



KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

**SUBMISSION TO THE INDEPENDENT EXPERT ON PROTECTION AGAINST
VIOLENCE AND DISRIMINATION BASED ON SEXUAL ORIENTATION AND
GENDER IDENTITY**

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Kenya National Commission on Human Rights
1st Floor, CVS Plaza, Lenana Road
P.O. Box 74359-00200
NAIROBI, KENYA
[Tel: 254-20-2717908 /2717256/2712664](tel:254-20-2717908)
Fax: 254-20-2716160
Website: www.knchr.org
Email: haki@knchr.org

A. INTRODUCTION

The Kenya National Commission on Human Rights is an independent national human rights institution established under article 59 of the Constitution and operationalized under the Kenya National Commission on Human Rights Act.¹ The Commission has a broad mandate to promote the respect and culture of human rights in the Republic of Kenya. The Commission's mandate is implemented through various strategies including research, advocacy and lobbying, education and training, complaints and investigations, litigation, monitoring, partnership building and networking among others. The Commission's functions are guided by the 1993 United Nations approved principles on the establishment and functioning of national human rights institution (Paris Principles) and is accredited as an 'A' status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples' Rights.

B. BACKGROUND

Out of 54 countries in Africa, Kenya is one of the 36 that have criminalized consensual adult same sex conduct in its Penal Code.²

Section 162 (a) and (c) of the Penal Code provides that

Any persons who has carnal knowledge of any person against the order of nature or permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years.

Section 165 of the Penal Code provides for the offence of indecent practices between males

Any male person who, whether in public or private, commits an act of gross indecency with another male person, or procures another male person to commit an act of gross indecency or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

A petition challenging the constitutionality of the above two decisions has been filed in the constitutional and judicial review division of the High of Kenya in Nairobi.³ The decision will be delivered on 24th May 2019.

The criminalization of same sex conduct continues to undermine the exercise of rights for persons of diverse sexual orientation and gender identity. However, policy and judicial interventions continue to expand the spaces for the exercise of rights of persons of diverse sexual orientation and gender identity. The High Court in the *Eric Gitari versus NGO Coordination Board and 4 others*⁴ has determined that the equality and non-discrimination

¹ Act No 14 of 2011 (revised 2012) available at <http://www.kenyalaw.org/lex/actview.xql?actid=No.%2014%20of%202011>

² Open for Business 'The Economic Case for LGBT+ Inclusion in Kenya' available at <https://drive.google.com/file/d/1qBeumxNW55O99ib4lTJ0TorycHYScGw5/view>

³ *Eric Gitari and another versus Attorney General and Others*, Petition Number 150 of 2018.

⁴ *Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR; Petition Number 440 of 2013 available at <http://kenyalaw.org/caselaw/cases/view/108412/> para 80.

clause applies to every persons and that an individual regardless of gender or sexual orientation is a person for purposes of the Constitution. Additionally, the Republic of Kenya during the 2nd cycle of the Universal Periodic Review accepted a recommendation to enact a comprehensive equality and non-discrimination legislation that affords protection to all individuals regardless of their sexual orientation and gender identity.⁵

The Commission in collaboration with the Network of National Human Rights Institution have embarked on a process to institutionalize responses to violence and discrimination against lesbian, gay, bisexual, transgender and gender-non conforming persons at the Commission. The project is anchored on [African Commission Resolution 275 of 2014](#) which called on states ‘to end all acts of violence and abuse, whether committed by state or non-state actors including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities ensuring proper investigations and diligent prosecution of perpetrators and establishing judicial procedures responsive to the needs of victims.’⁶

The project is guided by an action plan which requires the Commission to inter alia mainstream SOGIE in its complaints management system to enable the commission disaggregate data on complaints received from persons of diverse sexual orientation and gender identity.⁷

C. RESPONSE TO QUESTIONS

1. *What are the current efforts by States to increase their knowledge of the LGBT population? Specifically, are questions about sexual orientation and gender identity included in government surveys (e.g. the census, national health surveys, income and living condition surveys, or other surveys funded or mandated by the State), administrative records (e.g. birth certificates/birth registries, identity Cards, school records, professional licenses, social security and public benefit records, and other government documents)?*

Efforts by the state to collect data that would increase their knowledge of LGBT population have been done in the context of health. The Ministry of Health has conducted population based survey on HIV and STIs among at most risk populations including men who have sex with men, female sex workers and injecting drug users to estimate the prevalence of ad risk factors for HIV and STIs amongst these groups and estimate the population sizes.⁸ The Kenya Most at Risk Population Size Estimate Consensus Report prepared by the Ministry of Health provides estimates of most at risk population including men having sex with men for purposes of programming around HIV Prevention and Control. The report however recognises that estimating population size of Men who have sex with men or locating and counting them

⁵ United Nations Human Rights Council ‘Report of the Working Group on the Universal Periodic Review: Kenya (26th March 2015 A/HRC/29/10) para 142.41 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/064/59/PDF/G1506459.pdf?OpenElement>.

⁶ African Commission on Human and Peoples Rights’ Resolution 275 of 2014 on Protection against Violence and other Human Rights Violations against Persons on the basis of their Real or Imputed Sexual Orientation or Gender Identity.’ Available at <http://www.achpr.org/sessions/55th/resolutions/275>.

⁷ Kenya National Commission on Human Rights & Network of National Human Rights Institutions ‘Report on the Sexual Orientation, Gender Identity and Human Rights: The Kenya In-Country Workshop (2017)’ available at <https://www.nanhri.org/2017/07/21/kenya-in-country-sexual-orientation-gender-identity-report/> page 20.

⁸ Ministry of Health ‘Most at Risk Population Surveillance Report (2012)’ available at <https://www.nascop.or.ke/?p=1056>

through general survey is difficult due to criminalization of same sex conduct and stigma and discrimination associated with revealing ones sexual orientation.⁹ The Kenya AIDS Indicator Survey has also noted that ‘key populations at high risk of exposure to HIV are difficult to sample in household surveys. Therefore surveys focusing on key populations are needed to understand their contribution to the HIV epidemic.’¹⁰

In the health sector, the government has proposed to carry out an integrated HIV Bio-Behavioural Surveillance Study to gather information on HIV incidence and prevalence, risks behaviours, intervention exposure and more that is useful in evaluating progress of HIV programs. The study includes a survey of a number of each of key populations and information about HIV prevalence, risk behaviour and intervention exposure. The study includes plans to use biometric method of identification such as finger prints or iris scans for those who participated in study¹¹. Human rights groups and key population advocates have opposed the roll out of the program especially the incorporation of the biometric component for fear of data breaches which may expose their identity given the fact that sex work, drug use and same sex conduct is criminalized in Kenya.¹² Closely linked to this, is stigma and discrimination that key populations face including persons of diverse sexual orientation. Second concern stems from the use of data collected for purposes for which it was not collected.¹³

Due to the criminalization of same sex conduct, the government is reluctant to pose questions about sexual orientation and gender identity in government funded surveys, population and housing census and administrative records. Kenya will be carrying out the national Population and housing census between the 24th and 25th August 2019. There is no question within the enumeration instruments on sexual orientation or gender identity. Data collected by government on sexual orientation and gender identity is only done in the context of programs relating to HIV and STIs.

However, the Kenya National Bureau of Statistics has included within the census instruments a question concerning intersex persons as a third code in the sex category of the enumeration instruments indicated as ‘other’. The inclusion stems from advocacy by the Kenya National Commission on Human Rights which has a memorandum of understanding with the Kenya National Bureau of Statistics that is legally mandated to conduct census and collect statistics on behalf of the government. Advocacy was also carried out by the Taskforce on Legal, Policy, institutional and administrative Reforms regarding intersex persons created by the Attorney General¹⁴ with a mandate to recommend short term, mid-term and long term recommendations towards protecting the rights of intersex persons in Kenya.

The Kenya National Commission on Human Rights in pursuance of its mandate to receive and process complaints on human rights violations has included within its complaints management system and complaints collection forms non-binary markers, markers on sexual orientation and

⁹ Ministry of Health ‘Kenya Most at Risk Populations Size Estimation Consensus Report (April 2013)’ available at http://www.aidsinfoonline.org/kpatlas/document/KEN/KEN_2012_PSE_Report_FSW_MSM_PWID.pdf.

¹⁰ Ministry of Health ‘Kenya AIDS Indicator Survey 2012’ available at <https://nacc.or.ke/wp-content/uploads/2015/10/KAIS-2012.pdf> page 34.

¹¹ KELIN & Kenya Key Populations Consortium ‘Everyone Said No: Biometrics, HIV and Human Rights A Kenya Case Study (2018)’ available at <http://www.kelinkenya.org/wp-content/uploads/2018/07/%E2%80%9CEveryone-said-no%E2%80%9D.pdf> page 1.

¹² Ibid page 10.

¹³ Ibid page 9.

¹⁴ Gazette Notice No. 4904 (Vol. CXIX No.67 of 2017).

markers on sexual characteristics. This will enable the Commission to disaggregate data on complaints received on grounds of sexual orientation and gender identity. It is critical to note that a person's sexual orientation, gender identity and sexual characteristics is recorded upon consent from the complainant.¹⁵

2. *What kinds of data can be collected by government to understand the nature and extent of violence (e.g. through statistics on LGBT-phobic hate crimes and hate speech), discrimination, and disparities in health, education, labour, civic participation, and other important areas?*
 - (i) Population based surveys- are critical to provide insights on the social situation including extent of violence
 - (ii) National Census- to provide insights on the quantitative presence which can be cross referenced with data from population based surveys to understand social situation¹⁶
 - (iii) Administrative data on complaints on rights violations and experiences of discrimination can be collected by National Human Rights Institutions and Equality Bodies. In addition, National Human Rights Institutions can commission research on experience of persons of diverse sexual orientation and gender identity which can be a good source of data on the situation of persons of diverse sexual orientation and gender identity. The Commission has carried out on the situation of intersex persons in Kenya titled Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya, 2018.¹⁷

3. *What safeguards are in place, and what safeguards are needed, to protect the human rights of individuals providing personal data as well as individuals collecting such data? This question includes the following:*
 - a. *Safeguards to protect the privacy of individuals who provide data about their sexual orientation/gender identity, and the confidentiality of the data provided by these individuals.*
 - (i) *The Constitution:* It is important that the supreme law of the States guards the right to privacy which must include the right for every person not to have information relating to their private affairs unnecessarily revealed. The Constitution of Kenya, 2010 (Article 31) secures this right providing that, ‘ Every person has the right to privacy, which includes the right not to have-
 - a) Their person, home or property searched
 - b) Their possessions seized
 - c) **Information relating to their family or private affairs unnecessarily required or revealed;** or

¹⁵ Network on National Human Rights Institutions and the Kenya National Commission on Human Rights ‘Findings Report on the Extent to which responses on SOGIE related Violence have been Institutionalized within the Kenya National Commission on Human Rights (May 2018).’

¹⁶ Mark Bell ‘Analysis and Comparative Review of Equality Data Collection Practices in the European Union: Data Collection in relation to LGBTI People (2017)’.

¹⁷ Available at

https://www.knchr.org/Portals/0/GroupRightsReports/Equal%20In%20Dignity%20and%20Rights_Promoting%20The%20Rights%20Of%20Intersex%20Persons%20In%20Kenya.pdf?ver=2018-06-06-161118-323.

d) The privacy of their communications infringed.

- (ii) *Enactment of Data Protection Laws and Policies*- this is critical towards regulating collection and processing of personal data which includes an individual's sexual orientation and gender identity. In Kenya, there is no data protection framework in place to regulate the collection and processing of sensitive personal data including data collected by statistical offices. At the time of making this submission, the Privacy and Data Protection Policy and the Bill were in their draft forms.
- (iii) *Maintaining confidentiality and anonymity in data collection*- due to criminalization of same sex conduct and experiences of stigma and discrimination, one of the safeguards that can be put in place at institutional level when collecting data is to maintain confidentiality and anonymity of data collected on individual's sexual orientation and gender identity. During data collection in surveys one can administer anonymous online surveys or self-completed questionnaires. Additionally, data already collected should be secured through encryption and should not be used for any other purpose other than what it was collected for.

b. *What are the risks associated with the collection and management of data on sexual orientation and gender identity and initiatives to overcome those?*

Data Breach which would see to data on individuals' sexual orientation and gender identity made public. The risks associated with this is prosecution in countries where same sex conduct is criminalised or stigma and discrimination occasioned due to religious and cultural beliefs.

There is also need for strong laws that protect civic space generally and human rights defenders to make the environment safe for CSOs working on LGBT issues to work. Constrained and violent working environment, whether online or online inhibit operations including data collection on LGBT. Harassment, violence and discrimination must be punished in line with the laws without considerations of sexual orientation or gender identity unless that be an aggravating factor in a judicial process. African States, by the Resolution 275 referred to earlier committed to '*[ending] all acts of violence and abuse, whether committed by state or non-state actors including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence...*'. The legislatures must thus take steps to enact and repeal laws that are discriminatory or otherwise criminalize LGBT. That is a fundamental step to advocating for the rights of all persons, including LGBT persons.

There is also need for sensitisation on the rights of the LGBT persons. There is also need for a shift in focus - Government programmes and policies must be tailored beyond the disease question when addressing LGBT human rights issues. It must first and foremost be about securing the dignity inherent in the human person. Non-discrimination is a non-derogable right and a rule of *just cogens* that must be adhered to by all States. The current state of States programming around LGBT in most countries appears to zero in around HIV and STI prevention and treatment.

Development Partners' strategy to planning and funding must also change to decriminalisation of same sex conduct instead of focusing on HIV prevention and key populations as the sole strategy when it comes to addressing LGBT persons.

When States engage in data gathering activity, to what extent is civil society able to meaningfully participate in the design and implementation of these programs? This question includes the following:

- a. Do states have policies that guide the process of civil society participation national statistical programs and other State efforts to increase knowledge about LGBT populations?*

The Constitution of Kenya, 2010 requires all government agencies to ensure public participation in policy making and implementation. Article 10 of the Constitution outlines the national values and principles of governance which includes public participation. Indeed, public participation is a thread that runs through the entire text of the Constitution. Public participation is a key value that must be respected and taken into account whenever government agencies make or implement public policy decisions or enact and interpret any law. For Kenya, the principle of public participation must therefore apply with respect to the application and interpretation of the Statistics Act (No. 4 of 2006).

Public participation requirements enjoins the national statistical offices and other state agencies to include CSOs while collecting, analysing and presenting findings of the data. The government is in the process of developing a National Public Participation Policy that would guide government agencies on ensuing public participation including CSO participation.

- b. What constitutes meaningful participation in this area?*

- (i) Proper mapping of all the relevant CSOs and community based organisations to the lowest level organisations that hitherto are overlooked in forums. These grass root organisations are closest to the people and are key to data collection, advocacy and implementation of programmes generally concerning LGBT issues.
- (ii) Incorporating civil society organizations in national statistical processes including technical working groups that oversee development, collection and publication of data on LGBT populations.
- (iii) Formulation of partnerships towards collecting, analysing and dissemination of data on LBT populations.
- (iv) Engagement with civil society organizations to strengthen their capacity and expertise to collect data.
- (v) Creating a safe space in which civil society organization can carry out their work. National Human Rights Institutions can play a key role in facilitating these safe spaces.
- (vi) Decriminalizing work of organization working towards the protection and promotion of rights of persons of diverse sexual orientation and gender identity.

D. CONCLUSION

Overcoming barriers such as criminalization of same sex conduct and addressing root causes of discrimination such as religion and culture is key towards collecting data on the situation of LGBT persons in Kenya.