



Violations of the Human Rights of Trans Persons in Chile

List of Suggested Issues Presented to the Working Group on Chile's Report

Human Rights Committee

126^o Session Period

July 1-26, 2019

Report presented by:

- **Asociación OTD Chile – Organizando Trans Diversidades**
- **Akahatá – Equipo de trabajo en sexualidades y géneros**
- **Synergia - Initiatives for Human Rights**
- **SRI – Sexual Rights Initiative**

Asociación OTD Chile – Organizando Trans Diversidades; Akahatá – Equipo de trabajo en sexualidades y géneros; Synergia – Initiatives for Human Rights; and the SRI – Sexual Rights Initiative, are honored to submit the following list of issues to the Human Rights Committee with the aim of assisting it in the elaboration of the List of Issues for the follow up review of the implementation of the International Covenant on Civil and Political Rights by the State of Chile.

List of suggested issues and questions

Right to enjoy civil rights and to non-discrimination based on gender identity

Articles 2.1, 17, 23.1, 24 and 26

1. By the end of 2018, Chile passed Law 21.120 which recognizes and protects the right to gender identity¹, a historical step forward when it comes for trans identities to be recognized by the State. The law establishes some fundamental principles, such as the principle of not to patologize (art. 5, letter a) and forbids modifications of appearance or medical or surgical treatments to be required in order to access to the change of the registered name and sex (art. 2). This notwithstanding, between articles 12 and 19 of the law different procedures for the change of the registered name and/or sex are established according to marital status and age of applicants – with some of them being discriminatory in a law supposed to be progressive.
2. The law establishes an unobstructed, administrative procedure for persons who are single and 18 or more years old², but it is still troublesome because it requires two witnesses to be present to carry the procedure out. This requisite constitutes a violation to the right to non-discrimination and to the right to privacy, which are both recognized in other articles of the very same law³.
3. For children and adolescents elder than 14 years old and younger than 18 years old⁴, a legal procedure before the Family Court is established. In this procedure, it is mandatory for the application to be submitted at least by one of the legal representatives of the applicant⁵. The judge has the faculty to ask for two psycho-social reports: a) a psychological or psycho-social report stating that the concerned person and their family have received professional assistance for at least a year prior to the application; and b) another report with the objective of ruling out *“the decisive influence of third parties (...) on the expressed will of the concerned person about their gender identity”*⁶. This second report plays down the psychological/psychosocial report (a) while calling into question the fact that the child or adolescent is expressing their true will. By doing so, it opens up the possibility for the records change to be challenged by one of the parents or tutors who may not agree with the identity change –a frequent situation, in fact–, posing an obstacle to attaining the “best interests of the child”.

¹ Law 21.120 which recognizes and protects the right to gender identity. Library of the National Congress, Republic of Chile. Available at: <http://bcn.cl/283xn> [Visited: February 20, 2019].

² See title III, arts. 9 to 11 of law 21.120.

³ We consider it also attempts against the right to self-determine gender identity without the interference of third parties, in accordance to the recommendation of principle 31, letter c, section iii of the Yogyakarta Principles. See Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, +10, *Principle 31*. Available at: <http://yogyakartaprinciples.org/principle-31-yp10/> [Visited: March 13, 2019].

⁴ See title IV, paragraph 1^o, arts. 12 to 17 of law 21.120.

⁵ See article 14 of law 21.120.

⁶ See article 17, letter b of law 21.120.

4. If the person requesting the change of the registered name and sex is a married person, the established procedure ends the marriage⁷, declaring both parties as legally divorced⁸, without taking into account the opinion of the partner of the petitioner about their will to continue or to put an end to the marriage. This measure constitutes an arbitrary interference in the private life of the trans person and of their spouse and violates the right to form a family. This disposition was introduced because of the pressure put by conservative groups which seek to prevent at all costs the existence of same-sex marriage, even when it would be a mere *de facto* existence.
5. Chile lacks any legislation or public policies that put in place mechanisms for the protection of trans children and adolescents from the violence and discrimination they face within their families. The country has a high record of trans persons who have been expelled from their homes, and who, being unable to get a formal job due to structural discrimination, end up homeless, under conditions of great social vulnerability and often having to do sex work to survive.

Questions to the State of Chile

6. Through which mechanisms will the State protect the right to gender identity of trans persons under the age of 14, who are vulnerable to discrimination but are not included in law 21.120, especially when their right to identity is challenged by their own parents?
7. Through which mechanisms will the State guarantee the right to change the registered name and sex, as established by law 21.120, for persons between 14 and 18 years old, especially when their parents and/or tutors have exerted discrimination, violence or explicitly oppose to their right to identity?
8. Which measures are to be adopted by the State to correct law 21.120 in order to avoid arbitrary divorces affecting trans persons and their families?
9. Which measures are to be adopted by the State, both in the criminal and the family jurisdictions, to eradicate intra-family, transphobic violence perpetrated by parents or other family members of trans children and adolescents?
10. Which measures are to be adopted by the State for the protection of trans children and adolescents who are expelled from their homes when they reveal their gender identity or expression?

Discrimination against LGBTQ⁹ persons and obstacles for the application of Law 20.609, which contains provisions against discrimination Articles 2.1, 6, 7 and 26

11. On July 12, 2012, Law 20.609 –containing provisions against discrimination– entered into force. Among them was a procedure to report discriminatory acts before the civil courts –it

⁷ See title IV, paragraph 2º, arts. 18 and 19 of law 21.120.

⁸ See article 19, section 4º and 5º of law 21.120.

⁹ LGBTQ: stands for lesbian, gay, bisexual, trans and queer persons.

conferred judges the faculty of ordering the discriminatory act to stop and of imposing a fine. However, since the law was passed, several civil society organizations have noted that article 2, paragraph 3 in some way creates a “hierarchy” of rights, in which the right to non-discrimination can be relegated by other rights. The law states: *“distinctions, exclusions and restrictions will be considered reasonable when they are justified in the fair exercise of other fundamental right, especially those referred to in numbers 4º, 6º, 11º, 12º, 15º, 16º and 21º of article 19 of the Political Constitution of the Republic, or in any other constitutionally legitimate cause”*¹⁰. Such a restriction limits *de facto* the protection against discrimination that was to be granted by said law, for instance, when the right to freedom of expression of LGBTIQ people is violated through discriminatory actions.

12. The law also incorporated into the Chilean Criminal Code aggravating circumstances for crimes motivated by the sexual orientation or gender identity of the victim, punishing them with a higher sentence. However, the text of the law makes it difficult to demonstrate the motivations¹¹, because the courts require videos or other records of the moment when the crime was being committed to be produced, but in most cases that is not possible¹². These requisites rise concern, because they are an indirect way to cover with impunity the attacks and hate crimes against the LGBTQ population.

13. Acts of discrimination against LGBTIQ people raised by 44% during 2018, being the trans population the most affected one, with 272 cases, constituting a 39% of the total of cases. Among the cases was a hate crime that resulted in the death of a trans woman¹³. When this report is being written, 13 attacks have already been perpetrated during 2019, which in some cases amount to torture¹⁴ and which have called public attention due to their brutality.

Questions to the State of Chile

14. Which measures are to be adopted by the State to solve the contradictions implied in the hierarchy of rights created by law 20.690, in order to provide the anti-discriminatory legislation with concrete and real effectiveness?

15. Which measures are to be adopted by the State to eradicate and penalize hate crimes, or to give more effectiveness to the aggravating circumstances incorporated into law 20.609

¹⁰ Article 19 of the Constitution establishes the following rights: 4º, respect for private life and honor; 6º, freedom of consciousness and of belief; 11º, freedom to teach; 12º, freedom of opinion and to access information; 15º, freedom of association; 16º, freedom to work; and 21º, right to develop any economic activity.

¹¹ The aggravating circumstances added in number 21 of article 12 of the Criminal Code says: “To perpetrate the crime or to take part in it motivated by [...] the gender orientation, gender identity” among other circumstances.

¹² In this sense, we appreciate the former text of the draft Criminal Code, which states that the aggravating circumstances are to be applied when the crime is perpetrated “in such a way that expresses rejection or disdain of their gender, sexual orientation or sexual identity”. See articles 213, 231, 260, 269, 295 and 606 of the Draft Criminal Code, October 22, 2018. Available at: http://www.minjusticia.gob.cl/media/2018/10/Anteproyecto_de_C%C3%B3digo_Penal_2018.pdf [Visited: February 20, 2019].

¹³ See La Tercera: “Informe del Movilh reporta aumento de 44% en casos de homofobia y transfobia”. March 19, 2019. Available at: <https://www.latercera.com/nacional/noticia/informe-del-movilh-reporta-aumento-44-casos-homofobia-transfobia/577749/#> [Visited: March 22, 2019].

¹⁴ See La Tercera: “‘Ola de violencia’ preocupa a comunidad LGBTI: Van 13 ataques este año’. March 14, 2019. Available at: <https://www.latercera.com/la-tercera-pm/noticia/ola-de-violencia-preocupa-a-comunidad-lgtbi-van-13-ataques-este-ano/570132/> [Visited: March 22, 2019].

with the aim of reducing the high rates of violence and murders against trans persons in Chile?

Genital mutilations of intersex persons Articles 7 and 24.2

16. Circular 18¹⁵ –issued on December 22, 2015– sets guidelines on the health care of intersex children. It orders all public hospitals to put a halt to unnecessary “normalization” treatments, including irreversible genital surgeries, until the concerned persons reach enough age to be able to make choices about their bodies. It also included the creation of a multidisciplinary working group to address how to treat these cases.
17. In addition to Circular 18, Circular 7¹⁶ –issued on August 23, 2016– established that parents of an intersex newborn can give their consent as a substitution to permit surgeries. Because it lacks a proper guidance for parents, this disposition has allowed unjustified genital mutilations, which result in lifelong physical and psychological pain for the intersex person, to be carried out. Unnecessary surgeries on intersex children are considered a kind of genital mutilation and therefore the Human Rights Council¹⁷ has considered them as violations of the prohibition of torture established in several international instruments (among others, Article 7 of the CCPR). Finally, it should be noted that both Circulars apply only to public hospitals and public health centers but have no binding force for private ones, where “normalizing” surgeries on intersex newborns have never stopped to be widely performed.
18. In addition to that, the Civil Registry has sometimes denied the registration of a newborn when the medical staff reports sex as “undefined”, a situation causing deep anguish and desperation in families unable to register their children. In these cases, intersex persons are prevented from acquiring “legal existence” until some supplemental medical examinations are performed on them –examinations that lead to an arbitrary definition of the sex and gender of that person. It should be also noted that in those cases when the Civil Registry has registered intersex newborns as with “undefined sex”¹⁸, other problems arose due to legal vacuums, such as the impossibility to change the name or to establish sex through an unobstructed administrative procedure.

Questions to the State of Chile

¹⁵ Circular 18: sets guidelines for specific issues of health care for intersex children. Ministry of Health, Republic of Chile. December 22, 2015. Available at: <https://ihra.org.au/wp-content/uploads/2016/01/Circular-08-22.12.15-Instruye-Sobre-Ciertos-Aspectos-de-la-atencion-de-Salud-a-Ninos-y-Ninas-Intersex.pdf> [Visited: March 13, 2019].

¹⁶ Circular 7: complements circular nº 18, which set guidelines for specific issues of health care for intersex children. Ministry of Health, Republic of Chile. August 23, 2016. Available at: https://diprece.minsal.cl/wrdprss_minsal/wp-content/uploads/2018/03/Circular-aclaratoria-002.pdf [Visited: March 13, 2019].

¹⁷ Human Rights Council, Discrimination and violence against individuals based on their sexual orientation and gender identity Report of the Office of the United Nations High Commissioner for Human Rights. May 4, 2018. A/HRC/29/23. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A%2FHRC%2F29%2F23 [Visited: March 13, 2019].

¹⁸ See La Tercera: “269 niños han sido inscritos con sexo indefinido en el Registro Civil en los últimos 12 años”. March 14, 2018. Available at: <https://www.latercera.com/tendencias/noticia/269-ninos-inscritos-sexo-indefinido-registro-civil-los-ultimos-12-anos/98520/> [Visited: March 22, 2019].

19. Which mechanisms are going to be set up to really put a halt to unnecessary surgeries performed on intersex persons both in public and private hospitals?
20. Through which mechanisms is the State going to guarantee the right of intersex persons to make choices over their own gender identities, when they reach a proper age and according to their self-perception, without parents and/or tutors having the faculty to impede such decisions and without the interference of unnecessary legal procedures?
21. How is the State going to guarantee the right of intersex persons to a legal identity, taking into account the many obstacles and legal vacuums that have been exposed during the last years?

III-treatment and arbitrary detentions of trans persons **Articles 2, 10 and 26**

22. In its 2014 Concluding Observations, the Committee has recommended the State of Chile to repeal article 373 of the Criminal Code because it is *“used to arrest and harass persons due to their sexual orientation or gender identity”*¹⁹. This notwithstanding, the State has failed to adopt any measure regarding this point. Police forces currently still use that article to justify arbitrary detentions which are not reported to the Prosecutor²⁰. The most affected are trans women doing sex work, because the police uses this article to arrest them when trying to force them to leave the neighborhoods where they work.
23. In a recent case –still under investigation– surrounded by rare circumstances, a trans woman who was a sex worker was ran over, probably by a client. When publicly reporting the case, the police did not respect the social name of the victim, an attitude completely aligned with the ongoing harassment of sex workers by the police²¹.
24. 16 police abuses were recorded during 2018. In one of them, a trans woman who went to the police seeking help after having received transphobic insults in the street, was arbitrary arrested²².

¹⁹ See par. 14 in Human Rights Committee, Concluding observations on the sixth periodic report of Chile, August 13, 2014. CCPR/C/CHL/CO/6. Available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/CHL/CO/6 [Visited: March 13, 2019].

²⁰ See: Organización de Transexuales por la Dignidad de la Diversidad and International Gay and Lesbian Human Rights Commission (IGLHRC) (2013): *Human Rights Violations of Lesbian, Gay, Bisexual & Transgender (LGBT) People in Chile - Presented to the 108th Session of: International Covenant on Civil and Political Rights Human Rights Committee of the United Nations for consideration during the drafting of the List of Issues*. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fNGO%2fCHL%2f14590&Lang=en [Visited: March 13, 2019]. During the 2008 debate of a bill that aimed to repeal this rule and that was rejected, María Antonieta Saa, then representative, noted that the article *“did not define what was understood as or constituted the offences to modesty or to good habits, a situation that in practice meant that were the police officers who decided, in the street, when the requirements for this felony were present”*. See Informe de la Comisión de Constitución, Legislación y Justicia recaído en el proyecto de ley que deroga el artículo 373 del Código Penal, Boletín n° 5565-07. Available at: <https://www.camara.cl/pley/pdfpley.aspx?prmID=11750&prmTIPO=INFORMEPLY> [Visited: March 13, 2019].

²¹ See Soy Chile: *“Molestia en la comunidad Trans por no respetar nombre social de integrante muerta tras atropello en Copiapó”*. December 22, 2018.

²² See MOVILH (2019): XVII Informe Anual de Derechos Humanos – Diversidad sexual y de género en Chile – Hechos 2018. Available at: <http://www.movilh.cl/documentacion/2019/Informe-Anual-DDHH-2018-Movilh.pdf> [Visited: March 23, 2019].

25. During the last years, several irregular situations involving incarcerated trans persons have been reported. Among other situations, the gendarmerie carries out abusive searches, in a discriminatory way, over the bodies of trans inmates. The social name of trans persons is not respected when they are imprisoned and they are subjected to different forms of violence on a permanent basis²³.

Questions to the State of Chile

26. How is the State planning to start the procedure for repealing article 373? If that proves not to be possible, how is the State going to clarify the contents of the law to prevent it from keeping being arbitrarily used by police forces to perpetrate acts of discrimination and arbitrary detentions of persons solely due to their sexual orientation or gender identity?
27. Which actions are going to be adopted by the State to raise awareness and to train the gendarmerie on issues of human rights, sexual and gender diversity, in order to guarantee a decent and human treatment for imprisoned trans persons?

Bullying, high rates of depression and suicide in trans persons Articles 2.1, 6.1 and 24.1

28. Rates of depression and suicide among the trans population are alarming in Chile: 57% of trans people have tried to commit suicide before they were 15 years old and 59,9% of LGBTIQ students have been subjected to discriminatory bullying²⁴. In spite of this, until date there are no standard school programs for sexual and affective education designed with a focus on equality among sexualities and genders, aiming to advance the respect for human rights of LGBTIQ persons. Such programs would help to prevent the high teenage suicide rate among trans people.
29. This situation is worse and more violent in segregated women-only or men-only schools, because male chauvinist prejudices are stronger in those institutions. There is no sound reason for gender segregation in education and, when analyzed from a historical perspective, its only outcome has been to perpetuate gender inequalities. In these schools, students who make a gender transition have a higher exposition to discrimination and violence from teachers and from other students and many times they are directly or indirectly expelled, forcing them to change to a school of the other gender²⁵.

²³ See Schramm López, Steffi (2018): *Identidad de género y ejecución de pena: derechos vulnerados de personas trans privadas de libertad*. Available at: https://www.librotecnia.cl/ckfinder/userfiles/files/RJPdep_Identidad-de-genero-y-ejecucion-de-pena_SSchramm.pdf [Visited: March 23, 2019].

²⁴ See Valenzuela Cortez, Matías: "80,7% de las personas trans se reconocen como tales antes de los 11 años: ¿Por qué esperar hasta los 14?". *El Desconcierto*, June 22, 2018. Available at: <https://www.eldesconcierto.cl/2018/08/22/807-de-las-personas-trans-se-reconocen-como-tales-antes-de-los-11-anos-por-que-esperar-hasta-los-14/> [Visited: March 22, 2019].

²⁵ See the case of Arlén Aliaga, the first trans student to be admitted into a women-only high school, after asking to be transferred due to the transphobic bullying she was subjected to in the men-only school she previously attended. OTD Chile: "Arlén formaliza su matrícula al Liceo 1". March 1, 2019. Available at: <https://otdchile.org/arlén-formaliza-su-matricula-en-el-liceo-1/> [Visited: March 22, 2019].

Questions to the State of Chile

30. Which measures are to be adopted by the State to lessen discriminatory bullying in educational institutions, taking into account that this kind of harassment leads LGBTIQ youth to suicide?

31. Which actions are to be adopted by the State to put an end to gender segregation in the admission procedures to the educational system? In case this proves not to be feasible in the short time, how will the State protect the physical and psychic integrity of trans students who make their gender transition in gender segregated schools?