

Report to the UN Committee Against Torture

October 11, 2018

1. This report is submitted by **Egale Canada Human Rights Trust**, Canada's only national charity promoting LGBTQI2S human rights through research, education and community engagement. Egale works to improve the lives of LGBTQI2S (Lesbian, Gay, Bisexual, Trans, Intersex and Two Spirit) people in Canada and to enhance the global response to LGBTQI2S issues. Egale achieves this by informing policy, inspiring cultural change and promoting human rights and inclusion through research, education and community engagement. Egale also works to provide the LGBTQI2S community in Canada with access to essential services including counseling through Egale Youth OUTreach and transitional housing through the Egale Centre. Egale's vision is a Canada, and ultimately a world, without homophobia, biphobia, transphobia and all other forms of oppression so that every person can achieve their full potential, free from hatred and bias.
2. Section 268(1) of the Canadian Criminal Code outlines crimes of aggravated assault. Per Section 268(3) of the code, "*wounds*" or "*maims*" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person"¹ is also penalized as aggravated assault *except* when 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...*"² Essentially, Section 268 (3)(a) of the code permits non consensual, medically unnecessary surgeries on reproductive organs on bodies of infants and children perceived to be ambiguous, i.e. intersex or, in current medical discourse, to have a "disorder of sex development". The existing law deprives intersex children from criminal protections against pathologization of their bodies, instead sanctions normalizing surgical interventions based on cis-normative assumptions about medically "correct" or "normal" bodies.
3. "*Medical practice on intersex has [include] photography, frequent examinations, exposure to medical grand rounds where medical professionals would present the pre-op and post-op person's genitals in front of groups of residents, disregarding the child's presence and*

¹ Section 268 (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:

² Section 268 (3) (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;

referring to the genitals as «it», use of children as human research subjects, 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, prescription of dexamethasone to persons carrying a foetus diagnosed with CAH, post-surgery sensitivity testing on children, pathological discourse, screening for certain types of intersex variations and sometimes suggesting selective abortion, discounting of knowledge and expertise, as well as tone policing.”³

4. Egale organised Canada’s first Intersex conference bringing together academics, researchers, intersex children, youth and parents with objectives of fostering a dialogue to identify the needs of the intersex community in Canada. Conference attendees especially stressed on a significant intersection between the intersex and disability community, in that the ableist notions define qualifications for a “normal” or “desirable” human body. This is also reflected in the ways in which practitioners, whether in social work, genetics counselling, pediatric surgery and/or endocrinology view intersex and lead parents toward normative interventions either to prevent intersex altogether through the use of pre-implantation testing, or to prevent some forms of intersex features from developing (through the use of prenatally administered dexamethasone), or finally and persistently, to advise surgical “correction” of those who are still apprehended in infancy or childhood with an intersexualized difference. Moreover, with over 30-80% of intersex children undergoing one or as many as five irreversible surgeries⁴, intersex individuals suffer from life-long physical and psychological pain amounting to torture or cruel, inhuman or degrading treatment under The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Hereinafter referred to as UNCAT).

5. In 2013, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Hereinafter referred to as Special Rapporteur) grounds abuses arising in healthcare settings within the normative legal framework of torture, emphasizing 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.⁵ The concept of free and informed consent garners particular importance in the said case. While implicating rights relating to freedom from torture, the principle also forms the cornerstone of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,⁶ thus fundamental in ensuring individual’s

³ Bastien Charlebois, J. (2015). «Sanctioned Sex/ualities : The Medical Treatment of Intersex Bodies and Voices». Sanctioned sexualities panel. ILGA World Congress. Mexico. URL < <http://ilga.org/an-introduction-to-sanctioned-sexualities-the-medical-treatment-of-intersex-bodies-and-voices/>>

⁴ Holmes, M., & Hunt, R. (2011). Intersex Health. Retrieved from Rainbow Health Ontario website: https://www.rainbowhealthontario.ca/wpcontent/uploads/woocommerce_uploads/2011/08/RHO_FactSheet_INTERSEXHEALTH_E.pdf

⁵ Report of the Special Rapporteur on Torture, Juan E. Mendez, UN Doc. A/HRC/22/53 (2013), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

⁶ Article 12 of The International Covenant on Economic, Social and Cultural Rights.

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autonomy, self-determination and human dignity. Jurisprudentially, these principles are the founding basis of normative human rights legal system at large. When non consensual surgeries are performed on intersex infants, not only is there clear absence of free and informed consent but children are completely deprived of any capacity to make any future decisions about their own bodies, given the irreversible consequences of these procedures. In the same vein, free and informed consent is also compromised in the doctor-parent relationship due to power imbalances, owing to unequal knowledge levels and limited awareness of intersex bodies. As a result, these decisions are mostly taken by medical practitioners solely on the basis of medicalised and cis-normative understanding of gender often disguised as “medical necessity”.

6. Freedom from torture assumes the status of customary international law, a non derogable right under international law scheme. The law 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.*”⁷ Furthermore, the Special Rapporteur also “*call[ed] upon all 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.*”⁸ (A recommendation also reiterated by other treaty bodies.) Despite being a signatory to the convention and numerous requests by civil society urging for repeal of section 268(3), Canada has not taken any steps towards the recommended amendment neither any legislative action has been proposed to prohibit non consensual surgeries on intersex children. Canada, thus stands in critical violation of its treaty obligations, the severity of which is compounded by the fact that the violation is that of a *jus cogen* norm.
7. **Canada has displayed a total disregard for international human rights law by failing to take necessary steps towards the repeal of Section 268(3). We thus ask the committee to hold Canada accountable for its failure of compliance and urge Canada to:**
 - **Investigate cases of intersex genital mutilation and other medical malpractices pertaining to non consensual, cosmetic surgeries on intersex children;**
 - **Follow best practices with regard to providing free and informed consent, in compliance with its treaty body obligations;**
 - **Make necessary amendments to the criminal code adopt legal provisions to redress and compensate victims.**

⁷ UN CAT General Comment No.2 Para 15.

⁸ *Supra* Note 5.

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