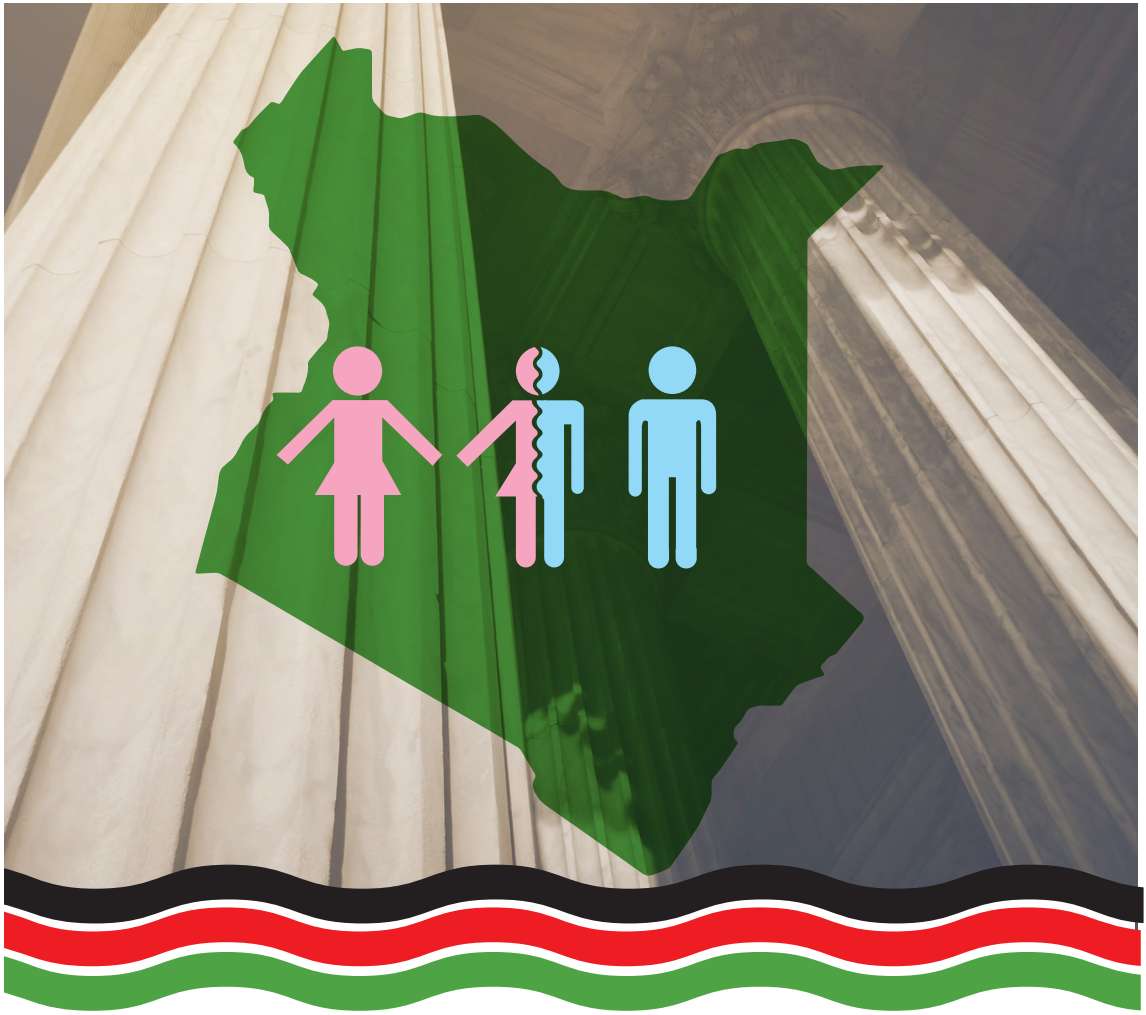
REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY GENERAL
AND DEPARTMENT OF JUSTICE



REPORT OF THE TASKFORCE ON POLICY, LEGAL, INSTITUTIONAL AND ADMINISTRATIVE REFORMS REGARDING

INTERSEX PERSONS IN KENYA

WARNING:

The document contains some images that are graphic in nature and might be disturbing to some readers.

Disclaimer

This publication has been developed with the technical assistance from the International Development Law Organisation (IDLO), with financial support from the United States Agency for International Development (USAID) and Danish International Development Agency (DANIDA). The printing of the publication has been undertaken by IDLO with funding from the Danish International Development Agency (DANIDA). The views expressed herein do not necessarily reflect the views or policies of IDLO or its Member Parties. Similarly, the views expressed in this publication do not necessarily reflect the views of USAID and DANIDA.

REPORT OF THE TASKFORCE ON POLICY, LEGAL, INSTITUTIONAL AND ADMINISTRATIVE REFORMS REGARDING THE INTERSEX PERSONS IN KENYA

SUBMITTED BY

THE TASKFORCE ON POLICY, LEGAL, INSTITUTIONAL AND ADMINISTRATIVE REFORMS REGARDING THE INTERSEX PERSONS ON KENYA

TO THE HONOURABLE ATTORNEY-GENERAL OF THE REPUBLIC OF KENYA

HON. P. KIHARA KARIUKI

DATED THIS.....DAY OF 2018

Hon. P. Kihara Kariuki
Attorney-General of the Republic of Kenya
State Law Office, Sheria House
Harambee Avenue
NAIROBI

10th December 2018

Dear Sir,

RE: LETTER OF TRANSMITTAL

The Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya was appointed by the Hon. Attorney-General vide Gazette Notice No. 4904 on 26th May 2017 with the following terms of reference:

a) Compile comprehensive data regarding the number, distribution and challenges of Intersex persons;

b) Undertake comprehensive literature review based on a comparative approach to care, treatment and protection of Intersex persons;

c) Examine the existing policy, institutional, legislative, medical and administrative structures and systems governing Intersex persons;

d) Recommend comprehensive reforms to safeguard the interests of Intersex persons;

e) Develop a prioritised implementation matrix clearly stating the immediate, medium and long term reforms governing the Intersex persons; and

f) Undertake any other activities required for the effective discharge of its mandate.

In exercise of its mandate, the Taskforce was required to complete its work and submit its final report to the Hon. Attorney-General within 6 months from the date of its appointment. The Taskforce subsequently sought two extensions of its tenure which were granted vide Gazette Notice Nos. 10810 and 4544 dated 3rd November, 2017 and 9th May 2018 respectively and a final one month administrative extension lapsing on 10th December, 2018.

The Taskforce has implemented its mandate, finalised its report which entails a proposed framework for implementing the recommendations made. We are humbled by the trust which was bestowed on us to serve in the taskforce.

The taskforce is honoured to present this report to your Lordship, the Attorney-General of Kenya.

.....

Mbage Njuguna Ng'ang'a - Chairperson

.....

Maryann Njau-Kimani, OGW - Member

.....

John M. Kinyumu - Member

.....

Jimmy Edwin Nyikuli - Member

.....

Lavina Achieng Oluoch - Member

.....

Jedidah Wakonyo Waruhiu - Member

.....

Caroline Towett - Member

.....

Sylvester Mbithi - Member

.....

Petronella Mukaindo - Member

.....

James Karanja - Member

.....

Samwel Odiwuor Kaumba - Joint Secretary

.....

Veronica Wambui Mwangi - Joint Secretary

TASKFORCE MEMBERS

The table below shows the names of the members and the institutions represented.

Name	Designation	Institution
Mbage Njuguna Ng'ang'a	Chairperson of the Taskforce	Kenya Law Reform Commission (KLRC)
Maryann Njau-Kimani, OGW	Member	Office of the Attorney General & Department of Justice (OAG &DOJ)
John M. Kinyumu	Member	Ministry of Interior and Coordination of National Government (Department of National Registration Bureau)
Jimmy Edwin Nyikuli	Member	Ministry of Interior and Coordination of National Government (State Department of Immigration, Border Control and Registration of Persons)
Lavina Achieng Oluoch	Member	The CRADLE –The Children Foundation
Caroline Towett	Member	Ministry of Labour and Social Protection; State Department of Children's Services.
Petronella Mukaindo	Member	Kenya National Commission on Human Rights (KNCHR)
Sylvester Mbithi	Member	National Gender and Equality Commission
Jedidah Wakonyo Waruhiu	Co-opted Member	Kenya National Commission on Human Rights (KNCHR)
James Karanja		
	Co-opted Member	Intersex Persons Society of Kenya (IPSK)
Samwel Odiwuor Kaumba	Joint Secretary	Office of the Attorney General & Department of Justice (OAG & DOJ)
Veronica Wambui Mwangi	Joint Secretary	Kenya National Commission on Human Rights (KNCHR)

ACKNOWLEDGEMENT

The completion of the Taskforce report is borne of the exemplary work, immeasurable dedication and cooperation of several individuals and institutions. We acknowledge key State and Non-State institutions i.e. Ministry of Interior and National Coordination of Government, Ministry of Health, Ministry of Education, Ministry of Labour and Social Protection, Kenyatta National Referral Hospital, Moi Teaching and Referral Hospital, Intersex Persons Society of Kenya, Jinsi Yangu, and Gender Minority Advocacy Trust (GMAT), among others. We also gratefully acknowledge all the professionals and individuals who supported this noble initiative through supplying crucial data and information regarding intersex persons.

The Taskforce acknowledges tertiary institutions that opened the door to the Taskforce Members and shared their institutional experiences on the subject and those that afforded a platform for creating awareness, including: the University of Nairobi, Kenyatta University, Moi University, Mt. Kenya University, Thika School of Medical and Health Services and United States International University - Africa.

The Taskforce especially remains grateful to the intersex persons and their families who willingly shared deep personal experiences and views concerning their lives. These included families in Kenya and those we met in Uganda during a study tour organised by SIPD-Uganda. Their individual and collective input made the work of the Taskforce achievable amid the trying challenges.

The Taskforce further extends its deep appreciation to each and every one of its Members for their personal involvement and dedication in the entire process, without which the report would not have been possible. We salute the administrative and logistical support accorded by the Joint Secretaries, Ms Veronica Mwangi and Mr Samwel Kaumba, which made the entire process seamless. The Taskforce also appreciates Dr. Antonina Okuta for the support as a joint secretary in the early stages of the Taskforce's work. We further acknowledge the continuous and effective work of the legal research consultants: Elizabeth Agina, Sheila Nnamdi and Virginia Nelder, who assisted in the collation and transformation of immense information into a coherent and analytical report. The Taskforce also wishes to express

its appreciation to John Chigiti, Lavinia Ogolla, Concilia Flora, Winnie Nyambegera and their entire team for facilitating the data collection and analysis process, which was a vital component in the completion of this report. The Taskforce, in the same breath greatly appreciates the indispensable contribution of Amos Omollo and Msanii Kimani wa Wanjiru for the final editing and design and layout of the entire report in time and in shape.

The Taskforce also appreciates the administrative support accorded by its secretariat, Kenya National Commission on Human Rights for graciously opening its doors and providing meeting facilities and its associated needs, putting at the Taskforce's disposal its staff for technical support especially on awareness initiatives and most importantly for its overall coordination of the field survey, the first of its kind in Kenya. Similarly, the Taskforce expresses its sincere thanks to Kenya Law Reform Commission for financial support, technical support through its officers and for the office space they accorded to part of the secretariat staff. Further, we recognise the key role played by other staff and all other actors who assisted the Taskforce in one way or the other at the various stages, especially in the technical review and finalisation.

The Taskforce is appreciative of the support and participation of Anne Nderi, Cindy Salim and other members of staff from the International Development Law Organisation (IDLO). Finally, the Taskforce greatly appreciates the generous financial and technical support of the IDLO and the Open Society Initiative of Eastern Africa (OSIEA).

Thank you all.

FOREWORD BY THE CHAIRPERSON

I am very pleased to be associated with the work and publication of this report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya. The Taskforce was constituted by the Hon. Attorney-General in May 2017, with its membership drawn from various State and non-State institutions in the governance, medical, religious sectors as well as representation from the Intersex community. Primarily, the Taskforce was to investigate and make recommendations aimed at addressing the plight of intersex persons in Kenya. Indeed, this is the first time, Kenya is undertaking a bold step of documenting the number and distribution of intersex persons to inform policy, legal, institutional and administrative interventions.

The Taskforce adopted various strategies in pursuit of its goals. Key among them were: a comprehensive and comparative desk review; stakeholder consultations; targeted awareness fora; a field survey; key informant interviews; field visits and use of ICTs. The approaches were also supported by a functional Secretariat, co-option of new members, hiring of a research consultant and partnership with relevant agencies and Development Partners.

The Taskforce took cognisance of the sensitivity of the subject matter, something that was confirmed by the responses received during the field survey and the institutional visits. It was also confronted firsthand with the realities and stigma associated with the Intersex condition as meted out on the intersex persons, especially the children. Evidently, intersex persons as a "marginalised", "minority" and "vulnerable" group face a multitude of challenges and human rights violations from birth that includes: stigmatisation, ridicule, discrimination and inadequate medical attention. There is also a general lack of awareness about the intersex condition and the appropriate ways of supporting an intersex child and the immediate family. This report documents these challenges based on a first person encounter with intersex persons and their families.

It was noteworthy that an inadequate policy and legislative framework has hampered development of supportive systems for intersex persons in the country. This had led to whatever advocacy efforts which may have

been made to go unnoticed and ultimately fail to realise the intended gains. However, the growing demonstration on the human aspects and appreciation of the need for integration of intersex persons has summoned society`s attention. In recent times, the country has witnessed positive legislative, judicial and administrative pronouncements that partially informed the work of the Taskforce. Specifically, the court decisions in the RM Case of 2010 and the Baby 'A' Case of 2014 prompted the establishment of the Taskforce.

In spite of challenges encountered due to the nature of work required by discharge of the Taskforce's mandate, there was remarkable progress and poignant success stories. The Taskforce findings further outline a number of recommendations that need to be implemented in order to guarantee that intersex persons achieve equality in law, human dignity and legal protection. Beyond meeting all the set goals, the Taskforce opened up the space for constant dialogue and engagement with intersex persons. This was achieved by working closely with the Intersex Persons Society of Kenya (IPSK). The Taskforce also developed a comprehensive and broad-based definition of the intersex status. This definition will no doubt inform the recognition debate and the response to the challenges associated with the intersex status. These and other milestones are detailed in this report.

These achievements, realised amid the obvious inherent and encountered challenges, were a product of collaboration, consultation and cooperation with many agencies and persons. The priceless input of all Taskforce Members, the Secretariat and the various experts and agencies is deeply appreciated. The Taskforce is further grateful to our partners particularly, the Office of the Attorney- General and Department of Justice (OAG&DOJ), International Law Development Organisation (IDLO) and the Open Society Initiative of Eastern Africa (OSIEA). We further acknowledge with profound gratitude, all those who were instrumental in the field work, development and finalisation of the Report.

Mbage Njuguna Ng'ang'a

Chairperson of the Taskforce

EXECUTIVE SUMMARY

The Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons was constituted and gazetted by the Office of the Attorney-General (OAG) vide Gazette Notice No. 4904 on 26th May, 2017. In undertaking the assignment, the Taskforce undertook comprehensive and intensive research and stakeholder consultations. In addition, the Taskforce rolled-out a nationwide survey to complement desk review and stakeholder input, which informed the key proposals on development of policy, legal, institutional and administrative measures to address the plight of intersex persons and development of an implementation matrix.

In Chapter One of the report, the Taskforce highlights that, while it is estimated that between 0.05 to 1.7% of babies worldwide are born intersex, most countries have not taken steps to establish comprehensive data on intersex persons. Consequently, most countries have not made concrete policy, legislative, institutional or administrative steps specifically aimed at safeguarding the rights of intersex children.

In Kenya, the High Court in the cases of R.M v Attorney General & 4 others [2010], eKLR and Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014], eKLR), upheld the rights of intersex persons to non- discrimination and affirmed their right to protection from torture, cruel, inhuman and degrading treatment by holding that intersex persons are protected under Article 27 (4) of the Constitution. The Court also underscored the need for empirical data on intersex persons in Kenya to inform relevant reforms to address challenges faced by intersex persons as a marginalised group.

The Persons Deprived of Liberty Act (2014) is a key legislative step that provides for the protection of human rights of intersex inmates pertaining to upholding their dignity and safeguarding their security through specific provisions on searches and confinement. Further, the National Police Service through its Standing Orders under Chapter 15 made provision for protection of the dignity and security of intersex persons while in detention by providing that intersex persons shall choose the sex of the officer to conduct any body searches and shall be confined separately from the male and female inmates.

Additionally, the 11th Parliament in 2017 through its Departmental Committee on Administration and National Security also made recommendations including on: the need for recognition before the law through introduction of an Intersex (I) marker, public awareness, generation of statistics, access to healthcare, and redress for human rights violations. The Kenya National Commission on Human Rights (KNCHR) has similarly documented the plight of intersex persons and proposed recommendations and, in that regard, wrote an advisory to the Kenya National Bureau of Statistics (KNBS) on 9th March, 2018, with regard to the collection of data on intersex persons within the national census or other socio-economic surveys to facilitate planning.

Chapter Two of the report is divided into two parts: the historical understanding of intersex persons and the contemporary understanding of intersex persons. Under the historical perspective, the chapter reviews the various rampant misconceptions relating to the term 'Intersex' and who it relates to. It is stated that while intersex persons were hitherto called 'hermaphrodite' and were known as such as early as the 18th and 19th centuries in Greece, it is not until the 20th century that the term 'Intersex' was used as a scientific and medical term by the medical practitioners.

In Kenya, intersex persons have been in existence for long time, something that is borne out by the fact that different communities have indigenous descriptive names for the intersex persons. The Taskforce established that the indigenous names depict the cultural biases against intersex persons. The second part of Chapter Two focuses on the legal, medical and religious perspectives on intersex persons. In all these, the Chapter concludes that even though there is a firm understanding and recognition of intersex persons, the various fields have a narrow perspective of their status. Accordingly, the Taskforce upon review of the 46 variations of intersex conditions identifiable at different stages, that is, during pregnancy screening, at birth, in childhood, during puberty or adulthood, adopts a more comprehensive definition of intersex persons, namely, that an intersex person is:

"A person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes)

or chromosomal (X and Y) patterns which could be apparent prior to, at birth, in childhood, puberty or adulthood."

Chapter Three of the report examines the key international and regional instruments and highlights on select countries' comparative practices on the care, treatment and protection of intersex persons. The Chapter concludes that the international and regional legal realms are replete with treaties and conventions that emphasise the dignity of the human person by prohibiting: discrimination on any basis including 'sex', birth or other status'; treatment of intersex persons amounting to torture, cruel, inhumane or degrading treatment instead, they make provision for the necessity of informed free and voluntary consent in medical procedures on intersex persons; consideration of the 'best interests of the child' in care and treatment of intersex children.

In addition they ensure safeguarding of the right of everyone to the enjoyment of the highest attainable standard of physical, mental health in Sports and Recreational activities; data protection and confidentiality by providing that data regarding intersex persons must be safeguarded and handled in an ethical manner, including information relating to sex and sex characteristics of the person; right to education and training by enjoining States to ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and; the inclusion of human rights of people of diverse sex characteristics in curricula, taking into consideration the evolving capacity of the child, teacher training and continuing professional development programmes.

On the context of Kenya's situation, the Taskforce concludes that while the Constitution under Articles 2, 19, 27, 28, 29, 35, 47, 53 and 56 provides the foundation for recognising and protecting human rights and fundamental freedoms of intersex persons in Kenya by preserving their dignity and promotion of social justice and the realisation of their potential as human beings, a review of the current state of sectoral laws established serious legal, institutional and administrative gaps that fail to take cognisance of the existence, needs and challenges of intersex persons in Kenya. The current statutory laws, administrative actions and institutional arrangements within the health, education, employment, civil registration, immigration and justice sectors are fashioned along a binary concept of male and female.

Chapter Four of the report summarises the current status of the intersex persons in Kenya in terms of the number, distribution, challenges, experience and recommendations as obtained from the field survey conducted from June to October, 2018. The summary of the key findings of the survey are that:

Majority of the intersex persons of school-going age experience low levels of access to education, with only about 10 % of them attaining tertiary education. Further, that most intersex persons and their families go through shock, anger, embarrassment, confusion and ultimately acceptance on discovery of intersex status.

In terms of self-recognition, the study found out that a paltry 5% recognised themselves as intersex, while the others are mostly confused about their exact status due to low levels of awareness and lack of information and support. On health care, 54% of the respondents ranked their experience in accessing healthcare as poor due to high cost of treatment and presence of very few specialised hospitals. While parents and caregivers who had, their children undergo corrective surgeries had mixed reactions, the study found unanimity on the views of intersex persons on surgery, that is, the need to wait for the child to reach puberty and allow the manifestation of the dominant sex characteristics; let the child consent to the medical surgical intervention; and have all the necessary medical diagnostic tests done before the surgery.

In terms of legal recognition and documentation, the study found out that a majority of the intersex persons had birth certificates, but the recorded sex conflicts with the self- recognised sex. The birth certificates make it difficult for intersex persons to acquire Identity cards (ID). This is compounded by their changed physical appearance that conflicts with the recorded sex. Due to this conflict between the recorded sex in the birth certificates and their physical appearance, the few who have IDs have acquired them through the use of alternative ways such as sworn affidavits, baptism cards and the assistance of the third parties. This long process of acquiring ID cards causes undue delay to the intersex person getting an ID card, with resultant negative social implications including missed opportunities, employment and voting. It also results in an intersex person having conflicting documents hence identity crisis where the name and recorded sex in the birth certificate and school documents are different from the sex in the birth certificate and other subsequent documents.

The study also established that intersex persons who have been in contact with the law enforcement officers felt that their privacy was eroded through intrusive and unnecessary searches. Those who had been detained, were mixed with the other male and female inmates, exposing them to the dangers of ridicule, sexual harassment, rape and attempted rape, among others.

Drawing from the desktop reviews in Chapters One, Two and Three and statistical data in Chapter Four, Chapter Five presents a compelling case for reform and strengthening, as the case may be, of the policy, legal, administrative and institutional framework in order to safeguard and guarantee the rights of intersex persons in Kenya. In response to the specific findings in Chapter Four of this report, the study makes the following recommendations:-

Recognition and Documentation

i. Legislative amendment to Section 3 of the Interpretation and General Provisions Act, Cap 2; and Section 2 of the Persons Deprived of Liberty Act [2014] to define an intersex status and introduction of substantive provisions on equal treatment, respect and protection of dignity within the criminal justice sector through amendment to the Prison Rules, 1963, Criminal Procedure Code, Cap 75, Borstal Institutions Act, Cap 92, Borstal Institutions Rules, 1963, Probation of Offenders Act, Cap 64 and Children's Act, 2001 to facilitate recognition of intersex persons before the law through the introduction of an intersex (I) marker.

ii. Responsible agencies to effect expeditious provision of birth certificates, identification documents, passports and other official personal documentation that include provisions for the intersex (I) marker. This will be effected through amendment of legislation including: Births and Deaths Registration Act Cap. 149, Registration of Persons Act Cap. 107, Interpretation of General Provisions Act Cap. 2, Kenya Citizenship and Immigration Act, Cap 172, and the Children Act, 2001.

Health

iii. Ministry of Health in consultation with relevant agencies to formulate specialised programmes to provide for intersex persons' care and protection in health facilities in order to facilitate their access to the highest attainable standard of health. Ministry of Health to work with other regulatory agencies towards their protection against involuntary medical intervention and ensure effective remedy. Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent. The Director of Medical Services in consultation with the regulatory body to develop a protocol on surgical and hormonal interventions that constitutes medical emergencies.

iv. Ministry of Health in consultation with Medical Practitioners and Dentists Board to formulate harmonised and comprehensive treatment guidelines focusing on a child and human rights-based approach to medical care and protection of intersex children. Healthcare must focus beyond physical wellbeing to encompass the mental health aspect. In this regard, provision should be made for psychosocial support to both the intersex child and their family.

v. State to establish a fund to cater for all medical-related interventions for intersex persons due to the high cost implications. The State to give a free/subsidised medical insurance health cover under the NHIF or any other scheme.

Awareness

vi. The State to mount awareness campaign targeting the general public, education providers, State institutions dealing with registration and documentation of persons, and health providers on the plight of intersex persons in Kenya and the need for their appropriate care and treatment.

vii. Collection of accurate and verifiable statistics on intersex persons.

viii. Development and review of social protection mechanisms to ensure realisation of social, economic and legal protections for intersex persons and safeguard against violations on the basis of their 'I' marker.

ix. Relevant training in schools and tertiary institutions regarding intersex status. The curricula to be revised accordingly to include intersex in the relevant subjects of instruction throughout the formal education system, including science, biology, sexual and reproductive health and anatomy, among others.

Chapter Six of the report arranges the recommendations into immediate, short term, medium-term and long-term implementation strategies wherein the short-term measures are to be implemented within the years 2019 to 2020, medium term within 2020 to 2023 and long term within 2023 to 2030 in order to coincide with the Vision 2030 Strategy. The Chapter also identifies the government institution(s) responsible for implementation of the key recommendations.

DEFINITION OF TERMS

Recorded at birth means the sex that is included in registration documents at the birth of a child.

Self-recognised sex means the sex category an intersex individual uses following biological developments or surgical intervention that alters their sex category to one which was not recorded at birth.

ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AISSGA	Androgen Insensitivity Support Group Australia
CAH	Congenital Adrenal Hyperplasia
CBOs	Community Based Organisations
CEDAW	Committee on the Elimination of Discrimination against Women
CJEU	Court of Justice of European Union
CLE	Council of Legal Education
CoK	Constitution of Kenya
CRC	Committee on the Rights of the Child
CREAW	Centre for Rights Education and Awareness
CRIN	Child Rights International Network
CRR	Centre for Reproductive Rights
CSOs	Civil Society Organisations
CUE	Commission for University Education
DSD	Disorders of Sexual Development
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EU	European Union
EUAFR	European Union Agency for Fundamental Rights
HERAF	Health Rights Advocacy Forum
FGM	Female Genital Mutilation
IAAF	International Association of Athletics Federations

ICCPR	International Covenant on Civil and Political Rights
ID	Identification Document
IDLO	International Development Law Organisation
IGM	Intersex Genital Mutilation
IPSK	Intersex Persons Society of Kenya
JTI	Judiciary Training Institute
KEMSA	Kenya Medical Supplies Authority
KEMRI	Kenya Medical Research Institute
KICD	Kenya Institute of Curriculum Development
KIPRA	Kenya Institute of Public Research
KISE	Kenya Institute of Special Education
KJV	King James Version
KLRC	Kenya Law Reforms Commission
KNCHR	Kenya National Commission on Human Rights
KNBS	Kenya National Bureau of Statistics
LRF	Legal Resources Foundation
LSK	Law Society of Kenya
MOE	Ministry of Education
MOH	Ministry of Health
MoICT	Ministry of Information, Communications Technology
MPDB	Medical Practitioners and Dentists Board
NACOSTI	National Commission for Science, Technology and Innovation
NCAJ	National Council on the Administration of Justice
NCCJR	National Committee on Criminal Justice Reform
NIV	New International Version

NEMA	National Environment Management Authority
NHIF	National Hospital Insurance Fund
NLAS	National Legal Aid Service
NPSC	National Police Service Commission
OAS	Organisation of American States
OAG	Office of the Attorney General
OSIEA	Open Society Initiative for East Africa
PStG	(Prussian) Law on Civil Status
PStV	(German) Regulation on the Implementation of the Civil Status Act, 2013
RODI	Resources Oriented Development Initiatives
SDGs	Sustainable Development Goals
SIPD	Support Initiative for People with Congenital Disorders
TSC	Teachers Service Commission
UDHR	Universal Declaration of Human Rights
UDPK	United Disabled Persons of Kenya
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCAT	United Nations Convention against Torture
UNDOC	United Nations Office on Drugs and Crime
UNDP	United Nations Development Programme
UNIFEM	United Nations Development Fund for Women
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
WHO	World Health Organisation
YP+10	Yogyakarta Principles plus 10

LIST OF TABLES

LIST OF FIGURES

TABLE OF CONTENT

1.

1.0 INTRODUCTION

"Hormones are not assigned, they assign themselves" - Dr. Ngatia[1]

1.1 Introduction

The first question at birth is whether a child is male or female? Such a seemingly harmless question has great ramifications on the enjoyment and realisation of all rights and freedoms by intersex children and adults. What happens when the doctors or birth attendants cannot discern the sex of the child at birth? What safeguards are contained in existing policy, legal, institutional and administrative frameworks internationally, regionally and within our national context? This chapter delves into the background on the plight of intersex persons and sets the pace for prevailing discussions on caring and protecting intersex persons globally in light of the challenges intersex persons face.

1.2 Background

The recognition of a person on the basis of sex is often pegged on the binary categorisation of one being either male or female at childbirth. This however, is not obvious for all births. In some cases, a child's sex cannot be clearly ascertained at birth due to marked differences in their sex characteristics, therefore they are referred to as intersex. Worldwide, an estimated 0.05 to 1.7% of new born babies are born intersex[2]. These estimates have similarly been stated by the United Nations Free & Equal Campaign, initiated by the UN Office for Human Rights, which concluded that around 1.7% of newborn babies across the world can be classified as intersex[3].

Despite the increase in population statistics and the estimates on the population of intersex persons worldwide, comprehensive data on intersex persons in most countries is lacking. Consequently, most countries have not made concrete policy, legislative, institutional or administrative steps specifically aimed at safeguarding the rights of intersex children. The lack of statistics is further compounded by the absence of a framework on the recognition before the law for intersex persons as they are mostly

[1]Doctor Ngatia is a medical practitioner specialised in Obstetrics & Gynaecology.
[2]Fact Sheet, Intersex, online: https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf/ (accessed on 13th June 2018).
[3]See Human rights and intersex people - https://rm.coe.int/16806da5d4.

categorised as either male or female. A research conducted in 2015 by the European Union Agency for Fundamental Rights acknowledged that many of its member states still legally require births to be certified and registered as either male or female[4]. South Africa, the first African country to define sex as including intersex as a distinct category, makes provision for change of sex through the Alteration of Sex Description and Sex Status Act (2003). Similarly, in Uganda, there is provision for the change of sex of a person born 'hermaphrodite', but which is also limited to either male or female.

Conversations on the rights of intersex persons continue to gain momentum all over the world, hence catalysing the development of policy, legal, institutional and administrative measures focusing on intersex persons. The United Nations has pronounced itself on safeguards towards enhancing the enjoyment and realisation of human rights by intersex persons as well as their protection against infringement and violation. The UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health in a statement speaks to the protection of intersex athletes with specific mention of sex testing, coercion or involuntary submission to medically unnecessary treatment, including removal of reproductive organs or Intersex Genital Mutilation (IGM)[5]. Additionally, speaking to the 'best interest of the child', the Committee on the Rights of the Child (CRC) has affirmed protections pertaining to medical intervention and informed consent. More specifically, the CRC proposes the establishment of a comprehensive data collection system to facilitate analysis of vulnerable children with a focus on disaggregated data on, among other things, sex[6].

The Parliamentary Assembly in Europe in a 2013 resolution on Children's Right to Physical Integrity proposed the use of research to safeguard against unnecessary medical/surgical treatment that is cosmetic in nature rather than vital to health. The German Ethics Council has also deliberated on the plight of intersex persons and makes specific pronouncements regarding the right to equality of intersex persons and the disadvantages they are subjected to. The Council states that compared to men and women, intersex persons are disadvantaged because they cannot register themselves in accordance with their sex. The need for information prior to consent to medical intervention has been affirmed by the Council,

[4]The fundamental rights situation of intersex people, FRA FOCUS (2015) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwjl_u-z4Z7eAhWC3CwKHfI5ARAQFjACegQIBxAC&url=http%3A%2F%2Ffra.europa.eu%2Fsites%2Fdefault%2Ffiles%2Ffra-2015-focus-04-intersex.pdf&usg=AOvVaw3cbLhYh0n-9jtL07wdgknl

[5]UN HRC, Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. UN Doc. A/HRC/32/33 (4 April 2016), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/067/39/PDF/G1606739.pdf?OpenElement/, online (accessed on 5th February 2018).

[6]UN CRC, Concluding observations on the combined third to fifth periodic reports of Kenya, UN Doc. CRC/C/KEN/CO/3-5 (21 March 2016), online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/KEN/CO/3-5&Lang=En/online (accessed on 5th February, 2018).

which advocates that, in such cases, intervention should be based on the diagnosis, proposed treatment, possible alternatives, associated risks and the uncertainty of outcomes.

The Council of Europe[7] in its recommendations on human rights and intersex people proposes safeguards to enhance the realisation of human rights by intersex persons. This includes facilitation of recognition of intersex persons before the law through the expeditious provision of all civil registration documents, including birth certificates, identity papers and passports. In that regard, the Commissioner for Human Rights further proposes that flexible procedures should be observed in stating sex in official documents. Additionally, the Commissioner recommends the use of public awareness, professional training, ethical and professional standards as well as legal safeguards.

Within the Inter-American human rights framework, (a regional human rights system responsible for monitoring, promoting and protecting human rights in 35 independent countries of the Americas that are members of the Organisation of American States (OAS)), judicial decisions affirm the right to informed consent prior to medical intervention for intersex children. The constitutional court has made provision for considerations on urgency of surgical intervention and use of less invasive procedures at the onset with others following at maturity as well as the use of an inter-disciplinary medical team.

Closer to home, the African Commission on Human and Peoples Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights specifically list intersex people as a vulnerable and disadvantaged group[8] . The Principles further recognise and stipulate the entitlement by all vulnerable and disadvantaged groups to protection and non-discrimination in the realisation of the rights in the Principles including; right to health, education, housing, social security, work and protection of the family.

During the 61st Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) held in November 2017, the matter of intersex persons was deliberated on for the first time. The panel discussions[9] conducted at the sidelines of the Ordinary Session through the auspices of

[7]Council of Europe, Commissioner for Human Rights, Human rights and intersex people Issue Paper (April 2015), online:https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish&Ver=original (accessed 18 October 2017) [CECHR Issue Paper].
[8]Guideline 1(e)
[9]University of Pretoria, Faculty of Law – News, Centre for Human Rights, Iranti-org and SIPD-Uganda host panel discussion on intersex human rights in Africa (7 November 2017), online: http://www.up.ac.za/en/faculty-of-law/news/post_2592164-centre-for-human-rights-iranti-org-and-sipd-uganda-host-panel-discussion-on-intersex-human-rights-in-africa (accessed 5th February 2018).

the Centre for Human Rights, Pretoria, noted the human rights violations faced by intersex persons as including infanticide as well as lack of appropriate legal recognition and administrative processes allowing for acquisition or amendment of identity documents. The discussions also brought to the fore the unfair discrimination intersex persons are subjected to in schools, healthcare facilities, competitive sports, access to public services and other spheres of life.

The deliberations led to the formulation of recommendations including: prohibition of intersex genital mutilation and other unnecessary medical interventions, and the investigation and prosecution of incidents of abandonment, abuse or infanticide against intersex children. States are further urged to prohibit the root causes of discrimination on the basis of intersex traits and characteristics and to offer training on the needs and human rights of intersex persons for all public service providers. Further, it urged States to amend existing legislative provisions and develop progressive administrative processes to allow intersex persons obtain identity documents as well as amend sex markers on birth certificates and other official documents.

Safeguards for intersex persons were similarly discussed in an East African Baseline Survey aimed at highlighting the plight of intersex persons that was conducted in Kenya, Uganda and Rwanda in 2015. [10]The survey recommended, among other things, the inclusion of the intersex status in health and social development education, service access and employment policies to prevent harassment, abuse and discrimination.

Despite progressive measures focusing on intersex persons taken so far, however, there remains significant international, regional and national outcry on the prevalence of human rights violations perpetrated against intersex persons. An analysis of approaches to care and protection of intersex children reveals a disjointed mechanism. While some intersex children are subjected to 'corrective surgeries' to normalise their sex to fit within the binary category of male or female, others, especially in the developed countries, are not subjected to medical interventions which are deferred until the child can make informed choices at maturity. Further, in other instances, intersex children are secluded and ostracised while others are victims of infanticide, a practice common in many African

[10]Support Initiative for People With Congenital Disorders, Baseline Survey on Intersex Realities in East Africa – Specific Focus on Uganda, Kenya and Rwanda (2015-2016), online: http://sipduganda.org/baseline-survey-on-intersex-realities-in-east-africa-specific-focus-on-uganda-kenya-and-rwanda/ (accessed 9th February 2018) [SIPD Baseline Survey]

communities where they are tabooed. Data on the aforementioned approaches is similarly not reflected in national systems on statistics in most countries.

1.2.1 Setting the Pace: Intersex Persons Agenda in Kenya

Based on the UNHCR Free &Equal global campaign statistics, as per Kenya's current population of 47,848,479 million[11], intersex persons can be estimated at between 23,925 and 813,425 nationally. The number of intersex persons in Kenya has also been documented by the Child Rights International Network (CRIN), which estimates that 20,000 of Kenyans alive are born intersex[12]. This therefore reflects the absence of conclusive and comprehensive statistics on intersex births or intersex persons in Kenya. Clearly, intersex persons continue to remain in the periphery as a group that requires policy, legislative, institutional and administrative interventions, including a robust national dialogue to realise and enjoy their rights.

Judicial decisions in Kenya have upheld and promoted the realisation of the rights of intersex persons with specific focus on protection against discrimination, torture, cruel, inhumane and degrading treatment (See both R.M v Attorney General & 4 others [2010], eKLR and Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014], eKLR). The cases also underscore the need for empirical data on intersex persons in Kenya to inform relevant reforms to address challenges faced by intersex persons as a marginalised group. Further, the determination by the High Court[13] observed that intersex persons fall within the ambit of Article 27 (4) of the Constitution of Kenya, 2010 (CoK, 2010) hence are entitled to equal treatment before the law and protection from discrimination.

The Kenyan Parliament has similarly formulated safeguards for intersex persons stemming from the Persons Deprived of Liberty Act (2014). The Act, the first in Kenya to define intersex,[14] provides for the protection of human rights of intersex inmates pertaining to upholding their dignity and safeguarding their security through specific provisions on searches[15] and confinement[16]. Additionally, the 11th Parliament in 2017 through its Departmental Committee on Administration and National Security, also made recommendations including on; the need for recognition before

[11]KNBS Statistical Abstract, 2018
[12]"KENYA: Baby A and the question mark", online: https://www.crin.org/sites/default/files/kenyababyaandthequestionmark.pdf/ (accessed on 12th November, 2018).
[13]Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014].
[14]Section 2
[15]Section 10
[16]Section 12

the law through introduction of an Intersex (I) marker, public awareness, generation of statistics, access to healthcare and redress for human rights violations[17].

Kenyan State agencies have also made progressive steps towards mainstreaming intersex safeguards within their institutional and administrative frameworks. In 2017, the National Police Service (NPS) through its Standing Orders under Chapter 15 made provision for protection of the dignity and security of intersex persons while in confinement. The rules provide that intersex persons shall choose the sex of the officer to conduct the search and that they shall be confined separately from the male and female inmates.

Further to that, the Kenya National Commission on Human Rights (KNCHR), a state agency charged with enhancing the promotion, protection and observance of human rights in Kenya, has similarly documented the plight of intersex persons and proposed recommendations in that regard. The Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya Report (2018)[18] highlighted the challenges faced by intersex persons in Kenya as including: discrimination, limited access to specialised healthcare, absence of informed consent; lack of psychosocial support for intersex persons and their families, early 'normalising' surgeries and stigma.

Additionally, KNCHR wrote an advisory to the Kenya National Bureau of Statistics (KNBS) on 9th March 2018, drawing their attention to the outcome of Baby 'A' (Suing through the Mother EA) & another v Attorney General & 6 others [2014], eKLR with regard to the collection of data on intersex persons. The advisory highlighted the recommendations directed to the Registrar of Persons, Kenya National Bureau of Statistics and Ministry of Health to provide statistics of all intersex persons and ensure they are captured in the national census or other socio-economic surveys to facilitate planning.

While the Bill of Rights (Chapter 4 of CoK, 2010) provides an array of fundamental freedoms and human rights every person, including intersex persons is entitled to, intersex persons as a vulnerable, marginalised, minority and disadvantaged group[19] are the victims of infringement and violation of human rights and freedoms on the basis of their sex. This stems from lack of legal recognition for intersex persons as a distinct sex category right from birth and at the point of registration.

[18]Equal in Dignity and Rights; Promoting the Rights of Intersex Persons in Kenya (2018), online: http://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/ (accessed on 12th November, 2018).
[19]Article 21(3), 56 and 260 of the Constitution of Kenya, 2010.

On the basis of the foregoing and in light of challenges faced by intersex persons, there is a need for relevant reforms to safeguard the enjoyment of human rights and fundamental freedoms by all. In that regard, the Hon. the Attorney-General established the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding the Intersex Persons in Kenya on 26th May, 2017 vide Gazette Notice No. 4904.

1.3 Mandate and Objectives of the Taskforce

The Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons was constituted by the Hon. Attorney-General vide Gazette Notice No. 4904 on 26th May 2017. The Taskforce was mandated to:

i. Compile comprehensive data regarding the number, distribution and challenges of Intersex persons;

ii. Provide a comparative analysis of approaches to care, treatment and protection of intersex persons;

iii. Conduct an analysis of the policy, legal, medical, administrative and institutional frameworks governing structures and systems with regard to Intersex persons;

iv. Recommend reforms to safeguard the interests of intersex persons;

v. Present a prioritised implementation matrix based on the immediate, medium and long term reforms governing the intersex persons; and

vi. Undertake any other activities required for effective discharge of the mandate.

Membership of the Task Force was drawn from various institutions that comprised: Office of the Attorney-General and Department of Justice (OAG&DOJ); Ministry of Interior and Coordination of National Government; Ministry of Labour and Social Protection; Kenya Law Reform Commission (KLRC); Kenya National Commission on Human Rights (KNCHR), National Gender and Equality Commission (NGEC), the CRADLE and Intersex Persons Society of Kenya (IPSK).

1.3.1 Scope of the Task Force

The Taskforce was constituted on May 2017 with an initial term of 6 months and subsequent extensions to facilitate comprehensive fulfilment of its mandate, which expired on 30th November 2018. The Taskforce term extensions were granted to make up for time lost in the early days due to funding constraints, which hindered the timely delivery of its mandate. The Taskforce's extensive mandate required comprehensive and intensive research, stakeholder consultations and the roll-out of a nationwide survey to complement desk review and stakeholder inputs. The Taskforce also embraced every opportune moment during its institutional visits to enhance awareness among practitioners, academia and students through public lectures.

1.3.2 Operationalisation of the Taskforce

The Taskforce was headed by the Chairperson of the Kenya Law Reform Commission (KLRC) with a designated Secretariat based at the Kenya National Commission on Human Rights (KNCHR). The Taskforce was supported by two joint secretaries drawn from KNCHR and OAG & DOJ. In addition to the participation of the other gazetted members and in exercise of its mandate, the Taskforce co-opted representatives from the Intersex Persons Society of Kenya (IPSK) and the Ministry of Health as key stakeholders on the subject of intersex persons. Further, the Taskforce engaged consultants to support desk review and field survey initiatives in exercise of its mandate.

1.3.3 Approach to the Taskforce Mandate

In order to fulfil its objectives, the Taskforce adopted various strategies and interventions as illustrated below:

a) Consultative Fora

The Taskforce coordinated roundtable discussions with various government institutions and senior officers drawn from: the Ministry of Interior and Coordination of National Government—Director of Civil Registration Services; Ministry of Information, Communications Technology (MoICT);

Ministry of Health; Ministry of Education; Kenya Prisons Service (KPS); Kenya National Bureau of Statistics (KNBS); Department of Children Services; Kenya Medical Practitioners and Dentists Board (KMPDB); Kenya National Examinations Council (KNEC); National Health Insurance Fund (NHIF); University of Nairobi (UoN)—Institute of Anthropology, Gender & African Studies and the School of Medicine; Kenyatta University (KU)—Department of Obstetrics and Gynaecology, and the Centre for Gender, Equality and Empowerment; Moi University (MU) Nairobi Campus—Dean of Students; Mount Kenya University, and; Thika School of Medical and Health Services—Dean of Students, as well as Members of the Kenyan Legislature, among others.

Further, targeted meetings were also held with senior government officials to discuss the institutional challenges and opportunities for immediate, medium and long terms interventions aimed at addressing challenges faced by intersex persons, especially in respect to their right to human dignity, health, privacy, education, protection from discrimination, right to registration, freedom of movement and association among others. Additionally, the Taskforce engaged the National Council on the Administration of Justice (NCAJ) Committee on Criminal Justice reforms in relation to its specific recommendations on legal, policy, institutional and administrative reforms within the criminal justice sector. The Taskforce also held dialogues with parents and guardians of intersex children and intersex persons. Further, the Taskforce engaged a notable media practitioner (who has produced a documentary, Born in-between: The challenges of intersex persons in Kenya[20], medical practitioners and judicial officers, among others.

b) Advocacy and Awareness Raising

The Taskforce made advocacy efforts and facilitated awareness initiatives by use of print and broadcast media; digital and online communication platforms; use of notable opinion leaders; use of drama in messaging, and; public lectures in liaison with the Intersex Persons Society of Kenya. Public lectures were held in colleges and universities, including: The University of Nairobi, Kenyatta University, and the United States International University–Africa (USIU-A) through the auspices of KNCHR, IPSK and Gender Minority Advocacy Trust (GMAT). Taskforce representatives from

[20]"Born in Between, the challenges of intersex persons in Kenya", online: https://youtu.be/hJbtDGSNhJM/

KNCHR and IPSK participated in the Kenya National Commission for UNESCO (KNATCOM) conference on the Right to Peace from 8-9th October at USIU-A campus, Nairobi, and delivered a presentation on the Status of Human Rights Education in Kenya with a focus on intersex children at the inaugural East African Regional Conference on Access to Justice through Legal Aid Legal (5th -8th November, 2018, Nairobi). In addition, Taskforce members delivered a talk in commemoration of the World Intersex Awareness Day on 25th October at the Kenyatta University School of Law.

Social Media was used as an advocacy tool to create awareness as well as collect data on intersex persons. The Taskforce created and administered its independent twitter account, @IntersexKE and hashtag #IntersexKE, in June 2018 to facilitate advocacy. With the support of the KNCHR communications team, the Taskforce also developed e-posters with call-to-action messages and contacts for the Taskforce Secretariat to advance sensitisation and data collection efforts. The twitter advocacy was complemented by the Intersex Society of Kenya (IPSK) twitter account @ Intersex_Kenya, The CRADLE Children's Foundation @TheCradleKenya, Kenya Law Reform Commission @ klrcKE and Kenya National Commission on Human Rights @HakiKNCHR. The twitter advocacy was further bolstered by public information fact sheets and posters hosted in the websites of the Kenya Law Reform Commission (www.klrc.go.ke) and Kenya National Commission on Human Rights Commission (www.knchr.org).

Further, the Taskforce used the Secretariat's SMS platform (Code 22359) to receive feedback and complaints from the general public. Immediate interventions were also undertaken by KNCHR in concert with IPSK on specific complaints, especially in respect to intersex children dropping out of school due to bullying and stigmatisation. Sensitisation efforts by the Taskforce generated thirty (30) cases, which were captured in the KNCHR database.

In addition, the Taskforce used local language (community) and international radio stations for public awareness and sensitisation during the data collection process and to continually share updates through the use of radio talk shows, interviews, press statements and paid-up infomercials. These were aired using the Somali, Dholuo, Luhya, Swahili, Kamba, English, Kikuyu and Kalenjin languages in KBC's Pwani FM, Ingo, Mayienga, Citizen

radio Coro, Inftin, Wajir Community, Pwani, Kitwek, Mbaitu, Radio Jambo, Mtaani, Inooro, Milele, Qwetu and Biblia Husema FM radio stations as well as Voice of America. These included participation of intersex persons, who were also interviewed and shared their personal stories on KBC TV and print media (Daily Nation, The Star, The Standard and People's Daily). Further, in celebration of Intersex Awareness Day, an opinion piece was published on the Daily Nation.

The Taskforce also collaborated with the Network of African National Human Rights Institutions (NANHRI) to produce a video titled, The Day of the African Child, which had a segment on the plight of the intersex child. Further, the Taskforce commemorated the Intersex Awareness Day on 26th October 2017 and 2018 by holding awareness dialogues with the general public, college and university students and administrations and radio media. Additionally, the Taskforce was invited and participated in discussions to advocate for the rights of intersex children during the 63rd Ordinary Session of the African Commission on Human and Peoples Rights in Banjul, The Gambia.

c) Comparative Studies and Surveys

The Taskforce conducted research by way of comparative studies and both primary and secondary research. This was achieved by use of desk review; administration of questionnaires; focus group discussions; institutional visits, requests for secondary data and field observation.

With minimal or no specific data and statistics on intersex persons in Kenya, the Taskforce had to embark on personalised advocacy strategies to begin mapping out and visiting key civil society and public institutions in Kenya and the East African region. The Taskforce thereby co-opted the founder of the Intersex Persons Society of Kenya (IPSK) into the Taskforce to facilitate the identification of intersex persons. Further, the Taskforce called for input from institutions with programmes and interaction with intersex persons for disaggregated data on intersex persons within their networks.

A benchmarking mission was also organised to Uganda to appreciate how their human rights institutions and networks operate and their impact on intersex persons in that country. The Taskforce held discussions with:

Uganda Human Rights Commission; Specialist Doctors (Paediatrician and Endocrinologist) at Mulago National Referral Hospital; Lecturers at Makerere University School of Medicine (Department of Paediatric and Child Health); Support Initiative for People with Congenital Disorders (SIPD)-Uganda; Reproductive Health Uganda; Human Rights Awareness and Promotion Forum; Refugee Law Project; Centre for Domestic Violence, and; Raising Voices. Further, there was a field visit to engage intersex persons and their families in Mukono District.

The Taskforce mapped out all the 47 counties of Kenya for data collection survey but reached a total of 37 counties. Data collection tools were developed and 15 data collectors trained on its administration for the pilot phase, which was conducted in 6 counties, namely, Nairobi City, Kiambu, Machakos, Kitui, Kajiado and Makueni Counties between 26th and 29th June 2018. Thereafter, the data collection tools were improved for the second phase of data collection, which was subsequently conducted by 27 data collectors across a further sample in 31 counties from 30th July 2018 to 26th October 2018 making a cumulative of 37 counties sampled.

d) Building Partnerships

The Taskforce observed that it was critical to build partnerships, especially with Development Partners in order to raise the necessary human and financial capacity needed to fully realise its objectives. The Taskforce thereby approached various Development Partners to support its work. International Development Law Organisation (IDLO) and Open Society Initiative for Eastern Africa (OSIEA) agreed to support the Taskforce with both financial and technical expertise during the implementation of its mandate.

e) Planning, Monitoring and Evaluation

The Taskforce developed a work-plan with specific timelines. Additionally, monitoring and evaluation tools were used to regularly monitor and report on progress. Regular meetings of the Taskforce served to review the progress, offer policy guidance and steer the process on course. Monitoring and evaluation data facilitated the appraisal and review of interventions where necessary.

f) Feedback Mechanisms and Reporting

The Taskforce established online and physical reporting mechanisms to fast track the sharing of useful feedback. At the conclusion of its nationwide data collection survey, the Taskforce in the spirit of public participation as enshrined in the CoK, 2010 convened regional validation meetings between 8th and 11th October 2018 in three counties, namely; Nairobi City, Mombasa and Kisumu to develop joint recommendations premised on stakeholders input.

Further, Taskforce members convened five retreats to interrogate its findings based on desk review, nationwide data collection survey, consultative stakeholder engagements and regional validation meetings. Finally, the Taskforce developed its final Taskforce Report and formulated reform proposals and an implementation matrix.

1.4 Challenges of the Taskforce

The lack of a recognition framework coupled with stigma and lack of awareness on intersex persons necessitated continuous sensitisation efforts to enable the Taskforce actualise its mandate. However, in the absence of adequate funding for mass media advocacy, social media played a complementary role. Whereas this enabled the Taskforce to cover significant ground, traditional media such as TV and radio still plays the greatest role in information dissemination especially in the grassroots, where affordability of data for social media outreach remains a luxury but most households have at least a television or radio set, if not both. Therefore, there is need for continuous sensitisation to expand the reach and active involvement of intersex persons in addressing their needs.

The exercise of the mandate of the Taskforce also required significant financial support to facilitate the running of the Secretariat through activities such as meetings, report writing and validation sessions, desk-review research and the field survey, which were critical in achieving the mandate set out above. However, there were budgetary constraints which resulted in the slow implementation of the Taskforce mandate. These were however addressed in due course and the Taskforce mandate was successfully discharged.

2.0 WHO IS AN INTERSEX PERSON?

2.1 Introduction

There are rampant misconceptions of the term 'intersex' and who it relates to. This chapter explains the key issues about this often-misunderstood term and dispels the myths and misconceptions surrounding the identity and nature of intersex persons. In that regard, the chapter delves into the legal, medical and religious realms and highlights the different terminologies often variously employed to refer to intersex persons. In doing so, the chapter establishes a common understanding of intersex persons in the Republic of Kenya.

2.2 Historical background

In the 18th and 19th centuries, the term 'hermaphrodite 'was commonly used to refer to a person with both male and female reproductive organs'.[21]The term was derived from the names of two deities, Hermes and Aphrodite, in Greek mythology and compounded as Hermaphroditus. Hermes (the Roman Mercury) was the ancient Greek god of trade, wealth, luck, fertility, animal husbandry, sleep, language, thieves, and travel. One of the cleverest and most mischievous of the Olympian gods, he was also their herald and messenger and lover to Aphrodite. Aphrodite was the Olympian goddess of love, beauty, pleasure and procreation and was depicted in art as a beautiful woman. Their love produced one son, Hermaphroditus, a remarkably handsome two-sexed child who became a symbol of androgyny or effeminacy, and was portrayed in Greco-Roman art as a female figure with male genitals. [22]The young god was sent to Mount Ida in Asia Minor, where he was raised by nymphs (divine nature spirits who were usually depicted as beautiful, young nubile maidens who love to dance and sing). However, the young god also had a more positive link with the institution of marriage: by embodying both masculine and feminine qualities, he symbolised the coming together of men and women in sacred union.[23]

[21]Merriam-Webster dictionary, online: https://www.merriam-webster.com/dictionary/hermaphrodite/ (accessed on 22nd September, 2017).
[22]Theoi Project- Greek Mythology, online: http://www.theoi.com/Ouranios/ErosHermaphroditos.html/(accessed on 13th June, 2018).
[23]Allen J. Romano. The Invention of Marriage: Hermaphroditus and Salmacis at Halicarnassus and in Ovid. The Classical Quarterly (New Series, Vol. 59, No. 2 (Dec., 2009), pp. 543-561. Cambridge University Press, online: https://www.jstor.org/stable/20616705/ (accessed on 23rd November, 2018).

Among the earliest reported case of a hermaphrodite was in the book, The Initiation of the Macedonian War, in 207 BCE.[24] In the Modern Era, the term was mentioned in Sweden around 1750.[25] Dr John Money, the pioneer US sexologist, uses the term 'intersex' in his publications in the 1950s.[26]

Similar indications of early existence of intersex persons are evident in other parts of the World. In India,[27] Vinay Lal notes that since time immemorial, there existed a community in India known as hijras and described variously by scholars as including eunuchs, intersex, castrated, effeminate and sexually anomalous or dysfunctional, among other terms.[28] It is not until the 20th century,[29] that the term 'intersex' was used as a scientific and medical term by medical practitioners. As early as 1977, a study documented 38 male pseudo-hermaphrodites from 24 families who were identified in 4 villages in the south-western section of the Dominican Republic.[30] Locally, they are referred to as guevedoces ('Penis at 12s') or machihembras (first a girl then a boy). Subsequent reports from the Dominican Republic point to the existence of children brought up as girls from infancy due to lack of obvious testes or a penis at birth but later developing penises and having their testicles descend when they neared puberty.

According to Health24, a South African health information website, it is estimated that one in every fifty children born in South Africa is intersex.[31] In Zambia, the first intersex case was recorded in 1960 at Ndola Hospital.[32] Sudan is reported to have one of the biggest hospitals in Africa for the treatment of intersex children, exploring and characterising cytogenetics, molecular alterations, hormonal profiling, and clinical aspects of different types of DSDs.[33] Uganda has the biggest intersex organisation in the world that takes care of intersex children and parents known as SIPD.[34]

In Kenya, the existence of intersex persons has been recognised for a long time. However, talking about sex was taboo, and even the mention

[24]See Valerie Warrior's (1996) translation, The Initiation of the Second Macedonian War: An Explication of Livy, Book 31. Franz Steiner Verlag, USA.
[25]Maja Larsson, Boundaries of the normal body: On hermaphrodites, medical classifications and control 1750-1850, online: http://www.rj.se/GlobalAssets/Slutredovisningar/2004/Maja_Larsson_e.pdf/ (accessed on 2nd November, 2018).
[26]John Money, "Hermaphroditism, gender and precocity in hyperadrenocorticism: psychologic findings," Bulletin of the John Hopkins Hospital 95, no. 6 (1955): 253–264, online: http://www.ncbi.nlm.nih.gov/pubmed/14378807 (accessed 4th December, 2018)
[27]See "The Hijras of India: Cultural and Individual Dimensions of an Institutionalised Third Gender Role", Serena Nanda, PhD pages 35-54, online: https://www.tandfonline.com/doi/citedby/10.1300/J082v11n03_03?scroll=top&needAccess=true/ (accessed on 29th October, 2018).
[28]Lal, Vinay. "Not this, not that: The hijras of India and the cultural politics of sexuality." Social Text 61 (1999): 119-140.
[29]Human Rights and Intersex Issue paper, online: http://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2015/07/31/Intersex.pdf (accessed on 12th September, 2017).
[30]See Peterson, R. E., Imperato -McGinley, J., Gautier, T., and Sturla, E. (1977). "Male pseudo-hermaphroditism due to steroid 5-a-reductase deficiency". American Journal of Medicine, 62, 170-190. As cited in S. A. Greene, E Symes, and C G Brook, 5-alpha-Reductase deficiency causing male pseudo hermaphroditism. Online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1545103/pdf/archdisch00801-0057.pdf (accessed on 9th October, 2017).
[31]Online: https://www.health24.com/Sex/Sexual-diversity/96-000-South-Africans-may-be-intersexed-20120721 (accessed 17th July, 2018).
[32]Forbes, J. I., and B. Hammar. "Intersex among Africans in Rhodesia." Archives of disease in childhood 41.215 (1966): 102.
[33]Ahmed, Samia Mahdi, and Imad Fadl-Elmula. "Clinical, Cytogenetic, and Molecular characterization of Disorders of Sexual Development (DSD) in Sudan." Genomics and Applied Biology 6 (2016).
[34]http://sipduganda.org/

of the more uncommon sex statuses as the intersex was unthinkable. Hence most communities either did not have proper names to describe the intersex, or else used some descriptive words to refer to them. Still, even such euphemisms were hardly ever used in public discourse since the entire subject of sex was tabooed. However, the Taskforce still encountered echoes of these related names and descriptions among the indigenous communities across the country, which included: Huntha/jinsia mbili (Kiswahili, literally 'intersex or two-sexed'); Mali-nda (Akamba, 'something inside the body'); nyot gath (Luo, 'deformed progeny or unnatural baby/child'); Kiugu/Ciugu (Kikuyu, 'someone not perfect, or of no value'), and; chelososiot (Kipsigis). Other indigenous references connotative of the intersex were: Labeeb (Somali), Entapis (Maasai), Mundumuka mundumurume (Embu), Chemuren (Keiyo), Nturuntu (Ameru); etc.

In 1964, an American anthropologist carried out a research on the cultural beliefs and perspectives on intersex persons among the Pokot. According to the research[35], an intersex child was perceived as an unfortunate occurrence and a freak, with some people in the community indicating that if they had such a baby, they would kill it. Others saw the killing of such intersex children as a cultural and religious duty.

The plight of intersex persons is illustrated by the endless struggles they go through right from the cradle in terms of naming, identity and cultural practices. In addition, they face difficulties in growing up, including having to endure social stigma that peaks in their puberty. Their situation is made worse by the ambivalent if not downright hostile community perception of their status, often leading to social isolation and ostracism. The immense emotional turmoil, stress and disagreement in the families caused by the birth and life of an intersex child, in a number of cases leads to mental breakdown of (usually) the mother or/and total family break-up caused by separation of parents. The life of the intersex persons is always precariously balanced between life and death, something not helped, for instance, by the dressing habits of the Pokot community. The traditional Pokot mode of dress, which barely covers the genitalia for both men and women, exposes intersex members of the community to open ridicule in a culture where body image is greatly treasured.[36]

[35]Robert B. Edgerton (1964). Pokot Intersexuality: An East African Example of the Resolution of Sexual Incongruity. The Neuropsychiatric Institute, University of California, Los Angeles. Online: https://anthrosource.onlinelibrary.wiley.com/doi/pdf/10.1525/aa.1964.66.6.02a00040 (accessed 4th December, 2018)
[36]Robert B. Edgerton, Pokot intersexuality: An East African example of the resolution of sexual incongruity. The Neuropsychiatric Institute, University of California, Los Angeles.

In comparison, the fate of intersex persons in the other indigenous Kenyan communities is no better. They face the same dilemmas due to prejudicial cultural beliefs throughout their lives, if they are lucky to survive.[37] This greatly contrasts with the care and nurture accorded to other persons falling within the binary categorisation of male and female. Kenyan law is clear on its prohibition against infanticide, but retrogressive cultural and religious beliefs and practises continue to endanger the lives of innocent intersex babies and children, with perhaps but a few of them lucky enough to survive.[38]

2.3 Contemporary Definitions of Intersex

The Intersex Society of North America defines Intersex as a "general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definition of female or male."[39] At the same time, a UN Human Rights Office of the High Commissioner Fact Sheet explains that intersex people are born with sex characteristics (including genitals, gonads and chromosomal patterns) that do not fit typical binary notions of male or female bodies.[40]

The Centre for Human Rights, Pretoria, defines 'intersex' as an umbrella term used to describe people who are born with natural sex characteristics including (genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies[41]. Additionally, it states that variations of intersex traits may be visible, while others only manifest during puberty.[42] Sociologists for Women Society define intersexuality as a variety of conditions in which individuals are born with (or develop later in life) ambiguous external genitalia and/or a combination of chromosomes, gonads, external genitalia and hormones that do not align as typical male or typical female. Thus, these definitions align with the term 'intersex' as employed in sociological literature as opposed to the rather pejorative 'Disorders of Sex Development', a term that has recently been adopted by some doctors and medical scholars.[43]

The Androgen Insensitivity Support Group Australia (AISSGA), a genetic support group with focus on intersex conditions offers a broader description

[37]Ibid
[38]Ibid
[39]Intersex Society of North America. Online: http://www.isna.org/faq/what_is_intersex/ (accessed on 2nd November, 2018).
[40]Online: https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf/ (accessed on 2nd November, 2018).
[41]UN OHCHR Factsheet on Intersex persons. Online: http://www.chr.up.ac.za/sogie-news/494-invitation-presentation-of-a-proposed-draft-model-law-on-intersex-persons-rights-in-africa-fact-sheet-on-intersex-persons?highlight=WyJmYWN0Iiwic2hlZXQiLCJmYWN0IHNoZWV0Il0/ (accessed on 19th October, 2018).
[42]Factsheet on Intersex persons, online: http://www.chr.up.ac.za/sogie-news/494-invitation-presentation-of-a-proposed-draft-model-law-on-intersex-persons-rights-in-africa-fact-sheet-on-intersex-persons?highlight=WyJmYWN0Iiwic2hlZXQiLCJmYWN0IHNoZWV0Il0/ (accessed on 19th October, 2018).
[43]Maura Kelly. Intersex. Sociologists for Women in Society Fact Sheet, Department of Sociology, University of Connecticut (Spring, 2007). Online: https://socwomen.org/wp-content/uploads/2018/03/fact_03-2007-intersex.pdf/ (accessed on 19th October, 2018).

of intersex. It defines intersex as genetic conditions identifiable at birth that result in the birth of a child with anatomical or biological sex differentiation which varies from that most commonly found in male and female births.[44] They also state that intersex conditions have a direct physical effect on reproductive organs and/or sex chromosomes. A recent communiqué by the UN Special Rapporteurs[45] describe intersex thus:

"Intersex people, also referred to as people with differences of sex development, or people with a subset of intersex variations, are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty."

The term 'intersex' has also been defined within the African regional human rights frameworks. In a joint dialogue of the African Commission on Human and Peoples Rights, the Inter-American Commission on Human Rights and the United Nations[46] that discusses intersex matters in its report, they define an intersex person as "a person born with sexual anatomy, reproductive organs and/or chromosome patterns that do not fit the typical definition of male or female." Further, the report states that an intersex presentation may be apparent at birth or later in life, and that an intersex person may identify as male, female or neither.

The Support Initiative for People with Congenital Disorders (SIPD) of Uganda has defined intersex as a "condition in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male, or a person born with genitals that lie between male and female."[47]

2.4 Legal Definition of Intersex

The Yogyakarta Principles +10 offers an international human rights framework that recognises, safeguards and protects the rights of the intersex against discrimination on the basis of sex characteristics. In its preamble, the Yogyakarta +10 Principles define sex characteristics as "each person's physical features relating to sex and including genitalia, as well

[44]Anthony Briffa. Submission to the NSW Anti-Discrimination Board and NSW Law Reform Commission regarding Discrimination against People affected by Intersex Conditions. Online: http://www.antidiscrimination.justice.nsw.gov.au/Documents/submission%20about%20intersex%20discrimination%20in%20nsw.pdf/ (accessed on 12th September, 2017).
[45]Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice (Dated 18 September, 2018).
[46]Ending violence and other human rights violations based on sexual orientation and gender identity. A joint dialogue of the African Commission on Human and Peoples Rights, Inter-American Commission on Human Rights and United Nations. Online: http://www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf/ (accessed on 20th September, 2017).
[47]SIPD Uganda, Baseline Survey on Intersex Realities in East Africa- Specific Focus on Uganda, Kenya and Rwanda. Online: http://sipduganda.org/baseline-survey-on-intersex-realities-in-east-africa-specific-focus-on-uganda-kenya-and-rwanda/ (accessed on 2nd November, 2018).

as other sexual and reproductive anatomy, chromosomes, hormones and secondary features that emerge from puberty.[48]

Similarly, intersex has been defined in South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as "a congenital sexual differentiation which is atypical to whatever degree."[49] A similar definition has been adopted in article 1 of South Africa's Alteration of Sex Description and Sex Status Act (2003), which similarly defines intersex as "a congenital sexual differentiation which is atypical to whatever degree."

The Gender Identity, Gender Expression and Sex Characteristics Act 2015 of Malta[50] not only defines what intersex is, but also makes provisions relating to sex assignment and/or surgical intervention for minors. The Act defines sex characteristics as "the chromosomal, gonadal and anatomical features of a person which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.

Intersex has also been defined in Australia's Sex Discrimination Act 1984, through the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. The amendment to subsection 4(1) defines intersex as the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male or a combination of female and male or neither female nor male[51] .

In Kenya, the first legal definition of intersex can be found in a landmark judgment that was subsequently operationalised in a statute. In the first reported intersex case in Kenya, R.M v Attorney General & 4 others [2010], eKLR, an intersex petitioner sought redress for the alleged violation of rights based on being an intersex person. The learned Judges defined intersex as an abnormal condition of varying degrees with regard to the sex constitution of a person.[52] Further, the Persons Deprived of Liberty Act [2014][53] defines the intersex as a person certified by a competent medical

[48]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 (as adopted on 10th November 2017, Geneva). Online: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf/ (accessed on 15th October, 2018).

[49]See Article 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Online: http://www.justice.gov.za/legislation/acts/2000-004.pdf/ (accessed on 17th October, 2018).

[50]Malta was the first country to provide legislative human rights reforms for intersex persons, particularly protecting them from any sex assignment treatment and/or surgical intervention on the sex characteristics of minors. Article 14(1) of the Gender Identity, Gender Expression and Sex Characteristics, Act 2015 prohibits sex assignment treatment and/or surgical intervention on sex characteristics of a minor which can be deferred until the person to be treated can provide informed consent.

[51]Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013. Online: https://www.legislation.gov.au/Details/C2013A00098/Download/(accessed on 21st October, 2018).

[52]See Para 109 of R.M v Attorney General & 4 others [2010], eKLR.

[53]See Section 2.

practitioner to have both male and female reproductive organs. As shall be discussed later on, this definition is narrow and calls for amendment.

2.5 Medical Definitions of Intersex

Despite the fact that medical practitioners were using the word intersex in the 1950s, they alternately used the term hermaphrodite until around 2005, when the Chicago Consensus (a multidisciplinary meeting of medical and nonmedical experts in Chicago) agreed a revised nomenclature and treatment recommendations in individuals with the newly coined term, 'Disorders of Sex Development' (DSDs). The European and American Society for Paediatric Endocrinology defined the DSDs as denoting congenital conditions[54] with chromosomal, gonadal and anatomical sex development that is a typical.[55]

In 2006, the Intersex Society of North America developed a handbook with clinical guidelines for the management of intersex in childhood[56]. In that publication, intersex is defined as conditions involving the following elements:

i. congenital development of ambiguous genitalia (e.g. 46XX virilising congenital adrenal hyperplasia, clitoromegaly, micropenis);

ii. congenital disjunction of internal and external sex anatomy (e.g. Complete Androgen Insensitivity Syndrome, 5-alpha reductase deficiency);

iii. incomplete development of sex anatomy (e.g. vaginal agenesis, gonadal agenesis;

iv. sex chromosome anomalies (e.g. Turner Syndrome, Klinefelter Syndrome, sex chromosome mosaicism);

v. disorders of gonadal development (e.g. ovotestes).

In the literature, the foregoing is indicative of the variety of manifestations of DSD /intersex that include anomalies of the sex chromosomes, the gonads, the reproductive ducts and the genitalia.[57]

[54]Conditions present at birth
[55]Not representative of a type, group or class.
[56]Intersex Society of North America (2006). Clinical Guidelines for the Management of Disorders of Sex Development in Childhood. Online: https://www.researchgate.net/publication/320867625_Clinical_Guidelines_for_the_Management_of_Disorders_of_Sex_Development_in_Childhood (accessed 4th December, 2018)
[57]Clinical Guidelines for the Management of Disorders of Sex Development in Childhood. Consortium on the Management of Disorders of Sex Development. Intersex Society of North America, 2006. Online: http://www.dsdguidelines.org/files/clinical.pdf/ (accessed on 7th November, 2017).

2.6 Religious Perspectives on Intersex

2.6.1 The Biblical Perspective

In the Christian faith, the Scripture speaks to creation of human beings as the works of God. For instance, in the story of creation, it provides that:

So God created man in his own image, in the image of God created he him; male and female created he them. (Genesis 1: 27, KJV)

The Scriptures portray the image of an all-knowing, all powerful and God and creator of the universe who makes no mistakes and whose creation was purposefully put together for a divine purpose. Thus, the Bible further says:

For you created my inmost being; you knit me together in my mother's womb.

I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well.

My frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth. (Psalms 139:13-15, NIV)

In the Gospels, the Bible alludes to sex characteristics when it says:

For there are eunuchs who were born that way, and there are eunuchs who have been made eunuchs by others—and there are those who choose to live like eunuchs for the sake of the kingdom of heaven. The one who can accept this should accept it. (Matthew 19:12, NIV)

Lastly, in addressing the question of congenital guilt or curse from God, family lineage, parents or other sources as a possible reason for children born with deformities, Jesus gives an emphatic and enlightened answer on the matter thus:

And his disciples asked him, saying, "Master who did sin, this man, or his parents, that he was born blind?" Jesus answered, "neither hath this man sinned, nor his parents: but that the works of God should be made manifest in him." (John 9:2-3, KJV)

A commentary by the Catholic Free Press of the Diocese of Worcester defines intersex as, "an imprecise term that can describe a range of situations in which a person is born with an internal reproductive anatomy or an external sexual anatomy that is not in accord with the typical expectations for femaleness or maleness."[58]

[58]Seeing through the Intersex Confusion". The Catholic Free Press. Online: http://www.catholicfreepress.org/commentary/2016/06/12/seeing-through-the-intersex-confusion/ (accessed on 28th September, 2017).

In summary therefore, the Bible recognises and expresses respect for all creation which, after all, was created by God Himself in His own image and likeness and who, at the end of His divine labours, pronounced it all good: "God saw all that he had made, and it was very good. And there was evening, and there was morning-the sixth day" (Genesis 1:31, NIV). It is important to note that this summation came after the creation of humanity as the epitome of all creation that had proceeded in the first five days. In fact, in placing man as the regent of the earth and all creation, God seems to put all issues of judgement, including acceptance or otherwise of the intersex, squarely on us, humanity:

Then God said, "Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground." (Genesis 1:26, NIV)

God blessed them and said to them, "Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground." (Genesis 1:28, NIV)

From the above context, it is clear that God does not discriminate among His creations, which are all good. It is thus incumbent upon us, humanity, to bring out the good in each creation, even the seemingly 'not good', and to 'avoid judging, that we be not judged":

Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you. Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye?

How can you say to your brother, "Let me take the speck out of your eye," when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye. (Matthew 7:2-5, NIV)

Intersex is a birth status, and not a choice made by either the parents or the innocent children. It simply is, and we need to recognise it for itself and make room for it, just like for every other creature. How many other differences do we carry in our own bodies and genetic make-up, and would we welcome discrimination based on any of them? And, for the parents and traditional birth attendants who would commit infanticide on intersex

babies, in that way echoing the infamous 'Massacre of the Innocents", in which Herod ordered all male infants two years old and under in Bethlehem to be killed (Matthew 2:16-18, NIV), the Bible has an admonition: We should not, like the godless King Herod, try to thwart the unknowable plans of God or the destiny of His people.

2.6.2 The Quranic Perspective

The Holy Quran unequivocally states that Allah has dominion over all creatures:

To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent. (Qur'an 42:49-50)

Classical Islam on its part recognises four genders[59] among human beings: male, female, khusna, and the effeminate male. Khusna is a person who has somatic sex ambiguity due to a disorder of sex development such as Congenital Adrenal Hyperplasia (CAH) or Androgen Insensitivity Syndrome (AIS). Khusna has been described as a person with both male and female sex organs, or with an opening in place of a sexual organ from which they urinate.[60] This is further categorised into two types:[61] wadhih (discernible) and musykil (intractable).

The discernible intersex (khusna wadhih) is a person with both male and female genitals who can be assigned a specific sex and gender based on the more dominant genital organ of the two. Therefore, when a person urinates from the penis, ejaculates semen, or grows facial hair, the person is regarded as male. If, however, the person develops breasts and menstruates, they are regarded as female. On the other hand, the intractable intersex (khusna musykil), is a person who cannot be easily categorised as either male or female, given that they can urinate from both the penis and the vagina.

In summary, it can be argued that, in the Islamic perspective, everything is made by Allah, who is Al-`Aleem – the All-Knowing:

[59]Haneef, S. S. S. (2011). "Sex Reassignment in Islamic law: The Dilemma of Transsexuals." International Journal of Business, Humanities and Technology, I, 98–107. Cited in Ani Amelia Zainuddin & Zaleha Abdullah Mahdy, 2017. The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development. Online: https://link.springer.com/content/pdf/10.1007%2Fs10508-016-0754-y.pdf/ (accessed on 29th September, 2017).

[60]Ibid.

[61]Mohd, Al-Bakri, Z. (2011). Kertas Kerja Memahami isu-isu kekeliruan jantina dari sudut syariah. Seminar memahami isu-isu kekeliruan jantina [A working paper on understanding gender dysphoria issues from the Syariah's perspective (Presented at a seminar on understanding gender dysphoria issues). Bangi, Kuala Lumpur: Institut Latihan Islam Malaysia (ILIM) and Jabatan Kemajuan Islam Malaysia (JAKIM) and Tak, Z. (1998). Khuntha& Mukhanath Menurut Perspektif Islam [The Khunsa (DSD) and Mukhannath (effeminate male) according to the Islamic perspective]. Cited in Ani Amelia Zainuddin and Zaleha Abdullah Mahdy, The Islamic Perspectives of Gender-Related Issues in the Management of Patients With Disorders of Sex Development. Online: https://link.springer.com/content/pdf/10.1007%2Fs10508-016-0754-y.pdf/ (accessed on 29th September 2017).

They said, "Exalted are You; we have no knowledge except what You have taught us. Indeed, it is You who is the Knowing, the Wise." (Surah al Baqarah, 2:32)

Since He is All-Knowing, Allah has complete knowledge of all the heights and depths of the visible and invisible worlds, the known and the unknown, the understood and the baffling. He knows what is and what could be, what was and what could have been, the minute and the gargantuan. Allah's knowledge has no beginning or end, and, unlike human knowledge, is not based on trial and error.

Does He not know what He has created, and He is the Subtle, the Acquainted. (Al-Mulk 67: 14)

And, in Surah al-An`aam, Allah says:

And with Him are the keys of the unseen; none knows them except Him. And He knows what is on the land and in the sea. Not a leaf falls but that He knows it. (al-An`aam 6:59)

If Allah knows every leaf that falls, He also knows what our souls whisper to us, our feelings, struggles and situations. Allah does not forget either, but some things need patience and Allah subhanahu wa ta`ala **teaches us with time:**

And most certainly shall We try you by means of danger, and hunger, and loss of worldly goods, of lives and of [labour's] fruits. But give glad tidings unto those who are patient in adversity – who, when calamity befalls them, say, "Verily, unto God do we belong and, verily, unto Him we shall return." It is they upon whom their Sustainer's blessings and grace are bestowed. (Surah Al Baqarah, 2:155-157)

Allah knows the most minute details of all things, both hidden and manifest, every generality and every particular, while humanity's knowledge is but like a speck in comparison:

"What you (O humanity) have been given of knowledge is but little." (Al-Isra' 17: 85)

In conclusion, to help humanity understand the deep things which are otherwise baffling, the Quran teaches us to make du`a (prayer) in this manner:

"Say: My Lord! Increase me in knowledge." (Ta-Ha 20:114)

And He assures us: "He has taught humanity what they did not know." (Al-`Alaq 96:5)

2.7 Manifestations of Intersex

Intersex is an umbrella term for different sex variations that have been documented. According to Dr. Milton Diamond, there are more than 46 variations of intersex conditions.[62] Research shows that these variations can be identified at different stages: during pregnancy screening, at birth, childhood, during puberty or adulthood.[63] Further, it is important to note that an individual can have more than one variation. Some intersex variations include the following.[64]

2.7.1 Congenital Adrenal Hyperplasia (CAH)

The Congenital Adrenal Hyperplasia (CAH), also called adreno-genital syndrome, is a variation that occurs in both males and females (XY and XX). Its variations include: 11-Beta hydroxylase deficiency, 17a-hydroxylase deficiency, 21-hydroxylase deficiency, congenital lipoid adrenal hyperplasia, p450 oxidoreductase deficiency, and 3-Beta-hydroxysteroid dehydrogenase deficiency. The latter type (3-Beta-hydroxysteroid dehydrogenase deficiency) causes ambiguity of genitalia in females (3-Beta-hydroxysteroid dehydrogenase deficiency) causes ambiguity of genitalia in both genders.

The external genitalia of a pre-teen child raised as female with low risk Congenital Adrenal Hyperplasia (CAH).

High risk Congenital Adrenal Hyperplasia in a pre-teen intersex child raised as a female.

[62]Diamond M, Sigmundson HK. "Sex Reassignment at Birth Long-term Review and Clinical Implications". Arch Pediatr Adolesc Med. 1997; 151(3):298–304. doi:10.1001/archpedi.1997.02170400084015

[63]"Living with Intersex/DSD". Online: https://www.scp.nl/dsresource?objectid=8cf44ca6-f696-4097-9032-2254c81a33eb/ (accessed on 8th June, 2018).

[64]Online: http://www.isna.org/faq/conditions/ (accessed on 27th September, 2017).

CAH occurs when an anomaly of the adrenal function causes a disorder in the stress hormone (Cortisol) synthesis that leads to excess formation of precursors that are then channelled to androgen synthesis. This initiates an excess of male hormones in a XX (genetically female) person in-utero, leading to virilisation of the external genitalia in females and hence ambiguous genitalia at birth. As a result, the XX embryos may therefore have larger than average clitorises, or a clitoris that looks rather like a penis, or labia that look like a scrotum.

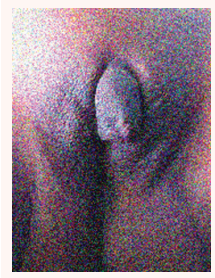
This is a variation among people with XX chromosomes (female) and is the only cause of intersex that represents a real medical emergency in the newborn period. It is notable that the statistics recorded are incomplete due to early infancy deaths.

2.7.2 Clitoromegaly

Clitoromegaly, also referred to as large clitoris, occurs when the clitoris is larger than expected. This has however been viewed as a description rather than a diagnosis, of which the most common cause is thought to be Congenital Adrenal Hyperplasia (CAH).

2.7.3 Ovo-testes (also known as ovotesticular DSD, formerly called "true hermaphroditism")

Ovo-testes are not evident through a visual examination at birth. It occurs when gonads (sex glands) contain both ovarian and testicular tissue. These are sometimes present in place of one or both ovaries or testes. As a result, a person might be born with two ovo-testes, or one ovary and one ovo-testis, or some other combination. Some people with ovo-testes look fairly typically female, some fairly typically male, and some look fairly in-between in terms of genital development.



External genitalia of an intersex child (age 1-4 years) who has been raised as female.

2.7.4 Androgen Insensitivity Syndrome (AIS)

Androgen Insensitivity Syndrome (AIS) is a variation where individual tissues fails to respond to hormones hence lack of virilisation of the external genitalia. An infant with Complete Androgen Insensitivity Syndrome (CAIS) has external genitalia of normal female appearance with un-descended or partially descended testes and, in most cases, a short vagina with no cervix. Often-times, it is not easily identified at birth or childhood.

In some instances, however, the vagina has been recorded as nearly absent. During puberty, the testes are stimulated by the pituitary gland, and produce testosterone which is very similar to oestrogen and converts some of the testosterone to oestrogen in the bloodstream. As a result, most women suffering from Complete Androgen Insensitivity Syndrome (CAIS) may not have pubic or underarm hair and, where it is present, it is sparse since their development is dependent on testosterone. They also have breast growth, though it may be late. The variation occurs in approximately 1 in every 20,000 individuals. Its cause has been linked to a genetic condition except for occasional spontaneous mutations.[65]

Genitalia of a young adult (ages 18-20 years) who identifies as female.

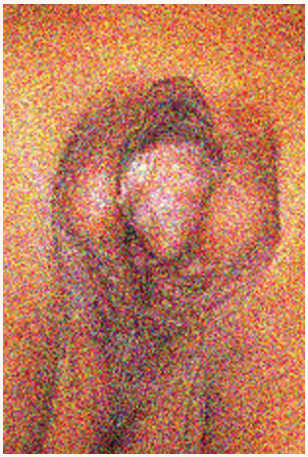
2.7.5 Partial Androgen Insensitivity Syndrome

Partial Androgen Insensitivity Syndrome (PAIS) results in "ambiguous genitalia" that presents itself as a large clitoris or a small penis and hypospadias. It may be quite common, and has been suggested as the cause of infertility in many men whose genitals are of typically male appearance.

[65]Venkatreddy Malipatil, Pushpanjlai Malipatil, &Chaitanya V. M. "Androgen insensitivity syndrome, a case report and literature review". International Journal of Research in Medical Sciences. June 2016, 4(6):1830-1833. Online: http://www.msjonline.org/index.php/ijrms/article/viewFile/814/789/ (accessd on 20th July, 2018).

2.7.6 Hypospadias

Hypospadias occurs when a urethral meatus ('pee-hole') is located along the underside of the penis rather than at the tip. In some hypospadias, the meatus may be located on the underside of the penis i.e. sub-coronal, mid-shaft and peno-scrotal. In more pronounced hypospadias, the urethra may be open from mid-shaft out to the glans, while in some cases the urethra may even be entirely absent, with the urine exiting the bladder from behind the penis. Early correction of hypospadias is associated with higher success rates. Hypospadias may be low risk or high risk as indicated in the images below:



High risk hypospadia presenting in a 3-5-year-old identified as male.

Low risk hypospadia

2.7.7 Progestin Induced Virilisation (PIV)

Progestin Induced Virilisation (PIV) occurs when XX people (female) affected in-utero by virilising hormones are born into a continuum of sex phenotype that ranges from "female with larger clitoris" to "male with no testes". Occasionally, a female neonate will have an excess of male hormones that she is given a male identity at birth and raised as a boy. This may result from maternal use of male hormones (androgens) during early pregnancy.

2.7.8 Pseudo-hermaphroditism (PH)

Pseudo hermaphroditism (PH) occurs in both male and female hermaphrodites, with the designating factor being the gonads.[66] Whereas in male pseudo- hermaphrodites the gonads are testes and the external genitalia are female, in female pseudo-hermaphrodites the gonads are ovaries with male tendencies in the organs of reproduction.[67] Male pseudo-hermaphroditism has primarily been attributed to Androgen Insensitivity Syndrome and 5-alpha reductase deficiency, while female pseudo hermaphroditism is caused by Congenital Adrenal Hyperplasia (CAH) and over-production of male hormones before birth.[68] However, this term has largely been abandoned in favour of the ones already outlined above.

2.7.9 Aphalia

Aphalia occurs when a person is born without a penis yet they have an otherwise typical male anatomy.

2.7.10 Klinefelter syndrome

This is an intersex variation that falls under the chromosomal DSD. It is quite common in male births with an occurrence rate of approximately1/500 to 1/1,000. Whereas most men inherit a single X chromosome from their mother and a single Y chromosome from their father, men with Klinefelter syndrome inherit an extra X chromosome from either their father or mother thus their karyotype is 47 XXY. Klinefelter syndrome presents itself through small testes, about half the typical size, which are quite firm. However, after puberty, the ejaculate contains no sperm. It may also present itself in other

[66]Stern, O. N., M.D, and W.J.Vandervort, M.D. "Testicular Feminization in a Male Pseudo-hermaphrodite - Report of a Case". N Engl Med 1956; 254:787-790|April 26, 1956|DOI:10.1056/NEJM195604262541703. Online: http://www.nejm.org/doi/full/10.1056/NEJM195604262541703/ (accessed on 30th October, 2017).
[67]Ibid.
[68]University of Rochester Medical Center, Health Encyclopedia, "Disorders of Sex Development." Online: https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=90&ContentID=P03079/ (accessed on 30th October, 2017).

quite variable forms. Boys with Klinefelter syndrome are usually born with male genitals that look like that of other boys', but they may not virilise very strongly at puberty. As a result, they may not develop much body hair, or they may experience breast development.

2.7.11 Micropenis

The Micropenis condition occurs when a person has a penis that is completely differentiated, that is, it has developed like a typical penis with the urethral meatus ('pee-hole') at the tip, but it is very small. Micropenis is apparent when a person has a 46, XY karyotype which is a typical male karyotype and testes that are either descended or un-descended with a urethral meatus ('pee-hole') at the tip of the glans penis, unlike in hypospadias. It may also include a stretched penis length at or below 2.5cm standard deviation for age and stage of development.

2.7.12 Mosaicism involving "sex" chromosomes

This occurs when a person has one kind of karyotype in some of his or her cells, and a different karyotype[69] in other cells. For instance, when a person is said to have a 45, X/46, XX karyotype, it indicates that he or she has 46, X in some cells, and 46, XX in other cells.

2.7.13 Swyer Syndrome

Also known as XY gonadal dysgenesis, Swyer syndrome occurs when a person is born without functional gonads (sex glands), but they have gonadal streaks. The gonadal streaks are minimally developed gonad tissue is present in place of testes or in the ovaries. A child born with Swyer syndrome looks like a typical female, but will not develop most secondary sex characteristics without hormone replacement. This is because streak gonads are incapable of producing the sex hormones[70] that bring about puberty.

2.7.14 Turner Syndrome

Turner syndrome occurs when a person has only one X fully functional chromosome[71] as opposed to what a typical female karyotype[72] would

[69] A karyotype is a picture of the chromosomes in a cell. A person is said to have a "mosaic karyotype" when he or she has one Mosaicism happens because sometimes cells divide incorrectly early in the life of an embryo. For instance, a woman with Mosaic Turner Syndrome may have some cells that are XO (typical Turner Syndrome karyotype) and some cells that are XX (typical female karyotype). Mosaicism also occurs in milder forms of Klinefelter Syndrome called 46/47 XY/XXY mosaic. In this case, the XY cells would have 46 chromosomes (a typical number of chromosomes) and the XXY cells would have 47 chromosomes.
[70] Both oestrogens and androgens.
[71] This is sometimes referred to as 45, XO or 45, X karyotype.
[72] Sex chromosome make-up.
[73] Swelling of hands and feet.

have, that is, 46, XX. When a person has Turner syndrome, the female sex characteristics are usually present but underdeveloped compared to the typical female. Turner syndrome presents as: short stature, lymphodema[73] , broad chest and widely spaced nipples, low hairline, low-set ears, and infertility. However, the presentation varies in different people, thus some signs associated with the syndrome may be more obvious in one woman than in the next.

2.7.15 Mosaic Turner Syndrome

This type of variation occurs when the person usually doesn't have all the associated signs of Turner syndrome but may have other signs of being intersex. It can also occur where some cells have two "sex" chromosomes (XX) while others only have one X, or when a person has 46, XY/45X. Other mosaic types are also possible.

2.7.16 Mayer, Rokitansky, Kuster, Hauser Syndrome

The Mayer, Rokitansky, Kuster, Hauser Syndrome (MRKH) (also known as Mullerian agenesis, vaginal agenesis or congenital absence of vagina) occurs when the ovaries are present but with an absent, misshapen, or small uterus. MRKH is associated with kidney and spine anomalies in a minority of individuals.

In conclusion, it is important to note that the variations discussed above are not exhaustive. However, they offer a representation of the different elements that inform the differences of sex development (intersex).

2.8 The Difference between Intersex, Sex, Gender and Transgender

As a phenomenon and concept, intersex is not new. In its various manifestations, intersex has been with humanity since the dawn of history. It has been so recognised in various religions and communities over the ages. Usually, the sex of a child is determined and recorded at birth as either female or male. Sex therefore is the primary biological characteristic in respect to ones physical genital organ, hormones and the gonads.

However, later on in life, due to environmental, religious, cultural or political socialisation or conditioning of their femaleness or maleness, these two sexes are allocated certain behavioural traits and roles that ideally affirm the gender:

[73]Swelling of hands and feet.

Gender, hence is strongly linked to society's expectations and is not exclusively a biological matter. … Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth..[74]

An intersex person and a transgender person are different in terms of their sex characteristics. An intersex person has no clear female or male sex characteristics due to the mix either of their physical genitalia (fe/male), hormones, chromosome (X or Y) or gonads (ovary and testes). In contrast, a transgender person is biologically born either female or male, but their feelings are not congruent with their body. Crucially, therefore, intersex is linked to in-born biological sex characteristics not gender identity. Thus, sex discrimination against intersex persons is on the basis of the biological sex characteristics and not gender or gender identity.[75] In a 2013 Fact Sheet, the UNHCHR clarifies:

Reference to intersex people as "intersexuals" is wrong since intersex sex characteristics are unrelated to sexual orientation. Similarly, reference to "intersex identity" is also incorrect as intersex is not a matter of identity or self-perception but mostly refers to physical aspects of the body.

In an attempt to fit or 'normalise' them into the specific female or male binary, intersex persons often undergo medical interventions or 'correctional' treatment procedures which are, more often than not, unnecessary. Such surgeries are often aimed at enabling them to more easily access the social entitlements that are otherwise freely available to the rest of society.[76] Intersex status is now universally recognised as a human rights issue that requires recognition and protection by all state and non-state parties.

2.9 Taskforce Definition of an Intersex

The Taskforce examined the above definitions, the different intersex variations, and the relevant social, medical and legal developments. The Taskforce further noted the evolving and increasingly informed understanding as well as the emerging consensus that persons born intersex are human beings with inherent rights and dignity.

Therefore, the Taskforce adopts the following definition to inform and guide the policy, legal and administrative structures and systems in Kenya.

[74] Ibid. at 12-13.
[75] Ibid. at 82.
[76] Ibid. at 15.

An intersex person is:

"A person who is conceived or born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.

3.0 INTERNATIONAL AND REGIONAL LEGISLATIVE AND HUMAN RIGHTS FRAMEWORKS

3.1 Introduction

This Chapter addresses key international and regional instruments with a focus on the three major regional human rights systems—the Inter-American, European and African—as well as various countries' comparative practices on the care, treatment and protection of intersex persons. In that regard, it highlights the challenges and milestones achieved by selected countries, with an eye to the key lessons and principles that Kenya could draw from these countries experiences.

3.2 International Human Rights Frameworks

Kenya is a state party to all the nine core international human rights instruments.[77] All the treaties and conventions ratified by Kenya as well as the general rules of international law form part of the law of Kenya by dint of Article 2(5)(6) of the Constitution of Kenya, 2010. We also have treaty body and special procedure mechanisms including the Special Rapporteurs at the international level who have made vital pronouncements relating to care, treatment and protection of intersex adults and children.

3.2.1 Recognition and Freedom from Discrimination

The international realm is replete with treaties and conventions that all emphasise the dignity of the human person and prohibit discrimination on any basis including 'sex', birth or other status'.[78] The Universal Declaration of Human Rights (UDHR) of 1948[79] provides for the inherent dignity and worth of all persons. The Declaration underscores that: "All human beings are born free and equal in dignity and rights."[80] Article 5 prohibits torture or cruel, inhuman or degrading treatment while Article 6 of the UDHR provides that, "everyone has the right to recognition everywhere as a person before the law." Article 13 provides for the freedom of movement

[77]Kenya has ratified all the core UN treaties (excluding the Optional Protocols) apart from the Convention for the Protection of All Persons from Enforced Disappearance (CED) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW). The core treaties include: International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; International Covenant on Civil and Political Rights (ICCPR), 1966; International Convention on the Elimination of All Forms of Racial Discrimination, (ICERD), 1965; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, and; Convention on the Rights of the Child (CRC), 1989.
[78]Article 2, UDHR.
[79]The Universal Declaration of Human Rights was adopted by resolution of the United Nations General Assembly on 10 December 1948, and was ratified by Kenya on 31 July 1990.
[80]Article 1, Universal Declaration of Human Rights.

including the right to leave the country, while Article 15 secures the right to a nationality.

Similar provisions are reiterated in the subsequent human rights Conventions adopted after the UDHR. The International Covenant on Civil and Political Rights (ICCPR)[81] ratified by Kenya in 1972, provides that, 'Every child shall be registered immediately after birth and shall have a name' (Article 24(2)). The ICCPR requires every state party to the Convention to respect and ensure the rights set out therein to all individuals within its territory, without distinction of any kind, such as sex, birth or other status are upheld.

Therefore, Kenya as a state party is bound to realise the rights of all persons. Accordingly, Kenya is required to realise the rights of intersex persons, including: the right to self-determination, protection from torture or from cruel, inhuman or degrading treatment or punishment, the right to recognition as a person before the law, and; the right not to be subjected to arbitrary or unlawful interference with one's privacy. In addition, every child has the right to protection by family, society and the State, the right to be registered immediately after birth, and to have a name.

Article 7 of the ICCPR is categorical that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." The ICCPR also stresses the equality of all persons and outlaws discrimination and need to guarantee all persons equal and effective protection against discrimination on any ground such as sex, birth or other status (Article 26).

The provisions of the International Covenant on Economic, Social and Cultural Rights[82] (ICESCR) ratified by Kenya in 1972 guarantees the right to self-determination (Article 1) and the enjoyment of all other rights in the ICESCR to all without discrimination on the basis of, inter alia, sex, birth or other status (Article 2(2)). Discrimination in relation to sex has been defined in various forums. For instance, in 2011, the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) clarified that:

The specific grounds of discrimination referred to in the International Covenant on Civil and Political Rights and other human rights treaties are not exhaustive. The

[81]UN GA Res. 2200A(XXI), UN Doc. A/6316 (1966), 999 UNITED NATIONS TREATIES SERIES (UNTS) 171 (entry into force 23 March 1976) [ICCPR].
[82]UN GA Res. 2200A (XXI), UN Doc. A/6316 (1966), 993 United Nations Treaties Series 3 (entry into force 3 January, 1976) [IESCR].
United Nations High Commissioner for Human Rights (2011), "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity", Human Rights Council, Nineteenth session, Report No. A/HRC/19/41, 17th November 2011, online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf (accessed 18 October 2017) [UNHCHR SOGI Statement] at para. 7.

drafters intentionally left the grounds of discrimination open by using the phrase "other status".[83]

More specifically, the General Comment by the UN Committee on Economic, Social and Cultural Rights of 2009 elaborated that 'other status' in relation to Article 2 on non-discrimination includes gender identity, with specific reference to serious human rights violations experienced by intersex persons.[84] In 2013, the UNOHCHR further clarified that:

Reference to intersex people as 'intersexuals' is wrong since intersex sex characteristics are unrelated to sexual orientation. Similarly, reference to 'intersex identity' is also incorrect as intersex is not necessarily a matter of identity or self-perception but mostly refers to physical aspects of the body.[85]

The Sustainable Development Goals (SDGs) aims for promotion of, "peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" (Goal 16). Some of the targets under SGD 16 are to, 'provide legal identity for all, including birth registration' and to 'promote and enforce non-discriminatory laws and policies for sustainable development'.

The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (The 'Yogyakarta Principles') 2007[86] affirm binding international legal standards with which all States must comply.[87] The Principles are endorsed by the African Commission on Human and Peoples' Rights.[88] The Principles call on States to inter alia:

take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex—including birth certificates, passports, electoral records and other documents [—reflect the person's profound self-defined gender identity]"[89]

Within the international human rights framework, there was no specific provision on protections for intersex persons, except advisories from the special rapporteurs and the UNOHCR. However, with the Yogyakarta Principles plus 10 (YP+10), there is an additional protection against

[83]United Nations High Commissioner for Human Rights (2011), "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity", Human Rights Council, Nineteenth session, Report No. A/HRC/19/41, 17th November 2011, online: http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/a.hrc.19.41_english.pdf (accessed 18 October 2017) [UNHCHR SOGI Statement] at para. 7.
[84]UN Committee on Economic Social and Cultural Rights, General comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2nd July 2009), online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F20&Lang=en (accessed 14th February 2018) at para. 32.
[85]CECHR Issue Paper, supra note 68 at 15.
[86]Principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007), online: www.yogyakartaprinciples.org [Principles].
[87]Ibid. at 7.
[88]Ibid. at 34 (Annex).
[89]Ibid. at 11.

discrimination on the basis of sex characteristics.[90] The Preamble to the YP+10 defines sex characteristics as each person's physical features relating to sex, including the genitalia and other parts of the sexual and reproductive anatomy, chromosomes, hormones and the secondary physical features emerging from puberty. Under the YP+10, States are obligated to take all appropriate steps to ensure "that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sex characteristics, including in education, employment, and access to services," as well as take measures to address discriminatory attitudes and practices on the basis of sex and sex characteristics.

In its concluding observations on the combined third to fifth periodic reports of Kenya in 2016[91], the UN Committee on the Rights of the Child noted its concern that vulnerable groups of children including intersex children faced difficulty in obtaining birth registration[92] and made a recommendation to Kenya to:

Expedite the adoption of a law that provides for universal and free birth registration at all stages of the registration process... and "strengthen various efforts to ensure the birth registration of all children, in particular in rural and remote areas, including through mapping out and registering those who have not been registered at birth.[93]

3.2.2 Treatment of Intersex Persons Amounting to Torture, Cruel, Inhuman or Degrading Treatment

Just like discrimination, torture is a non-derogable right under both national[94] and international law and constitutes one of the crimes of jus cogens. This class of rights cannot be waived even in times of state emergencies that threaten the life of a nation.[95] Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" likewise committed by any person acting in an official capacity. It requires States to ensure that education and training about these prohibitions are provided to, inter alia, medical personnel, and to further ensure that a "prompt and impartial investigation" is undertaken into any act that may

[90] 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 (10 November 2017), Geneva, online: https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [Yogyakarta Principles plus 10 (YP+10)](accessed 27th December 2017).

[91] The Committee considered the combined third to fifth periodic reports of Kenya (CRC/C/KEN/3-5) at its 2085th and 2087th meetings (see CRC/C/SR. 2085 and 2087), held on 21 January 2016, and adopted the following concluding observations at its 2104th meeting (see CRC/C/SR.2104), held on 29 January 2016. Online: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/KEN/CO/3-5&Lang=En.

[92] Para 29(d) of Concluding observations on the combined third to fifth periodic reports of Kenya (Adopted by the Committee at its seventy-first session (11-29 January, 2016).

[93] Para. 30 of "Concluding observations on the combined third to fifth periodic reports of Kenya" (Adopted by the Committee at its seventy-first session (11-29 January 2016).

[94] Article 24, Constitution of Kenya, 2010.

[95] Article 4, ICCPR.

reasonably constitute torture or cruel, inhuman or degrading treatment in violation of the Convention. Further, SGD Goal 16 targets to: "Significantly reduce all forms of violence and related death rates everywhere" and "end abuse, exploitation, trafficking and all forms of violence against and torture of children" by 2030.

In his report to the Human Rights Council in February 2013, Juan E Mendez, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, acknowledged the abundance of accounts of "…genital-normalising surgeries under the guise of so called 'reparative therapies". He added that "these procedures are rarely medically necessary, can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have been criticised as being unscientific, potentially harmful and contributing to stigma (A/HRC/14/20, para. 23)."[96]

The Special Rapporteur went further to raise concern that:

Children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilisation, involuntary genital normalising surgery, performed without their informed consent, or that of their parents, in an attempt to 'fix their sex' leaving them with permanent, irreversible infertility and causing severe mental suffering.[97]

The Special Rapporteur further clarified that the State's duty to protect against torture applies to doctors and other health care professionals in both public and private healthcare facilities.[98] In this respect, the Rapporteur further notes that:

Medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned … [particularly] when intrusive and irreversible, non-consensual treatments are performed on patients from marginalised groups, notwithstanding claims of good intentions or medical necessity.[99]

In July 2016, the UN Committee on the Elimination of Discrimination against Women welcomed the introduction of measures to combat harmful practices, but noted and echoed the recommendations of the Committee

[95] Article 4, ICCPR.
[96] A/HRC/22/53, Para. 76
[97] A/HRC/22/53, para 77
[98] UN GA, Human Rights Council Twenty-second session, UN Doc A/HRC/22/53 (1 February 2013), Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, online: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed 18 Oct 2017) at para. 24.
[99] Ibid.at para. 32.

against Torture and the Committee on the Rights of the Child to address the fact that medically unnecessary surgery continues to be routinely performed on intersex children.[100]

The Special Rapporteur notes that the European Court of Human Rights (ECHR) has interpreted the prohibition against torture and cruel or inhuman treatment as applying where the purpose or intent of the conduct was not to degrade or humiliate but was negligent to the extent that severe pain and suffering was nevertheless the effect experienced by the victim.[101] Further, "the Special Rapporteur on the Right to Health affirmed the need to pay special attention to vulnerable groups with particular focus on intersex person's special needs."[102]

The World Health Organisation (WHO) in 2014 issued an 'interagency statement' on behalf of the Office of the High Commissioner for Human Rights, UN Women, the Joint United Nations Programme on HIV/AIDS (UNAIDS), UN Development Program (UNDP), United Nations Population Fund (UNFPA), UNICEF and the WHO entitled Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation.[103] The introduction to the Interagency Statement notes that intersex persons continue to be subject to sterilisation – including when the loss of fertility is a secondary outcome of a medical intervention – without free and informed consent. Such involuntary sterilisation, including non-medically necessary surgery on intersex children in particular, has been described by international and regional human rights bodies as a violation of the rights to health, information and privacy, and the rights to be free from discrimination and from torture and other cruel, inhuman or degrading treatment or punishment.[104]

The Yogyakarta Principles[105] call on States to, inter alia:

Ensure full protection against harmful medical practices …, including on the basis of stereotypes, whether derived from culture or otherwise, regarding …, physical appearance…[106] and;

Ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of

[100]UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of France, UN Doc. CEDAW/C/FRA/CO/7-8 (25 July 2016), online: https://digitallibrary.un.org/record/840819/files/CEDAW_C_FRA_CO_7-8-EN.pdf (accessed 1 February 2018) at para. 18.
[101]Ibid. at paras. 18 and 20.
[102]Ibid. at para. 38
[103]World Health Organisation, Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement (May 2014) online: http://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en (accessed 18 October 2017) [interagency statement].
[104]Principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007), online: www.yogyakartaprinciples.org [Principles].
[106]Ibid. at 23.

the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.[107]

Principle 10 of The YP+10 secures the Right to be Free from Torture or other Cruel, Inhuman or Degrading Treatment. It provides that States shall:

[R]ecognise that forced, coercive and otherwise involuntary modification of a person's sex characteristics may amount to torture, or other cruel, inhuman or degrading treatment and prohibit any practice, and repeal any laws and policies, allowing intrusive and irreversible treatments on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation, medical display, 'reparative' or 'conversion' therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.[108]

The question of harmful practices in relation to 'corrective or normalising' surgeries has been of particular point of concern to the UN treaty bodies, which have made specific recommendations to various states in relation to intersex genital mutilation. In particular the Committee on the Rights of the Child (CRC) has repeatedly recognised Intersex Genital Mutilation (IGM)[109] as a 'harmful practice' and recently issued concluding observations to South Africa[110]. In respect to Article 39, the CRC highlighted the high prevalence of harmful practices in the State party, which included, "child and forced marriage, virginity testing, witchcraft, female genital mutilation, polygamy, violent or harmful initiation rites and intersex genital mutilation." The Committee further stated in respect to Article 40(d) that the State party should guarantee the bodily integrity…of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy and childhood."

3.2.3 Concept of 'Informed, Free and Voluntary Consent' in Medical Procedures

The prohibition against torture is an absolute, non-derogable human right that may not be subject to any limitation.[111] Accordingly, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment calls on all States to:

[107] Ibid.
[108] Ibid. at p 19.
[109] A term coined to refer to cosmetic, un-consented and unnecessary surgical intervention carried out by doctors on infants and/or older children born with ambiguous genitalia with the aim of assigning them a gender that fits within the binary notion of male and female sex.
[110] CRC/C/ZAF/CO/2 dated 27th October 2016 – Concluding observations on the second periodic report of South Africa as Adopted by the Committee at its seventy-third session (13-30 September 2016).
[111] Ibid. at para. 82.

Enforce the prohibition of torture in all health-care institutions, both public and private, by, inter alia, declaring that abuses committed in the context of health-care can amount to torture or cruel, inhuman or degrading treatment or punishment, and

Safeguard free and informed consent on an equal basis for all individuals without any exception, including by ensuring special protection of minority and marginalised groups and individuals by enabling them to exercise their legal capacity and that fully respect their individual autonomy, will and preferences and repealing any law that allows intrusive and irreversible treatments, including forced genital-normalising surgery.[112]

Irreversible medical procedures without free and informed consent are forbidden. Principle 32 of The YP+10 on The Right to Bodily Integrity stipulates thus:

Everyone has the right to bodily and mental integrity, autonomy and self-determination … No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.[113]

The World Health Organisation (WHO) Interagency Statement on Eliminating Forced, Coercive and Otherwise Involuntary sterilisation[114] (referenced above)takes the position that even non-medically necessary 'corrective surgery' on intersex babies with the consent of parents, legal guardians or medical professionals "compromises decision-making authority and the enjoyment of human rights" because a decision that has such drastic life-long consequences should not be made by anyone except the patient as it violates the principle of autonomy.[115] According to the Statement, "Respect for dignity and the physical and mental integrity of a person include providing that person with the opportunity to make autonomous reproductive choices". In addition, "the principle of autonomy, expressed through full, free and informed decision making, is a central theme in medical ethics, and is embodied in human rights law."

The Interagency Statement recommends that, in the absence of medical necessity, treatments that result in sterilisation should be postponed until the "person is sufficiently mature to participate in informed decision-making and consent".[116] Further, such consent must be fully and properly

[112]Ibid. at para. 84 and 85(a), (c), (d), (e) and (f).
[113]Ibid. at 10.
[115]World Health Organisation, Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement (May 2014) online: http://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en (accessed 18 October 2017) [interagency statement].
[116]Ibid. at 9.

informed of the potential risks and benefits, consequences and alternatives, and given without inducement, pressure or threat. Sufficient time and support should be allowed, with appropriate confidentiality safeguards.[117] Similarly, support and counselling should be available to the intersex person and their parents or other support person(s), both prior to and subsequent to any treatment.[118] In that regard, healthcare providers and policy makers should be trained and sensitised on the intersex condition. Further they should be sensitised on available options for treatment (including no treatment), and the meaning and requirements of free and informed consent.[119]

Finally, a comprehensive situation analysis should be undertaken, including the collection of disaggregated data and a responsive monitoring and evaluation mechanism established to inform policy measures aimed at preventing involuntary medical interventions and ensuring that health services and support provided to intersex persons are effective and efficient.[120]

3.2.4 Principle of 'Best Interests of the Child' in Care and Treatment of Intersex Children

The UN Committee on the Rights of the Child has issued a General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1 of the Convention on the Rights of the Child)[121] stating that States must ensure that the best interests of the child are a primary consideration in all actions, including:

- "ensuring that the requirement to consider the child's best interests is reflected and implemented in all national laws and regulations … [and] rules governing the operation of private or public institutions providing services or impacting on children"[122];
- "establishing mechanisms and procedures for complaints, remedy or redress in order to fully realise the right of the child to have his or her best interests appropriately integrated and consistently applied"[123];
- "providing information and training on the best interests of the child,

[117]Ibid.
[118]Ibid. at 15.
[119]Ibid.
[120]Ibid.
[121]UN CRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (29 May 2013), online: http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 18 October 2017).
[122]Ibid. at para. 15(a).
[123]Ibid. at para. 15(c).

and its application in practice to all those making decisions that directly or indirectly impact on children, including professionals and other people working for and with children"[124];

- "provide appropriate information to children in a language they can understand"[125];
- "combat[ing] all negative attitudes and perceptions which impede the full realisation of the right of the child to have his or her best interests assessed and taken as a primary consideration, through communication programmes involving mass media and social networks as well as children, in order to have children recognised as rights holders".[126]

With respect to the meaning of the "best interests of the child", the CRC has clarified that "it should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs."[127] The CRC Committee notes that:

[t]he best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonisation is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and [is] not just one of several considerations."[128] [Emphasis added]

Specifically with respect to a child's right to health, the CRC states that,

if there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the child must also be given due weight based on his or her age and maturity. In this respect, children should be provided with adequate and appropriate information in order to understand the situation and all the relevant aspects in relation to their interests,

[124]Ibid. at para. 15(f).
[125]Ibid. at para. 15(g).
[126]Ibid. at para. 15(h).
[127]Ibid. at para. 32.
[128]Ibid. at para. 39.

and be allowed, when possible, to give their consent in an informed manner.[129] [Emphasis added]

With respect to a child's best interests and their right to be heard, due weight must be given to the child's views on all matters affecting the child. The more physically, emotionally, cognitively and socially developed a child becomes, the more autonomy they must be given in making decisions, though the CRC takes pains to clarify that "babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children."[130] In this respect, States are required to provide independent representation for a child in the assessment of the child's best interests where the child is unable or unwilling to express their view,[131] or where their view is in conflict with the view of their parent, guardian or representative,[132] which assessment should take into account the evolving capacity of the child and therefore refrain from decisions that have irreversible consequences in favour of measures that can be revised or adjusted as the child matures.[133]

In addition, the CRC adds that formal assessment of a child's best interests, should be carried out in a friendly and safe atmosphere by [a multidisciplinary team of] professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner.[134]

A final decision regarding the child's best interests in any given situation must explain and justify the reasons for coming to the conclusion, based on a review of the factual circumstances, the child's capacity and views, and how the various factors and elements have been identified, weighed and assessed.[135] Such decisions must be subject to review or appeal via a formal judicial mechanism, and children must be facilitated to access such mechanism.[136] Principle 32 of YP+10 cautions that when it comes to children in medical procedures, States must "ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity."[137]

[129] Ibid. at para. 77.
[130] Ibid. at paras. 43, 44 and 83.
[131] Ibid. at para. 44.
[132] Ibid. at para. 90.
[133] Ibid. at para. 84.
[134] Ibid. at para. 94.
[135] Ibid. at para. 97.
[136] Ibid. at para. 98.
[137] Ibid. at 10.

The Concluding Observations of the UN Committee on the Rights of the Child on Kenya's third to fifth periodic reports[138] contained recommendations that are both generally and specifically related to the situation of intersex children. Some of the general relevant recommendations include the establishment of a comprehensive data collection system that facilitates analysis of the situation of vulnerable children by ensuring disaggregation of data by, among others, age, sex and socioeconomic background,[139] and involving children in policy and lawmaking by actively soliciting their views on issues that affect them.[140]

3.2.5 The Intersex and Sports

Various international Conventions recognise the right of every person to leisure and creative activity. In April 2016, the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health issued a report addressing issues affecting, among others, intersex persons in relation to sport.[141] The Special Rapporteur notes that intersex persons experience multiple human rights violations including, for example, 'sex testing' to avoid athletes of one sex 'fraudulently' competing against athletes of the other (binary) sex to obtain an unfair advantage, and policies that ban women with high levels of testosterone from competition.[142] In some cases, this has led to athletes being coerced or voluntarily submitting themselves to medically unnecessary treatment such as removal of reproductive organs or intersex genital mutilation.[143] The Special Rapporteur recommends that states and sporting bodies adopt legislation and policies incorporating international human rights standards to,

> Protect the physical integrity and dignity of all athletes, including intersex … athletes, and immediately remove any laws, policies and programmes that restrict their participation or otherwise discriminate or require them to undergo intrusive, unnecessary medical examinations, testing and/or procedures in order to participate in sport.[144]

The Yogakarta +10 Principles require sporting organisations to integrate the Yogakarta Principles (2007) and the Additional Principles (2017), as

[138] UN CRC, Concluding observations on the combined third to fifth periodic reports of Kenya, UN Doc. CRC/C/KEN/CO/3-5 (21 March 2016), online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/KEN/CO/3-5&Lang=En (accessed 5 February 2018).
[139] Ibid. at para. 14 (a) and (b).
[140] Ibid. at para. 27 (c).
[141] UNHRC, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/32/33 (4 April 2016), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/067/39/PDF/G1606739.pdf?OpenElement (accessed 5 February 2018).
[142] Ibid. at para. 55.
[143] Ibid. at para. 56.
[144] Ibid. at para. 101(a)(i).

well as all relevant human rights norms and standards in their policies and practices. The Principles in particular call upon the sporting organisations to:

a) "Take practical steps to create welcoming spaces for participation in sport and physical activity, including installation of appropriate changing rooms, and sensitisation of the sporting community on the implementation of anti-discrimination laws in the sporting context for persons of diverse sex characteristics;

b) Ensure that all individuals who wish to participate in sport are supported to do so irrespective of sex characteristics, and that all individuals are able to participate, without restriction, subject only to reasonable, proportionate and non-arbitrary requirements to participate;

c) Remove, or refrain from introducing, policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical examinations, testing and/or procedures in order to participate as women in sport; and

d) Take measures to encourage the general public to respect diversity based on sex characteristics in sports, including measures to eliminate hate speech, harassment, and violence at sports events." [145]

The issue of intersex and sports has increasingly become a matter of global interest and controversy particularly following the April 2018 publication of the controversial International Association of Athletics Federations (IAAF) 'Hyperandrogenism Regulations—Eligibility regulations for the female classification (athletes with differences of sex development). The regulations require women athletes with specific differences in sex development, androgen sensitivity and natural levels of testosterone above 5nmol/L to medically reduce their blood testosterone level 6 months before the competition and continuously thereafter, to below 5nmol/L, to maintain eligibility to compete in the female classification at international competitions.

The Taskforce notes that such requirements are punitive, disproportionate and intrusive on the individual athletes. There are also documented

[145] YP+10, p. 25.

negative effects of suppressed/hormone depletion on the health of the athletes including on brain and the nervous systems, heart, reproductive system, bones, skin and the urinary system. Article 7 of the ICCPR expressly provides, "...no one shall be subjected without his free consent to medical or scientific experimentation." Indeed, these Regulations have been recently challenged by the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Working Group on the issue of Discrimination against Women in Law and in Practice.

In their joint Communique[146] addressed to the President of the IAAF, Mr Sebastian Coe, the Special Rapporteurs are categorical that the IAAF eligibility criteria,

appear to contravene international human rights norms and standards including the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to physical and bodily integrity and the right to freedom from torture, and other cruel, inhuman or degrading treatment and harmful practices.

The Communiqué notes that the IAAF Regulations offend the principle of non-discrimination in that they, "specifically target women athletes with specific differences of sex development based on their natural physical traits, in this case, their naturally occurring levels of testosterone". They further observe that,

... humans are different, with a wide range of natural traits. Intersex people, also referred to as people with differences of sex development, or people with a subset of intersex variations, are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty. The population of women affected by the IAAF regulations were assigned female at birth, and have social and legal identities as women. Indeed, many athletes subject to the regulations might never be aware of their intersex traits were it not for the regulations.

The Communiqué goes on to point out the discriminatory aspect of the regulations:

[146] Joint Communiqué by UN Mandates of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Working Group on the issue of Discrimination Against Women in Law and in Practice dated 18th September 2018 (Online at https://www.ohchr.org/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf (last accessed November 2018).

The IAAF regulations seem to have specifically singled out women with a specific set of differences of sex development, androgen sensitivity and natural testosterone levels that are higher than 5nmol/L yet, as recognised by the Court of Arbitration for Sport, a range of natural physical and biological traits are associated with performance in sports, [including] height, lean body mass and specific genes that influence muscle composition, strength and endurance, in addition to social and economic factors and availability of economic resources. While the IAAF regulations section 1.1. refers to the importance of creating a level playing field to ensure fair and meaningful competition in sports, the regulations seem to have focused on only one group of people – women with a specific set of differences of sex development, androgen sensitivity and natural testosterone levels higher than 5nmol/L…

The Communiqué expresses concern over the effect of the Regulations on the rights of women athletes, including the right to equality and non-discrimination, physical and bodily integrity and the right to be medically free from non-consensual medical treatment, torture and other cruel, inhuman or degrading treatment as well as the right to informed consent, amongst others. Such Regulations are an affront to the, "dignity, health, physical and bodily integrity of elite women athletes with differences of sex development". The special Mandates therefore urged the IAAF to withdraw the Eligibility regulations for the female classification (athletes with differences of sex development) as they contravene international human rights standards.

The Taskforce notes that sporting activities are an expression of culture. They serve as an important means of self and cultural expression as well as of employment and livelihood for an individual. For Kenya, athletics has for a long time remained an important source of national pride. The Kenya Sports Act (No. 25 of 2013) is silent regarding participation and protection of the rights of athletes. There is need to amend the Sports Act and come up with appropriate regulations that prohibit such discrimination and intrusive medical procedures.

3.2.6 Right to a Legal Remedy

It is a general principle of international law that every wrong must attract a remedy. The Yogyakarta Principles also task states to, "ensure that victims of human rights violations have access to full redress through restitution, compensation, rehabilitation, satisfaction, guarantee of non-

repetition, and/or any other means as appropriate."[147]

Further, the Special Rapporteur on Health also notes the responsibility of States to provide victims with effective remedy and redress, including measures of reparation, satisfaction and guarantees of non-repetition as well as restitution, compensation and rehabilitation. In this respect the Rapporteurs' statement notes that the UN Committee Against Torture considers that the right to reparations extends to all acts of ill-treatment in a healthcare setting whether they meet the definition of torture or not. In this respect, intersex persons have the right to legal redress concerning any inhumane violations perpetrated against them.

The WHO Interagency Statement report on, Eliminating Forced, Coercive and Otherwise Involuntary Sterilisation called on states to: "Promptly, independently and impartially investigate all incidents of forced sterilisation with due process guarantees for the alleged suspect, and ensure appropriate sanctions where responsibility has been established" and, further:

> Provide access, including through legal aid, to administrative and judicial redress mechanisms, remedies and reparations for all people who were subjected to forced, coercive or involuntary sterilisation procedures, including compensation for the consequences and acknowledgement by governments and other responsible authorities of wrongs committed, and enable adults to seek redress for interventions to which they were subjected as children or infants.[148]

Ultimately, the Interagency Statement reinforces that:

> Accountability … rests with states, to prevent coerced sterilisation, to explicitly prohibit such practices, to respond to the consequences of these practices, to hold the perpetrators responsible, and to provide redress and compensation in cases of abuse.[149]

3.2.7 Data Privacy and Protection

As part of the protection of the Right to Privacy that is due to all persons, data regarding intersex persons must be safeguarded and handled in an ethical manner. Like for all persons, personal data, including information relating to sex and sex characteristics of a person must be handled with confidentiality. Article 12 of the UDHR provides that, 'No one shall be subjected to arbitrary interference with his privacy, family, home or

[147] Ibid. at 30.
[148] Ibid page 16.
[149] Ibid. at 13.

correspondence, or to attacks upon his honour and reputation' and that, 'Everyone has the right to the protection of the law against such interference or attacks.' Similar provisions are reiterated under Article 17 of the ICCPR.

The United Nations High Commissioner for Human Rights 'Guidance Note to Data Collection and Disaggregation: A Human Rights Based Approach to Data Leaving No One Behind in the 2030 Agenda for Sustainable Development'[150] sets out six principles which are key towards ensuring data collection and disaggregation, including transparency and privacy. This demands protection of the security, privacy and confidentiality of individual responses and personal information. Therefore, any requirement to provide sex and gender must be reasonable and necessary for a legitimate purpose. In its Principle 6 – The Right to Privacy, the YP+10 expressly provides that States shall,

> ensure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons' right to self-determination of gender.[151]

On the continental space, Chapter II of The Convention on Cyber Security and Personal Data Protection of the African Union (May 2014) provides for protection of personal data and calls upon State parties to establish a legal framework "aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy." Closer home, Article 31 (c) of the Constitution of Kenya, 2010, guarantees the right not to have information relating to family or private affairs unnecessarily revealed. At the time of publishing this report, Kenya's Draft Privacy and Data Protection Policy 2018 and the Data Protection Bill, 2018 were under discussion. The Draft Policy defines sensitive personal data to include information relating to the racial, ethnic or social origin, political opinions, religious belief or matters of conscience, culture, dress, language or birth of the data subject, gender, disability, sexual life or orientation, pregnancy, health status, etc. In addition, data processors must observe the core principles of data handling, that is, lawfulness, transparency, fairness, confidentiality, data minimisation, purpose limitation. Under the proposed Policy and Bill, the data subject is entitled to a catalogue of rights.

[150] Available at http://hrbaportal.org/wp-content/files/GuidanceNoteonApproachtoData.pdf
[151] Ibid. at 18.

3.2.8 Education and Training

Article 2 of Principle 23 of the United Nations Guidelines on IDPs as incorporated in the Act provide that

1. Every human being has the right to education.
2. To give effect to this right for Internally Displaced Persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education shall respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.

These provisions are commendable for their inclusiveness of all children despite the fact that 'special conditions' does not go further to explicitly provide for intersex children. The specific reference to women and girls acknowledges the vulnerabilities of these persons. Intersex children require similar consideration given the odds stacked against them. In addition, Principle 16 of the YP+10 Principles on The Right to Education provides that states shall:

> Ensure inclusion of comprehensive, affirmative and accurate material on sexual, biological, physical and psychological diversity, and the human rights of people of diverse … sex characteristics in curricula, taking into consideration the evolving capacity of the child [… and in] teacher training and continuing professional development programmes.[152]

3.3 Regional Human Rights Systems on Protection of Intersex Persons

3.3.1 The Inter-American Human Rights Framework

Despite the absence of laws expressly protecting the rights of the intersex at the regional level, various States in the Americas have made policy progress with regard to care, treatment and protection of intersex persons. One such state is Colombia, which has made efforts to define the concept of informed consent in relation to medical interventions and surgeries.

[152] Ibid.

In Colombia, the courts have defined the extent of 'informed consent' with specific reference to intersex persons. In Sentencia SU 337/99, Constitutional Court of Colombia (12 May 1999), consent was discussed[153]. The child, NN was declared female by a mid-wife at birth. However three Paediatric doctors found that NN was a pseudo-hermaphroditic male with ambiguous genitalia including a three centimetre phallus, a scrotum, labia folds and interior gonads. The medical team recommended genital conforming surgery before the child reached puberty after they found that NN's phallus would never be large or function like a normal penis. However, they declined to perform the surgery, contending that the Constitutional Court had previously held that parental permission could not be substituted for the permission of the child and that the child could not make such a decision until the age of majority. The plaintiff sought permission from the court to substitute the plaintiff's consent since the child was still a minor and "could not make decisions for herself", contending that, if the medical team were to wait for the child to have "the capacity to decide, it would be too late and would prevent normal psychological, physical, and social development".

The Court found that in the present case, NN was eight years old therefore the urgency of surgical intervention had diminished and the child had already developed a gender identity and showed no problems either psychologically or socially. In effect, the court held that the child of eight already had a sense of autonomy, and prior cases established that the need to protect the right of free development grew as a child became more self-aware. The Court therefore concluded that, constitutionally, consent could not be substituted if a child had achieved full cognitive, social, and emotional understanding of their body and had a gender identity firmly in place.

The Court based its reasoning on the following:

i. The original urgency to operate was lessened because the child had already developed a gender identity and become aware of his or her genitalia. In addition, the child was probably better able to define his or her own gender identity during puberty with the help of counselling.

[153]See Sentencia SU 337/99, Constitutional Court of Colombia (12 May 1999). Online: https://www.icj.org/sogicasebook/sentencia-su-33799-constitutional-court-of-colombia-12-may-1999/ (accessed on 29th September, 2017).

ii. A child exposed to surgery without a well-established reason would likely be confused and feel punished: he or she would need to be informed in order to avoid the dangers associated with unexplained and invasive change.

iii. An older child had greater autonomy and therefore benefited from greater constitutional protection. For children of five or older, therefore, surgery should be postponed until the child could consent.

The Court held that, since NN was an older child, denying immediate access to surgery was not a grave compromise of her right to life. The mother could therefore not authorise surgery or hormonal treatment. Additionally, because NN was eight years old, invasive medical procedures could only occur with the child's informed consent.

The Court therefore required that:

1. A medical team be established to help support both the plaintiff and the child and ensure that they were both completely informed of all treatment options;

2. If the medical team then found NN to be sufficiently autonomous to provide informed consent, she could have surgery before the age of majority, and;

3. In the alternative, the ability for informed consent could be approached on a sliding scale, with less invasive procedures taking place first and the rest following as NN matured.

Similarly, in Sentencia T-912/08, Pedro v. Social Security et al., Constitutional Court of Colombia, Chamber of Revision (18 December 2008)[154], the plaintiff's child was identified as having both male and female genitalia, including both ovaries and testicles, consent was discussed. The child was raised and identified as a boy, but it was unclear if the child could naturally produce male hormones or had the potential to procreate as a man. Subsequently, the defendants had the child examined to confirm the possibility of genital-conforming surgery, but found that the child had more congenital and physical female attributes, including a fallopian tube that might be functional and possible excretion of female hormones. The defendants then referred the case to a medical board, which concluded that surgery, in accordance with the laws and jurisprudence of the Colombian

[154] Online: https://www.icj.org/sogicasebook/sentencia-t-91208-pedro-v-social-security-et-al-constitutional-court-of-colombia-chamber-of-revision-18-december-2008/ (accessed on 29th September, 2017).

Constitution, needed the fully informed consent of the child, which would not be possible before the age of 18.

The issue for determination was whether the defendants' refusal to authorise and carry out genital-conforming surgery on the plaintiff's five year-old child, because parental consent was insufficient under the law undermined the child's right to life and freedom of personal development. The Court in assessing the right to autonomy vis a vis the rights of the beneficiary in intersex cases involving surgery found that the decision of the child was paramount, while the right of the parent to make decisions in a protective capacity was secondary. In determining whether the informed consent of a parent could be substituted for that of a minor, they considered: the urgency of the treatment, the impact and/or risk of the treatment on the autonomy and future of the child as well as the age and maturity of the child.

The Court therefore stated that if the child was five years or older, it became the right of that child to make the decision about their sexual identity premised on the following considerations:

1) The parent has also consented;
2) The child demonstrated an express desire to be of a particular gender [sex];
3) A respected and accredited medical board agreed with the decision. The board was to examine the child's physical attributes and evaluate the mental state of the child and parents, and;
4) Both the child and parents are aware of the known risks, future consequences and possible side effects of taking the medical action or not taking it.

Specifically, the Court considered it important to ascertain whether the child truly identified with the gender desired by the parents. It proposed that older children also needed help and support from therapists and social workers. Moreover, it stated that no time constraints should be imposed on the process of decision-making, to discuss alternatives, verify the parties' mental state, and ascertain that parents and the child were able to show consistent commitment to a chosen gender.

The Court held that the defendants must form a medical team within forty-eight hours, consisting of surgeons, urologists, endocrinologists, paediatricians, psychiatrists, therapists and social workers. The team would assist the child and the parents to understand the surgery and its implications, and would also perform exams, diagnostics, and evaluations, which they would explain and discuss with the child and parents. If, after the parents and child had been fully informed of the medical findings, the complications and risks of surgery, and potential future issues as well as alternative medical and non-medical options, and provided the medical team agreed with their decision, the defendants were mandated to perform surgery within fifteen days. However, if the child's decision did not match that of the parents, or the medical team did not agree with the decision of the child and parents, no surgery could be performed until the child was eighteen and able to make his or her own informed decision.

The cases highlighted above therefore enforce the intersex child's authority to consent and set the age of consent for intersex cases involving surgery at five years and above, subject to the considerations set out. As a consequence, when they are not met, the surgery is deferred. In line with the best interest of the child, we can therefore conclude that the surgical and medical interventions on children born with intersex conditions ought to be deferred where there is no medical necessity /urgency; given that it is often clouded with meeting societal expectations as opposed to the best interest of the child. Further, it subjects the children to cruel and degrading treatment as it has far reaching consequences affecting their capacity to exercise their sexual reproductive rights, their right to found a family and their right to dignity.[155]

3.3.2 The European Human Rights Framework

There are two separate yet complementary transnational legal regimes that address human rights in Europe, namely: the law of the European Union (EU), which is a 'supranational organisation'[156] and the Council of Europe, an 'intergovernmental organisation.'[157] The latter promotes human rights through international conventions, advocates freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities,

[155]Due to shame associated with their cosmetically modified genitalia.

[156]Defined as a "an international organization or union in which member states transcend national boundaries or interests to share in the decision making and vote on issues pertaining to the wider grouping. ... In the European Union, each member votes on policy that will affect each member nation. The benefits of this construct are the synergies derived from social and economic policies along with a stronger presence on the international stage", online: Investopedia. Online: https://www.investopedia.com/terms/s/supranational.asp (accessed 27th November, 2017).

[157]Defined as "an organization composed primarily of sovereign states (referred to as member states), or of other intergovernmental organizations. ... IGOs are established by treaty formed when lawful representatives (governments) of several states go through a ratification process, providing the IGO with an international legal personality", online: Wikipedia https://en.wikipedia.org/wiki/Intergovernmental_organization (accessed 27 November 2017).

and in addition helps member states fight corruption and terrorism and undertake necessary judicial reforms, monitoring their progress in these areas and making recommendations through independent expert monitoring bodies.[158]

The EU provides general protection of human rights through its various instruments. Foremost among these is the Charter of Fundamental Rights of the European Union,[159] which affirms the rights that arise from the national and international obligations that are common to the Member States of the EU, including the ECHR discussed below.[160] Article 1 of the EU Charter provides that human dignity is inviolable and must be respected and protected.[161] Article 3 provides for the right to physical integrity, expressly including the right to 'free and informed consent of the person concerned' in the field of medicine. Article 7 provides for the right to respect for one's private life, and Article 21 prohibits discrimination on any ground including, among others, sex, 'genetic features' and birth.

The EU Network of Independent Experts' commentary on the EU Charter states that these three provisions must be read together in respect of the fundamental rights that require protection in the field of medicine and biology.[162] Further, the Court of Justice of the European Union (CJEU) has held that the principle of free and informed consent is an element of the right to physical integrity.[163]

3.3.2.1 Best Interest of the Child

Under the European system, the best interest of the child features prominently. Article 24 of the Charter of Fundamental Rights of the European Union provides that: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". Further, children must be allowed to express their views freely and have those views "taken into consideration on matters which concern them in accordance with their age and maturity."

[158]Council of Europe, "About Us", online: https://www.coe.int/en/web/about-us/values (accessed 27th November, 2017).
[159]2000/C 364/01 (18 December 2000) [EU Charter].
[160]EU Charter, supra note 8 at Preamble.
[161]EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union (June 2006), online: <ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf> (accessed 2 February 2018) [Expert Commentary] at 24-25.
[162]Ibid. at 37.
[163]Ibid. at 39.
[164]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5 (entry into force 3 September 1953).

3.3.2.2 Prohibition of Torture

The rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms[164] closely mirror those set out in the UDHR, including the prohibition of torture (Article 3), which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" and the prohibition on discrimination (Article 14), which states that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In this respect, the German Ethics Council has opined that 'other status' would also include 'sexual identity'.[165] In addition to these rights, the right that has frequently been relied upon by persons in regard to sexual or gender identity is Article 8, which is the right to respect for privacy and family life.

The ECtHR has issued a Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life[166] that clarifies the scope of Article 8 of the European Convention which, while broad, is not limitless.[167] The essence of Article 8 is protecting the individual against arbitrary interference by public authorities, which "may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[168] Elements of physical, psychological and moral integrity that are within the personal sphere of private life under Article 8 include gender identification and sexual life.[169] Individuals have the right to legal recognition of their subjective sexual identity.[170] Finally, individuals also have the right to protection from violations of their physical integrity including forced medical treatment, including sterilisations undertaken without consent of the patient.[171] In this respect, the European Court of Human Rights (ECtHR) has found a violation of Article 8 when the state failed to give 'adequate information' about the health risks associated with a particular treatment. [172]

[164]Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5 (entry into force 3 September 1953).
[165]GEC Opinion, infra note 82 at 128.
[166]Council of Europe/European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life (31st December, 2016), online: www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (accessed 2nd February, 2018).
[167]Ibid. at para. 2.
[168]Ibid. at para. 3.
[169]Ibid. at para. 95.
[170]Ibid. at para. 162. See also GEC Opinion, infra note 82 at 126.
[171]Ibid. at para. 67.
[172]Ibid. at para. 69

3.3.2.3 Discrimination on Grounds of Sex

The Directorate-General for Justice of the European Commission issued a report in June 2011 entitled, Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression,[173] which opines that discrimination against intersex persons ought to be categorised as discrimination on the basis of sex rather than on the basis of gender or gender identity and, accordingly, a distinction needs to be made between intersex and transgender persons in the context of discussions about sex equality.[174] The report takes pains to clearly distinguish between the terms 'sex' and 'gender', clarifying that:

> Sex refers to biological makeup such as primary and secondary sexual characteristics, genes, and hormones, while gender refers to people's internal perception and experience of maleness and femaleness, and the social construction that allocates certain behaviours to male and female roles which vary across history, societies, cultures and classes. Gender is hence strongly linked to society's expectations and is not exclusively a biological matter. … Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth …[175]

This binary model of sex and gender results in systemic discrimination and marginalisation of any person whose sex or gender identity does not fit within the societal norms of 'male' and 'female'.[176] It is social and institutional expectations that people fit within this binary norm that results in intersex persons undergoing medical treatments or procedures, solely to access social entitlements that are otherwise freely available to the rest of society.[177] The report discusses what it terms the "medicalisation and pathologisation of intersex bodies",[178] noting that the term "disorders of sex development" (DSD) was adopted in 2006 at the International Consensus Conference on Intersex with the intention of introducing medical standards of care, but has been resoundingly rejected by intersex advocates for pathologising the condition and thus giving medical practitioners decision-making power over assignment of a child's sex and gender.[179]

[173] European Commission, Directorate-General for Justice, Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression (June 2011), online: http://ec.europa.eu/justice/discrimination/files/trans_and_intersex_people_web3_en.pdf (accessed 16th October, 2017).
[174] Ibid. at 82.
[175] Ibid. at 12-13.
[176] Ibid. at 13.
[177] Ibid. at 15.
[178] Ibid. at 5.
[179] Ibid. at 17.

In 2015 the European Union Agency for Fundamental Rights (EUAFR) released a focus paper on the "The fundamental rights situation of intersex people", which begins by clarifying that "[i]ntersex is a collective term for many natural variations in sex characteristics. It is not a medical condition".[180] The paper notes that the concerns of intersex persons are typically aimed to be addressed through measures targeting discrimination on the grounds of gender identity, despite the fact that there is no evidence linking sex characteristics with either gender identity or sexual orientation.

In this respect, the European Parliament adopted the 'Lunacek Report' in 2013, which called for the European Commission and EU member states to address the lack of knowledge around the human rights concerns of intersex persons.[181] The EUAFR proposes that unequal treatment of intersex persons is better addressed through measures targeting discrimination on the basis of sex, and supports the calls of intersex advocacy organisations for recognition of a new ground of 'sex characteristics'.[182] The paper canvasses the laws, policies and practices of EU member states with regard to recognition of and protections for intersex persons. The paper's key conclusions are as follows:

- Legal and medical professionals should be better informed of the fundamental rights of intersex people, particularly children.
- The need for alternatives to gender markers in identity documents and birth registries should be reviewed to better protect intersex people.
- Member States should avoid non-consensual 'sex-normalising' medical treatments on intersex people.[183]

3.3.2.4 On Medical Interventions and Informed Consent

A number of European Resolutions and Policies outlaw non-consensual sex-normalising' medical treatments on intersex people. In 2013, the Parliamentary Assembly of the Council of Europe adopted a resolution on 'Children's right to physical integrity,'[184] which specifically notes the Assembly's concern about "early childhood medical interventions in the case of intersex children"[185] and recommends that Member States ,

[180]European Union Agency for Fundamental Rights, The fundamental rights situation of intersex people (April 2015), online: <fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf> (accessed 16th October, 2017), at 2.
[181]Ibid. at 2 and 3.
[182]Ibid. at 3.
[183]Ibid. at 8.
[184]Online: <assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=20174&lang=en> (accessed 7th November, 2017).
[185]Ibid. at para. 2.

"undertake further research to increase knowledge about the specific situation of intersex people, ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support".[186]

More generally with respect to non-medically necessary interventions, the Assembly called upon Member States to provide specific training to medical professionals on the risks and alternatives to certain procedures, to undertake sensitisation directed towards families, schools, religious communities and service providers, and to "initiate a public debate, including intercultural and interreligious dialogue, aimed at reaching a large consensus on the rights of children to protection against violations of their physical integrity according to human rights standards".[187] Finally, the Assembly directed Member States to enact specific legislation prohibiting certain interventions from being undertaken until the child is old enough to consent.[188]

In April 2015 the Council of Europe Commissioner for Human Rights published an 'Issue Paper' entitled 'Human rights and intersex people.'[189] It contained detailed recommendations regarding the "medicalisation of intersex people", their enjoyment of human rights, the legal recognition of sex and gender in Europe, discrimination and violence suffered by intersex persons, and the emergence of access to justice and accountability for violations of the rights of intersex persons. The paper notes that the prevalence of intersex may not be as rare as might be believed, with research suggesting that as many as 1.7% of human births are intersex.[190]

The Commissioner further notes that the emphasis on sex-'normalising' surgeries performed on intersex newborns arises from society's expectation that humans are either male or female, rather than from any consideration of the child's best interests and welfare.[191] Such surgeries have been found to lead to rates of self-harming and suicidal behaviour that are double those found in a control group, and similar to rates among women with a history of being physically or sexually abused, while anecdotal evidence of

[186]Ibid. at para. 7.5.3.
[187]Ibid. at paras. 7.2-7.4.
[188]Ibid. at para. 7.7.
[189]Council of Europe, Commissioner for Human Rights, Human rights and intersex people Issue Paper (April 2015), online:https://wcd.coe.int/ViewDoc.jsp?Ref=CommDH/IssuePaper(2015)1&Language=lanEnglish&Ver=original (accessed 18th October, 2017) [CECHR Issue Paper].
[190]Ibid. at 16.
[191]Ibid. at 19.

intersex persons who have not been subject to corrective surgery suggest no negative impacts as a result.[192] The Commissioner finds that, despite such evidence and the documented view of many intersex persons that these terms are stigmatising, the continued trend of classifying variations in sex characteristics as a pathology or a disorder "raises serious questions with regard to the medical profession's ability to help intersex people attain 'the highest possible level of health' that they have a right to".[193]

In this respect, the paper notes that the right to health is contained in Articles 11 and 13 of the European Social Charter, and opines that the right to health of intersex persons encompasses both the right to access health services that are respectful of bodily diversity, and the right not to be subject to unnecessary and involuntary treatments or interventions that have negative long term consequences.[194] Regarding consent, the Council of Europe Commissioner for Human Rights reveals that research into 'sex assignment surgery' shows that parents are three times more likely to give consent when the information they are given is medicalised, as opposed to when the information provided includes psycho-social considerations.[195] With respect to the legal recognition of sex in Europe, and discrimination and violence suffered by intersex persons, the Commissioner noted thus:

> Legal certainty needs to be guaranteed. In this respect, a specific provision for intersex, such as ' 'sex characteristics' or 'intersex status', has the advantage of playing an educational role for society at large as well as providing visibility to this marginalised group. In the absence of a specific term, an authoritative legal interpretation of the applicability of the category of sex/gender would appear necessary. In the same vein, it is also important that the material scope of the legislation tackling discrimination covers all spheres of life, and that the framework tackling hate crimes and 'hate speech' also expressly covers violence against intersex people.[196]

The Commissioner reviewed the regional and international human rights frameworks, specifically noting as follows with respect to provisions of the European Convention on Human Rights:

- Article 2 – right to life – "While the convention has not yet been tested with regard to its applicability to intersex, many Council of Europe institutions have already raised concerns about the use of sex selection techniques."[197]

[192]Ibid. at 22.
[193]Ibid. at 23.
[194]Ibid. at 32.
[195]Ibid. at 23.
[196]Ibid. at 46.
[197]Ibid. at 30.

- Article 3 – Prohibition on torture and other cruel, inhuman or degrading treatment or punishment – "the key advocacy goal of intersex rights organisations is to end 'normalising' surgeries and other cosmetic medical treatment, which some organisations call 'intersex genital mutilation' (IGM)."[198]
- Article 8 - Right to respect for private life – "The European Court of Human Rights has held that even a minor interference with the physical integrity of an individual can be regarded as an interference with th[is] right … if it is carried out against the individual's will."[199]

Finally, the Commissioner made the following recommendations:[200]

- Member states should end medically unnecessary "normalising" treatment when it is enforced or administered without free and fully informed consent;
- Intersex persons and their families should be offered interdisciplinary counselling and support, and access to medical records;
- National and international medical classifications which pathologise variations in sex characteristics should be reviewed;
- Member states should facilitate the recognition of intersex persons before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker;
- Sex characteristics should be included as a specific ground in equal treatment and hate crime legislation;
- Member states should carry out research into the situation and human rights protection needs of intersex people, and improve public awareness, professional training, ethical and professional standards, and legal safeguards, and;
- The human rights violations intersex people have suffered in the past should be investigated, publicly acknowledged and remedied.

[198]Ibid. at 31.
[199]Ibid. at 31 and 32.
[200]Ibid. at 9-10 and 51-52.

3.4 A Comparative Review of International Practices

3.4.1 Germany

Different studies in Germany have highlighted the challenges and complications arising from corrective procedures often performed on intersex persons. For instance, in a 2013 report entitled "Children's right to physical integrity" to the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe, Rapporteur Marlene Rupprecht noted in part that,

> [m]any had been submitted to a series of operations and were confronted with post-operative complications. Relevant treatment was traumatising for them and often involved humiliating procedures such as being exposed to large groups of medical professionals and students studying this curious phenomenon. For many, the interventions linked to their syndrome had long-term effects on their mental health and well-being.[201]

3.4.1.1 Legal Framework

Intersex persons have been recognised in Germany canon law since the late 18th century,[202] though until the German-born geneticist Richard Goldschmidt coined the term 'intersex' in the 20th century,[203] such individuals were referred to as 'hermaphrodites'. Section 19 I (1) of the Prussian General Land Law of 1794 provided that parents could choose the sex of their hermaphrodite child, but section 20 I (1) provided that the child could change their sex upon reaching the age of 18, when men were legally entitled to marry.[204]

This right to choose was lost however, upon introduction in 1876 of the requirement to register one's civil status in accordance with the binary classification of 'male' or 'female', and thereafter an individual's sex would be assigned by experts.[205] Provisions relating to hermaphrodites disappeared in the new Law on Civil Status (PStG), which did not contain a definition of sex, and instead the explanatory notes described hermaphrodites on the basis of the male/female binary norm, as sexually malformed males/females.[206] Section 18 of the PStG requires parents to notify the registry office within one week of the birth of a child and, while

[201] M. Rupprecht (2013), "Children's right to physical integrity", report, Committee on Social Affairs, Health and Sustainable Development, PACE (Doc. 13297), online: http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=20057&lang=EN (accessed 30th October, 2017).
[202] DeutscherEthikrat (German Ethics Council), Opinion – Intersexuality (23 February 2012), online: http://www.ethikrat.org/files/opinion-intersexuality.pdf (accessed 18 October 2017) [GEC Opinion] at 109.
[203] Revolvy, Intersex rights in Germany, online: https://www.revolvy.com/main/index.php?s=Intersex%20rights%20in%20Germany (accessed 18th October, 2017).
[204] GEC Opinion, supra note 82 at 109.
[205] Ibid. at 111.
[206] Ibid. at 114.

in 2009 section 59(2) of the PStG was amended to provide for application to be made for indication of sex not to be included in a birth certificate, until 2013 section 21(1) still required registration of the child's sex as either male or female.[207] In this respect, the 2013 VerordnungzurAusführung des Personenstandsgesetzes (Regulation on the Implementation of the Civil Status Act) (Personenstandsverordnung - PStV) provides that the sex indication on a birth certificate may be left blank if the child has been diagnosed as being "affected by [Disorders of Sex Development]".[208]

Section 47(2) of the PStG provides that a child's registered sex could be changed if it turns out that the sex had been wrongly registered, proof of which is required, however the only options remained male and female, and once changed it cannot be changed again.[209] A child's first name can be changed in accordance with sections 3(1) and 11 of the Gesetzüber die Änderung von Familiennamen und Vornamen (Act on Changes of Surnames and First Names), but only if the applicant has a predominant interest that merits protection.[210]

While the German identity card does not include any indication of the holder's sex,[211] section 4(1) of the Passgesetz (Passport Act) provides that an individual's sex is required, and is determined on the basis of the holder's sex as registered under the Law on Civil Status.[212] The Grundgesetz (GG – Basic Law) article 6 provisions have been interpreted to allow for marriage only between a man and a woman, and for civil partnerships only between two persons of the same sex.[213] With respect to human rights protections, the GG (Basic Law) contains the following, among others:

- Article 1(1) – the right to human dignity, including the right of self determination
- Article 2(1) – the right of personality
- Article 2(2) – the right to physical integrity
- Article 3 – the right to equality

In a 2012 opinion on "intersexuality", prepared in response to the Federal Government's instruction to examine the situation of and challenges faced

[207]Ibid. at 115, 116 and 119.
[208]CECHR Issue Paper, supra note 68 at 38.
[209]GEC Opinion, supra note 82 at 118.
[210]Ibid. at 119.
[211]Ibid.at 118.
[212]Ibid. at 117.
[213]Ibid. at 119-120.

by intersex persons,[214] the German Ethics Council applied these provisions to intersex persons, opining that the rights to dignity and personality together mean that all individuals have the right to "to live their lives on a self-determined basis and by their own lights, and to act and be treated in accordance with the identity that best corresponds to their subjective feeling." In this respect the Ethics Council notes a decision of the Constitutional Court in which it was held that the right to personality includes the right to align one's civil status with one's subjective sexual identity.[215] With respect to the right to equality, the Ethics Council opined that intersex persons cannot be treated equally because they do not experience themselves as either male or female and therefore cannot be treated the same as either males or females, and that they suffer a disadvantage as compared to men and women because they cannot register themselves in accordance with their sex.[216] The Ethics Council further opined that intersex persons are protected by section 1 of the AllgemeinesGleichbehandlungsgesetz (AGG - General Equal Treatment Act) from discrimination on the basis of sex; however, that protection is only triggered if the discriminating party is aware of the person's intersex status.[217] In this respect, the Council of Europe Commissioner for Human Rights has noted that the General Equal Treatment Act implicitly includes intersex persons in the definition of 'sex', "in line with Germany's interpretation of CJEU jurisprudence."[218]

With respect to corrective surgery, the Ethics Council noted that both the criminal law and civil law of torts protect against bodily harm, even if the medical intervention is required for therapeutic reasons, unless there is informed consent to the specific intervention, and the person consenting is capable of understanding the nature, scope and significance of the procedure.[219] In a judgment dated 10 October 2006, the Bundesgerichtshof (Federal Court of Justice) held that a child has the right to veto a 'significant intervention' so long as it is not medically necessary.[220] Article 6(2) of the Basic Law provides that parents have the natural right and primary responsibility for the physical welfare, mental/intellectual development and upbringing of their children, but that parental discretion in this respect must be for the child's protection, and the state may intervene if the welfare of a child is impaired by parental actions.[221] Section 1626 II of

[214]Ibid. at 162. The Ethics Council was instructed to "dialogue with affected individuals and their support groups while taking due account of the relevant therapeutic, ethical, sociological and legal perspectives".
[215]Ibid. at 20-21.
[216]Ibid.
[217]Ibid. at 124-126.
[218]CECHR Issue Paper, supra note 68 at 45.
[219]Supra note 82 at 137 and 153.
[220]Ibid. at 139.
[221]Ibid. at 140-141.

the BürgerlichesGesetzbuch (BGB – Civil Code) provides that parents must involve children in important decisions affecting them, in accordance with the child's capacity and need for autonomy. The wishes of a child with decision-making capacity take priority in the event of conflict with the wishes of the parent(s). In any event, section 1631c of the BGB prohibits entirely the sterilisation of a child.[222]

With respect to the information required in order for consent to be validly given to a proposed treatment, at a minimum it must include the diagnosis, the cause of the disorder, the proposed treatment, possible alternatives, the risks associated with the treatment and the uncertainty of its outcome. The prospective patient must be informed in accordance with their age and ability to understand, as far as reasonably necessary in light of the nature and severity of the treatment and the desire of the patient to receive such information.[223]

3.4.1.2 Policy Recommendations

The Ethics Council noted that intersex persons have been subjected to "grave suffering" in the past, and stated that "[w]ith their particularity and as members of a society that espouses diversity, [intersex persons] deserve the respect and support of that society."[224] In this context, the Ethics Council made a number of policy recommendations with respect to the civil status and medical treatment of intersex persons (referred to by the Ethics Council as "persons with DSD").[225] These recommendations can be summarised as follows:

1. Diagnosis and treatment, along with medical and psychological counselling, should be provided to intersex persons by relevant experts and medical practitioners at specialised interdisciplinary centres distributed throughout the country so as to be reasonably accessible. These centres should ensure that peer counselling by other affected persons is provided. There should be ongoing monitoring and research into treatment of intersex persons including long term effects of any intervention taken;
2. The basic and continuing training of doctors, midwives, psychotherapists and other medical staff should include the avoidance of discrimination and insensitivity towards intersex persons, and

[222]Ibid. at 140 and 142.
[223]Ibid. at 149.
[224]Ibid. at 162.
[225]See ibid. at 163-167.

should ensure the early identification and referral of intersex persons to a specialised interdisciplinary centre of competence for diagnosis and treatment;

3. Any decision to undergo corrective surgery should only be made by the intersex person, at a time when that person is competent to decide. The decision should only be made in respect of an intersex person who is not competent to decide for himself if "irrefutable reasons of child welfare" exist, such as to avert a grave concrete risk to life or physical health, and after all potential medical, psychosocial and psychological advantages, disadvantages and long-term consequences of early intervention have been given "thorough consideration". With respect to determining what is an intersex child's welfare, the child must be involved in the decision making process and the child's wishes must be taken into account as far as possible. Where the wishes of the child conflict with the wishes of those who have the right to care for the child, the law should require a ruling to be made by the Family Court;

4. An intersex person and those with the right to care for them must be provided complete information on all options for treatment, including no treatment, and must be given a reasonable amount of time in which to weigh those options and make a decision. A hurried decision should only be made in the case of a medical emergency;

5. Comprehensive documentation of all treatment options and measures must be taken and retained for a minimum period of 40 years, with a right of access to the intersex person. Statutory limitation periods concerning both criminal and civil law prohibitions on violations of self-determination and abuse should be extended until the intersex person has reached the age of 18 for criminal matters and 21 for civil matters;

6. An ombudsman should be appointed to monitor and advice on all issues concerning intersex persons, including receiving complaints and making decisions concerning reparations. To this end, a fund should be established to provide relief and assistance to intersex persons for both current treatment (such as hormone therapy) and long term effects on their quality of life. Such fund should also be used to support allies and advocates of intersex persons;

7. "The German Ethics Council takes the view that personal rights and the right to equality of treatment are unjustifiably infringed if persons whose physical constitution is such that they cannot be categorised as belonging to either the female or the male sex are compelled by law to be designated in one of these categories in the civil register."[226] Accordingly, the law should be amended to provide for intersex persons to register as 'female', 'male' or 'other' once they have reached an age whereby they are capable of making the decision for themselves. Provision should also be made for intersex persons to amend their registered sex to correct an inaccuracy in the original registration;

Following the release of this report, in 2013 Germany became the first European nation to allow babies with characteristics of both sexes to be registered as indeterminate gender on birth certificates.[227] In this respect, on 31 January 2013 the Deutscher Bundestag (German Federal Parliament) amended section 22 of the PStG to include a new subsection (3), which now provides that "[i]f the child can be assigned to neither the female nor the male sex, then the child has to be entered into the register of births without such a specification."

3.4.1.3 Case Law

In the matter of Re: Völling, which resulted in a 2008 decision of the Regional Court of Cologne,[228] Christiane Völling, an intersex person, had been brought up as a boy.[229] During an appendectomy at the age of 17, doctors identified the presence of a female-typical chromosomal pattern and female reproductive organs, and the absence of male reproductive organs.[230] While Völling was informed of the existence of ovaries, he was not informed of the fact of a normal, female chromosome constitution and instead he was referred for surgery,[231] during which "a normal female anatomy with pre-puberal uterus, normal sized ovaries, blindly ending vagina..." was discovered, and completely removed without her consent.[232] Several years later, upon learning the truth, Völling sued the doctor who had performed the surgery. The court noted that, "there is no evidence that suggests that such a protocol [that is, continuing with the surgery despite such findings] was agreed upon by some sort of consensual agreement before the surgery"

[226] Ibid. at 166.
[227] Zwischengeschlecht.org, Intersex: Third Gender in Germany (22 August 2013), online: http://blog.zwischengeschlecht.info/post/2013/01/31/Deutschland-staatliches-Zwangsouting-Intersex (accessed 16th October 2017).
[228] Re: Völling, Regional Court Cologne, 25 O 179/07 (25th civil division), (6 February 2008).
[229] Ibid. at para. 3.
[230] Ibid. at paras. 3 and 6.
[231] Ibid. at para. 6.
[232] Ibid. at paras. 8, 25 and 29.

and held that the doctor ought to have stopped the surgery upon finding a physiological condition that was different than Völling believed existed, and obtained informed consent to continue with the procedure.[233] The court did not accept the defendants' argument that Völling would have been 'further confused' by learning that Völling was female, and noted that any risk to Völling's health was not so "grave and acute" so as to vitiate his right to self determination in respect of irreversible surgery.[234] Ultimately the surgeon was ordered to pay 100,000 Euros (approximately 14.5 million Kenyan shillings) in compensation.[235]

Another case brought before a German court by an intersex person is that of one Raab who, like Völling in the above case sued the doctors who removed Raab's underdeveloped penis – which Raab was told was an oversized clitoris—and prescribed female hormone therapy, despite the doctors' knowledge that Raab was in fact genetically male.[236] In December 2015, the Nuremburg State Court found that the surgeon was not responsible for the failure to disclose Raab's diagnosis; rather, this was the responsibility of the doctors who had diagnosed and ordered treatment, and accordingly held the clinic where Raab was treated and underwent surgery liable for damages and compensation.[237]

In June 2016, the German Federal Court of Justice issued a ruling in a constitutional challenge that rejected the creation of a third sex category of "inter", holding that there was no violation of the plaintiff's basic rights since intersex persons are now able to leave the sex entry blank in the German birth registries following the 2013 amendment to the PStG. The court refused to refer the matter to the constitutional court.[238]

Following this decision, a new challenge was filed in the federal constitutional court to section 22(3) of the Law on Civil Status (PStG) as it was amended in 2013,[239] regarding the failure to allow a positive gender entry that is not 'male' or 'female', as opposed to leaving the gender entry blank. The Bundesverfassungsgericht released its decision in Re K[240] on 10 October 2017, in which seven out of eight judges found that the law as

[233]Ibid. at paras. 29 and 31.
[234]Ibid. at para. 33.
[235]Zwischengeschlecht.org,"Christiane Völling: Hermaphrodite wins damage claim over removal of reproductive organs" (12 August 2009), online: http://zwischengeschlecht.org/pages/Hermaphrodite-wins-damage-claim (accessed 16 October 2017). See also Germany, Cologne District Court (Landgericht Köln), (2009), Case No. 25 O 179/07 (12 August 2009).
[236]DPA/The Local, supra note 78.
[237]Zwischengeschlecht.org, "Nuremberg Hermaphrodite Lawsuit: Michaela "Micha" Raab Wins Damages and Compensation for Intersex Genital Mutilations!" (17th December, 2015), online: http://stop.genitalmutilation.org/post/Nuremberg-Hermaphrodite-Lawsuit-Damages-and-Compensation-for-Intersex-Genital-Mutilations (accessed 16th October, 2017).
[238]Thomson Reuters, supra note 55.
[239]Which provides that: "If the child cannot be assigned to either the female or the male gender, the civil status case without such an indication must be entered in the birth register" [translated from German using Google Translate]
[240]1 BvR 2019/16, online (in German): Bundesverfassungsgerich. Online: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/10/rs20171010_1bvr201916.html;jsessionid=74562F477D0D880E03E99A1B49641A9E.2_cid361.

amended violated the complainant's fundamental rights and ordering the government to amend the law to give effect to its decision no later than 31 December 2018.[241]

The complainant had alleged a violation of the complainant's right to privacy in conjunction with the right to develop one's personality in line with Article 2 of the Basic Law, and of the right to equal treatment and freedom from discrimination on the basis of sex in Article 3.[242] The complainant argued that equal recognition of intersex status is a manifestation of the right to personality, and being compelled to choose between being classified as a sex that is incorrect and does not correspond to the individual's sense of identity, or not choosing a sex and therefore being classified as not having any identity is a violation of that right. In essence, the law even as amended continues to ignore the existence of intersex persons, hampering their ability to develop individual identity and status in the social context.[243] The complainant argued that a third option of 'inter/divers' is not the creation of a third sex but rather a collective term for all persons who are not male or female but are also not 'sexless', and is "no less suitable than the current legal situation".[244]

The majority of the constitutional Court acknowledged the submissions of various interested parties who were granted status in the proceedings, including the German Society for Psychology's statement that an "assumption that a person's gender can only be male or female is neither psychologically nor biologically and sexually sound", and current scientific findings show that legal and social recognition of a person's sexual existence and identity "is an essential prerequisite for the ability to develop a healthy sense of self and responsibility."[245] While the Central Committee of German Catholics acknowledged that social values are changing and in future there may well be a different outcome, its membership had "not voted unequivocally" for the creation of a third option.[246] Notably however, the position of the EKD Study Center on Gender Issues in the Church and Theology was that, "the institutionally and culturally dominant ordering principle of the two sexes poses a considerable interference with their self-image".[247]

[241]Ibid. at para.1.
[242]Ibid. at Part AIII, para. 15.
[243]Ibid. at Part AIII, para. 16 1.
[244]Ibid.
[245]Ibid. at Part AIV, para. 26 8.
[246]Ibid. at Part AIV, para. 30 12.
[247]Ibid. at Part AIV, para. 31 13.

The Court recognised that the registration of personal status plays a significant role in a person's life, for example with respect to access to health services, educational opportunities and employment, and carries with it legal and factual consequences.[248] With respect to health, the Court acknowledged a recent statement issued by the German Medical Association that variations in sex development should not be equated with illness or malformation.[249] The Court also noted that the government had not followed the recommendation of the German Ethics Council to introduce a third option on identification documents,[250] despite another opinion released by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth that the issue is not about the legislature 'creating' a third gender, but rather recognition of a non-binary sex option is necessary from a constitutional perspective that requires equal legal recognition on the basis of an individual's physical and psychological condition.[251]

The majority of the Court held that an intersex person's sexual identity is protected by the general right to privacy in the Basic Law, and this right is violated by a law that forces such persons to register a sex that does not correspond with their sexual identity.[252] Likewise, the general right to personality protects sexual identity as a constituent aspect of personality, as it contributes both to self identity and to how others perceive and treat a person, including what expectations are placed on a person's appearance, behaviour and position in society.[253] The majority noted that the legislature clearly attaches significance to sex for the description of a person's legal status, despite numerous reforms of the law of civil status, and accordingly must recognise that sex has an identity-forming effect. As such, requiring entry of sex in the civil register but denying entry to a group of individuals who do not identify as male or female denies them recognition as persons in society.[254]

Further, the Basic Law does not require that civil status be restricted to the binary norm. The requirement in Article 3 that social disadvantage between men and women be eliminated does not enshrine the binary norm of male and female to the exclusion of another sex category, but rather is directed at removing sex-based discrimination. In this respect, the status of 'male' and 'female' is not affected by recognition of a further sex status, as no one is

[248]Ibid. at Part AI, para. 8 2.
[249]Ibid. at Part AI, para. 9 3.
[250]Ibid. at Part AIV, para. 20 2.
[251]Ibid. at Part AIV, para. 22 4.
[252]Ibid. at Part BI, para. 36.
[253]Ibid. at Part BI, para. 39 1.
[254]Ibid. at Part BI, paras. 47 and 48 bb).

"forced to associate with" the third option.[255] The refusal to recognise a third option is not supported by any legitimate purpose, including bureaucratic or financial burdens that would only exist during a period of transition and cannot be compared to having one's identity ignored by the law.[256] Rather, bureaucratic delays may in fact be lessened as a result of addressing the confusion that may currently be caused by the mistaken impression that the entry was accidentally left blank.[257]

Accordingly, the majority of the Court ruled that section 22(3) of the PStG is unconstitutional. The remedy however is simply a declaration of incompatibility with the Basic Law, since the legislature has the option of accepting the complainant's submission of 'inter/divers', choosing a different "uniform positive" category, or even waiving or entirely eliminating the requirement of sex identity in the civil register.[258] The government is allowed until 31 December 2018 to enact new legislation, but in the interim administrative agencies and courts may no longer require a person to register a sex identity.[259]

3.4.2 Switzerland

3.4.2.1 Informed Consent

The Swiss National Advisory Commission on Biomedical Ethics (NationaleEhikkommissionimBereichHumanmedizin/Commission nationaled'éthique pour la médecinehumaine, hereinafter 'NEK-CNE' or 'Commission') in its 2012 opinion entitled On the management of differences of sex development: ethical issues relating to 'intersexuality'[260], submitted on request of the Director of the Federal Office of Public Health, uses the term 'differences of sex development' "in order to avoid any negative or misleading connotations associated with the term "intersexuality".[261] The NEK-CNE ultimately recommended use of this term for the reason that not all cases of 'Disorders of Sex Development' (DSD) involve a pathological 'disorder'; that is, a functional impairment associated with suffering that requires medical treatment, and thus the term "disorder" may appear stigmatising from the perspective of intersex persons.[262]

[255]Ibid. at Part B1, paras. 50 and 51.
[256]Ibid. at Part B1, paras. 49 and 52.
[257]Ibid. at Part B1, para. 54.
[258]Ibid. at Part C1, para. 65.
[259]Ibid. at Part CII, para. 66.
[260]Swiss National Advisory Commission on Biomedical Ethics NEK-CNE, On the management of differences of sex development: Ethical issues relating to "intersexuality" Opinion No. 20/2012 (Berne, November 2012), online: http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK_Intersexualitaet_En.pdf (accessed 18th October, 2017).
[261]Ibid. at 6.
[262]Ibid. at 8.

The opinion notes that the societal attitude that sex is an essential feature of identity, coupled with the binary norm of 'male' and 'female', underlies the requirement that all children be unequivocally categorised at birth, and that this has lead to medical sex assignment of children.[263] The opinion further notes however that even a diagnosis of DSD does not automatically lead to a conclusion that medical treatment is necessary.[264] The NEK-CNE therefore recommended that any irreversible sex assignment treatment should be deferred until "the person to be treated can decide for him/herself", so long as no urgent intervention was necessary.[265] In the NEK-CNE's opinion, children reach decision-making capacity between the ages of 10-14, but should nevertheless participate in decision-making even before they have attained full capacity, and parents should never be allowed to veto a child's decision if that child can understand the purpose, appropriateness and effects of surgery.[266]

Given that medical interventions "have lasting effects on the development of identity, fertility, sexual functioning and the parent-child relationship",[267] the Commission also recommended that psychosocial support and counselling should be offered free of charge to all intersex children and their parents[268] by an expert multidisciplinary team[269] at a specialised centre.[270] In this respect, the NEK-CNE advises that both medical and non-medical information must be provided to children and parents, specifically including a caution that sex assignment surgery does not determine a child's gender identity or sexual orientation.[271] To ensure that children are not unduly influenced by their parents, they should receive "independent, professional psychosocial support."[272]

3.4.2.2 Recognition/Documentation

With respect to classification of sex for the purpose of birth registration, the Commission canvassed the options of introducing a third sex, or introducing a marker '*' to indicate uncertainty, or maintaining the binary system but introducing a "facilitated system" for amending the register at a later date. Alternatively, the opinion proposes that the law could be amended to remove the requirement of sex registration entirely. Despite

[263] Ibid. at 5.
[264] Ibid. at 7.
[265] Ibid. at 14.
[266] Ibid. at 12 and 13.
[267] Ibid. at 12.
[268] Ibid. at 18.
[269] Including medical, psychological, legal, educational, social and ethical expertise
[270] Supra note 126 at 10.
[271] Ibid. at 11.
[272] Ibid. at 13.

noting that the binary system is based on social rather than medical factors, and leads to "unjustifiable discrimination", the Commission nevertheless recommends that the binary system be maintained, given that it is "deeply embedded socio-culturally", and that an "un-bureaucratic, low-threshold framework" for amending the classification later in life should be introduced.[273] Finally, the NEK-CNE recommended with respect to non-medically necessary surgical interventions that the law on assault and prohibition on genital mutilation, and the relevant limitation periods, should be investigated to address legal liability.[274]

3.4.2.3 Corrective Surgeries

The United Nations Committee Against Torture in its concluding observations on Switzerland's periodic report welcomed the NEK-CNE's recommendations and urged Switzerland's Federal Council to "take the necessary legislative, administrative and other measures to guarantee respect for the physical integrity and autonomy of intersex persons" and to provide redress to victims of unnecessary corrective surgeries, including adequate compensation.[275]

The NGO 'Zwischengeschlecht.org' in its 'shadow report' to the UN Committee on the Rights of the Child on Switzerland's compliance with the Convention on the Rights of the Child submits that the most pressing, distinct and unique human rights violation facing children today is the issue of 'Intersex Genital Mutilation' (IGM). Arguing that such medical treatment is a violation of Switzerland's obligations under the Convention,[276] they define IGM as including,

> non-consensual, medically unnecessary, irreversible, cosmetic genital surgeries, and/or other harmful medical treatments that would not be considered for 'normal' children, without evidence of benefit for the children concerned, but justified by societal and cultural norms and beliefs.[277]

In its concluding observations on Switzerland's report, the Committee on the Rights of the Child noted with respect to 'harmful practices' that the country had adopted a criminal prohibition on genital mutilation, however registered it's 'deep concern' about non-medically necessary

[273] Ibid. at 14-15.
[274] Ibid. at 19.
[275] UN CAT, Concluding observations on the seventh periodic report of Switzerland, UN Doc. CAT/C/CHE/CO/7 (7 September 2015), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/201/51/PDF/G1520151.pdf?OpenElement (accessed 18th October, 2017) at 20.
[276] Ibid. at 6.
[277] Zwischengeschlecht.org, Intersex Genital Mutilations: Human Rights Violations Of Children With Variations Of Sex Anatomy, NGO Report to the 2nd, 3rd and 4th Periodic Report of Switzerland on the Convention on the Rights of the Child (CRC) (March 2014), online: http://intersex.shadowreport.org/public/2014-CRC-Swiss-NGO-Zwischengeschlecht-Intersex-IGM_v2.pdf (accessed 18th October, 2017) at 3.

corrective surgeries on intersex children undertaken without informed consent, "causing severe physical and psychological suffering", without compensation or other remedy.[278] In this respect the CRC urged Switzerland to,

> [i]n line with the recommendations of the National Advisory Commission on Biomedical Ethics on ethical issues relating to intersexuality, ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support.[279]

Finally, in its November 2016 concluding observations on Switzerland's report, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) welcomed Switzerland's introduction of measures to combat intersex genital mutilation. However, CEDAW registered its concern about the "insufficient support for intersex persons who have undergone involuntary and medically unnecessary disfiguring surgical procedures when they were babies and children …"[280]

In this respect, the Committee noted its concern about the failure to consult "those directly affected" by such surgical procedures, and the limited access to legal remedies for such children given the short limitation periods for bringing claims. The Committee further noted the fact that even those who do consent likely do so as a result of "pressure placed on parents of intersex children by medical professionals, the media and society at large, … for so-called 'medical procedures', justified by psychosocial indications".[281]

As a result, the Committee recommended that Switzerland follow the recommendations of the NEK-CNE and adopt legislation to protect the bodily integrity and self-determination of intersex persons, including providing for redress in the case of those who were subject to unnecessary treatment without free and prior informed consent, and provide counselling and support to them and their families. The Committee further recommended that medical professionals be trained on the harmful impact of unnecessary medical interventions and establish interdisciplinary working groups to review such proposed interventions.[282] Finally, the

[278]UN CRC, Concluding observations on the combined second to fourth periodic reports of Switzerland, UN Doc. CRC/C/CHE/CO/2-4 (26 February 2015), online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/CHE/CO/2-4&Lang=En (accessed 18th October, 2017) at para. 42.
[279]Ibid. at para. 43.
[280]UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Switzerland, UN Doc. CEDAW/C/CHE/CO/4-5 (25 November 2016), online: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/402/99/PDF/N1640299.pdf?OpenElement (accessed 1st February, 2018) at para. 24(c).
[281]Ibid. at para. 24 (d) and (e).
[282]Ibid. at para. 25 (c), (d) and (e).

Committee recommended that intersex persons be included in national surveys and registers in order to address disparities in local access to health services for this vulnerable group.[283]

3.4.3 France

3.4.3.1 Principal Directions

In France, the Women's Rights and Equal Opportunities for Women and Men Committee of the Senate released a report entitled Variations in Sexual Development: lifting a taboo, combating stigma and exclusions in February 2017.[284] The report canvasses issues affecting intersex persons and makes recommendations with three 'principal directions': respect for their physical integrity and their private life; better medical and psychological care and enhanced support for families; and a full and complete recognition in society, to fight against taboos and avoid stigmatisation and marginalisation.[285] The report makes the following recommendations:

- retaining as official terminology the term 'variations of sexual development', rather than 'disorders of sexual development', so as to refrain from using a term that pathologises and therefore "unnecessarily stigmatis[es]" the intersex status; [286]
- amend the law to extend the period within which births must be registered and birth certificates issued, and provide for changes of sex registration to be made easily;[287]
- collecting accurate, scientifically based statistics on intersex persons, including details on corrective surgeries, and undertaking long term follow-up not only in medical and psychological terms, but also in the economic and social fields;[288]
- creation of a dedicated fund for compensation of persons who have suffered the consequences of corrective surgeries;[289]
- training of medical professionals and development of a protocol for the treatment of variations in sexual development, which makes the precautionary principle prevail before any decision concerning

[283]Ibid. at paras. 38(c) and 39(c).
[284]rapport d´information fait au nom de la délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes sur les variations du développementsexuel:lever un tabou, luttercontre la stigmatisation et les exclusions par Mmes MaryvonneBlondin et Corinne Bouchoux, Sénatrices (Enregistré à la Présidence du Sénat le 23 février 2017), online: https://www.senat.fr/rap/r16-441/r16-441-syn.pdf (accessed 18th October, 2017) [note: translated from French using Google Translate].
[285]Ibid. at 88.
[286]Ibid. (recommendation 1)
[287]Ibid. at 91 (recommendations 14 and 15).
[288]Ibid. at 88 and 89 (recommendations 2, 6 and 12).
[289]Ibid. at 89 (recommendation 4).

a surgical procedure is taken, assessing the medical necessity of the proposed operation and questioning its real urgency, and providing for families to be systematically referred to specialised centres where their child can be cared for by a multidisciplinary team, and;[290]

- raising awareness of the difficulties experienced by those affected by variations in sexual development, in order to break taboos and to prevent exclusion and marginalisation.[291]

3.5 The African Human Rights Framework

3.5.1 Overview and key Provisions

The African Charter on Human and Peoples' Rights[292] was ratified by Kenya on 23 January 1992. The Charter safeguards all people against discrimination and sets out the non-discrimination clause in Article 2, which requires states not to distinguish between persons on the basis of various grounds including sex, birth or 'other status'. This is further reinforced in Article 3, which provides for the right to equal treatment and protection before the law for all individuals, while Article 4 dictates that a person's physical integrity is inviolable. In addition, Article 5 states that human dignity is inherent and that every individual is entitled to recognition of his [their] legal status. With respect to physical integrity, Article 16 further guarantees entitlement to "the best attainable state of physical and mental health" and specifically directs States to take "necessary measures" to protect health.

Finally, states are obligated in Article 25 to, "promote and ensure, through teaching, education and publication" that the public is aware, understands and respects the rights and duties set out in the African Charter. In respect of duties, Article 28 requires every individual to respect others without discrimination and to promote, safeguard and reinforce mutual respect and tolerance. As a result, and in accordance with the non-discrimination clause in the African Charter everyone, including intersex persons, is entitled to the equal enjoyment and protection of the law.

Whereas the African Charter applies to all persons including children, the African Charter on the Rights and Welfare of the Child[293] (ACRWC) reinforces that children are entitled to these and other specific child-

[290]Ibid. at 89 (recommendations 7 and 8).
[291]Ibid. at 90 (recommendation 13).
[292]CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986) [African Charter].
[293]African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), entered into force 29 November 1999 [ACRWC].

related rights. It commits member states to the protection of all children against discrimination, child abuse and torture, harmful social and cultural practices, sexual exploitation among other protections. A child is defined as a human being below the age of eighteen[294].The ACRWC preamble explicitly recognises that children require "particular care with regard to health, physical, mental, moral and social development, and legal protection in conditions of freedom, dignity and security."

States are obliged in Article 1 of the ACRWC to take the necessary legislative measures to give effect to its provisions, and to "discourage" any "custom, tradition, cultural or religious practice" that are inconsistent with it. Article 3 of the Charter prohibits discrimination on the grounds of, among others, sex, birth and 'other status'. Article 4 affirms that the implementation of the rights of children are to be undertaken by any person or authority by primarily considering the best interest of the child, parents hold primary responsibility in this regard[295].

The Charter also affords children who are capable of communicating their own views on a matter to the opportunity to be heard and for their views to be taken into consideration. Recognition of a child through nationality is provided for in Article 6, which guarantees every child the right to a nationality, and requires that every child be registered "immediately after birth". The right to education and health of the child are similarly safeguarded in the Charter. Article 11 requires the State to take "special measures" to ensure that disadvantaged children have equal access to education; Whereas Article 14 guarantees entitlement to "the best attainable state" of physical and mental health. To safeguard this, Article 21 goes further to clarify that states are specifically required to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular, proscribe "practices discriminatory to the child on the grounds of sex or other status".

In this regard, the right of all children irrespective of sex or other status are entitled to the enjoyment and realisation of all the rights is safeguarded in the Charter. Intersex children are therefore protected from customs or practices that are discriminatory on the basis of their sex or other status i.e. infanticide, societal exclusion etc. Other relevant instruments include

[294]Article 2
[295]Article 20

the Protocol to The African Charter on Human and Peoples' Rights, On the Rights of Women in Africa (Maputo Protocol), which safeguards women's rights including non-discrimination, dignity, integrity and freedom from harmful cultural practices.

The African Commission on Human and Peoples' Rights issued Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights,[296] which specifically take into consideration the ACRWC, and 'draw inspiration' from other regional and international human rights instruments, declarations, reports and guidelines.[297] The guidelines explicitly recognise intersex people as vulnerable and disadvantaged group of people, who face or continue to face significant impediments to their enjoyment of economic, social and cultural rights.[298]

Article 260 of the Constitution of Kenya defines "marginalised group" to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). Further, it provides that "the rights of vulnerable and disadvantaged groups should be prioritised in all programmes of social and economic development, with particular attention to vulnerable and disadvantaged groups in programmes aimed at ensuring access to appropriate services and resources."[299]

Implementation of economic, social and cultural rights is subject to their 'progressive realisation',[300] but "states must implement a reasonable and measurable plan, including setting achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party."[301] The exception for progressive realisation are the prohibitions on retrogressive action, and discrimination in respecting, protecting, promoting and fulfilling economic, social and cultural rights.[302] An additional non-derogable obligation is referred to as the "minimum core obligation" to ensure, regardless of financial resources, that "no significant number of individuals is deprived of the essential elements of a particular right."[303] [304]

[296]African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted 26 May 2010), online: http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf(accessed 5th February, 2018) [ACHPR Guidelines].
[297]African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted 26 May 2010), online: http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf(accessed 5th February, 2018) [ACHPR Guidelines].(Preamble).
[298]Ibid. at 8 (para. 1(e)).
[299]Ibid. (para. 12).
[300]Ibid. (para. 13).
[301]Ibid. (para. 14) [emphasis added].
[302]Ibid. at 13 (paras. 16 and 19).
[303]Ibid. (para. 17).
[304]Ibid. at 14 (para. 22).

The ACHPR Guidelines also provide specific direction in regard to each of the rights contained in the African Charter. States are obliged to ensure that education systems give youth the necessary skills to freely and voluntarily choose what work to accept, though it is not an unconditional right to particular employment.[305] The right to the 'best attainable state of physical and mental health' requires, at a minimum, equal access to health facilities, goods and services, but does not extend to a right to be healthy.[306] A State's 'cross-cutting obligations' with regard to the right to health includes giving special attention to and protection for vulnerable groups in ensuring that no one is subject to medical or scientific experimentation without free and informed consent[307]. States must therefore intensify all efforts including criminalisation, social mobilisation, information and education to discourage harmful traditional practices, including female genital mutilation that interferes with the right to health."[308]

The ACHPR Guidelines affirms that the right to education is fundamental as it is the means by which vulnerable populations can develop the skills and become empowered to participate fully in society;[309] that fosters development of their personality and abilities to their fullest. States have many obligations in respect of promoting and fulfilling the right to education, including ensuring educators receive continuing training on human rights, education systems promote respect for human rights and fundamental freedoms, and that children receive education in an environment potential. This is not the case for intersex children who are often stigmatised and isolated by their peers and endure ridicule and unfair treatment from various actors, including teachers. States are specifically mandated with regard to vulnerable or disadvantaged children, to ensure equal access without discrimination to the education system, which may require special measures to eliminate economic, social and cultural barriers to full participation and enjoyment of this fundamental right.[310]

The ACHPR Guidelines specifically direct that States must develop national plans, policies and systems to "eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child. Particularly, they should focus on those customs and practices

[305]Ibid. at 21-22 (paras. 58 and 59).
[306]Ibid. at 24 (paras. 60, 61 and 67(a)).
[307]Ibid. at 26 (para. 67(t)).
[308]Ibid. at 27 (para. 67 (dd)).
[309]Ibid. at 34 (para. 69).
[310]Ibid. at 34-36 (para. 71 (a), (c), (f) and (p)).

which are prejudicial to the health or life of the child, and discriminatory to the child on the grounds of sex/gender or other status."[311]

The plight of intersex persons has also been deliberated within the African human rights framework. Most recently in 2017, such discussions have been conducted at the Centre for Human Rights of the University of Pretoria Faculty of Law in South Africa, Iranti[312] and SIPD-Uganda[313], and through a panel discussion: 'Intersex human rights: Challenges and opportunities' in Banjul. This was convened at the Gambia on the sidelines of the 61st Ordinary Session of the African Commission on Human and Peoples' Rights.[314] Commissioner Lawrence Mute (from Kenya) of the African Commission sat on the panel.[315] The panel noted that:

Intersex persons in Africa continue to face human rights violations which include non-consensual medically unnecessary genital normalising surgeries and genital mutilation on minors; infanticide and baby abandoning; lack of appropriate legal recognition and administrative processes allowing intersex persons to acquire or amend identity documents; and unfair discrimination in schools, health care facilities, competitive sports, work, access to public services, detention and many other spheres of life.[316]

As a result, the Centre for Human Rights made the following recommendations urging states to implement measures to, inter alia:

- Protect the physical integrity of intersex children by prohibiting intersex genital mutilation and other unnecessary medical interventions;
- Investigate and prosecute incidents of abandonment, abuse, violence against or infanticide of intersex children;
- Prohibit and address the root causes of discrimination on the basis of intersex traits, characteristics or status, including investigating and prosecuting human rights violations against intersex persons;
- Provide training on the needs and human rights of intersex persons for all public service providers including health care personnel, educators, law enforcement and judiciary, and;

[311]Ibid. at 39 (para. 75(g)).
[312]A media advocacy organisation based in Johannesburg, South Africa that defends the rights of lesbians, transgender and intersex persons in Africa. See online: http://www.iranti-org.co.za/about.html (accessed 9th February, 2018).
[313]Support Initiative for People with Congenital Disorders (SIPD) is an advocacy organization dedicated to creating awareness on intersex issues and advocating for a more open, tolerant, and supportive society towards children and people with intersex conditions. See online: http://sipduganda.org/about-us/ (accessed 9th February, 2018).
[314]University of Pretoria, Faculty of Law – News, Centre for Human Rights, Iranti-org and SIPD-Uganda host panel discussion on intersex human rights in Africa (7 November 2017), online: http://www.up.ac.za/en/faculty-of-law/news/post_2592164-centre-for-human-rights-iranti-org-and-sipd-uganda-host-panel-discussion-on-intersex-human-rights-in-africa (accessed 5th February, 2018).
[315]Ibid.
[316]Ibid.

- Amend legislative and develop administrative processes that allow intersex persons to obtain identity documents and if necessary, amend sex markers on birth certificates and official documents.[317]

3.5.2 Comparative African Practices

South Africa, Kenya and Uganda are the only African countries that have made attempts to explicitly recognise the existence of intersex persons within their societies, while Zimbabwe's Constitution indirectly underscores the need for consent in medical procedures generally.

3.5.2.1 South Africa

According to a recent study in South Africa, 88 out of 90 midwives indicated that when an intersex child is born they commit infanticide and tell the mother that the child was stillborn.[318] In the international arena, the Committee on the Rights of the Child (CRC) has repeatedly recognised Intersex Genital Mutilation (IGM)[319] as a "harmful practice" and recently issued binding recommendations to the Republic of South Africa to guarantee bodily integrity, autonomy and self-determination of all children including intersex children and to adopt legal provisions to provide redress to victims of such treatment, including adequate compensation.

According to a 2016 Report of the UN Committee on the Rights of the Child[320], Article 39 highlights the concern of the committee on the high prevalence of harmful practices in the State party, which include; child and forced marriage, virginity testing, witchcraft, female genital mutilation, polygamy, violent or harmful initiation rites and intersex genital mutilation." The Committee therefore states in Article 40(d) that the State party should guarantee the bodily integrity, autonomy and self-determination of all children, including intersex children, by avoiding unnecessary medical or surgical treatment during infancy and childhood".

South Africa has made great strides towards the inclusion and ultimate recognition of intersex persons within its legislative framework, becoming the first country to explicitly include intersex people in its anti-discrimination law. The Promotion of Equality and Prevention of Unfair Discrimination Act (2000), which governs the judicial interpretation of

[317] Supra note 233.
[318] Intersex Rights in Rural Settings: The First dialogue of its kind in South Africa by Kellyn Botha and Joshua Sehoole' A dialogue co-hosted by Iranti, Intersex South Africa and the Cultural Religious and Linguistic Communities' Rights Commission to mark Intersex Awareness Day on 26th October 2017 . Online: www.iranti-org.co.za (accessed 30th October, 2017).
[319] A term coined to refer to cosmetic, un-consented and unnecessary surgical intervention carried out by doctors on infants and/or older children born with ambiguous genitalia with the aim of assigning them a gender that fits within the binary notion of male and female sex.
[320] CRC/C/ZAF/CO/2 dated 27th October 2016 – Concluding observations on the second periodic report of South Africa as Adopted by the Committee at its seventy-third session (13-30 September 2016).

the equality clause, provides a broad categorisation of grounds for non-discrimination. It was subsequently amended through the inclusion of a definition of intersex. This was operationalised through the Judicial Matters Amendments Act, 2005 which provided that sex shall include intersex. The Act further defined intersex as "a congenital sexual differentiation which is atypical to whatever degree."

The Alteration of Sex Description and Sex Status (ASDSS) Act (2003) similarly defines intersex in article 1 as a congenital sexual differentiation which is atypical to whatever degree. It provides for the alteration of the sexual description of certain individuals in certain circumstances and amends the Births and Deaths Registration Act, 1992. An application under this Act is subject to the fulfilment of the following conditions by the applicant:

i. Submission of a medical report indicating that they are intersex.

ii. Submission of a report from a psychologist or social worker indicating that they have lived stably and satisfactorily for at least two years in the gender role corresponding to the sex description under which he or she seeks to be registered.[321]

Any refusal to grant the application must be accompanied by written reasons, and may be appealed to the Minister of Home Affairs, and a subsequent refusal may be further appealed to a court. The ASDSS Act also provides as follows in respect of the consequences of a successful application or appeal:

3. (2) A person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration.

(3) Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration.

3.5.2.2 Zimbabwe

While Zimbabwe does not have any laws specific to intersex persons, the Zimbabwean Constitution of 2013 addresses informed consent for medical procedures that apply to all persons, including intersex. In this regard,

[321]Section 27(A) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992) as read with the provisions of the Alteration of Sex Description and Sex Status Act, 2003 (Act No. 49 of 2003).

Article 53 sets out requirements for consent to "any conduct which is likely to cause harm to his or her person, proprietary rights or other interests," including that the consent is given prior to and not as "ratification afterwards", that the person consenting is capable in law of giving consent and they "are able to understand the nature and possible consequences" and give informed consent to the conduct, and that "the consent is real and is not induced by threat, force, fraud or mistake intentionally or knowingly induced …"

With respect to 'medical treatment for therapeutic purposes' undertaken to "cure or alleviate any disease or disability", Article 247 provides that a patient must consent or, if the patient is unable, then consent of a person capable in law of doing so on behalf of the patient must be given. Such consent must comply with the requirements set out in Article 52 and the treatment must be "carried out competently in accordance with recognised medical procedures." Finally, Article 248 addresses medical treatment for non-therapeutic purposes, carried out "otherwise than to cure or alleviate" disease or disability or, notably, carried out "in order to sterilise the patient". Such treatment may only be done if, as above, the consent complies with the requirements of Article 52 and the treatment is carried out in accordance with recognised procedures.

3.6 East African Case Studies

According to a baseline survey on intersex persons in East Africa on their lived realities (2015),[322] it is estimated that at least two intersex children are born every week in East Africa. Even so, the report notes that it is impossible to get accurate figures due to the stigma and "cultural practice of concealment".[323] The survey notes that, while medical professional use the term "disorders of sex development", intersex advocates "strongly disagree" with this "pathological terminology".[324] Whereas the survey acknowledges and commends the efforts to include intersex persons in the legislative framework in East Africa i.e. the Registration of Persons Act of 2015 in Uganda, it also objects to the use of the "dehumanising" term 'hermaphrodite' instead of 'intersex'. Additionally it objects to reported attempts in Rwanda to classify intersex children as 'persons with disabilities'.[325]

[322] Support Initiative for People With Congenital Disorders, Baseline Survey on Intersex Realities in East Africa – Specific Focus on Uganda, Kenya and Rwanda (2015-2016), online: http://sipduganda.org/baseline-survey-on-intersex-realities-in-east-africa-specific-focus-on-uganda-kenya-and-rwanda/ (accessed 9th February, 2018) [SIPD Baseline Survey] [note: page references below are to the print version].
[323] Ibid. at 9.
[324] Ibid.
[325] Ibid. at 13.

The Survey notes that social expectations along the male-female binary norm are "not only confusing but [are a] source of great social dilemma" for intersex persons.[326] Further, SIPD notes that the inclusion of the concerns of intersex persons under the LGBTI umbrella obscures their reality and results in a disadvantage "in terms of visibility, support, funding and security."[327] Accordingly, the Survey advocates for national, regional and international public education strategies that include community engagement, policy advocacy and media engagement.[328] The Baseline Survey makes the following recommendations:

- end Intersex Genital Mutilation, and document other sex and gender based violence against intersex persons;
- include information regarding the intersex condition in health and social development education, service access and employment policies to prevent harassment, abuse and discrimination; and
- include intersex in health and human rights initiatives[329]

3.6.1 Uganda

The plight of intersex persons in Uganda has mainly been advanced by the Support Initiative for People with Congenital Disorders (SIPD) – Uganda, which has developed several publications based on researches that it has carried out on intersex realities in East Africa, specifically in Uganda, Kenya and Tanzania. Its report issued in 2015, Uganda Report of Violations to Children and People Born Intersex or with Differences of Sex Development,[330] , poor women who give birth to intersex children will address the superstitions on intersex children by consulting traditional healers, mediums and witch doctors, which often results in killing the child. SIPD has documented 42 reports of children killed in 'cleansing rituals' due to beliefs that they are cursed, whereas fifty-one children are recorded as 'abandoned'.[331] Further, the report states that some families will attempt to impose a preferred sex on a child, expecting the child to conform to gender norms and punishing, ostracising or expelling the child from the family home when they don't comply.[332]

In comparison, wealthy families will submit the child to corrective surgery "without conclusive and required tests to warrant such surgeries and without proper surgical or psycho-social support facilities."[333] In this

[330][SIPD Report]
[331]Ibid. at 6 and 10.
[332]Ibid. at 11.
[333]Ibid. at 6.

respect, SIPD recorded twenty-two cases of surgery performed without informed consent.[334] SIPD recorded forty-eight cases of what they refer to as 'Best Guess Surgical Strategy' that resulted in physical and emotional scars.[335]

SIPD offers a distinction between "best guess surgical strategy" and "best guess non-surgical strategy" approach to assigning a sex to an intersex child.[336] The first strategy usually involves measuring a child's genitals to determine whether they are 'closer' to male or female, and then assigning a sex and performing surgery to make the genitals conform to that sex. The "best guess non-surgical strategy" on the other hand involves using genetic tests and 'historical data' to determine the gender that the child is "most likely" to identify with, and then raise the child in that gender until the child is old enough to decide their own gender identity. SIPD advocates for a "best guess non-surgical strategy", which allows intersex children to participate in decisions about whether or not to undergo corrective surgery at a time when they are able to do so, and provides counselling and information support for both the child and the parents.[337] The report also notes the difficulties that intersex children face in the education system, including discrimination and stigma often leading to drop-out. In this respect, SIPD recorded thirty-four cases of intersex children who left the education system.[338]

3.6.1.1 Legislative Framework

The legislative framework in Uganda does not offer an explicit recognition of intersex as a sex category, but makes provision for children born 'hermaphrodite. The Registration of Persons Act (2015) under section 38 makes provision for the updating of particulars of the child upon undergoing an operation to change from male to female or vice versa, which is certified by a medical doctor. It goes further to provide that the application tendered by the parents/guardian shall be authorised by the executive director of the authority. A similar provision is contained in the Births and Deaths Registration Act [Cap 309] under section 14 of the Act. The Births and Deaths Registration Act also makes provision under section 13 for change of name for children under the age of 21 years who is not married, divorced, a widower or a widow.

[334]Ibid. at 8.
[335]Ibid. at 11.
[336]SIPD, A Rights-Based Health Reference Kit for Intersex People, Parents of Intersex Children, Health Care Providers and Health Rights Advocates.
[337]Uganda Report of Violations to Children and People Born Intersex or with Differences of Sex Development (2015) p. 9.
[338]Ibid.

Additionally, the legislature in 2015 issued guidelines to the Ministry of Health advising against surgical intervention for intersex infants. The guidelines stress counselling for the parents of intersex children. The counsellors are specially trained and surgery can only be done when the child is old enough and has shown more features of either sex or the child can decide for him/herself.[339] Despite these efforts, Ugandan nationals continue to publicly fundraise for genital reshaping surgeries locally and abroad.

Noting the legislative advancements, the report recommends the Inclusion of a sex-neutral marker on birth certificates, to "ease change of sex, if necessary, when the child is old enough to be an active participant in this decision".[340] Additionally, it recommends: revising the education curriculum to include information on the intersex condition,[341] and incorporation of training on intersex in medical school curricula and for traditional birth attendants through capacity building programs. This was proposed owing to the high percentage (over fifty percent) of Ugandan women who give birth under the care of traditional birth attendants rather than in hospitals.[342] It is further recommended that parents be provided with information on the intersex condition in 'antenatal clinic information packs', and that parents and intersex children be provided with free counselling services, diagnostic testing, and lifelong hormone replacement therapy as needed or desired.[343]

3.6.2 Kenya

The first research study done on the intersex in Kenya was carried out by the Kenya National Commission on Human Rights. In its seven months research conducted between October 2016 and April 2017, and which resulted in the seminal report entitled, Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya (2018), the KNCHR examines the human rights violations faced by intersex children and their families right from the cradle and makes various recommendations towards protecting and promoting the rights of intersex persons.

The Equal in Dignity and Rights study employed both primary and secondary data and involved extensive consultation with intersex persons and various other stakeholders including doctors, lawyers, and parents

[339]According to Sam Lyomoki, a doctor and member of the Ugandan parliament interviewed by Thomson Reuters Foundation in Kampala and reported in af.reuters.com/article/africaTech/idAFL5N1E05NQ. Last accessed on 2nd November 2017.
[340]Ibid. at 13.
[341]Ibid. at 14.
[342]Ibid. at 13.
[343]Ibid.

of intersex children, human rights advocates and parliamentarians. The report paints a picture of intense discrimination and stigma against intersex persons, which further exacerbates the problem leaving them more vulnerable. Some of the recommendations of the report include:

- 'Amend and enact legislation that gives effect to the provisions of Article 27(4) of the Constitution to guarantee non-discrimination to intersex persons in all spheres of life including in education, health care, employment, sports and access to public services…'
- Establish national guidelines for treating intersex patients based on the patient's right to personal autonomy and the best interests of the child.
- Direct the National Hospital Insurance Fund to cover the full costs of health care for intersex persons to ensure that they attain the highest standard of health.
- Create multi-disciplinary teams to assess and care for intersex patients including surgeons, endocrinologists, and psychologists.
- Supportive counselling services for intersex persons and their family
- Direct doctors at designated Intersex Care Centres to advise all parents to withhold 'normalising' surgery until children are at an age when they can make a decision for themselves.
- Intersex and their family should be fully informed about the different treatment options and the consequences of each option.
- Legal amendments which allow intersex persons to change their name should be drafted to ensure the process is simple and fast; excluding medical interventions including surgeries and hormone treatment.
- The Government should initiate a nationwide intersex awareness campaign to combat stigma and promote acceptance of intersex people.

In terms of legislative and judicial recognitions, Kenya has made some commendable strides towards recognition of intersex persons. A detailed analysis of the legislative and jurisprudence will follow in the next section that discusses the national framework.

4.0 THE KENYA LEGAL AND HUMAN RIGHTS FRAMEWORK

4.1 Introduction

This Chapter examines Kenya's existing legal and policy framework, especially as it relates to the promotion and protection of human rights of all peoples, including the vulnerable and marginalised groups such as the intersex persons. It surveys the constitutional provisions, which incorporate international best practises that have been domesticated into Kenyan law, as well as those contained in specific statutes for some of the key sectors. In that way, it sets the ground for the subsequent crafting of specific and relevant recommendations (Chapter Six), which shall similarly be in tandem with the field survey findings (Chapter Five).

4.2 The Constitution of Kenya, 2010

The Constitution of Kenya, 2010 is the supreme law of the land and that binds all persons and State organs at both national and county levels. Part Four of the CoK, 2010 is the Bill of Rights, and Article 19 clarifies that the purpose of "recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings." The Constitution is categorical that the rights secured under the Bill of rights are inherent in every individual and are not given by the State (Article 19(3)(a)).

With respect to interpretation of the CoK, 2010, Article 20(3) provides that in applying the Bill of Rights, a court must develop the law to the extent that it does not give effect to a right or freedom. Article 259(1) provides that the Constitution must be interpreted in a manner that permits development of the law and advances human rights. On equality and non-discrimination, Article 27 stipulates thus:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

Article 28 provides that, "every person has inherent dignity and the right to have that dignity respected and protected." Given that 'every person' necessarily includes intersex persons, the CoK, 2010 requires that the laws of Kenya be interpreted and developed in a manner that gives effect to the right of intersex persons to be equal before the law and benefit equally from the law. Accordingly, at a minimum, given that the intersex condition is one of the differences in sex characteristics, any benefit or protection of the law that relates to or is based on sex must necessarily include and specifically respect and protect the dignity and promote the potential of intersex persons. Notably, Article 27 employs the term 'includes' on prohibited grounds of discrimination; this means that the list is not exhaustive and other grounds, including intersex status or sex characteristics may be added.

This position has been upheld in Baby 'A' Case,[344] which highlighted the need to interpret Article 27(4) as broadly as possible in order to include intersex persons. In the Court's words:

[344]See infra note 12.

An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals (sic) ought not to be discriminated against in anyway including in the issuance of registration documents such as a birth certificate. [Emphasis added]

The High Court did however leave the matter of addition of a third category of sex to the Legislature. The details and finding of the Court in the Baby 'A' case are discussed in more details under the Case Law section below.

Article 29 of the CoK 2010, provides that every person has the right to freedom and security of the person, which specifically includes the rights to be free from physical and psychological torture (sub-article (d)) and the right not to be treated in a cruel, inhuman or degrading manner (sub article (f)). This last right, to be free from inhuman and degrading treatment, is non-derogable, meaning that it is a right that may not be limited in any way, as dictated in Article 25(a).

Article 31 protects an individual's right to privacy, including the right not to have their person searched, and the right not to have information relating to their private affairs unnecessarily required or revealed. In this respect therefore, personal data relating to the intersex status should not be unduly disclosed. Rules relating to data processing, including confidentiality, ought to be observed.

Article 35 similarly protects the right to information, including both to access information held by any person that is required for the exercise or protection of any right or freedom, and further to have any untrue or misleading information that affects the person corrected or deleted. This applies both to information about an intersex person's health status, so that an informed decision about treatment can be made, and also to national identity and registration documentation, which must correctly reflect an intersex person's status in accordance with this right. Related to this right to have correct documentation is the freedom of movement in Article 39, which provides that a citizen has the right to leave and to enter Kenya. An intersex person who does not have a birth certificate or identity card, and who therefore cannot obtain a passport, is effectively restricted in this right of movement in and out of their country.

In this respect, Article 12(1) provides that every citizen[345] is entitled to the rights and benefits of citizenship including a Kenyan passport and any

[345]Article 14(1) provides that a person is a citizen by birth if, on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of that person is a Kenyan citizen.

document of registration or identification issued by the state to citizens. Likewise related to the rights of access to correct information and freedom of movement is the right in Article 47 to fair administrative action that is expeditious, lawful, reasonable and procedurally fair.

This means that intersex persons have the right to have the state recognise their status in law and to provide for fair and expeditious procedures to facilitate attainment of this recognition. Also relevant to the rights of intersex persons, being a marginalised group[346] in the country is Article 56 that requires the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields, and special opportunities for access to employment. Article 260 defines 'marginalised group' as, "a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)."

With regards to intersex persons, Article 56 requires the state to ensure that special attention is given to ensuring that intersex children attend and complete education so that they have equal opportunity as all other Kenyans to attain employment. The State is also duty-bound to ensure that the intersex as a marginalised group participate and are represented in governance and other spheres of life; and (b) are provided special opportunities in educational and economic fields.

Finally, and most importantly for the purposes of the rights of intersex children, Article 53 of the CoK 2010, contains specific protections for the rights of children. Article 53(1) provides that every child has the right to a name and a nationality from birth. In order for this right to have substance, it cannot be only that a child is named and born in a particular nation but that these rights are actualised through legal documentation. In other words, in Kenya, children have the right to a birth certificate that reflects their name and nationality and ultimately to a national identity card that reflects this nationality. Given that intersex children may not be registered at birth due to the barrier of having to identify a sex along binary lines, this may very well be a violation of their constitutional rights and must be immediately addressed by the State. Article 53(1)(d) expands on the non-derogable right to be free from inhumane treatment or punishment

[346]Defined in Article 260 as "a group of people who, because of laws or practices ... were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)".

as set out in Article 29, by specifically expanding this right to protection against abuse, neglect, harmful cultural practices, all forms of violence, and inhuman treatment. In terms of harmful cultural practices, Article 55 requires the state to take measures to ensure that youth are protected from harmful cultural practices. In respect of all the various rights specific to children set out in Article 53, the overarching provision in Clause (2) dictates that "a child's best interests are of paramount importance in every matter concerning the child." [Emphasis added]

It is prudent to note in concluding this review of the CoK 2010, that the rights enumerated in the Bill of Rights and outlined above reflect the same rights provided for in international and regional human rights instruments to which Kenya is a party. As noted earlier, Articles 2(5) and (6) of the CoK 2010, dictate that general rules of international law and the treaties or conventions ratified by Kenya form part of the laws of Kenya. In this respect therefore, the interpretation on the provisions of international treaties including on the principle of the best interests of the child, and the fact that non-medically necessary corrective surgeries of intersex children undertaken without properly informed consent is a violation of the prohibition against torture and inhuman treatment and the protection against harmful practices, apply likewise to interpretation of these provisions of the CoK, 2010. Finally, Article 2(4) of the CoK, 2010, provides that "any law, including customary law, which is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid." Accordingly, all the laws of Kenya that are non-inclusive of the rights of intersex persons or exclude recognition of intersex persons and thus violate their right to equality and human dignity are void to that extent and must be amended to be brought into compliance with the CoK, 2010.

Even so, paragraph 7 to the Sixth Schedule to the Constitution on Transitional provisions is categorical that all laws immediately before the effective date (being the 27th of August 2010) are to be construed, "with the alterations, adaptations, qualifications and exceptions" necessary to bring them in conformity with the CoK, 2010. As such, nothing stops the courts or even policy makers from reading in and interpreting laws in a manner aimed to promote the principles of human rights, equality and non-discrimination. The following is a report on the current state of

sectoral laws within Kenya that are likely to impact directly or indirectly on the rights of intersex persons in the country.

4.3 Sectoral Policy and Legal Frameworks

4.3.1 Health Sector

The Constitution of Kenya provides the overarching legal framework for the health sector in Kenya. It enshrines a comprehensive human rights-based approach to the delivery of health services. Article 43 (1) (a) stipulates that: "Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care." The Constitution obligates "…the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms" and to "…take legislative, policy and other measures, including setting of standards to achieve the progressive realisation of the rights guaranteed in Article 43."[347] It continues further that, "All state organs and public officers have a constitutional obligation to address the needs of the vulnerable groups within society…"[348] and to domesticate the provisions of any relevant international and regional treaty and convention that Kenya has ratified[349]. The State has a further constitutional obligation under Article 46 to protect consumer rights, including the protection of health, safety and economic interests. The following is an in-depth analysis into legislation and policy surrounding the health sector with particular focus on the most pertinent considerations for intersex persons.

4.3.1.1 The Kenya National Patients' Rights Charter, 2013

The Kenya National Patients' Rights Charter 2013 ("The Patient's Charter") is a medical-legal document produced by a Medical-Legal Tribunal established by statute in 2012. It is meant to inform clients and patients of their rights and responsibilities, thereby empowering them to demand quality services from health care providers. Thus, it reinforces the constitutional right to the highest attainable quality of healthcare products and services and is anchored on Articles 19, 20(5), 21(2), 22(1), 26,43(1)(2), 46, 53(1)(c) and 70 of the CoK, 2010. Some of the rights articulated by the Charter include: Right to access healthcare; Right to refuse treatment; Right to confidentiality; Right to informed consent to treatment; Right to information; and Right to be treated with respect and dignity.

[347]The Constitution of Kenya, Article 21 (1),(2).
[348]The Constitution of Kenya, Article 56.
[349]Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR), International Convention on Economic, Social and Cultural Rights (ICESCR), U.N. Convention on the Rights of the Child, 1989, African Charter on the Rights and Welfare of the Child, African Charter on Human and People's Rights as considered in the context of the encapsulated rights of intersex persons by virtue of being human beings.

The Charter does not contain provisions for treatment or care of any specific conditions or persons; rather, it captures an all-inclusive global rights-based approach to patient care. Of key importance, however, is the right to informed consent and the right to refuse treatment. The same are captured in the recently passed Health Act, 2017, discussed later in this report.

4.3.1.2 The Kenya Health Policy (2014-2030)

With the launch of Vision 2030 by former President Mwai Kibaki in 2008, Kenya set itself on course to achieving the status of a "globally competitive and prosperous and industrialised middle-income country providing a high quality of life to its citizens in a clean and secure environment by the year 2030." The Health sector is one of the key components of delivering Vision 2030's Social Pillar, given that it facilitates the provision and maintenance of a healthy workforce needed to drive the economy. In addition to Vision 2030, Kenya had previously committed itself to the 15-year cycle of the Millennium Development Goals (MDGs), a global poverty eradication plan that ended in 2015 and subsequently to the Sustainable Development Goals (SDGs). The MDGs and SDGs both stress the need for access to proper healthcare to enable countries to eradicate poverty and contribute to sustainable development respectively. A key policy document drawn up to harness and provide a guideline to the government's obligation under the Constitution, Vision 2030, the SDGs, and International standards as contained in various conventions ratified by Kenya, is The Kenya Health Policy 2014-2030 (KHP 2014 – 2030).[350]

The KHP (2014-2030) is a successor policy to the Kenya Health Policy Framework (KHPF 1994-2010), whose implementation led to significant investment in public health programmes and minimal investment in medical services, resulting in improvement of health indicators such as infectious diseases and child health. It however did not manage to address the emerging increase in non-communicable diseases. The goal of KHP (2014-203) therefore is to consolidate the gains made by the previous policy and proceed to "attain the highest possible standard of possible health in a responsive manner" by supporting equitable, affordable and high quality health and related services at the highest attainable standard for all Kenyans. The Policy outlines six main objectives. Of particular

[350]The Kenya Health Policy 2014-2030 (KHP 2014 – 2030), online: http://publications.universalhealth2030.org/uploads/kenya_health_policy_2014_to_2030.pdf/ (accessed 23rd June, 2018).

relevance to the Taskforce is policy objective 4 on provision of essential healthcare[351], which, among other things, states that: "the provision of essential health services will be geared towards providing affordable, equitable, accessible and quality healthcare that is responsive to clients' needs." One of the strategies to achieving this objective is to, (i) "Design, pilot and implement appropriate service delivery models for hard-to-reach areas and disadvantaged population groups."

The Taskforce opines that although not expressly providing for persons born with Differences of Sexual Development (DSD), the Policy makes provision for treatment and care of persons born with the intersex condition under this strategy. It also provides commitments in relation to improving quality of care and improving demand for health and related services for all[352].

4.3.1.3 The Kenya Mental Health Policy (2015-2030)

This Policy is the concretisation of the Government's commitment to pursuing policy measures for achieving optimal health status and capacity for every individual. Its goal is the attainment of the highest standard of mental health in line with the Constitution of Kenya, Vision 2030 and Kenya's global commitments. According to the Policy, mental health is a key determinant of overall health and socio-economic development. It influences individual and community outcomes such as healthier lifestyles, better physical health and improved recovery from illness; removes limitations in daily living and in higher education; facilitates greater productivity, employment and earnings, and; promotes and facilitates better relationships with adults and children, more social cohesion and engagement and overall improved quality of life.

Intersex persons, according to their testimonies, are at high risk of suffering mental disorders owing to the myths and misconceptions, stigma, discrimination, isolation and, sometimes, physical abuse due to their status. The Policy notes that children are often prone to mental disorders if their environment does not promote care, affection, love, and stimulation for cognitive abilities or other emotional or social support. An intersex person related to the Taskforce their tribulations, including a mental breakdown as a result of their inability to understand their bodies or receive proper care and guidance on the intersex status. The person further described the harrowing tale of how, by dint of their intersex status,

[351]KHP (2014-2030) at page 33 section 4.2.4
[352]KHP (2014-2030) at page 37-38

their mother also suffered trauma owing to sustained stigma and lack of social understanding, so much so that she was admitted into a mental health facility with depression.

4.3.1.4 The Health Act, 2017

The Health Act, 2017 (No. 21 of 2017) crystallises the government's obligation to address the health needs of vulnerable groups in addition to mandating the provision of emergency care by all service providers. The Act establishes various institutional structures, including the Kenya Health Professionals Oversight Authority[353] and The National Research for Health Committee[354] to ensure that the health system standards are maintained at both the national and county levels.

One of the key mandates of the Health Act, 2017 provides particular leverage to the protection and promotion of health care for persons born intersex. Without particular reference to any conditions, the Act seeks to safeguard access to healthcare for vulnerable groups by clarifying the state's obligation to provide such healthcare to women, the aged, and persons with disabilities, children, youth and members of minority or marginalised communities[355]. In addition, the following important rights are provided for in the Health Act, 2017: Right to informed consent, including consent by a parent/guardian for persons who lack capacity to give consent (Section 9); Right to confidentiality (Section 11), and; Right to health information (Section 8).

4.3.1.5 Public Health Act (Cap 242)

a) The Second Schedule (Drainage and Latrine Rules)

The Drainage and Latrine Rules makes detailed provision for bathroom facilities in public areas such as factories, hotels, theatres and public halls for persons of the male and female genders. Conspicuously, however, the rules fail to make provision for intersex persons, thereby indirectly contributing to one of the most serious challenges faced by intersex persons in the public arena. The Taskforce recommends that appropriate provision be made for public bathroom facilities that would accommodate intersex persons.

[353]Section 45 (1) and its functions include: a) Receive and facilitate the resolution of complaints from patients, aggrieved parties and regulatory bodies (b) maintain a duplicate register of all health professionals working within the nation and county health system and (c) Coordinate joint inspections with all regulatory bodies.
[354]Section 93 (1). The Committee is responsible for making recommendations on the development of the national research health policy and on the various priorities to be accorded in the area of research for health in light of current knowledge and needs.
[355]Section 4 (c)

b) Other Statute Laws

Other statute laws and policy guidelines considered under the Health Sector included the Kenya Medical Practitioners and Dentists Board Act, Cap 253, the Pharmacy and Poisons Board, Cap 244, The Nursing Council of Kenya and Clinical Officers Council guidelines, the Consumer Protection Act and the Public Health Officers Act, 2013. The statutes and guidelines make provision for general standards and guidelines for medical practitioners in dispensing access to health care as well as the general access to goods and services. However, all these laws remain silent on the protection, care, treatment or even advancement of knowledge related to the intersex status.

4.3.2 Education Sector

The Constitution provides for free and compulsory basic education to all children. Articles 43(1) (f), 53(1) (b) and 55 (a) of the Constitution obligates both the state and parents to facilitate quality basic education for all children. In addition, the MDGs, Education for All (EFA) goal, Sessional Paper No.14 of 2012 on Reforming Education and Training and the Basic Education Act (2013) all emphasise the need to provide quality basic education.

4.3.2.1 The National Education Sector Plan, 2013-2018

The National Education Sector Plan is a government initiative whose main goal is "Provision of Quality Basic Education for Kenya's Sustainable Development." A critical aspect of the programme is the improvement of access for children who are not able to access education easily through policy and management initiatives geared towards increasing enrolment and completion rates in basic education. 'Gender in Education' is discussed expansively in the Plan[356], where gender is defined as:

...the social roles, responsibilities and behaviours that are believed to belong to men, women, boys and girls. Gender roles are created by a society and are learned from one generation to the next. Because gender roles are socially learned, they can be changed to achieve equity and equality for boys, girls, men and women. The overall goal of the Department of Education is to provide equal access to education for both boys and girls irrespective of their socio-economic status.'

Based on this definition, all references to gender parity/disparity are understood to be in reference to the boy/girl or male/female ratios

[356]Ministry of Education, Science and Technology National Education Sector Plan Volume One, Basic Education Plan Rationale and Approach, 2013 -2018 at page 101

concerned. This unfortunately leaves intersex children unacknowledged, thus their special needs are not addressed in the Plan.

4.3.2.2 Ministry of Education, Science and Technology National Curriculum Policy

This 2014 Policy framework for curriculum review was intended to guide preparation of a relevant competency-based curriculum, which would ensure that all learners acquire competencies and qualifications capable of promoting national values, inspiring individual innovation and life-long learning. The Policy does not however take into account the specific needs of the intersex learner.

4.3.2.3 Education for All 2015 National Review

The Kenya 'Education for All 2015' National Review Report was prepared by the relevant national authorities for the World Education Forum (Incheon, Republic of Korea, 2015) and submitted in response to UNESCOs invitation to its member states to assess progress made since 2000 towards achieving Education For All (EFA). Both the National Curriculum Policy and the Education For All 2015 Review do not contain any mention of children/ students within the system who are born intersex and how that status impacts on their ability to stay in school, acquire an education or progress themselves in the context of education.

4.3.2.4 Basic Education Act (No.14 of 2013)

Section 34 (2) of the Basic Education Act (No.14 of 2013) states that, "A school or person responsible for admission shall not discriminate against any child seeking admission on any ground, including ethnicity, gender, sex, religion, race, colour or social origin, age, disability, language or culture". Subsection (3) further provides that, 'The provisions of subsection (2) shall not apply in matters relating to gender in cases where a school is registered for a particular gender.' Whereas sub-section 2 establishes non-discrimination on a comprehensive list of grounds, the subsequent section provides a loophole that may be used to discriminate against intersex students who may display physical outward traits that do not conform to the sex that they identify with.

4.3.2.5 Basic Education Regulations, 2015

Regulation 50(1)(d) of the Basic Education Regulations, 2015 states that:

A person, body, organ or institution responsible for the management of a pre-primary or secondary school shall have provision for adequate, safe, clean and appropriate sanitation facilities which are age and gender appropriate.

Regulation 64(c) similarly provides that: every institution of basic education and training shall have provisions for the following, "– sanitary facilities, including bathrooms for both learners and other persons, segregated by gender and age".

4.3.2.6 Kenya National Examinations Council Act (KNEC) (No. 29 of 2012)

This statute makes provision for the establishment, constitution, control and administration of the Kenya National Examinations Council. Section 40(B) (3) of the Act states that "The nomination bodies under Subsection 2 shall nominate and submit the names of at least two nominees being one man and one woman to the Cabinet Secretary for appointment." The impact of this provision is the effective denial of an opportunity for an intersex person to be nominated in the Examinations Appeal Tribunal.

In the Judicial Review Case Number 147 of 2013[357], the Court dealt with the question of requirement of a gender marker on a KCSE Certificate and whether it interfered with the petitioner's right to human dignity through humiliation or degradation. This judgment raised awareness of the existence of intersex children in the school system and the challenges they likely encounter in going through registration for examinations and other school activities such as sports, which all require one to identify as male or female. Unfortunately, the biggest challenge for intersex persons is likely to start when they are going through adolescence and when physical manifestation of their intersex status becomes apparent to all and sundry in the community.

4.3.2.7 Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act (No.56 of 2012)

Article 2 of Principle 23 of the United Nations Guidelines on IDPs as incorporated in the Act provides that:

[357]Republic v Kenya National Examinations Council & another (Ex parte) Audrey Mbugua Ithibu [2014], eKLR.

1. Every human being has the right to education.
2. To give effect to this right for Internally Displaced Persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education shall respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of women and girls in educational programmes.

These provisions are commendable for their inclusiveness of all children despite the fact that 'special conditions' does not go further to explicitly provide for intersex children. The specific reference to women and girls acknowledges the vulnerabilities of these persons. Intersex children require similar consideration given the odds stacked against them.

4.3.2.8 The Children Act (No. 8 of 2001)

Since the fact of being intersex is in most circumstances identifiable at birth, the rights of intersex persons will crystallise immediately and the law that most directly relates to the rights and circumstances of children is the Children Act. The Act became operational in March 2002. The Act repealed three existing Acts of Parliament: Children and Young Persons Act Cap 141; Adoption Act Cap 143; and Guardianship of Infants Act Cap 144. At that time, provisions affecting children were found in about sixty-five different statutes. With the three main statutes being consolidated however, it was generally agreed that the rest of the statutes would be reviewed over time. One objective of the Children Act 2001 was to give effect to the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, for which it was hailed as a major achievement in the children's sector.

Whereas its implementation generally improved standards in service delivery, however, certain gaps and conflicts were identified which created operational difficulties for practitioners. There have been several attempts since to substantively review and revise the legislation,[358] but to date, few amendments have been made. Currently however, there is a National Task Force on Children Matters that has the mandate to review the entire justice system as it relates to children, and which has resulted in a new, revised

[358]Including The Children Law Amendment Bill, 2011, The Children Act (Amendment) Bill, 2014 and The Child Justice Bill, 2014, none of which successfully passed the legislature.

and updated Children Bill proposal. At the time of finalising this Taskforce report, the Bill had not been enacted into law. Arguably, the most important provision of the Children Act is the overarching principle contained in section 4 that, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." [Emphasis added]

The principle of the best interest of the child is also reflected in the CoK 2010, under Article 53 thereof.[359] Further, section 5 of the Children Act specifically prohibits discrimination against any child on the basis of, inter alia, sex, birth or disability. Another right of the child that is specifically set out in the Children Act, and which is directly applicable to the challenges faced by intersex children is the right to a name and nationality in section 11, which specifically provides that "where a child is deprived of his identity, the Government shall provide appropriate assistance and protection, with a view to establishing his identity." Furthermore, every child is entitled to protection from abuse, whether physical or psychological (section 13), and from torture or cruel treatment (section 18).

Finally, every child has the right to privacy, "subject to parental guidance" (section 19). The Children Act also sets out responsibilities of parents vis-à-vis their children, including the duty to provide a child with medical care, the duty to protect the child from neglect, discrimination and abuse, and the right to give parental guidance with respect to, among others, "values", all of which must be exercised "in a manner consistent with the evolving capacities of the child" (section 23).[360] In this respect, section 127 provides that any person having parental responsibility or custody, charge or care of a child who wilfully assaults, ill-treats or exposes a child in any manner to unnecessary suffering or injury to health commits an offence punishable by a fine not exceeding two hundred thousand shillings, or by imprisonment for a term not exceeding five years, or both.

The Children Act establishes an administrative scheme for implementation and enforcement of its provisions that includes a National Council for Children's Services (NCCS) responsible for general supervision and control over the planning, financing and co-ordination of child rights and welfare activities (sections 30 and 32), and a Director of Children's Services (DCS)

[359] In this respect, Article 53(2) provides that "a child's best interests are of paramount importance in every matter concerning the child."
[360] While the Act does not explain what is meant by 'consistent with the evolving capacities of the child', section 158(4) may shed some light on this issue by requiring the consent of any child who is age 14 or older to be adopted

responsible for assisting in the establishment, promotion, co-ordination and supervision of services and facilities designed to advance the wellbeing of children (sections 37 and 38). Between them, the NCCS and the DCS are specifically responsible for: formulating policy and public awareness strategies concerning child welfare; designing programs targeted to alleviate the challenges facing children with special needs; maintaining records and data on the management of children's services; conducting investigations into hardships affecting children, and; providing assistance to acute situations of children suffering hardship, including intervening on behalf of any child who is in need of care and protection and is in danger of imminent injury or harm (ibid.).

A 'child in need of care and protection' for this purpose includes any child "who is disabled and is being unlawfully confined or ill treated" and any child "who is exposed to any circumstances likely to interfere with his physical, mental and social development" (section 119). Additional oversight and enforcement of this scheme rests with the courts, which are empowered to make a wide variety of orders in any proceedings concerning the welfare and upbringing of a child (section 113), including an order for a child to be "investigated or evaluated by a person appointed by the court to assist the court in determining any matter concerning the welfare and upbringing of the child" (section 114).

As noted above, several provisions and forms may directly affect intersex children in that they are either specific to the 'sex' of the child, based on the binary concept of male or female, or require particulars of the child's sex to be identified. Specifically:

- Section 158 affects adoption of and by intersex persons by restricting adoption of a) a male child by a sole female applicant; b) a female child by a sole male applicant; c) any child by a sole foreign female applicant, and by completely prohibiting adoption of any child by a sole foreign male applicant;
- The Foster-Care Placement Rules - Form 1 (Rule 3) - Application to Foster a Child allows the prospective foster parent to indicate their preference for a 'male' or 'female' child, and requires the applicant to indicate the 'sex' of any other child already in the home. Likewise the Foster-Care Placement Rules—Form 3 (Rule 7(2)) 'Form for

Undertaking' and Form 5 (Rule 12 and 13) 'Foster Child Care Record' refers to children by the binary pronouns "him/her" and further requires identification of the child's 'sex';

- Similar forms containing requirements to identify the 'sex' of the child, the prospective adopter(s) and any other child(ren) who may be in the home are required in respect of adoption under the Seventh and Eighth Schedules;
- Likewise, the Children (Charitable Children's Institutions) Regulations, 2005 contain various forms requiring an indication of the 'sex' or 'gender' of children who are accommodated in such institutions.

A blank space in any form requiring the person completing the form to indicate 'sex' or 'gender', without more (e.g. a box for male and a box for female), is not necessarily problematic, because intersex status could theoretically be indicated. However, the lack of any definition of sex or discussion of the binary notion of sex, that accounts for the reality of intersex by omission leads to a potential discriminatory effect on intersex children.

4.3.3 The Employment Sector

4.3.3.1 Employment Act (No. 11 of 2007) and Subsidiary Legislation

This statute law declares and defines the fundamental rights of employees: it provides for basic conditions of employment and regulates the employment of children along with all connected issues.

4.3.3.2 HIV and AIDS Prevention and Control Act (No. 14 of 2006)

The HIV and AIDS Prevention and Control Act (No. 14 of 2006) is an Act of Parliament that provides measures for the prevention, management and control of HIV & AIDS, protection and promotion of public health and appropriate treatment, counselling, and support and care for persons infected or at risk of HIV &AIDS infection. Part VIII of the Act proscribes all discriminatory acts and policies: it outlines a number of acts and/or policies that are prohibited for being discriminative against actual, perceived or suspected HIV &AIDS patients. Further, Part IX (Research), Sections 39 and 40 provide the requirements for research and consent for research for purposes of HIV &AIDS studies.

4.3.3.3 National Youth Service Act (CAP 208)

The National Youth Service Act is a statute that provides for the establishment of a National Youth Service. Section 7(1) (a) of the Act, provides for "Other members of the Service, who must be male or female citizens of Kenya between the ages of sixteen years and thirty years." [Emphasis added] This provision expressly and effectively discriminates against youthful intersex citizens who would wish to enrol in the Service.

4.3.4 Registration of Persons

4.3.4.1 Births and Deaths Registration Act (Cap149)

The Births and Deaths Registration Act (BDRA) requires every person who is aware of the birth of a child to register that birth in the national register within three months of the date of birth (Births and Deaths Registration Rules, 1966, Rule 6). Registrars are prohibited from registering a birth after six months without specific written authority (BDRA, s.8). Section 11 mandates the mother and father of a child (or any other person present at the birth or having charge of the child) to notify a registrar of a birth, and in doing so to give 'prescribed particulars' to the best of the person's knowledge and ability (s.10). Section 2 of the BDRA defines a 'birth' as "the issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or dead", and further defines 'prescribed particulars' as "name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents". Therefore, the 'sex' of every child born in Kenya must be recorded within three months (and no later than six months) of that child's birth. Form 1 "Register of Birth" contains checkboxes for 'male' and 'female' in the section labelled 'sex of child', meaning that no provision exists for the registration of an intersex child.

The Rules require that all entries made in the register are "complete in every respect" (R.9 (1)), though section 28 of the BDRA gives the Principal Registrar the power to correct "any error or omission" in a register of births. Upon registration, section 26(3) empowers the Registrar-General to issue a certificate of birth. Therefore, an intersex child cannot receive a birth certificate unless they are assigned (and therefore misrepresented as) either the male or female sex.

4.2.4.2 Registration of Persons Act (Cap107)

The Act requires the Registrar General to keep a register of all such persons, containing certain particulars in respect of each person, including that person's 'sex'. Section 6 requires any citizen who has turned eighteen years of age and who is not already registered, to register him/herself within 90 days of their 18th birthday, following which that person will be issued an identity card in accordance with section 9. A registration officer is empowered by section 8 to demand documentary proof of any information provided for the purpose of registration. The identity card, the form of which is prescribed under the Registration of Persons Rules, 1948, includes a space for the person's 'sex' to be identified.[361] Section 10 of the Act provides that such identity card may be required to be produced for the purposes of obtaining any licence, permit or "other document" or upon lawful demand by any authority. Section 11 makes it an offence punishable by a fine of up to two hundred thousand shillings or by imprisonment of up to one and a half years for either failing to register, or for giving any particulars that are false. Coupled with the restrictive options of 'male' or 'female' in the registration form, this might force intersex persons to break the law in one way or another. Further in this respect, a person's registration and identity card can be revoked pursuant to section 18A if it is determined that facts were concealed or misrepresented.

4.2.4.3 Kenya Citizens and Foreign Nationals Management Service Act (No. 31 of 2011)

The Kenya Citizens and Foreign Nationals Management Service Act establishes the Citizens and Foreign Nationals Management Service, which is responsible for implementing laws and policies relating to, among others, citizenship, registration of births and deaths, and identification and registration of persons in a national population register (section 4). With respect to the population register, the Service has the power to issue "unique identifiers" to individuals and groups, and to undertake data collection "for the purpose of collecting and compiling information concerning the distribution and composition of the population in Kenya". The Service is the body responsible for administering the Births and Deaths Registration Act, the Registration of Persons Act and the Citizenship and Immigration Act.

[361]Declaration 2014 issued by the Cabinet Secretary for the Interior and Co-ordination of National Government pursuant to the Kenya Citizenship and Immigration Regulations, 2012 declares "the identity card issued under section 9 (1) of the Registration of Persons Act to be a travel document for the purposes of travel to the Republic of Rwanda and the Republic of Uganda."

4.2.4.4 Statistics Act (No. 4 of 2006)

In addition to the national population register administered by the Service as outlined above, the Kenya National Bureau of Statistics (KNBS) that is established by section 3 of the Statistics Act is responsible for collecting and analysing statistical information and compiling it into a comprehensive national socio-economic database (section 4). Sections 17 and 18 of the Act provide for a national Population and Housing Census and for any other census for survey to be conducted at either national or local level. In this respect, section 19 authorises an officer of the KNBS to collect statistical information and to this end, to require any person to provide any particulars that may be required for the purpose. Section 26 makes it an offence for any person to provide information that the person knows to be false, which offence is punishable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding twelve months or to both. The Second Schedule to the 'Statistics (Census of Population) Order, 2008' mandated that the particulars to be asked of 'all persons' included 'sex', and the particulars to be asked of all 'females aged 12 years and older' included the 'sex of child' delivered at the 'last live birth' and the 'registration' of that birth.

Other Statute laws on Registration

While the Births and Deaths Registration Act and the Registration of Persons Act make registration of every citizen of Kenya mandatory, three further statutes provide for registration in applicable circumstances. This include; the Persons with Disabilities Act which provides for voluntary registration , the Marriage Act provides for mandatory registration upon entering into any of the lawful type of marriage, and the Elections Act which makes it mandatory for a citizen to register if they want to exercise their constitutional right to suffrage.[362]

4.2.5 Immigration

4.2.5.1 Kenya Citizenship and Immigration Act, 2011

Every citizen has the right to enter and leave Kenya (Article 39 CoK, 2010). Section 6 of the Kenya Citizenship and Immigration Act (KCIA) defines a citizen by birth in harmony with Article 14, and section 30 of the Sixth

[362]Article 38(3)(a) of the CoK 2010 provides that "every adult citizen has the right, without unreasonable restrictions, to be registered as a voter"

Schedule to, the CoK, 2010, which together provide that a person is a citizen by birth if:

a) on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen; or

b) the person acquired citizenship under Article 87 or 88 (1) of the former Constitution; or

c) having been born outside Kenya prior to independence, if the person's parents acquired, or if deceased would have acquired citizenship under Article 87 or 88 (1) of the former Constitution.

Section 22 provides that citizens are entitled to "be registered as a voter without unlawful restriction", to vote and stand for election, and to "any document of registration or identification issued by the State to citizens. This includes a birth certificate, passport, national identification card as well as a voter's card. Section 24 of the Act reinforces the entitlement of a citizen to be issued a passport "upon application, in the prescribed manner". A passport is prima facie evidence of the holder's citizenship and concomitant entitlement to state protection (s.32). Section 27 indicates that an application for a passport must be accompanied by a birth (or adoption) certificate or a national identity card. Section 30 mandates that an application for a passport will be rejected if the applicant gives 'false material information' or submits an incomplete application, and section 31 provides that a passport that has been issued may be confiscated or suspended if it was obtained by 'document fraud'. In this respect, the Kenya Citizenship and Immigration Regulations, 2012 sets out the procedure and particulars required (Regulation 12 and Form 19) to apply for a passport, which include indicating the applicant's sex by checking a box for either 'male' or 'female',[363] and providing a copy of the applicant's national identity card and birth certificate. Sections 53 and 54 of the KCIA set out offences under the Act, including refusing or neglecting to provide information or produce a document, knowingly or recklessly making any false or misleading statement, or presenting a false document. These offences attract significant penalties, such as a fine of up to five million shillings (for document fraud) or imprisonment for a term of up to five years (for document fraud) or both. Given the issues identified that present

[363]Several other forms established pursuant to the Kenya Citizenship and Immigration Regulations, 2012 that apply to foreign nationals (as opposed to citizens) also contain requirements to indicate 'sex' of either the applicant or the applicant's children or dependents: Form 20 – Entry/Departure Declaration Form; Form 22 – Application Form for a Visa; Form 23 – Application for Permanent Residence; Form 25 – Application for Issuance or Renewal of Permit; Form 28 – Application for Dependent's Pass; and Form 42 – Application for Registration as a Foreign National

barriers to an intersex person obtaining a birth certificate or a national identity card without fraud or misrepresentation, and the fact that these documents are required for obtaining a passport, the same barriers arise in this circumstance. This in turn presents a barrier to the constitutional right of citizens to leave and to enter Kenya.[364]

4.2.6 Formal Justice Sector

4.2.6.1 Prisons Act (Cap 90)

The Prisons Act requires that at all times the treatment of convicted prisoners shall be such as to encourage their self-respect and sense of personal responsibility, to rebuild their morale, to inculcate in them the habit of good citizenship and hard work, and to encourage them to lead a good and useful life on discharge and to fit them to do so.

Rule 38 of the Prison Rules, 1963 require that the name, race and tribe, age, weight, and particular marks, and such other measurements and particulars shall be recorded upon admission, and from time to time be recorded in such manner as the Commissioner directs. While there is no form provided in the Rules, it is likely that any such form will require an indication of 'sex' and therefore this must be noted and accommodation made for intersex inmates.

Section 11 of the Act vis-a-vis Rule 36 of the Prisons Rules, gives power to the officers to examine anything being brought into or out of a prison, including performing a search and check of inmates. This search exposes the body parts of the particular inmate being searched, and therefore section 36 of the Rules dictates that prisoners may only be searched by officers of the same sex, creating a clear problem for intersex inmates. Section 36 of the Prisons Act provides that male and female prisoners shall be confined in separate prisons or in separate parts of the same prison. Rule 32 further provides that women prisoners shall in all cases be attended by women officers and that a male prisoner shall not enter a prison or part of a prison appropriated to women prisoners. The question therefore arises how to accommodate an intersex prisoner. Prison officials must be trained to address this issue to ensure that the personal and physical integrity of an intersex prisoner is respected.

[364]CoK 2010, Article 39.

A medical officer is empowered by Rule 42 to conduct a medical examination on a prisoner on the day of admission or as soon as possible after admission, and record the state of health of the prisoner and such other particulars as may be directed. If the sex characteristics of an intersex prisoner have not already been discovered, such status will be uncovered at this point. It is therefore critical that medical officers in prisons be sensitised to the nature of the intersex status so that the medical examination does not result in violation of an intersex prisoner's dignity. As can be seen from the above, there is a gap in the legislation in regard to treatment of intersex persons who are incarcerated.

4.2.6.2 Borstal Institutions Act , Cap 92 and Probation of Offenders Act (Cap 64)

The Borstal Institutions Act relates to youthful offenders and their detention. Section 8 of the Act provides that before directing that a youthful offender be sent to a borstal institution, a court must ascertain whether accommodation is available for the youthful offender. In this respect, section 18 requires that males and females be accommodated in separate institutions. This clearly raises an issue of how to accommodate an intersex youth offender. The Minister is empowered by Section 52 of the Act to make rules defining which "types" of offenders are to be sent to particular institutions. It is not clear from the Act what is meant by "type"; however it is recommended that rules be made to define the process for accommodating intersex youth offenders. The current Borstal Institution Rules, 1963 provide that the Commissioner shall classify inmates having regard to their character, previous history and other relevant circumstances, and make arrangements for the "most suitable" borstal institution. 'Other relevant circumstances' should include the status of being intersex, but it is recommended that this be specifically clarified.

The Borstal Rules describe an "inmate" as any person detained in a borstal institution, which includes an intersex youthful offender that has been confined. Rule 17 provides that male and female inmates shall be kept absolutely separate from each other and shall be confined in different buildings. This Rule excludes intersex persons as it only provides for 'male' and 'female' and therefore needs to be reviewed. Rule 23 on the other hand requires an inmate to be searched only by officers of the same sex as the

inmate, raising the issue again of who then is to search an intersex person. It is recommended that the Rules be amended to provide for an intersex inmate to choose which sex of officer they are most comfortable to be searched by, so as to protect their dignity.

The superintendent in the institution is required to ensure so far as is practicable that the medical officer's instructions and recommendations in regard to any inmate are carried out as stipulated in Rule 65. Sensitisation is important for both the medical officer and the superintendent, in order for them to understand that the needs of intersex may not be the same needs that other inmates have. Rule 73 further mandates that the principal borstal officer and prison officers must direct the attention of the superintendent to any inmate who may appear to be in poor health, or whose state of mind may appear deserving of special notice and care, so that the opinion and instructions of the medical officer may be obtained. An intersex person deserves special notice and care especially in the context where one has been assigned the male sex and is therefore in a male institution but identifies as female. While such an intersex inmate may or may not have physical health concerns, it is important in any event that the mental health of such an inmate be monitored and any necessary counselling or other support provided.

Similar to the issues identified in the Prisons Act and the Borstal Institutions Act with respect to searches, subsection 14(2) of the Probation of Offender Act provides that female persons subject to probation must be assigned a female probation officer. While there is no similar provision with respect to male persons subject to probation, who by implication may be assigned either a male or female probation officer, the issue may nonetheless arise if an intersex person who has been assigned as a male instead identifies as a female and would be better served by a female probation officer.

4.2.6.3 Persons Deprived of Liberty Act (No 23 of 2014)

This is the first and only act in Kenya that has made an attempt to protect the rights of the intersex community. The Act defines an intersex person as one who has been competently certified by a medical practitioner to have both male and female organs. This definition is, however, somewhat simplistic and does not capture all of the possible variations of the intersex status and should therefore be reviewed and amended accordingly as recommended in Chapter 2 of this Report.

Section 3 of the Act requires the institution holding a person deprived of liberty to maintain a register, which shall be used by the law enforcement official to record the physical condition of the person and their medical history. It is likely at this point that the fact of a person deprived of liberty being intersex will be identified. Accordingly, persons who have the duty to implement this section should be sensitised on intersex matters, so as to handle the inmate with utmost care and respect for dignity.

Section 5 provides that persons deprived of liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity. Furthermore, section 10 of the Act contains restrictions on searches, which greatly protects this human dignity stipulated in section 5. In this respect, an intrusive search around a concealed body cavity shall be carried out in privacy and only by a person of the same sex, in a manner of decency that affords the person being searched the privacy and dignity consistent with the purpose of the search. Notable is subsection (3) which specifically provides for an intersex person to have the right to decide the sex of the person by whom they should be searched. Similarly, section 12 mandates that intersex persons deprived of liberty have reasonable accommodation, separate from other persons. All persons deprived of liberty also have the right to confidentiality regarding their health status as stipulated in section 16.

4.2.6.4 Criminal Procedure Code (Cap 75)

Some provisions of the Criminal Procedure Code directly affect intersex persons as they are based on the binary concept of 'male' and 'female'. Sections 27 and 120(4) provide that whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency. The Code is silent with respect to intersex persons, who should be allowed to choose whoever they're comfortable with to search them, as provided for in the Persons Deprived of Liberty Act.

Under the Criminal Procedure (Police Supervision) Rules, 1966, there is a schedule titled 'Identity Card – Police Supervision' that contains a blank space to indicate the 'sex' of the person. This is more inclusive than it would have been if there were instead two options for 'male' and 'female.'

4.2.6.5 Penal Code (Cap 63)

Section 320 of the Penal Code provides that any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law by any false pretence is guilty of a misdemeanour and is liable to imprisonment for one year. Section 321 similarly provides that any person who makes a false statement when procuring a passport whether for himself or for any other person is likewise guilty of a misdemeanour. These sections become problematic when registration only allows for two options to choose from, 'male' or 'female,' in regards to sex, leaving an intersex person with no option but to open themselves up to criminal liability by making a false statement just to obtain an identity document.

Again, section 323 also provides that any person who knowingly, and with intent to procure the same to be inserted in a register of births, deaths or marriages, makes any false statement touching any matter required by law to be registered in the register is guilty of a felony and is liable to imprisonment for three years. Given that the Births and Deaths Registration Act requires a newborn to be registered and assigned either the male or female sex in order to receive a birth certificate, the parents or doctors of an intersex child face the possibility of imprisonment just to register the child as required by law. Furthermore, intersex persons by virtue of their status are predisposed to commit offences including obtaining by false pretence. Thus, due to the lacuna in the law, the intersex persons are likely to be in conflict with the law in order to survive.

4.2.6.6 Sexual Offences Act (No. 3 of 2006)

The Sexual Offences Act makes provision for sexual offences, their definition, prevention and protection of persons from harm due to unlawful sexual acts and other connected purposes. The Act does not provide a definition or make any reference to intersex persons. It does however describe the term 'genital organs' as including, "the whole or part of male or female genital organs". The Act does not appear to anticipate a situation where both organs occur in one person or one who does not fit within the binary notion of a male or female. The same is noted with the Post Rape Care Form prescribed in the Schedule to the Sexual Offences Subsidiary

Legislation, which only provides options for a person of either the male or female gender to report a crime of rape.

The Act was amended by insertion of Section 40B and 40C to provide for special units and personnel trained to handle sexual offenders and victims. Similarly specially trained personnel as well as public education and promotion of public awareness should be undertaken with regards to intersex persons. The lack of specially trained personnel to conduct physical body searches was noted in the RM case, causing the accused further stigma and trauma while in custody of the State.

4.2.6.7 Prevention of Torture Act (No.12 of 2017)

Torture is defined as, among other things:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person … for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public officer or a person acting on behalf of a public officer …

This definition mirrors the definition of torture in the international Convention against Torture, which has been interpreted to include Female Genital Mutilation and Intersex Genital Mutilation.[365] In case of any doubt, the Schedule to the Prevention of Torture Act provides that acts constituting torture include mutilation of parts of the body such as the genitalia. Section 6 of the Act clarifies that there is no justification for torture and section 25 provides that any person who commits torture is liable to imprisonment of up to twenty-five years. Section 11 provides that, in sentencing a person for the offence of torture, a court must take into account the level of severity in all the circumstances, including the victim's age. With respect to redress for torture, sections 17 and 19 provide that a victim is entitled to reparations including compensation, rehabilitation, and restitution in the form of compensating the victim for costs of medical and psychological treatment. Notably, section 31 of the Prevention of Torture Act dictates that its provisions prevail in the case of conflict with any other law.

The acts of forced medical interventions, invasive searches and medical procedures without informed consent amount to torture, inhumane and degrading treatment contrary to the Prevention of Torture Act, the

[365] Supra note 90

Constitution of Kenya and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Indeed, torture is one of the crimes that are non-derogable under the Constitution (Article 25) as well as international human rights law.

The Taskforce takes cognisance of the National Coroners Service Act (No. 18 of 2017) that came into effect in July of 2017 and the need to fully operationalise the Act to ensure that cases of infanticide arising from intersex status, whether accidentally or wilfully at birth or due to medical negligence at any stage of life, are properly investigated and prosecuted.

4.2.7 Other Domestic Laws

Finally, the National Gender and Equality Commission Act, 2011 provides for the establishment of a national commission with the purpose of promoting gender equality and freedom from discrimination in accordance with Article 27 of the Constitution, including by ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including children. To this end, the National Gender and Equality Commission (NGEC) is tasked with, among other things, collecting data on the status of such special interest groups, and establishing databases on issues relating to achieving equality and freedom from discrimination for such groups.

With respect to 'gender equality', the NGEC Act defines 'gender' as "the social definition of women and men among different communities and cultures, classes, ages and during different periods in history" and 'gender mainstreaming' as "...ensuring that the concerns of women and men form an integral dimension of the design of all policies..." While the NGEC Act specifically refers to Article 27 of the Constitution, and in particular the grounds of discrimination in Article 27(4), which include 'sex' but do not make reference to 'gender', the Act does not define sex or make any distinction between sex and gender.

4.2.8 Kenyan Case Laws

In Kenya, two cases particularly stand out with regard to the judicial interpretation of the rights of intersex persons. One such case is Richard Muasya v Hon. Attorney General, High Court of Kenya (Nairobi High Court

Petition No. 705 of 2007), and the other is Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR (Petition 266 of 2013).

Notably, in the RM Case, the cause of action arose prior to the 2010 Constitution and the Court was guided by the repealed Constitution. On the other hand, the Baby A Case was decided post the 2010 promulgation. This is apparent in the interpretation of the two cases. While the RM case addressed challenges faced by intersex persons i.e. lack of awareness, human rights violations they are susceptible to and the need to formulate safeguards to ensure their protection, the Baby A case affirmed the need to investigate and put in place proper safeguards to ensure enjoyment of rights and freedoms without discrimination as well as collect data of intersex persons in Kenya.

4.2.8.1 Richard Muasya v Hon. Attorney General High Court of Kenya (Nairobi High Court Petition No. 705 of 2007)

The petitioner ("RM") was born with both male and female genitalia and was given a male name by his parents at birth. Due to his ambiguous genitalia, RM was unable to secure a birth certificate, identity card, or any travel documents. The petitioner dropped out of school at Class 3. He later attempted to marry but could not live with the wife, nor could his attempted marriage be given legal recognition. RM ended up in conflict with the law and was charged with an offence of robbery with violence in Kitui Chief Magistrate Court Criminal Case No.144 of 2005. While RM was in prison remand, awaiting the determination of his case, he was subjected to the usual statutory search at the prisons. It was realised during the search that he had both male and female genital organs. Confused on where to confine RM (the female or male cells?), prison officers referred the matter to Kitui Magistrate's Court. The Court ordered that RM be taken to Kitui District Hospital for verification of his sex. The doctor's report confirmed that the petitioner had ambiguous genitalia.

An order was therefore made for the RM to be remanded at Kitui Police Station during the pendency of his trial. After trial, RM was convicted and sentenced to death for robbery with violence and was committed to Kamiti Maximum Prison, which is reserved for male death row convicts. The petitioner was made to share cells, beddings and sanitary facilities

with male inmates, and was exposed to constant abuse, mockery and ridicule. RM told the Court that he was also sexually molested by curious male inmates. RM then petitioned the High Court to seek redress for infringement of several rights including the right to dignity, freedom against inhumane treatment, discrimination on grounds of sex, and rights to freedom of association, freedom of movement and right to fair hearing and protection under the law.

In the ruling of 2nd December, 2010, a three judge bench of the High Court (Okwengu, Dulu and Sitati JJ) defined the term 'intersex' as "an abnormal condition of varying degrees with regard to the sex constitution of a person" (para. 109), but noted that the Court was not presented with any evidence of the existence of an "identified class or body of persons known as intersex in [Kenya]" (para.112) and therefore the Court was not persuaded that RM could bring a constitutional challenge in the public interest. They determined that RM's ambiguous genitalia did not negate the fact that "his" biological sexual constitution had already been fixed at birth" (i.e. male) (para.128).

The Court further ruled that, "an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy" (para. 130), and accordingly with respect to RM specifically "the petitioner as an intersex person is adequately covered by the law and has suffered no discrimination or lack of legal recognition" (para.133).

The Court did however find that the strip searches RM had been subjected to during incarceration were "cruel and brought ridicule and contempt" and as a result constituted inhumane and degrading treatment in violation of the Constitution (paras.167-168). The Court made the following statement in obiter (para.145):

> What needs to be done is for parents and those who have such special conditions to be open about their situation, and for the society to be educated to respect the dignity of such people as human beings. As a Court, we can issue orders and make declarations, but this will be of little effect considering that the stigma is connected with the public perception, which is based on the public's limited knowledge of intersex status. Few seem to appreciate the fact that the issue of gender definition for an intersex person, unlike a transsexual or a homosexual, is a matter of necessity

and not choice. Tolerance and acceptance in this area will come with dissemination of appropriate information … [Emphasis added]

4.2.8.2 Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014], eKLR (Petition 266 of 2013)

This case was brought pursuant to the Constitution of Kenya, 2010 and in particular the fundamental rights and freedoms in the Bill of Rights. Baby A was born with both male and female genitalia. Hospital records indicated the baby's sex by a question mark (?) and as a result, the child could not be issued a birth certificate or, concomitantly, an identity card (para.1). The petition alleged that this offends the child's rights to legal recognition, erodes its dignity and violates the right of the child not to be subjected to inhumane and degrading treatment as guaranteed in both the CoK, 2010, and the Children Act (para.1).

In a progressive move away from the RM Case, the High Court (Lenaola J. as he then was) in Baby A case opined that Article 27(4) of the CoK, 2010 is an,

inclusive provision [that] is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersex persons ought not to be discriminated against in any way including in the issuance of registration documents such as a birth certificate. (para.61)

Similar to the RM Case, the High Court however left the specific addition of a third category of sex up to the legislature (para. 62). The Judge noted that the Court was not presented with any evidence upon which it could make a finding that Baby A was specifically subjected to discrimination on the basis of intersex status (para.63). That notwithstanding, the Court made a note that there is "clear evidence that there is an urgent need to address the plight of intersex persons," including "an obvious lack of appropriate guidelines and regulations on how medical examinations and eventual corrective surgery, if needed, would be carried out" (para.65). Accordingly, The High Court directed the Government to consider developing an appropriate legal framework governing issues related to intersex children:

[T]here is currently no legal framework on intersex persons or any policies in place for them. It is the duty of the State to protect children born as intersexuals by providing a legal framework to govern issues such as their registration under the Births and Deaths Registration Act, examinations and tests by doctors, corrective

surgeries, etc. It is on this basis that it behoves upon me to direct the Government towards an appropriate legal framework governing issues related to intersex children based on internationally acceptable guidelines. These guidelines would inform those minded to carry out medical examinations and corrective surgeries on intersex persons of the procedures and guidelines to follow so as to act within the law and in line with the best interests of the child. I would therefore strongly urge Parliament to consider enacting legislation in that regard. This in my view ought to be done in close consultation with various interested stakeholders … in recognition of the principle of public participation. (Para.67)

Further, the High Court urged the Government to consider the issue of collecting data relating to intersex persons with a view to designing policies to protect them as a marginalised group in society (para.68). It is pursuant to this Court's ruling that the Hon. Attorney-General constituted the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya.

Notably, in both of these two cases, the High Court was hesitant to make an order for inclusion of a third sex, intersex, rather leaving it to the legislature to make that provision. In the RM Case, the High Court was "not persuaded that as a court it is within our mandate to so expand the meaning of the term sex when the legislature in Kenya has not done so." (Para.131). Similarly, in the Baby A case, the Court was wary that, "Whereas [the] Court can find and has found that Baby A and intersexuals are entitled to all rights under the Bill of Rights, to go further and create, by a judgment such as this one, a third categorisation of sex would in my view be overstretching the mandate of this Court." (Para. 62)

We however see a positive departure in the Baby A case regarding who can bring a representative suit. While the Court in the RM case was, "not persuaded that there is a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner can bring a representative suit", further describing RM's condition as, "a rare phenomenon" which needed to be "treated as an isolated case", the High Court in the Baby A case was categorical that, such a submission,

…cannot hold water in view of Articles 20(2)(b) of the Constitution, which allows the presentation of actions premised on the Bill of Rights by a person acting in the interest of a group or class of persons. The issues raised in the present Petition

must be looked at in the wider context of the place of intersexuals in our society as opposed to the narrower and specific interests of Baby A, who is only one such person in our society.

The above two cases are evident of the jurisprudential milestones that the country has made with regard to the recognition and protection of the intersex persons. The Taskforce is optimistic that, a decade after the filing of RM case, the full recognition and protection of the rights of intersex persons have gained momentum and will be realised sooner than later.

5.

5.0 NUMBERS, DISTRIBUTION AND CHALLENGES OF INTERSEX PERSONS IN KENYA

5.1 Introduction

This chapter summarises the current status of the intersex persons in Kenya in terms of the number, distribution, challenges, experiences and recommendations. The Taskforce field study findings conducted from July to October 2018 was supplemented by data collected by KNCHR between October 2016 and April 2017, as well as data from various state and non-state institutions e.g. Kenyatta National Hospital, Moi Teaching and Referral Hospital, Jinsi Yangu, Intersex Persons Society of Kenya and Gender Minority Advocacy Trust (GMAT), UNHCR and other experts who made their presentations during Taskforce meetings. Further, this chapter presents the approach that the Taskforce used to achieve its mandate. It includes the study design; target population; research area; sampling techniques; data collection instruments; data collection procedures; pilot testing; data analysis and presentation of findings in respect to the survey. It is noteworthy, that this is the first survey of its kind in Kenya targeting intersex persons.

5.2 The Approach

The Taskforce field survey targeted all the 47 counties of Kenya from June to October 2018. However, due to logistical challenges, the Taskforce was able to effectively reach a total of 37 counties. Thus, data was collected from 37 counties through physical field visits utilising methodologies that included Key Informant Interviews (KIIs), institutional visits, face-to-face and online Mwananchi questionnaires, Focus Group Discussions (FGDs) and secondary data from both state and non-state institutions.

5.3 Sample and Sampling Technique

5.3.1 Sample Size

To arrive at the sample size, the Taskforce used the United Nations data estimates of intersex persons[366], which approximates the population

[366] https://www.unfe.org/intersex-awareness/

of intersex persons at 0.05-1.7% of global births. Using the data from the Kenya National Bureau of Statistics (KNBS Statistical Abstract, 2017), which projects Kenya's current population at 45.9 million, the number of intersex persons in Kenya was estimated at 779,414 using the upper limit of 1.7% of the population as per the UN guideline.

Based on the foregoing, the study used the following formula to arrive at a sample size of 385 intersex persons and households with intersex persons as follows:

$n = (Z^2*p*(1-p) *N)/e^2*(N-1) + Z^2*p*(1-p)$

Where n = sample size

N = estimated population size

Z = confidence/risk level, 1.96

e = level of precision, 0.05

p = probability of getting picked to participate in the survey, 0.5

Consequently, the same formula was used to calculate the population of intersex persons for each of the 47 counties of Kenya. This is shown in Table 5.1. The method of proportional allocation was adopted when calculating the county sample sizes across the 47 counties. The sizes of the samples from the different counties were kept proportional to the sizes of their populations.

Table 5.1: Population and sample size of intersex persons for the 47 counties of Kenya

CODE	COUNTY	Population	Estimated Population of intersex persons	Sample Size	Sample Size
1	MOMBASA	1,184,988	20145	0.025846092	10
2	KWALE	820,199	13943	0.017889581	7
3	KILIFI	1,399,975	23800	0.030535232	12
4	TANA RIVER	303,047	5152	0.00660984	3
5	LAMU	128,144	2178	0.002794983	1
6	TAITA TAVETA	358,173	6089	0.007812208	3
7	GARISSA	623,060	10592	0.013589729	5
8	WAJIR	661,941	11253	0.014437773	6
9	MANDERA	1,025,756	17438	0.02237304	9
10	MARSABIT	315,936	5371	0.006890965	3
11	ISIOLO	155,465	2643	0.003390889	1
12	MERU	1,470,801	25004	0.032080037	12
13	THARAKA NITHI	396,115	6734	0.008639771	3
14	EMBU	559,766	9516	0.012209207	5
15	KITUI	1,097,687	18661	0.023941947	9
16	MACHAKOS	1,191,325	20253	0.02598431	10
17	MAKUENI	959,022	16303	0.020917487	8
18	NYANDARUA	686,379	11668	0.014970797	6
19	NYERI	798,428	13573	0.017414728	7
20	KIRINYAGA	607,881	10334	0.013258656	5
21	MURANGA	1,084,871	18443	0.023662414	9
22	KIAMBU	1,868,208	31760	0.040747988	16
23	TURKANA	855,399	14542	0.018657338	7
24	WEST POKOT	649,418	11040	0.014164631	5
25	SAMBURU	283,780	4824	0.006189602	2
26	TRANS-NZOIA	1,037,455	17637	0.02262821	9
27	UASIN GISHU	1,132,603	19254	0.024703509	10
28	ELGIYO MARAKWET	468,835	7970	0.010225886	4
29	NANDI	953,978	16218	0.020807471	8
30	BARINGO	703,697	11963	0.015348525	6
31	LAIKIPIA	505,712	8597	0.011030221	4
32	NAKURU	2,031,247	34531	0.044304075	17
33	NAROK	1,077,719	18321	0.023506419	9
34	KAJIADO	870,721	14802	0.01899153	7
35	BOMET	916,175	15575	0.01998294	8
36	KERICHO	944,576	16058	0.020602402	8
37	KAKAMEGA	1,875,531	31884	0.040907712	16
38	VIHIGA	626,707	10654	0.013669275	5
39	BUNGOMA	1,553,434	26408	0.033882367	13
40	BUSIA	840,251	14284	0.018326941	7
41	SIAYA	984,308	16733	0.021469007	8
42	KISUMU	1,132,264	19248	0.024696115	10
43	HOMA BAY	1,126,270	19147	0.024565378	9
44	MIGORI	1,071,803	18221	0.023377384	9
45	KISII	1,346,547	22891	0.029369899	11
46	NYAMIRA	699,113	11885	0.015248542	6
47	NAIROBI	4463149	75874	0.097346945	37
	TOTAL	45,847,859	779414	1	385

5.3.2 Sampling Techniques

Based on the nature of the target population and the stigma surrounding the intersex conversation, the study applied the non-probability sampling technique. This included the Snowball Sampling Technique, which yielded a study sample through referrals. This method is well suited for such studies where the focus is on a sensitive issue and thus requires the knowledge of specific people to locate or identify other respondents for the study. In this regard, the study benefitted from personal introductions to intersex persons through the auspices of the Intersex Persons Society of Kenya (IPSK).

To compliment data from the Key Informant Interviews (which comprised intersex persons and intersex households), the survey also reached out to various institutions across the country. A Purposive Sampling Technique was adopted in that regard to identify the institutions for sampling using the following categories:

1. Professional Regulatory Officers
2. National Governments Administrative Offices
3. County Government Offices
4. Ministry of Labour and Social Protection
5. National Police Service
6. Correctional Facilities
7. Health Facilities
8. Educational Institutions
9. Religious Institutions
10. Civil Society Organisations

The institutions and target respondents in each of them were selected based on their relevance and probable experience in handling intersex persons. The Taskforce intended to get the views of at least 300 professionals and administrators in the aforementioned institutions.

Additionally, the Taskforce randomly collected views from other members of the public using physical as well as online questionnaires (Wananchi). In taking all the various approaches, the Taskforce sought to triangulate data from the different stakeholders. This would afford it a better and more in-depth view of the situation and challenges of intersex persons in Kenya and inform its identification of possible solutions to them.

5.4 Data Collection Tools and Procedures

The survey collected data by way of: FGDs, questionnaires, field visits and observations and face-to-face interviews using interview guides (See appendix). These tools were self-administered to the identified target respondents. The Taskforce hired research assistants and trainer them on the data collection procedures prior to field deployment. In addition, they were issued with introduction letters for ease of identification. Subsequently, the target institutions were notified of the imminent visit by the research assistants to ensure a high response rate with maximum input. This enabled the Taskforce and its field research assistants to facilitate the identification and preparation of the target respondents.

During the data collection, the research assistants were organised into teams which were deployed in each of the various counties. Each team had a team leader and an intersex person to guide the process as well as to help handle the more sensitive issues of the intersex. In all instances, the teams had a member conversant with the local dialect of the target county. Further, in order to preserve the rights and dignity of the intersex persons during the field visits, the teams administered consent forms to all the survey respondents.

5.4.1 The Pilot

The primary data collection instruments (questionnaires and interview guides) were first administered in a pilot phase to test the tools. The pilot was conducted in Nairobi City, Machakos, Kajiado, Kiambu, Makueni and Kitui counties owing to the following reasons:

- The aforementioned counties are comprised of both semi-urban and urban populations, hence giving a typical profile of expected field conditions across the counties.

- RM and Baby A (triggers of the conversation around intersex persons in Kenya through their judicial cases) reside in Kitui and Nairobi City counties, respectively.
- Machakos, Kajiado and Makueni counties are in close proximity to Kitui County while Kiambu County is accessible from Nairobi City County, hence making for more streamlined logistics.

The feedback from the pilot helped in improving the tools and strategies before the final data collection.

5.5 Data Analysis and Findings

5.5.1 Primary Data

This section captures the data analysis from the field as well as the qualitative findings as guided by the study objectives. The quantitative data captures the number and distribution of intersex persons in Kenya. This is presented in pie charts, graphs and tables. On the other hand, the qualitative data is presented descriptively. It is subdivided into response rate, demographic characteristics of the respondents, thematic findings and challenges encountered.

5.5.2 Secondary Data

To compliment the primary data sourced from the field visits, the Taskforce obtained secondary data from the following institutions as shown in Table 5.2.

Table 5.2: Taskforce secondary data (institutions) schedule

No.	Institution	Births of Intersex Persons Reported
1.	Kenyatta National Hospital	81
2.	Moi Teaching & Referral Hospital	23
3.	Jinsi Yangu	54
4.	Intersex Persons Society of Kenya	84
5.	Kenya National Commission on Human Rights	30
6.	Gender Minority Advocacy Trust (GMAT)	2
7.	Civil Registration	3
	TOTAL	**277**

5.5.3 Response Rate

The response rate did not substantially equate to the targeted sample through a 100% rate due to various reasons which include; time, funding and logistical constraints, as well as strictures arising from the confidential nature of the intersex status and related matters. Both the targeted and realised samples of the survey are captured in Table 5.3.

Table 5.3: Survey response rate

Description	Targeted Sample	Realised Sample
Key Informant Interviews	385	112
Complementary Data		
Institutional Visits	300	218
Mwananchi (Physical)		279
Mwananchi (Online)		90
Focus Group Discussions (Participants)		35
Total Number of Respondents		**634**

As already mentioned, the Taskforce conducted institutional visits to assess the different approaches to care and protection used within the institutional environments in which the intersex persons are often expected to fit into. Table 5.4 depicts a breakdown of the total number of respondents in each category of institutions visited.

Table 5.4: Institutional sample schedule

Professional Group	Frequency
Government Offices (Professional Regulatory Officers, National Governments Administrative Offices, County Government Offices, Ministry of Labour and Social Protection)	78
Correctional Facility Professionals	34
Educational Professionals	14
Modern Health Care Professionals	60
Religious Organisations	7
Civil Society Organisations	25
Total	**218**

5.5.4 Key Informant Interviews

5.5.4.1 Demographic Characteristics of the Respondents

a) Demographic Characteristics of Key Informants (Intersex Persons and Households with Intersex Persons)

Majority of the survey respondents (50%) comprised of the age group 18-35, while the others were aged 36-60 (39%), under 18 (4%), and those of ages 61-70 (1%). Whereas the demographic figures capture the respondents age, some of them responded to questionnaires in representative capacity for intersex persons i.e. in the case of children (parents/guardians) or in the absence of an intersex person a close companion. This is captured in Fig 5.1.

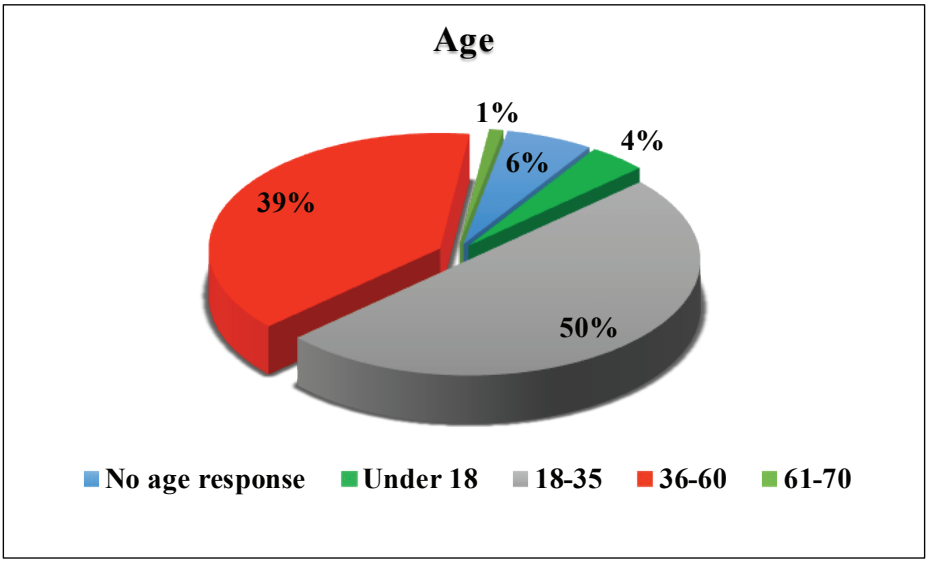


Fig 5.1: Level of Education of Key Informants

b) Level of Education of Key Informants

A significant portion of the respondents (33.7%) had reached secondary level education, while 28.6% of them had either reached or completed their primary level education. At the same time, the survey also indicated that 16.3% of respondents had no formal education/had not completed any formal education, and 4.1 % had attained university (undergraduate) education. Further, the data highlighted that 3.1% of them had garnered various levels of technical education, whereas 14.3% of the respondents did not declare their formal education status. This is captured in Fig. 5.2. These low levels of education and low transition rates can be attributed to, among others, the presence of systematic biases in the population and in key institutions such as the educational system. Such widespread biases, stigma and discrimination can only be tackled by a sustained and systematic public awareness campaign backed by a robust policy legal and administrative framework.

"I am glad that there is a taskforce going around the country now. I hope that this helps to address the administrative challenges for the intersex persons and create awareness about the status. I think that with information, it will be easier for the intersex persons and their families to live in society."

— Mama L (Nairobi City County)

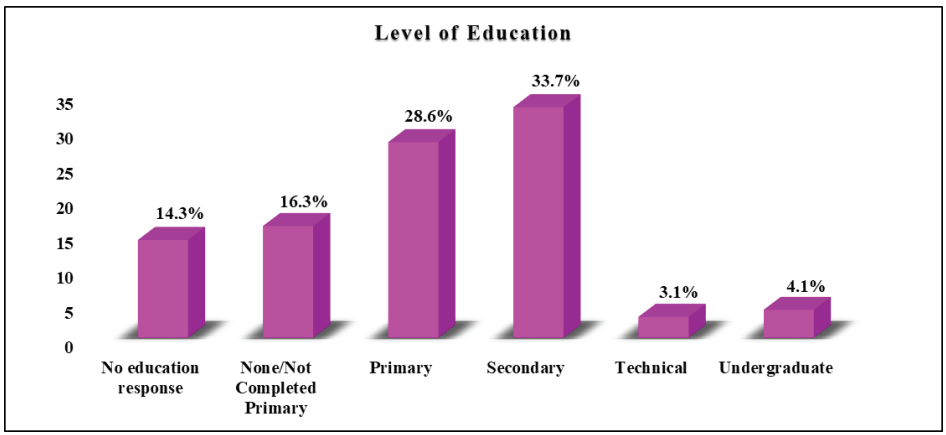


Fig 5.2: Level of Education of Key Informants

The study sampled a number of key informants, the focus being intersex persons. Where the intersex person was either a minor or not available for some reason, a proxy, either parent/guardian (i.e. siblings, grandparents and relatives such as aunts and uncles), or a close companion or an ally was interviwed. Below (Fig. 5.3) is a breakdown of the number of the key informants interviewed.

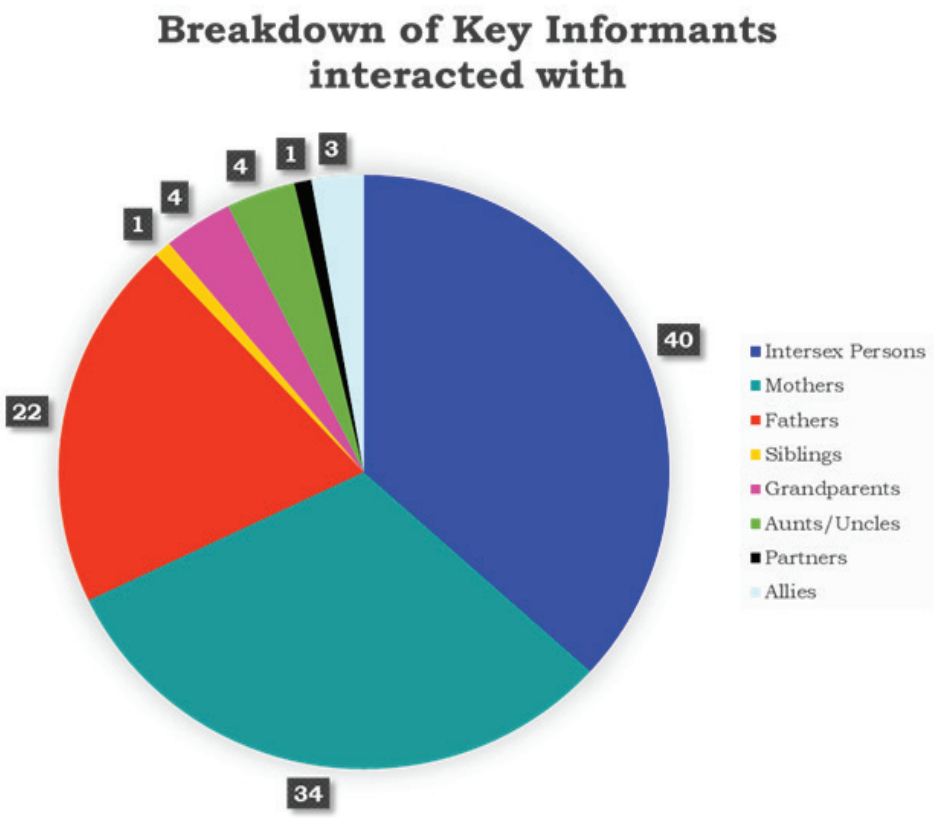


Fig 5.3: Breakdown of the Key Informants Interviewed

Out of the 112 key informants interviewed, 72 were proxies, i.e., mothers, fathers, siblings, grandparents, uncles/aunts, partners and allies—all who are in regular and sustained contact with the intersex adult and child and who, thus, are deeply acquainted with their situation. Further analysis of the data shows that the survey captured 58 minors (children under the age of 18) and 54 adults. The number of key informants for each of the counties sampled is shown in Table 5..

Table 5.5: Number of key informants per county

County	No.	Percentage of Country Covered	County	No.	Percentage of Country Covered
Bungoma	6	5%	Machakos	3	3%
Busia	1	1%	Migori	4	4%
Embu	1	1%	Nyamira	1	1%
Garissa	2	3%	Mombasa	1	1%
Homa Bay	3	3%	Murang'a	5	4%
Kajiado	2	2%	Nairobi City	12	11%
Kakamega	7	6%	Nakuru	2	2%
Kiambu	20	18%	Nyandarua	5	4%
Kilifi	4	4%	Nyeri	2	2%
Kitui	3	3%	Siaya	1	1%
Kirinyaga	1	1%	Trans Nzoia	2	2%
Kisumu	5	4%	Uasin Gishu	3	3%
Kwale	3	3%	Vihiga	8	7%
Laikipia	1	1%	Wajir	4	4%
TOTAL	59		TOTAL	53	

From the survey, Kiambu (20) and Nairobi City (12) counties have the highest numbers of intersex persons. This can be attributed to the fact that the IPSK, from its headquarters in Nairobi, has been able to reach out more effectively in these two adjacent counties, and was therefore able to provide contacts and introductions to more intersex persons. The IPSK has special programs for intersex persons and most of whom have been reached out to are from Kiambu and Nairobi City counties.

It is important to note that whereas the Taskforce directly visited 37 counties across the Republic, the actual intersex persons who were directly interviewed were in 16 counties. In that regard, the number of intersex persons directly interviewed per county is depicted in Fig 5.4.

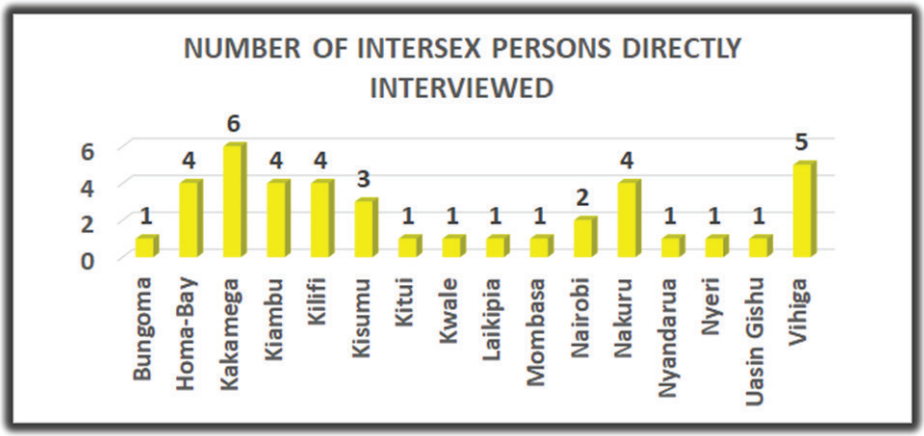


Fig 5.4: Number of intersex persons interviewed by county

From Fig 5.4, it can be seen that the number of intersex persons actually reached varied considerably across the counties. Particularly, Western region represented by Vihiga (5) and Kakamega (6) counties have fairly high representation, a fact that can be attributed to the strategy adopted by the Taskforce, whereby it actively sought the help of testing and counselling facilities in those areas that have special programs for the intersex persons.

c) Age Demographic Data and Level of Education Attained by Intersex Persons

The survey established that a majority (77%) of the intersex persons were in their youth, generally defined to include young people in the ages 18-35. In terms of intersex educational rates, nearly all the adult intersex persons interviewed (90%) were either in secondary (36%), primary (23%) or had never completed any level of formal education (31%). Only 10% of the adult intersex sampled had attained college or university education. These findings are captured in Fig 5.5.

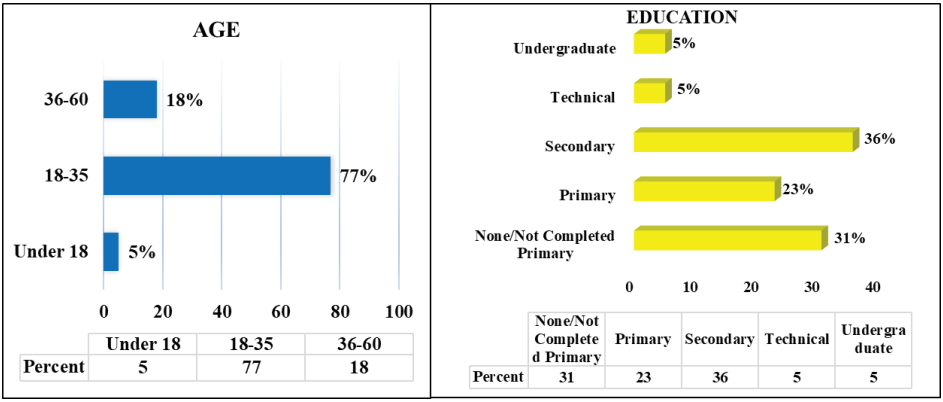


Fig 5.5: Intersex persons' age and educational attainment

From Fig 5.5, it is apparent that the intersex levels of education are very, very low! First, many intersex people may drop out of school much earlier due to negative peer pressure and societal stereotyping. Secondly, the fact that majority of intersex persons are in the secondary school level means that they do not continue their education beyond that stage because, from puberty onwards, their bodies have manifested different characteristics than the sex recorded at birth, and they find no place to belong as they can neither fit in the boys' or girls' schools, and there are no dedicated intersex educational facilities in Kenya. Their transition rates get progressively poorer so that, in the end, only a paltry 5% attain university or college education, and then they still have a mountain to climb when they join the job market.

B's second intersex child was born in 1999. They raised her as a girl but, when she reached puberty, she became aware of her condition and that badly affected her performance in secondary school. The head teacher of that school angrily demanded that B withdraw her child from the school before she spreads her 'ujinga' [stupidity or impudence] to the other students.

— B, mother of intersex children (Vihiga County)

5.5.4.2 Intersex Awareness

a) Cognisance of Intersex Status by Key Informants

Most key informants (71%) became aware of the intersex status of their child at birth and/or during the early days of childhood. At the same time, 23% of them discovered the intersex status of their children at puberty/ teenage, while 6% of the key informants realised the intersex status of their children quite late, in adulthood. This bears out the Taskforce's definition of the intersex, which argues that the intersex status "...can become apparent prior to, at birth, in puberty or adulthood." These findings are depicted in Figure 5.6.

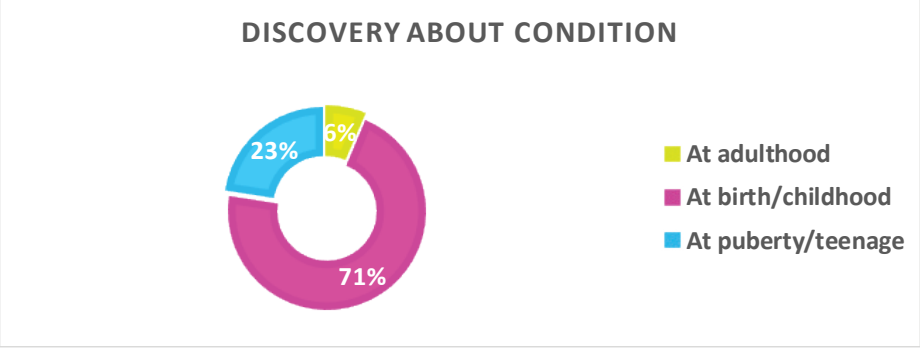


Figure 5.6: Age of discovery of intersex status

In all cases encountered, the respondents admitted to being confused and not clearly understanding the intersex status and its causes, with many relating it to a curse or a punishment for some sins committed either by them or their parents/forefathers. These findings support the Taskforce's finding that the intersex are still widely susceptible to misconceptions and misunderstanding among large segments of the population.

Awareness

"Intersex persons and their parents and guardians believe there is a great need for creation of awareness of intersex persons amongst the general public. This will enable them have easier access to their basic human rights without having to constantly face stigmatisation and living in isolation. Creation of awareness will enable members of the public to understand intersex persons better and treat them with dignity."

— P (Nakuru County)

P was born intersex and became self-aware while watching a documentary aired on a local TV station on intersex persons. This was in 2016, and he was 48 years of age. All along, he thought that he had a physical abnormality that could easily be corrected by ordinary surgery. After watching the documentary, he got to understand what his condition was medically, and was thereafter able to relate to his physical status.

b) Awareness of Intersex Status by Intersex Persons

As shown in Figure 5.7 below, self-cognition or awareness of intersex status by the intersex also came at various stages of their lives. The intersex status is mostly originally identified by the parents and/or birth attendants at birth, and it is this sex characteristic that is recorded at birth. This fact however mainly reflects the parents/guardians/birth attendants' choice and not that of the intersex child who, at that stage of their life, are not yet aware of their different sex characteristic, or else have no voice in society to express their opinion regarding such a weighty matter. Their own cognition of the intersex status, when it finally becomes apparent, appears at various ages. This is captured in Fig 5.7.

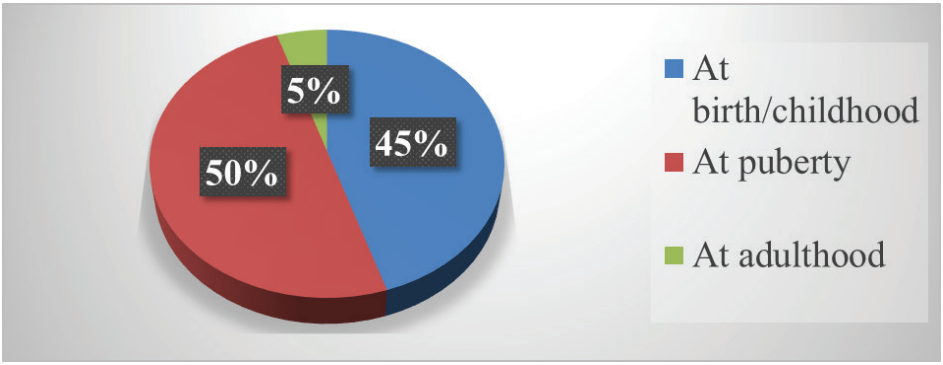


Fig 5.7: Age of self-cognition of intersex status

The pie chart (Fig. 5.7) shows the different stages of growth when the intersex persons discover their status. It shows that a majority (50%) recognised their status and self-identified as intersex at puberty, when the hormones often make their appearance and lead to a growth spurt, accompanied by the development of the secondary sex characteristics. Out of the 50%, 45% made their discovery and self-identification mostly in childhood, while 5% did so in adulthood, the latter perhaps also reflecting the late bloomers among them.

Whatever the case, all intersex persons reach a point of decision, where they have to identify themselves as intersex and make the necessary adjustment for their lives to continue normally. During such times, as indeed throughout their life, non-judgmental community perceptions and attitudes, psychosocial support, and overall facilitation through the legal, educational and vocational systems is critical in helping them adjust and settle down as productive adults and citizens.

c) Discovery about Status

As already alluded to above, the discovery of one's intersex status is not an event, but a process that is fraught due to challenges faced. This process involves multiple actors, whose role is crucial in helping the intersex person understand what is special about their bodies and the options before them. These actors include medical professionals, parents and guardians, teachers, religious leaders and other agents of socialisation, as well as

public officers and administrators, who are in charge of the issuance of civil documents such as the birth certificate and national identity card, among others. Fig 5.8 illustrates the journey discovery of both intersex persons and intersex households

For S, no one ever told him he was intersex. He only realised that he was intersex while in Form 2, when, all of a sudden, he started menstruating, experienced stomach cramps (PMS) and grew breasts. The boys at the school were curious and continually harassed him sexually. As a result, he dropped out of school and has no plan of going back ever again.

— S, intersex person, Trans Nzoia County)

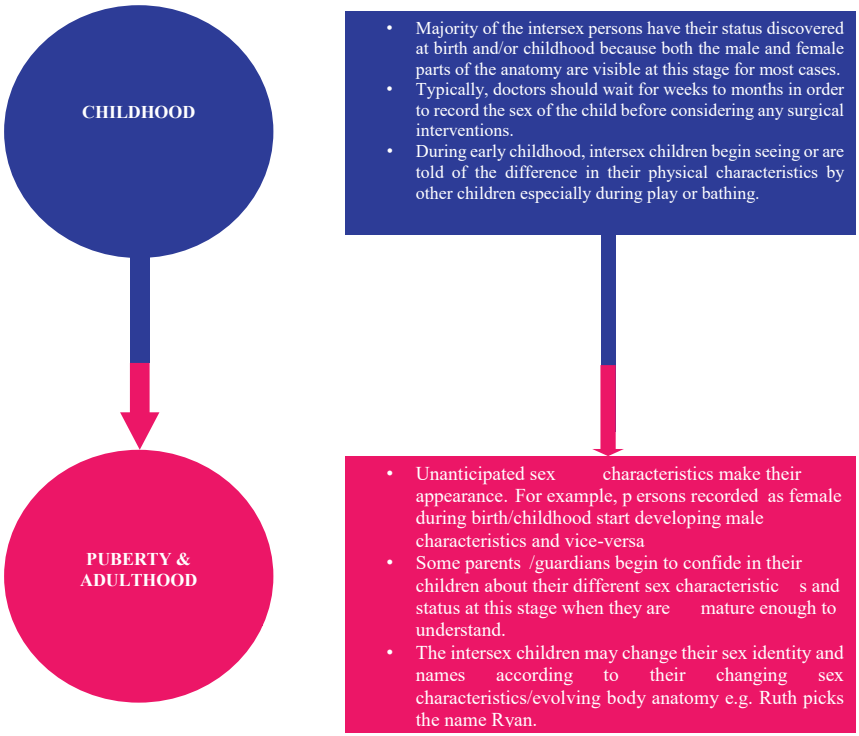


Fig 5.8: Intersex journey of discovery

5.6 Reactions on Discovery of Intersex Status

5.6.1 Emotional Reactions

As already mentioned, self discovery of the intersex status is a process, not an event. It may often take the noting of characteristics and other sex-related signs, the offhand comments from other people, and the growing feeling of doubt, confusion, and dawning realisation in the intersex child's own mind. Thus, this eventful journey may often run almost the entire gamut of the more brooding human emotions, including denial, shock, anger, embarrassment, confusion and, hopefully, acceptance for the eventually self-adjusted intersex individual. Fig 5.9 captures the range of emotions often experienced by the intersex, and which is often shared and mirrored by their immediate families/households. The critical value of general societal understanding, acceptance and support, and the role of caregivers and professionals such as teachers, social workers and counsellors in this drama cannot be gainsaid.

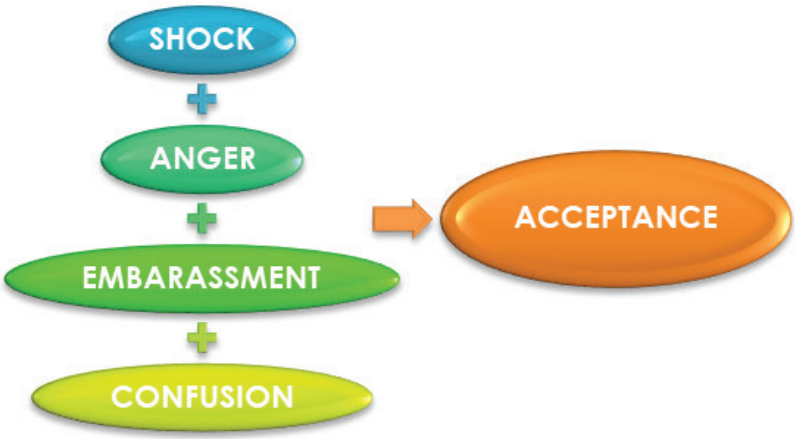


Fig. 5.9: Emotions experienced on discovery of the intersex status

5.6.2 Common Patterns of Reaction by Intersex Persons

Following the dawning realisation of their intersex status, various patterns of reaction are apparent both among the parents and entire family/ household, caregivers and colleagues in social settings as well as within the intersex person themselves. These may range from denial, shame and regret, confusion and perplexity, hatred and self-loathing (which may lead to various kinds of mental health challenges, including thoughts of infanticide among the parents, depression and suicidal tendencies among the intersex persons themselves, and rejection and isolation or even violence among the members of the community), to escapism. Only much later do the majority come to realise and accept their status, an eventuality that can greatly be helped by society and its various institutions.

From the study, among the most common patterns of reaction experienced by the intersex persons include: confusion; fear and worry about sickness, believing themselves ill; depression as they have to hide their intersex status, or else bear it among others who are not intersex, and who most often are not understanding or sympathetic; this often leads to thoughts of suicide. At that stage, if they survive, hopefully through the help of peer counsellors, social workers, faith-based values, and parental guidance and support, some of the intersex may open up about their status, while others, fearing stigma, judgment and exclusion, may remain in their closet and try to lead a double life, with great mental anguish and great harm to their health and well-being.

At the end, the only well-adjusted result is acceptance of their bodies and status, and the rational consideration of the medical pathways available to them if need be, whether hormonal or surgical, for example, but always with informed consent.

A, who is married to a widower in Nairobi, is a mother of an intersex child. Her husband has another child aged 5 from his previous marriage and who he fully supports and provides for, but he openly discriminates against A's intersex child. That attitude has only hardened after their extended family decided that the child should be killed following confirmation that the child was indeed an intersex. The mother refused, and henceforth has had to bear the brunt of stigma, discrimination and hostility.

Given how she was approached to participate in the death of her own child, A

thinks that many children born intersex must have been killed or died in the community for this reason. She remains fearful that villagers might try to harm her intersex child, and she has no one to turn to for support since her husband and the entire extended family have become distant and hostile.

She recommends that the government needs to do something to help the intersex persons, including through public awareness and sensitisation in the various institutions of society, as well as the creation of special schools for the intersex, healthcare support, and the elimination of discrimination and stigma.
— A, mother of 8-months old intersex child

5.6.2.1 Common Patterns of Reactions by the Parents/Caregivers

If the intersex persons go through the roller-coaster of emotions as their bodies mature and their day of reckoning with the intersex status approaches, their confusion and despondency is mirrored and in some cases amplified by that of their parents. In most African societies, intersex children are not favourably looked upon, and many people may at least subconsciously blame their parents for bringing forth such unusual children. The Taskforce encountered cases where the family unit broke up, as the stress and strain caused the father to blame the mother, in some cases chasing her away from the matrimonial home or abandoning her and their intersex child.

According to the findings of the study, mostly from the KIIs (interviews with intersex persons, their parents/guardians or adult members of their immediate households), the common patterns shared by the parents/caregivers included: suicidal thoughts and regrets, blaming birth of the intersex child as a curse or a taboo, family break-ups or abandonment of the mother by the husband and their relatives; resorting to consulting traditional healers, witchdoctors, spiritual leaders, and herbalists, many of whom, not being well-informed of the intersex status, may prescribe various 'purification' rituals or downright infanticide. It is notable that the ones who talked to enlightened allies were advised to seek help from various medical facilities, where they are likely to encounter more stigma and ignorance as well as risk misdiagnosis and suspect surgical interventions to 'normalise' the child; At this stage, many give up from the sheer weight of

their predicament, where specialised medical attention is way out of reach, and lower level healthcare facilities are of little or no help. Thereafter, some may be lucky enough to have their intersex children accept their status, and they support them in doing so. In all this, dedicated psychosocial support, publicly-funded medical aid schemes, multidisciplinary medical support teams, the existence of accessible medical centres of excellence with the right mix of skills and attitudes for handling intersex-related cases, as well as a generally enlightened legal and administrative regime could greatly help.

5.6.2.2 Options After Self Recognition of Intersex Status

Out of the 40 intersex persons interviewed, i.e. KIIs, 63% of them self-identified themselves as male and actively cultivated a male mode of life, while 20% recognised themselves as female. It is important to note that this self- recognition is not always in accord with that of the parent, or even the assigned sex as recorded at birth in the civil registration documents. That is why the principle of 'the best interest of the child' is important and paramount. 5% of these respondents recognised themselves as intersex and sought to make the best of their lives, while a further 12% were not ready to self-recognise as male/female/intersex. These responses are captured in Fig 5.10.

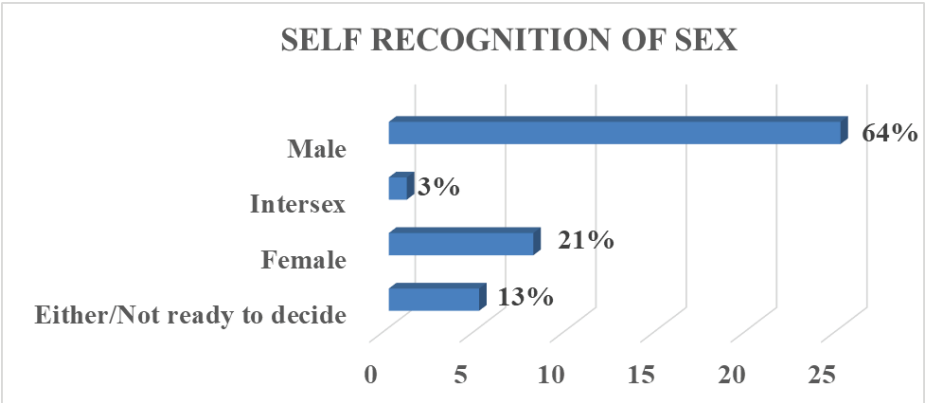


Fig 5.10: Self-recognition of the intersex status

On being asked during the interviews as to whether they recognised and accepted their condition as intersex, one respondent emphatically replied that they had accepted their intersex status and identified as such. From the interviews, some opted to retain the sex that was recorded at birth, while yet others recognised a different sex from that recorded at birth due to the physical male/female/intersex characteristics exhibited in childhood, during puberty or in adulthood. Where the self-recognised status of the child varies from that of the parents or the assigned status, the law and society must be willing to facilitate readjustment of the affected person, not only emotionally and mentally, but also practically through, for example, instituting non bureaucratic procedures for amending birth and other official civil documents.

> **"I have accepted myself the way I am and I am comfortable. I want to identify as intersex."**
>
> **— intersex respondent, Kakamega**

At the same time, it is worth noting that, among the intersex persons interacted with during the survey, a bigger number showed more male than female characteristics. In other words, majority had been raised as female. This may perhaps reflect the dominant gender roles prevalent in Kenyan society, where the masculine is exalted as the 'stronger and better' option.

5.7 Challenges Faced by Intersex Persons and Intersex Households

5.7.1 Health Care Challenges

According to the survey findings, 54% of the persons interviewed ranked their experience in accessing healthcare as poor, something attributable to the fact that healthcare facilities are part of the society and thus are influenced by the prevailing biases and prejudices. Whereas 32% of the intersex and adult members of intersex households ranked their level of access to medical care as 'Good', 14% of them were more cagey, indicating that they were neither satisfied nor dissatisfied by the level of care available to them. These findings are captured in Fig. 5.11.

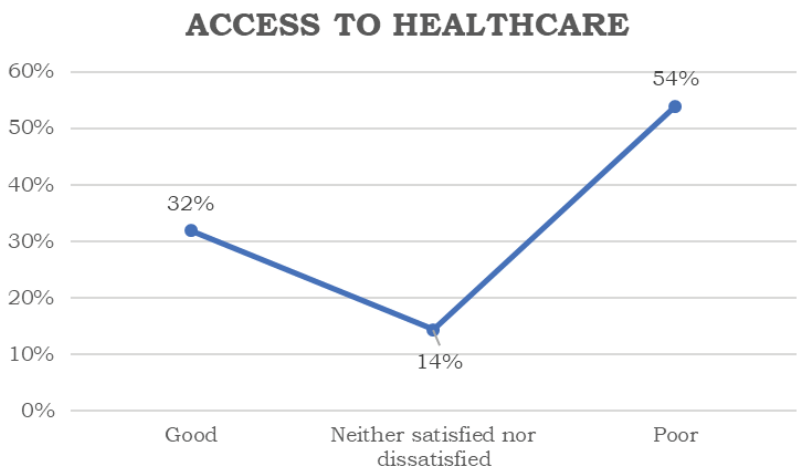


Fig 5.11: Challenges in access to healthcare among intersex persons

From the survey findings, these rankings may be attributed to many factors, including: lack of specialised and referral hospitals, which are either far between, inaccessible or otherwise unaffordable to the vast majority of them owing to lack of coverage by the NHIF or alternative private health insurance; majority of hospitals either did not have, or were not forthcoming with relevant information on the intersex status and its attendant issues.

Of the 112 key informants interviewed, 34 (29%) indicated that they had undergone surgery. Out of the 34, 30% reported that they were happy with the outcomes of surgery, while 24% were unhappy with the surgical interventions underwent. 43% did not provide comprehensive feedback on the status of the surgery. In addition, many intersex persons reported feeling that they were treated as "specimens" of curiosity due to too much exposure to the doctors, nurses, student interns, who often posed many unnecessary, intrusive and embarrassing questions.

C has experienced discrimination from friends and once dropped out of school, but timely intervention saved the day for her: after undergoing counselling, she made a choice to continue with education. She has a choice to take hormones but cannot, because they are expensive and out of her reach.

C, 19yrs, Nyeri County

Owing to this, many of them are hesitant to seek medical attention. Finally, the intersex respondents admitted that many were, in fact, reluctant to seek medical attention for issues related to their status.

From the findings of the survey, it is evident that there is need for systematic reform of the healthcare sector to better take care of the needs of the intersex. This includes through the development of treatment guidelines, publication and dissemination of relevant information packs, adoption of intersex-friendly procedures, and identification and operationalisation of intersex centres of excellence, especially in the level 5 and Level 6 hospitals across the country.

5.7.2 High cost of Medical Care

For those who sought medical intervention because of their intersex status, they complained of the high cost of surgery that ranged from Ksh. 125,000 to Ksh. 1,500,000. At the same time, the costs for hormonal therapy ranged from Ksh. 4,000 per session to Ksh. 12,000 per session, in addition to consultation fee of Ksh.6, 000. These costs are summarised in Table 5.6.

L had never met any other intersex person before, until the day the Taskforce interviewed her. Also, she never had her parents or anyone else explain to her why she was called Lydia yet she had no feminine features about her. Right now, her biggest challenge is healthcare. She says she has had some terrible abdominal pains for a while now, but for which she cannot seek medical attention as she does not like the way they treat her at the hospital. The questions are always intrusive and in her opinion useless in addressing her plight.

— L, Bungoma County

Table 5.6: Cost of intersex medical care (surgery and hormonal therapy) in Kenya

Treatment	Cost (Kshs.)
Surgery	125,000
	300,000
	500,000
	1,500,000
Hormonal Treatment	4000 per session
Consultation	6,000

The aforementioned costs were mentioned during the field work by the key informants. In addition to the foregoing, essential diagnostic tests related to the intersex are very expensive in Kenya. Table 5.7 gives a breakdown of some of the essential diagnostic tests for any intersex person to be able to determine the variation of their intersex status. These are the average costs as ascertained during the survey.

Table 5.7: Essential intersex diagnostic tests and their costs in Kenya

Diagnostic Test	KES
MRI –Cysto/Lap BX	45,000/-
Karyotype	35,000/-
Fish-SRY gene	30,000/-
17-OH Progesterone	3,000/-
Deoxycortisol	2,700/-
Androsteredione	2,900/-
Testosterone	3,000/-
Renin	3,600/-
LH	3,200/-
FSH	3,200/-
AMH	8,500/-
HCG Stimulation	2,700/-
Inhibin	-
General or specialised operation	-
TOTAL	**142,800/-**

The survey found out that most of the diagnostic and therapeutic interventions related to the intersex persons in Kenya are presently carried out at a few leading hospitals clustered around the major cities and towns of Kenya. These are: Kenyatta National Hospital; Moi Teaching & Referral Hospital; Jaramogi Oginga Odinga Teaching & Referral Hospital;

Wajir County Referral Hospital; the Aga Khan Hospital; Kijabe Mission Hospital; St. Mary's Hospital in Langata, Nairobi; and Gertrude's Children's Hospital. It is possible that other leading private hospitals in the country may have capacity for offering specialised intersex medical services, but its cost is likely to be exorbitant, hence a possible reason why they were not mentioned by respondents.

5.7.3 Parental Views on Intersex Surgery

Parents and caregivers who had their children undergo corrective surgeries reported having mixed feelings on the decision to have surgery, the procedures themselves and the outcomes thereof. Some felt that medical intervention had to be done urgently when the child is young in order to 'fix' the sex of the child and thus 'normalise' them into the accepted binary of male/female. This, they reported, could help the children 'look like the other children' and thus help them to avoid stigmatisation and discrimination while growing up. This finding speaks to the need for general awareness on intersex for society members so that they can better understand the issues and challenges affecting them.

At the same time, whereas the outcomes of the surgeries may be positive or negative, some parents indicated that it is important to let the child reach puberty in order to better participate in the decision as to whether or not to undergo the surgery. This suggests that the there is a popular, albeit very faintly felt, concept of 'the best interest of the child' among segments of the population, however small. This could be augmented by targeted awareness and culture change interventions, and this segment could then become the spearhead for change, acting as 'allies' of the intersex and helping spread the word on the realities and desired behaviour patterns regarding them.

This group of parents and guardians strongly reported feeling that, in any case, before any surgical procedures are undertaken on an intersex child, proper diagnostic tests should be carried out and accompanied by the requisite medical advice and support. Again, this echoes the need for a multidisciplinary medical approach to the issues of intersex surgery and overall medical support.

Still, other parents indicated that they had no choice and their intersex children had to undergo medical surgical intervention due to existing health

complications or emergencies. A significant portion of these respondents complained that their intersex children had been subjected to 'corrective' surgeries without being afforded adequate information on the nature of the surgery and other alternative pathways, if any. Respondents from this group admitted that at same time, they had taken their intersex children to hospital and consented without proper information or advice. This situation can be remedied by the setting up of multidisciplinary medical teams to handle intersex issues, insistence on informing the patient on all alternatives and the diagnosis, and the adoption of clear rules and procedures, including advisory support and diagnostic tests, to be followed in dispensing of all intersex cases in the country. The setting up of clearly designated and well publicised intersex health 'centres of excellence' and a reference mechanism from the lowest level of the health system would also help.

Overall, a good number of parents reported recognising that Kenya lacks specialised treatment facilities and personnel for the intersex persons but, nevertheless, they felt compelled to take the risk to undergo surgical medical interventions.

5.7.4 Intersex Persons' Views on Surgery

As the 'ground zero' for all intersex-related surgery, a good number of which are actually unnecessary and often unsuccessful attempts a 'correcting', 'fixing' or 'normalising' the sex of the affected children, the intersex persons had some interesting perspectives to share as well. To begin with, a majority of them felt that any non-emergency intersex-related procedures should be deferred until the child is of age, ideally up to reaching puberty to allow the manifestation of the dominant sex characteristics.

Secondly, they reported that the child should give their consent to all such surgical interventions. Of course, this can only be done in the context of the appropriate advisory and medical support so that it effectively constitutes 'informed consent'. Nearly all the intersex persons interviewed strongly opined that, even where any surgery is to be undertaken, all the necessary medical diagnostic tests must be conducted to establish the fact beyond doubt before the surgery, and that these must be thoroughly documented for their later reference, should they want to seek redress or remedy later in life.

That period of testing and confirmation, it was felt, could also allow them a window for seeking a second medical opinion before proceeding with such a critical and often irreversible sex-related procedure. This, they felt, could protect the intersex child against unnecessary and harmful 'corrective' procedures but in truth cosmetic interventions, which tend to have serious deleterious effects of on the health and wellbeing of the intersex persons later in life.

5.7.5 Intersex Education & Training

Education is one the most influential socialisation agents in society. The role of education in shaping social values and attitudes, promoting social cohesion and national integration, infusing positive values such as tolerance and affording the acquisition of key skills and abilities for success in later social, vocational, academic and professional success cannot be gainsaid. Yet, in such an important arena, the plight of the intersex is glaring.

In terms of access to educational facilities and opportunities by intersex persons, the survey by the Taskforce established that there existed clear obstacles and impediments for the intersex population in Kenya. A majority (57%) of the survey respondents ranked their experience in accessing education as 'Poor'. In many cases, these challenges are informed by a general and widespread lack of awareness and non-recognition of the non-intersex and their rights. This is shown in Fig. 5.12.

G was born and raised male but, when he turned 18 years, he started developing some feminine features, a more visible vagina and enlarged breasts. He was so shocked and confused that he did not share this with anyone, not even his own parents. To date, this remains his most closely guarded secret. He feels that there should be no medical or surgical intervention to 'fix' the intersex persons, as that would, in his words, be 'akin to FGM'. Instead, he recommends the training of community health workers to deal with such issues from the grassroots.

— G, intersex person, Kilifi County

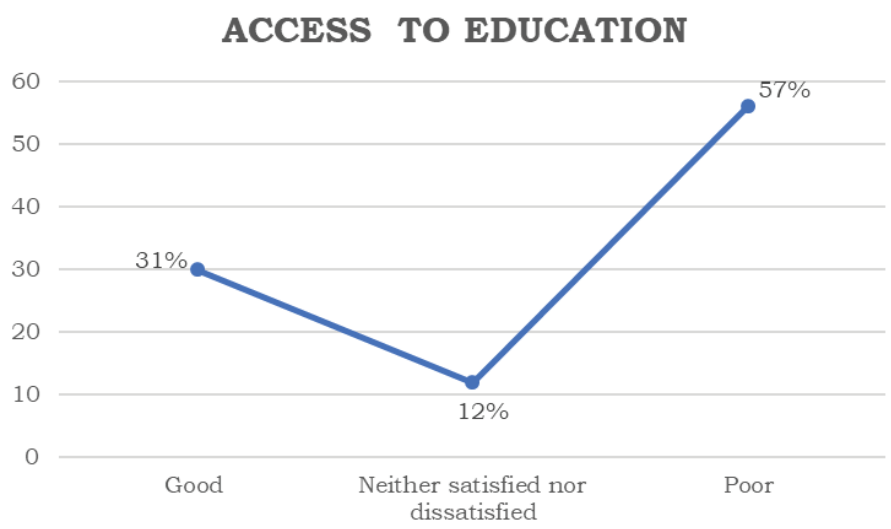


Fig 5.12: Access to education

The survey findings indicate that school teachers and administrators are often part of the problem. This is because, as role models, when they fail to recognise, facilitate, promote and affirm the status and rights of the intersex in the school environment, but instead often participate in actions and decisions that actively undermine the enjoyment of these rights (such as the right to dignity, privacy and bodily integrity), the peers and other students find it acceptable for them to cajole, embarrass or otherwise 'bully' the intersex persons as the out-group or even outcasts that do not 'belong'.

In that way, the study established that the learning environment becomes very hostile to the intersex children who have to deal with constant ridicule in schools, in addition to the fact that they don't have any administrative and structural facilities to resort to. Faced with these challenges, the intersex children usually face an uphill task from the admission level and during their entire (and often short) stay in school, before dropping out prematurely and withdrawing to the relative safety of their homes where they enjoy some level of security.

Among the key challenges identified by the Key Informants as impeding access to education and training for intersex persons in Kenya include: difficulties in obtaining birth certificates in their right sex status, which

make it challenging to get admission to both boys and girls schools, or may later lead their being forced out of school when discovery of their intersex status is made; high school dropout rates, which may have a domino effect, making most intersex children of school-going age to consider it normal to drop out of school; frequent changes of school in the course of their education in an attempt to hide or otherwise evade ridicule and stigma; school facilities and amenities, such as open bathrooms and toilets, which are not conducive to the intersex children; unresolved privacy issues and concerns and social rejection by other classmates and playmates, who may refuse to integrate with and accept them, and; rampant accusations on charges of engaging in and/or promoting lesbianism and homosexuality, for which they are often expelled from school.

As a result, the intersex persons often find the educational environment hostile and intolerable. Subsequently, they suffer low esteem and difficulties in adjusting, leading to poor performance in class that has nothing to do with their mental endowment or academic potential. Thus, they commonly drop out of school, suffer very low transitions rates and are very poorly represented in all segments of society, including school, work, social life and the professions.

Owing to these gargantuan and otherwise insurmountable challenges, many intersex children start schooling very late as they first have to wrestle with the time-consuming and energy-sapping intricacies of personal documentation from very early in their life. Not surprisingly, the study found that some parents of the children intersex opt to keep their intersex children away from the schools for fear of molestation.

Thus, there is an urgent need to re-examine all facets of the educational system as presently constituted to remove all stigmatising and problematic statutes, rules and procedures, and to replace these with progressive alternatives that better recognise, support and promote the diversity of the Kenyan population and support the fullest expression of their potential without discrimination on any basis.

Born in Mai-Mahiu, S was identified and socialised as a boy. He went to school just like other normal children, though, with difficulties especially when it came to interaction and socialising with other children. Still, things became so bad that he opted to stay behind in class while other pupils went to the toilet at break time so that he could always go alone later—as he needed to use the girls' washroom. He finally quit school in Class 5, after the challenges became unbearable. "The stigma and constant mocking, the insatiable curiosity of the other students threatened to drive me mad," he relates. He bitterly recounts an incident in which some of his schoolmates plotted and forcefully stripped him naked to trying and verify his sex. Thereafter, he was heavily stigmatised by his classmates and the community and, and he quit school immediately thereafter and never went back, ever again.

— S, an intersex person, Naivasha

5.7.6 Legal Recognition and Documentation of Intersex Persons

Right from birth, intersex persons in Kenya have to contend with statutory and administrative bottlenecks whenever they pursue identity and registration documents. This greatly compromises their rights, including the right to a personal identity, nationality, free travel in and out of one's country, and the right to the pursuit of a host of other legal, social and economic rights.

From the survey, while 44% of Key Informants ranked their access to key civil documents as generally good, 45% of them ranked them as dissatisfactory or poor. Further, 15% did not express a clear opinion on the matter, categorising their responses as neither satisfying nor dissatisfying. This is depicted in Fig 5.13.

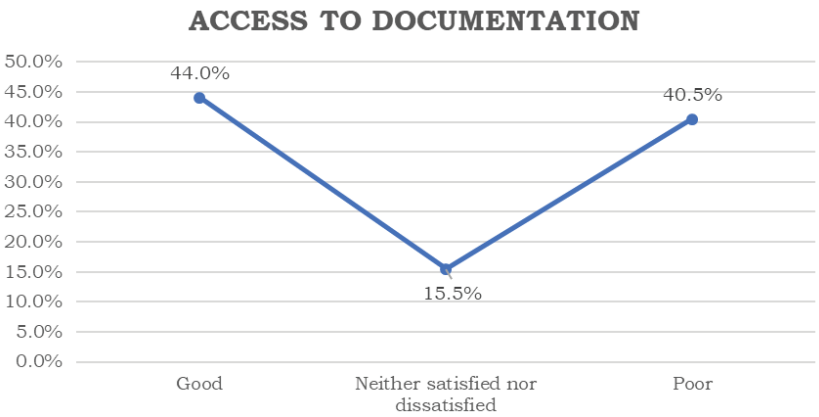


Fig 5.13: Legal Recognition and Documentation of Intersex Persons

The study established that, whereas a majority of the intersex persons have birth certificates, these most typically engender and perpetuate conflict with the law, since the recorded sex conflicts with the self-recognised sex. Instead of facilitating their further progress, the birth certificates thus only make it more difficult for them to attain ID cards.

This conflict accelerates once they join the school system and at puberty, when their biological maturity leads to a markedly changed physical appearance whose conflict with the recorded sex becomes most readily apparent. Due to this conflict between the recorded sex in the birth certificates and their physical appearance, the few who have IDs have acquired them through the use of alternative ways such as sworn affidavits, baptism cards and assistance of the third parties.

This long process of acquiring ID cards causes the intersex persons to miss out on key opportunities in life while the rest of their peers progress unimpeded. It also often results in the intersex person having conflicting documents, where the name and recorded sex in the birth certificate and school documents are different from the sex in the birth certificate and other subsequent docs (e.g. ID card and passport).

Take a child whose sex is recorded as a female named Ruth, for example. The child will obtain a birth certificate and school records with the name of Ruth. On reaching puberty, the child self-recognises as male and adopts

the name Ryan. If Ryan uses any of the above-named methods (affidavits, baptism cards, third party alternatives, etc.) to obtain an ID, the ID card for a male called Ryan would conflict with the birth certificate and the school certificates, causing untold administrative havoc, personal dilemmas and undeniable loss of opportunities. As a result of these conflicts in their documents and physical appearance, many fall foul of the law and are suspected of impersonation, fraud, masquerading as different persons, obtaining by false pretence, etc.

5.7.7 Employment

Employment, especially for the youth (ages 18-35), is one of the premier ways of earning a living in the contemporary economy. For intersex persons, however, this avenue is all but blocked due to several serious impediments in their path. The study established that, for a majority (57%) of intersex persons and their parents/caregivers, their experience with employment was poor. Only 16% of the Key Informants reported their experience of employment as good. These responses are captured in Fig. 5.14.

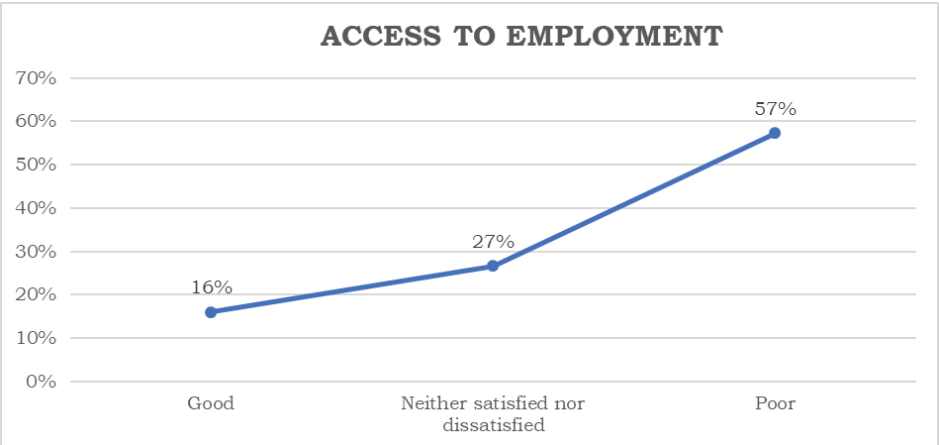


Fig 5.14: Access to employment for intersex persons

Legal Recognition

At that time, I was trying to get a birth certificate for baby. They refused to assign a gender because the tests had not been done and physically they couldn't tell what sex the baby was. When I finally got the birth certificate, the gender was presented as (??). This only served to confirm that my baby was abnormal and I got very distressed. — Mama L (Nairobi County)

Among the issues and concerns raised to account for this sorry state include widespread fear among the intersex persons and their parents/guardians as well as their siblings and members of their households of what would befall them if they closely interacted with unsympathetic strangers in the workplace. They reported fearing victimisation and judgment, which would frustrate them and affect their performance as well as chances of career progression. In addition, their prospects were not helped at all by their often conflicting identity documents, making potential employers to face a difficulty in establishing their true identity and sex status, which often is neither male nor female. Due to the low levels of education, low transition rates and high school drop-out rates, many intersex persons can simply not compete with the rest of their male and female peers in the job market. The lucky few who get employed face an uphill task holding on to their jobs, owing to massive social pressure to conform to the binary of male or female, coupled with both subtle and no-so-subtle harassment and ridicule which forces them to try changing jobs often or getting out of employment. In the end, most intersex persons simply choose to stay home as the better alternative, from where they may soon be forced to seek out menial and nondescript jobs where they can work anonymously away from the public glare, just to make ends meet.

5.7.8 Access to Institutions for Administration of Justice

As any other citizens, intersex person may once in a while find themselves in contact with law enforcement. Intersex persons who have been in contact with the law enforcement officers felt that their privacy was eroded through intrusive and unnecessary searches. Those who were held either in remand or prison were mixed with the other male and female inmates, exposing them to sexual harassment and other dangers. These

responses were received from the key Informant Interviews, which were supplemented by the institutional data

From their responses, among the key challenges that came to the fore are: rampant cases of sexual harassment and rape/attempted rape by other inmates, lack of appropriate facilities for their use as intersex persons, lack of well trained and specialised personnel to deal with intersex issues, and lack of a clear protocol on how to handle intersex persons in a way that protects, promotes and upholds their human rights. As a result, the Key Informants reported going through unending psychological challenges, eroding their right to privacy and freedom from torture, among other fundamental rights that are infringed as a matter of course.

Therefore, the survey establishes a clear case for the reform of the prison and remand system, all the way from admission through search and registration, to assignment in specific prisons with appropriate intersex-friendly facilities, the training of at least some key personnel in each such facility in the handling of intersex persons, and consideration, where possible, of preferring non-custodial sentences for intersex persons, among other measures.

5.7.9 Societal/Customary/Religious Awareness/ Challenges

According to data from the KIIs, the challenges facing intersex persons in Kenya primarily emanate from low public awareness levels on the intersex status due mainly to unenlightened religious and customary beliefs and practises. From the survey, these challenges include: stigma and discrimination, which have a cumulative negative impact on their social relations; low self-esteem and exclusion, and dysfunctional social relationships. As a consequence, the intersex children typically suffer isolation, sexual violence, rejection, exclusion and threats. As already mentioned, the KIIs were supplemented by data from the institutional visits (218), which highlighted additional challenges, namely: stigma, discrimination, rejection, infringement of privacy, isolation, withdrawal and low self-esteem.

5.7.10 Awareness and Understanding of Intersex Issues by Professionals

Data from the field survey showed that the professionals sampled were generally aware of the existence of intersex persons. From their responses,

their understanding of the intersex persons was mainly anatomical; that they are persons with both male and female organs. That betrays a gap in their knowledge, for the Taskforce established that intersex goes beyond physical, gonadal or sex identification, and encompasses important hormonal and genetic considerations, most of which may become apparent in childhood, puberty or in adulthood. This gap can be bridged through targeted IEC materials and advocacy, and these professionals can then become very good allies in the cause of the intersex in society. The role of professional societies in this effort could be crucial.

A further understanding of intersex that was conveyed by the professionals sampled is that they are a taboo, a curse to the society and outcasts. In that respect, the professionals shared the same basic and erroneous misunderstanding with that expressed by the general public (94%). The study found the highest levels of professional awareness among government officers (72%), and the lowest among religious and faith-based institutions at only 6%.

However due to a lack of supportive policy frameworks, the professionals often adopt a passive approach when dealing with the intersex persons. A case in point was in a boy's rehabilitation school, where an intersex child raised as a boy but who exhibited female characteristics (monthly menstruations) underwent great suffering and torment as the institution had no provision or budget allocation for sanitary towels. The principal had first to write to the head office to ask for specific permission to buy the sanitary towels before any action could be taken.

These findings corroborate the concern about the role of backward religious beliefs and practices in contributing to the plights of the intersex in Kenya. Thus, religious and faith-based organisations must be specifically engaged and reached with approved intersex-friendly messages which, once they internalise, they can share with their members and congregations.

5.7.11 Awareness of Intersex Persons and Issues Among the General Public

The study established the prevalence of a limited and often mistaken understanding of the intersex persons and related issues on Kenya, suggesting the need for sustained and systematic public education

and awareness on the same. 94% of respondents from the Mwananchi questionnaire survey (both online and face to face) expressed their feeling that intersex children were a taboo, a curse on their parents and community and not natural nor to be accepted and treated as such. This is shown in Fig. 5.15.

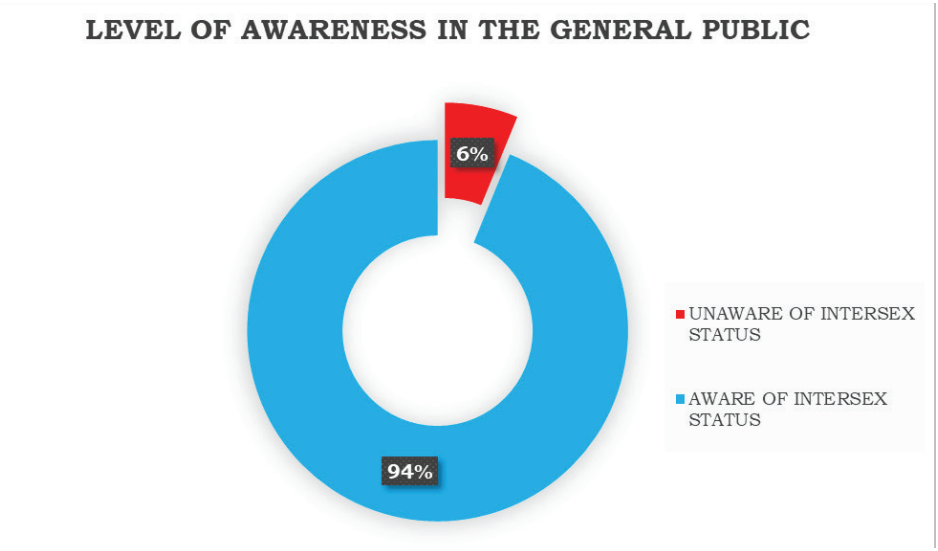


Fig 5.15: Level of awareness of intersex persons and issues among the general public

5.6.12 Sources of information on the intersex

From the survey, the majority of respondents (51%) reported their source of information on intersex persons and their related issues as the media. At the same time, 36% got their information from the surrounding community or general society, while only 13% had encountered intersex persons and learnt firsthand from them. This applied to all segments of the population sampled. This information is captured in Figure 5.16

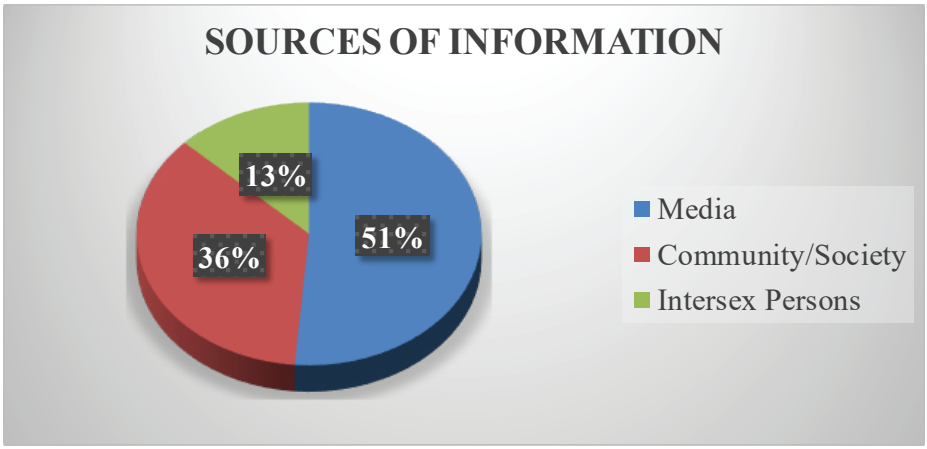
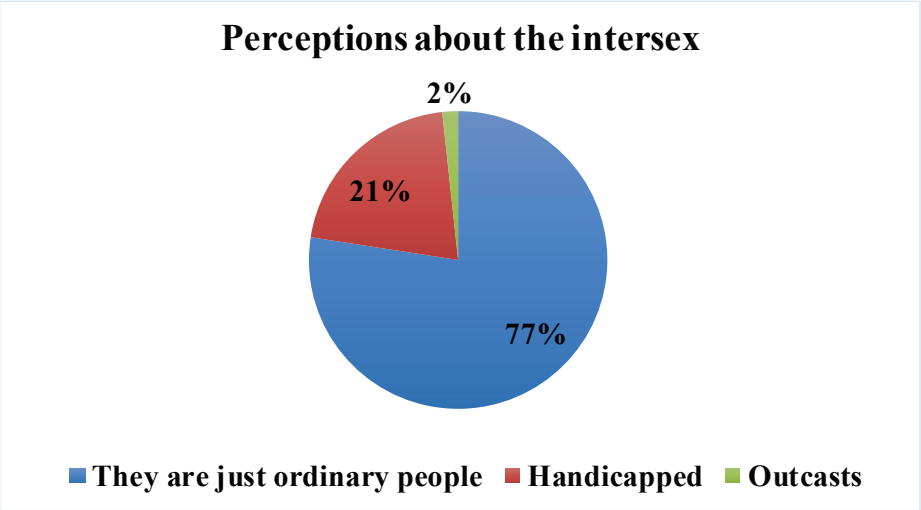


Figure 5.16: Sources of information on the intersex

5.6.13 Perceptions about the Intersex

The study shows that 80% of the Wananchi interviewed across all 37 counties sampled felt that intersex persons are just ordinary people. At the same time, 21% of respondents reported feeling that the intersex persons are handicapped, while 2% think that they are outcasts. These responses are depicted in Fig 5.17.



Perceptions about the Intersex

These findings indicate the vital role played by the mass media in shaping public perceptions and attitudes about a myriad of issues in society, not least among them, the treatment and perception of minorities and the marginalised such as the intersex persons. In addition to other actions taken to address the challenges the intersex persons face, there must be a robust media component to help drive the behaviour and culture change required to bring effective improvement in the lot of the intersex persons and other marginalised segments of the population in Kenya.

5.6.14 Challenges Outlined by the Institutions and Wananchi

a) Lack of or Sufficient Statistics for Decision Making

Institutions had limited or no data on the intersex persons and the issues and challenges affecting them, while those that had data found it aggregated and uncategorised, making it difficult to locate and provide for the intersex in the mass of data.

b) Education and Training

The challenges identified under this rubric include: high school dropout rates due to harassment by peers at school (especially boarding school).

Intersex children face discrimination, and are given pejorative nicknames associated with their conflicting features from their name/presentation. In addition, the intersex students face psychological challenges that negatively impact their academic performance and self-confidence. Other identified challenges include: lack of appropriate bathroom and accommodation facilities in schools and other public spaces; missing out on examinations due to conflicting registration records; constant change of schools due to non-inclusive programs (including games and sports), stigma and insecurity; inconsistent school attendance due to continuous medical check-up visits lasting close to a month during treatment, and; common inability to sit for exams due to disparities in documentation and appearance.

c) Health

According to the survey findings, among the health-related challenges facing the intersex include: Lack of proper mental/psychosocial and/or professional care; expensive surgeries, medical procedures and care; difficulty finding trustworthy care-givers for intersex children; reports of exploitation by uninformed doctors who conduct surgeries without approval and informed consent of parents, while some doctors based in public hospitals decline to attend to them as a public service, instead preferring to refer them to other private facilities which they own or work for, and which are much more expensive; doctors' continuously using the intersex as specimens, which intersex persons find intrusive, and; mismanaged surgeries due to miss-diagnosis or wrong treatment by doctors who were reported to sometimes conduct up to 7 surgeries on one person. As a consequence, some intersex persons reported having scars that have not healed and suffer incontinence, forcing them to use diapers through to adulthood.

Other challenges include difficulty in accessing medical cover (NHIF), especially for hormonal treatment; lack of specialised doctors, treatment centres and equipment hence the need to send diagnostic tests to other countries (mainly India and South Africa), and having to proceed abroad for surgeries not otherwise available in Kenya (e.g. microsurgery), which is expensive and stressful.

d) Sports

For the intersex persons who participate in sports, they have the challenge of choosing the category to compete in. They are often forced to undergo tests, some of which may be intrusive and unwelcome. As a result, they may be asked to take hormonal drugs to artificially keep some hormones in check, with possible life-long and deleterious effects on their health and well-being. In a school in Meru County, for example, a girl was disqualified from competing in the cross-country marathon because the games officials considered her to be more masculine than other girls in the same race. This decision negatively impacted her mental health and morale and she decided never to participate in the county games, ever again.

e) Employment

Most intersex people find it difficult to apply for gendered jobs, which do not take their interest into account. This is made worse by the inconsistency of documentation, which may force them to make disclosure of their status that often may cost them the opportunity. In fact, most employment vacancies are expressly advertised on the binary basis of fe/male openings, so the intersex persons naturally fear to apply for jobs due to their status.

f) Financial Services

The intersex persons also face challenges in accessing banking, mobile money transfer and most financial services that require identification. These extend into challenges experienced in identification during over-the counter transactions owing to their physical appearance, which is commonly different from the documents they present. In Kiambu County, for instance, an intersex person, R, who went to make a cash withdrawal over the counter was delayed and detained until the police arrived. His ID card was for a female, which is the sex that had been recorded at birth. It took the intervention of a senior politician who knew the bank manager who made a telephone call explaining that R was, in fact, intersex, before the transaction could be allowed to proceed.

g) Elections

The intersex persons also face challenges in voter registration or as candidates for elective office. Whereas there may be dedicated queues for

special interest person or for wo/men separately, there are no designated queues for intersex persons. Their physical identity may also contradict their ID, making identification difficult and hence preventing them from voting.

h) Legal/Policy Challenges-Registration and Documentation

The intersex persons face challenges while applying for documents like ID and birth certificate. There is lack of data/records on intersex persons, thus they comprise the 'invisible community', not quite recognised or classified as existing in the community. These challenges persist when it comes to making changes to their registration documents after undergoing surgeries, where change of the sex marker from 'F' or 'M' becomes difficult.

i) Socio-Cultural Challenges

The socio-cultural challenges that face the intersex persons include stigma due to limited social interaction, identity crisis /psychosocial trauma, neglect leading to a withdrawn lifestyle, and difficulty in forming social relationships, among others, which include identification at birth as Labeeb (intersex), thus branding them and leading to life-long discrimination, lack of societal recognition and visibility, and child abandonment and family breakages. These challenges have been aptly captured by a graphic illustration created and shared by an intersex person as shown in Fig. 5.18.

5.8 Challenges of data collection

One of the Taskforce Terms of Reference was to collect data on the number, distribution and challenges faced by intersex persons.. In pursuing its mandate, the Taskforce faced the following challenges: time constraints, made more pressing by difficulties in tracing out and engaging the intersex in diverse localities of the Republic. Considerations of intersex as a taboo topic also posed a great challenge as respondents were hesitant to give out information. Additionally, limited financial resources adversely affected the logistical preparations and hence restricted the scope of institutional visits. Finally, the Taskforce encountered a major lack of disaggregated data on intersex persons in all the institutions visited and sources consulted.

These challenges were mitigated by: inclusion of intersex persons in the data collection exercise; the cooption of Intersex Persons Society of

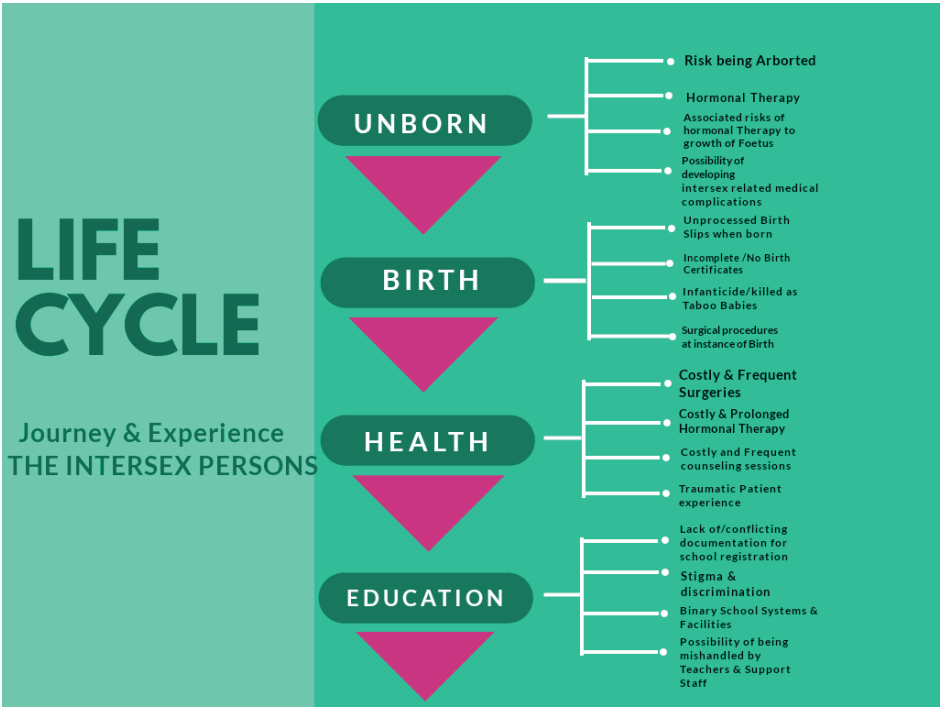


Fig 5.18: Life journey and experiences of an intersex person

Kenya into the taskforce; collection of secondary data from the following institutions: KNH, MTRH, Jinsi Yangu, Intersex Persons of Kenya, Gender Minority Advocacy Trust, Kijabe Hospital and the Civil Registry. In all, the Taskforce resorted to sensitisation approaches first for all cases before the main agenda of the data collection could be broached and pursued in earnest.

6.

6.0 RECOMMENDATIONS

6.1 Introduction

In view of the status (number, distribution and challenges) of intersex persons in Kenya; taking into account the lessons and milestones gleaned from a comparative analysis of international, regional, and selected States' approaches to the care, treatment and protection of intersex persons, and arising from an analysis of the policy, legal, medical, administrative and institutional frameworks governing structures and systems with regard to intersex persons in Kenya, the Taskforce identified and hereby proposes the following thematic reforms:

6.1.2 RECOGNITION

1. The Legislature in consultation with stakeholders to facilitate recognition of intersex persons in the law. This could be realised through the introduction of an Intersex (I) marker in all official documents that require identification of sex. This calls for amendment and introduction of a comprehensive definition of who an intersex person is.

More specifically, this requires an amendment of:

Interpretation and General Provisions Act, Cap 2

Section 3 of the Interpretation and General Provisions Act, Cap 2, be amended to provide for the following new definitions as follows:

"Intersex" means a person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.

"Sex" means a person who is male, female or intersex.

Persons Deprived of Liberty Act, 2014

The term intersex as defined in Section 2 of the Persons Deprived of Liberty

Act, 2014 be amended by deleting the same and substituting therefor the following new definition:

"Intersex" means: A person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.

Children Act, 2001

Section 2 of the Children's Act, 2001 be amended to provide for the definition of an Intersex child as follows:

"Intersex child" means a child who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns which could be apparent prior to, at birth, in childhood, puberty or adulthood.

6.1.3 DOCUMENTATION:

2. **Effecting expeditious provision of birth certificates, identification documents, passports and other official personal documentation by including provisions for the intersex (I) marker. This should include flexible legislative and administrative procedures for amending sex markers in official documents and correcting the original official documentation.**

Compared to their male and female counterparts, intersex persons are disadvantaged because they cannot register themselves in accordance with their sex. To ensure equality in that regard, the Taskforce proposes safeguards against infringement of their right to recognition before the law. This will be effected through amendment of legislation including: Births and Deaths Registration Act, Cap 149, Registration of Persons Act, Cap 107, Interpretation of General Provisions Act Cap 2, Kenya Citizenship and Immigration Act, Cap 172 and Children Act, 2001.

Further, the development of attendant guidelines within the Acts of Parliament should be initiated to include an 'I' marker for intersex as well as provision to amend documentation. Additionally, administrative provisions

should be formulated to effect any changes in other records, including school certificates and institutional administrative records such as Birth Notification and medical cards.

Births and Deaths Registration Act, Cap 149:

Section 2 of the Births and Deaths Registration Act, Cap 149 be amended to provide for the definition of Sex to read as follows:

"Sex" means a person who is male, female or intersex.

Further, the Taskforce proposes that a new section 14A be introduced in the Births and Deaths Registration Act, to provide for a change of sex as follows:

An intersex person may amend their sex marker from male or female to intersex, or from intersex to male or female, upon the production to the registrar of a medical certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services.

In the Births and Deaths Registration Rules, 1966, we propose that the Schedule be amended as follows:

Form No.1

3. SEX OF CHILD

Intersex 3 | |

Form No.6

3. SEX OF CHILD

Intersex 3 | |

Registration of Persons Act, Cap 107

Section 3 of the Registration of Persons Act, Chapter 107 be amended to provide for the definition of Sex as follows:

"Sex" means a person who is male, female or intersex.

Similarly, we propose for an introduction of a new section on the change of sex as follows:

An intersex person may amend their sex marker from male or female to intersex, or from intersex to male or female, upon the production to the registrar of a medical

certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services.

Kenya Citizenship and Immigration Act, 2011

Section 2 of the Kenya Citizenship and Immigration Act be amended to provide for the definition of Sex as follows:

"Sex" means; a person who is male, female or intersex.

Similarly, the Taskforce proposes introduction of a new sub-section 28 (1) (a) on the change of sex as follows:

Where an intersex person is the holder of a passport or other travel document and wishes to change the sex marker in the passport or travel document, the holder shall apply in the prescribed manner and produce before an immigration officer a medical certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services.

Further, we propose an amendment to sub-section (2) of the Kenya Citizenship and Immigration Act by inserting "and 1(a)" in the proviso immediately after "sub-section (1)".

Kenya Citizenship and Immigration Rules, 2012

Amend Form 19 in the First Schedule of the Kenya Citizenship and Immigration Regulations, 2012 to introduce a box as follows:

Intersex	3	

6.1.4 CRIMINAL JUSTICE SECTOR

4. **The Legislature to amend laws to ensure equal treatment, respect and protection of the dignity of intersex persons within the criminal justice sector.**

Prison Rules, 1963

Amend Rule 32 (2) (a) by deleting the same and substituting therefor the following new paragraph:

(a) Male, female and intersex prisoners shall be kept absolutely separate from each other and shall be confined in appropriate separate accommodation.

Introduce a new Rule to provide as follows:

Where the prisoner is an intersex person, they shall choose the sex of the officer to conduct the search.

Criminal Procedure Code, Cap 75

Amend Section 25 of the Criminal Procedure Code, Cap 75 by introducing a new paragraph (c) as follows:

(c) When the arrested person is an intersex person, they shall choose the sex of the officer to conduct the search.

Borstal Institutions Act, Cap 92

Delete and substitute section 18 of the Borstal Institutions Act, Cap 92 as follows:

Male, female and intersex persons shall be detained in appropriate separate facilities.

Borstal Institutions Rules, 1963

Delete and substitute Rule 17 (2) (a) of the Borstal Institutions Rules as follows:

(a) Male, female and intersex inmates shall be kept in appropriate separate accommodation.

Amend rule 21 of the Borstal Institutions Rules by inserting the following words, "by a person of the same sex" in the proviso immediately after the words "as the superintendent directs".

Introduce the following new Rule 21(a) to provide as follows:

(a) Where the inmate is an intersex person, they shall choose the sex of the officer to conduct the search.

Probation of Offenders Act, Cap 64

Introduce a new section to provide as follows:

Where an intersex person or intersex child is placed under supervision of a probation officer, the probation officer shall be of a sex acceptable to the intersex person.

Children Act, 2001

Introduce a new section to provide as follows:

Male, female and intersex children deprived of liberty shall be accommodated in appropriate and separate facilities.

6.1.5 PUBLIC HEALTH

5. The Ministry of Health in consultation with relevant agencies to formulate specialised programmes to provide for intersex persons' care, treatment and protection in health facilities to facilitate their access to the highest attainable standard of health.

   a) Development of information booklets focusing on pre-natal counselling to incorporate sensitisation on sex development.

   b) Streamlining of compulsory genetic testing within the Maternal and Child Health (MCH) guidelines for expectant mothers. This will introduce ante-natal genetic testing for every expectant mother and foetus, including for Congenital Adrenal Hyperplasia (CAH), thus reducing under-5 mortality rates attributed to CAH.

   c) Introduction of essential screening for all new-borns to improve early detection of high risk intersex variations.

   d) Mapping out of centres of excellence within the existing Level 5 and Level 6 Hospitals to offer specialised medical treatment for intersex persons through multi-disciplinary teams. The Government to ensure that these facilities are properly equipped and staffed to offer holistic care and treatment in accordance with the needs of each intersex person.

   e) Put in place a clear referral mechanism for intersex persons within all health facilities to the designated centres of excellence.

6. Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent. The Director of Medical Services in consultation with the relevant regulatory body (Kenya Medical Practitioners and Dentists Board, KMPDB) to develop a protocol on surgical and hormonal interventions that constitute medical emergencies.

In all instances, the best interest of the child is paramount. The intersex child and guardians/ parents of the child or intersex person must be fully and properly informed on the potential risks and benefits as well as consequences and alternatives of all major sex-related medical interventions or lack thereof. In addition, their express consent for medical interventions must be obtained. Further, except for a duly documented medical emergency, such decisions should be deferred until such time that the intersex person is able to give informed consent as facilitated by the multi-disciplinary team, taking into account the child's age, mental and physical development.

7. **The Ministry of Health to work with other regulatory agencies towards the protection against involuntary and inappropriate medical intervention and ensure effective remedy for persons otherwise affected.**

8. **The Ministry of Health in consultation with the KMPDB to formulate a harmonised and comprehensive care, treatment and protection guideline focusing on a child- and human rights-based approach for the medical care and protection of intersex children.**

The guidelines shall be pre-cautionary in nature and will provide an outline of the procedures and steps to be followed by healthcare professionals, including:

a) Prohibition of 'normalising' surgeries that do not advance the child's best interest and welfare;

b) Provision of complete information to form the basis of 'informed consent' for medical intervention;

c) Conducting of requisite diagnostic tests;

d) Consideration for and monitoring of development milestones of the child in order to determine the appropriate medical intervention, and;

e) Constitution of a multi-disciplinary team including a neonatologist, endocrinologist, geneticist, urologist, paediatrician, surgeon, gynaecologist, psychiatrist, clergy, ethicist, radiologist, molecular biologist and social worker to determine the appropriate medical intervention with regard to intersex persons.

9. The State to establish a fund to cater for all medical-related interventions for intersex persons due to the high cost implications of specialised intersex medical care. The State to give a free/subsidised medical insurance health cover under the NHIF or any other scheme for intersex persons.

i. Some of the proposed diagnostic tests to be covered include:

   a. Karyotype

   b. Hormonal tests i.e. ADH, DHEA, 17 Hydroxyprogestin

   c. Imaging i.e. ultrasound and scans

ii. Some of the proposed hormonal drugs to be covered may include:

   a. Hydrocortisone (steroids)

   b. Androgens

   c. Testosterone

   d. Oestrogen

iii. Appropriate surgeries

iv. Psycho-social support

6.1.6 EDUCATION AND AWARENESS

10. Roll out awareness and sensitisation initiatives.

   a) The Ministry of Education to review the digital registration system (NIEMS) to include a special registration number for intersex children. This system should also include:

   i) The feature to change the sex marker i the system later when self-recognition occurs after puberty.

   ii) A special discipline feature on when to alert the Head-teacher and/or County Education Officers of the special child (intersex) and facilitate appropriate protection.

   b) The Ministry of Education to provide for appropriate and mixed uniform including the wearing of trousers and dress with trousers in primary schools to respect and protect the dignity of the child as they develop.

c) Promotion of continuous and targeted awareness to the general public and all stakeholders to combat stigma and promote societal acceptance.

d) Review of the education curriculum in primary, secondary and tertiary education institutions appropriately with the aim of recognising and infusing specific training in the syllabuses and training modules on sex development and categories. This will include the following subjects: science, biology, anatomy, life skills, anthropology, criminology, medical ethics, theology, law, pathology, laboratory and imaging, physical education and sports, gynaecology, psychology, reproductive health, genetics and statistics.

e) Review and introduction of professional development training curriculum for continuous training and sensitisation to include intersex;

i. Health care professionals to be trained and sensitised on care and protection as well as appropriate medical interventions for intersex persons including; options for treatment, no treatment as well as the meaning and requirements of free and informed consent. Additionally, they should be sensitised on the prohibition of involuntary medical intervention, which constitutes a violation of human rights and its associated repercussions.

ii. Media, legal, education, religious and demographic professionals should be sensitised on approaches to care and protection of intersex persons in conformity with human rights standards and principles.

iii. All government officers to be sensitised and trained on care, protection and documentation protocols for intersex persons.

f) Introduction of research initiatives within research and health institutions as well as institutions of higher learning to explore intersex themes for purposes of information, documenting best practices and guiding policy development and practice.

6.1.7 STATISTICAL DATA

11. Collection of accurate and verifiable statistics on intersex persons.

This will be achieved through:

a) Kenya National Bureau of Statistics, the principal government agency for collecting, analysing and disseminating statistical data to include intersex as a third sex code/category.

i. Piloting of code 3 by including intersex as a sex category in the Kenya Population and Housing Census pilot.

ii. Inclusion of intersex (code 3) in the Kenya Population Housing Census scheduled for August 2019.

b) Government agencies and ministries focusing on collection of data i.e. surveys to introduce intersex as a third code/category within sex in their enumeration instruments and tools and in data analysis.

c) Institutions to administratively include intersex as a sex category in their forms and records generated in the course of their work to supplement efforts by other government agencies in recording statistics of intersex persons in Kenya. Further, all administrative data in all sectors must be disaggregated in terms of sex, including intersex, within all relevant Ministries, especially the: Ministry of ICT and Ministry of Interior, National Coordination and Government, etc.

i. Inclusion of the intersex category as one of the sex categories within the NIIMS framework;

ii. Inclusion of intersex as a sex category in administrative and institutional forms, i.e. Birth Notification and medical documents;

iii. Amendment of Persons Deprived of Liberty Act, 2014 in the proviso to section 3(a) by inserting the word "sex" appearing immediately after the word "age".

iv. Amendment of the Prison Rules, 1963 in Rule 38 by inserting the word "sex" in the proviso immediately after the word "age".

d) Classification and re-classification of intersex in records in all official facilities including: health, security, correctional and educational facilities and institutions.

e) The Ministry of Health to annually report on the intersex medical data for both planning and budgeting purposes

6.1.8 SOCIAL, ECONOMIC AND LEGAL PROTECTION

12. **Development and review of social protection mechanisms to ensure realisation of social, economic and cultural protections for intersex persons and safeguarding against violations on the basis of their 'I' marker.**

    a) Formulation of special protection mechanisms by State agencies to monitor violations of the enjoyment and realisation of human rights on the basis of a sex marker 'I' including in: The Ministry of Labour and Social Protection; Ministry of Sports, Culture and Heritage, Ministry of Education and; Ministry of Interior, National Coordination and Government.

    b) Periodic reporting by State agencies and organs on the observance, protection and promotion initiatives to safeguard enjoyment of human rights and fundamental freedoms by intersex persons.

    c) Mainstreaming of inclusion of intersex persons in existing social protection frameworks;

    i. Ministry of Labour and Social Protection to formulate funding programmes specific to intersex children and their parents/ caregivers;

    ii. Review of the Bail and Bond and Sentencing Policies to consider mitigation and environmental realities of an intersex person who is more vulnerable in detention;

    iii. Amend the Children Act, 2001 by introducing a new paragraph in Section 119 (1) to provide as follows:

Who is intersex and is subjected to differential treatment or is likely to be subjected to abuse or any circumstances to interfere with their development (either due to medical or societal factors), and whose parents are unable or unwilling to exercise proper care of the child.

    d) Review of any laws, policies and programmes that discriminate or require intrusive and unnecessary procedures or medical interventions to ensure equal participation of intersex persons in all spheres of life.

i. Review of the Sports Act, 2013 and constitutions of the various sports federations to introduce anti-discriminatory meaning to all provisions that may presently require intrusive and unnecessary tests and declarations for participation of intersex athletes;

ii. Ensuring that intersex issues are captured in the Equality law with specific provision for:

a) Special protection of intersex persons, and;

b) Inclusion of affirmative action provisions.

iii. Decriminalise or declassify crimes that are felonies to misdemeanours to reduce the need to confine/ imprison intersex persons in conflict with the law.

iv. Amend the Sexual Offences Act, 2006 by inserting the following new Section 40A on special units for sexual offences as follows:

40 A. (1) The Cabinet Secretary responsible for national security and the National Police Service shall ensure that all police stations have special units to deal with sexual offences:

a. Ensure that police officers are specifically trained in handling and investigating sexual offences, including those involving intersex persons;

b. Establish one special unit within the Service in each county to handle sexual violence;

c. Ensure that each special unit established in (b) above shall have at least one officer specially trained to handle intersex persons.

(2) The special units referred in sub-section (1) shall be equipped with modern equipment and facilities for carrying out investigations and forensics.

e) Re-categorisation of social amenities in public and private facilities to include inclusive amenities for male, female and intersex persons.

i. Mixed system inclusion mainstreaming, i.e., privacy in male and female amenities.

ii. Inclusion of general unmarked toilets and bathrooms in public spaces.

7.

7.0 IMPLEMENTATION MATRIX

7.1 Introduction

This Chapter arranges the recommendations into immediate, short term and long term implementation strategies and sets out the specific Government MDAs and key stakeholders and partners responsible for their implementation.

IMPLEMENTATION MATRIX

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
	Between 6 to 12 months from January, 2019	Within 2 years from January,2019	Within 4 years from January, 2019				
LEGISLATIVE							
Facilitate recognition of intersex persons in the law through the introduction of an intersex 'I' marker through amendment and introduction of a comprehensive definition of who an intersex person is.							
Amendment of Interpretation and General Provisions Act, Cap 2 Section 3 of the Interpretation and General Provisions Act, Cap 2, be amended to provide for the following new definitions as follows:				Inclusion of Intersex definition in the Act	Office of the Attorney-General and Department of Justice (OAG &DOJ) Kenya Law Reform Commission(KLRC) National Assembly Senate Kenya National Commission on Human Rights(KNCHR)	The CRADLE Law Society of Kenya(LSK) Intersex Persons Society of Kenya(IPSK) FIDA-Kenya Legal Resources Foundation (LRF)	1 year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
"Intersex" means a person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood. **"Sex" means a person who is male, female or intersex.**					National Gender and Equality Commission(NGEC)		
Amend the definition of Intersex in Persons Deprived of Liberty Act, 2014				Amendment and adoption of relevant sections	Office of the Attorney-General and Department of Justice		

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
The term intersex as defined in Section 2 of the Persons Deprived of Liberty Act, 2014 be amended by deleting the same and substituting therefor the following new definition					Kenya Law Reform Commission National Assembly Ministry of Health Ministry of Interior and Coordination of National Government -Kenya Prisons Service -State Department of Correctional Services, and Probation and Aftercare Service -National Police Service -NYS -Department of Children Services Kenya National Commission on Human Rights National Gender and Equality Commission (NGEC)	The CRADLE Law Society of Kenya Intersex Persons Society of Kenya FIDA- KENYA HERAF LRF	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
"Intersex" means: A person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.							
Amend Children Act, 2001 **Section 2 of the Children's Act, 2001 be amended to provide for the definition of an Intersex child as follows:**				Amendments adopted.	Office of the Attorney- General and Department of Justice Kenya Law Reform Commission Directorate of Children Services	NCAJ Special Taskforce on Children Matters The CRADLE Intersex Persons Society of Kenya Plan International	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
"Intersex child" means a child who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns which could be apparent prior to, at birth, in childhood, puberty or adulthood.					Kenya Prisons Services Ministry of Labour and Social Protection - State Department of Probation and Aftercare Services	Save the Children UNICEF Child Fund Centre for Children Rights and Development USAID CRS World Vision	
Effecting expeditious provision of birth certificates, identification documents, passports and other official documentation through including provisions for the intersex 'I' marker.							
Births and Deaths Registration Act, Cap 149: Section 2 of the Births and Deaths Registration Act, Cap 149 be amended				Amendment and adoption of relevant sections	Office of the Attorney- General Kenya Law Reform Commission	The CRADLE Law Society of Kenya Intersex Persons Society of Kenya FIDA-Kenya	1 year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
to provide for the definition of Sex to read as follows: "Sex" means a person who is male, female or intersex. Further, we propose that a new section 14A be introduced in the Births and Deaths Registration Act, to provide for a change of sex as follows: An intersex person may amend their sex marker from male or female to intersex, or from intersex to male or female, upon the production to the registrar of a medical certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services.				Generation of relevant forms to effect the amendments Issuance of Birth Notifications with an 'I' for intersex as a sex marker Issuance of birth certificates with I marker	Ministry of Interior and Coordination of National Government - Department of Civil Registration Ministry of Health National Assembly Senate Ministry of Labour and Social Protection Directorate of Children Services KNCHR National Gender and Equality Commission	Health Rights Advocacy Forum (HERAF)	

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
In the Births and Deaths Registration Rules, 1966, we propose that the Schedule be amended as follows: Form No.1 1. SEX OF CHILD Intersex 3 ☐ Form No.6 3. SEX OF CHILD Intersex 3 ☐							
Amend Registration of Persons Act, Cap 107 Section 3 of the Registration of Persons Act, Chapter 107 be amended to provide for the definition of Sex as follows:				Amendment and adoption of relevant sections Generation of relevant forms to effect the amendments Issuance of IDs with I- marker	Office of the Attorney- General and Department of Justice Kenya Law Reform Commission Ministry of Interior and Coordination of National Government - National Registration Bureau	The CRADLE Law Society of Kenya Intersex Persons Society of Kenya FIDA	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
"Sex" means a person who is either male, female or intersex. **Similarly, we propose for an introduction of a new section on the change of sex as follows:** An intersex person may amend their sex marker from male or female to intersex, or from intersex to male or female, upon the production to the registrar of a medical certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services.					National Assembly Ministry of Health Senate Ministry of Labour and Social Protection - Directorate of Children Services Kenya National Commission on Human Rights National Gender and Equality Commission		
Amend Kenya Citizenship and Immigration Act, Cap 172				Amendments developed	Ministry of Interior and Coordination of National Government	The CRADLE Law Society of Kenya	6 Mnths

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Section 2 of the Kenya Citizenship and Immigration Act, Cap 172 be amended to provide for the definition of Sex as follows: "Sex" means; a person who is male, female or intersex. Similarly, we propose for an introduction of a new sub-section 28 (1) (a) on the change of sex as follows: Where an intersex person is the holder of a passport or other travel document and wishes to change the sex particulars in the passport or travel document, the holder shall apply in the prescribed manner and produce before an immigration officer a medical					- Directorate of Immigration Services Ministry of ICT Kenya National Commission on Human Rights National Gender and Equality Commission	Intersex Persons Society of Kenya FIDA-Kenya National Coordination Mechanism (NCM)	

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
certificate issued by a competent medical doctor designated for that purpose by the Director of Medical Services. Further, we propose an amendment sub-section (2) of the Kenya Citizenship and Immigration Act by inserting "and 1(a)" in the proviso immediately after "sub-section (1)" Kenya Citizenship and Immigration Rules, 2012 Amend Form 19 in the First Schedule of the Kenya Citizenship and Immigration Regulations, 2012 to introduce a box as follows: Intersex 3 ☐							

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Facilitate review of laws to ensure equal treatment, respect and protection of dignity within the criminal justice system.							
Review laws to ensure equal treatment of persons deprived of liberty without discrimination on the basis of sex marker 'I'				Amend Prison Rules, 1963 Amend Rule 32 (2) (a) by deleting the same and substituting therefor the following new paragraph; (a) Male, female and intersex prisoners shall be kept absolutely separate from each other and shall be confined in appropriate separate accommodation. Introduce a new Rule to provide as follows:	Office of the Attorney- General and Department of Justice Kenya Law Reform Commission Kenya Prisons Service National Police Service Directorate of Children Services Kenya Prisons Services Ministry of Labour and Social Protection - State Department of Probation and Aftercare Services KNCHR National Gender and Equality Commission	NCAJ Committee on Criminal Justice Reforms LRF National Council for Administrative Justice (NCAJ) Special Taskforce on Children Matters The CRADLE Intersex Persons Society of Kenya Plan International Save the Children UNICEF Child Fund Centre for Children Rights and Development UN-Women	

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Where the prisoner is an intersex person, they shall choose the sex of the officer to conduct the search. Amend Criminal Procedure Code, Cap 75 Amend Section 25 of the Criminal Procedure Code, Cap 75 by introducing a new paragraph (c) as follows: (c) When the arrested person is an intersex person, they shall choose the sex of the officer to conduct the search.	Anti- FGM Board		

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Amend Borstal Institutions Act, Cap 92 Delete and substitute section 18 of the Borstal Institutions Act, Cap 92 as follows: Male, female and intersex persons shall be detained in appropriate separate facilities. Amend Borstal Institutions Rules, 1963 Delete and substitute Rule 17 (2) (a) of the Borstal Institutions Rules as follows:			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				(a) Male, female and intersex inmates shall be kept in appropriate separate accommodation. Amend rule 21 of the Borstal Institutions Rules by inserting the following words "by a person of the same sex" in the proviso immediately after the words "as the superintendent directs". Introduce the following new Rule to provide as follows: (a) Where the inmate is an intersex person,			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				they shall choose the sex of the officer to conduct the search. **Amend** Probation of Offenders Act, Cap 64 **Introduce a new section to provide as follows:** Where an intersex person or intersex child is placed under supervision of a probation officer, the probation officer shall be of a sex acceptable to the intersex person. **Amend the** Children Act, 2001			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Introduce a new section to provide as follows: Male, female and intersex children deprived of liberty shall be accommodated in appropriate and separate facilities.			
ADMINISTRATIVE (SYSTEMS AND STRUCTURES)							
PUBLIC HEALTH							
Formulate specialised programmes to include intersex person's care and protection in health facilities to facilitate their access to the highest attainable standard of health.				a) Development of information booklets focusing on pre-natal counselling to incorporate sensitisation on sex development. b) Streamlining of compulsory genetic testing within the	Ministry of Health KMPDB	UN-Women UNFPA UNICEF	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Maternal and Child Health (MCH) guidelines for expectant mothers. This will introduce ante-natal genetic testing for every expectant mother and foetus, including for Congenital Adrenal Hyperplasia (CAH) thus reducing under-5 mortality rates attributed to CAH. c) Introduction of essential screening for all new-borns to improve early detection of high risk intersex variations.			2 Years 2 Years 2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				d) Mapping out of centres of excellence within the existing Level 5 and Level 6 Hospitals to offer specialised medical treatment for intersex persons through multi-disciplinary teams. The Government to ensure that these facilities are properly equipped and staffed to offer holistic care and treatment in accordance with the needs of intersex patients. e) Putting in place a referral mechanism for intersex persons	KEMSA KEMRI	UNICEF WHO UNAIDS UNODC Level 5 and 6 Hospitals	2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				within all health facilities to the designated centres of excellence.			
Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent. The Director of Medical Services in consultation with the relevant regulatory body (Kenya Medical Practitioners and Dentists Board, KMPDB) to develop a protocol on surgical and hormonal interventions that constitute medical emergencies.				In all instances, the best interest of the child is paramount. The intersex child and guardians/ parents of the child or intersex person must be fully and properly informed on: a.) the potential risks and benefits, and b.) Consequences and alternatives. In addition, their express consent for medical interventions must be obtained.			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				In addition, their express consent for medical interventions must be obtained. Further, except for a duly documented medical emergency, such decisions should be deferred until such time that the intersex person is able to give informed consent as facilitated by the multi-disciplinary team, taking into account the child's age, mental and physical development.	Ministry of Health MPDB KEPSA		1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
The Ministry of Health to work with other regulatory agencies towards the protection against involuntary medical intervention and ensure effective remedy for persons otherwise affected.					CAJ KMPDB		6 Mnths
Ministry of Health in consultation with Medical Practitioners and Dentists Board to formulate a harmonised and comprehensive treatment guideline focusing on a child centered and human rights-based approach for the medical care and protection of intersex children.				The guidelines shall be pre-cautionary in nature and will provide an outline of the procedures and steps to be followed by healthcare professionals, including: a) Prohibition of 'normalising' surgeries that do not advance the child's best interest and welfare;	MPDB Ministry of Health Level 5 and 6 Hospitals (see appendix) Centre for Adolescent Health Mathari Mental Hospital KEMRI CRR Family Options KELIN Kenya KNCHR NGEC	African Society for Paediatric and Adolescent Endocrinology (ASPAED) Paediatric Endocrine Society Society of Adolescent Health in Uganda WHO UNDP UNIFEM United Disabled Persons of Kenya (UDPK) FIDA-Kenya	2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				b) Provision of complete information to form the basis of 'informed consent' for medical intervention; c) Conducting of requisite diagnostic tests; d) Consideration of development milestones of the child in order to determine the appropriate medical intervention, and; e) Constitution of a multi-disciplinary team including a neonatologist, endocrinologist, geneticist, urologist,			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				paediatrician, surgeon, gynaecologist, psychiatrist, clergy, ethicist, radiologist, molecular biologist and social workers to determine the appropriate medical intervention with regard to intersex persons.			
The State to establish a fund to cater for all medical-related interventions for intersex persons due to the high cost implications of specialised intersex medical care. The State to give a free/ subsidised medical insurance health cover under the NHIF or any other scheme for intersex persons.				Underwriting of: Some of the proposed diagnostic tests to be covered include: a) Karyotype b) Hormonal tests i.e. ADH, DHEA, 17 Hydroxyprogestin	National Treasury Office of the Attorney General and Department of Justice Ministry of Health NHIF KEMSA	USAID IDLO OSIEA UNICEF UNAIDS KEBS Ministry of Industry, Trade and Cooperatives	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				c) Imaging i.e. ultrasound and scans Some of the proposed hormonal drugs to be covered may include: a) Hydrocortisone (steroids) b) Androgens c) Testosterone d) Oestrogen Appropriate surgeries. Psycho-social support			
Education and Awareness							
Promotion of continuous and targeted awareness to the general public and all stakeholders to combat stigma				Roll out of public awareness initiatives	Ministry of ICT KNBS Kenya National Commission on Human Rights	Media - Telecommunication agencies i.e. Telkom, Safaricom, Airtel etc.	8 months -ongoing

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
and promote societal acceptance.					- Mainstream media National Gender and Equality Commission NPSC Ministry of Interior and Coordination of National Government Ministry of Education (MoE) TSC Ministry of Sports, Culture and Heritage NCPD	Government Advertising Agency Sports Federations FBOs CBOs CSOs	

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Review of education curriculum in primary, secondary and tertiary education institutions with the aim of recognising and infusing specific training in the syllabuses and training modules on sex development and categories. This will include: science, biology, anatomy, life skills, anthropology, criminology, medical ethics, theology, law, pathology, laboratory and imaging, physical education and sports, gynaecology, psychology, reproductive health and statistics.				Curriculum change adopted	KICD KISE Ministry of Health KMPDB MOE JTI CUE Ministry of Industry, Trade and Cooperatives Kenya School of Government	FBOs	2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Review and introduction of professional development training curriculum for continuous training and sensitisation to include intersex.				• Healthcare professionals to be trained and sensitised on care and protection as well as appropriate medical interventions for intersex persons including; options for treatment, no treatment as well as the meaning and requirements of free and informed consent. Additionally, they should be sensitised on the prohibition of involuntary medical intervention,	Ministry of Health TSC KMPDB Kenya School of Government MOE JTI Council Of University Education (CUE) Ministry of Industry, Trade and Cooperatives	Media Law Society of Kenya (LSK) CLE Psychiatric and Counselling Association Amani Centre	1 Year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				which constitutes a violation of human rights and its associated repercussions. • Media, Justice, Education, Religious and Demographic professionals should be sensitised on approaches to care and protection of intersex persons in conformity with human rights standards. • All government officers to be sensitised and trained on care, protection and documentation			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				protocols for intersex persons.			
Introduction of research initiatives within research and health institutions as well as institutions of higher learning to explore intersex themes for purposes of information documenting best practices and guiding policy development and practice.				Roll out of research initiatives	Council of University Education (CUE) NACOSTI National Crime Research Centre KIPRA	Public and Private Universities, Colleges UNODC CAP.15 Institutions - Lands - Teachers - Parliament - Judiciary	3 Years
Collection of accurate and verifiable statistics on Intersex persons							
Kenya National Bureau of Statistics, the principal government agency for collecting, analysing and disseminating statistical data to include intersex as a third sex code/ category.				Piloting of code 3- by including intersex as a sex category in the Kenya Population and Housing Census pilot Inclusion of intersex- code 3 in the Kenya Population	Kenya National Bureau of Statistics (KNBS)	KNCHR Intersex Persons Society of Kenya Ministry of Labour and Social Protection	3 Mnths 6 Mnths

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Housing Census scheduled for 2019			
Government agencies and ministries focusing on collection of data i.e. surveys to introduce intersex as a third code/ category within sex in their enumeration instruments and tools.				Dissemination of report of the health survey on intersex (variations and frequency) Report on demographic survey on the Intersex persons in Kenya.	National Council for Population and Development (NCPD) Ministry of Health Ministry of Interior MOE CUE TSC KEMRI Mathare Hospital	KNCHR UNFPA HERAF National Gender and Equality Commission LRF Kituo cha Sheria RODI Kenya UNHCR UNODC	1 year

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Institutions to administratively include intersex as a sex category in their forms and records generated in the course of their work to supplement efforts by agencies in recording statistics of intersex persons in Kenya. Further, all administrative data in all sectors must be disaggregated in terms of sex including (intersex) including within; Ministry of Interior and Coordination of National Government and Ministry of Information, Communication and Technology				Inclusion of intersex category as one of the sex categories within the NIIMS framework Inclusion of intersex as a sex category in administrative and institutional forms i.e. Birth Notification Amendment of Persons Deprived of Liberty Act, 2014 in the proviso to section 3(a) by inserting the word "sex" appearing immediately after the word "age".	Ministry of Interior and Coordination of National Government Ministry of Information, Communication and Technology Ministry of Labour and Social Protection Kenya Prisons Service All state agencies and organs		6 Mnths

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Amendment of the Prison Rules, 1963 in rule 38 by inserting the word "sex" in the proviso immediately after the word "age".			
Classification and Re-classification of intersex in records in facilities including; health facilities, correctional facilities education institutions.				Report of the data disseminated	Ministry of Health Ministry of Education (MOE) Ministry of Interior and Coordination of National Government All state organs and agencies		6 Mnths

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Development and review of social protection mechanisms to ensure realisation of social, economic and legal protections for intersex persons and safeguard against violations on the basis of their 'I' marker							
Formulation of special protection mechanisms by State agencies to monitor violations of the enjoyment and realisation of human rights on the basis of a sex marker 'I' including in the: Ministry of Labour and Social Protection; Ministry of Sports, Culture and Heritage, and Ministry of Interior and National Coordination				Special protection mechanism developed. Capacity building of Ministry of Sports, Culture and Heritage to litigate on behalf of intersex athletes	Ministry of Labour and Social Protection Ministry of Education Kenya National Commission on Human Rights National Gender and Equality Commission Ministry of Interior and Coordination of National Government ODPP Office of the Attorney-General and Department of Justice Ministry of Sports, Culture and Heritage	FBOs UNICEF Law Society of Kenya International Commission of Jurists (ICJ) FIDA-Kenya National Legal Aid Service (NLAS) Centre for Rights Education and Awareness (CREAW) Katiba Institute Kituo cha Sheria LRF	2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Periodic reporting by State agencies on the observance of protection and promotion initiatives to safeguard enjoyment of human rights by intersex persons.					Office of the Attorney-General and Department of Justice KNCHR National Gender and Equality Commission CAJ National Police Service Kenya Prisons Service Department of Probation and Aftercare Services Ministry of Sports, Culture and Heritage		3 Years
Mainstreaming of inclusion of intersex persons in existing social protection frameworks.				Ministry of Labour and Social Protection to formulate funding programmes specific to intersex	Ministry of Labour and Social Protection Ministry of Interior -National administrative units i.e. chiefs Ministry of Health	UNICEF Intersex Persons Society of Kenya	3 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				children and their parents/ caregivers. Review of the Bail and Bond and Sentencing Policy to consider mitigation and environmental realities of an intersex person who is more vulnerable in detention. Amend the Children Act, 2001 by introducing a new paragraph in section 119 (1) to provide as follows: Who is intersex and is subjected to differential treatment or is likely to be	HIF KNBS Ministry of Sports, Culture and Heritage		

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				subjected to abuse or any circumstances to interfere with their development (either due to medical or societal factors), and whose parents are unable or unwilling to exercise proper care of the child.			
Review of any laws, policies and programmes that discriminate or require intrusive and unnecessary procedures or medical interventions to ensure equal participation of intersex persons in all spheres of life.				Review of the Sports Act, 2013 and constitutions of various sports federations to introduce anti-discriminatory provisions requiring intrusive and unnecessary provisions for participation of athletes who are intersex.	Ministry of Sports, Culture and Heritage Sports Federations in Kenya - Athletics Kenya - Football Kenya Federation - Cricket Kenya - Kenya Hockey Union - National Olympic Committee of Kenya	FIDA-Kenya Centre for Rights Education and Awareness (CREAW) Independent Medico-Legal Unit (IMLU) ICJ LSK	2 Years

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				Ensuring that intersex issues are captured in the Equality Bill with specific provision for: a) Special protection of intersex persons b) Inclusion of affirmative action provisions Decriminalise or declassify crimes that are felonies to misdemeanours to reduce the need to confine/ detain intersex persons in conflict with the law. Amend the Sexual Offences Act, 2006 by inserting the following	- Kenya Rugby Union National Gender and Equality Commission Ministry of Youth, Gender and Public Service Ministry of Labour and Social Protection Ministry of Education KNCHR OAG KLRC		

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				new section 40 A on special units for sexual offences as follows: 40 A. (1) The Cabinet Secretary responsible for national security and the National Police Service shall ensure that all police stations have special units to deal with sexual offences; a. Ensure that police officers are specifically trained in handling and investigating sexual offences, including those involving intersex persons;			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
				b. Establish one special unit within the Service in each county to handle sexual offences; c. Ensure that each special unit established in (b) above shall have at least one officer specially trained to handle intersex persons. (2) The special units referred in sub-section (1) shall be equipped with modern equipment and facilities for carrying out investigations.			

Recommendations	Short Term	Medium Term	Long Term	Indicators	State body Responsible	Potential Partners	Time frame
Re-categorisation of social amenities in public and private facilities to include amenities for male, female and intersex				Mixed system inclusion mainstreaming i.e. privacy in male and female amenities. Inclusion of general unmarked toilets and bathrooms in public spaces.	National and County Government Physical Planning Department Ministry of Public Works and Physical Planning Ministry of Health - Department of Public Health NEMA	Architects and Engineers associations	3 years

ANNEX

ANNEX I: Key Informant Interviews (KII) Schedule

ANNEX II: Institutions (Visit and Interview) Schedule

ANNEX III: Focus Group Discussions (FGDS) Schedule

ANNEX IV: Wananchi (Online and Face To Face) Questionnaire/ Interviews Schedule

ANNEX V: Kenya Level 5 And 6 Hospitals – Mapping of Intersex Centres of Excellence

ANNEX VI: Field Survey Team

ANNEX I: KEY INFORMANT INTERVIEWS (KII) SCHEDULE

CODE	COUNTY	OCCUPATION
1. BUN1	BUNGOMA	-
2. BUN 2	BUNGOMA	TEACHER
3. BUN 3	BUNGOMA	CARETAKER
4. BUN 4	BUNGOMA	BUSINESSWOMAN
5. BUN 5	BUNGOMA	CASUAL LABORER
6. BUN 6	BUNGOMA	-
7. BUS 1	BUSIA	POSTAL OFFICER
8. GAR 1	GARISSA	-
9. GAR 2	GARISSA	-
10. GAR3	GARISSA	
11. EMB 1	EMBU	RECEPTIONIST
12. HB 2	HOMA BAY	APOSTLE/PRIEST
13. HB 3	HOMA BAY	HOTEL STAFF
14. HB 4	HOMA BAY	BUSINESSMAN
15. KAJ 1	KAJIADO	-
16. KAJ 2	KAJIADO	BUSINESSMAN
17. KAK 1	KAKAMEGA	STUDENT
18. KAK 2	KAKAMEGA	-
19. KAK 4	KAKAMEGA	-
20. KAK 5	KAKAMEGA	-
21. KAK 6	KAKAMEGA	-
22. KAK 7	KAKAMEGA	FOOTBALLER
23. KAK 8	KAKAMEGA	BODABODA
24. KAK 9	KAKAMEGA	-
25. KMB 1	KIAMBU	-

CODE	COUNTY	OCCUPATION
26. KMB 2	KIAMBU	SELF EMPLOYED
27. KMB 3	KIAMBU	MENIAL JOBS
28. KMB 4	KIAMBU	CASUAL LABORER
29. KMB 5	KIAMBU	CASUAL
30.KMB 6	KIAMBU	-
31.KMB 7	KIAMBU	UNEMPLOYED
32.KMB 8	KIAMBU	-
33.		
34. KMB 9	KIAMBU	FARMING
35. KMB 10	KIAMBU	HOUSE HELP
36. KMB 11	KIAMBU	UNEMPLOYED
37. KMB 12	KIAMBU	CASUAL
38. KMB 13	KIAMBU	BUSINESSWOMAN
39. KMB 14	KIAMBU	STUDENT
40. KMB 15	KIAMBU	-
41. KMB 16	KIAMBU	HOUSEWIFE
42. KMB 17	KIAMBU	BUSINESSWOMAN
43. KMB 18	KIAMBU	FARMER
44. KMB 19	KIAMBU	SECURITY GUARD
45. KMB 20	KIAMBU	STAFF
46. NRB 7	NAIROBI	STUDENT
47. VIHI 1	VIHIGA	FARMER

ANNEX II: INSTITUTIONS (VISIT AND INTERVIEW) SCHEDULE

NO	COUNTY	OCCUPATION/ INSTITUTION
1	BOMET	ADMINISTRATOR GENERAL HOSPITAL
2	BOMET	MINISTRY OF EDUCATION (COUNTY QUALITY ASSURANCE & STANDARDS OFFICER)
3	BOMET	HEALTH CARE PROFESIONAL
4	BOMET	COUNTY COORDINATOR FOR CHILDREN'S SERVICES
5	BOMET	HEALTH OFFICER
6	BOMET	PRISON OFFICIAL
7	BOMET	CHIEF
8	BOMET	ASSISTANT COUNTY COMMISSIONER
9	BUNGOMA	OFFICER IN CHARGE BUNGOMA PRISON
10	BUNGOMA	REGISTRAR OF PERSONS
11	BUNGOMA	CRP BUNGOMA
12	BUNGOMA	DIRECTOR, PROBATION COUNTY ACP
13	BUNGOMA	YOUTH & GENDER DIRECTOR
14	BUNGOMA	DISTRICT PROBATION OFFICER
15	BUNGOMA	COUNTY EDUCATION OFFICER
16	BUNGOMA	NATIONAL GOVERNMENT ADMINISTRATOR
17	BUNGOMA	ADMINISTRATOR
18	BUNGOMA	SURVEYOR
19	BUSIA	DEPUTY NURSING OFFICER, BUSIA GENRAL HOSPITAL
20	BUSIA	BUSIA COUNTY REGISTRAR OF PERSONS
21	BUSIA	COUNTY COORDINATOR, EARLY CHIDHOOD
22	BUSIA	COUNTY COMMISSIONER
23	BUSIA	DOCTOR,COUNTY HV PROGRAM
24	BUSIA	ADMINISTRATOR CHILDREN WELFARE SOCIETY

NO	COUNTY	OCCUPATION/ INSTITUTION
25	EMBU	MEDICAL SUPRITENDANT
26	EMBU	OFFICER IN CHARGE OF MAIN PRISON
27	EMBU	REGIONAL COORDINATOR PUBLIC HEALTH
28	EMBU	CLINICAL OFFICER, EMBU LEVEL 5 HOSPITAL
29	EMBU	COUNTY ADMINISTRATOR
30	EMBU	MEDICAL FIELD
31	HOMA BAY	PRIOSN OFFICER
32	HOMA BAY	PRIOSN OFFICER
33	HOMA BAY	AREA CHIEF
34	HOMA BAY	COUNTY DIRECTOR GENDER AFFAIRS
35	HOMA BAY	HEALTH CHIEF OFFICER
36	HOMA BAY	ANALYTICAL CHEMIST
37	KAKAMEGA	NURSE
38	KAKAMEGA	OUTREACH WORKER
39	KAKAMEGA	COUNTY ASSISTANT COMMISSIONER
40	KAKAMEGA	CHILDREN OFFICER
41	KAKAMEGA	MEDICAL SUPERITENDANT, KAKAMEGA COUNTY REFERAL HOSPITAL
42	KAKAMEGA	DEPUTY REGISTRAR KAKAMEGA
43	KAKMEGA	COUNTY GOVERNMENT ADMINISTRATOR
44	KAKAMEGA	PEER EDUCATOR
45	KAKAMEGA	MOH,MUMIAS WEST
46	KAKAMEGA	CHIDREN OFFICER 1, MUMIA EAST,WEST& MATUNGU
47	KAKAMEGA	LABORATORY TECHNICIAN
48	KAKAMEGA	SOCIA WORKER, KAKAMEGA COUNTY MUMIAS UNITY ORGANISATION

NO	COUNTY	OCCUPATION/ INSTITUTION
49	KIAMBU	KIBICHIKU SECONDARY SCHOOL
50	KERICHO	GYNAECOLOGIST
51	KERICHO	CHILDREN'S HOME
52	KERICHO	MALE PRISON
53	KERICHO	PRIEST, CATHOLIC CHURCH KERICHO
54	KERICHO	DOCTOR
55	KERICHO	PRIEST,INDIAN TEMPLE
56	KERICHO	SOCIAL DEVELOPMENT OFFICER
57	KERICHO	DEPUTY OFFICER IN CHARGE, KERICHO PRISON
58	KERICHO	CHILDREN'S OFFICER, KERICHO EAST
59	KERICHO	SUB-COUNTY PROBATION OFFICER
60	KERICHO	DISTRICT HEALTH RECORDS INFORMATION SYSTEM
61	KIRINYAGA	MEDICAL PRACTITIONER
62	KIRINYAGA	OFFICER IN CHARGE PRISON
63	KIRINYAGA	CLINICAL OFFICER
64	KISUMU	C.E.C KISUMU COUNTY HEALTH
65	KISUMU	CHIEF NURSING OFFICER, KISUMU DISTRICT HOSPITAL
66	KISUMU	H.O.D NURSING KMTC
67	KISUMU	CLINICA OFFICER,KISUMU DISTRICT HOSPITAL
68	KISUMU	NURSES,KISUMU DISTRICT HOSPITAL
69	KISUMU	H.O.D MEDICAL LABORATORY SERVICES KMTC
70	KISUMU	PROGRAM DIRECTOR
71	KISUMU	OFFICER IN CHARGE, KIBOS
72	KISUMU	OFFICER IN CHARGE, KODIAGA PRISON
73	KITUI	ACTING CHIEF
74	KITUI	ACTING CHIEF

NO	COUNTY	OCCUPATION/ INSTITUTION
75	KITUI	PAEDIATRIC ENDOCRINOLOGIST, KITUI COUNTY REFERRAL HOSPITAL
76	KITUI	KITUI GOVERNOR'SOFFICE
77	KITUI	ASSISTANT COUNTY SECRETARY
78	KITUI	A.I.C MIAMBANI
79	KITUI	CIVIL SOCIETY ORGANISATION
80	KITUI	CHIEF'S CAMP MIAMBANI CENTRAL
81	KITUI	EDUCATION PROFESSIONAL, MUSLIM PRIMARY SCHOOL
82	KITUI	KITUI PRISON
83	KWALE	NURSE IN CHARGE, KWALE SUB-COUNTY HOSPITAL
84	KWALE	CHIEF REGISTRAR OF PRISONS
85	KWALE	ASSISTANT COMMISSIONER OF PRISON
86	KWALE	CHIEF OFFICER HEALTH SERVICES
87	LAIKIPIA	DEPUTY COUNTY COMMISSIONER
88	LAIKIPIA	ADMINISTRATOR
89	MAKUENI	-
90	MAKUENI	CHIEF
91	MAKUENI	CHIEF
92	MAKUENI	CHIEF
93	MAKUENI	CORRECTIONAL SERVICE PROFESSIONAL
94	MAKUENI	CBO MAPACA
95	MANDERA	KADHI MANDERA
96	MANDERA	SENIOR CHIEFBURAFOR LOCATION
97	MANDERA	OCPD MANDERA POLICE
98	MANDERA	DIRECTOR MANDERA COUNTY REFERRAL HOSPITAL
99	MANDERA	OFFICER IN CHARGE, NATIONAL REGISTRATION BUREAU

NO	COUNTY	OCCUPATION/ INSTITUTION
100	MANDERA	REPRODUCTIVE HEALTH OFFICER,MANDERA COUNTY REFERRALHOSPITAL
101	MANDERA	DIRECTOR, SPORTS & CULTURE
102	MANDERA	CHILDREN'S OFFICER MANDERA
103	MANDERA	OFFICER IN CHARGE,MANDERA PRISON
104	MANDERA	MANAGER MANDERA ISAMIC CENTRE
105	MERU	COUNTY HEALTH PROMOTION OFFICER
106	MERU	RIPPLES INTERNATIONAL
107	MERU	REGISTRAR OF BIRTHS AND DEATHS
108	MERU	COUNTY COMMISSIONER
109	MIGORI	NURSING OFFICER
110	MIGORI	SUB-COUNTY CHILDREN'S OFFICER
111	MIGORI	ASSISTANT DEPUTY COMMISIONER OF PRISON
112	MIGORI	NURSING OFFICER
113	MIGORI	SPORTS OFFICER
114	MIGORI	DIRECTOR OF GENDER & EQUALITY
115	MIGORI	ASSISTANT COMMISIONER OF PRISON
116	MIGORI	HEAD TEAACHER
117	MIGORI	PASTOR
118	MOMBASA	PERSONS WITH DISABILITY SERVICE OFFICER
119	MOMBASA	DIRECTOR, IMMIGRATION MOMBASA
120	MURANG'A	CHIEF, TOWNSHIP LOCATION
121	MURANG'A	DEPUTY COUNTY COMMISSIONER, MURANG'A EAST
122	MURANG'A	PRISON OFICER
123	MURANG'A	PAEDITRICIAN
124	MURANG'A	COUNTY REGISTRAR OF PERSONS
125	MURANG'A	BRANCH ADMINISTRATIVE OFFICER

NO	COUNTY	OCCUPATION/ INSTITUTION
126	NAKURU	CIVIL SERVANT
127	NAKURU	SOCIAL WORKER
128	NAKURU	NURSE IN CHARGE,BONDENI MATERNITY
129	NAKURU	HEALTH ADMINISTRATIVE OFFICER
130	NAKURU	REGISTRAR OF PERSONS
131	NAKURU	REGISTRAR OF BIRTHS AND DEATHS
132	NAKURU	WELFARE OFFICER, NAKURU CHIDREN,S HOME
133	NAKURU	CHILD COUNSELOR, CHILD PROTECTION CENTRE, NAKURU
134	NAKURU	ASSISTANT DIRECTOR, CHILDREN DEVELOPMENT
135	NAKURU	HEALTH ADMINISTRATIVE OFFICER, NAVAISHA REFERRALHOSPITAL
136	NAKURU	HEALTH PROFESSIONAL
137	NAKURU	IN CHARGE OF NAKURU PRISONS
138	NAKURU	PROGRAM OFFICER,OGIEK PEOPLE'S DEVELOPMENT PROGRAM
139	NAKURU	OCCUPATIONAL TERAPIST, NAIVASHA SUB-COUNTY HOSPITAL
140	NAKURU	REGISTRAR OF PERSONS
141	NAKURU	PROGRAM OFFICER
142	NAKURU	REGISTRAR OF PERSONS
143	NAKURU	REGISRAR OF PERSONS
144	NYANDARUA	PUBLIC OFFICER
145	NYANDARUA	ADMINISTRATOR
146	NANDI	PUBLIC HEALTH OFFICER
147	NANDI	MEDICAL OFFICER, REALE HOSPTAL
148	NANDI	COUNTY DIRECTOR HEALTH,NANDI
149	NANDI	IMAM

NO	COUNTY	OCCUPATION/ INSTITUTION
150	NANDI	PRISON OFFICER
151	NANDI	CIVI SERVANT
152	NYERI	MANAGER, HUDUMA CHIDREN'S HOME
153	NYERI	ASISTANT COUNTY COMMISSIONER
154	NYERI	DEPUTY OFFICER, NYERI MAXIMUM PRISON
155	NYERI	NURSE
156	NYERI	SPORTS DIRECTOR, NYERI COUNTY
157	SIAYA	COUNTY REGISTRAR OF PERSONS
158	SIAYA	COUNTY DIRECTOR OF EDUCATION
159	SIAYA	COUNTY COMMISSIONER
160	SIAYA	CIVIL REGISTRAR
161	TAITA TAVETA	CHIEF,MARUMANGE
162	TAITA TAVETA	CHIEF, WUNDDAYI LOCATION
163	TAITA TAVETA	CHIEF, WUMINGO LOCATION
164	TAITA TAVETA	SOCIAL DEVELOPMENT OFFICER
165	TAITA TAVETA	MEDICAL SUPRETENDANT, WESU DISTRICT HOSPITAL
166	TAITA TAVETA	OFFICER IN CHARGE, WUNDAYI GK PRISON
167	TAITA TAVETA	SENIOR CHIEF, REVGA LOCATIONS
168	TAITA TAVETA	CLINICAL OFFICER
169	TAITA TAVETA	REGISTRAR BIRTHS AND DEATHS
170	THARAKA NITHI	NURSE
171	THARAKA NITHI	DISTRICT COMMISSIONER
172	THARAKA NITHI	COUNTY SECRETARY
173	THARAKA NITHI	OFFICERIN CHARGE,KATHWANA MEN'S PRISON
174	THARAKA NITHI	RECORD KEEPER
175	THARAKA NITHI	COUNTY EDUCATION OFFICER

NO	COUNTY	OCCUPATION/ INSTITUTION
176	THARAKA NITHI	CHILDREN'S OFFICER
177	THARAKA NITHI	EDUCATION COUNTY DIRECTOR
178	TRANS NZOIA	OFFICER IN CHARGE OF WELFARE
179	TRANS NZOIA	OFFICER IN CHARGE
180	TRANS NZOIA	MEDICAL OFFICER
181	TRANS NZOIA	CHIEF, MUNICIPALTY LOCATION
182	TRANS NZOIA	ASSISTANT CHIEF
183	TURKANA	PARALEGAL OFFICER
184	TURKANA	COUNTY COMMISIONER
185	TURKANA	DISTRICT REGISTRAR OF PERSONS
186	TURKANA	LODWAR DISTRICT HOSPITAL ADMINISTRATOR
187	TURKANA	DIRECTOR, LODWAR COUNTY & REFERRAL HOSPITAL
188	TURKANA	SOCIAL WORKER
189	TURKANA	PRISON COUNTY COMMANDER
190	TURKANA	CHILD PROTECTION
191	TURKANA	SOCIAL DEVELOPMENT OFFICER
192	TURKANA	DEPUTY DIRECTOR, MINISTRY OF TRADE, GENDER AND YOUTH AFFAIRS
193	TURKANA	RADIOGRAPHER, COUNTY HOSPITAL
194	UASIN GISHU	SECURITY
195	UASIN GISHU	DEAN SCHOOL OF LAW,ANNEX
196	UASIN GISHU	CHIEF
197	UASIN GISHU	CHIEF REGISTRAR OF PERSONS
198	UASIN GISHU	MEDICAL OFFICER
199	UASIN GISHU	HUMAN RIGHTS OFFICER,NGAIRA FARM PRISON
200	UASIN GISHU	H.O.D NURSING,KMT ELDORET

NO	COUNTY	OCCUPATION/ INSTITUTION
201	UASIN GISHU	ADMINISTRATOR, USHIRIKA CHIDREN'S INTERVENTION CENTRE
202	UASIN GISHU	-
203	UASIN GISHU	ADMNISTRATOR
204	UASIN GISHU	-
205	UASIN GISHU	CIVI SERVANT PCR0
206	VIHIGA	SOCIAL WORKER, MUSEMBE PAG CHILD DEVELOPMENT CENTRE
207	WAJIR	MEDICAL SUPERITENDANT, WAJIR COUNTY REFFERAL HOSPITAL
208	WAJIR	SENIOR NUTRITION COORDINATOR, SAVE THE CHILDREN
209	WAJIR	DEPUTY OFFICER IN CHARGE,WAJIR G.K PRISON
210	WAIR	CHIEF OFFICER,EDUCATION & VOCATIONL TRAINING
211	WAJIR	CHILDREN OFFICER
212	WAJIR	CORPORAL, IVESTIGATION OFFICER, GRIFTU POLICE STATION
213	WAJIR	HEALTH PROFESSIONAL
214	WAJIR	MEDICAL SUPERETENDENT, GRIFTU SUB-COUNTY REFFERAL HOSPITAL

ANNEX III: FOCUS GROUP DISCUSSIONS (FGDs) SCHEDULE

NO	CODE	COUNTY	OCCUPATION/ INSTITUTION
1	BUN 1	BUNGOMA	ADVOCATE, FIDA KENYA
2	ELD 1	ELDORET	ARTIST
3	HB 1	HOMA BAY	ADVOCATE
4	KMB 1	KIAMBU	CHURCH OF PROPHETS
5	KMB 2	KIAMBU	THIKA WEST POLICE STATION
6	KMB 3	KIAMBU	ADVOCATE
7	KIL 1	KILIFI	DIRECTR,AMKENI YOUTH GROUP
8	KIR 1	KIRINYAGA	LEGAL
9	KSM 1	KISUMU	GOVERNMENT OFFICER
10	MAK 1	MAKUENI	ADVOCATE
11	NAI 1	NAIROBI	STATE COUNSEL
12	NAI 2	NAIROBI	LAWYER
13	NAI 3	NAIROBI	LAWYER
14	NAI 4	NAIROBI	THE CRADLE, CHILDREN'S FOUNDATION
15	NAI 6	NAIROBI	APO, CIVIL SOCIETY ORGANISATION
16	NAI 10	NAIROBI	-
17	NAI 11	NAIROBI	PARALEGAL OFFICER
18	NAI 12	NAIROBI	CORRECTIONAL SERVICE FACILITY
19	NAI 13	NAIROBI	CORRECTIONS OFFICER
20	NAI 14	NAIROBI	ADVOCATE
21	NAI 15	NAIROBI	CORRECTIONAL SERVICE PROFESSIONAL
22	NAI 17	NAIROBI	ADVOCATE
23	NAI 18	NAIROBI	CIVIL SOCIETY ORGANISATION
24	NAI 19	NAIROBI	CIVIL SOCIETY ORGANISATION
25	NAK 1	NAKURU	CHIEF
26	-	NAKURU	LBTI RIGHTS ORGANISATION

ANNEX IV: WANANCHI (ONLINE AND FACE TO FACE) QUESTIONNAIRE / INTERVIEWS SCHEDULE

NO	CODE	COUNTY	OCCUPATION
1	BOM 1	BOMET	AMINISTRATION OFFICER
2	BUN 1	BUNGOMA	BUNGOMA YOUTH BUNGE FORUM
3	BUN 2	BUNGOMA	SOCIAL WORKER
4	BUN 3	BUNGOMA	FARMER
5	BUN 4	BUNGOMA	FARMER
6	BUN 5	BUNGOMA	SOCIAL WORKER
7	BUN 6	BUNGOMA	CIVIL SERVANT
8	BUN 7	BUNGOMA	CASUAL LABOURER
9	BUN 8	BUNGOMA	CARETAKER
10	BUN 9	BUNGOMA	CASUAL LABOURER
11	BUN 10	BUNGOMA	PROBATION OFFICER
12	BUN 11	BUNGOMA	PROBATION OFFICER
13	BUN 12	BUNGOMA	CIVIL SERVANT
14	BUN 13	BUNGOMA	CIVIL SERVANT
15	BUN 14	BUNGOMA	PROBATION OFFICER
16	BUN 15	BUNGOMA	CIVIL SERVANT
17	BUN 16	BUNGOMA	CIVIL SERVANT
18	BUN 17	BUNGOMA	FARMER
19	BUN 18	BUNGOMA	BUSINESS LADY
20	BUN 19	BUNGOMA	CARPENTER
21	-	BUNGOMA	SOCIAL WORKER
22	BUS 1	BUSIA	BUSINESS LADY
23	BUS 2	BUSIA	POST OFFICE
24	BUS 3	BUSIA	BODA BODA RIDER

NO	CODE	COUNTY	OCCUPATION
25	BUS 4	BUSIA	CHILDREN'S OFFICER
26	BUS 5	BUSIA	CHILDREN'S OFFICER
27	BUS 6	BUSIA	CHILDREN'S OFFICER
28	BUS 7	BUSIA	TAILOR
29	BUS 8	BUSIA	BUSINESSMAN
30	BUS 9	BUSIA	BUSINESSLADY
31	BUS 10	BUSIA	HOUSEWIFE
32	-	BUSIA	SHOPKEEPER
33	EMB 1	EMBU	PROJECT COORDINATOR
35	EMB 2	EMBU	GYNAECOLOGIST
36	EMB 3	EMBU	WELFARE&HUMAN RIGHTS OFFICERS
37	EMB 4	EMBU	POLICE OFFICER
38	EMB 5	EMBU	TEACHER
39	EMB 6	EMBU	PRISON OFFICER
40	EMB 7	EMBU	PRISON OFFICER
41	EMB 8	EMBU	MATRON
42	EMB 9	EMBU	CHILDREN'S OFFICER
43	HB 1	HOMABAY	COUNTY COORDINATOR PARALEGAL SOCIETY
44	HB 2	HOMABAY	DEPUTY DIRECTOR EDUCATION
45	HB 3	HOMABAY	GENERAL SERVICE CHILDREN'S WELFARE
46	HB 4	HOMABAY	PROPHETESS
47	HB 5	HOMABAY	COUNSELOR
48	HB 6	HOMABAY	-
49	HB 7	HOMABAY	-

NO	CODE	COUNTY	OCCUPATION
50	KAK 1	KAKAMEGA	SHOP ATTENDANT
51	KAK 2	KAKAMEGA	MUMIAS FACTORY
52	KAK 3	KAKAMEGA	MUSEMBE PHG CHILD DEV. CHURCH CENTRE
53	KAK 4	KAKAMEGA	BODABODA OPERATOR
54	KAK 5	KAKAMEGA	-
55	KAK 6	KAKAMEGA	SECRETARY
56	KAK 7	KAKAMEGA	STUDENT
57	KAK 8	KAKAMEGA	SOCIAL WORKER/COUNSELLOR
58	KAK 9	KAKAMEGA	STUDENT
59	KAK 10	KAKAMEGA	STUDENT
60	KER 1	KERICHO	FARMER
61	KER 2	KERICHO	EDUCATION OFFICER
62	KER 3	KERICHO	LECTURER
63	KER 4	KERICHO	PRISON OFFICER
64	KER 5	KERICHO	MPESA AGENT
65	KER 6	KERICHO	HEALTH RECORD ADMINISTRATOR
66	-	KERICHO	MEDIC
67	KMB 1	KIAMBU	BUSINESS LADY
68	KMB 2	KIAMBU	VOLUNTEER
69	KMB 3	KIAMBU	STUDENT
70	KMB 4	KIAMBU	TOUT
71	KMB 5	KIAMBU	FARMER
72	KIT 1	KITUI	-
73	KIT 2	KITUI	BODABODA OPERATOR
74	KIT 3	KITUI	BUSINESSMAN
75	KIT 4	KITUI	TECHNOLOGIST

NO	CODE	COUNTY	OCCUPATION
76	KIT 5	KITUI	SHOP OWNER
77	KIR 1	KIRINYAGA	SEARGENT
78	KIR 2	KIRINYAGA	-
79	KSM 1	KISUMU	LABORATORY TECHNICIAN
80	KSM 2	KISUMU	LIBRARIAN
81	KSM 3	KISUMU	-
82	KIT 1	KITALE	SOCIAL WORKER AT TALENTED HOME CENTRE
83	KIT 2	KITALE	SOCIAL WORKER AT TALENTED HOME CENTRE
84	KWA 1	KWALE	COUNTY WEALTH ADMINISTRATOR
85	KWA 2	KWALE	-
86	KWA 3	KWALE	TRAINING
87	KWA 4	KWALE	CLINICAL OFFICER
88	KWA 5	KWALE	INTERN
89	KWA 6	KWALE	CHEF
90	KWA7	KWALE	BUSINESSMAN
91	KWA 8	KWALE	TEACHER
92	KWA 9	KWALE	TEACHER
93	KWA 10	KWALE	CLINICIAN
94	KWA 11	KWALE	TECHNICIAN
95	KWA 12	KWALE	FARMER
96	KWA 13	KWALE	-
97	KWA 14	KWALE	RETIRED TEACHER
98	LAI 1	LAIKIPIA	SECURITY GUARD
99	LAI 2	LAIKIPIA	BUSINESS LADY
100	LAI 3	LAIKIPIA	SOCIAL WORKER

NO	CODE	COUNTY	OCCUPATION
101	LAI 4	LAIKIPIA	POLICE OFFICER
102	LAI 5	LAIKIPIA	CIVIL SERVANT
103	LAI 6	LAIKIPIA	-
104	MACH 1	MACHAKOS	-
105	MACH 2	MACHAKOS	CASUAL
106	MAK 1	MAKUENI	-
107	MAK 2	MAKUENI	DRIVER
108	MAK 3	MAKUENI	RECEPTIONIST
109	MAK 4	MAKUENI	VEGETABLE VENDOR
110	MAK 5	MAKUENI	UBER DRIVER
111	MAK 6	MAKUENI	CIVIL SERVANT
112	MAK 7	MAKUENI	MANAGER (PASTOR'S SACCO)
113	MAN 1	MANDERA	-
114	MAN 2	MANDERA	-
115	MAN 3	MANDERA	RECEPTIONIST HUDUMA CENTRE
116	MAN 4	MANDERA	DEPUTY DIRECTOR ISLAMIC CENTRE
117	MAN 5	MANDERA	CID MANDERA HUDUMA CENTRE
118	MAN 6	MANDERA	NHIF OFFICIAL REPRESENTATIVE
119	MAN 7	MANDERA	DOCTOR
120	MAN 8	MANDERA	CHILDREN'S OFFICER
121	MAN 9	MANDERA	HIGH COURT KADHI CLERK
122	MAN 10	MANDERA	TEACHERR
123	MAN 11	-	-
124	MAN 12	MANDERA	ETHICS & ANTI-CORRUPTION COMMISSION REPRESENTATIVE
125	MAN 13	MANDERA	-
126	MAN 14	MANDERA	-

NO	CODE	COUNTY	OCCUPATION
127	MAN 15	MANDERA	-
128	MAN 16	MANDERA	-
129	MAN 17	MANDERA	-
130	MAN 18	MANDERA	-
131	MAN 19	MANDEA	-
132	MAN 20	MANDERA	POSTA REPRESENTATIVE HUDUMA CENTRE
133	MER 1	MERU	ASISTANT PROJECT OFFICER (HOPE WORLDWIDE KENYA)
134	MER 2	MERU	-
135	MER 3	MERU	HEAD TEACHER
136	MER 4	MERU	STUDENT
137	MER 5	MERU	-
138	MIG 1	MIGORI	FIELD OFFICER
139	MIG 2	MIGORI	PRISON CONSTABLE
140	MIG 3	MIGORI	PRISON CONSTABLE
141	MIG 4	MIGORI	TEACHER
142	MIG 5	MIGORI	BUSINESS
143	MIG 6	MIGORI	NURSE
144	MIG 7	MIGORI	SECURITY MAN
145	MSA 1	MOMBASA	BUSINESS
146	MSA 2	MOMBASA	BUSINESS
147	MSA 3	MOMBASA	BUSINESSMAN
148	MSA 4	MOMBASA	TEACHER
149	MSA 5	MOMBASA	-
150	MSA 6	MOMBASA	-
151	MSA 7	MOMBASA	CASUAL
152	MSA 8	MOMBASA	BUSINESS MAN

NO	CODE	COUNTY	OCCUPATION
153	MSA 9	MOMBASA	-
154	MSA 10	MOMBASA	STUDENT
155	MSA 11	MOMBASA	BUSINESS MAN
156	MSA 12	MOMBASA	BIOCHEMIST
157	MSA 13	MOMBASA	-
158	MSA 14	MOMBASA	-
159	MSA 15	MOMBASA	CHV
160	MSA 16	MOMBASA	BUSINESSMAN
161	MUR 1	MURANG'A	TEACHER
162	MUR 2	MURANG'A	CIVIL SERVANT
163	MUR 3	MURANG'A	NURSE AIDE
164	MUR 4	MURANG'A	BUSINESS WOMAN
165	MUR 5	MURANG'A	HOUSEWIFE
166	MUR 6	MURANG'A	HOUSEWIFE
167	MUR 7	MURANG'A	BUSINESSMAN
168	MUR 8	MURANG'A	SOCIAL WORKER
169	NRB 1	NAIROBI	PHOTOGRAPHER
170	NRB 2	NAIROBI	PHOTOGRAPHER
171	NRB 3	NAIROBI	PHOTOGRAPHER
172	-	NAIROBI	SALESMAN
173	-	NAKURU	PRISON INSPECTOR
174	NAK 1	NAKURU	SECURITY GUARD
175	NAK 2	NAKURU	SOCIAL WORKER
176	NAK 3	NAKURU	PASTOR
177	NAK 4	NAKURU	-
178	NAK 5	NAKURU	TAXI DRIVER
179	NAK 6	NAKURU	BUSINESS LADY

NO	CODE	COUNTY	OCCUPATION
180	NAK 7	NAKURU	POLICE OFFICER
181	NAN 1	NANDI	STUDENT
182	NYAND1	NYANDARUA	-
183	NYAND2	NYANDARUA	-
184	NYE 1	NYERI	BODABODA
185	NYE 2	NYERI	BODABODA RIDER
186	NYE 3	NYERI	STAFF AT HURUMA CHILDREN'S HOME
187	NYE 4	NYERI	FARMER
188	NYE 5	NYERI	-
189	NYE 6	NYERI	STAFF AT HURUMA CHILDREN'S HOME
190	SIA 1	SIAYA	-
191	SIA 2	SIAYA	HOUSEGIRL
192	SIA 3	SIAYA	BODABODA OPERATOR
193	SIA 4	SIAYA	BAR ATTENDER
194	SIA 5	SIAYA	TEACHER
195	TAT 1	TAITA TAVETA	-
196	TAT 2	TAITA TAVETA	BODABODA DRIVER
197	TAT 3	TAITA TAVETA	STUDENT
198	TAT 4	TAITA TAVETA	CHV
199	TAT 5	TAITA TAVETA	TEACHER
200	TAT 6	TAITA TAVETA	HOUSEWIFE
201	TNT 1	THARAKA NITHI	ADMINSTRATION POLICE
202	TNT 2	THARAKA NITHI	DRIVER
203	TNT 3	THARAKA NITHI	DRIVER
204	TNZ 1	TRANS NZOIA	POLICE OFFICER

NO	CODE	COUNTY	OCCUPATION
205	TNZ 2	TRANS NZOIA	HOSPITAL ADMINISTRATOR
206	TNZ 3	TRANS NZOIA	INTERN
207	TNZ 4	TRANS NZOIA	ADMINISTRATOR
208	TNZ 5	TRANS NZOIA	BODABODA OPERATOR
209	TNZ 6	TRANS NZOIA	-
210	TNZ 7	TRANS NZOIA	TEACHER
211	TNZ 8	TRANS NZOIA	FARMER
212	TNZ 9	TRANS NZOIA	-
213	TNZ 10	TRANS NZOIA	HOTELIER
214	TUR 1	TURKANA	ADMINISTARTIVE ASSISTANT
215	TUR 2	TURKANA	BUSINESSMAN
216	TUR 3	TURKANA	SELF-EMPLOYED
217	TUR 4	TURKANA	-
218	TUR 5	TURKANA	CASUAL WORKER
219	TUR 6	TURKANA	BUSINESSMAN
220	TUR 7	TURKANA	STUDENT
221	TUR 8	TURKANA	STUDENT
222	TUR 9	TURKANA	-
223	TUR 10	TURKANA	TEACHER
224	TUR 11	TURKANA	-
225	TUR 12	TURKANA	SELF-EMPLOYED
226	TUR 13	TURKANA	SELF-EMPLOYED
227	TUR 14	TURKANA	SELF-EMPLOYED
228	TUR 15	TURKANA	-
229	TUR 16	TURKANA	SELF-EMPLOYED
330	TUR 17	TURKANA	SOCIA WORKER
331	-	TURKANA	RETIRED SOLDIER

NO	CODE	COUNTY	OCCUPATION
332	-	TURKANA	SELF-EMPLOYED
333	UAS 1	UASIN GISHU	STUDENT
334	UAS 2	UASIN GISHU	PHOTOGRAPHER
335	UAS 3	UASIN GISHU	STUDENT
336	UAS 4	UASIN GISHU	STUDENT
337	UAS 5	UASIN GISHU	FARMER/VILAGE ELDER
338	UAS 6	UASIN GISHU	LABORATORY TECHNICIAN
339	UAS 7	UASIN GISHU	VILLAGE ELDER
340	UAS 8	UASIN GISHU	PLICE OFFICER NGERIA
341	UAS 9	UASIN GISHU	VILAGE ELDER
342	UAS 10	UASIN GISHU	STUDENT
343	UAS 11	UASIN GISHU	STUDENT
344	UAS 12	UASIN GISHU	MIDWIFE
345	UAS 13	UASIN GISHU	HOUSEWIFE
346	UAS 14	UASIN GISHU	CASUAL WORKER
347	UAS 15	UASIN GISHU	HRO
348	UAS 16	UASIN GISHU	INTERN
349	UAS 17	UASIN GISHU	JUVENIE CHILD OFFICER
350	UAS 18	UASIN GISHU	STUDENT ,NURSE, PHARMACIST
351	VIHI 1	VIHIGA	EMPLOYED
352	VIHI 2	VIHIGA	HOTEL WORKER
353	VIHI 3	VIHIGA	-
354	WAJ 1	WAJIR	CASUAL LABOURER
355	WAJ 2	WAJIR	-
356	WAJ 3	WAJIR	CHIEF
357	WAJ 4	WAJIR	CHIEF HALANE
358	WAJ 5	WAJIR	HUMANITARIAN

NO	CODE	COUNTY	OCCUPATION
359	WAJ 6	WAJIR	HERDER
360	WAJ 7	WAJIR	-
361	WAJ 8	WAJIR	CHIEF KAJAJA WAJIR EAST
362	WAJ 9	WAJIR	-
363	WAJ 10	WAJIR	CARETAKER
364	WAJ 11	WAJIR	BUSINESS WOMAN
365	WAJ 12	WAJIR	HUMAN RIGHTS ACTIVIST
366	WAJ 13	WAJIR	ATHLETE
367	WAJ 14	WAJIR	POLICE OFFICER
368	WAJ 15	WAJIR	NURSE
369	WAJ 16	WAJIR	STUDENT
370	WAJ 17	WAJIR	GUARD
371	WAJ 18	WAJIR	-
372	WAJ 19	WAJIR	TUKTUK DRIVER
373	WAJ 20	WAJIR	WAITRESS
374	WAJ 21	WAJIR	-
375	WAJ 22	WAJIR	BUSINESSMAN
376	WAJ 23	WAJIR	-
377	WAJ 24	WAJIR	SECURITY OFFICER
378	WAJ 25	WAJIR	DRIVER
379	WAJ 26	WAJIR	PUBLIC HEALTH PRACTITIONER

ANNEX V: KENYA LEVEL 5 AND 6 HOSPITALS – MAPPING OF INTERSEX CENTRES OF EXCELLENCE

Level 6 Hospitals

1. Kenyatta Hospital
2. Moi Referral Hospital
3. Jaramogi Oginga Odinga

Level 5 Hospitals

1. Machakos Level 5 Hospital
2. Nyeri Level 5 Hospital
3. Kisumu Level 5 Hospital
4. Meru Level 5 Hospital
5. Thika Level 5 Hospital
6. Nakuru Level 5 Hospital
7. Mombasa Level 5 Hospital
8. Mama Lucy Level 5 Hospital
9. Kisii Level 5 Hospital
10. Kakamega Level 5 Hospital
11. Garissa Level 5 Hospital
12. Embu Level 5 Hospital

ANNEX VI: FIELD SURVEY TEAM

1. John Chigiti – Lead Consultant
2. Lavinia Ogolla
3. Concilia Flora Awino
4. Mary Belinda
5. Winnie Nyambegera
6. Ryan Muiruri also known as Ruth Wangui
7. James Karanja also known as Mary Waithera
8. Sidney Etemesi
9. Kwamboka Kibagendi
10. Joseph Ngare
11. Elizabeth Agina,
12. Sheila Nnamdi
13. Virginia Nelder
14. Fanis Inganga
15. Clive.O.Fenton
16. Geoffrey Kimotho
17. Kenfrey Kipchumba
18. Alphonce Rono
19. Calvince Otula
20. Yvonne Mboya
21. Anthony Ochieng
22. Lucia Mwikali
23. Njambi Kamau
24. James Adala
25. Ibrahim Alasow
26. Euniter Wairimu
27. Osman Abdikadir
28. Meshack Kiptoo
29. Faith Ogutu
30. Mary Syombua
31. Joram Lokol

NOTES

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY GENERAL
AND DEPARTMENT OF JUSTICE