

Towards an evaluation of the Victims' Rights Directive

Submission prepared by OII Europe

22.10.2021

OII Europe

OII Europe is the European intersex umbrella organisation with intersex-led member organisations in 20 Council of Europe member states. OII Europe advocates for the protection of intersex people's human rights, raises awareness of intersex issues in society, e.g., through campaigns during Intersex Awareness Weeks, and supports the growth of the European intersex community together with its growing number of member organisations and allies through measures like the annual OII Europe Community Event & Conference.

Since 2012 OII Europe has been regularly consulted on intersex issues by the Office of the United Nations High Commissioner for Human Rights, the Parliamentary Assembly of the Council of Europe, the Bioethics Committee of the Council of Europe, the European Parliament, the European Commission, the European Union Agency for Fundamental Rights, the European Network of Equality Bodies, the European Commission against Racism and Intolerance and national governments.

Since 2020 OII Europe is registered as an expert on sexual orientation, gender identity and sex characteristics with the SOGI Unit of the Council of Europe. The NGO OII Europe was created in 2015, as an extension of a network of the same name set up in 2012, and is based in Berlin.

Table of Content

Introduction.....	3
Key recommendations	3
Who are intersex people?	4
Intersex people are specifically vulnerable to bias motivated violence and crime.....	5
Violence based on sex characteristics is gender-based violence.....	6
Intersex Genital Mutilation (IGM) is gender-based violence comparable to Female Genital Mutilation (FGM).....	8
Intersex victims are victims with special needs.....	12
Data collection and under-reporting	14
Appendix	16

Introduction

Intersex persons, i.e., persons with a variation of sex characteristic, are at high risk of becoming victims of gender-based and domestic violence as well as bias motivated hate speech and hate crime. Rigid sex/gender norms, based on the false notion of the binary of sex and gender, prevalent across Europe, incite violence and hatred against everybody who is perceived as transgressing this binary, including intersex people. Their personal accounts, shadow reports and an increasing number of research reports on the lived situation of intersex people, show the high degree of discrimination, violence and hate-motivated acts intersex individuals are regularly subjected to.

The range of settings in which these incidents take place and the group of perpetrators is diverse: the latter include colleagues at school attacking the intersex person physically and verbally, family members, who do not accept the intersex person as they are and even rape by medical doctors, who perceive the intersex person's body as non-conforming and not entitled to be respected.

However, only a small fraction of these violent incidents is being reported, due to fear of a LGBTI-phobic reaction from authorities, lack of trust and lack of a protective ground specific to intersex people and intersex people's experience of bias motivated violence.

The Victims' Rights Directive, in its current form, does not yet recognize intersex people as victims of bias motivated crime, in particular gender-based violence, and as victims with specific needs. The following submission presents data on the scope of violence intersex people face, points out the specific needs of intersex victims, and puts forward recommendations on how these needs and specific situations of intersex victims can be better addressed through the Victims' Rights Directive.

Key recommendations

RECOMMENDATIONS:

Revise the Victim's Rights Directive such that

it reflects the understanding that gender-based violence and bias motivated violence include violence on the ground of a person's sex characteristics, by including the ground of "sex characteristics" in

- recital 9 on non-discrimination
- recital 17 on gender-based violence

it explicitly reflects the understanding that intersex victims are victims with specific needs by

- including “sex characteristics” in recital 56 on individual assessment
- allowing in the victim to choose an interviewer of the sex/gender they feel most safe with (article 23.2d)

it postulates meaningful and disaggregated data collection by

- expanding recital 64 on systematic and adequate data collection to include (as far as such data is known and are available), the specific protective ground/bias motivation (e.g., sexual orientation, gender identity, gender expression, sex characteristics/homophobic, transphobic, intersexphobic attack)
- if possible, establishing an obligation for Member States to communicate this data.

Who are intersex people?

Intersex people are born with sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns) that do not fit the typical definition of male or female¹.

The term “intersex” is an umbrella term for the spectrum of variations of sex characteristics that naturally occur within the human species. The term intersex acknowledges that physically, sex is a spectrum and that people with variations of sex characteristics other than male or female exist. The fact that someone has an intersex body can become apparent at different times in their life: at birth, during childhood, in puberty or even in adulthood. Depending on the specific life circumstances and the degree of taboo in their environment, a person might learn that they have an intersex body at a very early age or later in life. Some intersex people never find out at all.

Up to 1,7 % of the global population is intersex, i.e., has a variation of sex characteristics, which equals, of this date, 132 million intersex people globally².

Since 2009, United Nations Treaty Bodies have made 65 calls on Member States to stop serious human rights violations against intersex people³. 18 Council of Europe Member States have received 40 UN

¹ Ghattas, D. C. (2019). Protecting Intersex people in Europe. A toolkit for law and policy makers. With digital Appendix and Checklist. Ed. by ILGA-Europe and OII Europe, p.9, available at <<https://oiieurope.org/library-en/toolkit-cat/legal-toolkit/>>

² See the United Nations Office of the High Commissioner for Human Rights (2015). Fact Sheet. Intersex, available at <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf>

³ The United Nations Committee on the Rights of the Child (CRC); The United Nations Committee against Torture (CAT); The United Nations Committee on the Elimination of Discrimination against Women (CEDAW); The United Nations Committee on the Rights of the People with Disabilities (CRPD); the United Nations Human Rights Committee (CCPR). See OII Europe (2021, August). Intersex Resources, available at <<https://oiieurope.org/wp-content/uploads/2021/08/International->

Treaty Bodies recommendations, among which 15 European Union countries received 32 recommendations.⁴

Intersex people are specifically vulnerable to bias motivated violence and crime

The 2019 FRA LGBTI survey⁵, the first and largest data set on the situation of intersex people in the EU to this date, identifies intersex people, together with trans people, as the most vulnerable group in the LGBTI spectrum in regards to experiencing violence and gender-based violence:

- in the five years before the survey 22% of intersex respondents experienced a **physical and/or sexual attack** for being LGBTI, being the most affected group among LGBTI people.
- 38% of intersex people at least once experienced **violent in-person threats** due to being LGBTI in the 12 months before the survey, and 27% even six or more times.⁶

Among all LGBTI respondents, intersex (42%) and trans (48%) people experienced the highest rates of **harassment** for being LGBTI in the year before the survey. Across the EU, intersex respondents indicated the highest rate (41%) for often or always avoiding certain locations.⁷

The findings get even more worrying when looking at the situation of **young people**:

- 14% of the young respondents (aged 15-17) stated they suffered from physical or sexual attacks due to being LGBTI in the 12 months before the survey
- 79% of them reported physical attack, while 20% sexual attack or a combination of physical and sexual attack.⁸

This means that at least 14% of intersex youth **experienced incidents that meet the criteria of a criminal offense and of bias motivation**. The figures also show that intersex youth live in a societal environment where hate crime against intersex people can and does flourish: 50% of intersex

[intersex-human-rights-movement Links-to-human-rights-documents-adressing-intersex-and-important-events August-2021.pdf](#)>

⁴ Country (Number of recommendations): Austria (2); Belgium (3); Bulgaria (1); Denmark (3); Finland (1); France (3); Germany (5); Ireland (2); Italy (3); Liechtenstein (1); Luxembourg (1); Malta (1); Netherlands (3); Portugal (2); Slovakia (1); Spain (1); Switzerland (4); UK (3). See OII Europe, Intersex Resources, cited above.

⁵ European Union Agency for Fundamental Rights (2020). A long way to go for LGBTI equality, available at <<https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>>. All figures quoted from here on are the result of our own research through the Data Explorer, unless otherwise specified.

⁶ See OII Europe infographic based on LGBTI Survey Data Explorer available at <<https://oiieurope.org/physical-violence-and-harassment/>>

⁷ Ibid.

⁸ See OII Europe infographic based on LGBTI Survey Data Explorer available at <<https://oiieurope.org/intersex-youth/>>

respondents aged 15-17 said they experienced **bullying** at school/university and 39% identified school as the location of the last incident of hate-motivated harassment.⁹

Reports submitted by intersex people to OII Europe show that **domestic violence is a common experience of intersex people** and the **high number of homeless intersex people**, the highest among the respondents to the 2019 FRA LGBTI survey, confirms these reports:

- 29% of the intersex survey respondents stated facing housing difficulties
- and close to half of them, 41%, stated family or relationship problems as reason for the housing difficulties¹⁰

However, only a small fraction of these violent incidents is being reported (see section *Data Collection and under-reporting*).

The **negative impact** of these incidents on the individual is severe:¹¹ when asked about how the last hate-motivated violent incident affected their health and well-being,

- 59% stated they were afraid to go out or visit places
- 56% said they had psychological problems (e.g., depression or anxiety)
- 9% said they needed medical assistance or hospitalization.¹²

Violence based on sex characteristics is gender-based violence

The Victims' Rights Directive in its current form states that violence based on gender, gender identity or gender expression is understood as **gender-based violence** (recital 17). However, since the directive entered into force in 2012 the concept **has evolved further to include violence based on sex characteristics**.

- The **EU Gender Equality Strategy 2020-2025** affirms that policy objectives and key actions to guarantee gender equality must include women and men, girls and boys, **in all their diversity**.¹³ The Strategy clarifies that the expression 'in all their diversity' is used to "express that, where women or men are mentioned, these are a heterogeneous category including in relation to their sex, gender identity, gender expression or **sex characteristics**. It affirms the commitment to leave no one behind and achieve a gender equal Europe for everyone,

⁹ Ibid.

¹⁰ See OII Europe infographic based on LGBTI Survey Data Explorer available at <<https://oiiurope.org/housing-and-economic-difficulties/>>

¹¹ On the negative impact of hate crime on the victims and the community, also see Equality and Diversity Forum / Aziz Foundation (2018). Hate Crime: Cause and Effect. A research synthesis, p.6 <<https://www.equallyyours.org.uk/wp-content/uploads/2018/10/Hate-crime-cause-and-effect.pdf>>, See also research referenced there.

¹² Ibid.

¹³ European Commission, Gender Equality Strategy 2020-2025, p. 2
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>

regardless of their sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹⁴

- In its **LGBTIQ Equality Strategy 2020-2025**, the Commission:¹⁵
 - states that harmful practices against women and girls, in all their diversity, **are forms of gender-based violence**
 - identifies intersex genital mutilation (IGM) as harmful practice and emphasizes that harmful practices “such as non-vital surgery and medical intervention on intersex infants and adolescents without their personal and fully informed consent (intersex genital mutilation) [...] may have serious bodily and mental health repercussions.”
 - **diversity exists** and hence requires an **intersectional approach**.

- In its **Resolution on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU** the European Parliament:
 - highlights that “**LGBTIQ+ persons** are also **victims of gender-based violence** because of their gender, gender identity, gender expression and sex characteristics”;¹⁶
 - recognises that “gender-based violence targets women and girls in all their diversity and LGBTIQ+ persons, driven by a desire to **punish those seen as transgressing societal norms** of gender hierarchies, gender expression and binary gender systems”¹⁷
 - affirms that “gender-based violence against LGBTIQ+ persons includes [...] **female and intersex genital mutilations**”¹⁸
 - emphasized that it “**condemns all forms of violence** against women and girls in all their diversity and other forms of gender-based violence, such as violence against LGBTIQ+ persons on the grounds of gender, gender identity, gender expression or **sex characteristics**, which is considered to refer to different acts of online and offline violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering”¹⁹

RECOMMENDATION: Revise the Victim’s Rights Directive to reflect the understanding that gender-based violence and bias motivated violence include violence on the ground of a person’s sex characteristics, by including the ground of “sex characteristics” in

¹⁴ Ibid., footnote 9

¹⁵ European Commission, LGBTIQ Equality Strategy 2020-2025, p. 15

https://ec.europa.eu/info/sites/default/files/lgbtig_strategy_2020-2025_en.pdf

¹⁶ European Parliament, Resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (2021/2035(INL), Recital H

¹⁷ Ibid., recital L

¹⁸ Ibid., recital H

¹⁹ Ibid., article 1

- recital 9 on non-discrimination
- recital 17 on gender-based violence

Intersex Genital Mutilation (IGM) is gender-based violence comparable to Female Genital Mutilation (FGM)

In addition to the experiences of gender-based and domestic violence and bias motivated hate crimes they share with other groups of the population (see section *Intersex people specifically vulnerable to bias motivated violence and crime*), many intersex individuals experience Intersex Genital Mutilation (IGM), a harmful medical practice that is performed on them as result of their variation of sex characteristics.

IGM is a non-vital intervention on the inner or outer genitalia of an intersex person's body without the person's own wish and without their free, prior and fully informed consent. Most often IGM is performed on infants and young children, with follow-up surgeries when they grow up being common. IGM deprives those children of their human right to bodily integrity and self-determination. It sets them apart from non-intersex children who are not subjected to these interventions and carries multiple health risks for the child and the future adult.

According to a 2015 FRA survey, IGM is being carried out in at least 21 of the EU Member States.²⁰ The 2019 FRA LGBTI Survey revealed that out of all participating intersex people who had been subjected to IGM, 62% of those cases fully informed consent was not provided and neither sought for from them nor from their parents before the first surgical intervention to modify their sex characteristics. And 49% said the same about hormonal or any other medical intervention on their sex characteristics.²¹

In the past years these interventions have been widely recognized on international and European level as harmful medical practices and a fundamental rights violation:

International level

- Since 2009, **United Nations Treaty Bodies** have made 65 calls on Member States to stop IGM and other **serious human rights violations** against intersex people²². 18 Council of Europe

²⁰ See: European Union Agency for Fundamental Rights: FRA Focus Paper. The Fundamental Rights Situation of Intersex People. Vienna 2015, p. 1 <http://fra.europa.eu/en/publication/2015/fundamental-rights-situationintersex-people>

²¹ European Union Agency for Fundamental Rights (2020). *A long way to go for LGBTI equality* <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>. See also OII Europe's infographic based on FRA data <https://oiiurope.org/recent-survey-shows-high-rate-of-medical-interventions-on-intersex-people-lack-consent/>

²² The United Nations Committee on the Rights of the Child (CRC); The United Nations Committee against Torture (CAT); The United Nations Committee on the Elimination of Discrimination against Women (CEDAW); The United Nations

Member States have received 40 UN Treaty Bodies recommendations, among which 15 European Union countries have received 32 recommendations²³. They are urged to «[p]rohibit the performance of unnecessary medical or surgical treatment on intersex children where those procedures may be safely deferred until children are able to provide their informed consent»²⁴.

- The **UN Committee on the Elimination of Discrimination against Women (CEDAW)** has repeatedly expressed strong concern about violence against intersex persons, taking place in EU Member States, including “medically irreversible sex reassignment surgery on intersex persons, a practice which is defined as non-consensual, unnecessary genital surgery and includes other comparable procedures that violate the physical integrity of such individuals”.²⁵
- The 2017 **Parliamentary Assembly of the Council of Europe Resolution 2191 (2017) Promoting the human rights of and eliminating discrimination against intersex people** confirmed that these kinds of surgeries are “serious breaches of physical integrity” and highlighted that they are performed “despite the fact that there is no evidence to support the long-term success of such treatments, no immediate danger to health and no genuine therapeutic purpose for the treatment”²⁶.
- In 2017, the **BanFGM Conference** on the worldwide ban on female genital mutilation decided to include victims of intersex genital mutilation in their supporting structure through the provision of essential services (medical, psychological and legal)²⁷.

EU level

- In the 2020 *LGBTIQ Equality Strategy 2020-2025* the **European Commission** affirms that “harmful practices such as non-vital surgery and medical intervention on intersex infants and adolescents without their personal and fully informed consent (intersex genital mutilation) [...] may have serious bodily and mental health repercussions”. It commits to “foster Member States’ exchange of good practice on ending these practices”²⁸.

Committee on the Rights of the People with Disabilities (CRPD); the United Nations Human Rights Committee (CCPR). See OII Europe (2021, August). Intersex Resources, available at <https://oiieurope.org/wp-content/uploads/2021/08/International-intersex-human-rights-movement_Links-to-human-rights-documents-addressing-intersex-and-important-events_August-2021.pdf>

²³ Country (Number of recommendations): Austria (2); Belgium (3); Bulgaria (1); Denmark (3); Finland (1); France (3); Germany (5); Ireland (2); Italy (3); Liechtenstein (1); Luxembourg (1); Malta (1); Netherlands (3); Portugal (2); Slovakia (1); Spain (1); Switzerland (4); UK (3). See OII Europe, Intersex Resources.

²⁴ The United Nations Committee on the Rights of the Child concluding observations on the combined fifth and sixth periodic reports of Austria (CRC/C/AUT/CO/5-6) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUT%2fCO%2f5-6&Lang=en

²⁵ CEDAW/C/LUX/CO/6-7 <https://intersexrights.org/wp-content/uploads/2020/08/N1807025.pdf>, see also these recommendations to EU member states: CEDAW/C/BGR/CO/8, CEDAW/C/AUT/CO/9, CEDAW/C/ITA/CO/7, CEDAW/C/DEU/CO/7-8, CEDAW/C/IRL/CO/6-7, CEDAW/C/NLD/CO/6, CEDAW/C/EST/CO/5-6, CEDAW/C/FRA/CO/7-8, CEDAW/C/SVK/CO/5-6

²⁶ Parliamentary Assembly (PACE), Resolution 2191 (2017). *Promoting the human rights of and eliminating discrimination against intersex people*, para. 2 <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24232&lang=en>

²⁷ http://www.npwj.org/sites/default/files/ressources/Declaration%20in%20EN_rev.pdf

²⁸ European Commission, *LGBTIQ Equality Strategy 2020-2025*, p. 15 https://ec.europa.eu/info/sites/default/files/lgbtiq_strategy_2020-2025_en.pdf

- In the 2021 *EU Strategy on the Rights of the Child* the **European Commission** affirms the high vulnerability of intersex children and adults and the need to protect them against violence in all areas; it addresses IGM as a harmful medical practice adjacent to Female Genital Mutilation (FGM); the Commission also explicitly addresses the impact of harmful practices such as non-vital surgery and non-vital medical intervention on intersex infants and adolescents carried out without their personal and fully informed consent and commits to “support the exchange of good practices on ending non-vital surgery and medical intervention on intersex infants and adolescents to make them fit the typical definition of male or female without their or their parents’ fully informed consent (intersex genital mutilation)”²⁹.
- The 2017 **European Parliament Resolution on equality between women and men in the European Union in 2014-2015** “condemns the fact that genital ‘normalisation’ surgery still takes place on intersex infants in most EU countries, despite not being medically necessary; urges the Member States to avoid such medical treatments without the free and informed consent of the person concerned”³⁰.
- The 2019 **European Parliament Resolution on the rights of intersex people** “strongly condemns sex-normalising treatments and surgery; welcomes laws that prohibit such surgery, as in Malta and Portugal, and encourages other Member States to adopt similar legislation as soon as possible”³¹.
- The 2021 **European Parliament Resolution on the situation of sexual and reproductive health and rights in the EU** identifies IGM as equal to FGM³² and reaffirms its “call on Member States to adopt legislation ensuring that intersex persons are not subjected to non-vital medical or surgical treatment during infancy or childhood, and that their right to bodily integrity, autonomy, self-determination and informed consent is fully respected”³³.
- The 2021 **European Parliament Resolution on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU** emphasizes that gender-based violence includes “female and intersex genital mutilation”³⁴; furthermore it “recalls that Parliament has previously strongly encouraged Member States to adopt laws and policies banning [...] female and intersex genital mutilations and forced sterilisation practices”³⁵.

National level

- Already in 2014, the **24th Conference of Equality and Women Ministers and Senators of the German Länder (GFMK)** pointed to the similarities between IGM and FGM and called for

²⁹ European Commission, *EU Strategy on the Rights of the Child*, pp. 10-12 https://eur-lex.europa.eu/resource.html?uri=cellar:e769a102-8d88-11eb-b85c-01aa75ed71a1.0002.02/DOC_1&format=PDF

³⁰ European Parliament resolution of 14 March 2017 on equality between women and men in the European Union in 2014-2015 (2016/2249(INI)), article 39 https://www.europarl.europa.eu/doceo/document/TA-8-2017-0073_EN.html

³¹ European Parliament resolution of 14 February 2019 on the rights of intersex people (2018/2878(RSP)), article 2 https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.pdf

³² European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women’s health (2020/2215(INI)), recital I: “harmful gender stereotypes and practices such as female and intersex genital mutilation” https://www.europarl.europa.eu/doceo/document/TA-9-2021-0314_EN.html

³³ Ibid. article 19

³⁴ European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (2021/2035(INL)), recital H and article 7 https://www.europarl.europa.eu/doceo/document/TA-9-2021-0388_EN.pdf

³⁵ Ibid., article 28

implementing a corresponding standard of protection for intersex children. The GFMK pointed out that “family law already prohibits guardians from consenting to the sterilisation of a child (§ 1631c BGB)” and that, “in the case of girls, parents cannot give effective consent to the removal or circumcision of the clitoris, as this is punishable as female genital mutilation (§ 226a StGB)”, but that intersex minors were “in fact often denied this protection by carrying out procedures that have a sterilizing effect or that alter the genitals of intersexual minors without their consent and without compelling medical indication”.³⁶

- Three EU Member States have banned IGM: **Malta**, Portugal and Germany.³⁷ The Maltese law also **prescribes criminal sanctions** for medical practitioners and other professionals who breach the article containing the ban.³⁸

Female Genital Mutilation (FGM) is a crime in all EU member states.³⁹ The currently still prevailing differentiation between FGM and IGM in most EU Member States is largely arbitrary. FGM and IGM share many common characteristics and individuals who are subject to FGM or IGM experience gender-based violence:

- Framed in terms of the need to be accepted socially; however, for many intersex people, surgeries in their childhood and teenage years did not improve their situation concerning social inclusion or marginalisation.
- Motivated by beliefs about what is considered acceptable sexual behaviour; in the case of intersex people, the ultimate goal of those performing IGM is to allow for penetrative intercourse of the future adult and for an alleged ability to procreate. Neither the impossibility to foresee the future intersex adult’s gender identity, sexual orientation or sexual preference, nor the fact that the capacity for penetrative intercourse may be less important for the intersex adult than unharmed genitalia are taken into account.
- Motivated by the notion that parts that are not considered female (or male) enough should be removed; in the case of intersex people this includes interventions on infants and children such as clitoris reduction/recession, removing the labia, moving the opening of the urethra to the tip of the penis, to name but a few.

³⁶ See: 24. Konferenz der Gleichstellungs- und Frauenministerinnen und -minister, -senatorinnen und - senatoren der Länder (GFMK) (2014): Tagesordnungspunkt 8.1: Rechte intersexueller Menschen wahren und Diskriminierung beenden – insbesondere Schutz der körperlichen Unversehrtheit https://www.gleichstellungsmministerkonferenz.de/documents/2014_10_13_beschluesse_gesamt_extern_2_1510227377.pdf (translated from German)

³⁷ Malta: Gender Identity, Gender Expression And Sex Characteristics Act, 14th April 2015, art. 14; Portugal: Lei n.º 38/2018 de 7 de agosto. Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa, art. 5; Germany: Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung. Vom 12. Mai 2021; the fourth non-EU country is Iceland: Lög nr. 154 29. desember 2020. Lög um breytingu á lögum um kynrænt sjálfræði, nr. 80/2019 (ódæmigerð kyneinkenni).

³⁸ Gender Identity, Gender Expression and Sex Characteristics Act, article 14 (2), <https://legislation.mt/eli/cap/540/eng/pdf>

³⁹ All EU Member States criminalise female genital mutilation, either by incorporating it in in general criminal law or by explicitly mentioning it in a specific provision or law; 18 countries have a specific criminal law on female genital mutilation, see: European Institute for Gender Equality (EIGE, 2018): Estimation of girls at risk of female genital mutilation in the European Union Belgium, Greece, France, Italy, Cyprus and Malta, p. 16. <https://eige.europa.eu/rdc/eige-publications/estimation-girls-risk-female-genital-mutilation-european-unionreport-0>

- Impactful on the person's life and health; in the case of intersex people this includes impairment of sexual sensation, poorer sexual function, painful scarring, painful intercourse, increased sexual anxieties, problems with desire, infertility issues and lifelong trauma, including feelings of child abuse and sexual abuse.

Like female genital mutilation, intersex genital mutilation is carried out for cultural reasons. Social pressure to conform to gender roles and stereotypes about male and female bodies is the commonly shared ground between both. Recent developments in the past years show that this is increasingly understood and identified on EU level and within EU Member States. As a result, there is a growing trend to establish laws to protect intersex people from these harmful practices and acknowledges intersex people who are subjected to such surgeries without their personal, free and full informed consent as victims of crime: While Malta criminalises such acts in the respective law, the Germany and Portugal bans make explicit that a surgical intervention on an intersex child is only legal under certain, limited circumstances. As a result, parents cannot legally consent to medical interventions which are not covered by these exceptions. Hence, performing an intervention on an intersex child's sex characteristics outside of the framework of intervention allowed by these laws, is illegal and, as a bodily injury, performed without consent, can be considered a criminal act.

Hence, in all three countries **victims of IGM** can be considered as **victims of crime according to the definition in article 2 of the Victims' Rights Directive**. Most EU Member States have strong protections for the right to consent to medical interventions.⁴⁰ With an increasing number of EU Member States considering to ban IGM, the number of countries that criminalize IGM directly or through the framework of lack of patient consent is likely to increase in the upcoming years.

However, in its current form **the Victims' Rights Directive does not include intersex people as victims of crime and victims with special needs yet** - needs that stem from the experience of violence specific to them. We therefore call on the European Commission **to add the ground of "sex characteristics" to the directive** to reflect the current and ongoing developments and, at the same time, ensure that intersex people are visible as victims with specific needs in the course of the implementation of the directive.

Intersex victims are victims with special needs

The European Commission, in its LGBTIQ Equality Strategy 2020-2025, emphasizes that "**LGBTIQ people suffer disproportionately from hate crime, hate speech and violence**"⁴¹ and identifies, in its

⁴⁰ See European Commission (2016): Patients' Rights in the European Union. Mapping Exercise. Final Report, p. 30,

https://ec.europa.eu/health/sites/default/files/cross_border_care/docs/2018_mapping_patientsrights_frep_en.pdf

⁴¹European Commission, LGBTIQ Equality Strategy 2020-2025, p. 13

EU Strategy on Victims' Rights (2020-2025), LGBTI+ victims, including intersex victims, as victims with special needs that need specific attention.⁴²

In its key action points the European Commission therefore commits to promoting “**integrated and targeted support to victims with special needs**, such as child victims, victims of gender-based or domestic violence, victims of racist and xenophobic hate crime, **LGBTI+ victims of hate crime**, elderly victims and victims with disabilities, through EU funding possibilities and the EU awareness campaign on victims' rights”⁴³.

The Victims' Rights Directive in its current form equally affirms that Member States shall pay attention to the **specific needs of victims who have suffered considerable harm** due to the severity of the crime, by working to provide them with targeted, specialist and integrated support (articles 8, 9 and 22) and that victims of gender-based violence and hate crime will benefit from special protection measures (recital 57).

As the data presented earlier in this submission shows, intersex people face violence in close relationships, sexual violence, gender-based violence and bias motivated hate crime on the grounds of their sex characteristics and are at high risk for secondary and repeated victimisation. Lack of general awareness on intersex issues make it even more difficult for victims to seek help, which not only leads, as research shows, to a severe underreporting of such crimes (see section *Data Collection and under-reporting*). The lack of awareness and of general attention to the specific situation and needs of intersex people by authorities and support services also causes substantial obstacles for intersex people to access their rights as victims with special needs as enshrined in the directive. It is therefore high time, that intersex people and their specific needs are included in trainings for officials in criminal proceedings and for professionals working in the area of victim support.

Article 23 of the directive calls for a right to protect victims with specific protection needs during criminal proceedings. Paragraph 2d stipulates that during interview proceedings, the interviews are being conducted by a person of the same sex as the victim, if the victim wishes so.

However, the sex intersex people were assigned to at birth and the sex/gender marker in their official documents may not be in line with their gender identity (as is the case with transgender persons). Furthermore, intersex persons may have experienced domestic and gender based-violence by male or female perpetrators. This includes humiliating and harmful medical practices, performed by a male or a female doctor. As a result, limiting the choice to the option to choose an interviewer based on the same sex/gender marker in official documents does not increase safety for an intersex victim. Therefore, we recommend widening the choice to allow the victim to choose an interviewer of the sex/gender they feel most safe with.

⁴² European Commission, Strategy on Victim's Rights 2020-2025, p. 15 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0258&from=EN>

⁴³ Ibid. p. 15

RECOMMENDATION:

Revise the Victim's Rights Directive such that

- it explicitly reflects the understanding that intersex victims are victims with specific needs by including "sex characteristics" in *recital 56 on individual assessment*
- article 23.2d allows the victim to choose an interviewer of the sex/gender they feel most safe with

Data collection and under-reporting

The still prevailing **lack of a specific protective ground** (sex characteristic) in most countries (except for Malta, Greece and Belgium) puts a general **obstacle in the way of intersex people to reporting** gender-based violence and hate crimes **and to their access to justice**.

In addition, this lack makes collecting meaningful data impossible: As long as the **ground of sex characteristics is not included in documentation and monitoring measures and processes** meaningful data on bias motivated violence against intersex people cannot be collected.

In the 2021 European Commission Roundtable on equality data, the Director of Resources at Eurostat, therefore, put a spotlight on the "need for more granular data to understand different phenomenon like discrimination and equality" and that "we must go **beyond the six EU grounds of discrimination** and collect data that could feed into other dimensions of equality and look at the cross-cutting and intersectional elements"⁴⁴.

In its LGBTIQ Equality Strategy 2020-2025 the European Commission already emphasized that "the **under-reporting of hate crimes to the police** or other organisations **remains a serious problem**, stemming from a lack of trust in law enforcement, **fear of LGBTIQ-phobic reactions** or victim-blaming, previous negative experiences in contacts with the police or not expecting them to do anything"⁴⁵.

As the 2019 FRA LGBTI survey shows, underreporting is particularly high with intersex participants: of all intersex respondents who experienced an incident of harassment or physical or sexual attack within the 12 months prior to the survey, **only 25% reported** the incident to any authority or organisation (incl. police, national human rights institutions/equality bodies/ombudspersons, LGBTI organisation, general victim support organisation, hospital or other medical service, someone in

⁴⁴ https://roundtable-equality-data-2021.eu/media/j50bwrjv/roundtable-equality-data_event-report.pdf, p. 5

⁴⁵ European Commission, LGBTIQ Equality Strategy 2020-2025 p. 13

organisation/institution where it happened, the media or other) and even less, **16%**, reported the incident **to the police**.⁴⁶

The most common **reasons** include former experience or fear that:

- the police would not or could not do anything
- not trusting the police
- fear of a LGBTIQ-phobic reaction if they reported to the police.

On average, 25 % of all LGBTI respondents mentioned **fear of a LGBTI-phobic reaction** from police as the reason for not reporting a physical or sexual attack. The lack of education of public servants (e.g., the police) about the existence of intersex people and about intersex issues makes it additionally difficult for intersex people to report bias motivated hate crimes.⁴⁷

Disaggregated data, however, which includes a specific bias motivation of the crime, as well as publication, dissemination and easy access to this data, helps to reassure not only the actual victim of hate-motivated violence that their specific situation is recognized and taken into account by the authorities but also the whole community that attacks on them are taken seriously. In addition, disaggregated data collection is essential in order to understand and document the actual dimension of the phenomenon, to give it visibility and send the clear message to potential perpetrators that hate crime and violence against intersex people are not tolerated. Last but not least, evidence-based policy measures strongly rely on access to such data.

The Victims' Rights Directive already highlights the **importance of data collection and disaggregation**, in stating that "Member States should communicate to the Commission relevant statistical data related to the application of national procedures on victims of crime, including at least the number and type of the reported crimes and, as far as such data are known and are available, the number and age and gender of the victims" (recital 64).

However, in its current form, the directive does not include any information about a possible bias motivation of the crime, making it difficult to collect this particular information. In addition, the relevant article 28 of the directive only requires Member States to "communicate to the Commission available data showing how victims have accessed the rights set out in this Directive", hence narrowing the frame set out in recital 64.

This leads to a **lack of effectiveness** by leaving substantial discretion in recording, publishing and disseminating data, thus failing to fulfil the underlying objective of building an evidence-based policy response.

⁴⁶ See European Union Agency for Fundamental Rights (2020). A long way to go for LGBTI equality, p. 39 and 42 for rates of hate motivated physical/sexual attacks and harassment among the groups of respondents.

https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf

⁴⁷ European Union Agency for Fundamental Rights (2020). A long way to go for LGBTI equality, p. 47

RECOMMENDATION

- Expand recital 64 on systematic and adequate data collection to include (as far as such data is known and are available), the specific protective ground/ bias motivation (e.g., sexual orientation, gender identity, gender expression, sex characteristics/ homophobic, transphobic, intersexphobic attack)
- If possible, establish an obligation for Member States to communicate this data.

Appendix

Please find here a selection of **testimonials** of intersex people who suffered from gender-based violence and hate crimes. None of these incidents were reported to the authorities due to, on one hand, the lack of understanding of the respective individuals that they had actually been victims of a bias motivated crime and, on the other hand, the high societal taboo and shame that intersex people have been raised with and that is still common for many intersex people across the EU.

More examples can be found in

OII Europe (2021): Towards an extension of the list of EU crimes to hate speech and hate crime. Submission to the European Commission. Prepared by OII Europe 20.4.2021. https://oiieurope.org/wp-content/uploads/2021/05/OII-Europe-Submission_Extension-Hate-Speech-and-Crime_FINAL.pdf

Severe physical assault in educational facility

“The classmates laughed at me openly and often made me fall down the stairs. Twice I had broken bones. I was afraid to go to school. I still hear my father telling me that if I was bored, I should fight “like a man”. I experienced all this as deeply unfair. The truth is, I wasn’t allowed to be myself. I am still always afraid of what people think of me and afraid of how others look at me. When I have to go to the pool with my children, I often have to take an anxiolytic.” (Belgium, intersex person, age 40-45)⁴⁸

Severe verbal attack and subsequent failure to render needed medical assistance

“[...] my first obstetric doctors in the local hospital were not that well-informed: they call us on a hospital counselling meeting (two of them) and insisted that the “standard procedure” was to

⁴⁸ OII Europe (2019): #MyIntersex Stories. Personal accounts by intersex people living in Europe, p. 16 https://oiieurope.org/wp-content/uploads/2019/11/testimonial_broch_21-21cm_for_web.pdf We include all of these testimonies and the additional information (e.g., country, age) as consented to by the respective intersex individuals.

terminate ANY XXY foetus, cause they will be “A freak! A monster! A nature’s fault! Someone like with Down syndrome, a dump person incapable of living on its own! A boy with a so small phallus, so better not to be at all” (these were their exact words...) Since we were informed that all these was false and outdated, we insisted on keeping the baby and they refuse to deliver it, so they made us sign papers that we continue on our own responsibility and they send me to an Athens central hospital to find new doctors to carry on.” (Greece, parent of an intersex child, born 2009)⁴⁹

Rape in a medical setting (1):

“When I was 15 years old, I had a check-up, the first time my father had waited outside. He had always been present while the doctor and often students came to poke me and measure me, telling me how I look or don’t look, whether I’m becoming a real boy or not, checking to see if I was growing feminine characteristics, breasts, if I had body hair or not, to see if my voice was breaking etc etc. The man who had been my surgeon since I was three months old decided to check if I could produce sperm this time. I had no idea that he didn’t need to do this, that a simple test could be done, but this doctor decided to do it manually. I had no idea that it was inappropriate, or that it was sexually motivated, as an intersex male I was used to having no privacy over the part of my body that everyone calls our “private parts”, they had never been private in my life, at the hospital it was a show for everyone to see, in my daily life it was a secret, my whole body was a shameful secret. How would I have ever known that a doctor shouldn’t be manually doing a sperm test on me?! When he had finished measuring me, in different physical states, had injected me with viagra and taken photos of me, he congratulated me, he told me that I was developing very well, that I was a “normal” boy, that I “wasn’t at the back of the queue when God was designing boys”. What he actually did was masturbate me and when he had his sample he looked under a microscope at my sperm, I felt happy that I could be normal. It happened again when I was 17 years old, he was shocked that I didn’t do those things myself at home, I was asexual, I never even thought about it, he told me that was part of my condition and I should practice, he showed me how to do it, and then he told me he could operate again just to correct those imperfections. I did not really understand, he did not tell me the real reason, that it was just aesthetic, he was trying to make my appearance like a “normal” guy.

After the surgery, and this molestation, for which I had no reference to know that it was molestation, I spent the last years of adolescence, and the beginning of my 20s, confused. I began to realise after I became a sexual person that what the doctor had done to me was sexual abuse. But he had told me it was a medical procedure, and as I was growing up, I had become accustomed to being touched and checked, being tested, so I did not know what the limit was.

One day I turned on the television and saw that the doctor had been arrested, he was being tried for sexual abuse of underage patients, and I decided to go to the police and tell them that maybe I could help, to provide evidence, I needed answers and I wanted to know if what happened to me had been for medical reasons or not.

So, I think that as an intersex person, I was subjected to this lack of control of my sexuality ... my first sexual experience was in a context in which my body was violated. This violence happens to intersex

⁴⁹ Ibid., p. 35

people a lot... I do not know an intersex person who did not have to go through this.” (UK, intersex person)⁵⁰

Rape in a medical setting (2):

“The hormones my doctor chose for me meant I needed to come to the hospital regularly to have them administered. One day I came to the hospital and was told my doctor was sick and would be off work for a while. I was already feeling the symptoms of the menopause. No other doctor at the hospital would see me. I started calling every gynaecologist I could find in the phone book. Nobody would see me after I told them why I needed to see them, except one.

I came in and explained why I needed these hormones and he agreed to give me them.

He made me completely undress and lay under a sheet with my legs up in stirrups. My doctor never did that, I could just lay on a bench with my clothes on and expose the area needed. I was confused.

He put his hands on my butt and pulled me further down on the bench. He administered the hormones and they really hurt, a lot. I cried. It had never hurt before. He examined my genitals, his face was very close, I could feel his breathing on my genitals. My doctor never did that, even the one time I had needed a genital examination. I started panicking. I was frozen and could not move, it was hard to breathe and I started seeing black spots. Then he stuck his fingers inside of me and moved them back and forth. He asked me if I felt it, if I liked it... His smile was very creepy. I could not answer. I could not breathe. He stood up and told me to get up and get dressed. Then I had to pay him. It took me many years to realise that this was rape. No one ever talked about rape where I lived except about violent strangers that attacked women and forcibly and violently held them to rape them, rape always involved a penis. It was not until I met feminist groups later in my life that I realised that THIS WAS RAPE and I had paid someone after they raped me.

I still cannot talk about it. I might never be able to.” (intersex person)⁵¹

⁵⁰ Ibid., p. 44-46

⁵¹ Ibid., p. 69-70