

Submission on language related to gender identity and expression to the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

The purpose of this submission is to take advantage of the opportunity provided by the first report ([A/HRC/35/36](#)) of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) that was presented to the Human Rights Council on 6 June 2017 at the United Nations in Geneva. It responds to the Independent Expert's generous call to civil society organisations to provide input to his Mandate such as suggesting different approaches to addressing specific issues within the Mandate and how they are framed. This short submission raises some issues with language, content, and references with regards to gender identity and expression issues in the IE SOGI's first report. In part, the submission builds on the in-person private meeting that the IE SOGI had with 17 trans advocates during the 35th session of the Human Rights Council in Geneva on 7 June 2017.

I. Defining gender identity

The IE SOGI, in this report and in various speeches since the establishment of the Mandate¹, has used language to explain the concepts of **sexual orientation and gender identity as external and internal dimensions**, respectively. For example, from the first report:

“Sexual orientation has an external dimension — it indicates a person’s sexual inclination and feelings towards others. Gender identity has an internal dimension — the term refers to how a person self-identifies in regard to his or her own gender, which may be different from the gender assigned at birth.”

While we understand that it is important to explain the key differences in accessible and simple terms, we are concerned that this differentiation may be harmful for the following reasons:

1. The current dichotomy **may falsely suggest that gender identity has no external component**. UN sources have explained that gender identity incorporates components both of **gender identity** (internal) and **gender expression** (external), indicating that they must be used together because there is an inextricable link between the two. For instance, the World Health Organisation² has provided the following definitions:

***Gender identity** is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms. Gender identity exists on a spectrum. This means that an individual’s gender identity is not necessarily confined to an identity that is completely male or completely female. When an individual’s gender identity differs from their assigned sex, they are commonly considered to be transgender, gender fluid, and/or gender queer. Whereas when an individual’s gender identity aligns with their assigned sex, they are commonly considered cisgender.*

¹ For instance, at the *The Yogyakarta Principles: What have we learnt and where to now?* conference in Bangkok on 25 April 2017, the IDAHOT Forum in Brussels on 19 May 2017, and the Miami OutGames on 28 May 2017.

² FAQ on Health and Sexual Diversity An Introduction to Key Concepts. WHO/FWC/GER/16.2. <http://apps.who.int/iris/bitstream/10665/255340/1/WHO-FWC-GER-16.2-eng.pdf> .

***Gender expression** refers to the way in which an individual outwardly presents their gender. These expressions of gender are typically through the way one chooses to dress, speak, or generally conduct themselves socially. Our perceptions of gender typically align with the socially constructed binary of masculine and feminine forms of expression. The way an individual expresses their gender is not always indicative of their gender identity.*

Other UN entities, such as the Special Rapporteur on extrajudicial, summary or arbitrary executions have used similarly worded definitions.³

2. The current dichotomy **renders violations that trans people suffer on the basis of their gender expression invisible**. It suggests that rights violations that trans people experience are limited to discrimination and violence based solely on someone's internal feelings. In fact, discrimination and violence are often linked to discrepancies between a person's gender identity *and gender expression* and their official documents that are based on a person's sex assigned at birth. We fear that this dichotomy also puts the IE SOGI in a difficult position to adequately address the lived realities of trans people worldwide and inadvertently limits the scope of his mandate.
3. The current phrasing, while not inherently pathologising, **gives weight to arguments that gender identity is "all in one's head"** and may ultimately be used to undermine efforts to protect and defend the human rights of trans and gender diverse individuals. In the context of current classifications, defining gender identity as a purely internal phenomenon reinforces psycho-medical authority over trans and gender diverse people.
4. As the definitions provided by the the World Health Organisation and the Yogyakarta Principles show, all individuals experiment with different aspects of their identities, including through identity, expression, sexuality and embodiment. By **referring to trans people's gender identities as "internal", those identities are implicitly differentiated from the gender identities held by cisgender people**, whose identities are never assumed to be located in a particular space or to be experimental, confused, or complex, but just to be individual experiences of the self.

We are aware that the Resolution which appointed the IE SOGI ([A/HRC/32/L.2/Rev.1](#)) only explicitly names "sexual orientation and gender identity" without explicitly mentioning gender expression. However, paragraph 3(b) explains that the IE is appointed "to identify and address the root causes of violence and discrimination". We believe that it is crucial that the IE SOGI exercise some flexibility when defining and explaining the most fundamental concepts guiding the work of the Mandate work in the next years so as to adequately address this component of the Mandate. This has been done in the first report of the IE SOGI with regards to sexual orientation: although the Mandate only covers sexual orientation, the first underpinning focuses on the decriminalisation of *same-sex relations*. We hope that a similarly flexible and analytical approach can be applied in the case of gender identity and expression.

³ "In its general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights observed that gender identity is recognized as among the prohibited grounds of discrimination and can be defined as each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms." UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to Honduras, 11 April 2017, A/HRC/35/23/Add.1, para. 19.

RECOMMENDATION #1: Define gender identity more broadly to incorporate gender expression components.

RECOMMENDATION #2: Include references to gender expression throughout the work of the Mandate in order to bring more focused attention to expression-specific issues.

RECOMMENDATION #3: Avoid using the internal / external dichotomy when addressing gender identity and sexual orientation.

II. Conflating sexual orientation and gender identity

The first report addresses sexual orientation and gender identity as intrinsically linked and, at the same time, as hierarchically differentiated, giving sexual orientation primacy over gender identity. Our concern in this regard is informed by a history of erasure and dismissal of gender identity-related issues within activism, academia and public policy, and the ways in which these factors were also reflected to such conflation in language.

For one example, the report only uses the language “sexual orientation and gender identity”, rarely referring to one or the other and always, when grouped, treating them as a potentially inseparable idea.

For another example, the report expresses surprise at circumstances where legislation related to gender identity is more progressive than that related to sexual orientation in the same country (paragraph 32).

As a final example, the report uses the phrase “within the lesbian, gay, bisexual, and transgender setting” (paragraph 55). LGBT people exist in the full diversity of contexts, cultures, and circumstances. This language implies the idea of a commonality of place amongst this diversity, instead of highlighting the diversity itself. From linguistic issues to identity, the diversity within LGBT communities is vast, and a truly intersectional approach must address this head-on.

Such examples of phrasing imply several problematic issues.

1. They imply that sexual orientation and gender identity are inseparable and shall be discussed together, which **creates the illusion that the violations on the basis of sexual orientation and those on the basis of gender identity and expression are similar**. This suggests that **specific violations on the basis of gender identity and expression are unnecessary to address in their own merit**.
2. They **suggest that sexual orientation is an ‘easier’ concept for the general public to accept** and thus to legislate positively in relation to, which is not a universal reality. In many contexts and cultures around the world, gender diversity is more accepted - even celebrated - as compared with sexual diversity.
3. They **imply that sexual diversity is the entry point to gender diversity**; putting this another way, they reinforce a rather common assumption that a transgender identity is an extreme form of a lesbian or gay sexual orientation.
4. This balance between sexual orientation and gender identity could **imply that addressing**

sexual orientation issues is necessary and sufficient, as a pathway to gender identity issues.

5. It is often **assumed that gender identity and sexual orientation are mutually exclusive identities**: a person may be gay, lesbian, bisexual or they may be trans, but not both. In other terms, this means that cisgender people have the possibility of having a distinct sexual orientation, while trans people are often only allowed to be trans. However, trans and gender diverse people exist across the entire sexual orientation spectrum. As sexual orientation is usually predicated about cisgender people and gender identity about transgender people, privileging sexual orientation over gender identity reinforces cissexism (i.e., social structures, systems, and personal beliefs and biases that normalise and naturalise cisgender people as superior to trans people on the basis of gender identity and expression and is often used to justify stigma, discrimination, and violence against trans and gender diverse people).
6. In the same sense, sexual orientation is only “easier” when predicated about cisgender people, but transgender people not only have sexual orientations too, but also suffer from human rights violations based on their sexual orientation. By implicitly identifying sexual orientation with cisgender gay, lesbian and bisexual people those **human rights violations remain invisible**. As an example, we may cite how non-heterosexual transgender people might face more significant constraints in convincing courts about their right to legal gender recognition, in various contexts.

RECOMMENDATION #4: When appropriate, refer to sexual orientation or gender identity, not only to sexual orientation and gender identity. Be specific about whether a point is about sexual orientation, gender identity and expression, or all of these.

RECOMMENDATION #5: Build on the introductory point that everyone has a sexual orientation and a gender identity by fundamentally breaking the association between sexual orientation as cisgender and gender identity as transgender and providing specific examples to this end.

RECOMMENDATION #6: Continue to address gender identity issues specifically and directly.

RECOMMENDATION #7: Avoid preference towards sexual orientation as the first or only examples.

RECOMMENDATION #8: Avoid creating artificial progress accounts that put advances on sexual orientation issues as a precondition for advances on gender identity issues, and acknowledge that cultures and peoples around the world respond to and legislate around sexual and gender diversity in different ways.

III. Decriminalisation

The first underpinning focuses on decriminalisation, but does not adequately address criminalisation that affects trans and gender diverse people. Such perception concerns us strongly, since in different contexts, not only specific violence stems from laws and policies aimed at these people and communities in particular, but also measures aimed at criminalising sexual orientations or practices might disproportionately affect them as well.

First, the title “decriminalisation of same-sex relations” omits reference to the specific types of criminalisation inflicted on the basis of gender identity and expression. Sexual orientation and gender identity and expression are criminalised far beyond the bounds of only laws focused on same-sex relations.

Second, the substantive paragraphs (52-54) largely focus on criminalisation that affects those engaging in same-sex relations, and only makes marginal references to trans people. As the IE SOGI is aware, extensive international documentation by trans and LGBTI organisations and UN agencies indicates that criminalisation also heavily impacts trans and gender diverse people. We welcome the reference in the first report to criminalisation of so-called “cross-dressing”⁴ as it opens the door. However, there are many other types of gender identity and expression-based criminalisation in need of direct mention and attention by the Mandate, including “impersonation” provisions as well as inconsistent or unjust implementation of laws on beggary, HIV, sex work, nuisance, and loitering in ways that are punitive to trans people, most especially toward trans women.⁵ Some specific examples include:

- **Singapore:** Section 20 of the Miscellaneous Offences Act prohibits indecent behaviour in public spaces, and could be interpreted broadly enough to capture so-called “cross-dressing.”⁶ At the same time, while cisgender female sex workers are able to work in legal, licensed brothels, trans sex workers are not, exposing them to persecution and prosecution.⁷
- **South Korea:** Trans women who, due to social and family pressures, do not medically transition have been jailed for evading military service after receiving an exemption on the basis of gender identity.⁸ This is *de facto* criminalisation of some forms of gender identity and expression, as it forces a type of medical transition in order to access legal gender identity-based protections.
- **Brunei:** Section 197 of the Syariah Penal Code criminalises indecent behavior, which can be interpreted broadly to include trans people. Section 198 of the same code criminalises “man posing as a woman and vice-versa.”⁹
- **Malaysia:** While Section 21 of the Minor Offences Act, which criminalises disorderly behaviour in public places, has been used against trans women,¹⁰ Syariah Laws in 14 states

⁴ Trans communities around the world reference the language of “cross-dressing” in quotation marks to indicate that the concept itself is a misnomer - there are not “men’s clothes” or “women’s clothes”, but only clothes which have been actively gendered by a society that discriminates on the basis of gender identity and expression.

⁵ UNDP, APTN (2017). Legal Gender Recognition A Multi-country Legal and Policy Review in Asia. UNDP: Bangkok. (Forthcoming)

⁶ Miscellaneous Offences (Public Order and Nuisance) Act (Chapter 184). Singapore Statutes Online: <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0:query=DocId:%22ca5b9bd4-5b2e-4b42-9349-a5aaf258d9a4%22%20Status:inforce%20Depth:0:rec=0> .

⁷ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme. Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific. Washington, DC: Futures Group, Health Policy Project; 2015.

⁸ Ibid.

⁹ Syariah Penal Code Order, 2013. Available at: http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/syariah%20penal%20code%20order2013.pdf ..

¹⁰ Minor Offences Act 1955 (Revised 1987). Available at: http://www.commonlii.org/my/legis/consol_act/moa19551987225/ .

criminalise “a man pretending to be a woman” and 5 criminalise “a woman pretending to be a man” or similar phrasing.¹¹

- **Chile:** Article 373 of the Penal Code punishes faults to morals and good manners, and has been used to detain and imprison trans women.¹²
- **Zimbabwe:** Section 46 of the Criminal Nuisance Law can be used to prosecute trans persons who use toilets according to their gender identity and/or expression.¹³
- **Bulgaria:** Article 128 of the Penal Code defines as “heavy bodily injury” the causing of reproductive inability, and this is classified as “crime against the health” of a person. The person who has inflicted change of the reproductive ability on another person can be punished with imprisonment from 3 to 10 years.¹⁴

In countries with mandatory military conscription, trans women who have not been able to change their gender markers and trans men who have may face legal or economic consequences in this context.¹⁵

Noting the above, it must also be acknowledged that trans people may in fact be affected by laws criminalising same-sex relations, whether or not they are in such a relationship. In many countries, trans women are perceived as men and trans men are perceived as woman, therefore a trans woman with a male partner or a trans man with a female partner are also included within the criminalisation of same-sex conducts. Additionally, there are gay, lesbian, and bisexual trans people, who are also targets of these laws and policies. Furthermore, trans people are often targeted because of their gender expression, as this is commonly used to assume a person’s sexual orientation.

RECOMMENDATION #9: We recommend that this underpinning is rephrased as “Decriminalisation of same-sex relations or gender identity and / or expression.”

RECOMMENDATION #10: We further recommend that the IE SOGI includes more detailed examples of how criminalisation affects trans and gender diverse people.

IV. Addressing ignorance and confusion about gender identity

In the discussion of his mandate (paragraph 6) the IE SOGI discusses the confusion around language when referring to trans men and trans women:

¹¹ Act 559 - Syariah Criminal Offences (Federal Territories) - Act 1997. Available at: [http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20559%20-%20Syariah%20Criminal%20Offences%20\(Federal%20Territories\)%20Act%201997.pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20559%20-%20Syariah%20Criminal%20Offences%20(Federal%20Territories)%20Act%201997.pdf) .

¹² Código Penal. Available at: <https://www.leychile.cl/Navegar?idNorma=1984> .

¹³ Criminal Law (Codification and Reform) Act. Available at: https://www.unodc.org/res/cld/document/zwe/2006/criminal_law_codification_and_reform_act_html/criminal_la_w_codification_and_reform_act.pdf .

¹⁴ Criminal Code. Available at: https://www.imolin.org/doc/amlid/Bulgaria/Bulgaria_Criminal_Code_2009.pdf .

¹⁵ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme. Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific. Washington, DC: Futures Group, Health Policy Project; 2015.

“Many people are confused by the terms ‘transgender man/trans man’ and ‘transgender woman/trans woman’.”

In addition to addressing this in the report, the IE SOGI has also raised this issue in his keynote at the *The Yogyakarta Principles: What have we learnt and where to now?* conference in Bangkok on 25 April 2017:

“They [trans people] don’t know which toilets to go to sometimes.”

“Everybody gets confused by trans men, trans women.”

“You’re not the only ones who are confused.”

This confusion is real, and the attempt at clarity is appreciated. However, unfortunately, a tone of levity does not do this issue justice and can inadvertently reinforce negative stereotypes and assumptions about trans people. Such statements assume that transgender people are never in the audience and, therefore, that they are not negatively affected by the use of such terminology.

1. The statements above **imply that gender identity and expression issues are too confusing to understand** and, therefore, could imply that widespread ignorance about them is justifiable.
2. Such statements could potentially serve as an **excuse for States to refrain from addressing gender identity and expression issues**. They might argue that these issues are too difficult to understand or to tackle.
3. They also **falsely suggest that trans people are confused about their gender**. For all people, trans or cisgender, exploring gender, gender expression, and gender identity (as well as sexual orientation) is a process of self-discovery.

We believe that it is important for the IE SOGI to acknowledge that there may be confusion about gender identity and expression issues, but in ways that dismantle the idea that they are too complex or difficult to be understood or addressed.

RECOMMENDATION #11: We recommend to acknowledge the possible confusion in discussing gender identity and expression by focusing on the concepts and avoiding broad phrases that could have derogatory implications towards trans people generally and specifically avoiding phrases such as “you are not the only ones who are confused”, as these can underplay how central a person’s gender identity is to an individual’s personality, self-determination, dignity and freedom.

V. Sex assigned at birth

Discussing his Mandate (paragraph 6), the IE SOGI provides the following definition of trans men and women:

“Many people are confused by the terms ‘transgender man/trans man’ and ‘transgender woman/trans woman’. The former denotes those classified biologically at birth as women, who wish to have their self-identity recognized as men, while the latter means the converse: those classified biologically at birth as men, who wish to have their self-identity recognized as women.”

While the terms “biological men” and “biological women” were used in older definitions, this practice has changed, partly to reflect modern scientific understanding of sex, neurobiology, and gender. There is no scientific consensus on the causes of gender diversity, including the extent to which there is a biological basis for trans or cisgender identities. This raises the question about the accuracy of defining a person biologically according to the sex that individual was assigned at birth.

At a more fundamental level, the above definition **can reinforce arguments that biology is destiny**. It also **suggests that trans men are not *real men* and trans women are not *real women*** by implying that anatomy is more important than gender identity. As the IE SOGI is aware, those arguments have been used to deny transgender people access to legal gender recognition or to any form of gender affirming health interventions, and to justify psychopathologisation and conversion therapy. Given these concerns and context, we recommend phrasing that focuses on *sex assigned at birth*. This has the added advantage of opening dialogue on the range of laws, policies, regulations and practices that assign “legal sex”, which can then be amended to recognise transgender people’s gender identity in all areas of their life.

In fact, several entities within the UN¹⁶, the Council of Europe¹⁷, and the European Union¹⁸ have been using the phrase *sex assigned at birth*. Just to mention one example, the 2017 IDAHOT joint statement sets out:

*“The statement refers to trans and gender diverse children and adolescents in an inclusive manner to include children and adolescents whose gender identity does not match the sex they were assigned at birth”.*¹⁹

Plus, many transgender people identify in other ways than as men or women. Therefore, the expression “sex assigned at birth” simplifies their inclusion in the work of the Mandate. For example:

- A trans man can be introduced as a person assigned as female at birth who identifies himself as a man.
- A trans woman can be introduced as a person assigned as male at birth who identifies herself as a woman.
- A travesti can be introduced as a person assigned as male at birth who identifies herself as a travesti.
- A non-binary person can be introduced as a person assigned either male or female at birth who identifies themselves as a third or other alternative genders, a combination of genders, or having no gender.

Finally, it is worth noting that the existence of intersex people renders the expressions “biologically male” or “biologically female” inaccurate and misleading.

RECOMMENDATION #12: We recommend that the IE SOGI refrain from using terms such as “biologically male / female” and instead apply the phrase “sex assigned at birth” throughout this Mandate.

¹⁶ <http://www.who.int/gender-equity-rights/news/sexual-gender-diversity-faq.pdf>

¹⁷ Human rights and intersex people. Issue paper published by the Council of Europe Commissioner for Human Rights. 2015. <https://rm.coe.int/168045d749>

¹⁸ Being Trans in the European Union: Comparative analysis of EU LGBT survey data. European Union Agency for Fundamental Rights. 2014. <http://fra.europa.eu/en/publication/2014/being-trans-eu-comparative-analysis-eu-lgbt-survey-data>

¹⁹ Embrace diversity and protect trans and gender diverse children and adolescents: International Day against Homophobia, Transphobia and Biphobia. Joint Statement, 17 May 2017. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622&LangID=E>

VI. Including reference to the full variety of gender identities

When referring to trans people, the report operates within a binary framework, mentioning only “trans men” and “trans women”. We observed a similar trend in speeches that the IE SOGI has delivered in the past months, where the binary pronouns “he” and “she” are used, without any terminology to incorporate **trans and gender diverse people who have non-binary and / or indigenous or traditional identities**.

Non-binary is a broad term for trans people whose gender identity does not match their sex assigned at birth and who do not fit in the binary system of male and female. Several UN documents have made reference to non-binary people. For example, the first report of the High Commissioner for Human Rights on SOGI acknowledges that the acronym LGBT covers non-binary identities.²⁰

In many cultures, alternative gender identities - both binary and non-binary - have very long histories. A non-exhaustive list of these includes:

bandhu (Bangladesh), *hijra* and *thirunagai* (India), *khwaja sira* (Pakistan), *meti* (Nepal), *kathoey* (Thailand), *waria* (Indonesia), *mak nyah*, *thirutambi*, and *kua xing nan* (Malaysia), *transpinay* and *transpinoy* (the Philippines) and *bin-sing-jan* and *kwa-sing-bit* (Hong Kong) in Asia; and *fakafifine* (Niue), *fa’afafine* (Samoa and Tokelau), *fa’afatama* (Samoa), *leiti* (Tonga), *palopa* (Papua New Guinea), *akava’ine* (Cook Islands), *whakawahine* and *tangata ira tane* (New Zealand) and *Sistergirl* and *Brotherboy* (Australia) in the Pacific²¹, *travesti* (Latin America), *muxe* (Mexico), *men and women of trans experience* (Caribbean and United States of America), and *two-spirit* Native identities (North America).

The 2017 joint IDAHOT statement uses an expansive and inclusive definition, saying:

“The statement refers to trans and gender diverse children and adolescents in an inclusive manner to include children and adolescents whose gender identity does not match the sex they were assigned at birth, as well as those for whom their gender identity is not limited to binary concepts of being either a man or a woman and/or whose gender expression is not limited to being either masculine or feminine. This includes those who identify with third and other alternative genders, or a combination of genders.”²²

²⁰ Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights. 15 December 2011. A/HRC/19/41, footnote 2.

²¹ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme. Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific. Washington, DC: Futures Group, Health Policy Project; 2015.

²² Embrace diversity and protect trans and gender diverse children and adolescents: International Day against Homophobia, Transphobia and Biphobia. Joint Statement, 17 May 2017. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21622&LangID=E>

RECOMMENDATION #13: We recommend that the IE SOGI makes explicit references to and provide examples of non-binary identities.

RECOMMENDATION #14: We recommend that the IE SOGI makes explicit references to a variety of specific identities, including identities originating in the Global South and those not easily translated to or explained in English.

RECOMMENDATION #15: We recommend that the IE SOGI use the pronouns “he”, “she”, and “they” in future speeches in an effort to include those with non-binary identities.

VII. Conclusion

It is clear that the Independent Expert has sought to improve explanations of these complex topics since the start of his Mandate, and those efforts are very well noted and much appreciated. We will be happy to continue to engage the IE on these issues throughout his tenure and are available as a resource whenever needed.

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