



**SOGIESC FACT SHEET SERIES**

## **Fact Sheet 5:**

# **International and regional developments in human rights law**

### **Introduction: the universality of all human rights**

*“All human beings are born free and equal in dignity and rights”.*

*Article 1, Universal Declaration of Human Rights, 1948*

Human rights are:

- fundamental or foundational, going to the heart of human personhood
- entitlements, not mere claims or requests
- applicable to every human being.

By definition, human rights are universal. They are the rights of all people, in all places, at all times. Everyone is entitled to human rights (whatever their sexual orientation, gender identity or expression, or sex characteristics) because they are human beings.

It does not matter that there is no specific reference to the categories of sexual orientation, gender identity, gender expression or sex characteristics in the the Universal Declaration of Human Rights. Nor does it matter that these terms are not mentioned in the two foundational human rights treaties - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is because the fundamental principle of universality ensures all human beings are entitled to all human rights. This is also demonstrated by the inclusion of the phrase ‘or other status’ in all of these three instruments.

Over the past 30 years, international human rights mechanisms and forums have come to recognise explicitly what is guaranteed implicitly in human rights instruments. That is, that the universality of all human rights includes lesbian, gay, bisexual, transgender and intersex people.

This factsheet discusses the approaches they have taken to ensuring the protection and promotion of the human rights of lesbian, gay, bisexual, transgender and intersex people. While the progress is uneven, it is building and irreversible.

## **1. The interpretation and application of international human rights law by treaty monitoring bodies**

### **1. *The treaty monitoring body system***

Each of the nine core international human rights treaties has a committee of independent human rights experts to:

- promote ratification and implementation of the treaty
- receive periodic reports from States parties and examine the States parties on the basis of those reports
- issue guidance to States parties on the interpretation and implementation of the treaty
- receive and give advisory opinions on individual complaints of violation of the treaty where the State party has accepted that jurisdiction of the committee
- hold general discussion days on themes arising under the treaty.

The jurisprudence from treaty monitoring bodies is contained in their opinions responding to individual communications, their concluding observations on State reports, and in their interpretative guidance (generally in the form of 'general comments' or 'general recommendations'). In this jurisprudence, the treaty monitoring bodies have made it clear repeatedly that the treaties for which they are responsible extend to all persons.

Most of them have now made specific reference to sexual orientation, with some also referring to gender identity or expression, as within the scope of the treaty. A smaller number have referred to sex characteristics (often as 'intersex' or 'intersex status') specifically. Some treaty monitoring bodies have still made no mention at all to issues within their jurisdictions affecting lesbian, gay, bisexual, transgender and intersex people.

### ***b. Concluding observations***

Every State party to a human rights treaty must submit periodic reports to the treaty monitoring body on its implementation of the treaty, which is then examined by the members of the treaty monitoring body. The treaty monitoring body issues its concluding observations, with findings and recommendations, after the examination of the State.

Increasingly, human rights issues related to people's sexual orientation, gender identity and expression, and more recently about sex characteristics, are raised during this process. More treaty monitoring bodies are also referring to these issues in their concluding observations. Since 2009, this has included attention, particularly by the Committee against Torture, to human rights violations experienced by intersex people.

### ***c. Individual communications***

The first reference to sexual orientation by a treaty monitoring body was a positive comment in a concluding observation in 1993. However, the inclusion of violations of the rights of lesbian and gay persons in international human rights jurisprudence first occurred in response to individual communications (complaints).

In 1991, Nicholas Toonen, a gay man, complained to the Human Rights Committee that laws criminalising homosexuality in the Australian state of Tasmania violated his rights under the International Covenant on Civil and Political Rights. The Committee's decision in 1994 established for the first time that international human rights law applies to promote and protect the human rights of lesbian, gay and bisexual people.

#### **d. General comments**

The greater awareness of these issues in the treaty monitoring bodies is also reflected in the inclusion of references to sexual orientation, gender identity and expression and sex characteristics in General Comments and Concluding Observations or Recommendations. These include, for example, General Comments or Recommendations from the:

- *Human Rights Committee* (including as vulnerable persons needing “exceptional measures of protection”)
- *Committee on Economic, Social and Cultural Rights* (including in relation to the rights to the highest attainable standard of health, to water, to work, and to social security)
- *Committee on the Elimination of Discrimination against Women* (including in relation to access to justice and to the human rights of older women, and of those who are asylum seekers, refugees or stateless)
- *Committee on the Rights of the Child* (in relation to the best interests of the child, and their rights to the highest attainable standard of health and to freedom from all forms of violence) and the
- *Committee against Torture* (identifying lesbian, gay, bisexual, transgender and intersex people as especially vulnerable to torture).

## **2. The views and approaches of the special procedures of the human rights council**

The Human Rights Council is the UN's highest body with specialist responsibility for human rights. It has a very broad mandate for the promotion and protection of human rights. One of the functions of the Human Rights Council is the establishment of special procedures, independent human rights experts appointed to:

- study and increase understanding of a particular human rights matter or situation
- receive information and report on particular human rights violations.

Their mandates can relate to a specific human rights issue or theme ('thematic mandates') or to the human rights situation in a specific country ('country mandates').

The mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity was established through a UN Human Rights Council mandate in 2016. Some of the Independent Expert SOGI's recent thematic reports have focused on gender theory, the impact of COVID-19 on LGBT persons, so-called conversion therapy practices, and social, cultural and economic inclusion.

## **3. Sexual orientation, gender identity and sex characteristics in UN political forums**

The UN's political bodies – the General Assembly and the Human Rights Council – have been far slower to accept that lesbian, gay, bisexual, transgender and intersex people have human rights and

experience violations of those rights. In these forums, the members are States, not human rights or legal experts, where votes are taken on issues. At times these votes are based on international and domestic political ideologies, not on international law.

Harmful traditional cultural beliefs and practices are often built on ignorance and prejudice. That has been evident historically in many areas of human rights concern. It is especially evident today in relation to the rights of lesbian, gay, bisexual, transgender and intersex people, including debates about renewing the Independent Expert SOGI's mandate. Nonetheless, even the UN's political forums are now recognising these human rights issues.

**a. UN international conferences**

The first forums in which human rights issues in relation to sexual orientation were raised were UN international conferences, starting with the Third World Conference on Women, in Nairobi, Kenya in 1985. This was followed by the second World Conference on Human Rights in Vienna, Austria, in 1993 and the Beijing World Conference on Women in 1995.

These forums are far more open than the official UN bodies and there are more opportunities for statements to canvass relevant issues widely. Attempts to include a reference to sexual orientation in UN General Assembly Special Sessions in 2000 and 2001 were not successful, but the tide was turning.

**b. The Human Rights Council's Universal Periodic Review**

The Commission on Human Rights was established in 1946 as the highest-ranking UN forum with specialised responsibility for human rights. It was succeeded by the Human Rights Council in 2006, through a resolution of the UN General Assembly.

Under the Universal Periodic Review (UPR) the Human Rights Council reviews the human rights performance of each UN member State individually over a cycle of four and a half years. It is now completing its third cycle, covering the period from 2017 until 2022.

By the end of each UPR period, all 193 member States will have been reviewed. The review is based on:

- the UN Charter
- the Universal Declaration of Human Rights
- human rights instruments to which the State is party and
- voluntary pledges and commitments made by the State.

The process involves:

- the collection of reports and information from the State under review, UN agencies and other stakeholders, including NHRIs and NGOs
- an interactive dialogue with the State under review where other States can ask questions and make recommendations to the State under review
- a report on the dialogue
- the adoption of the report in a plenary session of the Human Rights Council, during which "A status" NHRIs and accredited NGOs can comment on the report

- a response from the State under review, indicating which recommendations in the report it accepts fully or partly and which it rejects.

The UPR process has resulted in a large number of recommendations to States on human rights in relation to sexual orientation, and to a much lesser extent gender identity. When the APF manual on protecting and promoting human rights in relation to SOGIESC was written in 2015, no States had made recommendations concerning sex characteristics. These significant gaps have only recently started to be filled, largely due to the advocacy of civil society organisations.

For example, in 2019, New Zealand received its first three UPR recommendations on SOGIESC issues, all relating to the human rights of intersex and transgender people. Chile recommended that New Zealand ended medical procedures performed on intersex people without their consent. Iceland and Australia recommended that anti-discrimination protections be extended to explicitly include gender identity, gender expression and sex characteristics.

#### 4. Regional perspective on human rights law: Asia Pacific

Uniquely among the world's regions, the Asia Pacific has no regional human rights treaty, court or protection system that people can turn to when their human rights are violated.

In the ASEAN sub-region, the ASEAN Inter-Governmental Commission on Human Rights (AICHR), a “consultative intergovernmental body”, works to promote human rights within the region, including through enhanced regional cooperation. However, it is not comparable to the regional human rights institutions in other regions as it is not an independent body and it is not based on an underlying treaty. It therefore has no function or power to enforce specific rights and obligations, apart from a commitment to upholding universal human rights standards. Its terms of reference require it to “engage in dialogue and consultation” with a range of stakeholders, including NGOs and NHRIs.

In this regional context, the Asia Pacific Forum (APF) of National Human Rights Institutions makes a unique contribution. The APF is a coalition of NHRIs from all corners of the Asia and Pacific region. A fundamental goal of the APF is to support the establishment of independent NHRIs in the region and to strengthen its members to do the work of promoting and protecting human rights. The APF brings its members together and builds partnerships with others to tackle some of the most serious and complex human rights challenges facing our region. The APF has played a leadership role in the Asia Pacific in recognising and addressing human rights issues associated with sexual orientation, gender identity and expression and sex characteristics.

### Key points

- In all countries in all regions people experience human rights violations based on their sexual orientation, gender identity and sex characteristics.
- Although there is no specific reference to sexual orientation, gender identity or expression or sex characteristics in international human rights instruments, there can no longer be any doubt that the provisions of international human rights law extend in full to all people, including lesbian, gay, bisexual, transgender and intersex people.
- This is the unanimous view of international human rights experts, expressed by the jurisprudence, general comments and concluding observations of human rights treaty monitoring bodies, the reports of the UN special procedures, resolutions of the Human Rights Council, decisions of regional human rights courts and resolutions of regional human rights commissions and mechanisms.

- The prohibition of discrimination on the basis of 'other status' in international human rights law is properly considered to include sexual orientation, gender identity and expression, and sex characteristics.
- Lesbian, gay, bisexual, transgender and intersex people are as entitled as anyone else to the full protection of their human rights under international and national laws.
- As with all human rights, every State has legal obligations to respect, protect and fulfil the human rights of lesbian, gay, bisexual, transgender and intersex people.
- There has been uneven but growing recognition of the rights of lesbian, gay, bisexual, transgender and intersex people within UN human rights mechanisms and these mechanisms have called, with increasing frequency and strength, for the promotion and protection of their rights.