

7 The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health – resolution E/CN.4/2004/49

The full text resolution E/CN.4/2004/49 is reproduced in **Core document 16**.

The UN Commission on Human Rights established a three-year mandate for the Special Rapporteur in 2002 and it was extended in 2005 for three more years. Paul Hunt, the Special Rapporteur, gathers information on health from member States, inter-governmental organisations, NGOs and individuals. The Office of the Special Rapporteur sets up cooperation frameworks in the field of health with all relevant actors - including other UN agencies, reports, etc - throughout the world on the right to health and makes recommendations on measures, policies etc, which could promote that right or eliminate obstacles to attain it.

www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/5f07e25ce34edd01c1256ba60056deff?Opendocument

Commission on Human Rights resolution 2002/31. **The right of everyone to the enjoyment of the highest attainable standard of physical and mental health**

It is important to underline that the Special Rapporteur receives individual complaints both in case of urgency, when a violation of the right to the enjoyment of the highest attainable standard of physical and mental health is occurring or when the violation has already occurred. The Special Rapporteur addresses urgent action letters to governments when such violations occur. Governments are asked to respond promptly to the Special Rapporteur and sometimes they are called on to take actions to redress situations involving the violation of the right to health. However, it should be noted that such requests by the Special Rapporteur are not enforceable on states.

<http://www.ohchr.org/english/bodies/chr/special/complaints.htm>

Complaints Procedure Assumed by the Human Rights Council

On the occasion on the 10th anniversary of the Cairo conference (2004), the Special Rapporteur dealt with reproductive and sexual rights in his report to the Commission on Human Rights. This is one of the most comprehensive statements on sexual and reproductive rights. It contains valuable statements regarding the relationship between these rights and LGBT people.

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<http://daccessdds.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf?OpenElement>
The right of everyone to the enjoyment of the highest attainable standard of physical and mental health. **Report of the Special Rapporteur**, Paul Hunt. Resolution **E/CN.4/2004/49**

With respect to the relation between sexual and reproductive health and human rights, the Special Rapporteur states in Paragraph 13:

Of course, not all sexual and reproductive ill-health represents a violation of the right to health or other human rights. Ill-health constitutes a human rights violation when it arises, in whole or in part, from the failure of a duty-bearer - typically a State - to respect, protect or fulfil a human rights obligation. Obstacles stand between individuals and their enjoyment of sexual and reproductive health. From the human rights perspective, a key question is: are human rights duty-bearers doing all in their power to dismantle these barriers?

The report affirms that sexual and reproductive ill-health represents a violation of human rights when it arises from the failure of the State to protect, respect or fulfil it.

The obligation to **protect** means that:

States should take steps to prevent third parties from jeopardizing the sexual and reproductive health of others, including through sexual violence and harmful cultural practices.

The obligation to **respect**:

requires States to refrain from denying or limiting equal access for all persons to sexual and reproductive health services, as well as the underlying determinants of sexual and reproductive health.

The obligation to **fulfil** requires:

States to give recognition to the right to health, including sexual and reproductive health, in national political and legal systems. Paragraph 4 states that health systems should provide for sexual and reproductive health services for all, including in rural areas, and States should carry out information campaigns to combat, for example, HIV/AIDS, harmful traditional practices and domestic violence.

The right to health, including sexual and reproductive health, encompasses sexual rights, which are defined as sexual freedoms by the Special Rapporteur:

The right to health, including sexual and reproductive health, encompasses both freedoms, such as freedom from discrimination, and entitlements.

Paragraphs 24 - 25 - In the context of sexual and reproductive health, freedoms include a right to control one's health and body. Rape and other forms of sexual violence, including forced pregnancy, non-consensual contraceptive methods (e.g. forced sterilization and forced abortion),

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female genital mutilation/cutting (FGM/C), and forced marriage all represent serious breaches of sexual and reproductive freedoms, and are fundamentally and inherently inconsistent with the right to health

States have the obligation to provide a wide range of sexual and reproductive health services including voluntary testing, counselling and treatment for sexually transmitted infections, including HIV/AIDS.

In paragraph 32, the Special Rapporteur refers to the prohibition against sexual orientation discrimination:

International human rights law proscribes discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds or race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status that has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.

Nonetheless, sexual minorities are still being denied equal access to sexual and reproductive health services:

Paragraph 33 - Discrimination and stigma continue to pose a serious threat to sexual and reproductive health for many groups, including women, sexual minorities, refugees, people with disabilities, rural communities, indigenous persons, people living with HIV/AIDS, sex workers, and people held in detention. [...]

Concerning LGBT people's access to health, in paragraph 39 the Special Rapporteur highlights:

Consistent with Toonen v. Australia and numerous other international and national decisions, they should ensure that sexual and other health services are available for men who have sex with men, lesbians, and transsexual and bisexual people. It is also important to ensure that voluntary counselling; testing and treatment of sexually transmitted infections are available for sex workers.

<http://www.ohchr.org/english/about/publications/docs/sdecisions-vol5.pdf>

See **page 133** of this OHCHR reference. It is the first successful homosexual case taken to the Human Rights Committee. Toonen argued that the ban on same-sex male acts in the Tasmanian Criminal Code violated his right to privacy and equality under the International Covenant on Civil and Political Rights (ICCPR) (Articles 17 and 26).

Sexual rights (see paragraph 54) are human rights and they include:

the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.

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Further attention should be paid to the relationship between sexual and reproductive rights. Indeed, in paragraph 55 the Special Rapporteur underlines that:

Since many expressions of sexuality are non-reproductive, it is misguided to subsume sexual rights, including the right to sexual health, under reproductive rights and reproductive health. Given the nature of his mandate, the Special Rapporteur has a particular concern with the rights to sexual and reproductive health, hence the title of this section of the report. These rights, however, have to be understood in a broader human rights context that includes sexual rights.