ITANZ (Intersex Trust Aotearoa New Zealand)

Alternate NGO Submission on the sixth periodic report to the United Nations on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from New Zealand (CAT/C/NZL/6).

Introduction

ITANZ is a New Zealand registered charitable Trust formed in 1996, whose primary focus is to advance the human rights, protection and dignity of intersex persons. ITANZ works both within New Zealand and internationally with relevant human rights organisations, intersex colleagues, and professionals (individuals and organisations).

This is an update of an original 2013 submission from ITANZ and is resubmitted because ITANZ is extremely disappointed to note the absence of any reference to intersex human rights issues in CAT/C/NZL/6. This may be due to a somewhat restrictive interpretation of the definition of torture and, if so, it is a failure to take cognisance of the U.N. Special Rapporteur Juan E. Mendez, in his report dealing with forms of abuse in health-care settings (A/HRC/22/53, 1 February 2013)[1]:

The opening summary to A/HRC/22/53 states:

"The present report focuses on certain forms of abuses in health-care settings that may cross a threshold of mistreatment. It is tantamount to torture or inhuman or degrading treatment or punishment. It identifies the policies that promote these practices and existing protection gaps.

By illustrating some of these abusive practices in health-care settings the report sheds light on often undetected forms of abusive practices that occur under the auspices of health-care policies and emphasises how certain treatments run afoul of the prohibition on torture and ill- treatment. It identifies the scope of State's obligations to regulate, control and supervise health care practices with a view to preventing mistreatment under any pretext.

The Special Rapporteur examines a number of the abusive practices commonly reported in health-care settings and describes how the torture and ill treatment framework applies in this context. The examples of torture and ill-treatment in health-care settings discussed likely represent a small fraction of this global problem."

It is significant that A/HRC/22/53 triggered important follow up work and ITANZ draws attention to the comprehensive 322-page book from the Center for Human Rights and Humanitarian Law, Washington College of Law, American University, published in February 2014, entitled *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report.*[2] This book draws on the expertise and experience of 30 contributing authors from throughout the world.

Anne Tamar-Mattis, Executive Director, Advocates for Informed Choice contributes a chapter on *Medical Treatment of People with Intersex Conditions as Torture and Cruel, Inhuman, or Degrading Treatment or Punishment*[3].

The abstract to her chapter states:

"*People worldwide born with intersex conditions, or variations of sex anatomy, face a wide range of violations to their sexual and reproductive rights, as well as the rights to bodily integrity and individual autonomy. Beginning in infancy, and continuing throughout childhood, children with intersex conditions are subject to irreversible sex assignment and involuntary genital normalizing surgery, sterilization, medical display and photography of the genitals, and medical experimentation. In adulthood, and sometimes in childhood, people with intersex conditions may also be denied necessary medical treatment. Moreover, intersex individuals suffer life-long physical and emotional injury as a result of such treatment. These human rights violations often involve tremendous physical and psychological pain and have been found to rise to the level of torture or cruel, inhumane, or degrading treatment. We offer recommendations for states working to address torture and inhuman treatment in medical settings."*

And from Australia: The Senate Report, Community Affairs References Committee, *Involuntary or coerced sterilisation of intersex people in Australia*, October 2013.[4] Under the heading *"Prohibition against torture and other cruel, inhuman and degrading treatment"* this report states:

"3.93 There is growing recognition at the international level that medical interventions of an invasive and irreversible nature, absent a therapeutic purpose, may constitute torture or ill-treatment when administered without the free and informed consent of the person concerned.[5]

3.94 Noting that members of sexual minorities may be disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations[6]*, the United Nations Special Rapporteur on Torture has expressed concern at evidence of non-consensual gender assignment surgery:*

> *There is an abundance of accounts and testimonies of…hormone therapy and genital–normalising surgeries under the guise of so-called 'reparative therapies'. These procedures are rarely medically necessary, can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticised as being unscientific, potentially harmful and contributing to stigma*[7]*.*

3.95 The Special Rapporteur recommended the repeal of all laws and healthcare practices that discriminate against lesbian, gay, bisexual, transgender and intersex persons:

> *The Special Rapporteur calls 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. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups."*[8]

The Submission

ITANZ submits that New Zealand's report should take account of laws and practices that impact not only on intersex persons but also related issues for transgender ('trans') persons. The historical and on-going treatment of people in these communities requires consideration

with reference to Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In particular the following issues will be addressed:

(1) The current medical practice regarding the treatment of children born with ambiguous genitalia plus consideration of Section 204A of the Crimes Act 1961 regarding female genital mutilation.
(2) Sections 28 and 29 of the Births, Deaths, Marriages and Relationships Recognition Act 1995 with consideration of involuntary or coerced sterilisation as a requirement for legal gender recognition
(3) Transgender prisoners.

(1) The current medical practice regarding the treatment of children born with ambiguous genitalia

A surgical approach to deal with those presenting as 'intersex' (a label to describe biological variety of anatomical conditions that do not fall within standard male and female categories) became standard practice in the 1970s. Genital-normalising treatment, involving both surgery and hormone therapy, is however often medically unnecessary, not always consistent with the person's gender identity, poses severe risks for sexual and reproductive health and is often performed without free and fully informed consent. Intersex people in New Zealand report their condition was viewed "as a medical problem to be fixed" and that they are dissatisfied by their treatment and lack of current recourse to remedy their physical and emotional damage[9]

If surgery is not medically necessary to perform while the person is an infant (for the child's physical well-being), any irreversible treatment should not occur until the person can give free and fully informed consent. Such surgery has recently been categorised as a violation of children's rights by the International NGO Council on Violence against Children (October 2012) and as a form of torture as stated in the introduction by the Special Rapporteur, Mendez.

The protocols regarding medical care have also been criticized as being unscientific.[10] Professional organisations admit there is no data to support their treatments, yet in New Zealand the historical approach is still followed. Doctors argue in favour of early surgery as it provides the best clinical outcomes – but what they mean is best physical healing prospects.

The scope of s 204A of the Crimes Act 1961

This section criminalises surgery on the female genitalia of any person, in certain situations. Parliamentary intent was to single out the culturally significant practice sometimes labelled 'female genital mutilation', but it is much wider in scope. The section attempts to provide a defence when the surgery is performed by a medical practitioner "for the benefit of a person's physical or mental health" – but in determining when the benefit exists "no account shall be taken of the effect on that person of any belief on the part of that person or any other person that the procedure is necessary or desirable as, or as part of, a cultural, religious, or other custom or practice". As non-medically indicated surgery on children born with ambiguous genitalia is undertaken for the purpose of assisting them to fit in with, or look like, their peers (that is, have culturally acceptable genitals), the current medical practice appears to be in breach of the section, at least with regard to surgery on 'female' genitals. The section does not attempt to deal with surgery on male genitalia. There is reference to "sexual reassignment surgery", but this is narrowly defined as assigning a person to "the opposite sex".

ITANZ contends that s 204A sends an inconsistent message about the importance of ensuring that infants or young children who are incapable of giving full and informed consent are protected from non-essential genital surgery – surgery which may be both irreversible and inconsistent with the person's self-identification. While attempting to prevent only "female genital mutilation", as currently drafted it extends, in our view correctly, to criminalise some forms of genital normalising surgery (that conducted on female genitals, not male genitals).

ITANZ submits that s 204A should be either repealed and accompanied by a public debate about genital surgery in all its forms (including male circumcision), or amended in order to fully protect all young children from all forms of non-essential procedures. ITANZ also notes that consent of the child is no defence to an offence under s 204A. ITANZ agrees that parents should not be entitled to agree to cosmetic surgery on the genitals of their children, in the absence of a process to ensure there is a full understanding of the future implications of that surgery.

ITANZ therefore recommends that in New Zealand there should be:

- *statutory prohibition of non-consensual surgical procedures on children aimed solely at correcting genital ambiguity;*
- *a Government-led commitment to improving understanding around informed consent and the rights of children and their parent(s), and ensuring that parents and competent young people are made aware of the differing views about medical or surgical interventions before making any decisions;*
- *facilitation of dialogue between intersex people, relevant government agencies, District Health Boards and medical practitioners in order to best inform policy and medical practice regarding intersex conditions; and*
- *compulsory provision of training in relevant undergraduate and postgraduate courses on appropriate medical responses to intersex conditions.*

(2) Births, Deaths Marriages and Relationships Act 1995 with consideration of involuntary or coerced sterilisation as a requirement for legal gender recognition

In order for a trans person to amend the sex details on their birth certificate, New Zealand law requires them to undergo medical treatment resulting in "physical confirmation that accords with the[ir] gender identity".[11]

In the January 2008 final report of the Human Rights Commission's Transgender Inquiry, the relevant government agency stated "our understanding is that the Family Court has often interpreted this to mean that full gender reassignment surgery is required…[however] a court might determine that 'appropriate' [medical treatment] means that substantive, but not complete, surgery has taken place".[12]

The Transgender Inquiry recommended that the legal threshold be simplified, based on a transgender person having "taken decisive steps to live fully and permanently" in their chosen gender identity. To date, there has been no amendment to the law. A 2008 Family Court decision clarified that the Family Court does not always require full gender reassignment surgery.[13] However, subsequently, other Family Court judges have required such evidence.[14]

Without a binding decision from a higher court, or a change to the underpinning legislation, there is no guarantee that individual trans people seeking to amend their birth certificate, will not be required to have surgical or medical procedures that result in sterilisation.

Since 2009, a number of domestic courts around the world have ruled that "not only does enforced surgery result in permanent sterility and irreversible changes to the body, and interfere in family and reproductive life, but it also amounts to a severe and irreversible intrusion into a person's physical integrity". Furthermore Principle 3 of the Yogyakarta Principles states, "no-one should be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity".[15]

New Zealand's Births, Deaths, Marriages and Relationships Registration Act 1995 has not kept pace with international case law or legislation including the 2012 Argentinean Gender Identity and Health Comprehensive Care for Transgender People Act.[16] This law removes any form of coercion or pressure on transgender people to undergo surgical medical interventions in order to be recognised in their appropriate sex / gender identity. It does so by enabling sex details on a birth certificate and national identity card to be amended based solely on self-identification.

In New Zealand, such a focus on self-identification underpins the November 2012 change to the Passports Office's policy for trans and intersex people and the NZ Transport Agency's 2013 amendments to the requirements for changing sex / gender on the driver's license register.[17] This approach should be extended to the process for changing sex details on a New Zealand birth certificate. A birth certificate has particular importance including that it is used as the source document to record a parent's sex (and related relationship to their child) on the child's birth certificate. Unlike a passport or driver license, it also cannot be revoked.

ITANZ recommends that the New Zealand government:

- *removes any requirement to undergo or intend to undergo medical or surgical procedures, including those that may result in sterilisation, as a prerequisite for changing sex details on a birth certificate or other official document*
- *enables adults with intersex conditions and trans and other gender diverse adults to change the sex details on any official documentation to male, female or indeterminate based solely on the individual's self-identification, without any requirement for medical treatment and without the need to resort to a court process*
- *enables children and young people under the age of 18 who have intersex conditions or who are trans or gender diverse to access this same procedure, with only the additional requirement that they have the support of their legal guardian / parent, taking into account the evolving capacities and best interests of the child*

(3) Transgender prisoners

Both the Office of the Ombudsman and the Human Rights Commission (in the 2008 final report of its Transgender Inquiry) have raised concerns that transgender prison inmates are particularly vulnerable to abuse and/or sexual assault.[18] Partly this is because, unless they have "completed gender reassignment surgery", they are housed according to their biological sex.[19] The vast majority, if not all, of the current trans prison population are trans women who are held in men's prisons. A Health Centre manager told the Ombudsman's Office that "abuse of trans prisoners "goes unreported in male prisons", while a prisoner said this was

due to fear of retaliation. Voluntary segregation is one safety option but can reduce trans prisoners' access to prison activities including rehabilitation programmes.[20]

In 2008 and 2012 respectively, New Zealand's Human Rights Commission and the Office of the Ombudsmen have recommended that the Department of Correction review its policy for trans prisoners. In each case the Department has said such a review is unnecessary. Recent case law and policy developments reinforce the need for change.

United Kingdom provisions introduced in 2011 note "*recent legislative changes and court judgments have had implications for how we care for and manage transsexual prisoners*".[21] Increasingly such policies allow greater levels of flexibility around prisoner placement, with a focus on ensuring the safety of all prisoners and equitable access to healthcare and prison rehabilitation services. They also outline practical issues such as dress codes and name change policies for trans prisoners.

ITANZ welcomes the recently announced new policy about placement of prisoners but notes there has been no real engagement regarding the wider issues for trans prisoners around safety, being treated with dignity and having access to health and rehabilitation services. These are the primary issues raised by trans prisoners themselves in submissions to the HRC's Transgender Inquiry - and they remain ignored. ITANZ also stresses the importance of suitably training prison staff regarding implementation of the new policy.

ITANZ therefore recommends that the Department of Corrections:

- *updates its Transgender Prisoner policy to reflect international best practice about placement, care and management of trans prisoners to ensure their right to safety, and access to health services and rehabilitation on an equal basis as others*

ITANZ appreciates the opportunity to provide supplementary information to complement New Zealand's sixth periodic report CAT/C/NZL/6.

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[3] ibid pp 91-104.

[4] The Senate, Community Affairs References Committee *Involuntary or coerced sterilisation of intersex people in Australia. (2013),* ISBN 978-1-74229-917-4 *Accessible online at:*

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[5] Mendez (reference 1) and also UN Committee against Torture, Concluding observations on the fifth periodic report of Germany, CAT/C/DEU/CO/5 (2011), para 20.

[6] Mendez p19.

[7] Mendez p18.

[8] Mendez Recommendation 3, p23.

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[10] Mendez at [76] p18.

[11] Section 28(3) (c) of the Births, Deaths, Marriages and Relationships Registration Act 1995.

[12] HRC (reference 9) p73, para 6.54.

[13] *"Michael" v Registrar-General Births, Death and Marriages* FC FAM-2006-004-02325 (June 2008).

[14] HRC (reference 9) Chapter 19 p319.

[15] *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* are a set of internationally recognised principles developed at an experts meeting held by the International Commission of Jurists (ICJ) and human rights experts in 2006 in Indonesia. Accessible online at:
www.yogyakartaprinciples.org/principles_en.htm

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[21] Ministry of Justice (2011). *The Care and Management of Transsexual Prisoners.* PSI 07/2011, para 1.4, p 2.