



**AFRICAN COMMISSION'S RESOLUTION ON
*THE RIGHTS OF INTERSEX PERSONS IN AFRICA***

WHAT IT MEANS FOR STATE AND
NON-STATE ACTORS IN AFRICA

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AFRICAN COMMISSION'S RESOLUTION ON *THE RIGHTS OF INTERSEX PERSONS IN AFRICA*

WHAT IT MEANS FOR STATE AND
NON-STATE ACTORS IN AFRICA

*A GUIDE TO RESOLUTION 552 ON THE PROMOTION AND
PROTECTION OF THE RIGHTS OF INTERSEX PERSONS IN AFRICA*



Centre for
Human Rights
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552: Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa

ACHPR/Res.552 (LXXIV) 2023

The African Commission on Human and Peoples' Rights (the Commission), meeting at its 74th Ordinary Session, held virtually from 21 February to 07 March 2023:

Recalling its mandate to promote and protect human and peoples' rights in Africa under Article 45 of the African Charter on Human and Peoples' Rights (the African Charter);

Recalling also that Article 2 of the African Charter prohibits any form of discrimination against any person on the basis of race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Noting that Article 3 of the African Charter grants equal protection of the law to all, and that Article 5 guarantees to all the recognition of legal personality and the prohibition of torture and cruel, inhuman and degrading treatment;

Noting also that Article 16 of the African Charter guarantees everyone the right to the enjoyment of the highest attainable standard of physical and mental health, and that Article 9 of the African Charter guarantees everyone the right of access to information, including medical records and histories;

Considering that Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and Article 21 of the African Charter on the Rights and Welfare of the Child prohibit harmful social and cultural practices;

Recognizing that intersex persons, who are born naturally with a chromosomal abnormality and reproductive or sexual anatomy that does

not appear to fit the typical definitions of female or male, exist in all African societies;

Recognizing that intersexuality is an inherent handicap at birth and that it should not be considered a taboo in all African societies;

Recognizing also that non-consensual and unnecessary surgical and other genital normalization procedures performed on intersex persons, in a medical or other setting, may cause them lifelong physical and psychological suffering, permanent sterility, incontinence, and loss of sexual pleasure;

Further recognizing that the above-mentioned non-consensual and unnecessary surgical and other genital normalization procedures have irreversible consequences similar to genital mutilation and can be considered as such;

Concerned about human rights violations against intersex persons which include, but are not limited to, rejection in society; infanticide and abandonment of children; lack of proper legal recognition and administrative processes that prevent intersex persons from acquiring or altering identity documents; unfair discrimination in schools, health facilities, competitive sports, work; access to public services; and detention;

Further concerned about the invisibility and lack of awareness and sensitivity to the plight and situation of intersex persons in African communities;

Recalling that States Parties to the African Charter have the obligation to recognize the rights, duties and freedoms guaranteed by the African Charter by adopting legislative or other measures to implement them;

Noting that most States Parties do not have appropriate legislative, policy or other measures to guarantee the protection of the rights of intersex persons;

The Commission calls on States Parties to:

1. Promote and protect the rights of intersex persons on the continent;
2. Stop non-consensual genital normalization practices on intersex persons, such as surgical, hormonal and sterilization procedures that alter the sexual characteristics of intersex persons and ensure respect for their rights to make their own decisions regarding their bodily integrity, physical autonomy and self-determination;
3. Ensure that any action concerning an intersex minor is carried out with the permission of the parents and after medical analysis, taking strict account of the best interests of the child;
4. End human rights violations against intersex persons, such as infanticide and abandonment of intersex children;
5. Prohibit discrimination based on intersex traits and characteristics or intersex status, including in education, health, employment, competitive sports, and access to public services, and address such discrimination through appropriate anti-discrimination initiatives;
6. Ensure that intersex human rights defenders work in an environment free from stigmatization, retaliation, or criminal prosecution because of their human rights activism;
7. Incorporate intersex education into prenatal counselling and support services, and provide training for health care personnel focused on the health needs and human rights of intersex persons, as well as the appropriate counselling and care to be given to intersex parents and children, respecting the autonomy, psychological integrity and sexual characteristics of the intersex person;
8. Enact enabling legislation and institutionalize administrative processes that allow intersex persons to change the gender designation on their birth certificates and other official documents, based on decision taken through medical intervention;
9. Ensure intersex peoples' right to full information, including access to their own medical records and history;
10. Ensure that human rights violations against intersex people are investigated, perpetrators are prosecuted, and victims have access to effective remedies, including redress and compensation;
11. Raise awareness of intersex issues and the rights of intersex persons in society; and
12. Ensure that members of the judiciary, immigration officials, law enforcement officers, health, education and other officials and personnel are sensitized to the respect and equal treatment of intersex persons.

Done virtually, on 7 March 2023

ACKNOWLEDGMENTS

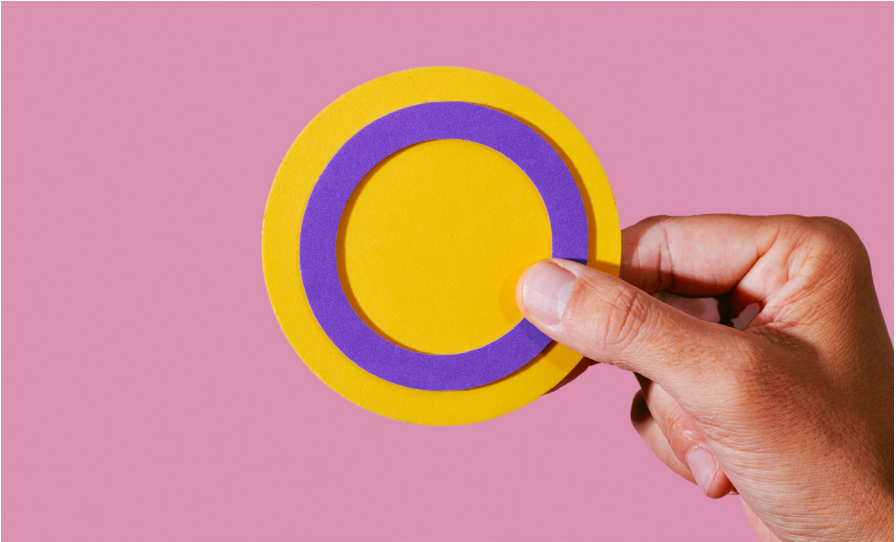
This guide is a product of the Centre for Human Rights (the Centre), Faculty of Law, University of Pretoria.

The Centre is an academic department of the Faculty of Law at the University of Pretoria, South Africa. It also doubles as a non-profit organisation (NPO) and as a think tank. It therefore functions as a teaching, training and research department as well as implementing human rights projects with external donor funding. The Centre's reach is within South Africa and beyond, particularly on the African continent. The Centre enjoys 'observer status' with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The Centre has also submitted cases before the African Court on Human and Peoples' Rights. It, therefore, identifies itself as a pan-African organisation. It specialises in human rights law and human rights issues on the African continent, while linking these to global human rights knowledge streams and discourses from other regions of the world.

The contributions of Professor Frans Viljoen and the members of the Sexual Orientation, Gender Identity Expression and Sex Characteristics (SOGIESC Unit) was invaluable in the development of this guide. The Centre also acknowledges the contribution of the African Intersex Alliance for their review and contribution to this Guide. Finally, the Centre would like to thank its partners, the Embassies of the Kingdom of the Netherlands and the Kingdom of Sweden in Pretoria, South Africa for their continued support.



INTRODUCTION



The *Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa* (Resolution 552/ Resolution) was adopted in line with the African Commission on Human and Peoples' Rights (Commission) mandate under article 45 of the African Charter on Human and Peoples' Rights (African Charter) to interpret the rights in the Charter. The Resolution was adopted with the realisation that Intersex persons in Africa face human rights violations in the form of unnecessary genital 'normalising' surgeries on minors, a lack of appropriate legal recognition and poor birth registration processes, discrimination in the justice system, infanticide, baby dumping and various forms of discrimination in other spheres of life. The existing legislative gap in African countries on the laws protecting intersex persons has contributed to the human rights violations. However, as a matter of law and principle, the human rights of intersex persons are effectively protected under the African Charter. Progressive measures protecting intersex persons

have been put in place by other regional human rights mechanisms, United Nations (UN) agencies and a number of countries in the world.

In 2014 The African Commission made progress with regard to sexual and gender minorities rights when it adopted the *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (Resolution 275). However, Resolution 275 focuses on sexual orientation and gender identity, which is unrelated to sex characteristics of intersex persons. While issues related to sexual orientation and gender identity and those concerning intersex persons often overlap, some issues are completely distinct. Examples are genital 'normalising' surgery, intersex genital mutilation by traditional birth attendants, infanticide and 'baby dumping'. These issues, which are pertinent to intersex persons only, require specific elaboration and attention.

INTRODUCTION

This guide is meant to help state and non-state actors to understand and implement Resolution 552. The Resolution expresses concern about the invisibility and lack of awareness and sensitivity to the plight and situation of intersex persons in African communities. In this regard it calls upon state and non-state actors to take all necessary steps to promote and protect the rights of intersex persons in all African communities.



TERMS TO NOTE

Gender expression: is a person's external ways of communicating masculinity or femininity, both or neither, through physical appearance and mannerisms.

Gender identity: a deeply felt and experienced sense of one's own gender which may not correspond with the sex assigned at birth.

Gender: socially constructed roles, behaviours, activities and attributes considered appropriate for men and women at a given time.

Intersex: an umbrella term used to describe people who are born with natural sex characteristics variations (including observable genitals, gonads and chromosome patterns) that do not fit typical binary definitions of male or female bodies.

Sex characteristics: refers to the chromosomal, gonadal and anatomical features of a person. These include primary characteristics such as reproductive organs and secondary characteristics such as chromosome patterns.

Sex: a category assigned at birth based upon body parts and other physical characteristics. The categories are male, female and intersex.

Sexual orientation: refers to a person's physical, romantic and emotional attraction towards other people. Everyone has a sexual orientation, which is integral to a person's identity. Homosexuality, bisexuality and heterosexuality are some categories of sexual orientation.

Sexuality: describes a broad spectrum and individual erotic feelings, thoughts, attractions and behaviours towards other people at a given time.



The principle of non-discrimination

Resolution 552 recalls article 2 of the Charter which prohibits any form of discrimination. In this regard, states must take the necessary measures to ensure that the rights of people are guaranteed and protected, irrespective of their race, colour, nationality, citizenship, ethnicity, profession, political opinions, sex, *sex characteristics, sexual orientation, gender identity, gender expression* or any other factor that could lead to discrimination against them. The interpretation of article 2 of the African Charter is open ended and inclusive, and aims at offering the maximum protection to all Africans, hence the inclusion of sex characteristics, gender and sexual orientation as prohibited grounds of unfair discrimination. By implication, states must prohibit discrimination on the basis of intersex traits, characteristics or status in all spheres of life and social institutions including education, health care, employment, competitive sports, access to public services, and address such discrimination through relevant anti-discrimination initiatives.

Equal protection before the law

Noting article 3 of the African Charter which provides for equal protection before the law, Resolution 552 affirms that intersex persons in Africa are equal before the law and therefore should be treated with dignity, and enjoy equal protection under the law. Equal protection before and under the law is grounded on non-discrimination and entails that states have the obligation to ensure that laws are not exclusively and/or negatively applied against a certain group because of their *sex, sex characteristics, sexual orientation, gender identity, gender expression* or any

other unfair ground of discrimination.

Recognition by the law

States are obliged to recognise the equal worth and inherent dignity of all persons regardless of their sex characteristics. States are therefore obliged to enact enabling legislation and institutionalise administrative processes that promote and protect the rights of intersex persons. Such enabling legislation and institutionalised administrative processes include laws, policies and processes which allow intersex persons to change the gender designation on their birth certificates and other official documents, based on decisions taken as individuals. Recognition also includes laws and practices that provide for non-binary sex and gender classifications on official identity documents and protocols. Recognition further entails classifying intersex persons as a demographic variable.

The 'do no harm' principle- Protection from harmful practices

States have an obligation to stop non-consensual genital 'normalisation' practices on intersex persons, such as surgical, hormonal and sterilisation procedures that alter the sexual characteristics of intersex persons to suit the social classification of male and female. These practices include labia reduction, removal of external male genitalia including the penis, scrapping and reshaping of genitals, hormone injections and frequent genitalia inspection. States must further ensure the respect for the rights of intersex persons to make their own decisions regarding their bodily integrity, physical autonomy and self-determination.





Obligation to raise awareness of the rights of intersex persons to state institutions

States have the obligation to raise awareness of the rights of intersex persons in all state institutions. Particularly, states must ensure that members of the judiciary, paralegals, immigration officials, law enforcement officers, health professionals, educators, public media practitioners and other officials and personnel are sensitised on the rights of intersex persons. In this regard, states must create on-going educational programmes with appropriate materials that challenge the stereotypes and misconceptions about intersex persons including intersex children. In these efforts, states must aim

at institutional and attitudinal change towards intersex persons in a manner that is positive and progressive for the rights of intersex persons as well as all sexual and gender minorities.

Creating an enabling environment for intersex human rights defenders

States have the obligation to ensure that intersex human rights defenders work in an environment free from stigmatisation, retaliation, or criminal prosecution because of their human rights activism. States must therefore adhere to the various Resolutions and guidelines of the African Commission on the protection and promotion of the rights and work of human rights defenders in Africa.

Resolution 552 makes reference to the African Charter on the Rights and Welfare of the Child (African Children's Charter). Article 2 of the African Children's Charter defines a child as a person below the age of 18 years. Intersex children are therefore persons who are below the age of 18 years and are born with the sex variation(s) encapsulated in the definition of intersex. Intersex children suffer several

human rights violation mostly because of the misconception that intersex children are 'bad omens', a sign of witchcraft, a punishment from God and a curse on the family they are born into. States are therefore obliged to protect and promote the rights of intersex children taking into account principles in the African Children's Rights Charter which include the following principles:

The best interest of the child: Must be the primary consideration in relation to all decisions, actions and omissions with respect to each individual intersex child - taking account of the child's individual characteristics. In all decisions taken regarding the bodily autonomy and integrity of the child, the overall well-being of each individual child should take priority over any other factor. Children must be seen as their own person, each in their own unique context and environment. Intersex children should therefore not be subjected to medical procedures which in the view of their guardians or medical officers will normalise their sex characteristics. Intersex children should also not be subjected to medical procedures which in the view of their guardians or medical officers are not necessary. This will ensure that the highest attainable standard of health is protected. The decision should be made by the intersex person when they are old enough to make a full, free and informed decision.

Survival and development: This entails that institutions and individuals, including parents and guardians, have a legal obligation to ensure the safety and life of the child and make decisions towards the best development of the child into adulthood. The principle prohibits infanticide against all children, which includes intersex children, irrespective of cultural, religious or other beliefs about them. Survival and development therefore respects the rights of the intersex children to have a normal childhood and grow into adulthood without interference based on their sex characteristics.

Participation: Children including intersex children have the right to participate in all decision making processes at home, in institutions and wider society, especially decisions that affect them as individuals. Participation entails that intersex children are recognised as rights holders with respect to their bodies and all other areas of life and therefore, that no decision is made without their participation in a manner that their voices and concerns are heard and taken into regard.

States must also ensure that harmful cultural and social practices against children, infanticide, abandonment and rejection are eradicated. This can be done through enabling legislation, public awareness and sensitivity programmes aimed at providing correct information about intersex persons and changing social attitudes towards them.

PREVENTING AND ADDRESSING HUMAN RIGHTS VIOLATIONS AGAINST INTERSEX PERSONS



Raising public awareness

States must conduct public awareness campaigns aimed at correcting the misconceptions about intersex persons and creating social positive attitudes them. These campaigns must address the root cause(s) of human rights violations against intersex persons in Africa. These include harmful social and cultural norms and stereotypes as well as beliefs about attributes required of men and women. The campaigns must be targeted towards informing people about the laws enacted to prevent harm against intersex persons, their provisions and the remedies available to the victims under these laws. These campaigns must underscore that human rights violations and harmful practices against intersex persons are criminal offences and specify corresponding penalties to deter people from continuing with the harmful social and cultural practices. They must also provide information on the mechanisms available to report human rights violations and other harmful acts against intersex persons.

Public awareness campaigns must be nationwide especially in rural communities. States must also carry out awareness activities with stakeholders in the private and informal sectors. States must conduct these awareness

raising activities through all appropriate means and channels based on the context and the specific needs of the target audience: poster campaigns, social media campaigns, through advertising in televisions, radio, including community radio, and newspapers.

States must educate advertising professionals, journalists, and other communication specialists including personnel working in pop culture media and community radio to raise awareness against harm and all forms of human rights violations targeted at intersex persons. States must encourage information professionals to establish partnerships with public experts on intersex rights so as to prevent negative reporting and depictions of intersex persons. States must also train and use public figures such as traditional, religious and community leaders to campaign against harmful social



PREVENTING AND ADDRESSING HUMAN RIGHTS VIOLATIONS AGAINST INTERSEX PERSONS

and cultural practices and other forms of human rights violations against intersex persons.

Investigating and prosecuting harm and human rights violations against intersex persons

States must put in place measures to effectively investigate and prosecute acts of harm and human rights violations against intersex persons. In this regard, states must ensure investigations and prosecutions are carried without delay, independently, impartially, and in a manner that will lead to the identification and sentencing of perpetrators.

Investigations and prosecution must consider the rights of victims throughout the proceedings and guarantee the well-being and safety of victims and their families.

Access to justice and effective remedies

States must ensure access to justice for intersex persons, particularly access to legal representation and a fair trial. In this regard, states must adopt the various resolutions and guidelines of the African Commission relating to legal representation and access to a fair trial.

States must also adopt legislative and any other measures required to guarantee effective, sufficient and timely remedies, including reparations to intersex victims. Remedies must be affordable and accessible without unjustified delays. Reparation includes restitution where possible, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

Counselling for intersex victims of harm and other human rights violations

States must take measures to provide counselling and support services to intersex persons and their families especially those who are victims of harm and human rights violations. In this regard, states must provide training to social workers, psycho-social counsellors, victim support police officers, health care workers and other professionals who come into contact with intersex victims of harm and human rights violations, focusing on their mental as well as physical health needs and wellbeing.

Access to information

States must ensure that intersex persons and their families have access to comprehensive, free and easy to understand information about their rights. This information must include how and where to access legal representation, report human violations, as well as remedies available for human rights violations. The information must also include how and where to access counselling and other support services.

Collaboration with local stakeholders and civil society organisations

Local authorities can play a particularly important role in promoting the rights of intersex persons especially in remote or marginalised areas under the principle of complementary and shared responsibility. As such, under the principle of complementary and shared responsibility, the obligations of states as

highlighted above trickle down to local authorities. States must therefore ensure that they co-operate and collaborate with local authorities when fulfilling their obligations under the African Charter towards the implementation of Resolution 552. Local authorities equally have a shared responsibility to ensure that they promote and protect the rights of intersex persons within their jurisdiction and therefore, should reach out to central government in the realisation of this shared obligation.

Civil society organisations, including community-based organisations, also have an important role to play in promoting the rights of intersex persons. States must allow, register and support intersex organisations to carry out their programmes. Barriers that hinder the work of intersex organisations, including legal barriers, must be removed, and effective protection of such organisations or human rights defenders must be provided against attack, reprisals or recriminations.

Summary

Implementation of this guide by state actors

States must adopt legislative, administrative, judicial, and all other measures necessary to implement Resolution 552 in law and fact as elaborated in this guide. This will include examining legislative and regulatory provisions and practices to meet the normative standard of Resolution 552 in line with the African Charter.

States should ensure that this guide is broadly disseminated, including at the offices of relevant ministries, departments, local authorities, national representatives, national gender equality institutions and national human rights institutions; to defence and security personnel and personnel in the legal, educational, medical and social fields as well as throughout civil society. This guide should be disseminated to services providers who are likely to be the first interveners in assisting intersex persons, especially those who are victims of harm and human rights violations.

States must ensure that all government employees in charge of preventing violence, punishing perpetrators and supporting and protecting intersex victims receive appropriate training on the contents and implementation of this guide. State are therefore encouraged to make this guide and other supplementary materials on the rights of intersex persons an integral part of programmes for training apart from making legislative and policy interventions.



Non-state actors bear a shared responsibility to not only ensure that states implement Resolution 552 but to ensure that they themselves adhere to the standards set out in the Resolution. In this regard, non-state actors can also take steps towards the implementation of Resolution 552. These steps include:

Collaborating with state actors:

Non-state actors should collaborate with states to ensure the effective promotion and protection of the rights of intersex persons as set out in Resolution 552. For example, non-state actors such as private media can collaborate or independently carry out awareness programmes through radio and television shows. Welfare based civil society organisations can collaborate with state institutions such as police and state hospitals to provide counselling services to intersex victims and their families, while human rights civil society organisations can collaborate on the preparation appropriate materials and the provision of training to state institutions on the rights of intersex persons.

Adopting appropriate practices:

Non-state actors should adopt appropriate practices based on Resolution 552 and the normative standards in the African Charter and its protocols towards the promotion and protection of the rights of intersex persons. These practices include work place policies that prohibit discrimination based on sex, sex characteristics, sexual orientation, gender identity, and gender expression. Further, non-state actors should sensitise their staff, affiliates and partners on the rights of intersex persons towards the realisation of Resolution 552.

Specific non-state actors: What they should do

- **Media**

Private media plays an important role in dissemination of information and formation of opinion. As such, private media should carry out programmes that provides correct information about intersex persons and their rights. The media should include the voices of intersex people and groups in their programmes so that lived experiences are documented, captured and accurately portrayed.

- **Legal profession**

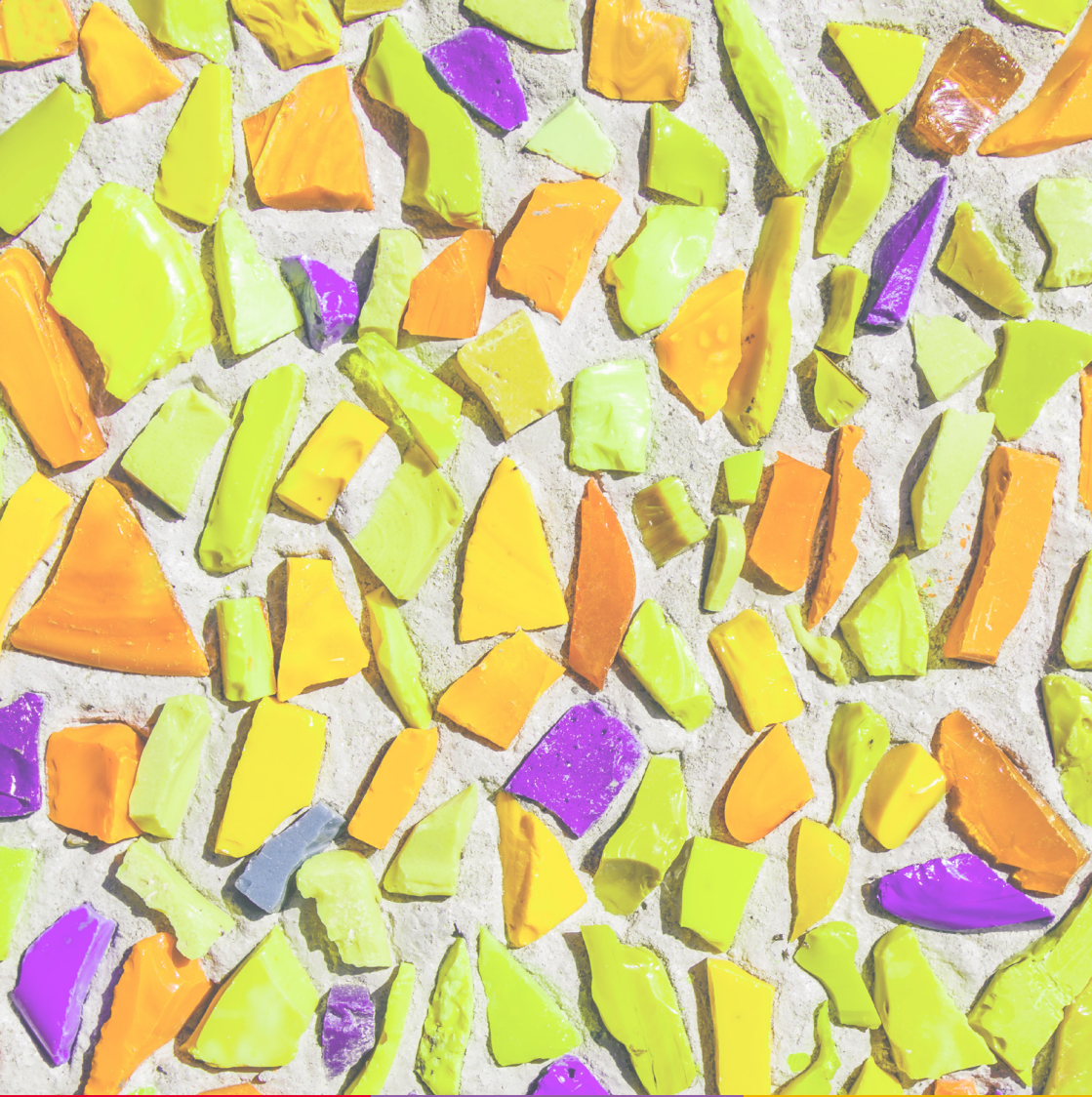
The legal profession is vital in the provision of access to justice. Legal professional bodies such as Law Societies and Bar Associations should create and implement pro-bono legal services schemes to assist intersex persons with legal representation either as victims of violations or in administrative processes such as acquiring or altering identity documents. Law Societies and Bar Associations can also use their human

rights committees to conduct trainings, raise awareness and lobby for legislative reforms towards the promotion and protection of the rights of intersex persons. In the same light, Law Societies and Bar Associations can carry out strategic litigation or file amicus briefs towards law reform aimed at promoting and protecting the rights of intersex persons.

- **Medical profession**

The medical profession, such as medical and surgical societies or associations should use its strategic position to prevent and end non-consensual genital 'normalisation' practices on intersex persons. They should further adopt human rights based standards for clinical practitioners in the treatment of intersex persons including intersex children. Medical and surgical societies or associations should also collaborate with state and other non-state actors to provide accurate information about intersex persons, their rights and the short and long term physiological harm associated with or caused by 'normalisation' practices.





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