

# Is the UN Committee on the Rights of the Child Doing Enough to Protect the Rights of LGBT Children and Children with Same-sex Parents?

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## ABSTRACT

Children often face discrimination, bullying and even violence because of their sexual orientation or gender identity, as do children raised by parents who are lesbian, gay, bisexual or transgender (LGBT). This article considers what the UN Committee on the Rights of the Child is doing to protect the rights of LGBT children and children with LGBT parents. To make such an assessment, this article critically analyses the Committee's Concluding Observations over a ten-year period, its General Comments and its Views on Individual Communications. The conclusion reached is that while the Committee has made encouraging progress in recent years when it comes to addressing LGBT related issues, there is still room for improvement in the way the Committee seeks to protect children from discrimination on the basis of sexual orientation and gender identity.

**KEYWORDS:** LGBT, sexual orientation, gender identity, SOGI, Convention on the Rights of the Child, Committee on the Rights of the Child.

## 1. INTRODUCTION

*There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace.<sup>1</sup>*

Kofi Annan

### A. Challenges Facing LGBT Children and Children with Same-sex Parents

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<sup>1</sup> Kofi Annan's Forward in UNICEF, 'The State of the World's Children 2000', available at: <https://www.unicef.org/media/84776/file/SOWC-2000.pdf> [last accessed 3 March 2021].

Lesbian, gay, bisexual and transgender ('LGBT') children<sup>2</sup> and children with LGBT parents can face significant challenges growing up in a heteronormative world.<sup>3</sup> LGBT children, and children being raised by same-sex parents, especially in their adolescent years, are likely to experience higher rates of discrimination, bullying and violence, particularly in the school environment.<sup>4</sup> The school playground is often the first place that children experience the hurt and humiliation that comes from not conforming to heteronormative standards.<sup>5</sup> A United Kingdom study in 2007 found that 65 per cent of lesbian, gay and bisexual students had been bullied at school due to their sexual orientation, with more than a quarter also being physically abused.<sup>6</sup> Outside of the UK, LGBT students experience similar levels of abuse.<sup>7</sup> As a result of homophobic and transphobic bullying, LGBT students can experience a 'loss of confidence, low self-esteem, anxiety, depression and social isolation, and it can often result in reduced school attendance, early school dropout, and poorer academic

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<sup>2</sup> In this article 'LGBT children' refers to lesbian, gay, bisexual and transgender persons under the age of 18. An 'I' is sometimes added to the end of the acronym, that is, LGBTI, to refer to intersex persons who have anatomical, chromosomal and hormonal characteristics that differ from medical and conventional understandings of male and female bodies. Intersex children face additional and unique human rights violations, such as intersex genital mutilation, which is beyond the scope of this article, which focuses exclusively on sexual orientation and gender identity.

<sup>3</sup> Heteronormative refers to the explicit and implicit assertion of heterosexuality as the social norm: see Butler (ed), *Macquarie Dictionary* 5th edn (2009) (definition of 'heteronormative').

<sup>4</sup> Cornu, 'Preventing and Addressing Homophobic and Transphobic Bullying in Education: A Human Rights-Based Approach Using the United Nations Convention on the Rights of the Child' (2016) 13(1–2) *Journal of LGBT Youth* 6; OHCHR, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity* A/HRC/19/41 (2011) at 58, available at: [www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41\\_English.pdf](http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf) [last accessed 3 March 2021], in respect of Economic, Social and Cultural Rights; OHCHR, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity* A/HRC/29/23 (2015) at 55, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/088/42/PDF/G1508842.pdf?OpenElement> [last accessed 3 March 2021]; Ruck et al, 'The United Nations Convention on the Rights of the Child: Its Relevance for Adolescents' (2014) *Journal of Research on Adolescence* 1 at 5; Konnoth, 'The Protection of LGBT Youth' (2019) 81(2) *University of Pittsburgh Law Review* 263 at 270 reports rates of bullying at 'nearly twice that for non-LGBT children at 31%' in Washington, DC; Virzo, 'The United Nations Committee on the Rights of the Child and the Protection of the Fundamental Rights of LGBTI Minors' (2017) 45(1) *Syracuse Journal of International Law and Commerce* 59 at 76–7.

<sup>5</sup> Office of the United Nations High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, supra n 4 at 59.

<sup>6</sup> OHCHR, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* HR/PUB/12/06 (2012) at 52, available at: [www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf](http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf) [last accessed 3 March 2021].

<sup>7</sup> *Ibid* at 52.

performance and achievement’,<sup>8</sup> which can have long lasting consequences for the child. At times, LGBT children and children with same-sex parents are also refused admission to, or are expelled from, school due to their sexual orientation or gender identity (‘SOGI’), or that of their parents.<sup>9</sup>

Because of the discrimination they face, LGBT children are at higher risk of developing problems with alcohol and substance abuse, when they reach adolescence.<sup>10</sup> LGBT children are also vulnerable to involuntary or coercive sexual orientation change efforts (commonly referred to as ‘conversion therapy’), which may cause ‘treatment-related anxiety, suicidal ideation, depression, impotence, and relationship dysfunction.’<sup>11</sup> LGBT youth also face increased risk of homelessness if they are rejected by their parents because of their SOGI.<sup>12</sup> Once on the streets, LGBT youth are more vulnerable to sexual exploitation, abuse and risky sexual behaviours,<sup>13</sup> which may increase their chances of contracting a sexually transmitted disease.<sup>14</sup>

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<sup>8</sup> Cornu, supra n 4 at 6, 8; see also OHCHR, *Born Free and Equal*, supra n 6 at 52; Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd edn, 2011) at 106, 116; Konnoth, supra n 4 at 274–5 cites a study that found ‘one-third of LGBT youth reported missing an entire day of school in the previous month because they felt unsafe’; Virzo, supra n 4 at 77.

<sup>9</sup> OHCHR, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, supra n 4 at 18–19; OHCHR, *Born Free and Equal*, supra n 6 at 51–2; see also Council of Europe, supra n 8 at 106.

<sup>10</sup> Chan, ‘No, It Is Not Just a Phase: An Adolescent’s Right to Sexual Minority Identity under the United Nations Convention on the Rights of the Child’ (2006) 10(2) *The International Journal of Human Rights* 161 at 166, although it should be noted that the author confined his analysis to LGBT adolescents; Saewyc, ‘Research on Adolescent Sexual Orientation: Development, Health Disparities, Stigma, and Resilience’ (2011) 21(1) *Journal of Research on Adolescence* 256 at 262; Council of Europe, supra n 8 at 106.

<sup>11</sup> Nugraha, ‘The Compatibility of Sexual Orientation Change Efforts with International Human Rights Law’ (2017) 35(3) *Netherlands Quarterly of Human Rights* 176 at 178, 181.

<sup>12</sup> Chan, supra n 10 at 166; Fineman, ‘Vulnerability, Resilience, and LGBT Youth Symposium: LGBT Youth: Reconciling Pride, Family, and Community’ (2014) 23(2) *Temple Political and Civil Rights Law Review* 307 at 322; Ruck et al, supra n 4 at 5; Saewyc, supra n 10 at 264, referring to sexual minorities; Council of Europe, supra n 8 at 101; Konnoth, supra n 4 at 275; Virzo, supra n 4 at 73 notes that when LGBTI youth are made homeless because they are rejected by their parents, this results in ‘triple vulnerability’ - referring to the vulnerability attached to being an adolescent, being LGBTI and being homeless.

<sup>13</sup> Kaleidoscope Human Rights Foundation, *Submission on General Comment on Children in Street Situations to the United Nations Committee on the Rights of the Child* (2016) at 3; Saewyc, supra n 10 at 264, 266; Council of Europe, supra n 8 at 106.

<sup>14</sup> Chan, supra n 10 at 166; Konnoth, supra n 4 at 276 notes that LGBT children are more likely to be homeless and engage in ‘survival sex’ to survive financially.

LGBT youth are also at a significantly higher risk of suicide.<sup>15</sup> Approximately 30 per cent of LGBT youth around the age of 15 have attempted suicide, with suicide the leading cause of death among gay and lesbian adolescents in the United States.<sup>16</sup> The disproportionately high rate of suicide among LGBT youth is not due to their SOGI, but rather, the persistent discrimination, harassment and social exclusion they experience.<sup>17</sup>

Bisexual youth may face biphobia, which is ‘prejudice, fear or hatred directed toward bisexual people’ and/or ‘bi erasure’, in which bisexual people are ‘excluded or rendered invisible’ in the LGBT community.<sup>18</sup> Transgender children experience their gender differently to their biological sex.<sup>19</sup>

## B. Terminology

There are limitations associated with using an acronym, like LGBT, to reflect the rich diversity of individuals’ lived experiences, which can be lost with the use of the ‘umbrella’ term, LGBT. Specifically, it encourages the perception that the LGBT community is homogenous and susceptible to a ‘one-size-fits-all’ approach. Whilst acknowledging these limitations, LGBT is still the most appropriate term to use in this research, since it is one of the terms consistently used by the United Nations

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<sup>15</sup> Chan, *supra* n 10 at 167; Saewyc, *supra* n 10 at 262; Office of the United Nations High Commissioner for Human Rights, *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, *supra* n 4 at 15 [55]; OHCHR, *Born Free and Equal*, *supra* n 6 at 52; Council of Europe, *supra* n 8 at 106–7; see, for example, Jones, ‘Adolescent Gender Identity and the Courts’ in Freeman (ed), *Children’s Health and Children’s Rights* (2006) 121 at 125.

<sup>16</sup> Fineman, *supra* n 12 at 322; see also Konnoth, *supra* n 4 at 278 who states that LGBT youth ‘outstrip their peers in ... suicidal attempts and ideation’.

<sup>17</sup> Rosenstreich, *LGBTI People: Mental Health and Suicide* National LGBTI Health Alliance (2013) at 4, available at: <https://www.beyondblue.org.au/docs/default-source/default-document-library/bw0258-lgbti-mental-health-and-suicide-2013-2nd-edition.pdf?sfvrsn=2> [last accessed 3 March 2021].

<sup>18</sup> Human Rights Campaign, ‘Bisexual FAQ’, available at: <https://www.hrc.org/resources/bisexual-faq/> [last accessed 3 March 2021]; see also McLean, ‘Invisibility of Bisexuality’ in Gerber (ed), *Worldwide Perspectives on Lesbians, Gays, and Bisexuals* (2020) 392.

<sup>19</sup> Australian Institute of Family Studies, ‘LGBTIQA+ Communities: Glossary of Common Terms’, *Child Family Community Australia*, November 2019, available at: <https://aifs.gov.au/cfca/publications/lgbtiq-communities>; see generally Downs and Whittle, ‘Seeking a Gendered Adolescence: Legal and Ethical Problems of Puberty Suppression among Adolescents with Gender Dysphoria’ in Heinze (ed), *Of Innocence and Autonomy: Children, Sex and Human Rights* (2018) 195.

(‘UN’) Committee on the Rights of the Child (‘Committee’) and is widely used in scholarly literature.

### C. Reviewing the Jurisprudence of the Committee

There has been little scholarly attention paid to the work of the Committee in relation to LGBT children and children with same-sex parents. Indeed, there appears to have been only five studies that relate to the rights of LGBT children under the Convention on the Rights of the Child (‘CRC’),<sup>20</sup> and none of them involved any empirical analysis of the Committee’s work relating to LGBT children and children with same-sex parents.<sup>21</sup> This article seeks to make a modest contribution to filling this gap. This article analyses the major outputs of the Committee, including Concluding Observations (from 1 January 2010 to 1 January 2020), General Comments and Views on Individual Communications, in order to assess the extent to which the Committee is promoting and protecting the rights of LGBT children and children with same-sex parents. This analysis reveals that while the Committee’s awareness of SOGI issues is growing, there is still room for improvement.

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<sup>20</sup> Virzo, *supra* n 4; Sandberg, ‘The Rights of LGBTI Children under the Convention on the Rights of the Child’ (2015) 33(4) *Nordic Journal of Human Rights* 337; Chan, *supra* n 10; Linde, ‘The Rights of Queer Children: The Denial of Children’s Sexual Agency in the Convention on the Rights of the Child’ (2019) 27(4) *The International Journal of Children’s Rights* 719; Bacataru, ‘Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: The Context of Education and Transition’ (2016) 3(1) *Queen Mary Human Rights Law Review* 59, which focusses exclusively on the protection of transgender children under the CRC; the following scholars have mentioned/referred to LGBTI children, but not as the primary focus of their research: Freeman (ed), *Children’s Health and Children’s Rights* (2006) at 283–4; Veerman et al, ‘HIV Prevention, Children’s Rights, and Homosexual Youth’ (1999) 7(1) *International Journal of Children’s Rights* 83; Besson, ‘The Principle of Non-Discrimination in the Convention on the Rights of the Child’ (2005) 13(4) *International Journal of Children’s Rights* 433; Heesterman, ‘An Assessment of the Impact of Youth Submissions to the United Nations Committee on the Rights of the Child’ (2005) 13(3) *International Journal of Children’s Rights* 351; Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?’ (2009) 23(1) *International Journal of Law, Policy and the Family* 110 on lesbian and gay adoption under the CRC; on the inclusion and formation of international norms around SOGI in UN treaty bodies, see Baisley, ‘Reaching the Tipping Point: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38(1) *Human Rights Quarterly* 134; Persad, ‘An Expanding Human Rights Corpus: Sexual Minority Rights and International Human Rights’ (2014) 20(2) *Cardozo Journal of Law and Gender* 337 at 360.

<sup>21</sup> The empirical analysis in Chan, *supra* n 10, is limited to Article 8 of the Convention on the Rights of the Child.

Part 2 of the article begins with an examination of the historical context of the CRC. This helps to explain why the Committee has been slow to consider the vulnerability of LGBT children and children with same-sex parents. This historical analysis is followed by a critique of the text of CRC, in order to identify the provisions that are most relevant to a consideration of the rights of LGBT children and children with same-sex parents. Part 3 reviews the Committee's Concluding Observations, noting the Committee's increasing use of SOGI terminology and a greater level of precision when using different terms. This indicates a growing awareness and sensitivity by the Committee to the rights of LGBT children and children with same-sex parents. Nevertheless, the Committee's work in this space would be improved by refraining from 'bundling' minorities together, when making recommendations.

Part 4 examines the 25 General Comments published by the Committee, to determine the extent to which issues relating to LGBT children and children with same-sex parents have been addressed. This analysis reveals that LGBT related issues were briefly discussed by the Committee in its General Comments in 2003 and then not again until 2011. Since that time, both the quantity and quality of the Committee's engagement with LGBT issues has improved. However, there is still significant scope for improvement, and this is highlighted in the comparison of levels of engagement of other UN treaty committees with these issues in their General Comments. Part 5 examines the Committee's Views on Individual Communications. As the Committee has only had the power to receive complaints alleging violations of the CRC since April 2014, and there are only 46 State Parties to this latest Optional Protocol, it is not surprising that there have only been 39 Views published by the Committee. None of these communications related to the rights of LGBT children or children with same-sex parents.

The conclusions are set out in Part 6, along with recommendations for how the Committee could better promote and protect the rights of LGBT children and children with same-sex parents.

## 2. THE CONVENTION ON THE RIGHTS OF THE CHILD AND LGBT CHILDREN

*A century that began with children having virtually no rights is ending with children having the most powerful legal instrument that not only recognizes but protects their human rights.*<sup>22</sup>

Carol Bellamy

The CRC entered into force in September 1990.<sup>23</sup> At the time the CRC was drafted – between 1979 and 1989 – there was significantly less knowledge and understanding about the rights of LGBT people, than there is today.<sup>24</sup> Indeed, when work on the drafting of the CRC began, the majority of states still treated homosexual conduct as a crime.<sup>25</sup> The first reported cases of HIV/AIDS occurred in 1981. Strongly associated with gay men, this fuelled discrimination and prejudice against the LGBT community.<sup>26</sup> Transgender persons were often treated as psychiatric patients (as they still are in some states),<sup>27</sup> and issues such as marriage equality and same-sex families were barely imaginable.<sup>28</sup> Within this historical context, it is unsurprising that the rights of LGBT children are not explicitly protected in the CRC.<sup>29</sup> For example, Article 2 of the CRC lists ten grounds of discrimination which

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<sup>22</sup> Carol Bellamy, UNICEF Executive Director, quoted at UNICEF, ‘Special Session on Children’, 10 May 2002, available at: [www.unicef.org/specialsession/rights/path.htm](http://www.unicef.org/specialsession/rights/path.htm) [last accessed 3 March 2021].

<sup>23</sup> Convention on the Rights of the Child 1989, 1577 UNTS 3.

<sup>24</sup> Rendel, ‘Sexuality and the United Nations Convention on the Rights of the Child’ in Heinze (ed), *Of Innocence and Autonomy: Children, sex and human rights* (2018) 49 at 50–1.

<sup>25</sup> Paternotte et al., ‘The History of ILGA 1978 - 2012’, *ILGA*, 2012, available at: <https://ilga.org/ilga-history> [last accessed 3 March 2021]; Office of the United Nations High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, supra n 4 at para 43; see also UNICEF, ‘Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity’ (2014) 9 *Current Issues* 1 at 2; for an up-to-date list of states that still criminalise same-sex relations, see Gerber, ‘Countries That Still Criminalise Homosexuality’, *Countries where Homosexuality is still a Crime*, 14 August 2019, available at: <https://antigaylaws.org/> [last accessed 3 March 2021].

<sup>26</sup> In fact, AIDS was initially known as ‘Gay Related Immune Deficiency Syndrome’: Forestein, ‘AIDS: A History’ (2013) 17(1) *Journal of Gay and Lesbian Mental Health* 40 at 45.

<sup>27</sup> See, for example, Committee on the Rights of the Child, Concluding observations regarding the Russian Federation, 25 February 2014, CRC/C/RUS/CO/4-5 at 14.

<sup>28</sup> Philips, ‘A Worldwide History of Marriage Equality’, *Radio National*, 16 June 2015, available at: <http://www.abc.net.au/radionational/programs/rearvision/a-worldwide-history-of-marriage-equality/6549338> [last accessed 3 March 2021].

<sup>29</sup> Chan, supra n 10 at 162; see also UNICEF, ‘Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity’, supra n 25 at 3.

are prohibited, but sexual orientation and gender identity are not amongst them. Nevertheless, the CRC applies to *all* children, including LGBT children and children with same-sex parents.<sup>30</sup>

The CRC can be divided into three groups of rights, commonly referred to as the three Ps, being participation, provision and protection.<sup>31</sup> Protection includes protecting children from discrimination, including those from minority, stigmatised and otherwise vulnerable groups.<sup>32</sup> While the principle of non-discrimination is important, it is not the only provision relevant to LGBT children and children with LGBT parents. The CRC provisions that are most relevant to a discussion of LGBT children and children with same-sex parents are set out in the table below.

Article	Right	Examples of Relevance
2	Non-discrimination	Children must not be discriminated against on the basis of their, or their parents, SOGI based on an expansive interpretation of ‘other status’. <sup>33</sup>

<sup>30</sup> Note that the United States of America is the only state that has not ratified the CRC. Thus, children in all other parts of the world are entitled to respect for their rights as set out in the CRC.

<sup>31</sup> Cantwell, ‘Monitoring the Convention through the Idea of the 3Ps’ in Pia-Liisa Heilio, Erja Lauronen, and Marjatta Bardy (eds), *Politics of Childhood and Children at Risk: Provision - Protection - Participation* (1993) 121; see also Virzo, *supra* n 4 at 73 who divides the rights and principles into those that exist in other human rights treaties and those that apply specifically to children.

<sup>32</sup> Ruck et al, *supra* n 4 at 5; OHCHR, *Born Free and Equal*, *supra* n 6 at 10; Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005) at 27–8 refers to the principle of non-discrimination as one of four general principles that apply to State Parties irrespective of budgetary resources. The other three general principles being the best interests of the child, right to life and respect for the views of the child, at 175; UNICEF, ‘Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity’, *supra* n 25 at 2, 5; ‘protection’ is one of the ‘four P’s’ (protection, prevention, provision and participation), which the CRC draws upon in addressing children’s rights: Rendel, *supra* n 24 at 50; on the use of ‘vulnerable’ and ‘innocent’ groups, such as children ‘as victims of discrimination and violence on the basis of sexual orientation and/or gender identity’, to promote the formation of international norms regarding ‘bodily integrity and the prevention of bodily harm’, see Baisley, *supra* n 20 at 158.

<sup>33</sup> Committee on the Rights of the Child, General Comment No 15: on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art 24), 17 April 2013 at para 8; see also Committee on the Rights of the Child, General Comment No 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 1 July 2003 at para 6, where the Committee extended the principle of non-discrimination to sexual orientation, although not gender identity; Sandberg, *supra* n 20 at 339; Chan, *supra* n 10 at 162–3; see also Council of Europe, *supra* n 8 at 35, 36; Vandenhole, *supra* n 32 at 174 also notes that ‘sexual orientation might [also] be subsumed’ through the meaning of ‘sex’, although ‘other status’ is the preferred option; Virzo, *supra* n 4 at 60–1, 72 who writes ‘one can fully agree with the [CRC] Committee’s argument that sexual orientation and gender identity fall within the Article 2 ‘other status’ residual category; but see Freeman, ‘The Future of Children’s Rights’ (2000) 14(4) *Children and Society* 277 at 283, who suggests that it would be ‘stretching’ the term ‘status’ to include sexual orientation for the purposes of extending Article 2 (non-



3	Best interests of the child	This principle should guide all decisions relating to LGBT children and children with same-sex parents. For example, decisions about whether a transgender child can access puberty blockers or whether a gay, lesbian or bisexual child should be subjected to conversion therapy. <sup>34</sup>
7	Right to Birth registration, identity and to know and be cared for by child's parents	This Article is relevant to transgender children who wish to change their name and/or registered gender to reflect their lived experience. It is a relevant to children with same-sex parents who want a birth certificate that accurately reflects their family structure. <sup>35</sup>
8	Right to preserve child's identity without unlawful interference	This Article protects children's identity from unlawful state interference, which extends to their SOGI. <sup>36</sup>
12	Right to heard	Relevant to LGBT children regarding the expression of their SOGI. <sup>37</sup> It is also relevant to how LGBT children are consulted on policies that affect them. <sup>38</sup>

discrimination) to gay children.

<sup>34</sup> See Downs and Whittle, supra n 19 at 201; Nugraha, supra n 11 at 188–9.

<sup>35</sup> Committee on the Rights of the Child, Concluding observations regarding Iraq, 3 March 2015, CRC/C/IRQ/CO/2-4 at para 19; Committee on the Rights of the Child, Concluding observations regarding Republic of Korea, 2 February 2012, CRC/C/KOR/CO/3-4 at para 37, which states 'In accordance with Article 7 of the Convention, the Committee urges the State Party to undertake measures to ensure that birth registration is available to all children regardless of their parents' legal status and/or origin. In doing so, the Committee further urges the State Party to ensure and verify that the registration accurately indicates the biological parents of the child'. See generally Gerber and Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *New York University Journal of Legislation and Public Policy* 225; Gerber and Lindner, 'Modern Families: Should Children Be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34.

<sup>36</sup> According to Chan, supra n 10 at 163–4 the characteristics specifically mentioned in Article 8 (nationality, name and family relations) are all extraneous to the person, whereas sexual orientation better reflects the 'deeper connotations with the innerness of the person; Sandberg, supra n 20 at 343 relies on the Committee's General Comment No 14 (2013) on the best interests of the child (discussed in Part 4) to support extending the meaning of identity in the CRC to sexual orientation and gender identity. In General Comment No 14, identity is one of the elements to be considered when assessing a child's best interests, and sexual orientation forms part of a child's identity. According to Sandberg, there is no reason to distinguish gender identity from sexual orientation for the purposes of defining identity. Therefore, the right to an identity under Article 8 of CRC should be extended to include sexual orientation and gender identity; extending the meaning of identity in this way has been welcomed by other scholars and international institutions, including: Hodgkin and UNICEF (eds), *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, 2007) at 115; Jones, supra n 15 at 129; Council of Europe, supra n 8 at 83; on the states 'obliteration' of LGBT identity through oppressive regulation, see Konnoth, supra n 4 at 269–79.

<sup>37</sup> Jones, supra n 15 at 127.

<sup>38</sup> See, for example, Government of Western Australia, 'LGBTI Children and Young People', *Commissioner for Children and Young People, Western Australia*, 6 March 2019, available at: <https://www.ccp.wa.gov.au/our-work/resources/lgbti-children-and-young-people/> [last accessed 3 March 2021].

16	Right to privacy	Allows children to express their SOGI without interference to their privacy, thereby promoting their right to an identity. <sup>39</sup> This also benefits children with LGBT parents as it protects their family from unlawful interference. Also relevant (in combination with Article 12) to transgender children and pubertal-suppression therapies. <sup>40</sup>
19	Right to be free from violence and abuse of all kinds	This Article protects children in the home or at school from abuse because of their actual or perceived SOGI, or the SOGI of their parents. <sup>41</sup>
24	Right to health	The right to ‘enjoyment of the highest attainable standard of health’ includes ‘physical, mental and social well-being’ and therefore intersects with Article 19. <sup>42</sup> This right extends to all children, irrespective of SOGI. <sup>43</sup>
28	Right to an education	This Article requires that schools are a safe and accessible environment for LGBT children and children with same-sex parents. <sup>44</sup>
29	Education to include human rights and fundamental freedoms	This article requires that education must respect diversity, reduce prejudice and discrimination against LGBT children and children with same-sex parents and promote respect for the rights of sexual and gender minorities. <sup>45</sup>

Having identified the most relevant Articles in the CRC, it is appropriate to consider the extent to which the Committee, when examining State Parties compliance with these provisions, is promoting respect for LGBT children and children with same-sex parents.

### 3. THE COMMITTEE’S CONCLUDING OBSERVATIONS

<sup>39</sup> Sandberg, supra n 20 at 344; Virzo, supra n 4 at 74.

<sup>40</sup> Sandberg, supra n 20 at 344, however, this argument is unlikely to support an enforceable obligation on States Parties to provide the treatment at the government’s expense.

<sup>41</sup> See Sandberg, ‘Children’s Right to Protection Under the CRC’ in Falch-Eriksen and Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (2018) 15 at 24; Committee on the Rights of the Child, General Comment No 13: The Right of the Child to Freedom from all Forms of Violence, 18 April 2011 at para 72(g); see also Virzo, supra n 4 at 61, 76–7.

<sup>42</sup> Sandberg, supra n 20 at 345.

<sup>43</sup> Virzo, supra n 4 at 78; on the right of transgender children to medical treatment, see Sandberg, supra n 20 at 345.

<sup>44</sup> Office of the United Nations High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, supra n 4 at para 61; see also OHCHR, *Born Free and Equal*, supra n 6 at 52.

<sup>45</sup> See Virzo, supra n 4 at 78.

*Too much blood has flown from the wrist,  
Of the children shamed for those they chose to kiss.*<sup>46</sup>

State Parties are required to submit a report to the Committee every five years (following the initial report) outlining how they are upholding children's rights. These Periodic Reports must follow guidelines published by the Committee. The latest guidelines were released in March 2015, and set out the substantive content to be covered in reports.

The CRC Committee is composed of 18 independent experts who monitor State Parties' implementation of the CRC. The reporting procedure is the Committee's primary supervisory tool. The United Nations International Children's Emergency Fund ('UNICEF'), national human rights institutions, and domestic and international NGOs can submit alternative reports highlighting issues relating to the rights of children that a State Party may not have covered, or covered inaccurately, in its Periodic Report. The Committee meets with the State Party to discuss its progress before publishing its Concluding Observations.

Concluding Observations are the Committee's assessment of a State Party's implementation of the CRC, and include recommendations for improvement.<sup>47</sup> Although Concluding Observations are not legally binding, in the sense that they are only recommendations for improved compliance,<sup>48</sup> they do represent the views of the whole Committee, which is the 'most authoritative body monitoring the Convention'.<sup>49</sup> As such, Concluding Observations provide important insight into how the Committee thinks the rights of LGBT children and children with same-sex parents can be better protected. Although non-binding, Virzo asserts, that the principle of sincere cooperation between international bodies and their members means that exhortatory acts, like Concluding Observations, must be taken into account by State

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<sup>46</sup> Lyrics from 'Make It Stop (September's Children)' by Rise Against from *Endgame* Album (2011).

<sup>47</sup> Sandberg, *supra* n 20 at 338; the Committee is empowered to publish Concluding Observations under Convention on the Rights of the Child 1989, *supra* n 23 at Art 45(d); Rendel, *supra* n 24 at 56.

<sup>48</sup> Verheyde and Goedertier, *supra* n 30 at 30; Virzo, *supra* n 4 at 62; Baisley, *supra* n 20 at 143, 158–9.

<sup>49</sup> Verheyde and Goedertier, *supra* n 30 at 30.

Parties and considered in good faith.<sup>50</sup> Furthermore, Concluding Observations are ‘effective instruments of political pressure’ that advocates can use to help persuade governments to reform their laws and practices.<sup>51</sup>

This section analyses the Committee’s Concluding Observations to determine the nature and extent of SOGI related reflections and recommendations.<sup>52</sup> The analysis reveals that the Committee is paying increasing attention to the rights of LGBT children and children with LGBT parents and using terminology that is more inclusive.

### **A. Overview and Analysis of the Concluding Observations**

Between 1 January 2010 – 1 January 2020 (‘the study period’), 170 State Parties were reviewed by the Committee in a total of 200 Concluding Observations. Of the 200 Concluding Observations published, 73 included one or more references to LGBT issues (36.5 per cent). This figure is slightly higher than that found in a similar analysis of the Concluding Observations of the Human Rights Committee from March 2003-March 2013, which found 33.8 per cent of Concluding Observations referred to LGBT issues.<sup>53</sup> This higher engagement may be attributed to increasing awareness of

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<sup>50</sup> Virzo, *supra* n 4 at 63.

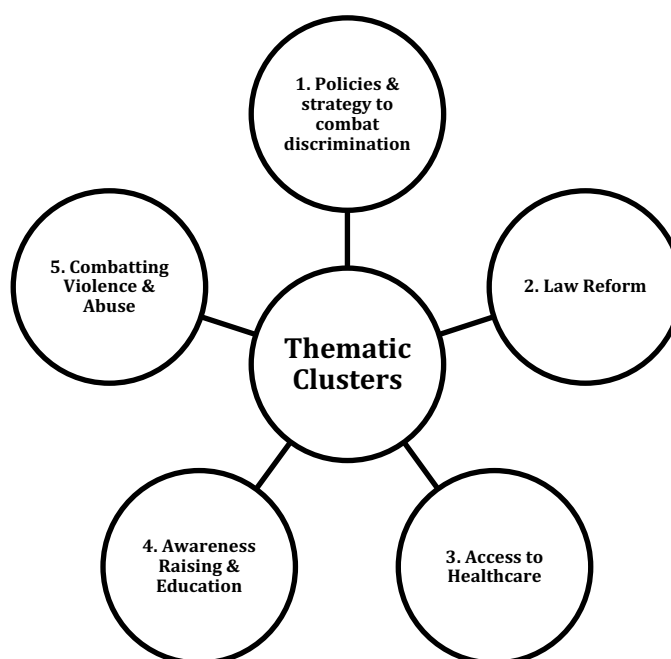
<sup>51</sup> *Ibid* at 62.

<sup>52</sup> On manifest coding, see Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (7th edn, 2014) at 374. The search terms and phrases are on file with the authors and available upon request. To be included in the analysis, all documents must be in English. It is an acknowledged limitation of this study that the requirement for all documents to be published in English results in a lower representation of non-English speaking countries. The total number of documents in a particular category, used for the quantitative analysis, is based on the filing convention of the UN Treaty Base. Where filing date was missing from the UN Treaty Base, the distribution date (abbreviated to ‘distr.’ on the UN documents) on the document was used. Where one Concluding Observation was filed for multiple countries (such as the Netherlands, including Antilles and Aruba or China, including Hong Kong and Macao) then this was counted as one Concluding Observation. Coding and analysis was performed using QSR International’s Nvivo 12 for Mac (v12.6.0) and Microsoft Excel for Mac (v16.34); while the Optional Protocols may be relevant to some LGBT children, they are beyond the scope of this study and haven been excluded from further analysis to extent possible, see generally: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2002, A/RES/54/263, (2002); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2002, A/RES/54/263, (2002).

<sup>53</sup> Gerber and Gory, ‘The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?’ (2014) 14(3) *Human Rights Law Review* 403 at 5.

human rights violations relating to SOGI, or it could be due to the different membership and/or focus of these two committees.

When analysing the Concluding Observations of the CRC Committee, references to SOGI related terms were categorised as either a ‘concern’ or a ‘recommendation’ based on the language used by the Committee. An analysis of the concerns and recommendations were categorised into one of five categories, set out in Figure 1 below. These categories were identified through an analysis of the language used by the Committee.



*Figure 1: Five thematic clusters that emerged from the coding of the Committee's Concluding Observations for 2010-2020.*

It is somewhat surprising that education does not have its own category, given the important role it plays in children's lives. However, the Concluding Observations during the study period contained few references to children's education and the references that were made are captured in the other categories. For example, references to education and LGBT children or children of LGBT parents generally related to addressing schoolyard bullying which was categorised as ‘physical or mental violence, injury or abuse of LGBT children’.

The Concluding Observations were also coded according to the ‘intensity’ of the Committee’s concern and recommendation. That is, there were three degrees of intensity, namely,<sup>54</sup>

- i. ‘specific and exclusive’: the sentence or paragraph containing the SOGI term focused exclusively on LGBT children and children with LGBT parents;
- ii. ‘non-exclusive’: the sentence or paragraph containing the SOGI term refers to other groups of children;
- iii. ‘non-specific’: the paragraph does not explicitly refer to SOGI but its applicability to LGBT children or children with LGBT parents can be reasonably inferred due to its proximity (both physically and in terms of content) to a paragraph where SOGI issues were discussed.<sup>55</sup>

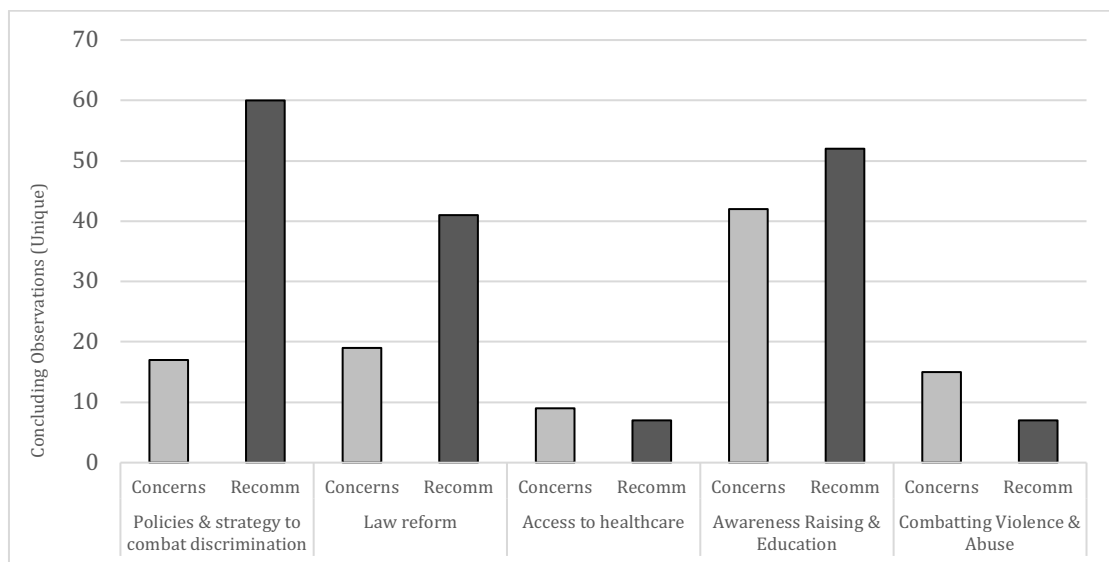


Figure 2: Volume of Concerns and Recommendations for each of the five thematic clusters

<sup>54</sup> On the four coding systems for text-based content analysis, including intensity, see Neuman, *supra* n 52 at 374.

<sup>55</sup> Failure to code some paragraphs as ‘non-specific’ would have otherwise meant many of the Committee’s concerns and recommendations would look like they were not addressed when, in fact, the Committee had simply referred to *all* children, which includes LGBT children and children of a LGBT parent(s).

Figure 2 above illustrates the extent to which the Committee addressed LGBT-related concerns and recommendations (inclusive of all levels of intensity) across the five thematic clusters.<sup>56</sup>

(i) *Policies and strategies to combat discrimination against LGBT children*

This category captures the Committee's concerns and recommendations relating to the policies and strategies that State Parties have, or do not have, to protect LGBT children from discrimination. There is a diversity of concerns and recommendations expressed by the Committee that fall within this group. One common concern within this category was the absence or deficiency of a strategy to protect LGBT children and children with same-sex parents from discrimination.<sup>57</sup> Such concerns were raised in 17 Concluding Observations, representing 23.3 per cent of the Concluding Observations that referred to LGBT children and children with same-sex parents or 8.5 per cent of all Concluding Observations during the study period. The majority of the Committee's concerns within this category were framed within the broader context of marginalised and vulnerable children. For example, in its 2017 Concluding Observations to the Democratic Republic of Congo, the Committee stated that it was concerned about the,

lack of an overall strategy [to combat the] persistent discrimination against children in vulnerable and marginalized situations, including children with disabilities, children with HIV/AIDS, children accused of witchcraft, children with albinism, indigenous

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<sup>56</sup> In coding the Committee's 'concerns' and 'recommendations', a paragraph may be coded into more than one category. For example, in respect of Chile, the recommendation 'Strengthen its efforts to combat negative attitudes and eliminate discrimination against children on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics' was coded under 'Awareness raising and education campaigns to improve respect for LGBT children and children of same-sex families' and 'Policies and strategies to combat discrimination against LGBT children': see Committee on the Rights of the Child, Concluding observations regarding Chile, 30 October 2015, CRC/C/CHL/CO/4-5 at 6.

<sup>57</sup> Committee on the Rights of the Child, Concluding observations regarding Brazil, 30 October 2015, CRC/C/BRA/CO/2-4 at 5; Committee on the Rights of the Child, Concluding observations on the fifth periodic report of France, 23 February 2016, CRC/C/FRA/CO/5 at 5; Committee on the Rights of the Child, Concluding observations regarding Congo, 28 February 2017, CRC/C/COD/CO/3-5 at 5; see also Virzo, *supra* n 4 at 70.

children, lesbian, gay, bisexual and transgender children, demobilized child soldiers and internally displaced children.<sup>58</sup>

In 60 Concluding Observations, the Committee recommended that a State Party develop a policy or strategy to combat discrimination against LGBT children. This equates to 82.2 per cent of the Concluding Observations that contained a reference to LGBT children or children with same-sex parents, and 30 per cent of all Concluding Observations. The number of Concluding Observations that *recommended* the development of a policy or strategy is significantly higher than the number of Concluding Observations where the Committee expressed *concern* about this issue. This disparity may be due, in part, to the broad recommendations made by Committee.<sup>59</sup> For example, the Committee recommended ‘strengthening efforts to combat discrimination’ in 28 Concluding Observations (38.4 per cent of Concluding Observations referring to LGBT children and children with same-sex parents, which equates to 14 per cent of all Concluding Observations). In respect of Chile, the Committee recommended that the State Party ‘Strengthen its efforts to combat negative attitudes and eliminate discrimination against children on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics.’<sup>60</sup>

Similarly, there were 32 State Parties that the Committee made recommendations to about developing a strategy or policy to address discrimination or inequality (42.4 per cent of Concluding Observations referring to LGBT children or children with same-sex parents, which equates to 15.5 per cent of all Concluding Observations). In some cases, the Committee provided guidance regarding the appropriate strategy or policy. For example, the Committee recommended that Ecuador,

Adopt a strategy, specific legal provisions and clear guidelines for public authorities aimed at upholding non-discrimination against children on any grounds and combating stigma against children of single-parent families, children born to persons deprived of

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<sup>58</sup> Committee on the Rights of the Child, Concluding observations regarding Congo, supra n 57 at 5.

<sup>59</sup> This issue is discussed in more detail below when considering the areas where the Committee can improve its Concluding Observations.

<sup>60</sup> Committee on the Rights of the Child, Concluding observations regarding Chile, supra n 56 at 6.



their liberty, children in families composed of same-sex couples and lesbian, bisexual, gay, transgender and intersex children.<sup>61</sup>

This is a commendable recommendation as it clearly indicates who is responsible and what is needed in order to better protect LGBT children and children with same-sex parents from discrimination. As is discussed later, only six Concluding Observations expressly consider discrimination experienced by children with same-sex parents. The Committee's explicit reference to transgender and intersex children is also commendable. For these reasons, the above recommendation can be considered the 'gold standard' of recommendations because it is inclusive and specific.

The Committee also made broad recommendations, like 'adopt a comprehensive strategy to eliminate discrimination on any grounds and against all vulnerable groups'.<sup>62</sup> The Human Rights Committee also has a tendency to make generic and non-specific recommendations relating to SOGI and LGBT issues.<sup>63</sup> Gerber and Gory observe, that high-level recommendations, without distinguishing between the differing needs and capacities of the State Parties, represents a 'wasted opportunity to make constructive and actionable recommendations'.<sup>64</sup> When it comes to addressing discrimination against LGBT children and children with LGBT parents, it would be more helpful for the Committee to make targeted recommendations, like it did in the Concluding Observations of Ecuador, that can be readily implemented by State Parties, and can be measured and evaluated by the Committee in subsequent reviews.

(ii) *Law reform*

This category captures instances where the Committee addressed inadequate or problematic legislation such as the criminalisation of same-sex relationships. The need

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<sup>61</sup> Committee on the Rights of the Child, Concluding observations regarding Ecuador, 26 October 2017, CRC/C/ECU/CO/5-6 at 6.

<sup>62</sup> Committee on the Rights of the Child, Concluding observations regarding Congo, supra n 57 at 5.

<sup>63</sup> Gerber and Gory, supra n 53 at 15.

<sup>64</sup> Ibid at 16.

for law reform was raised in 19 Concluding Observations,<sup>65</sup> which accounts for over 26 per cent of the Concluding Observations with a SOGI related term, or 9.8 per cent of all Concluding Observations. The Committee's primary concern was with perceived deficiencies in legislation. This occurred in 13 Concluding Observations. For example, in relation to Australia, the Committee noted 'The absence of federal legislation protecting against discrimination on the basis of sexual orientation or gender identity.'<sup>66</sup> Since this observation in 2012, the *Sex Discrimination Act 1984* (Cth) was amended to introduce new protections against discrimination on the basis of SOGI and intersex status.<sup>67</sup> Although the Australian Human Rights Commission was already advocating for such reform,<sup>68</sup> the concern expressed by the Committee undoubtedly added weight to the calls for amendment.

Another important law reform issue raised by the Committee concerns the criminalisation of same-sex relationships. Concern about this issue was raised with The Gambia, Eritrea, Iran, Sri Lanka and the Maldives.<sup>69</sup> The Committee views the criminalisation of same-sex sexual conduct to be a violation of the Article 2 of the CRC relating to non-discrimination. However, for the Maldives and Sri Lanka, the Committee raised its concerns in the context of torture and other cruel or degrading treatment of punishment (Article 37(a)) and sexual exploitation and abuse (Article

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<sup>65</sup> Afghanistan (2011) at 11; Republic of Korea (2012) at 7; Australia (2012) at 7; Slovenia (2013) at 6; Poland (2015) at 3; Peru (2016) at 6; Russian Federation (2014) at 6; Switzerland (2015) at 5–6; the Netherlands (2015) at 5–6; Argentina (2018) at 4; Denmark (2017) at 3; Eritrea (2015) at 5; Gambia (2015) at 6; Iraq (2015) at 7; Maldives (2016) at 9; Palau (2018) at 4; Singapore (2019) at 5; Sri Lanka (2018) at 6; Islamic Republic of Iran (2016) at 6.

<sup>66</sup> Committee on the Rights of the Child, Concluding observations regarding Australia, 28 August 2012, CRC/C/AUS/CO/4 at 7.

<sup>67</sup> Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, (Cth).

<sup>68</sup> Australian Human Rights Commission, 'Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination: Consultation Report', 2011, available at: <https://www.humanrights.gov.au/our-work/lgbti/publications/addressing-sexual-orientation-and-sex-and-or-gender-identity> [last accessed 10 January 2020]; see also Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, (Cth).

<sup>69</sup> Committee on the Rights of the Child, Concluding observations regarding Gambia, 20 February 2015, CRC/C/GMB/CO/2-3 at 6; Committee on the Rights of the Child, Concluding observations regarding Eritrea, 2 July 2015, CRC/C/ERI/CO/4 at 5; Committee on the Rights of the Child, Concluding observations regarding Islamic Republic of Iran, 14 March 2016, CRC/C/IRN/CO/3-4 at 6; Committee on the Rights of the Child, Concluding observations regarding Maldives, 14 March 2016, CRC/C/MDV/CO/4-5 at 9; Committee on the Rights of the Child, Concluding observations regarding Sri Lanka, 2 March 2018, CRC/C/LKA/CO/5-6 at 6.

34), respectively.<sup>70</sup> The Committee recommended that The Gambia, Eritrea, Iran and Sri Lanka ‘repeal the legal provisions criminalizing homosexuality [sic]’ or ‘decriminalize same-sex relations’.<sup>71</sup> Despite the Committee calling on all State Parties to repeal national laws criminalising homosexuality in General Comment No 20,<sup>72</sup> it was not consistent in addressing this rights violation. For example, the Committee raised criminalisation as a concern with the Maldives but did not make a recommendation for decriminalisation.<sup>73</sup> Further, the Committee recommended Singapore decriminalise consensual same-sex sexual acts,<sup>74</sup> without having previously raised it as a concern. It would be preferable if the Committee raised the issue of criminalisation of same-sex sexual relations as a concern and followed this up with an express recommendation for decriminalisation. It would also be preferable if this was done with each of the 72 States that continue to criminalise consensual same-sex sexual conduct.<sup>75</sup> This improvement in consistency of addressing this issue would be facilitated if civil society and NGOs consistently raised criminalisation of same-sex relationships in their Alternative Reports.

Forty-one Concluding Observations contained a law reform recommendation relating to better protecting the rights of LGBT children and children with same-sex parents (56.2 per cent of the Concluding Observations with a SOGI related term(s) which equates to 20.5 per cent of all Concluding Observations). For Denmark, the Committee recommended the adoption of ‘specific anti-discrimination legislation explicitly prohibiting discrimination in all areas against children with disabilities and

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<sup>70</sup> Virzo, supra n 4 at 75 argues that the Committee should have also considered Article 37(a) in its recommendations to Iran given the Committee’s concerns regarding capital punishment and flogging for minors engaging in ‘same-sex sexual behaviour’ in Iran.

<sup>71</sup> Committee on the Rights of the Child, Concluding observations regarding Eritrea, supra n 69 at 6; Committee on the Rights of the Child, Concluding observations regarding Gambia, supra n 69 at 7; Committee on the Rights of the Child, Concluding observations regarding Islamic Republic of Iran, supra n 69 at 6; Committee on the Rights of the Child, Concluding observations regarding Sri Lanka, supra n 69 at 4.

<sup>72</sup> General Comment No 20 is discussed further in Part 4(A)(vi) below. See also Virzo, supra n 4 at 67.

<sup>73</sup> Committee on the Rights of the Child, Concluding observations regarding Maldives, supra n 69 at 9.

<sup>74</sup> Committee on the Rights of the Child, Concluding observations regarding Singapore, 31 May 2019, CRC/C/SGP/CO/4-5 at 5.

<sup>75</sup> See Gerber, supra n 25 for an up-to date list of countries that still criminalise same-sex relationships.

lesbian, gay, bisexual, transgender and intersex children.<sup>76</sup> This recommendation would have been strengthened by also including a reference to prohibiting discrimination against children with same-sex parents.

(iii) *Improving access to healthcare for LGBT children*

The Committee expressed concerns about the health and wellbeing of LGBT children in nine Concluding Observations (12.3 per cent of Concluding Observations with a SOGI related terms or 4.5 per cent of all Concluding Observations). The Committee identified five states where it explicitly expressed concern that a child's SOGI status affected their access to healthcare.<sup>77</sup> For example, the Committee expressed concern that the inequality in access to health services was negatively impacting LGBT children in the UK.<sup>78</sup> It is surprising that LGBT children's access to healthcare did not feature more prominently in concluding Observations. This may, in part be explained by the fact that access to healthcare for LGBT children did also not feature prominently in Alternative Reports. For example, the Costa Rican Coalition for Compliance with the Convention on the Rights of the Child in 2017 and 2018 expressed concern about 'health care officials hav[ing] poor attitudes toward LGBTI people' but did not frame this as an access issue.<sup>79</sup> In other reports, reference was made to 'access to education, employment, and other goods and services' or 'other social services' but without specific reference to healthcare.<sup>80</sup> There is a large body of evidence that documents the difficulties that LGBT populations have accessing

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<sup>76</sup> Committee on the Rights of the Child, Concluding observations regarding Denmark, 26 October 2017, CRC/C/DNK/CO/5 at 3.

<sup>77</sup> Committee on the Rights of the Child, Concluding observations regarding United Republic of Tanzania, 3 March 2015, CRC/C/TZA/CO/3-5 at 13; Committee on the Rights of the Child, Concluding observations regarding Colombia, 6 March 2015, CRC/C/COL/CO/4-5 at 5; Committee on the Rights of the Child, Concluding observations regarding Peru, 2 March 2016, CRC/C/PER/CO/4-5 at 6; Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5 at 14; Committee on the Rights of the Child, Concluding observations regarding South Africa, 14 March 2016, CRC/C/ZAF/CO/2 at 5.

<sup>78</sup> Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, *supra* n 77 at 14.

<sup>79</sup> Costa Rican Coalition for Compliance with the Convention on the Rights of the Child in 2017 and 2018, *2007-2017 Shadow Report on the Compliance with the Convention on the Rights of the Child, Costa Rica* (2019) at para 5.4.2.

<sup>80</sup> Iranian Lesbian and Transgender Network, *The Situation of LGBT Children in Iran* (2015) at 7, 17.

appropriate and adequate healthcare.<sup>81</sup> It is important that both the Committee and civil society recognise and address discrimination that LGBT children and children with same-sex parents experience when accessing healthcare services. When the Committee did address access to healthcare, it was done well.<sup>82</sup> For example, the Committee recommended that Bosnia and Herzegovina ‘Ensure equal access to sexual and reproductive services for adolescent girls and boys, particularly those in marginalized groups, such as Roma children, LGBTI children and children with disabilities, across the State party.’<sup>83</sup>

Another health issue the Committee addressed was State Parties continuing to ‘diagnose’ LGBT children. For example, in the Concluding Observations concerning the Russian Federation, the Committee noted ‘reports of coercive treatment of transsexual and homosexual [sic] persons, in particular children, and an attempt to diagnose transsexuality as psychiatric disease.’<sup>84</sup> Iran received similar comments with the Committee expressing concern that ‘LGBTI children are subjected to electric shocks and the administration of hormones and strong psychoactive medications for the purpose of “curing” them.’<sup>85</sup> The Committee also expressed concern about the lack of information available to LGBT children about sexual health, sexual orientation and gender identity in Iran, the Russian Federation and the United

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<sup>81</sup> See, for example, Shields et al, ‘Lesbian, Gay, Bisexual, and Transgender Parents Seeking Health Care for Their Children: A Systematic Review of the Literature’ (2012) 9(4) *Evidence Review* 200; Jillson, ‘Opening Closed Doors: Improving Access To Quality Health Services For LGBT Populations’ (2002) 19(2–3) *Clinical Research and Regulatory Affairs* 153; Ryan, ‘Generating a Revolution in Prevention, Wellness, and Care for LGBT Children and Youth’ (2013) 23 *Temple Political and Civil Rights Law Review* 331.

<sup>82</sup> Committee on the Rights of the Child, Concluding observations regarding Argentina, 1 October 2018, CRC/C/ARG/CO/5-6 at 4; Committee on the Rights of the Child, Concluding observations regarding Australia, 1 November 2019, CRC/C/AUS/CO/5-6 at 11; Committee on the Rights of the Child, Concluding observations regarding Bosnia and Herzegovina, 30 September 2019, CRC/C/BIH/CO/5-6 at 9; Committee on the Rights of the Child, Concluding observations regarding Ecuador, supra n 61 at 6; Committee on the Rights of the Child, Concluding observations regarding United Republic of Tanzania, supra n 77 at 13.

<sup>83</sup> Committee on the Rights of the Child, Concluding observations regarding Bosnia and Herzegovina, supra n 82 at 9.

<sup>84</sup> Committee on the Rights of the Child, Concluding observations regarding the Russian Federation, supra n 27 at 14.

<sup>85</sup> Committee on the Rights of the Child, Concluding observations regarding Islamic Republic of Iran, supra n 69 at 9–10.

Kingdom.<sup>86</sup> The Committee made healthcare recommendations to 7 State Parties (11 per cent of Concluding Observations referring to LGBT rights which equates to 4 per cent of all Concluding Observations). The Committee’s concerns regarding the coercive “treatment” of LGBT children in Iran and the Russian Federation, were followed up with recommendations to end these human rights violations.<sup>87</sup>

It is surprising that the connection between LGBT children and poorer mental health outcomes did not feature more prominently in the Committee’s Concluding Observations. Only two Concluding Observations raised the mental health of LGBT children as a concern during the study period despite the issue being raised in the Alternative Reports for other State Parties.<sup>88</sup> For example, with respect to Ireland, the Children’s Rights Alliance stated that,

Of particular concern is the mental health of lesbian, gay, bisexual and transgender (LGBT) young people. A study of LGBT young people under the age of 25 years found that 27 per cent of those interviewed had self-harmed; on third had seriously thought of ending their lives in the past year; and 18 per cent had attempted suicide.<sup>89</sup>

In relation to Iran, the Iranian Lesbian and Transgender Network urged the Committee to recommend that ‘adolescents ... receive quality mental health care for issues relating to sexual orientation and gender identity’ due to ‘Iranian mental health professionals believ[ing] that homosexuality [sic] is a form of mental illness, and gender variance is in and of itself a pathological condition.’<sup>90</sup> While mental health was addressed by the Committee in each of these Concluding Observations, it was not

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<sup>86</sup> Committee on the Rights of the Child, Concluding observations regarding the Russian Federation, supra n 27 at 14; Committee on the Rights of the Child, Concluding observations regarding Islamic Republic of Iran, supra n 69 at 13; Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, supra n 77 at 16.

<sup>87</sup> Committee on the Rights of the Child, Concluding observations regarding Islamic Republic of Iran, supra n 69 at 10; Committee on the Rights of the Child, Concluding observations regarding the Russian Federation, supra n 27 at 15.

<sup>88</sup> Committee on the Rights of the Child, Concluding observations regarding Australia, supra n 82 at 10; Committee on the Rights of the Child, Concluding observations regarding Norway, 4 July 2018, CRC/C/NOR/CO/5-6 at 8.

<sup>89</sup> Children’s Rights Alliance, *Are We There Yet? Parallel Report to Ireland’s Third and Fourth Combined Report under the UN Convention on the Rights of the Child* (2015) at 70.

<sup>90</sup> Iranian Lesbian and Transgender Network, supra n 80 at 10.

done so in the specific context of the mental health harms that LGBT children experience.

It is worth noting that Australia is one of two countries where mental health of LGBT children was raised as an explicit concern by the Committee, was recently ranked 35 out of 38 wealthy nations, for child mental well-being.<sup>91</sup> Child mental health is a growing concern globally.<sup>92</sup> This is true for all children, but especially LGBT youth who experience high levels of discrimination that lead to well documented increased risks of adverse mental health outcomes.<sup>93</sup>

(iv) *Awareness raising and education campaigns to improve respect for LGBT children and children of same-sex families*

This category captured references to the need for awareness raising and education campaigns to counter prejudice, stigmatisation, intolerance and hate speech directed at LGBT children and children with same-sex parents. Concerns of this kind were raised in 42 Concluding Observations,<sup>94</sup> which is 57.5 per cent of Concluding

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<sup>91</sup> UNICEF Innocenti, *Worlds of Influence: Understanding What Shapes Child Well-Being in Rich Countries* (2020) at 11, available at: <https://www.unicef-irc.org/publications/pdf/Report-Card-16-Worlds-of-Influence-child-wellbeing.pdf> [last accessed 28 September 2020].

<sup>92</sup> See, for example, Bruha et al, 'Global Child and Adolescent Mental Health: Challenges and Advances' (2018) 10(4) *London Journal of Primary Care* 108; Belfer, 'Global Child Mental Health', *Psychiatric Times*, 14 April 2014, available at: <https://www.psychiatristimes.com/view/global-child-mental-health> [last accessed 4 October 2020]; World Health Organisation, 'Child and Adolescent Mental Health', available at: [http://www.who.int/mental\\_health/maternal-child/child\\_adolescent/en/](http://www.who.int/mental_health/maternal-child/child_adolescent/en/) [last accessed 4 October 2020]; World Health Organisation, 'Adolescent Mental Health', 28 September 2020, available at: <https://www.who.int/news-room/fact-sheets/detail/adolescent-mental-health> [last accessed 4 October 2020].

<sup>93</sup> See, for example, Russell and Fish, 'Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth' (2016) 12 *Annual Review of Clinical Psychology* 465; Wilson and Cariola, 'LGBTQI+ Youth and Mental Health: A Systematic Review of Qualitative Research' (2020) 5 *Adolescent Research Review* 187.

<sup>94</sup> See the Committee on the Rights of the Child, Concluding observations regarding: Angola (2018) at 5; Argentina (2018) at 4; Brazil (2015) at 5; Chile (2015) at 6; Colombia (2015) at 5; Congo (2017) at 5; Dominican Republic (2015) at 4; France (2016) at 5; Guyana (2013) at 6; Haiti (2016) at 5; Holy See (2014) at 5; Hungary (2014) at 4; Islamic Republic of Iran (2016) at 6; Iraq (2015) at 5; Ireland (2016) at 6; Kyrgyzstan (2014) at 4; Maldives (2016) at 6, 10; Mexico (2015) at 4; the Netherlands (2015) at 5; Peru (2016) at 6; Poland (2015) at 3, 4; Portugal (2014) at 7; Serbia (2017) at 5; Singapore (2019) at 5; Slovakia (2016) at 4; Slovenia (2013) at 6; South Africa (2016) at 5; Switzerland (2015) at 5-6; United Republic of Tanzania (2015) at 13; the United Kingdom and Northern Ireland (2016) at 5; Bolivian Republic of Venezuela (2014) at 6; Brunei Darussalam (2016) at 5; Cameroon (2017) at 4; Gabon (2016) at 5; Guatemala (2018) at 4; Italy (2019) at 4; Mongolia (2017) at 4; Pakistan (2016) at 4; Republic of Korea (2019) at 4, 14; Romania (2017) at 3; Saudi Arabia (2016) at 4; Zimbabwe (2016) at 6.

Observations that included a SOGI related term and equates to 21 per cent of all Concluding Observations. The primary concern of the Committee was the continued discrimination and stigma experienced by LGBT children and children with same-sex parents. This concern was raised in 35 Concluding Observations (45.9 per cent of Concluding Observations referring to LGBT issues and 17.5 per cent of all Concluding Observation).<sup>95</sup> In relation to discriminatory attitudes experienced by LGBT children, a typical example of the Committee's concerns is that 'children in marginalized and disadvantaged situations such ... lesbian, gay, bisexual, transgender and intersex children continue to face discrimination.'<sup>96</sup>

Concern about discrimination against children based on the SOGI of their parent(s) was first raised by the Committee in the Concluding Observations of Slovenia in 2013, when the Committee expressed concern 'that children of same-sex couples face various forms of discrimination in school based on their family's sexual orientation, with no appropriate redress provided.'<sup>97</sup> Since then, discrimination based on a parent's SOGI has only been raised four times: with the Holy See (2014), Hungary (2014), Iraq (2015) and Singapore (2019).<sup>98</sup>

In fifty-two Concluding Observations, the Committee made recommendations that a State take steps to address the prejudice, stigmatisation, intolerance and hate

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<sup>95</sup> See the Committee on the Rights of the Child, Concluding observations regarding: Brazil (2015) at 5; Brunei Darussalam (2016) at 5; Cameroon (2017) at 4; Colombia (2015) at 5; Congo (2017) at 5; Dominican Republic (2015) at 4; France (2016) at 5; Gabon (2016) at 5; Guatemala (2018) at 4; Guyana (2013) at 6; Haiti (2016) at 5; Holy See (2014) at 5; Hungary (2014) at 4; Islamic Republic of Iran (2016) at 6; Iraq (2015) at 5; Ireland (2016) at 6; Kyrgyzstan (2014) at 4; Maldives (2016) at 6; Mexico (2015) at 4; Mongolia (2017) at 4; the Netherlands (2015) at 5; Pakistan (2016) at 4; Peru (2016) at 6; Poland (2015) at 4; Portugal (2014) at 7; Republic of Korea (2019) at 4, 14; Romania (2017) at 3; Saudi Arabia (2016) at 4; Serbia (2017) at 5; Singapore (2019) at 5; Slovenia (2013) at 6; South Africa (2016) at 5; the United Kingdom and Northern Ireland (2016) at 5; Bolivian Republic of Venezuela (2014) at 6; Zimbabwe (2016) at 6.

<sup>96</sup> Committee on the Rights of the Child, Concluding observations regarding the Netherlands, 8 June 2015, CRC/C/NDL/CO/4 at 5.

<sup>97</sup> Committee on the Rights of the Child, Concluding observations regarding Slovenia, 8 July 2013, CRC/C/SVN/CO/3-4 at 6.

<sup>98</sup> Committee on the Rights of the Child, Concluding observations regarding Holy See, 25 February 2014, CRC/C/VAT/CO/2 at 5; Committee on the Rights of the Child, Concluding observations regarding Hungary, 14 October 2014, CRC/C/HUN/CO/3-5 at 4; Committee on the Rights of the Child, Concluding observations regarding Iraq, supra n 35 at 5; Committee on the Rights of the Child, Concluding observations regarding Singapore, supra n 74 at 5; Committee on the Rights of the Child, Concluding observations regarding Slovenia, supra n 97 at 6.



speech experienced by LGBT children and children with same-sex parents. This equates to 71.2 per cent of Concluding Observations referring to LGBT issues or 26 per cent of all Concluding Observations. The most common recommendation was that the State develop an awareness-raising or education campaign, which occurred in 43 Concluding Observations (58.9 per cent of Concluding Observations referring to LGBT rights or 21.5 per cent of all Concluding Observations). The recommendation made to New Zealand was about,

Strengthening its awareness-raising and other preventive activities against discrimination and, if necessary, taking affirmative action for the benefit of children in vulnerable situations, such as ... lesbian, bisexual, gay and transgender children and children living with persons from these groups.<sup>99</sup>

This recommendation is noteworthy for the reference to affirmative action, which only occurred in three other Concluding Observations during the study period.<sup>100</sup> Calls for affirmative action generally occur in the context of race or gender. Extending affirmative action to LGBT children and ‘children living in lesbian, bisexual, gay or transgender’ families, as it did with Italy, emphasises how seriously the Committee takes this issue.<sup>101</sup>

Addressing negative attitudes towards children with LGBT parents was recommended in the Committee’s Concluding Observations regarding Ecuador, Italy and Singapore.<sup>102</sup> For example, the Committee recommended that Italy strengthen,

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<sup>99</sup> Committee on the Rights of the Child, Concluding observations regarding New Zealand, 11 April 2011, CRC/C/NZL/CO/3-4 at 5.

<sup>100</sup> Committee on the Rights of the Child, Concluding observations regarding Australia, supra n 66 at 7; Committee on the Rights of the Child, Concluding observations regarding Italy, 28 February 2019, CRC/C/ITA/CO/5-6 at 4; Committee on the Rights of the Child, Concluding observations regarding Singapore, supra n 74 at 5; Committee on the Rights of the Child, Concluding observations regarding Sri Lanka, supra n 69 at 4.

<sup>101</sup> Committee on the Rights of the Child, Concluding observations regarding Italy, supra n 100 at 4.

<sup>102</sup> Committee on the Rights of the Child, Concluding observations regarding Ecuador, supra n 61 at 6; Committee on the Rights of the Child, Concluding observations regarding Italy, supra n 100 at 4; Committee on the Rights of the Child, Concluding observations regarding Singapore, supra n 74 at 5.

other preventive activities against discrimination and, if necessary, taking affirmative action for the benefit of children and in particular children in marginalized and disadvantaged situations, such as ... lesbian, bisexual, gay or transgender children and children living in lesbian, bisexual, gay or transgender families.<sup>103</sup>

The reference to ‘affirmative action’ in Italy’s Concluding Observations is very broad and it would have been preferable for the Committee to elaborate on the type of affirmative action required. Nevertheless, it is a positive development that the Committee is considering the impact that negative attitudes towards same-sex families have on children. Within the study period, this recommendation only occurred three times, and all after 2017. It is hoped that similar recommendations will appear more frequently in the future.

(v) *Physical or mental violence, injury or abuse of LGBT children*

Concern about violence (physical and mental), injury and abuse of LGBT children, in breach of Article 19, was raised in 15 Concluding Observations,<sup>104</sup> which represents 20.5 per cent of Concluding Observations referring to LGBT children or children with same-sex parents and equates to 7.5 per cent of all Concluding Observations. The Committee was particularly concerned about bullying in schools, with this referred to in eight Concluding Observations.<sup>105</sup> An illustration of this is the Concluding Observations to the United Kingdom, in which the Committee noted that ‘Bullying, including cyberbullying, remains a serious and widespread problem, particularly against lesbian, gay, bisexual, transgender and intersex children’.<sup>106</sup>

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<sup>103</sup> Committee on the Rights of the Child, Concluding observations regarding Italy, supra n 100 at 4.

<sup>104</sup> Russian Federation (2014) at 6, 9, 16; Columbia (2015) at 5; Poland (2015) at 4; Haiti (2016) at 5; Iraq (2015) at 7; Maldives (2016) at 9, 10; Bhutan (2017) at 10; Islamic Republic of Iran (2016) at para 77(e); Latvia (2016) at para 26; South Africa (2016) at para 23; Spain (2018) at para 39(d); Sweden (2015) at para 15(d); United Kingdom of Great Britain and Northern Ireland (2016) at para 48(a); Bolivian Republic of Venezuela (2014) at para 27; Serbia (2017) at para 32(d).

<sup>105</sup> Bolivian Republic of Venezuela (2014) at 6; Russian Federation (2014) at 16; Sweden (2015) at 4; Latvia (2016) at 6; United Kingdom of Great Britain and Northern Ireland (2016) at 11; Islamic Republic of Iran (2016) at 14; Spain (2018) at 11; Serbia (2017) at para 32(d).

<sup>106</sup> Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, supra n 77 at 11.

The Committee made seven recommendations to State Parties about addressing bullying, including of LGBT children, constituting approximately half of all the times it expressed concern about bullying to a State Party.<sup>107</sup> An illustration of such a recommendation is the Concluding Observation of Bhutan, where the Committee recommended that the State ‘Develop and implement initiatives to combat violence, sexual harassment and bullying among children in schools, including towards lesbian, gay, bisexual, transsexual and intersex children’.<sup>108</sup> It is unfortunate that the Committee’s concerns did not always translate into recommendations, since it is recommendations that State Parties look to when deciding how they can improve their compliance and it is the recommendations that the Committee looks at when assessing a State Party’s progress since its last review.

### **B. Positive Aspects of the Concluding Observations**

The content analysis of the Concluding Observations highlights two aspects where the Committee is improving its consideration of rights violations pertaining to LGBT children and children with same-sex parents, and these are discussed in this section.

#### *(i) Increased attention to SOGI*

Reviewing the frequency in which SOGI related terms were used in the Concluding Observations reveals a rapid increase in the Committee’s awareness and/or willingness to consider SOGI issues over time (see Figure 3 below).<sup>109</sup>

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<sup>107</sup> Australia (2019) at 12; Bhutan (2017) at 10; Islamic Republic of Iran (2016 at 14; Norway (2018) at 9; Russian Federation (2014) at 16; Spain (2018) at 11; United Kingdom of Great Britain and Northern Ireland (2016) at 11.

<sup>108</sup> Committee on the Rights of the Child, Concluding observations regarding Bhutan, 5 July 2017, CRC/C/BTN/CO/3-5 at para 39(g).

<sup>109</sup> See also Nolan, *United Nations Treaty Bodies: References to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics 2015*, International Lesbian, Gay, Bisexual, Trans and Intersex Association (2016) at 9, available at: [http://ilga.org/downloads/2015\\_UN\\_Treaty\\_Bodies\\_SOGIEI\\_References.pdf](http://ilga.org/downloads/2015_UN_Treaty_Bodies_SOGIEI_References.pdf) [last accessed 12 January 2021]; Virzo, *supra* n 4 at 66; but see Persad, *supra* n 20 at 360 who wrote in 2014 ‘the CRC has only infrequently raised issues of sexual orientation discrimination through its concluding observations on state reports’.

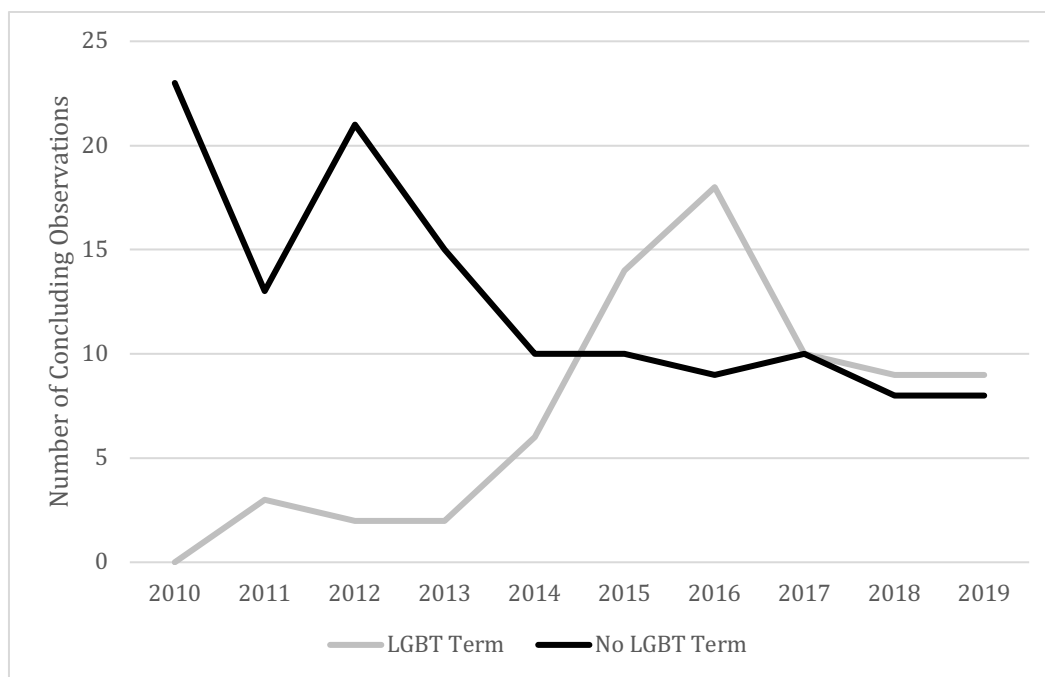


Figure 3: CRC Committee Concluding Observations for 2010-2020 Referring to LGBT issues

Between 2010–2013, there was never more than three Concluding Observations per year containing a SOGI related term. Between 2014 – 2016, the number of Concluding Observations that included a SOGI related term tripled, from six Concluding Observations in 2014, to 18 Concluding Observations in 2016. The first time during the study period that more than half the Concluding Observations contained a SOGI related term, was in 2015. This trend has continued, with more than half of the Concluding Observations referring to SOGI at least once for the rest of the study period.

It is unclear, based on the content analysis of the Concluding Observations, why the Committee began referring to SOGI more often from 2014 onwards. It is also unknown why so many Concluding Observations discussed LGBT issues in 2015 and 2016 compared to other years. There are three possible explanations:

1. a coordinated effort across the United Nations as a whole, to better address human rights violations associated with SOGI;
2. a change in the membership of the Committee; and/or
3. growing awareness generally about the rights of LGBT people to live their lives free from discrimination based on their SOGI.

All three factors may have contributed to the extent to which the Committee LGBT related issues, and each is considered in more detail below.

*(a) Targeted efforts of the United Nations*

In September 2012, the UN Office of the High Commissioner for Human Rights (OHCHR) launched a new publication on sexual orientation and gender identity titled ‘Born Free and Equal’.<sup>110</sup> The booklet is,

designed as a tool for States, to help them better understand the nature of their obligations and the steps required to meet them, as well as for civil society activists, human rights defenders and others seeking to hold Governments to account for breaches of international human rights law.<sup>111</sup>

This was followed by a public information campaign launched in July 2013, by the then High Commissioner, Navi Pillay, ‘designed to raise awareness of homophobic and transphobic violence and discrimination and promote greater respect for the rights of LGBT people everywhere’.<sup>112</sup> In 2015, two joint statements relevant to LGBT children were issued. The first was jointly issued by the Committee and several other individuals and bodies<sup>113</sup> on the International Day against Homophobia, Biphobia and Transphobia and called for the ‘recognition and protection of the rights of young

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<sup>110</sup> OHCHR, ‘Born Free and Equal’, 14 September 2012, available at: [www.ohchr.org/EN/NewsEvents/Pages/BornFreeAndEqual.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/BornFreeAndEqual.aspx) [last accessed 3 March 2021].

<sup>111</sup> Ibid.

<sup>112</sup> OHCHR, ‘Combating Discrimination Based on Sexual Orientation and Gender Identity’, 7 March 2012, available at: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> [last accessed 3 March 2021]; on the role of Navi Pillay (and Ban Ki Moon) as a ‘norm entrepreneur’ for SOGI, see Baisley, *supra* n 20 at 156–9.

<sup>113</sup> The UN human rights experts were: Mr. Philip Alston, Special Rapporteur on extreme poverty and human rights; Mr. Maina Kiai, Special Rapporteur on the rights to freedom of peaceful assembly and of association; Mr. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Mr. Dainius Pūras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Mr. Michel Forst, Special Rapporteur on the situation of human rights defenders; Mr. Juan Méndez, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment. Also party to this statement was the Inter-American Commission on Human Rights, the Special Rapporteur on Human Rights Defenders of the African Commission on Human and Peoples’ Rights, and the Commissioner for Human Rights of the Council of Europe: see OHCHR, ‘Discriminated and Made Vulnerable: Young LGBT and Intersex People Need Recognition and Protection of Their Rights International Day against Homophobia, Biphobia and Transphobia’, 17 May 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=%20%20E#sthash.aiEvQmvg.dpu> [last accessed 3 March 2021]; see also Virzo, *supra* n 4 at 69.

LGBT and intersex people'.<sup>114</sup> The second statement was again issued jointly by UN bodies and called for an end to violence and discrimination against lesbian, gay, bisexual, transgender and intersex adults, adolescents and children.<sup>115</sup>

In addition, the UN Human Rights Council passed three resolutions in 2011, 2014 and 2016 recognising that discrimination and violence based on SOGI is a breach of human rights.<sup>116</sup> The 2016 resolution, appointed an inaugural Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity ('Independent Expert') for three years, with their mandate renewed in July 2019.<sup>117</sup> Although the 2016 resolution did not specifically refer to children, the Independent Expert's broad mandate (which extends to 'existing international human rights instruments') is likely to influence the work of all treaty bodies, and generally raise the profile of SOGI based discrimination and violence across the UN.

Between 2002-2014, the General Assembly also passed seven resolutions urging all State Parties to ensure effective protection of the right to life and the prompt and thorough investigation of killings based on the victims' SOGI.<sup>118</sup>

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<sup>114</sup> Sandberg, *supra* n 20 at 351.

<sup>115</sup> The UN Bodies were: UNICEF, International Labour Organization, UNAIDS Secretariat, United Nations Development Programme, United Nations Educational, Scientific and Cultural Organization, United Nations Population Fund, United Nations High Commissioner for Refugees, World Food Programme, UN Women, Office of the United Nations High Commissioner for Human Rights, United Nations Office on Drugs and Crime, and the World Health Organisation: see UNICEF et al, 'United Nations Entities Call on States to Act Urgently to End Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Adults, Adolescents and Children', *UNICEF*, September 2015, available at: [https://www.unicef.org/media/files/Joint\\_LGBTI\\_Statement\\_ENG.pdf](https://www.unicef.org/media/files/Joint_LGBTI_Statement_ENG.pdf) [last accessed 4 October 2020]; see also McGoldrick, 'The Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16(4) *Human Rights Law Review* 613 at 619.

<sup>116</sup> HRC Res 17/19, Human Rights, Sexual Orientation and Gender Identity, 14 July 2011, A/HRC/RES/17/19; HRC Res 27/32, Human Rights, Sexual Orientation and Gender Identity, 2 October 2014, A/HRC/RES/27/32; HRC Res 32/2, Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 15 July 2016, A/HRC/RES/32/2; see also OHCHR, 'LGBT UN Resolutions', available at: <https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx> [last accessed 1 March 2020].

<sup>117</sup> Human Rights Council, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity* A/HRC/32/L.2/Rev.1 (2016) at 3.

<sup>118</sup> Res 69/182, 18 December 2014, A/RES/69/182 at 6(b); Res 67/168, 20 December 2012, A/RES/67/168 at 6(b); Res 65/208, 21 December 2010, A/RES/65/208 at 6(b); Res 63/182, 18

The Children’s Rights Committee is not the only treaty committee paying more attention to LGBT related issues.<sup>119</sup> A comparison of General Comments from all UN treaty committees (analysed in Part 4 below) demonstrate that several different treaty committees have increased their focus on SOGI related discrimination and violence. This is likely to have had a positive influence on the Committee and contributed to it paying more attention to the rights of LGBT children and children with same-sex parents.

*(b) Change in the Committee membership*

From the publicly available information about the Committee, it is not possible to determine which specific Committee member(s) raised LGBT issues in the Concluding Observations.<sup>120</sup> This is unfortunate as this information provided a valuable insight into the Human Rights Committee’s work on LGBT issues.<sup>121</sup> Gerber and Gory found that increased attention to SOGI issues could be predominantly traced back to one committee member.<sup>122</sup> Unfortunately, comparable findings are not possible in respect of the Children’s Rights Committee. Nevertheless, some observations can be made, which may help explain some of the Committee’s increased attention to the rights of LGBT children and children with same-sex parents.

The Committee’s membership changed in March 2013,<sup>123</sup> which could lead to the inference that the incoming members from Bahrain, Togo, Russian Federation,

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December 2008, A/RES/63/182 at 6(b); Res 61/173, 19 December 2006, A/RES/61/173 at 5(b); Res 59/197, 20 December 2004, A/RES/59/197 at 8(c); Res 57/214, 18 December 2002, A/RES/57/214 at 6.

<sup>119</sup> See, for example, Gerber and Gory, *supra* n 53.

<sup>120</sup> On the ‘potential lack of openness of some Committee Members to [sexual orientation, gender identity, gender expression, intersex, sex characteristics] issues, see Nolan, *supra* n 109 at 9.

<sup>121</sup> See Gerber and Gory, *supra* n 53.

<sup>122</sup> Michael O’Flaherty, who was a member of the HRC from 2004 to 2012: see *ibid* at 8.

<sup>123</sup> OHCHR, ‘Membership’, *Committee on the Rights of the Child*, 1 March 2015, available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx> [last accessed 3 March 2021]; United Nations Human Rights Office of the High Commission, ‘Information on Former CRC Members from 2005 to 2013’, available at: <http://www.ohchr.org/Documents/HRBodies/CRC/PastMembers.doc> [last accessed 3 March 2021].

Ethiopia, Malaysia, Brazil, Ecuador, Italy and Austria were responsible for the increase in engagement with the rights of LGBT children and children with same-sex parents. The change in membership may also help to explain the decrease in the Committee’s engagement with SOGI based discrimination in 2017. There were four Committee members whose terms started in 2013 and ended in 2017 (Malaysia, Brazil, Ecuador and Italy). One can speculate that one or more of these members may have been behind the increase in the Committee’s engagement with LGBT issues during this period. These four Committee members are highlighted in black in Figure 4 below. Although all four members have a demonstrated commitment to children’s rights, none have revealed a specific interest in the rights of LGBT children or children with same-sex parents.

The Committee members highlighted in light grey in Figure 4, commenced in 2013, and their tenure continued for the duration of the study period. They may also have played a part in the Committee’s increased focus on LGBT issues. This would help explain why the use of SOGI terms remained relatively high after 2017.

Member Name	State	Criminalise same-sex <sup>2</sup>	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Mr. Kamel FILALI	Algeria	Yes										
Ms. Moushira KHATTAB	Egypt	Yes										
Mr. Hatem KOTRANE	Tunisia	Yes										
Mr. Lothar Friedrich KRAPPMANN	Germany	No										
Ms. Yanghee LEE	Republic of Korea	No										
Ms. Rosa Maria ORTIZ	Paraguay	No										
Mr. Awlich POLLAR	Uganda	Yes										
Mr. Jean ZERMATTEN	Switzerland	No										
Ms. Agnes Akosua AIDOO	Ghana	Yes										
Mr. Luigi CITARELLA	Italy	No										
Ms. Maria HERCZOG	Hungary	No										
Mr. Dainius PURAS	Lithuania	No										
Ms. Hadeel Al-Astmar	Syrian Arab Republic	Yes										
Mr. Peter Gurán	Slovakia	No										
Ms. Azza el-Ashmawy	Egypt	Yes										
Mr. Sanphasit Koomgraphant	Thailand	No										
Ms. Marta Masarás Pérez	Chile	No										
Ms. Kamla Devi Varnah	Mauritius	Yes										
Ms. Susana Villarín de la Puente	Peru	No										
Ms. Aseli Al-Shehail	Saudi Arabia	Yes										
Mr. Jorge Cardona Llorens	Spain	No										
Mr. Bernard Gastaud	Monaco	No										
Mr. Gehad Madi	Egypt	Yes										
Ms. Pilar Norez	Peru	No										
Ms. Kirsten Sandberg	Norway	No										
Ms. Hiranthi Wijemanne	Sri Lanka	Yes										
Ms. Amal Salman ALDOSEI	Bahrain	No										
Ms. Suzanne AHO ASSOUMA	Togo	Yes										
Ms. Hynd AYQUBI IDRISI	Monocco	Yes										
Ms. Olga a. KHAZOVA	Russian Federation	No										
Mr. Benyam Dawit MEZMUR	Ethiopia	Yes										
Ms. Yasmeen MUHAMAD SHARIFF	Malaysia	Yes										
Mr. Clarence NELSON	Samoa	Yes										
Mr. Wanderlino Nogueira Neto	Brazil	No										
Ms Sara DE JESÚS OVIEDO FIERRO	Ecuador	No										
Ms. Maria Rita PARI	Italy	No										
Mr. José Ángel RODRÍGUEZ REYES	Venezuela	No										
Ms. Renate WINTER	Austria	No										
Mr. Cephas LUMINA	Zambia	Yes										
Ms. Mikiko OTANI	Japan	No										
Mr. Luis Ernesto PEDERNEIRA REYNA	Uruguay	No										
Ms. Ann Marie SKELTON	South Africa	No										
Ms. Velina TODOROVA	Bulgaria	No										
Mr. Bragi GUDBRANDSSON	Iceland	No										
Mr. Phillip D. JAFFE	Switzerland	No										
Mrs. Faith MARSHALL-HARRIS	Barbados	Yes										
Ms. Aissatou Alassane Moulaye SIDIKI	Niger	No										



*Figure 4: Committee Membership over the Study Period.*

Reviewing the publicly available information about each of the Committee members, there is only one Committee member who appears to have a distinct interest in the rights of LGBT children, and that is Professor Kirsten Sandberg, who served as a Committee member between 2011 and 2019. Her commencement coincided with the Committee's first reference to SOGI in its Concluding Observations during the study period. Sandberg is a distinguished jurist and academic expert on the rights of children, who has published an article on the rights of LGBTI children under the CRC.<sup>124</sup> Sandberg's article was published in 2015, which was the first year the number of Concluding Observations that referred to SOGI outnumbered those that did not. It is, therefore, possible that Sandberg was responsible (in full or part) for the Committee paying more attention to the rights of LGBT children and children with same-sex parents.

Committee members are appointed based on their individual expertise, and are not there to represent the views of their government. It is therefore unwise to try and draw any inferences between the State that a member comes from, and their position on the rights of LGBT children or same-sex families. In other words, it is not a useful exercise to look at how many members come from States that criminalise same-sex relationships and try and correlate this to how many Concluding Observations address LGBT issues during the candidature of those members.

For the above reasons, it is not possible to conclude whether a change in the Committee's membership was responsible (in full or part) for the increased references to LGBT issues.

*(c) Growing public awareness*

Another possible explanation for the Committee engaging more with the rights of LGBT children and children in same-sex families, is the growing awareness and sensitivity to these issues in the general community. The Committee members are not

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<sup>124</sup> Sandberg, supra n 20; Sandberg, supra n 41.

impervious to social changes. In fact, under the ‘living instrument’ interpretative approach to international human rights law,<sup>125</sup> Committee members should be mindful of changes to contemporary attitudes, as has been the case with LGBT issues.

A longitudinal study into the acceptance of same-sex relationships conducted by the Pew Research Centre,<sup>126</sup> between 2002 and 2019, found a double-digit increase in respondents, in 10 states, agreeing with the statement that ‘homosexuality [sic] should be accepted by society.’<sup>127</sup> Furthermore, tragic events, like the killing of 49 people and wounding of 53 others in the Pulse, a gay nightclub in Orlando, in 2016, put a spotlight on violence targeting LGBT people. In addition, 21 State Parties attained marriage equality during the study period<sup>128</sup> and 13 State Parties decriminalised same-sex sexual activity.<sup>129</sup> All these developments illustrate that public awareness of LGBT issues increased during the study period, and public attitudes became more supportive and accepting, in many parts of the world. It thus appears that the Committee’s awareness and attitudes to the discrimination and inequality that LGBT people face, mirrors societal changes.

Irrespective of the cause(s), it is encouraging to see that the Committee is discussing SOGI based discrimination more often in its Concluding Observations. The benefits of such an increase, however, will only be realised if the Committee maintains this degree of focus. It is, therefore, concerning to note that references to SOGI in the Committee’s Concluding Observations dropped in 2017, 2018 and 2019 from its high in 2015 and 2016. Meaningful change will only be possible if State

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<sup>125</sup> Theil, ‘Is the “Living Instrument” Approach of the European Court of Human Rights Compatible with the ECHR and International Law?’ (2017) 23(3) *European Public Law* 587 at 603.

<sup>126</sup> Poushter and Kent, *The Global Divide on Homosexuality Persists*, Pew Research Centre (2020).

<sup>127</sup> The United Kingdom, Canada, Argentina, the United States, Mexico, Japan, South Africa, South Korea, India and Kenya: see *ibid* at 4.

<sup>128</sup> Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012–2017), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), Luxembourg (2015), the United States (2015), Ireland (2015), Greenland (2016), Colombia (2016), Finland (2017), Faroe Islands (2017), Malta (2017), Germany (2017), Australia (2017), Austria (2019), Taiwan (2019) and Ecuador (2019).

<sup>129</sup> Fiji (2010), Lesotho (2012), São Tomé and Príncipe (2012), Northern Cyprus (2014), Palau (2014), Mozambique (2015), Belize (2016), Nauru (2016), Seychelles (2016), India (2018), Trinidad and Tobago (2018), Angola (2019) and Botswana (2019).

Parties know they will be held to account about their efforts to protect the rights of LGBT children and children with same-sex parents.

(ii) *Greater inclusivity*

The language used to address SOGI is important because language has the power to reinforce heteronormative binaries and stereotypes, or break them down.<sup>130</sup> Language has played a role in ‘othering’ LGBT persons through medicalising and pathologising SOGI.<sup>131</sup> The Committee’s trend towards using more appropriate and inclusive language, is worth noting.

Between 2010 and 2013, the Committee barely referred to SOGI in its Concluding Observations. When it did, it was generally a reference to ‘sexual orientation’ on its own, i.e. without also referencing ‘gender identity’ (see Figure 5 below).

SOGI term	2010 (n=23)	2011 (n=16)	2012 (n=23)	2013 (n=17)	2014 (n=16)	2015 (n=24)	2016 (n=27)	2017 (n=20)	2018 (n=17)	2019 (n=17)	Total (n=200)
Bisexual	0	1	0	0	6	13	17	10	6	7	60
Diverse gender	0	0	0	0	0	0	0	0	0	0	0
Gay	0	1	0	0	6	13	17	10	6	7	60
Gender Identity	0	0	1	1	2	5	7	0	3	4	23
Homosexual	0	1	0	0	2	2	0	0	1	0	6
Lesbian	0	1	0	0	6	13	17	10	6	7	60
Lesbian, gay, bisexual and transgender	0	0	0	0	2	3	1	3	0	1	10
Lesbian, gay, bisexual, transgender and intersex	0	0	0	0	4	8	15	6	6	5	44
LGBT acronyms	0	0	0	0	2	2	1	0	0	1	6
Queer	0	0	0	0	0	0	0	0	0	0	0
Same sex	0	0	0	1	2	1	3	1	1	1	10
Sexual orientation	0	1	2	2	4	9	6	1	3	3	31
Transgender	0	1	0	0	6	13	17	10	7	7	61

<sup>130</sup> Gerber and O’Hara, ‘The Power of Language’ in Gerber (ed), *Worldwide Perspectives on Lesbians, Gays, and Bisexuals* (2020) 18.

<sup>131</sup> See Konnoth, *supra* n 4 at 264.

Total (Unique)	0	3	2	2	6	14	18	10	9	9	73
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Figure 5: Select LGBT terms used during the study period

The Committee’s preference for the phrase ‘sexual orientation’ may have been an attempt to keep their concerns and recommendations broad and avoid using ‘highly political’ sexual identity labels.<sup>132</sup> However, references to ‘sexual orientation’ without including gender identity, as was the case in the Concluding Observations of Denmark (2011), the Republic of Korea (2012) and Slovenia (June 2013),<sup>133</sup> is inappropriate as it renders transgender children invisible. The omission of ‘gender identity’ in the Concluding Observations of Slovenia is particularly problematic as the Committee used the more inclusive phrase ‘sexual orientation and gender identity’ in its Concluding Observations of Australia in 2012 and Guyana in February 2013,<sup>134</sup> demonstrating the Committee’s awareness of this more inclusive phrase. Specific and inclusive language is necessary to describe a diverse population and reflect a growing awareness and sensitivity to the ‘dispersed nature of sexuality’.<sup>135</sup> It is commendable that the Committee has increased its use of more inclusive language over the 10-year period examined.

Prior to 2014, there was only one reference to ‘lesbian, bisexual, gay and transgender children’. This was in the Concluding Observations regarding New Zealand.<sup>136</sup> In early 2014, the Committee used the phrase ‘lesbian, gay, bisexual, transgender and intersex’ in its Concluding Observations regarding Hungary, Kyrgyzstan, Venezuela, and the Russian Federation.<sup>137</sup> Since then, the phrase

<sup>132</sup> Gerber and Gory, supra n 53 at 12.

<sup>133</sup> Committee on the Rights of the Child, Concluding observations regarding Denmark, 7 April 2011, CRC/C/DNK/CO/4 at 6; Committee on the Rights of the Child, Concluding observations regarding Republic of Korea, supra n 35 at 7; Committee on the Rights of the Child, Concluding observations regarding Slovenia, supra n 97 at 6.

<sup>134</sup> Committee on the Rights of the Child, Concluding observations regarding Australia, supra n 66 at 7; Committee on the Rights of the Child, Concluding observations regarding Guyana, 18 June 2013, CRC/C/GUY/CO/2-4 at 6.

<sup>135</sup> Gerber and Gory, supra n 53 at 11.

<sup>136</sup> Committee on the Rights of the Child, Concluding observations regarding New Zealand, supra n 99 at 5.

<sup>137</sup> Committee on the Rights of the Child, Concluding observations regarding Hungary, supra n 98 at 4; Committee on the Rights of the Child, Concluding observations regarding Kyrgyzstan, 7 July 2014,

‘lesbian, gay, bisexual, transgender and intersex’ was adopted and used with greater frequency. In fact, between 2014 and 2016, the phrase ‘lesbian, gay, bisexual, transgender and intersex’ was used in 25 per cent (2014), 33.33 per cent (2015) and 55.56 per cent (2016) of Concluding Observations that discussed LGBT children and children with same-sex parents.

To summarise the Committee demonstrated a commitment to promoting the rights of LGBT children and children with same-sex parents by the increased attention it paid to SOGI. The Committee also expanded *who* it considers in need of protection under the CRC by including gender identity as potential grounds for discrimination and transgender children as explicit rights holders. Through awareness raising and greater inclusivity, the Committee is challenging heteronormative norms and stereotypes among the State Parties under review, and in the international community more broadly.

### **C. Areas for improvement in the Concluding Observations**

Notwithstanding the positive aspects of the Committee’s work acknowledged in the preceding section, there is still room for improvement. The Committee can improve its Concluding Observations by providing more specific and tailored recommendations regarding LGBT children and children with same-sex parents, rather than ‘bundling’ complex and disparate groups of children together. The Committee should also be consistent when considering the domestic legislation within State Parties. There were occasions where discriminatory legislation required amendment or repeal, but the Committee failed to make this recommendation. There were also instances where concerns were raised about violations of the rights of LGBT children in Alternative Reports, which were not addressed by the Committee in its Concluding Observations. These areas for improvement are discussed in more detail below.

#### *(i) ‘Bundling’ of diverse groups*

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CRC/C/KGZ/CO/3-4 at 4; Committee on the Rights of the Child, Concluding observations regarding Bolivian Republic of Venezuela, 13 October 2014, CRC/C/VEN/CO/3-5 at 7; Committee on the Rights of the Child, Concluding observations regarding the Russian Federation, supra n 27 at 6.

The Committee has a propensity to combine or ‘bundle’ minority groups together for the purposes of making recommendations. There were 33 Concluding Observations where a recommendation included LGBT children or children with same-sex parents with a long list of other groups of vulnerable children. For example, in its Concluding Observations regarding Kyrgyzstan, the Committee recommended that,

the State party take urgent measures to prevent discrimination against children in marginalized and disadvantaged situations, such as children belonging to minority groups, including Lyuli children, children in care institutions, children with disabilities, girl children in rural areas, children of migrant workers, children not registered as residents and children belonging to the LGTBI group ....<sup>138</sup>

This recommendation is particularly troubling as the reference to ‘the LGTBI group’ implies that being LGBT is like joining a club, rather than being a core part of the child’s sexual or gender identity.

Similarly, in the Concluding Observation relating to New Zealand, the Committee recommended,

Strengthening its measures to combat negative attitudes among the public and other preventive activities against discrimination and, if necessary, taking affirmative action for the benefit of children in vulnerable situations, such as Maori and Pasifika children, children belonging to ethnic minorities, refugee children, migrant children, children with disabilities, lesbian, bisexual, gay, transgender and intersex children and children living with persons from those groups.<sup>139</sup>

In the above examples, the Committee ‘bundles’ diverse groups of children together under the principle of non-discrimination. There are several problems with such an approach. First, it means the recommendation is very broad, which makes it harder to effectively implement and evaluate any implementation.

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<sup>138</sup> Committee on the Rights of the Child, Concluding observations regarding Kyrgyzstan, supra n 137 at para [19].

<sup>139</sup> Committee on the Rights of the Child, Concluding observations regarding New Zealand, 21 October 2016, CRC/C/NZL/CO/5 at 5.

This practice of bundling is not unique to the Children’s Rights Committee. A similar concern was raised in an analysis of the Concluding Observations of the Human Rights Committee, where several of the recommendations were found to be ‘general, vague and offering little guidance to the State Party under review.’<sup>140</sup> This is despite a report by the United Nations High Commissioner for Human Rights encouraging treaty bodies to provide ‘more focussed Concluding Observations’ containing ‘concrete and achievable outcomes’.<sup>141</sup> The findings from the present analysis, combined with Gerber and Gory’s earlier analysis, suggest a lack of specific recommendations may be a broader issue effecting a number of treaty committees.

Second, the diversity between the groups of children referred to in the Committee’s recommendations is enormous. The issues and challenges faced by these groups of children are distinct and, in many cases, unique. Arguably, the individuals within these groupings would have more in common with the majority than with each other. Effectively addressing the discrimination faced by marginalised groups requires a targeted and nuanced approach, not a ‘one size fits all’ approach, which may further marginalise the less politically organised of these groups.<sup>142</sup>

Third, ‘bundling’ children together into groups may give the impression (explicitly or implicitly) that all within a group have homogeneous stories, experiences, concerns, desires and face the same challenges, or that their lives can be distilled down to a common experience. This is particularly problematic among the LGBT community, which covers an enormous diversity of people who do not conform with the heteronormative paradigm. Even within each subgroup (for example, gays and lesbians) it is fallacious to think that all that self-identify with this label have a common lived experience.

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<sup>140</sup> See Gerber and Gory, *supra* n 53 at 15.

<sup>141</sup> Pillay, *Strengthening the United Nations Human Rights Treaty Body System*, OHCHR (2012) at 4.2.6, available at: [www.ishr.ch/sites/default/files/article/files/HCRReportTBStrengthening.pdf](http://www.ishr.ch/sites/default/files/article/files/HCRReportTBStrengthening.pdf) [last accessed 3 March 2021]; see also Gerber and Gory, *supra* n 53 at 15.

<sup>142</sup> See generally McGill, ‘SOGI - So What: Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 *Canadian Journal of Human Rights* 1 at 4, 24.

(ii) *Consistent consideration of anti-discrimination legislation*

Anti-discrimination legislation that prohibits discrimination on the basis of SOGI has a determinative effect on an individual's expression of their rights and freedoms within State Parties, as well as influencing the attitudes of other citizens. Yet, many State Parties have not enacted legislation that protects the rights of LGBT children and children with same-sex parents. In many of its Concluding Observations, the Committee failed to comment on the absence of such legislation.<sup>143</sup> Notable examples include:

- Armenia, Azerbaijan and Turkey do not have anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation.<sup>144</sup> It is unclear whether the States' non-discrimination legislation extends to gender identity, either in substance or its implementation.<sup>145</sup> The Committee failed to raise *any* issue regarding the rights of LGBT children with these State Parties during the study period.<sup>146</sup> The Committee's lack of consistency is evident in the fact that the Committee raised inadequacies in the lack of legislative protection against discrimination on the basis of SOGI, in its Concluding Observations for Australia, Republic of Korea, Guyana and Slovenia during the same time period (2012-2013).<sup>147</sup>
- In Lithuania, a law to ban 'propaganda' of homosexuality and bisexuality in schools and other places accessible to young people due to its 'detrimental'

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<sup>143</sup> See Virzo, *supra* n 4 at 79–80 who notes that 'the decision to not call on certain State parties to protect LGBTI minors can be traced back to the last recital in the Preamble to the Convention, which emphasizes "the importance of the traditions and cultural values of each people"'. This may serve to explain why the Committee failed to make this recommendation. However, Virzo notes that the balancing between 'dominant values and traditions of a certain Party' and fundamental rights, the CRC Committee favours the latter.

<sup>144</sup> Council of Europe, *supra* n 8 at 43.

<sup>145</sup> *Ibid* at 44.

<sup>146</sup> Committee on the Rights of the Child, Concluding observations regarding Armenia, 8 July 2013, CRC/C/ARM/CO/3-4; Committee on the Rights of the Child, Concluding observations regarding Azerbaijan, 12 March 2012, CRC/C/AZE/CO/3-4; Committee on the Rights of the Child, Concluding observations regarding Turkey, 20 July 2012, CRC/C/TUR/CO/2-3.

<sup>147</sup> Committee on the Rights of the Child, Concluding observations regarding Australia, *supra* n 66 at 7; Committee on the Rights of the Child, Concluding observations regarding Republic of Korea, *supra* n 35 at 7; Committee on the Rights of the Child, Concluding observations regarding Guyana, *supra* n 134 at 6; Committee on the Rights of the Child, Concluding observations regarding Slovenia, *supra* n 97 at 6.



effect on children was passed in 2009.<sup>148</sup> In 2011, the Lithuanian Parliament introduced an amendment to the *Code of Administrative Offences*, which criminalised the ‘public promotion of homosexual relations’ and provided for the imposition of fines ranging from €580 to €2,900 (US\$648 to US\$3249).<sup>149</sup> In 2013, the Committee published its Concluding Observations regarding Lithuania and made no mention of these harmful laws or any other concerns affecting LGBT children within the State.<sup>150</sup> This is even more surprising given the Human Rights Committee published its Views on *Fedotova v Russian Federation* in 2012, finding that the petitioners conviction for ‘public actions aimed at propaganda of homosexuality among minors’ violated her ‘her right to freedom of expression, read in conjunction with her right to freedom from discrimination’.<sup>151</sup> One would expect the Committee to be aware of this View and therefore attuned to this human rights violation.

- In the Committee’s Concluding Observations regarding Tanzania, sexual orientation was discussed in relation to access to healthcare and HIV treatment.<sup>152</sup> The Committee also recommended a public education campaign to reduce discrimination towards children based on their sexual orientation.<sup>153</sup> However, no recommendation was made to decriminalise same-sex sexual conduct.<sup>154</sup>

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<sup>148</sup> Child Rights International Network, ‘Lithuania: President’s Veto of Law on Homosexuality Is Overturned’, available at: <https://archive.crin.org/en/library/news-archive/lithuania-presidents-veto-law-homosexuality-overturned> [last accessed 3 March 2021].

<sup>149</sup> Child Rights International Network, ‘Lithuania: Euro-Politicians Again Hit Out at Anti-Gay Proposals by Lithuanian MPs’, available at: <https://archive.crin.org/en/library/news-archive/lithuania-euro-politicians-again-hit-out-anti-gay-proposals-lithuanian-mps> [last accessed 3 March 2021].

<sup>150</sup> Committee on the Rights of the Child, Concluding observations regarding Lithuania, 30 October 2013, CRC/C/LTU/CO/3-4.

<sup>151</sup> Gerber and Gory, *supra* n 53 at 30; see also McGoldrick, *supra* n 115 at 630, 654–5; Viljoen, ‘Minority Sexual Orientation as a Challenge to the Harmonised Interpretation of International Human Rights Law’ in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law* (2017) 156 at 184.

<sup>152</sup> Committee on the Rights of the Child, Concluding observations regarding United Republic of Tanzania, *supra* n 77 at para 56, 57(d).

<sup>153</sup> *Ibid* at para 57(e).

<sup>154</sup> Nolan, *supra* n 109 at 69; see also Gerber, ‘Countries Where Homosexuality Is Still a Crime’, *Countries that still criminalise homosexuality*, 12 December 2013, available at: <https://antigaylaws.org/all-countries-alphabetical/> [last accessed 3 March 2021].

A lack of legislative protection from discrimination on the basis of SOGI and the continued criminalisation of same-sex relationships promotes an environment where stigma and prejudice against LGBT children, can flourish. The Committee cannot be expected to have a detailed knowledge of the domestic legislation in all of the 170 State Parties that were reviewed over the study period, such that specific recommendation to amend legislative provisions can be made to protect the rights of LGBT children. This highlights the important role that civil society, and specifically, NGOs, play in submitting Alternative Reports that bring such deficiencies to the attention of the Committee.<sup>155</sup> In respect of examples cited above, with a few exceptions,<sup>156</sup> either no Alternative Report was filed, or the reports made no mention of LGBT children or children with same-sex parents.<sup>157</sup> If this situation persists then the Committee's ability to encourage State Parties to effect structural change through legislative reform will be severely impaired.

*(iii) Greater receptivity to alternative reports*

The previous section highlighted the reliance the Committee has on civil society and NGOs to bring concerns regarding the violation of the rights of LGBT children and children in same-sex families to the Committee's attention. There were, however, instances during the study period where NGOs raised concerns regarding LGBT issues in their Alternative Reports,<sup>158</sup> but these concerns were not taken up by the

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<sup>155</sup> On the role of arguments presented to UN treaty bodies by counsel or amici curiae, see Viljoen, supra n 151 at 189.

<sup>156</sup> For Albania, no terms relating to LGBT children were found in its Concluding Observation. Although one of the Alternative Reports referred to 'sexual orientation and gender identity' the reference occurred in the Annex, which repeated the disability references across the various treaty bodies' Concluding Observations with respect to Albania; in this case the Concluding Observations of the CEDAW Committee, 46th session, 2010, CEDAW/C/ALB/CO/3. Furthermore, the reference to 'sexual orientation and gender identity' did not relate to legal gender recognition. In respect of Lithuania, two Alternative Reports used the term 'sexual orientation', although one reference was in an annexure quoting the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women and the other in relation to access to youth-friendly sexual and reproductive health services. Thus, neither of the Alternative Reports regarding Lithuania raised concerns about the problematic legislation discussed previously. In Bangladesh, one Alternative Report recommended 'further focus and resources to combat violence, stigma and discrimination against homosexual [sic] boys' and noted that the State Party has failed to address discrimination against transgender children in schools. However, the Child Rights Advocacy Coalition in Bangladesh did not raise the criminalisation of same-sex relations as an issue.

<sup>157</sup> No Alternative Reports were filed for Turkey, Ukraine and Yugoslav Republic of Macedonia during the report period.

<sup>158</sup> Alternative Reports includes documents filed in the UN Treaty Base under 'Info from Civil Society

Committee in its Concluding Observations. Or, a concern regarding LGBT rights was raised in the Concluding Observations but the nature of the concern was different to that identified in the Alternative Report. Although it may seem too onerous to expect the Committee to address all human rights issues in the Alternative Reports submitted, the number of Alternative Reports received by the Committee is generally quite small. During the study period, the average number of Alternative Reports filed per Concluding Observation was less than four.

In total, there were 18 Concluding Observations which did not discuss LGBT rights, despite at least one Alternative Report doing so.<sup>159</sup> For example, during the 2013 periodic review of Malta, two of the four Alternative Reports raised LGBT issues, with one of these reports dedicating a substantial section to LGBTI perspectives.<sup>160</sup> Yet, the 2013 Concluding Observations regarding Malta did not mention LGBT children.<sup>161</sup> Similarly, the Committee's Concluding Observations for China did not contain any reference to LGBT rights, in 2013,<sup>162</sup> notwithstanding that three Alternative Reports raised concerns about the rights of LGBT children.

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Organizations', 'Info from National Human Rights Institutions' ('NHRIs'), 'Info from NHRI's (for List of Issues ["LOIs"])' and 'Info from UN Agencies'. These search criteria captured documents titled 'alternative reports' but also documents titled 'supplementary reports', 'complimentary reports', 'comments on State Parties', written replies and list of issues, and other less descriptive titles. To be included in the data set the Alternative Report must be available in English. The authors acknowledge that the requirement for all Alternative Reports to be published in English means that non-English speaking countries are under-represented, which is a limitation of this study. Links to Alternative Reports in the UN Treaty Base that resulted in '404 Not Found' error messages were removed from the dataset.

<sup>159</sup> The Concluding Observations were for the following States: Albania (2012), Austria (2012), Bangladesh (2015), Bulgaria (2016), China (including Hong Kong and Macao) (2013), Cook Islands (2012), Costa Rica (2011), Cyprus (2012), Estonia (2017), Georgia (2017), Germany (2014), Greece (2012), Liberia (2012), Lithuania (2013), Malawi (2017), Montenegro (2018), Namibia (2012) and the Syrian Arab Republic (2019).

<sup>160</sup> Aditus Foundation et al, *Submissions to the Committee on the Rights of the Child (Consideration of State Reports - Malta)* (2012) at 10–20, available at: [www.archive.crin.org/en/docs/Malta\\_Aditus%20Foundation\\_CRC%20Report.pdf](http://www.archive.crin.org/en/docs/Malta_Aditus%20Foundation_CRC%20Report.pdf) [last accessed 3 March 2021]; the other Alternative Report, International Disability Alliance, *Suggestions for Disability-Relevant Questions to Be Included in the List of Issues for Pre-Sessional Working Group, CRC 61st Session* Committee on the Rights of the Child (2012), discussed the legislative protections against discrimination within the state report, which extended to sexual orientation.

<sup>161</sup> Committee on the Rights of the Child, Concluding observations regarding Malta, 18 June 2013, CRC/C/MLT/CO/2.

<sup>162</sup> Committee on the Rights of the Child, Concluding observations regarding China (including Hong Kong and Macau Special Administrative Regions), 29 October 2013, CRC/C/CHN/CO/3-4.

The periodic review of Jamaica revealed another ‘gap’ between the Concluding Observations and what was reported to the Committee via the Alternative Reports. Ahead of Jamaica’s third and fourth periodic review, an Alternative Report submitted by Jamaican’s for Justice, advised the Committee that the *2011 Charter of Fundamental Rights and Freedoms* does not protect citizens from discrimination, including discrimination based on sexual orientation.<sup>163</sup> It also noted that ‘homosexual intercourse is criminalized and carries a prison sentence’ in Jamaica and as such, discrimination is widespread and resulting in potentially violent attacks.<sup>164</sup> The Concluding Observations contained no recommendations relating to discrimination against LGBT children and children with same-sex parents, and did not encourage the State to decriminalise same-sex sexual conduct. The only recommendation regarding LGBT rights had to do with improved data collection to address gaps relating to LGBT children, among other marginalised groups.<sup>165</sup> It is unclear why the Committee sometimes fails to take up the concerns regarding the rights of LGBT children raised in Alternative Reports. It is possible that in prioritising the various issues raised by NGOs,<sup>166</sup> the Committee did not feel that the rights of LGBT children and children with same-sex parents were as pressing as other concerns. If true, this represents a missed opportunity to raise these issues with the State Party. Protecting and promoting the rights of one vulnerable and marginalised group need not be at the expense of another.

This section has highlighted three areas where the Committee could improve its Concluding Observations, namely, by addressing the specific needs of marginalised and vulnerable children separately, thereby avoiding grouping these children together; by being responsive to Alternative Reports that consider the anti-discrimination legislation (or lack thereof) within the State Party and other reforms required to better promote and protect the rights of LGBT children and children with

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<sup>163</sup> Jamaicans for Justice Ltd, *Non-Governmental Organisations Report to the UN Committee on the Rights of the Child* (2015) at 6, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRC%2fNGO%2fJAM%2f18947&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRC%2fNGO%2fJAM%2f18947&Lang=en) [last accessed 3 March 2021].

<sup>164</sup> Ibid.

<sup>165</sup> Committee on the Rights of the Child, Concluding observations regarding Jamaica, 10 March 2015, CRC/C/JAM/CO/3-4 at [16]-[17].

<sup>166</sup> Sandberg, *supra* n 20 at 342.

same-sex parents; and by improving the take up of LGBT issues that are raised in Alternative Reports. By embracing these recommendations, the Committee will improve the depth and consistency of its Concluding Observations and make a meaningful contribution to the lives of LGBT children and children with same-sex parents around the world.

#### 4. GENERAL COMMENTS

*There is nothing we can say to the world's children that can convince them the world needs to be the way it is. That means we must do everything we can to close the gap between the world as it is and the world as it should be.*<sup>167</sup>

General Comments<sup>168</sup> provide authoritative interpretations of treaty provisions or guidance on how State Parties should implement a treaty. Although General Comments are not enforceable *per se*,<sup>169</sup> they have achieved a quasi-judicial status as statements reflecting a committee's expectations of State Parties under the treaty.<sup>170</sup> As such, General Comments are somewhere between normative and descriptive instruments articulating State Parties' obligations under a treaty.<sup>171</sup>

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<sup>167</sup> UN Secretary-General Ban Ki-Moon's address to the General Assembly in New York: see United Nations, "Our Mission Is Possible", Secretary-General Tells General Assembly, Urges Shift from "Silos to Synergy" in Sustainable Development Drive towards Ending Poverty", 28 September 2015, available at: <https://www.un.org/press/en/2015/sgsm17133.doc.htm> [last accessed 3 March 2021].

<sup>168</sup> Note that some treaty committees, such as the CERD and CEDAW committees, call their General Comments, General Recommendations.

<sup>169</sup> See Gerber, Kyriakakis and O'Byrne, 'General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What Is Its Standing, Meaning and Effect' (2013) 14(1) *Melbourne Journal of International Law* 93 at 6–8; Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in Boisson de Chazournes and Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001) 764 at 763, 764; Virzo, *supra* n 4 at 62; see also Gerber and Gory, *supra* n 53 at 18.

<sup>170</sup> Otto, 'Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women' (2002) 14 *Canadian Journal of Women and the Law* 1 at 11; Pillay, *supra* n 141 at 82; Virzo, *supra* n 4 at 64, 65; see also Verheyde and Goedertier, *supra* n 30 at 40–1.

<sup>171</sup> See Gerber and Gory, *supra* n 53 at 17–18.

The interpretative role of the General Comments is reflected in the fact that the Committee referred State Parties to a General Comment in 100 per cent of its Concluding Observations between 2010-2020. This is a clear indication that the Committee expects State Parties to follow its interpretation of the CRC as set out in its General Comments.

### **A. General Comments Containing References to LGBT Rights**

The Committee published its first General Comment in 2001, and is currently working on its 25<sup>th</sup> one, which focuses on children's rights in relation to the digital environment.<sup>172</sup> Of the 25 General Comments published by the Committee, including the Draft General Comment, 11 (or 44 per cent) refer to SOGI related term(s) (see Figure 6).<sup>173</sup>

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<sup>172</sup> Committee on the Rights of the Child, Draft General Comment 25 on children's rights in relation to the digital environment, 13 August 2020. See <https://www.ohchr.org/EN/HRBodies/CRC/Pages/GCChildrensRightsRelationDigitalEnvironment.aspx>.

<sup>173</sup> Committee on the Rights of the Child, General Comment No 3 on HIV/AIDS and the rights of the child, 17 March 2003; Committee on the Rights of the Child, General Comment No 4, supra n 33; Committee on the Rights of the Child, General Comment No 13, supra n 41; Committee on the Rights of the Child, General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013; Committee on the Rights of the Child, General Comment No 15, supra n 33; Committee on the Rights of the Child, General Comment 20 on the implementation of the rights of the child during adolescence, 22 April 2016; Committee on the Rights of the Child, General Comment No 21 on children in street situations, 21 June 2017; Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017; Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017; Committee on the Rights of the Child, General Comment No 24 (2019) on children's rights in the child justice system, 21 June 2017; Committee on the Rights of the Child, General Comment No 21, supra n 172.

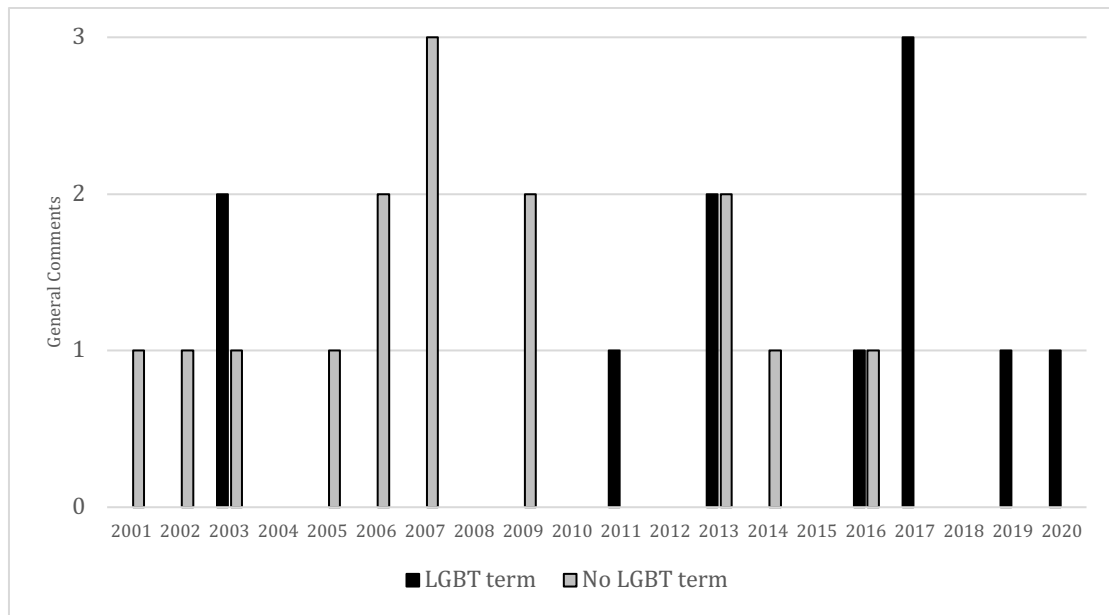


Figure 6: Committee's General Comments Containing a LGBT term

As Figure 7 below illustrates, the range of LGBT terms used by the Committee in its General Comments have become more diverse and inclusive in recent times. This is consistent with the analysis of the Concluding Observations. 2016 was a particularly notable year, due to range of LGBT terms used in one General Comment (General Comment No 20 on the implementation of the rights of the child during adolescence). By comparison, in 2017, although the range of LGBT terms used by the Committee was higher, this was spread over three General Comments.

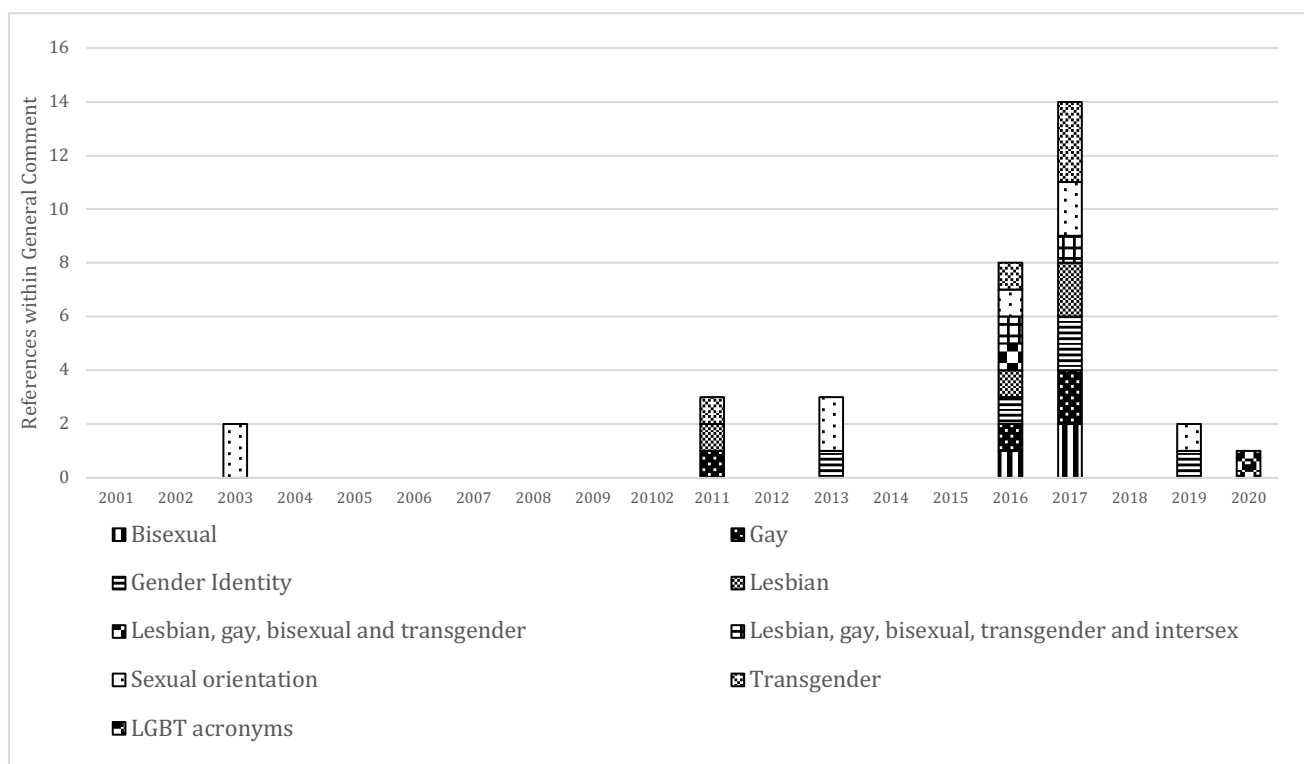


Figure 7: LGBT Terms Used by the Committee in its General Comments

The Committee’s first General Comment was directed at the aims of education, and would therefore have been an ideal opportunity to address the rights of LGBT children.<sup>174</sup> Given that it is within schools that many LGBT children and children with same-sex parents face discrimination, it is a shame that the Committee was silent about the importance of education that promotes respect for all persons, regardless of their sexual orientation or gender identity. The Committee stated that education which discriminated against children on the basis of their gender, disability or HIV/AIDS status was inconsistent with Article 29 of the CRC, but stopped short of explicitly including sexual orientation and gender identity as prohibited grounds of discrimination within education systems.<sup>175</sup> Ideally, General Comment No 1 would have recommended that State Parties ensure their educational systems teach students about the diversity of genders and sexualities. This is consistent with the Committee’s statements at paragraph 4 of the General Comment, which notes that educational

<sup>174</sup> Committee on the Rights of the Child, General Comment No 1 on the aims of education (Art 29), 17 April 2001.

<sup>175</sup> Ibid at 4.



systems should encompass a wide range of values.<sup>176</sup> Although the CRC does not explicitly refer to SOGI, Article 29(1)(d) of the CRC requires State Parties to prepare children ‘for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin’.<sup>177</sup> In the same way that ‘other status’ in Article 2 of the CRC has been extended to include sexual orientation and gender identity,<sup>178</sup> the phrase ‘all peoples’ in Article 29(1)(d) could have been explicitly extended to SOGI in General Comment No 1. One would think that today, the Committee would approach this General Comment differently to how it did in 2001, and combatting SOGI based discrimination in education would feature prominently.

General Comment No 12, published in 2009, is another example of the Committee not addressing SOGI issues, when they were clearly relevant. This General Comment focuses on the right of the child to be heard under Article 12 of the CRC. It acknowledges that the right to be heard is linked to other provisions of the CRC, including Article 2 (non-discrimination) and Article 3 (best interests of the child).<sup>179</sup> It also discusses the implementation of the right to be heard in the context of health care.<sup>180</sup> All of these rights are of particular relevance to LGBT children and children with same-sex parents, and it is therefore disappointing, that the Committee did not discuss LGBT issues at all.

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<sup>176</sup> Ibid at 2- 3 [4].

<sup>177</sup> Ibid at para 4.

<sup>178</sup> See Committee on the Rights of the Child, General Comment No 4, supra n 33 at para 6 (citing sexual orientation); Committee on the Rights of the Child, General Comment No 15, supra n 33 at para 8 (citing sexual orientation and gender identity); see also Virzo, supra n 4 at 72–3 on how a literal interpretation of Article 2 supports the inclusion of sexual orientation and gender identity within the meaning of ‘other status’, which is not displaced by a teleological or progressive interpretation. Furthermore, the object and purpose of the CRC supports interpreting ‘other status’ as including sexual orientation and gender identity, as does ‘the practice of principal and subsidiary organs of the UN human rights committees and regional international courts’ that have included SOGI as ‘grounds protected from discrimination’ irrespective of the actual wording of the treaty; Persad, supra n 20 at 360.

<sup>179</sup> Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, 20 July 2009 at 17, 18.

<sup>180</sup> Ibid at 23.

General Comment No 17 (2013) on the right to play and leisure similarly does not refer to LGBT children and children with same-sex parents despite identifying many vulnerable groups of children, including: girls, children living in poverty, children with disabilities, children in institutions, children from Indigenous and minority communities and children in situations in conflict, humanitarian and natural disasters.<sup>181</sup> This omission in General Comment No 17 is problematic because LGBT children and children with same-sex parents are at a high risk of experiencing bullying and harassment in the playground.<sup>182</sup>

Notwithstanding these omissions, the CRC Committee is at the forefront of UN treaty committees in the depth and breadth of attention it has given to protecting the rights of LGBT children in its General Comments. As Figure 8 illustrates, the Committee has published the highest number of General Comments referencing SOGI issues and LGBT children. This is particularly impressive as the Committee only has 25 General Comments, which is considerably fewer than other committees; the Committee on the Elimination of Discrimination against Women and the Committee (‘CEDAW’) has 37 General Comments, the Committee on the Elimination of Racial Discrimination 36, and the Human Rights Committee 35.

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<sup>181</sup> Committee on the Rights of the Child, General Comment No 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Art 31), 17 April 2013 at 8–9; see also Sandberg, *supra* n 20 at 340.

<sup>182</sup> See Council of Europe, *supra* n 8 at 114–5.

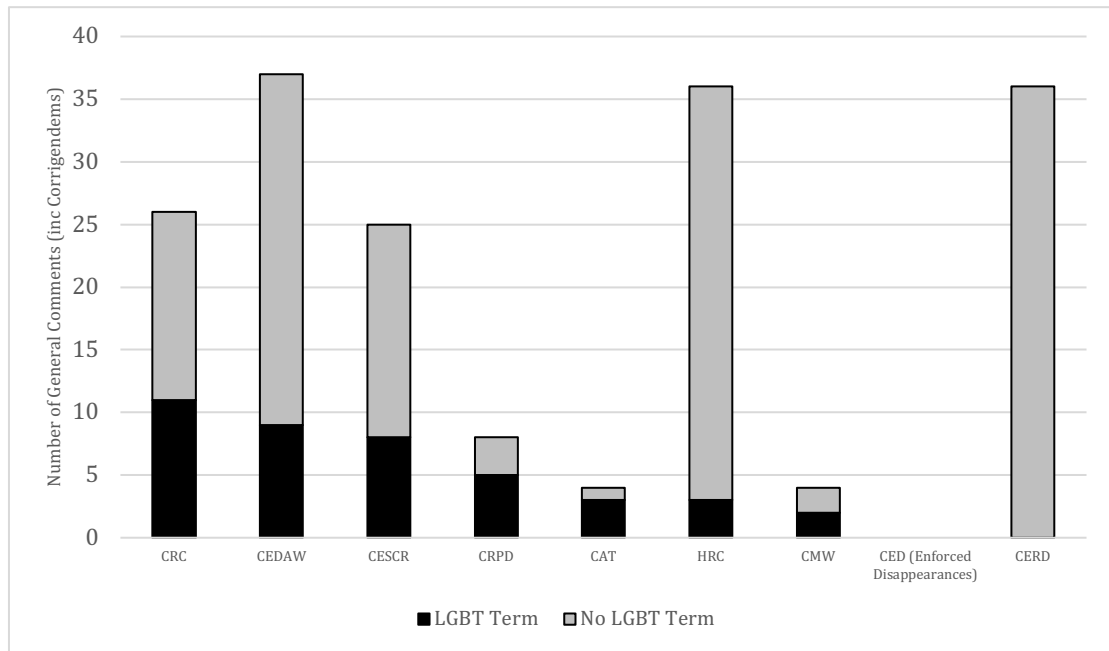


Figure 8: General Comments by UN Treaty Committee since 1972

Since 1972, when the first General Comment was published by the CERD Committee, only 41 out of 176 General Comments (or 23.2 per cent) contain a SOGI related term. The first General Comment to refer to the rights of LGBT persons was in 2000, when the Committee on the Economic, Social and Cultural Rights published General Comment 14, in which it stated that the ICESCR proscribes discrimination in access to health care that is based on sexual orientation.<sup>183</sup> It is encouraging to note that references to LGBT rights in General Comments has become more prevalent since 2000, evidencing a greater awareness of issues affecting LGBT persons, and willingness to confront them, across all UN treaty committees (see Figure 9 below).

<sup>183</sup> Committee on Economic, Social and Cultural Rights, General Comment No 14 on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2000 at 6.

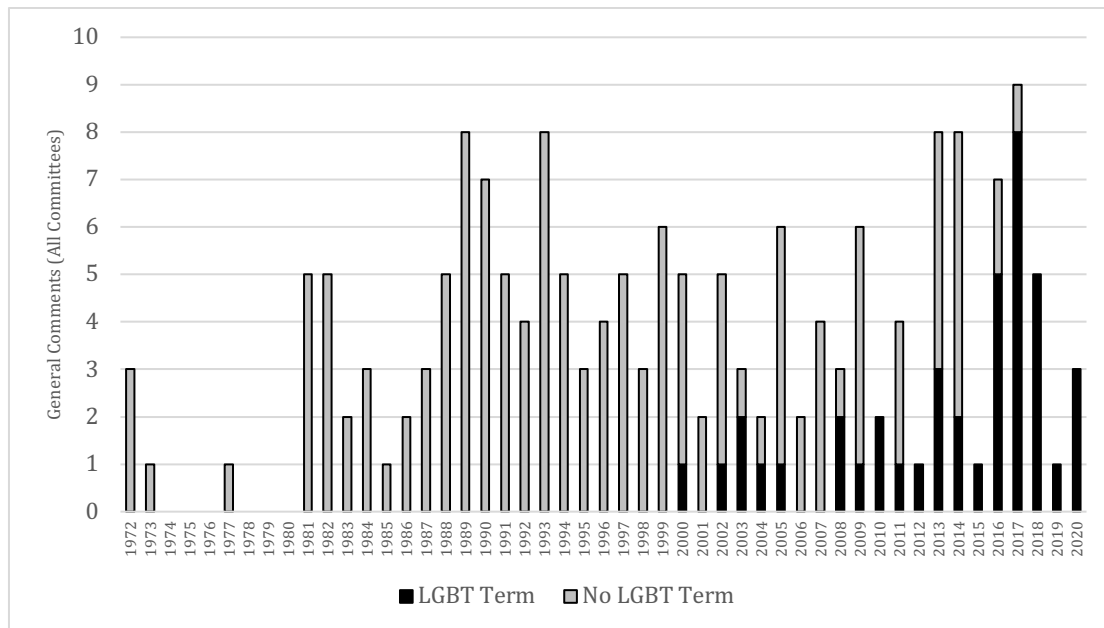


Figure 9: General Comments from all UN Treaty Committees Containing LGBT term

While some committees may believe that LGBT rights is beyond their remit, the growing discourse on intersectional and compounding forms of discrimination demonstrates that this is not the case.<sup>184</sup>

The Committee’s General Comments that reference LGBT or SOGI related issues are analysed below (in chronological order), including discussions about how the Committee could improve its consideration of LGBT rights in its General Comments.

(i) *General Comment No 3 on HIV/AIDS and the rights of the child (2003)*

General Comment No 3 is the first time that the Committee used a SOGI related term in its General Comments.<sup>185</sup> Specifically, the Committee expressed concern about how discrimination based on sexual orientation can limit ‘access to preventative measures

<sup>184</sup> See, for example, Committee on the Elimination of Discrimination against Women, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014 at para 6, 16; Committee on the Elimination of Discrimination against Women, General Recommendation No 33 on women’s access to justice, 3 August 2015 at para 3, 8, 10; see especially Committee on Economic, Social and Cultural Rights, General Comment No 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 27 April 2016 at para 2, 30.

<sup>185</sup> Committee on the Rights of the Child, General Comment No 3, supra n 173 at 3.

and other services.’<sup>186</sup> It is regrettable that the Committee did not include gender identity as a potential source of discrimination, which may also affect access to preventative measures and other services. The invisibility of transgender, queer and gender non-conforming children in this General Comment sends an unfortunate message to State Parties and others about the importance of respecting children’s diverse gender identities.

(ii) *General Comment No 4 on adolescent health and development in the context of the Convention on the Rights of the Child (2003)*

In response to the insufficient attention State Parties are giving the ‘specific concerns of adolescents as rights holders and to promoting their health and development’,<sup>187</sup> the Committee published General Comment No 4. The Committee adopts a broad interpretation of health and development in Article 6 (right to life, survival and development) and Article 24 (right to health).<sup>188</sup> It is, therefore, disappointing that the General Comment did not contain more discussion about the unique challenges facing LGBT adolescents. In the opening paragraphs, the Committee acknowledge the challenges faced by all youths include ‘developing an individual identity and dealing with one’s sexuality.’<sup>189</sup> Clearly, these challenges are more poignant for LGBT youth growing up in a heteronormative and cisgendered world, but this is not acknowledged.

There is one reference to ‘sexual orientation’ as an ‘other’ basis for discrimination under Article 2.<sup>190</sup> The Committee acknowledges that ‘Adolescents who are subject to discrimination are more vulnerable to abuse, other types of violence and exploitation, and their health and development are put at greater risk.’ While adolescents discriminated on the basis of their ‘language, religion, political or other opinion, national, ethnic or social origin’ are vulnerable to these risks, the risks of violence, exploitation and other types of abuse are particularly relevant to LGBT youth.

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<sup>186</sup> Ibid.

<sup>187</sup> Committee on the Rights of the Child, General Comment No 4, supra n 33 at 2.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid at 1.

<sup>190</sup> Ibid at 2.

General Comment No 4 represents a missed opportunity for the Committee to acknowledge and specifically address the vulnerabilities of LGBT adolescents.

(iii) *General Comment No 13 on the right of the child to freedom from all forms of violence (2011)*

General Comment No 13 notes that States have a pro-active duty to protect vulnerable and marginalised children from all forms of violence under Article 19 of the CRC.<sup>191</sup> However, the way the Committee addressed LGBT issues is less than ideal. In the middle of an extremely long sentence – 306 words – that lists children who can be in potentially vulnerable situations, the Committee included a reference to “lesbian, gay, transgender or transsexual children”.<sup>192</sup> This inclusion is problematic for three reasons. First, it fails to include bisexuals, and therefore contributes to the chronic problem of bi-erasure/bi-invisibility.<sup>193</sup> Second, the Committee uses the term ‘transsexual’ which is entirely inappropriate in the context of children. Transsexuals fall under the umbrella term ‘transgender’, and are people who have permanently changed their bodies through medical interventions, including hormones and/or surgeries.<sup>194</sup> Such permanent body changes are unlikely to happen during childhood. Furthermore, it is a term that many people find offensive and stigmatising because historically, it was used by doctors and psychologists to incorrectly label transgender people as mentally ill or sexually deviant.<sup>195</sup> Finally, the inclusion is problematic because by referencing LGBT children in such a long list of vulnerable children whose circumstances bear little or no similarity to the experience of LGBT children, the Committee fails to recognise the unique vulnerabilities of LGBT children. By grouping LGBT children with children who ‘are not registered at birth’, who are ‘born prematurely or part of a multiple birth’ or who are ‘living in accident- or

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<sup>191</sup> Committee on the Rights of the Child, General Comment No 13, supra n 41 at 3; see also Sandberg, supra n 20 at 340; Cornu, supra n 4 at 12; Virzo, supra n 4 at 77.

<sup>192</sup> Committee on the Rights of the Child, General Comment No 13, supra n 41 at 27; see also Sandberg, supra n 20 at 340; Cornu, supra n 4 at 12–13.

<sup>193</sup> See McLean, supra n 18.

<sup>194</sup> Gay and Lesbian Alliance Against Defamation, ‘GLAAD Media Reference Guide - Transgender’, *GLAAD*, 9 September 2011, available at: <https://www.glaad.org/reference/transgender> [last accessed 19 February 2020].

<sup>195</sup> Abrams, ‘What’s the Difference Between Being Transgender and Transsexual?’, *Healthline*, 21 November 2019, available at: <https://www.healthline.com/health/transgender/difference-between-transgender-and-transsexual> [last accessed 27 September 2020].

disaster-prone areas or in toxic environments’, the Committee makes no attempt to address the actual vulnerabilities of LGBT children. It appears to be more of a ‘tick the box’ exercise than a genuine attempt to recognise and protect the rights of LGBT children.

(iv) *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (2013)*

Two years later, in General Comment No 14, we see a change in the language being used by the Committee. In a paragraph headed ‘The Child’s Identity’, the Committee states that,

Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. ... The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.<sup>196</sup> As sexual orientation is part of a child’s identity, a child’s sexual orientation should be taken into account when accessing their best interests.<sup>197</sup>

While the use of the term ‘sexual orientation’ is an improvement on the terminology used in General Comment No 13, the language is still not as inclusive as it should be. As discussed previously, when the Committee fails to include gender identity as an aspect of a child’s identity the Committee contributes to the invisibility of transgender, queer and gender non-conforming children.

(v) *General Comment No 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art 24) (2013)*

In 2013, the Committee also published General Comment No 15 regarding the right to highest attainable standard of health. The Committee states that children’s health should not be undermined by discrimination on any of the grounds articulated in Article 2 of the CRC, which it notes includes sexual orientation and gender identity. It

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<sup>196</sup> Committee on the Rights of the Child, General Comment No 14, supra n 173 at para 55; Sandberg, supra n 41 at 32.

<sup>197</sup> Committee on the Rights of the Child, General Comment No 14, supra n 173 at para 55.

is pleasing to see that in this General Comment, the Committee does reference both sexual orientation and gender identity. However, it does make the failure to include gender identity in General Comment No 14 even more perplexing. The more so, because General Comment No 15 was actually published in April 2013, one month *before* General Comment No 14, which was published on May 2013. The inconsistency in language across the two General Comments, published within a two-month period, suggests that greater quality control may be needed in the drafting of these documents to ensure the use of inclusive, uniform language.

General Comment No 15 also states that children should be able to access information regarding all aspects of their health and lifestyle, including sexual and reproductive health education.<sup>198</sup> Such education includes ‘self-awareness and knowledge about the body, including anatomical, physiological and emotional aspects’.<sup>199</sup> For the avoidance of doubt, and to promote the sexual health of *all* children, it would have been preferable for the Committee to explicitly state that such education should include education about diverse sexual orientations and gender identities.

(vi) *General Comment 20 on the implementation of the rights of the child during adolescence (2016)*

One would expect that in a General Comment focusing on children’s rights during adolescence the Committee would discuss the particular vulnerabilities of LGBT adolescents, and that is exactly what it did.<sup>200</sup> General Comment No 20 represented a new highwater mark in the Committee’s approach to protecting the rights of LGBT children and stands in stark contrast to General Comment No 4 on adolescent health and development. For the first time, the Committee specifically addressed the experience of LGBT youth, which is in sharp contrast to its previous practice of just bundling up the experience of LGBT children with other minorities. The comprehensive nature of the Committee’s coverage of the rights of LGBT adolescents warrants quotation in full:

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<sup>198</sup> Committee on the Rights of the Child, General Comment No 15, *supra* n 33 at para 60.

<sup>199</sup> *Ibid.*

<sup>200</sup> Committee on the Rights of the Child, General Comment No 20, *supra* n 173 at para 26, 33.



### **Lesbian, gay, bisexual, transgender and intersex adolescents**

33. Adolescents who are lesbian, gay, bisexual, transgender and intersex commonly face persecution, including abuse and violence, stigmatization, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information.<sup>201</sup> In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness.<sup>202</sup>

34. The Committee emphasizes the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. It condemns the imposition of so-called “treatments” to try to change sexual orientation and forced surgeries or treatments on intersex adolescents. It urges States to eliminate such practices, repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. States should also take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures.<sup>203</sup>

The Committee is to be commended for explicitly addressing the trauma that LGBT youth face when their rights are violated, including, exposure to ‘conversion therapies’, bullying, poor mental health outcomes and homelessness when their families reject them because of their sexual orientation or gender identity.

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<sup>201</sup> See OHCHR, ‘Discriminated and Made Vulnerable: Young LGBT and Intersex People Need Recognition and Protection of Their Rights International Day against Homophobia, Biphobia and Transphobia’, 13 May 2015, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID=E> [last accessed 25 September 2020].

<sup>202</sup> Ibid.

<sup>203</sup> Committee on the Rights of the Child, General Comment No 20, supra n 173 at 10.

In addition to these two paragraphs focusing exclusively on the rights of LGBT youth, the Committee referred to LGBT adolescents when discussing risks children face in the digital environment,<sup>204</sup> accessing sexual and reproductive health services,<sup>205</sup> the risk of HIV/AIDS<sup>206</sup> and discrimination in education.<sup>207</sup> Adolescence is a period of sexual maturation, and it was therefore important that the Committee addressed the rights of LGBT youth in the comprehensive manner in which it did. As Jacob Thomas observes, ‘It is not an overstatement to say that our LGB youth are in trouble, and more needs to be done to ensure they can enter adulthood in a safe, supported environment.’<sup>208</sup> General Comment No 20 sends a clear message to State Parties that they have an obligation to respect and protect the human rights of LGBT adolescents.

(vii) *General Comment No 21 on children in street situations (2017)*

Every General Comment since General Comment No 20, has recognised the vulnerabilities of LGBT children. General Comment No 21 begins by acknowledging that children in street situations are not a homogenous group and may vary on a range of diverse characteristics, including ‘sexual orientation and gender identity/expression’.<sup>209</sup> This is the first time the Committee has referred to ‘gender expression’ in a General Comment. It appears to reflect an effort by the Committee to be more inclusive, since it recognises the difference between gender identity and gender expression, and that discrimination can be based on either or both of these attributes.<sup>210</sup>

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<sup>204</sup> Ibid at 13.

<sup>205</sup> Ibid at 16.

<sup>206</sup> Ibid at 17.

<sup>207</sup> Ibid at 18.

<sup>208</sup> Thomas, ‘LGB Youth’ in Gerber (ed), *Worldwide Perspectives on Lesbians, Gays, and Bisexuals* (2020) 99 at 109.

<sup>209</sup> Committee on the Rights of the Child, General Comment No 21, supra n 173 at 4.

<sup>210</sup> Gender identity is how a person sees themselves; their own internal sense and personal experience of gender. Whereas gender expression refers to how a person outwardly shows their gender identity. It includes physical expressions such as person’s clothing, hairstyle, makeup, and social expressions such as name and pronoun choice. Some examples of gender expression are masculine, feminine, and androgynous: see BC Centre for Disease Control, ‘Gender Identity and Expression’, *Smart Sex Resource*, available at: <https://smartsexresource.com/topics/gender-identity-expression> [last accessed 27 September 2020].

The General Comment recognises that one of the causes of youth homelessness is that LGBT children are ‘cast out from families as a result of questioning their sexuality or identifying as lesbian, gay, bisexual, transgender, intersex or asexual’.<sup>211</sup> The explicit acknowledgment of this cause of children living on the streets is significant since one of the stated objectives of this General Comment is ‘To provide comprehensive and authoritative guidance to States on using a holistic, child rights approach to: prevent children experiencing rights violations’.<sup>212</sup> In light of this, it can be argued that State Parties have an obligation to prevent LGBT children living on the streets. This obligation could be realised through a widespread awareness raising program to educate parents about diverse SOGIs, with the aim of reducing the risk of a family rejecting a lesbian, gay, bisexual or transgender child.

Importantly, in this General Comment, the Committee also acknowledged the intersectionality of discrimination, highlighting that a child may experience discrimination in breach of Article 2 of the CRC because they are homeless *and* because of their sexual orientation, gender identity or gender expression.<sup>213</sup> Such an acknowledgement encourages State Parties to develop holistic child rights programs that address the multifaceted faces of discrimination.

(viii) *Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (2017)*

This General Comment is the first of two to be jointly drafted by the Migrant Workers Committee and the Committee. It is interesting to note that neither of the two General Comments published by the Migrant Workers Committee prior to this one, made any reference to LGBT or SOGI. One could hypothesise that it was the influence of the Committee that lead to SOGI being included in this General Comment.

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<sup>211</sup> Committee on the Rights of the Child, General Comment No 21, supra n 173 at para 8.

<sup>212</sup> Ibid at para 9(b).

<sup>213</sup> Ibid at para 26.

General Comment 22 refers to sexual orientation and gender identity in the introductory paragraphs as a potential vulnerability, over and above their status as a migrant.<sup>214</sup> It then goes on to emphasise the prohibition on discrimination against children on the basis of their sexual orientation or gender identity *or* the sexual orientation or gender identity of their parents, guardians or family members.<sup>215</sup> This gives effect to the non-discrimination provision in the CRC which provides that:

**Article 2**

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's *or his or her parent's or legal guardian's* race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

[Emphasis added]

Thus, the publication of this Joint General Comment by two treaty committees elevated the application of the provisions of the CRC within other UN bodies.

As seen in the above analysis, LGBT and SOGI are commonly used as umbrella terms with no attention paid to the distinct issues faced by the diverse groups covered by these terms. This Joint General Comment is a welcome exception to this trend. The two committees state that, ‘Initiatives should be taken to prepare girls and transgender children to participate actively, effectively and equally with boys at all levels of social, economic, political and cultural leadership.’<sup>216</sup> Identifying transgender children as needing targeted initiatives to protect their rights, signals a more nuanced approach to respecting the rights of LGBT children.

(ix) *Joint General Comment No 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on state obligations*

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<sup>214</sup> Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No 3/ No 22, supra n 173 at para 3.

<sup>215</sup> Ibid at para 21.

<sup>216</sup> Ibid at para 39.

*regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (2017)*

Unfortunately, the second Joint General Comment published by the same two UN committees, in the same year, did not address the rights of LGBT children in the same in-depth or nuanced manner. There is only one passing reference to sexual minorities, namely,

Additional measures should be taken to address the particular vulnerability of girls and boys, including those who might have a disability, as well as children who are lesbian, gay, bisexual, transgender or intersex persons, to trafficking for the purposes of sexual exploitation and abuse.<sup>217</sup>

It would have been preferable for this second Joint General Comment to adopt the same comprehensive approach seen in the first Joint General Comment.

(x) *General Comment No 24 on children's rights in the child justice system (2019)*

The final General Comment replaces General Comment No 10 (2007) on children's rights in juvenile justice, which had become outdated.<sup>218</sup> The Committee states that safeguards are 'needed from the earliest contact with the criminal justice system' to ensure children are not discriminated against on the basis of their SOGI.<sup>219</sup> Although there are some references to child mental health during detention, given the potentially high-risk environment youth detention centres pose for LGBT adolescents it is unfortunate that the Committee did not provide more guidance to State Parties to better protect the mental health of LGBT adolescents while in custody.

(xi) *Draft General Comment No 25 on children's rights in relation to the digital environment (2020)*

The latest General Comment is disappointing in the minimal attention given to protecting the rights of LGBT children. However, given that it is still in a draft form, there is the possibility that this will be remedied.

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<sup>217</sup> Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Joint General Comment No 4/ No 23, supra n 173 at para 41.

<sup>218</sup> Committee on the Rights of the Child, General Comment No 24, supra n 173 at para 1.

<sup>219</sup> Ibid at para 40.

The only attention given to protecting the rights of LGBT children is in draft paragraph 12, where a diverse selection of vulnerable minorities are bundled together:

Specific groups of children may require particular measures to prevent discrimination on the grounds of sex, disability, socioeconomic background, ethnic or national origin, or any other ground. This includes minority and indigenous children, asylum-seeking, refugee and migrant children, LGBTI children, child victims of sexual exploitation, children in poverty and children in alternative care, including institutions, and children from other vulnerable situations. This is because, for such groups, the digital environment may both provide unique access to vital resources, and also it may present heightened risks.

This is an unfortunate reversion to early General Comments when the rights of LGBT children are mentioned in passing; given no nuanced consideration. It is particularly disappointing because of the recognised risks that LGBT persons, including children, are exposed to on the internet.<sup>220</sup>

#### **B. Areas for Improvement in the Committee's General Comments**

Clearly, it is not the intention of the Committee to discount or diminish the experience of LGBT children and children with same-sex parents. To avoid any such implication, the Committee could consider publishing a General Comment dedicated to LGBT children and children with same-sex parents. While many previous General Comments concern a specific Article of the CRC, there is precedent for the Committee to devote a General Comment entirely to a vulnerable group. For example, General Comment No 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, General Comment No 9 (2007) on the rights of children with disabilities, and General Comment No 11 (2009) on Indigenous children. On the same grounds of special vulnerability, LGBT children and children in same-sex families could be the subject of a dedicated General Comment. This General Comment could address the many Articles of the CRC that were identified above as being relevant to LGBT children and children with same-sex parents.

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<sup>220</sup> See, for example, Wood, 'The Impact of Technology and the Internet on LGB Lives' in Gerber (ed), *Worldwide Perspectives on Lesbians, Gays, and Bisexuals* (2020) 312.

A General Comment dedicated to LGBT children and children with same-sex parents is needed to provide clear guidance on the obligations State Parties owe to this vulnerable minority, pursuant to the CRC.

## 5. VIEWS ON INDIVIDUAL COMMUNICATION

*When you take the time to actually listen, with humility, to what people have to say, it's amazing what you can learn. Especially if the people who are doing the talking also happen to be children.*<sup>221</sup>

Since the Third Optional Protocol to the CRC on a Communications Procedure ('Communications Protocol') entered into force in April 2014, children are able to bring a complaint to the Committee alleging a violation of their rights.<sup>222</sup> The Communications Protocol is a significant development and brings the CRC in line with other core international human rights treaties, in having a mechanism for a committee to find that the treaty it administers has been violated.<sup>223</sup> The CRC was the last human rights treaty to have such a mechanism. On the day the Communications Protocol came into effect, Child Rights Connect stated that, 'This is a moment of celebration, but also reflection on the task ahead.'<sup>224</sup> One such task is to increase ratification of the Communications Protocol. Considering the CRC is the most widely ratified treaty in the world,<sup>225</sup> the ratification of the Communications Protocol remains low. As of 3 March 2021, there are 52 signatories and 46 State Parties to the

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<sup>221</sup> Mortenson, *Stones into Schools: Promoting Peace with Education in Afghanistan and Pakistan* (Reprint edition, 2010).

<sup>222</sup> Child Rights Connect, 'Optional Protocol on a Communications Procedure', available at: <http://opic.childrightsconnect.org/> [last accessed 3 March 2021].

<sup>223</sup> Ibid.

<sup>224</sup> Child Rights Connect, 'OP3 CRC Is Now in Force', available at: <http://www.childrightsconnect.org/press-release-op3-crc/> [last accessed 5 August 2016]. Document on file with authors.

<sup>225</sup> See United Nations, 'UN Lauds Somalia as Country Ratifies Landmark Children's Rights Treaty', *UN News*, 20 January 2015, available at: <https://news.un.org/en/story/2015/01/488692-un-lauds-somalia-country-ratifies-landmark-childrens-rights-treaty> [last accessed 3 March 2021], which states that the CRC is 'the most widely ratified international human rights treaty in history' with South Sudan and the United States yet to ratify. South Sudan has since ratified the treaty, leaving the United States as the only State to ratify the CRC; Rendel, *supra* n 24 at 57.

Communications Protocol.<sup>226</sup> Such low ratification and accession limits its effectiveness and leaves many children without a means of seeking redress under the CRC.

There have been 39 Individual Communications decided by the Committee, as of October 2020. None of the applications have alleged discrimination on the basis of SOGI. Complaints to date have included allegations relating to matters such as,

- the forced eviction of a family with children from a Roma camp;<sup>227</sup>
- the attempted deportation of a Somalian girl at alleged risk of forced female genital mutilation;<sup>228</sup> and
- the registration of the biological mother's maiden name on the birth certificates of two children conceived through in vitro fertilisation and carried to term by a surrogate.<sup>229</sup>

It is likely that as ratifications of the Communications Protocol increase, and as it becomes more well known as a mechanism for seeking redress, the number of communications submitted to the Committee will increase, including from LGBT children and children with same-sex parents. Potential communications could relate to:

- i. a LGBT child being physically abused at school, which the school and domestic courts fail to provide a remedy (Article 19);
- ii. a child with same-sex parents not being able to have a birth certificate which records the name of both their parents (Article 7);<sup>230</sup>
- iii. criminalisation of same-sex sexual conduct (Article 2); and
- iv. transgender children who are prevented by the State from expressing their gender identity (Article 12).

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<sup>226</sup> See United Nations, 'Status of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure', *United Nations Treaty Collection*, 2 March 2021, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-d&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en) [last accessed 22 March 2021].

<sup>227</sup> *SCS v France* (10/2017), CRC/C/77/D/10/2017.

<sup>228</sup> *IAM v Denmark* (3/2016), CRC/C/77/D/3/2016.

<sup>229</sup> *JABS v Costa Rica* (5/2016), CRC/C/74/D/5/2016.

<sup>230</sup> Gerber and Lindner, *supra* n 35.



Over time the jurisprudence from the CRC Committee around SOGI and LGBT issues will grow, and will hopefully contribute to greater respect for the rights of LGBT children and children with same-sex parents around the world, in the same way that the HRC's View in *Toonen v Australia*<sup>231</sup> contributed to the greater respect for the rights of gay men around the world.<sup>232</sup>

## 6. WHAT MORE COULD THE CRC COMMITTEE BE DOING?

*The ultimate test of a moral society is the kind of world that it leaves to its children.*<sup>233</sup>

Based on the empirical evidence and analysis presented in this article, it is clear that the Committee would benefit from adopting a systematic approach to the rights of LGBT children and children with same-sex parents, so as to ensure that such children receive consistent and sustained attention in Concluding Observations and General Comments.<sup>234</sup> To do so, the Committee should amend its guidelines for the State's periodic reports to require that State Parties report on the steps they are taking to protect the rights of LGBT children and children with same-sex parents.<sup>235</sup>

A uniform structure of eight sections was proposed in the 1991 guidelines for States initial periodic reports.<sup>236</sup> A second set of guidelines for the State's periodic

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<sup>231</sup> *Toonen v Australia* (488/1992), Views, CCPR/C/50/D/488/1992.

<sup>232</sup> Harrison, 'How a Tasmanian Gay Rights Battle Influenced the World', *The Sydney Morning Herald*, 10 April 2014, available at: <https://www.smh.com.au/politics/federal/how-a-tasmanian-gay-rights-battle-influenced-the-world-20140412-zqt2p.html> [last accessed 4 October 2020].

<sup>233</sup> Dietrich Bonhoeffer quoted at Malkov, 'Dietrich Bonhoeffer Quotes', *DBonhoeffer.org*, available at: <http://www.dbonhoeffer.org/Quotes.html> [last accessed 3 March 2021].

<sup>234</sup> See O'Flaherty and Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 207; Baisley, supra n 20 at 142 states that 'SOGI issues are not yet systematically integrated in state reports, Concluding Observations, and General Comments'; see also Gerber and Gory, supra n 53 at 32.

<sup>235</sup> See Verheyde and Goedertier, supra n 30 at 17.

<sup>236</sup> *Ibid* at 18.

reports was published in 1996, with the latest edition revised in 2015.<sup>237</sup> The eight sections have been maintained.<sup>238</sup> The last section is headed ‘Special protection measures’ and is subdivided into ‘children in situations of emergency’, ‘children in conflict with the law’, ‘children in situations of exploitation’ and ‘children belonging to a minority or an indigenous group’.<sup>239</sup> Undoubtedly, the last subsection includes LGBT children and children of a LGBT parents.<sup>240</sup> However, for this group to be explicitly identified in the guidelines would likely increase State Parties reporting on measures they are taking to protect this vulnerable minority. While acknowledging this may lengthen the report,<sup>241</sup> this article has demonstrated a clear need for increased reporting about LGBT children and children with same-sex parents. Opponents may claim that giving LGBT children and children with same-sex parents their own category offends the principle of equality and/or would open the floodgates to other groups requesting their own category. These are valid concerns. However, as previously outlined, the needs of LGBT children and children of a LGBT parents are incredibly diverse, such that generic and bundled references to ‘LGBT’ can be tokenistic and even counter-productive. If other children face the same challenge of intragroup diversity, then it may be appropriate for these children to also be explicitly referenced in the guidelines.

In the alternative, the Committee could make an informal commitment to raise LGBT issues with State Parties that have not already addressed these issues during the pre-sessional working group stage. This would give State Party representatives adequate opportunity to prepare their reply to Committee questions regarding the rights of LGBT children and children with same-sex parents.<sup>242</sup> Furthermore, knowing questions will be asked regarding the rights of LGBT children, either in the

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<sup>237</sup> Committee on the Rights of the Child, *Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to Be Submitted by State Parties Under Article 44, Paragraph 1(b), of the Convention on the Rights of the Child*, CRC/C/58/Rev.3 (2014), available at: <https://digitallibrary.un.org/record/789762?ln=en>; see Rendel, supra n 24 at 60–1.

<sup>238</sup> Ibid at III(B); Verheyde and Goedertier, supra n 30 at 21.

<sup>239</sup> Ibid at para 40; Verheyde and Goedertier, supra n 30 at 19–20.

<sup>240</sup> Although appearing last, the Committee has stated that the order is not based on the importance of the rights: Verheyde and Goedertier, supra n 30 at 20–1.

<sup>241</sup> See ibid at 22.

<sup>242</sup> Ibid at 24.

State Party report, or in the pre-sessional working group stage, will help institutionalise emerging norms regarding SOGI.<sup>243</sup> The publication of a General Comment dedicated to the rights of LGBT children would complement this recommendation.

To increase the attention being paid to SOGI-based discrimination and violence, it is recommended that the Committee assimilate the Yogyakarta Principles (YPs) and the Yogyakarta Principles Plus 10 (YP+10),<sup>244</sup> and urge State Parties to do likewise.<sup>245</sup> The YP and YP+10 were drafted by a distinguished group of international human rights experts to outline how international human rights laws apply to violations based on SOGI. Of particular relevance to LGBT children and children with same-sex parents (and therefore the Committee) are the following principles,

- Principle 13: States must ensure that social or welfare benefits are not subject to any form of discrimination based on the SOGI of the child or the child's parents.<sup>246</sup>
- Principle 15: States must develop social and support programs that address SOGI in order to avoid homelessness, social and familial exclusion, violence, discrimination and financial abuse.<sup>247</sup>
- Principle 16: Affirms the right of every child to an education that does not discriminate, and respects diverse genders and sexualities.<sup>248</sup>
- Principle 24: States must not consider the SOGI of a child or the SOGI of any family member as incompatible with the best interests of the child. States must ensure that a child can exercise the right to

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<sup>243</sup> Baisley, *supra* n 20 at 163.

<sup>244</sup> Grinspan et al, *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017), available at: <https://yogyakartaprinciples.org/principles-en/yp10/> [last accessed 12 January 2021]; see also McGoldrick, *supra* n 115 at 631–2.

<sup>245</sup> International Commission of Jurists and International Service for Human Rights, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), available at: [http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles\\_en.pdf](http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf) [last accessed 12 January 2021].

<sup>246</sup> *Ibid* at 19.

<sup>247</sup> Committee on the Rights of the Child, *Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports*, *supra* n 237 at 20–1.

<sup>248</sup> *Ibid* at 21.

express their views freely, and that such views are given due weight in accordance with the age and maturity of the child.<sup>249</sup>

The Yogyakarta Principles are an important tool available to the Committee and the State Parties to help them ensure that the CRC is implemented in a way that best protects the rights of LGBT children to live their lives free from discrimination based on their SOGI. It is, therefore, unfortunate that the Committee did not refer to the YPs or the YP+10 at all in its Concluding Observations during the study period. The YPs and YP+10 are also not used to strengthen its General Comments or Views on Individual Communications.

## 7. CONCLUSION

*Children, after all, are not just adults-in-the-making.  
They are people whose current needs and rights and  
experiences must be taken seriously.*<sup>250</sup>

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The continued stigma and discrimination faced by LGBT children and children with same-sex parents often results in psychological and physical harms that can severely impact their wellbeing.<sup>251</sup> The effects of discrimination based on the SOGI of a child or their parents, can be devastating; reaching beyond the playground into adulthood.

The Committee has an important role to play in ensuring that State Parties protect the rights of LGBT children and children with same-sex parents. The data analysed in this article reveals that over the last decade, the Committee has increased its engagement with these issues as well as improving the quality of that engagement. However, the engagement with the issues faced by LGBT children and children with same-sex parents, remains ad-hoc and lacking actionable recommendations.

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<sup>249</sup> Ibid at 28.

<sup>250</sup> Kohn, 'Choices for Children: Why and How to Let Students Decide', *Phi Delta Kappan*, 1993, available at: <https://www.alfiekohn.org/article/choices-children/?print=print> [last accessed 27 September 2020].

<sup>251</sup> UNICEF, 'Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity', supra n 25 at 1.

Frequently, the rights of this cohort were overlooked or ignored. When LGBT children and children with same-sex parents were acknowledged, they were often ‘bundled’ together with other groups of vulnerable and marginalised children. The lack of Committee members with a stated interest in and deep understanding of the rights of LGBT children and children with same-sex parents, is no doubt a contributing factor. So too, is the low number of Alternative Reports that raise LGBT related concerns. This finding is consistent with an earlier study of the UN Human Rights Committee on LGBT issues.<sup>252</sup> Both studies identify a weakness in the UN treaty committees’ capacity to monitor the domestic affairs of States Parties without a strong and engaged civil society to support their work.

Several recommendations were made to improve the Committee’s protection and promotion of the rights of LGBT children and children with same-sex parents. In particular, more specific and actionable recommendations should be made to State Parties on how they can better respect the rights of these children to live their lives free from discrimination based on their, or their parents’ SOGI. It was also recommended that the reporting guidelines be updated to ensure that State Parties report on steps they have taken to protect the rights of LGBT children and children with same-sex parents. These reforms would be strengthened by the publication of a General Comment dedicated to the unique challenges facing LGBT children and children in same-sex families.

Increasing the Committee’s capacity to monitor human rights violations against LGBT children and children with same-sex parents could help address negative attitudes and stereotypes that children with diverse SOGI experience. Left unchecked in society, negative attitudes and stereotypes towards LGBT persons may manifest in the tragic scenes that occurred in Orlando, USA, in June 2016, or through self-harm and suicide. The Committee is uniquely positioned to drive attitudinal change for future generations, which is arguably one of the Committee’s most important functions. Rather than create false dichotomies, challenging prejudice against one marginalised community helps to address discrimination against other

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<sup>252</sup> Gerber and Gory, *supra* n 53 at 35.

communities. If the Committee succeeds in decreasing discrimination and violence based on SOGI, this will have a positive impact on other forms of prejudice and inequality within State Parties.

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