<sup>8</sup> The Canadian Human Rights Act, Multiple grounds of discrimination, 3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

<sup>9</sup> Bill C-16: An Act to amend the Canadian Human Rights Act and the Criminal Code, available at:

[https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/421C16E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C16E)

<sup>10</sup> “When the subject matter of a law is said to be the comprehensive statement of the “human rights” of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises. As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with “particular and specific legislation”, is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law”. Supreme Court of Canada Judgements, Insurance Corporation of British Columbia v. Heerspink et al., [1982] 2 S.C.R. 145, Date: 1982-08-09, pp. 157-158, available at:

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5502/index.do>; See also Zurich Insurance Co. v. Ontario (Human Rights Commission), [1992] 2 S.C.R. 321, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/895/index.do>

<sup>11</sup> Supreme Court of Canada Judgements, Egan v. Canada, [1995] 2 SCR 513, Date: 1995-05-25, available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1265/index.do>

<sup>12</sup> Quebec Human Rights Tribunal, M.L. and Commission des droits de la personne et des droits de la jeunesse du Québec v. Maison des jeunes, [1998] J.T.D.P.Q. no 22, (1998) 33 C.H.R.R. D/263.

**10. Having regard to the decision of the Human Rights Tribunal of Ontario in *Lewis v. Sugar Daddys Nightclub*<sup>13</sup>, that a trans man was subjected to malicious physical and verbal abuse based on his gender identity and expression.**

**11. Having regard to the decision of the Human Rights Tribunal of Ontario, confirming the right to be free from discrimination in housing, where gender identity is expressly listed as a prohibited ground of discrimination.<sup>14</sup>**

**12. Having regard to the report of the Canadian Human Rights Act Review Panel | published by the Canadian Human Rights Act Review Panel under the authority of the Minister of Justice and the Attorney General of Canada, including the recommendation “that gender identity be added to the list of prohibited grounds of discrimination in the Act.”**

*“We heard numerous instances of discrimination on the ground of gender identity. We were told about the difficulty of seeking changes to government documents and officials’ lack of respect for the privacy of transgendered persons seeking government services. [...] We agree with the view that transgendered individuals are protected from discrimination on the ground of sex or the combined grounds of sex and disability. However, to leave the law as it stands would fail to acknowledge the situation of transgendered individuals and allow the issues to remain invisible. While these issues are clearly related to sex, this ground may not cover all those encountered in the transgendered experience, especially in the decision to undergo a sex change and its implementation. To say transsexualism is a disability seems to make it a medical matter rather than a matter of life experienced in the opposite gender. [...] Based on past experience, we do not expect a great many cases would be filed on this ground, but we believe nevertheless that gender identity should expressly be added to the Act. However, the cases that do arise can cause substantial harm to those affected, and legal protection is warranted.”<sup>15</sup> [Emphasis added]*

<sup>13</sup> Human Rights Tribunal of Ontario, *Lewis v. Sugar Daddys Nightclub*, 2016 HRTO 347, File number: 2014-19766-I, March 17, 2016, available at: <https://www.canlii.org/en/on/onhrt/doc/2016/2016hrto347/2016hrto347.pdf>

<sup>14</sup> *McMahon v. Wilkinson*, 2015 HRTO 1019, File number: 2013-16269-I; 2013-16270-I, Date: 2015-07-30, available at: [https://www.canlii.org/en/on/onhrt/doc/2015/2015hrto1019/2015hrto1019.html?searchUrlHash=AAAAAQALdHJbnNnZW5kZXI\\_AAAAAAQ&resultIndex=21](https://www.canlii.org/en/on/onhrt/doc/2015/2015hrto1019/2015hrto1019.html?searchUrlHash=AAAAAQALdHJbnNnZW5kZXI_AAAAAAQ&resultIndex=21)

<sup>15</sup> The report of the Canadian Human Rights Act Review Panel, *Promoting equality: A New Vision*, Ottawa - Ontario: Justice Canada, June 2000, Catalogue number: J2-168/2000E-PDF, p. 108., available at: <http://publications.gc.ca/site/eng/412030/publication.html>

**13. Having regard to the Canadian provinces and territories legislation, which most of them include gender identity and/or gender expression as prohibited grounds of discrimination under their human rights laws.<sup>16</sup>**

**14. Having regard to the Universal Declaration of Human Rights.<sup>17</sup>**

**15. Having regard to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>18</sup>**

**16. Having regard to the UN Convention on the Rights of the Child.<sup>19</sup>**

**17. Having regard to the UN Convention on the Rights of Persons with Disabilities.<sup>20</sup>**

**18. Having regard to the 2013 report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>21</sup>**

<sup>16</sup> Prohibition of discrimination based on “gender identity”: The Northwest Territories, Human Rights Act, S.N.W.T. 2002, c.18, available at: <https://www.justice.gov.nt.ca/en/files/legislation/human-rights/human-rights.a.pdf>; The Saskatchewan Human Rights Code, SS 1979, c. S-24.1. , Repealed by Chapter S-24.2 of the Statutes of Saskatchewan, 2018 (effective October 1, 2018), available at: <http://www.publications.gov.sk.ca/freelaw/documents/English/Statutes/Repealed/S24-1.pdf>; Manitoba, The Human Rights Code, C.C.S.M., c. H175., available at: <https://web2.gov.mb.ca/laws/statutes/ccsm/h175e.php>; Prohibition of discrimination based on “gender identity” and “gender expression”: British Columbia, Human Rights Code, RSBC 1996, c. 210., available at: [http://www.bclaws.ca/Recon/document/ID/freeside/00\\_96210\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01); Alberta Human Rights Act, Revised Statutes of Alberta 2000, Chapter A-25.5, available at: <http://www.qp.alberta.ca/documents/Acts/A25P5.pdf>; Ontario, Human Rights Code, R.S.O. 1990, c. H.19, available at: <https://www.ontario.ca/laws/statute/90h19>; Quebec, Charter of human rights and freedoms, CQLR, c. C-12., available at: <http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-12>; Prince Edward Island, RSPEI 1988, c. H-12., available at: <https://www.princeedwardisland.ca/sites/default/files/legislation/H-12%20-Human%20Rights%20Act.pdf>; Nova Scotia, Human Rights Act, RSNS 1989, c. 214., available at: <https://nslegislature.ca/sites/default/files/legc/statutes/human%20rights.pdf>; New Brunswick, Human Rights Act, 2011-c.171. available at: <http://laws.gnb.ca/en/ShowPdf/cs/2011-c.171.pdf>; Newfoundland and Labrador, Human Rights Act, SNL 2010, c. H-13.1., available at: <https://assembly.nl.ca/legislation/sr/statutes/h13-1.htm>; The exceptions are: Nunavut, Human Rights Act, S.Nu. 2003, c.12., available at: [http://www.nhr.ca/files/NHR\\_Act\\_Eng.pdf](http://www.nhr.ca/files/NHR_Act_Eng.pdf); and Yukon, Human Rights Act, RSY 2002, c.116., available at: <http://www.gov.yk.ca/legislation/acts/huri.pdf>.

<sup>17</sup> Articles, 1, 2, 3, 6 and 7 of the Universal Declaration of Human Rights: “all human beings are born free and equal in dignity and rights”, “everyone is entitled to all the rights [...] without distinction [...] colour, sex [...] birth or other status”, “everyone has the right to life, liberty and security of person”, has the right to “recognition as a person before the law”, and that “all are equal before the law”: The United Nations, Universal Declaration of Human Rights, 217 A (III), 1948, Available at: <https://www.refworld.org/docid/3ae6b3712c.html>

<sup>18</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>

<sup>19</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>

<sup>20</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, Annex I, available at: <https://www.refworld.org/docid/4680cd212.html>

<sup>21</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53, available at: <https://www.refworld.org/docid/51136ae62.html>

**19. Having regard to the 2014 UN Human rights, sexual orientation and gender identity resolution adopted by the Human Rights Council.<sup>22</sup>**

**20. Having regard to the 2015 Council of Europe Resolution 2048 - Discrimination against transgender people in Europe.<sup>23</sup>**

**21. Having regard to the 2015 report of the Council of Europe Commissioner for Human Rights on human rights and intersex people,<sup>24</sup> as well as to the 2016 keynote address by Council of Europe Commissioner for Human Rights.<sup>25</sup>**

**22. Having regard to the 2016 UN Resolution, adopted by Human Rights Council, on the Protection against violence and discrimination based on sexual orientation and gender identity.<sup>26</sup>**

**23. Having regard to the Yogyakarta Principles<sup>27</sup>, as well as the Yogyakarta Principles Plus 10<sup>28</sup> on the application of international human rights law in relation to sexual orientation, gender expression and sex characteristics.**

**24. Having regard to the European Parliament resolution on the rights of intersex people, adopted on February 8, 2019.<sup>29</sup>**

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<sup>22</sup> UN Human Rights Council, *Human rights, sexual orientation and gender identity : resolution adopted by the Human Rights Council*, 2 October 2014, A/HRC/RES/27/32, available at: <https://www.refworld.org/docid/55ed69214.html>

<sup>23</sup> Council of Europe: Parliamentary Assembly, Resolution 2048 - Discrimination against transgender people in Europe, 22 April 2015, Resolution 2048 (2015), available at: <https://www.refworld.org/docid/55b242e94.html>

<sup>24</sup> Council of Europe: Commissioner for Human Rights, Human rights and intersex people, 12 May 2015, CommDH/IssuePaper(2015)1, available at: <https://www.refworld.org/docid/55afaf0a4.html>

<sup>25</sup> Council of Europe: Commissioner for Human Rights, European societies should recognise the full diversity of gender identities, 3 June 2016, CommDH/Speech(2016)2, available at: <https://www.refworld.org/docid/5756edef4.html>

<sup>26</sup> UN Human Rights Council, Protection against violence and discrimination based on sexual orientation and gender identity: resolution / adopted by the Human Rights Council, 15 July 2016, A/HRC/RES/32/2, available at: <https://www.refworld.org/docid/57e3d9934.html>

<sup>27</sup> International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: <https://www.refworld.org/docid/48244e602.html>

<sup>28</sup> International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017, available at: <https://www.refworld.org/docid/5c5d4e2e4.html>

<sup>29</sup> European Union: European Parliament, European Parliament resolution of 08 February 2019 on the rights of intersex people, 2018/2878(RSP), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2019-0101&format=XML&language=EN>



**In this regard,**

**Following our letter to you of October 26<sup>th</sup>, 2018 whereby you dismissed our concerns pertaining to the use of subsection 268(3), we again, draw your attention to the following:**

**PART I: BIAS, EXCLUSION AND STIGMA**

**25.** Intersex people are born with “genital, genetic, or hormonal characteristics” that do not fit typical binary notions of male or female bodies, and some people find it confusing.<sup>30</sup> Some chromosomal intersex variations may not be physically apparent at all. In some cases they are and this is discovered during puberty or adulthood, and some are visible at birth.<sup>31</sup>

**26.** Because of their sex characteristics, who in terms of body, behavior, and/or identity do not fit into the typical binary system are accorded an inferior social status associated with social stigma, social isolation, deep depression and suicide.

*“Since the 1990s, intersex activists have been fighting for bodily autonomy, mainly to halt the social and physical damages wreaked by medical interventions aimed at regulating intersex bodies to fit male or female norms. Genital mutilation, damaged erogenous sensitivity and genital sensation, lack of reproductive potential, somatic alienation, a sense of shame and need for secrecy, social isolation, deep depression, and suicide attempts are only some of the myriad long-term consequences of such interventions”.*<sup>32</sup>

<sup>30</sup> Morland, I., Intersex, TSQ: Transgender Studies Quarterly, 2014: 1(1–2): 111–15.

<sup>31</sup> Lisdonk, van J., Living with intersex/DSD: An exploratory study of the social situation of persons with intersex/DSD, Netherlands Institute for Social Research | SCP, The Hague, August 2014, 10.

<sup>32</sup> Danon, L.M., Intersex Activists in Israel: Their Achievements and the Obstacles They Face, Bioethical Inquiry, 2018; 15: 569–578; at 569. See also: Creighton, S.M., Surgery for intersex. Journal of the Royal Society of Medicine, 2001; 94(5): 218–220; Creighton, S.M., Long-term outcome of feminization surgery: The London experience. British Journal of Urology International, 2004; 93(3): 44–46; Crouch, N.S., L.M. Liao, C.R. Woodhouse, G.S. Conway, and S.M. Creighton, Sexual function and genital sensitivity following feminizing genitoplasty for congenital adrenal hyperplasia, The Journal of Urology, 2008; 179(2): 634–638. Morland I., What can queer theory do for intersex? GLQ: A Journal of Lesbians and Gay Studies, 2009; 15(2): 285–312.

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*There is a great deal of ignorance about intersex/DSD. The persons with intersex/DSD who were interviewed for this study come up against this ignorance and, with some conditions, against the perception of a person's sex as a simple dichotomy in which the distinction male/female is taken for granted as the norm (sex normativity). Intersex/DSD differs from that norm. There are taboos and sensitivities here because it impinges on issues in relation to sex and sexuality. Persons with intersex/DSD generally do not feel the need to question the male/female distinction, and in most cases prefer to be seen as a complete man or woman. This means that intersex/DSD is not very visible in society.<sup>33</sup>*

**27.** The dominant social and cultural norms are highly influential over individual behavior, creating stigma, discrimination and prejudice against LGBTI people, including sanctioning their behaviour. There is an ideological presumption about typical binary notions of male or female bodies, their greatest barriers to access to justice and reparations, access to information, and legal recognition, and satisfying their life as others, who are the majority.

*“The minority stress model suggests that because of stigma, prejudice and discrimination, LGBTI people may experience more stress than non-LGBTI people, and that it is this disproportionate experience of stress that can lead to increased incidence of physical and mental health problems. Minority stress occurs where marginalized groups display specific risk factors. Whilst the entire population may display a particular risk factor, the incidence and effects of these risk factors may be more pronounced in smaller subsections of the larger population<sup>34</sup> [...] Intersex people also showed a raised incidence of suicide attempts at 19%, with 60% having considered suicide compared to 3% in mainstream populations<sup>35</sup> [...] Minority stress theory proposes that inequalities occur due to social, cultural and political factors where LGBTI people may experience discrimination associated with their minority status.”<sup>36</sup>*

<sup>33</sup> Lisdonk, van J., Living with intersex/DSD: An exploratory study of the social situation of persons with intersex/ DSD, Netherlands Institute for Social Research | SCP, The Hague, August 2014, 13-14.

<sup>34</sup> Zeeman, L., Sherriff, A., Browne, K., McGlynn, N., Mirandola, M., Gios, L., Davis, R., Sanchez-Lambert, J., Aujean, S. Pinto, N., Farinella, F., Donisi, V., Niedzwiedzka-Stadnik, M., Rosinska M., Pierson, A., Amaddeo, F., the Health4LGBTI Network, A review of lesbian, gay, bisexual, trans and intersex (LGBTI) health and healthcare inequalities, European Journal of Public Health, 2018: 1–7, 3.

<sup>35</sup> Ibid, p. 5.

<sup>36</sup> Ibid, p. 6.



**28.** Intersex people remain invisible in society, which can lead to secrecy and shame, also “as a result of their frequently being unaware of the surgeries or treatments performed on them early in their life”.<sup>37</sup> Because of fear of stigmatization and social exclusion, most intersex people “stay in the closet”. The continued stress and traumatic experiences associated with medicalization, individual and/or familial isolation, discrimination, verbal and behavioural reactions and violence caused by stigma can lead intersex people to be “structurally excluded” from access to health care, education, adequate accommodation, and employment.<sup>38</sup>

*“[...] Their life experience is often shrouded in secrecy and shame, also as a result of their frequently being unaware of the surgeries or treatments that were performed on them early on in their life. Access to medical records is often rendered very difficult, as is access to personal history, including childhood pictures and other memories. Intersex individuals who are discovered later on in life may experience the same invasive treatment – without their free and informed consent – as intersex individuals who are identified during childhood<sup>39</sup> [...] A strong fear of stigmatisation and social exclusion forces most intersex people to stay “in the closet”, even when they become aware of their sex. Moreover, society remains largely ignorant about the existence of intersex people since hardly any information is made available to the public about the matter. Consequently, for many years, the human rights problems affecting intersex people’s well-being were either unknown or ignored.”<sup>40</sup>*

**29.** Intersex people are subjected to discrimination, prejudice, and ignorance and are prone to stigmatisation. This stigma and socio-legal distancing have the potential to worsen their well-being in several ways, with the potential for direct harmful effects.

*“Patients with DSD, particularly those with an atypical appearance, are prone to stigmatisation. Such stigmatisation is stressful and leads to negative emotional reactions and social isolation. These findings support the assumption that an atypical physical appearance can be harmful for*

<sup>37</sup> Council of Europe: Commissioner for Human Rights, Human rights and intersex people, 12 May 2015, CommDH/Issue Paper (2015)1, p.14.

<sup>38</sup> UNDP, Intersex Research Study - Albania, BiH, Macedonia, Serbia 2017, UNDP Europe and Central Asia, 2018, p. 19; available at: <http://www.eurasia.undp.org/content/dam/rbec/docs/Intersex%20Research%20Study%20UNDP%202017.pdf>

<sup>39</sup> Council of Europe: Commissioner for Human Rights, Human rights and intersex people, 12 May 2015, CommDH/ Issue Paper(2015)1, at p. 14. see note 6: The Swiss National Advisory Commission on Biomedical Ethics (NEK-CNE) (2012), “On the management of differences of sex development: ethical issues relating to ‘intersexuality’” Opinion No. 20/2012; Intersexuelle Menschen e. V. / XY-Frauen (2008), Shadow Report to the 6th National Report of the Federal Republic of Germany on the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

<sup>40</sup> Ibid, p. 14.

*psychosocial well-being. This may be particularly true when the medical condition is not understood by the patient, the parents and members of the community, as well as when the patient cannot make their own decisions regarding clinical management. Culturally sensitive education about DSD that is accessible to patients, families and the community would go a long way towards improving social acceptance and thereby the well-being of (young) people with DSD.”<sup>41</sup>*

## **PART II: CANADIAN CHARTER v. HARMFUL PRACTICE**

**30.** The 2013 report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment wherein he grounds abuses arising in healthcare settings within the normative legal framework of torture under the Convention Against Torture (UN CAT). The report expressly states that any involuntary medical interventions undertaken without a therapeutic purpose and free and informed consent of the individual in question meets the standards of torture and ill-treatment.<sup>42</sup> The UN CAT establishes a positive obligation of the state to

*“[...] prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled... and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”<sup>43</sup>*

**31.** Subsection 268(3) of the Criminal Code,<sup>44</sup> which exempts non-consensual, medically unnecessary, sex normalizing surgeries on intersex infants from the purview of aggravated

<sup>41</sup> Ediati A, Juniarto AZ, Birnie E, et al. Social stigmatisation in late identified patients with disorders of sex development in Indonesia. *BMJ Paediatrics Open* 2017;1: e000130. doi:10.1136/bmjpo-2017-000130, p. 7-9.

<sup>42</sup> Juan E. Mendez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/22/53, 1. February 2013, available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

<sup>43</sup> See Para 15, UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, available at: <https://www.refworld.org/docid/47ac78ce2.html>

<sup>44</sup> Subsection 3: Excision: (3) For greater certainty, in this section, “wounds” or “maims” includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or (b) the person is at least eighteen years of age and there is no resulting bodily harm. Criminal Code (R.S.C., 1985, c. C-46), p.56, available at <https://laws-lois.justice.gc.ca/eng/acts/C-46/page-56.html#docCont>

assault amounts to a specific failure to prohibit a practice that qualifies as torture and cruel, inhuman and degrading treatment under international law.

**31.1** It is pertinent to note that intersex is a visually apprehended condition which is pathologized by medicine. “Intersex” as a diagnosis is a societal and medical barometer surrounding rigid conception of genital size and shape. The surgical interventions are merely cosmetic in nature based on ableist and binary notions that define qualifications for a “normal” or “desirable” human body, thus devoid of any therapeutic purpose.

**31.2** The substantive law under subsection 268(3) deprives intersex children from criminal protections against pathologization of their bodies and associated involuntary surgical intervention. In this way subsection 268(3) contravenes the requirement of UN CAT that the state take proactive actions to prohibit and prevent practices amounting to torture and cruel, inhuman and degrading treatment. Intersex individuals are not only left unprotected by the law in cases of non consensual, cosmetic, medical intervention they are also dispossessed of any legal remedies for redress under criminal law.

**31.3** Subsection 268(3) absolves medical practitioners of criminal liability when informed consent is given by parents, equipping parents with primary legal capacity to make decisions regarding bodily autonomy of the child. This stance also violates treaty body standards which state that informed consent must be granted by the person in question. Given the irreversible consequences of these procedures that have the ability to restrict an individual’s capacity to make any future decision regarding their body, the inherent principles of self determination, bodily autonomy and human dignity that form the jurisprudential basis of human rights law are compromised as a whole.

**32.** It’s also crucial to understand that the objective standards of free and informed consent, i.e. informed consent without coercion, misrepresentation and undue influence<sup>45</sup> are deeply compromised in a doctor-parent relationship in this setting. Power imbalances, owing to unequal knowledge levels and limited awareness of intersex bodies result in these decisions taken mostly by medical practitioners solely on the basis of medicalised and cis-normative understanding of gender often disguised as “medical necessity”.

<sup>45</sup> Anand Grover, Report of the Special Rapporteur Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, available at, <http://www.refworld.org/pdfid/4aa762e30.pdf>

*“Because their bodies don’t comply with typical definition of male or female, intersex children and adults are frequently subjected to forced sterilisation and irreversible surgery, and suffer discrimination in schools, workplace and other settings.”<sup>46</sup>*

*United Nations High Commissioner for Human Rights  
Zeid Ra'ad Al Hussein*

**33.** Freedom from torture assumes the status of customary international law, a non derogable right under international law.. Despite being a signatory to the Convention Against Torture, and numerous requests by civil society urging for necessary amendments to subsection 268(3), Canada has not taken any steps in furtherance of the same, thus standing in critical violation of UN CAT. The severity of this is compounded by the fact that the violation is that of a *jus cogen* norm.

**34.** Together with a *jus cogen* norm violation, subsection 268(3) also violates the rights of intersex infants under section. 7 of the *Canadian Charter of Human Rights and Freedoms*. As legal persons under the law, intersex infants are also entitled to section 7 guarantees to life, liberty and security.

*“Medical practice on intersex [include]... clitoridectomies, clitoral recessions or clitoral reductions, hypospadias «repair», the creation of or deepening of vaginal cavities, the regular insertion of vagina dilators on children or adolescents, gonadal removal or sterilization, the prescription of high doses of hormones[...]<sup>47</sup>*

**35.** These decisions surrounding a person’s sexual and reproductive organs are “*fundamental life choices*”<sup>48</sup> that have permanent impacts on one’s expression of personhood with implications in spheres of physical, sexual and mental health. Subsection 268(3), by not allowing for agency pertaining to these choices with the intersex persons themselves, grossly impedes the exercise of personal autonomy.

*Every person in Canada—regardless of whom they love, or how they identify or express their gender— has the right to live free without fear of*

<sup>46</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights : Geneva, 14 September 2015 , available at: <https://www.refworld.org/docid/55f7d2c64.html>

<sup>47</sup> Bastien Charlebois, J., Sanctioned Sexualities: The Medical Treatment of Intersex Bodies and Voices. Sanctioned sexualities panel, ILGA World Congress. Mexico, 2015, available at: <http://ilga.org/an-introduction-to-sanctioned-sexualities-the-medical-treatment-of-intersex-bodies-and-voices/>

<sup>48</sup> Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307.

*discrimination, violence or exclusion, and to be fully included and embraced in all facets of Canadian society.*<sup>49</sup>

*Canadian Human Rights Commission*

*Let's work together, so that all Canadians, including all trans and gender-diverse persons, see themselves in their human rights laws.*<sup>50</sup>

*~ Chief Commissioner Marie-Claude Landry, Ad.E.*

**36.** In accordance with the Supreme Court's decision in *Blencoe v. British Columbia (Human Rights Commission)*, this is a section 7 infringement of liberty under the Canadian Charter, wherein "*individuals are entitled to make decisions of fundamental importance free from state interference*".<sup>51</sup> With over 30-80% of intersex children undergoing one or as many as five surgeries<sup>52</sup>, intersex individuals suffer from life-long physical and psychological pain. Subsection 268(3) sanctions medical interventions that seriously interfere with a person's physical and psychological integrity. Such interferences have been repeatedly recognized by the Supreme Court of Canada<sup>53</sup> as deprivations of security of the person within the meaning of s. 7 of the *Charter*. Also, considering the Supreme Court's line of reasoning in the *Alberta Reference Case*<sup>54</sup> wherein it was opined that international custom forms persuasive sources for interpretation of charter provision and *Kazemi Estate*<sup>55</sup> case wherein courts drew parallels between *jus cogens* norms and principles of fundamental justice, it is established that deprivation of a person's security in a manner that violates *jus cogens* prohibition against torture is patently contrary to principles of fundamental justice. It is thus amply clear that Subsection 268(3) does not even stand the test of constitutionality.

**37.** In General Comment No. 20 (Non-discrimination in economic, social and cultural rights) "Other status" includes sexual orientation, as well as gender identity as among the prohibited grounds of discrimination. For example, as is stated, persons who are

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<sup>49</sup> Source: <https://www.chrc-ccdp.gc.ca/eng/content/lgbtq2i-rights>

<sup>50</sup> Ibid.

<sup>51</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307

<sup>52</sup> Holmes, M., & Hunt, R. (2011). Intersex Health. Retrieved from Rainbow Health Ontario website: [https://www.rainbowhealthontario.ca/wp-content/uploads/woocommerce\\_uploads/2014/08/Intersex.pdf](https://www.rainbowhealthontario.ca/wp-content/uploads/woocommerce_uploads/2014/08/Intersex.pdf)

<sup>53</sup> *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Carter v Canada (AG)*, 2015 SCC 5; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

<sup>54</sup> [1987] 1 S.C.R. 313.

<sup>55</sup> 2014 SCC 62.

transgender, transsexual or intersex often face serious human rights violations.<sup>56</sup> As a State Party to the ICESCR<sup>57</sup>, Canada should ensure that a person's sex, gender or gender identity v. 'sex characteristics' is not a barrier to realizing Covenant rights, for example, as subsection 268(3) in question above.

**38.** The UN Human Rights Committee in its Communication Decision No. 2172/2012 (*G v. Australia*) recognized that "the prohibition against discrimination under article 26 (of the International Covenant on Civil and Political Rights - ICCPR) encompasses discrimination on the basis of marital status and gender identity, including transgender status".<sup>58</sup>

*"The Committee recalls its general comment No. 18 (1989) on non-discrimination (para. 1), in which it is stated that article 26 entitles all persons to equality before the law and equal protection of the law, prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this context, the Committee observes that the prohibition against discrimination under article 26 encompasses discrimination on the basis of marital status and gender identity, including transgender status."*<sup>59</sup>

**39.** Even if the intent of the provision may not be to expressly authorize these medical interventions, as contended by your response. It begs the question, why are the same legal safeguards of aggravated assault afforded in cases of Female Genital Mutilation not granted in cases of Intersex Genital Mutilation? There is no intelligible basis to distinguish the two practices as both are carried out without consent of the person in question with irreversible alterations to sexual organs, based on cultural expectations of gender and sexuality. The unreasonable exclusion of intersex infants from legal safeguards is

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<sup>56</sup> Paragraph 32 of the General Comment No. 20, UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html>; See also: CESCR general comments Nos. 14 and 15., and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

<sup>57</sup> Canada acceded to the ICESCR on May 19, 1976, and the treaty entered into force in Canada on August 19, 1976.

<sup>58</sup> UN Human Rights Committee (HRC), Communication no. 2172/2012: Human Rights Committee : views adopted by the Committee at its 119th session, 6-29 March 2017, 28 June 2017 CCPR/C/119/D/2172/2012, available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fd%2f2172%2f2012&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f119%2fd%2f2172%2f2012&Lang=en)

<sup>59</sup> Ibid, para 7.12, p. 16.



manifestly discriminatory in nature, on the grounds of gender identity, under the *Canadian Human Rights Act*.

*In modern pluralistic societies, there is no such criterion as an objective best interest standard for child care. [...] Protection for the child means not just protection by but also protection from society and the state. The same attitude is expressed by the UN Convention of the Rights of the Child [...] Thus, parents take first-line responsibility in defining what might be best for the child, and this may rightly vary according to their individual experience and life style, cultural expectations, and beliefs. The right to familial privacy, however, is not unlimited. It has to comply with the ethos of parenthood determined by the larger cultural context, not just by the individual parents themselves. This almost universal ethos demands both a caring and encouraging human relationship between parent and child and respect for each and every child. The way in which parents are expected to live up to this ethos has to be socially negotiated in line with social, cultural, or religious attitudes [...] Nevertheless, it is necessary to outline some general principles limiting parental discretion in accordance with commonly shared beliefs of the good parent on one hand and of the child's human dignity and bodily integrity on the other hand. First of all, the child itself is to be respected as another major player in the decision-making process. Even the small child can express preferences or vetoes. As early as the age of 6 or 7, children are able to understand biological processes or to reflect on their identity. The child, therefore, should be granted partnership status and be involved in all examination and treatment steps, as appropriate to his or her developmental level. This helps to modify the family perspective usually represented by the parents. Secondly, all persons involved should be aware of the fact that a good parent-child relationship is the result of a process of continuing efforts and not just a state of mind. It can be facilitated by appropriate therapeutic interventions.”<sup>60</sup>*

<sup>60</sup> Claudia Wiesemann, C., Ude-Koeller, S., Sinnecker, G. H. G., Thyen, U., Ethical principles and recommendations for the medical management of differences of sex development (DSD)/intersex in children and adolescents, *Eur J Pediatr*, 2010; 169:671–679, 674.

### **PART III: EXAMPLES OF CRUCIAL CHANGE**

**40.** In 2015, Malta became the first country to legally recognize “bodily integrity and physical autonomy” for all individuals adopting the Gender Identity, Gender Expression and Sex Characteristics Act. It is the first law to prohibit surgery and treatment on the sex characteristics of minors without informed consent of the minor itself, giving a wide comprehensive approach of “sex characteristics” to discrimination law, as well as ‘prohibiting social, cultural and other unnecessary interventions on the sex characteristics of minors’.<sup>61</sup> Malta’s approach to the issue is ‘holistic’ in response to the “most important agenda issue for the intersex community”:

*“Malta specifically outlaws unnecessary sex assignment treatment and surgery on intersex minors through the Gender Identity, Gender Expression and Sex Characteristics Act 2015 (GIGESC). Section 15 GIGESC defers sex reassignment surgery and surgical interventions on sex characteristics until the individual is able to make an informed choice. Section 15(2) recognises there may be some exceptional circumstances whereby surgery takes place where a minor is unable to provide consent but states that ‘medical intervention which is driven by social factors without the consent of the individual concerned will be in violation of this Act’. This form of legal governance directly challenges the medical jurisdiction over intersex bodies as it allows individuals rather than their families and doctors to make ‘decisions affecting their own bodily integrity and physical autonomy’. Additionally, Malta permits individuals to self-determine their own gender identity (without medical evidence); extends its ‘hate crime’ legislation to incorporate sex characteristics and also sets out sex characteristics as a protected category within its anti-discrimination law. Thus Malta has an expansive approach that decouples legal regulation of intersex embodiment from the biomedical narrative and instead attempts to redress substantive inequalities. Indeed the major purpose of these reforms were not only to recognise intersex embodied people, but also to attempt to integrate intersex embodied people as full participants within Maltese society.”<sup>62</sup>*

<sup>61</sup> Carpenter, M., The human rights of intersex people: addressing harmful practices and rhetoric of change, *Reproductive Health Matters*, 24:47, 2016; 74-84, DOI: 10.1016/j.rhm.2016.06.003, p. 77; See also: Malta. Gender Identity, Gender Expression and Sex Characteristics Act, 2015, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1>.

<sup>62</sup> Garland, F., Travis, M., *Legislating Intersex Equality: Building the Resilience of Intersex People through Law*, *Legal Studies*, 38 (4), 2018; pp. 587-606. ISSN 0261-3875, <https://doi.org/10.1017/lst.2018.17>, at p. 7.

**41.** Next to Malta, Chile and Portugal have prohibited ‘irreversible cosmetic genital surgeries for intersex babies’.<sup>63</sup> In 2013, Australia adopted the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill<sup>64</sup> which explicitly includes intersex status as a stand-alone prohibited ground of discrimination. As Australia, Germany also introduced equality provisions that focus on status and identity using, for example, “third sex/gender markers on official documents and antidiscrimination law in an attempt to level the social playing field”.<sup>65</sup> Various countries such as Australia, Malaysia, Nepal, New Zealand<sup>66</sup> and South Africa already allow “X” as another sex category on passports, while the Indian passport application form, next to “Female” and “Male”, as a third sex/gender marker allows “Others”.<sup>67</sup>

**42.** Colombian Constitutional Court has restricted the capacity of doctors and parents to allow for non consensual, cosmetic surgeries on intersex infants. In four separate judgements, the courts have opined:<sup>68</sup>

- 42.1** That sex normalizing procedures cannot take place without the informed consent of the child itself;
- 42.2** The standard of informed consent for parents to agree to these medical interventions is that of “qualified and persistent” informed consent wherein parents are to be informed about all the risks associated with the procedures together with existence of alternate treatments methods available. Plus, consent must be in written form, and provided more than once over a period of time in order to ensure that parents were made completely aware of the ramifications of the treatment.
- 42.3** Parents cannot consent on behalf of a child over the age of 5 in cases of sex normalizing genital surgeries.
- 42.4** Under certain conditions of absolute medical urgency and need parents can consent on behalf of their children for surgical medical interventions pertaining to sex normalization.

<sup>63</sup> Danon, L.M., Intersex Activists in Israel: Their Achievements and the Obstacles They Face, *Bioethical Inquiry*, 2018; 15: 569–578, 570.

<sup>64</sup> Available at: [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5026](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5026)

<sup>65</sup> Garland, F., Travis, M., *Legislating Intersex Equality: Building the Resilience of Intersex People through Law*, p. 2.

<sup>66</sup> Information about Changing Sex/Gender Identity <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>

<sup>67</sup> UNDP, *Intersex Research Study - Albania, BiH, Macedonia, Serbia 2017*, p.22.

<sup>68</sup> The Constitutional Court of Colombia, Judgements: Sentencia T-477/95, Sentencia SU-337/99, Sentencia T-551/99, Sentencia T-912/08.

**43.** In November 2017, the German Constitutional Court (Bundesverfassungsgericht) ruled that civil status law must allow a third option for intersex persons, acknowledging the possibility of legal categorization outside male and female.<sup>69 70</sup> In December 2018, the German parliament approved a law allowing a third gender option on birth certificates for people who are not distinctly male or female.<sup>71</sup>

**44.** In its judgment of June 2018, the Austrian Constitutional Court (Verfassungsgerichtshof Österreich, VfGH) ordered, with immediate effect, that the interpretation of the term “gender” in the Austrian Personal Status Act must not be restricted to binary gender and the provision in question may therefore remain in force (VfGH G 77/2018).<sup>72</sup>

*“The Constitutional Court stated that persons have to accept only state sex assignments which correspond to their gender identity (Rz 18). The state is required to respect an individual decision for or against a certain gender and to provide a sex entry which reflects and adequately expresses a person’s individual gender identity (par. 23). The constitution protects individuals from heteronomous sex assignment, in especially persons with alternative gender identity (par. 18). Notably intersex persons are a group in special need of protection due to their small numbers and due to their - from the perspective of the majority - "otherness" (par. 20). The constitution protects individuals from heteronomous sex assignment, in especially persons with alternative gender identity (par. 18). Notably intersex persons are a group in special need of protection due to their small numbers and due to their - from the perspective of the majority - "otherness" (par. 20) [...] Departing from its preliminary decision and following the arguments of the complainant the Constitutional Court found that the legal provisions in force do not restrict sex entries rigidly binary to male and female and do allow for an adequate display of a self-determined gender identity and provide precautions for the effective exercise of self-determined assignment of sex, particularly for children (par 43) [...] Finally the Constitutional Court made clear that Intersex constitutes an alternative sex development and not an expression*

<sup>69</sup> Dunne, P., Mulder, J., Beyond the Binary: Towards a ‘Third’ Sex Category in Germany? German Law Journal, 19(3), 2018: 627-648. See also, Botha, H., Beyond Sexual Binaries? The German Federal Constitutional Court and the Rights of Intersex People” *PER / PELJ* 2018(21) - DOI <http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4747>

<sup>70</sup> Judgement of the German Constitutional Court, available in English at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010\\_1bvr201916en.html;jsessionid=805A4C4127B0605B0631CA8C43130D37.1\\_cid361](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html;jsessionid=805A4C4127B0605B0631CA8C43130D37.1_cid361)

<sup>71</sup> Source: <https://www.ctvnews.ca/canada/german-law-allows-third-gender-in-birth-certificates-1.4219424>

<sup>72</sup> Rechtskomitee LAMBDA (RKL), Dr. Helmut Graupner, <https://www.rklambda.at/index.php/en/news-en/361-austrian-constitutional-orders-immediate-third-gender-recognition>

*of a pathological development (par. 16). Thus sex-assigning medical interventions in newborns and children should be avoided as much as possible and could only be justified in exceptional cases of sufficient medical indication (par 16). Families' fears of stigmatisation could never serve as an indication for intervention into sex development (par 16, 20). Such sex-assigning medical interventions today face resolute rejection (par. 16).''<sup>73</sup>*

**45.** In 2017, the Parliamentary Assembly of the Council of Europe adopted resolution 2191, *Promoting the human rights of and eliminating discrimination against intersex people*. This resolution prohibits medically unnecessary sex “normalising” surgery, sterilisation and other treatments practised on intersex children without their informed consent. The resolution also calls for consultation with intersex people and asserts a need for data collection and access to medical records for intersex people.<sup>74</sup>

*“With regard to effectively protecting children’s right to physical integrity and bodily autonomy and to empowering intersex people as regards these rights: prohibit medically unnecessary sex-“normalising” surgery, sterilisation and other treatments practised on intersex children without their informed consent; ensure that, except in cases where the life of the child is at immediate risk, any treatment that seeks to alter the sex characteristics of the child, including their gonads, genitals or internal sex organs, is deferred until such time as the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent; provide all intersex people with health care offered by a specialised, multidisciplinary team taking a holistic and patient-centred approach and comprising not only medical professionals but also other relevant professionals such as psychologists, social workers and ethicists, and based on guidelines developed together by intersex organisations and the professionals concerned; ensure that intersex people have effective access to health care throughout their lives; ensure that intersex people have full access to their medical records; provide comprehensive and up-to-date training on these matters to all medical, psychological and other professionals concerned, including conveying a clear message that intersex bodies are the result of natural variations in sex development and do not as such need to be modified.”<sup>75</sup>*

<sup>73</sup> Ibid.

<sup>74</sup> Council of Europe: Parliamentary Assembly, *Promoting the human rights of and eliminating discrimination against intersex people*, 12 October 2017, Doc. 14404, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&>

<sup>75</sup> Ibid, para 7.1 (7.1.1-7.1.6).



**46.** In July 2017, a major report on Human Rights violations in US hospitals: “I Want to Be Like Nature Made Me”: Medically Unnecessary Surgeries on Intersex Children in the US, which includes graphic descriptions of traumatic experiences, often affecting children.

*“Intersex people in the United States are subjected to medical practices that can inflict irreversible physical and psychological harm on them starting in infancy, harms that can last throughout their lives. Many of these procedures are done with the stated aim of making it easier for children to grow up “normal” and integrate more easily into society by helping them conform to a particular sex assignment. The results are often catastrophic, the supposed benefits are largely unproven, and there are generally no urgent health considerations at stake. Procedures that could be delayed until intersex children are old enough to decide whether they want them are instead performed on infants who then have to live with the consequences for a lifetime.”<sup>76</sup>*

**47.** In October 2017, The American Academy of Pediatrics issued a statement recognizing Intersex Awareness Day.

*“Current surgical practices on infants and children with intersex variations lack an evidence base. Human rights violations occur routinely in US hospitals, and elsewhere in the world.”<sup>77</sup>*

**48.** On the 14<sup>th</sup> of February 2019, the European Parliament adopted a Resolution on the Rights of Intersex People.<sup>78</sup> By adopting this resolution, the European Parliament is calling for the protection of the fundamental rights of intersex people within the European Union, for their bodily integrity and human rights. The resolution complements the resolution 2191 of the Parliamentary Assembly of the Council of Europe on Promoting the human rights of, and eliminating discrimination against, intersex people.

<sup>76</sup> Human Rights Watch, I Want to Be Like Nature Made Me: Medically Unnecessary Surgeries on Intersex Children in the US, 25 July, 2017, available at:

<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#>

<sup>77</sup> American Academy of Pediatrics statement on Intersex Awareness Day, 27 October 2017, available at:

<https://intersexday.org/en/aap-statement-2017/>

<sup>78</sup> European Union: European Parliament, European Parliament resolution of 14 February 2019 on on the rights of intersex people (2018/2878(RSP)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2019-0101+0+DOC+XML+V0//EN&language=EN>



*“Notes the urgent need to address violations of the human rights of intersex people, and calls on the Commission and the Member States to propose legislation to address these issues; Strongly condemns sex-normalising treatments and surgery; welcomes laws that prohibit such surgery, as in Malta and Portugal, and encourages other Member States to adopt similar legislation as soon as possible; Stresses the need to provide adequate counselling and support to intersex children and intersex individuals with disabilities, as well as to their parents or guardians, and fully inform them of the consequences of sex-normalising treatments; [...] Calls on the Member States to improve access for intersex people to their medical records, and to ensure that no one is subjected to non-necessary medical or surgical treatment during infancy or childhood, guaranteeing bodily integrity, autonomy and self-determination for the children concerned; Takes the view that pathologisation of intersex variations jeopardises the full enjoyment by intersex people of the right to the highest attainable standard of health as enshrined in the UN Convention on the Rights of the Child; calls on the Member States to ensure the depathologisation of intersex people; [...] Deplores the lack of recognition of sex characteristics as a ground of discrimination across the EU, and therefore highlights the importance of this criterion in order to ensure access to justice for intersex people [...]”<sup>79</sup>*

#### **PART IV: CANADA IS FAILING WITH SUBSTANTIVE EQUALITY**

**49.** Canada can be seen as failing to engage with formal or substantive accounts of equality. We are deeply disappointed by the dismissal of our requests pertaining to the use of subsection 268(3) to sanction non-consensual, sex normalizing and cosmetic medical interventions on intersex children. We also find that asking us to address our concerns with provincial authorities, citing issues of jurisdiction is an evasion of federal responsibility. You created the law, you have the authority and responsibility to change it.

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<sup>79</sup> Ibid, paras 1-3, 6-7, and 10.

**50.** Speaking to the force of international law in Canadian jurisdiction, the Supreme Court has noted that international customs forms persuasive sources for interpretation of charter provision.<sup>80</sup> In the same vein, the Supreme Court in *R v. Hape*<sup>81</sup> stated that the

*“[...] the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation.”<sup>82</sup>*

**51.** Given this jurisprudential analysis by the apex court, we ask for interpretation of domestic law to be reconciled with the International Human Rights standards, as its legally binding obligations for Canada under the International Covenant on Civil and Political Rights (ICCPR): *The Right to Liberty and Security of Person; The Right to Respect for Private Life and The Prohibition of Torture and Inhuman or Degrading Treatment*. These protections and obligations are analogous to those offered under the Canadian Charter of Human Rights.

**52.** The Human Rights Committee of the ICCPR, in its General Comment No. 35 has interpreted that security of person under the Covenant ‘concerns freedom from injury to the body and the mind, or bodily and mental integrity’:

*“Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in paragraph 9 below. Article 9 guarantees those rights to everyone. “Everyone” includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons... [...] The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury. [...] and more generally to protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors. States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury.”<sup>83</sup>*

<sup>80</sup> [1987] 1 S.C.R. 313 (S.C.C.).

<sup>81</sup> *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26.

<sup>82</sup> *Ibid.*, supra note 1 at 316.

<sup>83</sup> UN Human Rights Committee (HRC), General comment no. 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/553e0f984.html>

53. The right to privacy is guaranteed under article 17 of the ICCPR, which affirms that

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*<sup>84</sup>

54. In the view of the Human Rights Committee (HRC) article 17 of the ICCPR provides

*“inter alia, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name.”*<sup>85</sup> [Emphasis added]

55. Thus, it is clear that Article 17 encompasses, *inter alia*, sexual identities and sexual practices<sup>86</sup>, gender identities, and expected gender roles.

*“In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws [...] The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.”*<sup>87</sup>

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<sup>84</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

<sup>85</sup> Para 10.2, UN Human Rights Committee (HRC), Communication No. 453/1991: Human Rights Committee : views adopted by the Committee at its 52nd session (On 31 October 1994), 9 December 1994, CCPR/C/52/D/453/1991., available at: <http://hrlibrary.umn.edu/undocs/html/vws453.htm>

<sup>86</sup> Toonen v. Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994, available at: <https://www.refworld.org/cases,HRC,48298b8d2.html>

<sup>87</sup> Ibid, Para 8.2.

**56.** Article 7 of the ICCPR prohibiting torture and cruel, inhumane and degrading treatment.

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*<sup>88</sup>

**57.** For the purpose of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) the term “torture”, as stated in Article 1, means

*“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*<sup>89</sup>

**58.** The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment has recognized that

*whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned.*<sup>90</sup> [Emphasis added]

**59.** Given Canada has displayed tremendous leadership in the promotion and protection of Sexual Orientation and Gender Identity rights on the global stage, Canada’s own

<sup>88</sup> UN General Assembly, International Covenant on Civil and Political Rights.

<sup>89</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>

<sup>90</sup> Manfred Nowak, Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment, Torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/63/175, 28. July, 2008, Para 47, p. 11.

criminal code cannot enable a practice that amounts to torture per normative human rights standards. Canada's neglect towards intersex issues is evidenced by the fact that other jurisdictions have already taken note of the issue and have begun work on reconciling normative human rights standards as contained in the UN CAT with domestic law.

## **PART V: RECOMMENDATIONS**

**60.** We ask that our recommendations are met with positive consideration and proactive steps are undertaken towards legal amendments so that Canada can lead by example for Intersex rights within its own jurisdiction and across the globe.

**61.** The human rights violations to intersex populations in Canada as a result of medically unnecessary surgical interventions are severe. Despite these harms, the *Criminal Code* creates an express carve-out for such procedures. Consequently, practices that amount to *torture* under international law are not even considered to be aggravated assault, or otherwise prohibited, under Canadian criminal law.

**62.** Parliament is currently in the process of modernizing the *Criminal Code*: it falls squarely within federal responsibility to ensure that torture is criminalized in Canada. Provincial medical standards that allow for non-consensual, medically unnecessary surgeries on intersex infants in Canada are a result of lack of accountability in criminal law.

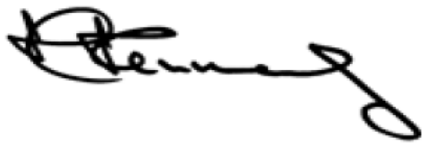
**63. We call attention of the Minister of Justice and Attorney General of Canada to the following recommendations:**

- **Align the criminal code of Canada** with its treaty body obligations under the UN CAT; prevent and prohibit all non consensual, cosmetic, surgeries on intersex children.
- **Ensure section 7** charter protection to all intersex persons in Canada
- **Amend Subsection 268** to include IGM as aggravated assault under the criminal code in order to provide legal redress to victims of IGM.
- **Amend Subsection 268(3)** to include standards of informed consent at par with the Malta Model, wherein

*“It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent...”<sup>91</sup>*

**64.** The Malta model, keeping with its treaty body obligations under UN CAT, gives the agency to grant informed consent to the individual in question itself.

**65.** Egale has the relevant community networks to aid a policy review of the matter and is pleased to partner with your government to help Canada fulfill its treaty body obligation and foster an environment of LGBTQI2S inclusion within the country.



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Every Minister of Justice across Canada  
Every Health Minister across Canada  
Every Human Rights Commissioner across Canada

<sup>91</sup> Section 14 of Gender Identity, Gender Expression and Sex Characteristics Act, 2015, Malta, available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>