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KENYA HUMAN RIGHTS
COMMISSION

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**A STUDY OF THE LGBTI COMMUNITY'S SEARCH FOR
EQUALITY AND NON-DISCRIMINATION IN KENYA**

By

The Kenya Human Rights Commission

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ACRONYMS/ABBREVIATIONS

AFRA	Artists for Recognition and Acceptance
AIDS	Acquired Immune Deficiency Syndrome
EASHRI	East Africa Sexual and Health Rights Initiative
GALCK	Gay and Lesbian Coalition of Kenya
GKT	Gay Kenya Trust
HERAF	Health Rights Advocacy Forum
HIV	Human Immuno-deficiency Virus
ICCPR	International Covenant on Civil and Political Rights
IDAHO	International Day against Homophobia and Transphobia
ISHTAR MSM	A Health advocacy group within GALCK
KHRC	Kenya Human Rights Commission
KIPE	Kisumu Initiative for Positive Empowerment
KNCHR	Kenya National Commission on Human Rights
LGBTI	Lesbian Gay Bisexual Transgender and Intersex
MSM	Men who have Sex with Men
MWA	Minority Women in Action
NACC	National AIDS Control Council
PEMA	People Marginalized and Aggrieved

STI	Sexually Transmitted Diseases
SWOP	Sex Workers Outreach Program
TEA	Transgender Education Advocacy
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commission for Refugee

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Executive Summary

The KHRC has always worked with minority, marginalized and disadvantaged groups to enable them, in their own way, articulate, defend and realize their human rights be they civil, political, economic, social and cultural. One such group is Kenya's LGBTI community which includes gender and sexual minorities, that is, Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons. The KHRC and LGBTI Organizations' continue to receive cases of human rights abuses against the LGBTI persons.

Through its engagements, the KHRC has encountered a general lack of researched information on how widespread these cases are or indeed who are the main and common perpetrators. Owing to the scanty data available on the nature, pattern and those most affected by these rights abuses, human rights advocacy and responses have sometimes been reactionary and lacking in strategic focus. Moreover, the interventions neither address the real source of the problem, nor do they build on past responses. It is against this historical background deplete with research data on human rights violations against LGBTI persons in Kenya that this study has been done.

This study was conducted within four months with a national geographical focus .The study finds that human rights violations against LGBTI persons in Kenya are systematic, highly prevalent and generally not redressed by the state when called to. There is a high prevalence of violence upon LGBTI persons who are routinely abused, subjected to hate speech and incitement to violence, suffer physical violence in terms

from mobs and occasionally raped by police, vigilantes and organized criminals.

It is the finding of this study that LGBTI persons are often harassed by state officials, who enforce heteronormativity against presumed homosexual expressions, extort for bribes or ask for sexual favours and charge those who do not comply with their demands with trumped up charges. There is a deliberate failure by the state to protect LGBTI persons from discrimination both in policy and legislation.

The study further finds that there is a low uptake of medical services by LGBTI persons due to structural and legal barriers which either drive LGBTI persons underground due to fear of prosecution or barely offer comprehensive sexual and reproductive health services and products. It is the finding of this study that there is no government policy to guide the handling of intersex children and the therapy treatment of transgender persons. The law in Kenya is heterosexist and only recognizes the male and female gender dichotomy; intersex and transgender persons have no legal recognition due to lack of legislative architecture.

The study also faults service providers such as health care practitioners, education administrators, landlords and state security agents for omitting to provide services to LGBTI persons; some health institutions deliberately refuse to treat LGBTI persons, schools and colleges expel students on grounds of actual or presumed sexual orientation or gender identity and the police fail to investigate and prosecute persons who perpetrate violence or violate rights of LGBTI persons.

It is the conclusion of this study that human rights advocacy and responses by Civil Society Organizations (CSOs) to human rights abuses against LGBTI persons have been few, reactionary and lacking in strategic focus. Moreover the interventions rarely address the real source of the problem (criminalization), nor do they build on past responses. Further to this is an absence of mainstreamed LGBTI programmes in most organizations especially those that deal with women and gender issues. Gender identity and sexual orientation are so intrinsic to the success of any gender programme in women rights and gender-based violence.

The study therefore recommends decriminalization of consensual same sex sexual practices among adults. It also recommends among other things the setting up of a law that recognizes transgender persons who do not fit in either dichotomy of present genders or also the mainstreaming of LGBTI programmes by CSOs who work in human rights.

Through this study, the KHRC seeks to affirm the jurisprudence that humanity has a constant search for objective truth, with the understanding that new knowledge and experience constantly alter our imperfect perception of it, and; a conviction that with reason, an open exchange of ideas, good will, and tolerance, progress can be made in building a better world for all present and for future generations.

Historical Background

In his works, *Homosexuality in 'Traditional' Sub-Saharan Africa*, sociologist Stephen O. Murray cites countless cultural practices spanning the entire continent that indicate homosexuality was practiced by Africans before white imperialism.¹ His findings are given countless upshots by successive studies that have found cultural and traditional practices that demonstrate the existence of homosexuality in Africa for centuries before colonialism.² Further studies even found that sexual relationships between men and boys were practiced throughout African history, and even though they were not always widely accepted or institutionalized, they were often tolerated.³

It is against this backdrop of research and scientific fact that arguments portraying homosexuality as a colonial heritage fall as red herring. Many scholars have sought to disprove the belief that homosexuality is a decadent, bourgeois Western innovation forced upon colonial Africa by white men, or, alternatively, by Islamic slave-traders, the belief that homosexuality is exogenous to the history of African people, citing it as a belief with real social consequences but not, however, based on serious inquiry, historical or otherwise.⁴ It has been scientifically found that Africans were generally not heteronormative with most communities

¹ Murray, S. O. (1998) "Homosexuality in 'Traditional' Sub-Saharan Africa and Contemporary South Africa: an overview," in *Boy-Wives and Female Husbands. Studies on African Homosexualities*, ed. S. O. Murray and W. Roscoe. New York: St. Martin's Press, pp. 1-18.

² Roscoe M., (1987) "The Mamlukes," in *Cultural Diversity and Homosexualities*, ed. S. O. Murray. New York: Irvington, pp. 213-219.

³ Evans-Pritchard, E. E. (1970) "Sexual inversion among the Azande," *American Anthropologist* 72: 1428-1434.

⁴ Supra note 1. The most common social consequence is homophobia which is the irrational fear and hatred of homosexuals. Homophobia is often expressed through hateful sentiments about homosexuality, denial of essential services such as health to homosexuals, criminalizing homosexuality and sometimes physical violence

being found to be 'normatively fluid, i.e. non-normative regarding sexualities'.⁵

In Kenya, politicians and religious leaders often use homophobic sentiments to spite on sexual minorities. In 1999, former president Daniel Moi of Kenya denounced homosexuality, describing it as a scourge that goes against Christian teachings and African traditions.⁶ The first signs of an organized LGBTI movement appeared in 1997 with the forming of Ishtar MSM. This group has been in the forefront in advancing LGBTI health rights in Kenya and was one of the founders of the Gay and Lesbian Coalition of Kenya (GALCK).⁷ GALCK is an umbrella organization which currently consists of six LGBTI groups; Minority Women in Action, Ishtar MSM, Gay Kenya, Artists for Recognition and Acceptance and the newest addition People Aggrieved and Marginalized.⁸

Over the years, LGBTI persons have come together in groups to advance the protection and realization of their rights. While, these groups are well organized, some of them have been denied formal registration by the Government.⁹ Virtually all LGBTI organized groups and individuals face both direct and indirect discrimination from the government and

⁵ Bernedette Muthien, 'Heteronormativity in the African Women's movement', available at <http://www.engender.org.za/publications/heteronormativity.html> (last accessed on 6 October 2010)

⁶ Moi Condemns gays, Available at <http://news.bbc.co.uk/2/hi/africa/461626.stm> (last accessed 2 October 2010)

⁷ Peter Njane., 2010 *About Ishtar MSM*. (personal communication -Phone Interview) 3 July,2010)

⁸ GALCK members, available at http://galck.org/index.php?option=com_content&view=category&id=3&Itemid=3 (last accessed 5 October 2010)

⁹ The few LGBTI groups that are registered in Kenya are Community Based Organisations whose geographic scope is limited to area of registration. Their constitutions barely state their objective as working with LGBTI persons for fear of denial of registration; they simply word it as minorities. (for example, the Gay Kenya group is registered as a Youth group). Transgender Education and Advocacy (TEA), which is a transgender, transexual and intersex persons group was denied registration by the NGO bureau of Kenya because of their membership to GALCK which consists of Most At Risk Population.

society at large on account of their sexual orientation and gender identity.

In recent years the LGBTI agenda has elicited heated debates in Kenya punctuated with homophobic sentiments and often times violence. The World Social Forum held in Nairobi in 2007 was an important step towards promoting LGBTI rights as it made the LGBTI movement visible not only nationally but also internationally.¹⁰ Several LGBTI-activists were present at the event.

As a national human rights body, the KHRC therefore works closely with local and regional activists and partners around the issues of LGBTI. The KHRC has over the years partnered with the Gay and Lesbian Coalition of Kenya (GALCK) in various activities and has hosted various interns from GALCK and engaged with stakeholders in advocating for the recognition and the non discrimination of LGBTI persons. In 2010, KHRC in collaboration with GALCK organised Kenya's first public celebration of the International Day against Homophobia and Transphobia (IDAHO) to wade off stigma and victimization of LGBTI persons.¹¹ Other notable LGBTI engagements have been through urgent action and fact finding missions where LGBTI persons' rights have been violated, sensitization trainings for duty bearers, LGBTI human rights defenders training,

¹⁰ Joyce Mulama., 2007 *Long Fight for Justice for Homosexuals*. Available at <http://ipsnews.net/news.asp?idnews=36271> (last accessed 5 october2010)

¹¹ GALCK had begun celebrating IDAHO three years ago. These previous IDAHO celebrations were usually a GALCK members' affair with guests from the donor community and strategic LGBTI defenders and supporters invited. The KHRC sought to make IDAHO a public event with the general public and the media invited in order to engage the wider public in constructive dialogue, deconstruct stereotypes of LGBTI persons especially in the media and also highlight the negative linkage between homophobia and HIV AIDS spread in Kenya. The results were remarkable; there was positive press, building of more alliances with key allies in the academia and other disciplines and improved public tolerance and constructive dialogue; conversations had begun.

development of a human rights guide for LGBTI persons in Kenya, SGBV training for LGBTI groups, registration of LGBTI groups, legal change of names for trans persons, dispute mediations between LGBTI persons and their families or clients (for sex workers) and continuous civic education for movement building

The KHRC and LGBTI Organizations' continue to receive cases of human rights abuses against the LGBTI persons. These are mainly related to physical violence, blackmail and extortion, denial of housing or evictions on account of their sexual orientation and gender identity. For a long time, these cases have not been tabulated and/ or analyzed. There has therefore been a general lack of researched information on how widespread these cases are or indeed who are the main and common perpetrators. Owing to the scanty data available on the nature, pattern and those most affected by these rights abuses, human rights advocacy and responses have sometimes been reactionary and lacking in strategic focus. Moreover, the interventions neither address the real source of the problem, nor do they build on past responses. It is against this historical background deplete with research data on human rights violations against LGBTI persons in Kenya that this study has been done.

Conceptual Framework of the Study

This study is framed along the human rights pillars of equality and non discrimination. It hinges on the concept of universality of rights, their interdependence, interrelatedness and their indivisibility. This conceptual framework will first point to underpinnings found in international law upon which this study is grounded and show how

despite ratifying these laws, Kenya is in breach of its international obligations. Secondly, it will briefly delve into the universality principle of rights and lay basis on why the KHRC works with sexual minorities

On equality, the study borrows ground from the Universal Declaration of Human Rights (UDHR) which affirms in Article 1 that “all human beings are born free and equal in dignity and rights.”¹² Kenya has ratified this law and is now part of the Kenyan domestic law through Article 2 (6) of the Constitution of Kenya, 2010.¹³

Since the UDHR in 1948, several international human rights instruments echo the equality provisions of the UDHR. The International Covenant on Civil and Political Rights (ICCPR) which Kenya has also ratified states in its Preamble that: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The ICCPR also states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It further requires each State Party to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴

¹² Universal Declaration of Human Rights, Article 1. Available at <http://www.un.org/en/documents/udhr/> (last accessed 5 September 2010)

¹³ Constitution of Kenya, 2010. Government Printer, Nairobi .2010. Also available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 9 October 2010)

¹⁴ The United Nations International Covenant on Civil and Political Rights. Articles 2, and 26 Available on <http://www.hrweb.org/legal/cpr.html> (last accessed on 8 September 2010)

The United Nations Human Rights Committee which authoritatively interprets the United Nation Human Rights Instruments such as the ICCPR held in *Toonen v. Australia*, that the ground of sex in the ICCPR also included sexual orientation. The committee further stated that the criminalisation of sexual conduct between men, including all forms of sexual contact between consenting adult men in private was incompatible with the right to privacy under Article 17 of the ICCPR.¹⁵ It also confirmed that the prohibition of differential treatment enshrined in Article 2 of the ICCPR extended to discrimination on the grounds of sexual orientation

The African Charter on Human and People’s Rights states in Article 3 that every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law. Article 2 provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.”

Although sexual orientation or gender identity is not explicitly included, it can be argued using international authorities that they are included in “sex”. In *Toonen v. Australia* the Human Rights Committee determined that the prohibition based on ‘sex’ encompasses the prohibition of discrimination on the grounds of sexual orientation. European Union law

¹⁵ Comm. No. 488/1992; 31 March 1994. The Commission held that “it is undisputed that adult consensual activity in private is covered by the concept of privacy”, *Toonen v. Australia*, para 8.6.

regards discrimination against transgender persons as a form of sex discrimination. This principle was established by the European Court of Justice in *P. v. S. and Cornwall County Council*, where it was held that the dismissal of an individual following gender reassignment was unlawful discrimination on the grounds of her sex. The phrase “other status” was intentional on the part of drafters. The phrase ‘other status’ makes the list open-ended and illustrative. It has been argued by scholars that inclusion of additional grounds is unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive.¹⁶

This view was demonstrated by the African Commission on Human and Peoples Rights in *Zimbabwe NGO Human Rights Forum v. Zimbabwe* where the commission stated that “Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Art. 2 of the Charter provide the foundation for the enjoyment of all human rights. . . . The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.”¹⁷

Consequently, it therefore follows that the Kenyan anti-homosexual legislation is at odds with international human rights law instruments

¹⁶ ICJ Briefing Paper, May 2010. *International Human Rights Law and the Criminalization Of Same-Sex Sexual Conduct*. Available at <http://www.icj.org/dwn/database/ICJBriefingPaper-Criminalization-SSSConduct-May2010.pdf> (accessed 5 September 2010)

¹⁷ Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*. Decided at the 39th ordinary session, 21 May 2006, Activity Report, ACHPR, 2006. Also available at <http://www.chr.up.ac.za/index.php/browse-by-country/zimbabwe/506-zimbabwe-zimbabwe-human-rights-ngo-forum-v-zimbabwe-2006-ahrlr-128-achpr-2006.html> (last accessed 4 August 2010)

including the ICCPR, ACHPR and the UDHR which as shown above, enshrine a range of relevant rights aimed at protecting human dignity, privacy and equality.

At the writing of this report, there was no case involving the human rights of LGBTI persons in any domestic court in Kenya save one filed by an Intersex person who was seeking a declaration of a third gender. His prayer for a third gender was refused although the court found that he had been inhumanely treated by state officials.¹⁸ However, recent trends in the domestic law of Commonwealth states illustrate that the rights enshrined in international law are also recognised by national Courts in this area. In *National Coalition for Gay and Lesbian Equality*¹⁹, the Constitutional Court of South Africa found that statutory provisions and common law offences prohibiting sodomy were incompatible with section 8 (right of equality) and section 9 (prohibition of discrimination, including on grounds of sexual orientation) of the South African Constitution. Sachs J, rendering a concurring opinion in the same judgment emphasised the signal importance of equality under the South African Constitution:

‘The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference ... Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgement and

¹⁸ R.M. v Attorney General & 4 others [2010] eKLR. Available at http://kenyalaw.org/Downloads_FreeCases/79392.pdf (last accessed 10 December 2010)

¹⁹ South African Constitutional Court 1999 (1) SA 6.

acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment'²⁰

In India, another commonwealth state, a Delhi High Court found that provisions within the Indian Penal Code that criminalised "unnatural offences" were incompatible with Articles 14 (equality), 15 (non-discrimination), 19 (freedom of expression) and 21 (life, personal liberty and dignity) of the Indian Constitution. Finding that a central tenet of the Indian Constitution was "inclusiveness", it held that those perceived by the majority as "deviants" or "different" should not be marginalised.²¹ Similarly, the High Court of Fiji in 2005 found sodomy laws to be unconstitutional, on the grounds that criminal law should not be used to discriminate against private same-sex acts. Central to that analysis was an emphasis on the rights to privacy and equality

The Constitution of Kenya similarly affirms inclusiveness and protection of the marginalized as valued tenets of the Kenyan state.²² Further, articles 27 (4) and (5) of the Constitution of Kenya, read together with Articles 259 (4) (b) and 260 (definition of a person and marginalized group) the Constitution of Kenya prohibits direct and indirect discrimination against any person by the State or other person. This arguably includes sexual orientation and gender identity since the grounds for non discrimination are an illustrative open ended list. This

²⁰ Ibid, para 132.

²¹ See *Naz Foundation v Government of NCT of Delhi* – Delhi High Court No. 7455/2011

²² Constitution of Kenya, 2010. Article 10 (2b) Government Printers, Nairobi .2010. Also available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php (accessed on 9 October 2010)

however requires judicial interpretation as it is not explicit. However article 27 (4) has an illustrative open ended list of grounds for non discrimination and reads that “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.” Article 27 (5) states that “a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”²³

Universality is a core principle that informs the work of the KHRC. However, universality of rights versus cultural relativism has been a long standing debate on the application of rights in certain countries that claim to protect their ‘cultures’. Debate about the universality of human rights requires definition of "human rights" and of "universality." The idea of human rights relates to the conception that every individual has legitimate claims upon his or her society for defined freedoms and benefits. The UDHR provides an authoritative catalog of rights. The rights of the Universal Declaration are politically and legally universal, having been accepted by virtually all states, incorporated into their own laws, and translated into international legal obligations.²⁴ This school of thought denies the relationship between human rights and a cultural context, while affirming that human rights come exclusively from international legal

²³ Supra note 13

²⁴ Louis Henken., 1989. The Universality of the Concept of Human Rights. *Annals of the American Academy of Political and Social Science* © 1989 American Academy of Political and Social Science

instruments and can be preserved without cultural variation according to existing international jurisprudence.²⁵

Other rights, however - notably, freedom of expression, religious, sexual and ethnic equality, and the equality of women - continue to meet deep resistance because of domestic cultures. Proponents of this cultural relativism assert that human rights and values, far from being universal, vary a great deal according to different cultural perspectives. It then follows that cultural relativist apply this theory to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal.²⁶They politicize it further by asserting that human rights are western notions, imposed on the populations of the South, unrelated to the reality of non-western world cultures.²⁷

The argument of cultural relativism frequently includes or leads to the assertion that traditional culture is sufficient to protect human dignity, and therefore universal human rights are unnecessary. Furthermore, the argument continues, universal human rights can be intrusive and

²⁵ Prof. El Obaid Ahmed El Obaid., 2002. Universality of Human Rights and Cultural Relativism. Available at <http://www.equitas.org/english/programs/downloads/lhrtp-proceedings/23rd/Rehman-El-Obaid-Ang.pdf> (last accessed on 6 October 2010)

²⁶ Diana Ayton-Shenker., 1995. The Challenge of Human Rights and Cultural Diversity. United Nations Department of Public Information DPI/1627/HR--March 1995

²⁷ See Adamantia Pollis and Peter Schwab, Human Rights: Cultural and Ideological Perspectives, Praeger Publishers, New York, 1979, p.8.

disruptive to traditional protection of human life, liberty and security.²⁸ The KHRC affirms that traditional culture is not a substitute for human rights; it is a cultural context in which human rights must be established, integrated, promoted and protected. Human rights must be approached in a way that is meaningful and relevant in diverse cultural contexts.

This study seeks to adopt a more egalitarian attitude towards sexual, linguistic, religious and other minorities, an attitude informed by scientific facts and methods of inquiry, an attitude that respects diversity, inclusiveness and the protection of minorities.

Outline of the Study

This study endeavors to provide information on the nature, scope and unique characteristics of these violations as well as long term strategies to address the same.

The report is divided into four main sections:

- a) Methodology;
- b) Major findings;
- c) Analysis of violations;
- d) Recommendations.

This report seeks to highlight the violations observed and reported to the KHRC between May and October, 2010 regarding LGBTI persons with a

²⁸ Supra note 25

view to draw attention to the need to enhance equality and non discrimination in Kenya as a vibrant, tolerant and open democracy.

The KHRC hopes that this report will inform a factual dialogue on sexuality issues in Kenya and Africa at large with a view to moving the debate to positive legal and social reforms that are enhance equality and non discrimination.

CHAPTER 1: RESEARCH OBJECTIVES AND METHODOLOGY

1.1 RESEARCH OBJECTIVES

The main objectives of this study were:

- To establish the nature, scope and pattern of human rights abuses on LGBTI persons in Kenya. Principally, the study undertook monitoring and reporting of human rights violations against LGBTI persons in all eight provinces in Kenya with specific emphasis on both rural and urban populations;
- To identify current strategies in addressing human rights violations on LGBTI persons;
- To inform, and evaluate the effectiveness of the current strategies in addressing these human rights abuses and offer recommendations on their enhancement, and;
- To tabulate cases of human rights violations and abuses against the LGBTI community which had not been done before despite many previous complaint of abuse by LGBTI persons having been made to the KHRC and other LGBTI organizations.

KHRC hopes that this report will elicit public dialogue on LGBTI issues, lead to investigation, discussion and provision of further recommendations on appropriate remedial measures as well as substantive human rights investigation reports and solutions. This

detailed human rights report will equip human rights defenders with a tool to call for dialogue with relevant authorities such as police officers, Ministry of Home Affairs, Ministry of state for Special Programmes, Office of the Vice President Immigration and Registration of Persons, Ministry of Public Health and Sanitation as well as Ministry of Justice. Hopefully, by highlighting the human rights abuses, most violations will be urgently reined in while remedial measures will be provided and appropriate safeguards undertaken by the State.

1.2 RESEARCH METHODOLOGY

Selection of the geographical regions was done with advice from the Gay and Lesbian Coalition of Kenya (GALCK) who have a nationwide membership of LGBTI persons and activism networks²⁹. The regional centers most of which are former provincial headquarters or regional business or administrative hubs were selected on the basis of the considerable presence of LGBTI individuals measured by their visibility through local organizing and snow-balling by other groups from GALCK; preliminary violation reports received by the KHRC from the regions which helped identify areas where human rights violations targeting LGBTI persons regularly occur. The regional centers were located in Nairobi, Central, Mid Rift, North Rift, Northern, Nyanza, Western Kenya, Upper Eastern and, Coast.

²⁹ Solomon Wambua.,2010 *LGBTI Groups within Kenya*. (personal communication -Phone Interview) 3 July,2010)

The lead researchers in this study were human rights monitors who have worked with KHRC or GALCK on LGBTI issues with extensive knowledge and skills necessary to perform their task of reporting and responding to human rights violations of sexual minorities in Kenya.

The researchers met LGBTI individuals and groups in key regional areas sitting in at least a town in each of the eight provinces. At least 474 respondents were interviewed with a minimum of 50 in every region. Researchers employed snow ball sampling and administered/used open ended questions, interviews, Focused Group Discussions (FDGs) and delineating victims to collect the qualitative data.

Group discussions were held in at least one town per province in Kenya. From the groups, the study expanded its scope by getting a reconnaissance of what areas of human rights violations the study needed to pursue further, identified case studies, contact persons, reviewed previous data on the same and existing strategies, if any, that were in place to report and address the human rights violations of LGBTI persons.

Selected victims were also identified from Focused Group Discussions and the scanty reports on rights violations from various civil societies working on LGBTI. Experts familiar with LGBTI matters also came from these organizations.

The researchers also collected data from other sources such as the Kenya Police Force, stakeholders in the health sector, academia and civil society.

Within a period of four months, the researchers sampled 474 Kenyans, aged 18 to 65, and interviewed them for the study. Focused group discussions were also used to crystallize qualitative data on common rights violated.

CHAPTER 2: MAJOR FINDINGS

Most respondents were relatively young (in the range of 20-27 years) and were sampled from diverse socioeconomic backgrounds, ranging from the unemployed to educated professionals. The survey sample comprised students, Men having Sex with Men (MSM) sex workers, small-scale earners, and white collar professional or steady income earners.

The research revealed that most LGBTI persons in Kenya also engage in sexual activities with members of the opposite sex and many are married (heterosexual marriages) to or in a long-term relationship with the opposite sex.³⁰

I have a wife, I don't love her because I married her to please my mother, I love my boyfriend most.

If the law gave us equal rights in marriage I would marry my boyfriend.... 54 married Bi sexual man

Some of the respondents stated that they get married to conceal their true sexual orientation. There are however few who are in long term relationships with same sex partners with few terming them as 'marriages' since same sex unions and marriages are illegal in Kenya.

³⁰ At least one in every four LGB persons alluded to having a heterosexual relationship to serve as a distraction for family and neighbours

2.1 Harassment by State Officials

Same sex sexual practices remain criminalized in Kenya, and even though there are few convictions based on sections 162 to 165 of the Penal Code that criminalize these practices, LGBTI persons are routinely harassed by the police, held in remand houses beyond the constitutional period without charges being preferred against them, and presented in court on trumped-up charges.³¹ Closely related to this, is a cartel of corrupt police officials who routinely extort and blackmail LGBTI persons with the threat of arrest and imprisonment if they do not give those bribes.³²

I was in my house with my partner when persons claiming to be police officers banged my door demanding entry. As I was trying to open they forced themselves in without identifying themselves and proceeded to search the house without a warrant. They claimed they had been tracking my text messages and knew we were about to commit an act of gross indecency (sodomy). They found gay pornographic magazines and also confiscated my laptop claiming to take it for further hard drive searches. They then made us strip naked, beat us up and told us to have sex for them to see what we do. We refused and they beat us further. They said they would frog march us naked from my fourth floor apartment, call the media and make an arrest of gay people caught in the act. I am a respected doctor and live in the staff residence. They said that if I paid them 100,000shs they would leave us alone. I reluctantly agreed. They allowed me to dress, we drove to the bank in my car which they commandeered where I withdrew the 100,000 shs and paid them. I have since changed

³¹ Chapter 63 of the Laws of Kenya, Can be accessed on 20/09/2010 through http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, The constitution of Kenya, 2010 stipulates in article 49 that an arrested person must be presented in court as soon as is reasonably possible but not later than 24 hours.

³² David Kuria., 2010. *The Need to Decriminalize Homosexuality*. (Personal communication (decriminalization roundtable meeting at KHRC offices, 23 August, 2010)

*phone numbers and changed residence..... 29 year old single,
gay.*

The most common of trumped up charges was possession of narcotic drugs where reports were received of police “planting” rolls of bhang (cannabis sativa) on the suspects.³³In the Coast, respondents reported that the police and other state officials usually arrest them along the beaches and charge them with wrong offences the most common being drunk and disorderly and prostitution.³⁴ Similar reports were received in Nairobi where city council security officers arrest LGBTI persons for the same reasons.³⁵

LGBTI sex workers, mostly MSMs are often asked for bribes and sexual favours by male police officers in exchange for their freedom and security.

Karau akikushikia pale kwa street usiku na anakujua vizuri, anakwambia mwende lodging ya soo moja achape shoti moja mmalizane. Hata hawatumiangi condom jameni (when the police (male officers) arrest us in the streets, they know we are sex workers. They ask us for sex in exchange for our freedom. They never use condoms.) 26 MSM sex worker.

³³ KHRC is currently offering legal advice to one of our clients who is going through such a case. He is a transgender sex worker in Mombasa. When arrested, the police asked him for either sex or money to secure his freedom. He offered none and was taken to the police station and later charged with possession of bhang

³⁴ Michael Kioko., 2010. *Status Report from PEMA Kenya*, (Personal Communication (email) 4th September 2010

³⁵ John Mathenge., 2010. Sex Workers Outreach Programme (SWOP) challenges of MSM sex workers in Nairobi. (Meeting in central park, Nairobi. 4th August 2010)

Those who fail to give bribes or sexual favours are charged with trumped up charges and sometimes raped by state security officers. In the Coast province, respondents who do sex work reported to have been arrested by the police officers on night patrol only for them to be raped in dark street alleys then thereafter released. Attempts to report such incidents to the police were unsuccessful due to the reluctance of the police to investigate and prosecute their own.

I am a male sex worker in Mombasa; my clients are rich respectable men who during the day preach in mosques that all homosexuals should be killed or locked up for treatment. I was walking in town late one night with my friend escorting him to his client when two police officers on patrol stopped us. They searched us then demanded an explanation as to why we were dressed like women and acting effeminate. One of them said he had been seeing me a lot at night and knew that I was a 'shoga' (homosexual). They said they would lock us in the cells and plant toy pistol in us then charge us with robbery with violence which is punishable by death. We were terrified. They asked us for a bribe but we had no money. They said that if we cooperated we can work a deal. They dragged us to a dark alley and asked us to give them oral sex. We did but they further turned us around and took turns having unprotected forced anal sex with us. They said that would teach us a lesson and 'straighten' us. When they were done, they beat us up wounding us badly and told us never to show face on the streets again. My friend and I were HIV positive yet the police officers did not care even after we told them not to rape us. We tried reporting to the police station the following day but the police laughed at us and slapped us saying that we were cheap shogas looking for fame. I have since relocated to Kilifi. I fear for my life....., 23 year old Gay man

The binary norms of male and female genders continue to intensify the exclusion of LGBTI people in Kenya. LGBTI issues are hardly discussed in the public arena.

The ambiguity of what is really criminalized confuses both the State agents as well as the sexual minorities. This then informs the misunderstanding in state agent's interpretation of penal provisions.

*Mashoga wote ni criminals, these are rapists who should be locked up forever.(All homosexuals are criminals and rapists...)...police constable,
Malindi Police Division*

2.2 Stigma and Exclusion by Family and Society

Stigma and discrimination are the major problems that LGBTI persons in Kenya face.³⁶ In most instances this is as a result of failure to appreciate the human diversity in sexual orientation and gender identity. As observed elsewhere in this report, the failure to address and bring out these issues in the public have resulted in the same being treated as taboo topics and thus creating superstitious beliefs on the same.

The stigma usually begins from family and neighbours, who alienate, harass and humiliate LGBTI persons when they are "outed".³⁷ Close friends and workmates or school mates also perpetuate this stigma against the LGBT persons. Only 18% of the respondents reported to have come out to their families or having been "outed".³⁸ 89% of the

³⁶ Sign of disgrace and social unacceptability: the shame or disgrace attached to something regarded as socially unacceptable, disgraceful and unwanted.

³⁷ To be outted is to have one's orientation (often gay or lesbian) revealed to one's family, colleagues or public.

³⁸ To state openly and publicly one's sexual orientation

respondents who came out or were outted reported having being disowned by their family members on discovery of their sexual orientation or gender identity.

I am a lesbian with a 3 year old child. I was married to a man until last year when my sexual orientation was discovered by my in laws through a jilted girlfriend. My husband divorced me and took the baby from me. My own parents supported his move and don't want anything to do with me. I sought the intervention of our child welfare officers but when my husband told them that I am a lesbian, they condemned me and said I am absolutely immoral and incapable of raising my own child. They said I would rape her and convert her to lesbianism....., 32 year old school teacher. Lesbian

Some of them were forced to attend counseling sessions in the belief that they were undergoing a psychological crisis and thus required help to get over the “confusion”.

More than 300 respondents stated that they feel most unwanted and threatened by the religious groups. However, majority of them seek refuge and acceptance from the same religious groups which preach against them condemning them as unworthy and wretched.³⁹

There are a million people in this country who want nothing to do with me and would kill me because of my sexuality. I ran to the church for comfort as a wounded soul who needed acceptance, I found none; in return I was wounded more by rejection, condemnation and helplessness... 41 Gay

for most communities in Kenya, an intersex child is deemed to be a curse and more often than not, such a child is either abandoned or killed by the

³⁹ Dennis Nzioka., 2010. *Homosexuality and Religion in Kenya*. (personal communication, 8 September 2010)

community. In essence, as illustrated by various studies, most parents of an intersex child do not know that they can opt to have their child go through reconstructive surgery.

I am a 20 years old intersex individual living in Maragua district. My mother died when i was 5 years old. Although I am intersex, she had brought me up as a female. Upon my mother's death, I was transferred to my maternal uncle where I was brought up as a male . My uncle's family was not aware of my intersex condition. Upon reaching puberty, although I had testicles, I started menstruating and grew breasts. My uncle's wife over reacted and kept tying up my breasts tightly so that they don't show. I dropped out of school since the other children were making fun of me. I wish I could undergo surgery and become a biologically fit woman..... 20 year old intersex.

Respondents at the working level reported to have been discharged from duty when their sexual orientation/gender identity was discovered, yet others reported to have suffered a discriminate refusal of promotion, hostile working environment, ridicule and humiliation at the work place.

I am an IT technician. Last year, I was working in a medium sized IT consultancy firm. There were general rumours and queries about my rough looks such as the dreadlocks and the baggy pants. One day my Human Resource manager called me to the office and told me that I was being let go because they had information proving my lesbian orientation from my Facebook inbox. My dismissal letter simply stated gross misconduct., 27 year old Lesbian

Secondary to the stigma and discrimination are a chain of associated violations which include aggression and humiliation in public, refusal to get service by service providers such as doctors' landlords, bankers and lawyers. Criminalization of same sex sexuality is simply linked to stigmatized service provision since many service providers find it

difficult to provide non-stigmatizing services to clients perceived to be practicing illegal behaviour⁴⁰.

I am a transgender. My national ID and all legal documents from the government show that I am a man, which I am not; I don't even dress like one. The first time I tried over the counter bank withdrawal I was turned away and accused of impersonating the account holder (it was my account) they were quite confused and turned me away..... 25 Transgender

My landlord saw me on TV in an LGBTI event and demanded that I move out that same day. He said he did not need my dirty money earned from prostitution. He thought all lesbians are prostitutes....., 34 Lesbian.

2.3 Physical Violence and Threats of Death

The most reported forms of violence include, but are not limited to, physical violence (harassment, riots, beatings, lynching and mob justice), hateful printed publications (text messages, posters, books, printed and online publications) and hate speech.⁴¹ The common form of violence was verbal where insults and derogatory terms were used in reference to LGBTI persons who are often referred to in words that portray them as subnormal, pathological, perverted and deserving of annihilation.

⁴⁰ Kenya National Aids Strategic Plan 2009/10 – 2012/13, Nairobi 2009 pg. 6.

⁴¹ Hate speech include, Using threatening, abusive and insulting words or behavior or displays any written material. Publishing or distributes written material. Presenting or directing the performance of a performance of a play. Distributing, showing a play or recording of visual images. Producing or directing a programme which is threatening abusive or insulting that intended to stir up ethnic hatred. Offenders of hate speech will face a fine not exceeding 1 million or 3 years in prison or both.

Pig, they should all be rounded and locked up in an island....Businesswoman, Nairobi

They (homosexuals) need to be burned⁴²...Protester at Mtwapa February 2010

Physical violence perpetrated by the public was reported in the Coast, Nyanza, Eastern and Nairobi regions. Reports of physical violence mostly came from Nairobi where LGBTI persons reported to have suffered violence when their orientation was discovered especially in night clubs, through display of same sex display of affection in the streets and neighborhoods.

I was dancing with my girlfriend in a night club in Nairobi Central Business District, the bouncers just came to us and said 'people like us' we not allowed into their bars. He dragged us forcefully and humiliated us by physically kicking us out and shouting that we needed real 'penis to teach us how to be a woman'... 32 Lesbian.

There were 6 cases of sexual violence on gays perpetrated by the police in the Coast and Nairobi regions.

I was walking with my friends one Friday at midnight near Dagorretti corner early September this year (2010) coming from a party when a white salon car slowed down and one of the passengers splashed us with water. We hurled insults at them. They stopped the car and introduced themselves as police officers. One of them said he knew me through a friend of mine who I hang out with a lot (a gay friend). They took us to Karen police station and locked us up. It was a Friday evening; they said that if we paid five hundred shillings each they would let us go. We tried getting people to send us this money and one of the officers would go

⁴² See <http://www.akawilliam.com/kenya-mob-attacks-gay-men-this-is-not-allowed-these-people-need-to-be-burned/> last accessed on September 23, 2010

withdraw. I was unsuccessful all weekend. On Monday morning, my name was not read among those being taken to court for taking plea. Later, the officer who had said he knew me came and said he knows what I and my friend do and so we must go to his house so that I can pay for my freedom. I was confused. He dragged me to his house holding my hand. He then undressed me in the house and had unprotected anal sex with me. I contracted gonorrhoea. I spent a week in the house taking antibiotics then later reported to the KHRC legal aid desk. Without evidence, we couldn't proceed with charges against the officer....., 26 Gay

Further to this, were 3 reports of gang rape in Nairobi by organized gangs perceived to be Mungiki⁴³ and others who specifically targeted gay men and raped them to 'punish them for their errant ways.'

Earlier this year in February, we had come home late with 2 of my gay friends (all from our estate) from town. It was deserted. When we alighted off the matatu, we found some four men on the stage. They ordered us to stop and said they knew us and that we were shogas. They said they were mungiki. They slapped us and demanded silence as they dragged us to a bush. We were forced to bend and undress and they raped us using saliva as lubricant. They never used any condom. They strangled any who moaned of pain. When they were done, they beat us up and let us go threatening to kill us if we ever reported or told anyone. This is the first time any of us is speaking about this, six months later..... 20, Gay

In three out of the nine regions of Kenya, there were consistent reports by lesbians that they were subjected to verbal sexual abuse with threats of rape to 'straighten them'.

⁴³ Mungiki is a politico-religious group and a banned organization in Kenya. See Mutuma Ruteere., 2008. *Dilemmas of Crime, Human Rights and the Politics of Mungiki Violence in Kenya*. Kenya Human Rights Institute, 2008

I was drinking downtown Nairobi at night with my friends, when I left at eleven, some four men followed me from the nearby drinking den. I started walking faster since I was crossing a dark patch. Before I got to the matatu stage, they caught up with me and started beating me up. They said they were Mungiki and wanted to stop my homosexuality. One of them ripped off my clothes wanting to rape me, I yelled and kicked but they kept punching me up. Before he could penetrate me some passersby came to my rescue and the men fled. I was too wounded, bleeding and could barely walk. Since I am a homeless sex worker, I slept with a friend until the next day I went to the KHRC who wrote a referral for me to the Nairobi Women's Hospital. I was treated at the gender violence recovery centre then later discharged. I refused to go to the police. I feel they won't get help since I have dealt with them before and all they do is make fun of us and ask for sexual so that they can teach me how to love a penis. ..., 29, Lesbian

I had to flee home, my father said his son cannot be a woman (gay) I am now a sex worker in Nairobi. I look for clients at night in clubs and sleep in the park during the day. My family says I am as good as dead to them, they have even given away my clothes to my cousins..... 27 year old gay man

Additionally, some religious leaders incite their followers, in speech and action, to eliminate LGBTI persons from Kenya.

We will eradicate gays.....How can a State institution be involved in providing counseling services to these criminals (homosexuals). We ask the government to shut it down with immediate effect or we shall descend on its officials⁴⁴....., Mtwapa February 11 2010

⁴⁴ Muslim and Christian religious leaders united and vowed to stop an alleged gay wedding in Mtwapa "at all costs."The Council of Imams and Preachers of Kenya (CIPK) and the National Council of Churches of Kenya (NCCK)

I would remove my dagger and kill if I met any (homosexual or lesbian).....religious elder in Wajir, Northern Kenya

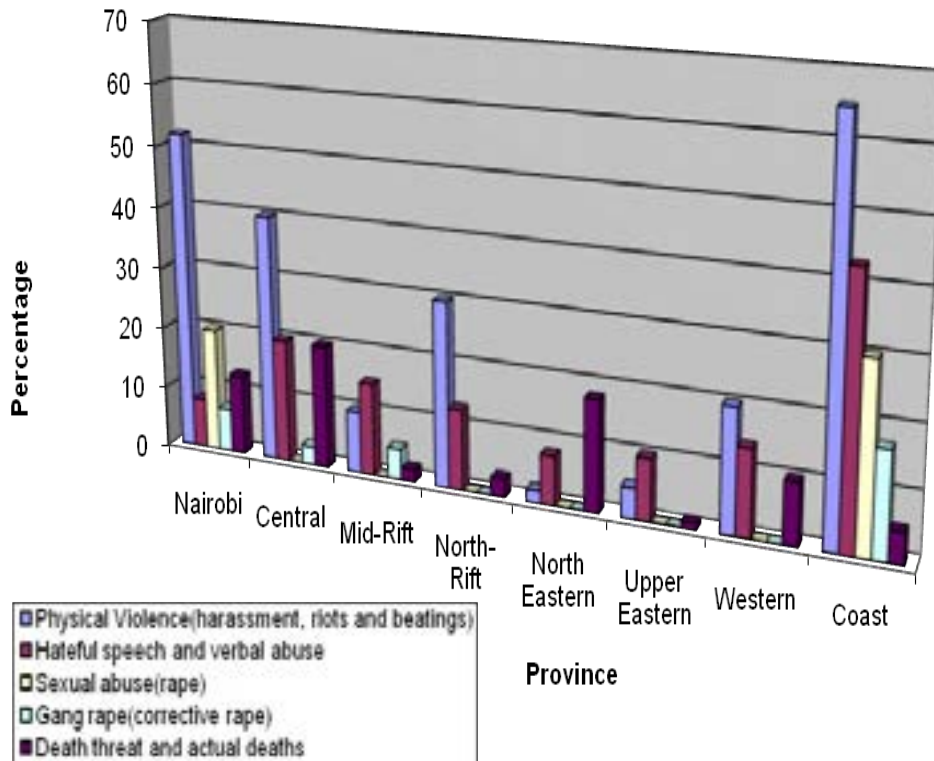
No action has so far been taken against the perpetrators of such heinous acts of human rights violations in Mtwapa⁴⁵. These actions continue to be a constant problem for the LGBTI community in light of the reluctance of State officials to indiscriminately apply and enforce the existing laws to protect and safeguard the rights of LGBTI persons. Such reluctance is further accentuated by the lack of comprehensive laws that prohibit all forms of discrimination against all persons. The lack of awareness and understanding of the LGBTI issues has resulted in the wrong beliefs by the police that it is *right* to punish LGBTI persons especially on the basis of sexual orientation.

It is an offence, an unnatural offence, and also their behaviour is repugnant to the morality of our people ..., a senior police commander, Coast Province addressing the media after the Mtwapa attacks on gay men fore mentioned in this report.

issued a statement that read inter alia 'Come night, come day, we shall not allow that marriage to be conducted in this town tomorrow (Friday). We shall stand firm to flush out gays who throng this town every weekend from all corners of this country.' See <http://www.nation.co.ke/News/-/1056/860254/-/vqhr6e/-/index.html> last accessed on 10th September 2010

⁴⁵ The KHRC has been monitoring the situation in Mtwapa and making follow up consultations with the Kilifi District Commissioner (who is in charge of the district security committee) and the Kilifi Divisional OCPD. They reported that no action had been taken on Sheikh Ali and Bishop Chai both of whom incited the mtwapa violence. The failure to act is under the guise of balancing security and peace concerns to avoid backlash from the religious sector. The KHRC affirms that the rule of law must be upheld and people who incite others to violence must all face the law regardless of their standing in society

PREVALENCE OF VIOLENCE(PHYSICAL AND SEXUAL)



2.4 Expulsion from Learning Institutions

LGBTI persons in high school or college students are punished, suspended or expelled from school on grounds of ‘actual’ or suspected sexual orientation or gender identity. 23% of the respondents reported to have actually gone through one or more of these. 75% of the respondents who confirmed having been disciplined for alleged same sex sexual conduct or tendencies in schools were expelled.

I was a student in Kenyatta University until 3 years when I appeared in the media and declared that I am gay and demanded legal recognition. What followed after this was a consistent chain of backlash. My land

lord demanded that I move within a week, in college, my group members kicked me out of group work and failed to allot my course work. Some professors deliberately failed me and made side jokes about homosexuality in class all to spite me. It was difficult walking around campus as people would point fingers, whisper and sneer. I couldn't bare the stigma and frustration in the school environment and my academic pursuits. Further to these was withdraw of financial support by my family due to my coming out. Eventually I dropped out of college and I am now trying to resume studies outside the country....., 28, Lesbian

Expulsion and suspension on grounds of sexual orientation or gender identity was reported to be most common in public high schools.

I was in St Mary's Yala six years ago. The deputy complained he had received reports of homosexuality in the school. Few students and prefects were asked to write a list of suspects. My name was read thrice and I was expelled without a right of fair hearing. It was embarrassing and meant to frustrate my academic pursuits. , 25 Gay

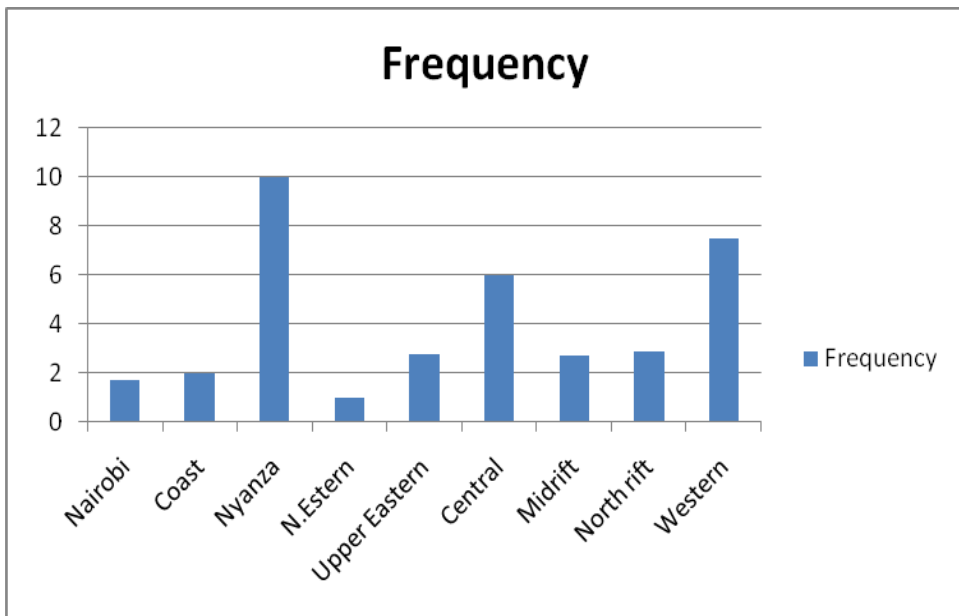
I was in Chuka Girls High School nine years ago. I was found making out with another girl in the dining hall. It was a week to the KCSE. We were both expelled and had to commute to the school every day to sit our KCSE exams yet it was a boarding school. The administration never even gave us hearing. They said they could not risk us 'infecting' other girls. They made us feel diseased. Due to the disruption in my studies I performed below average and had to repeat form four in another school the following year..... 26 Lesbian.

In universities and colleges, victims reported social exclusion, stigmatization, sometimes bullying and dismissals by Private Christian colleges. Some private universities refuse to allot course work to

students who undertake their internships in organizations sympathetic to LGBTI issues

I am a student in Strathmore University. My course has internship requirements. I volunteered as an intern with GALCK but our placements office refused to allot my marks stating that GALCK is blacklisted by the university because they practice ungodly acts of sodomy....., 20 gay.⁴⁶

Expulsions and Suspensions in Schools and Colleges per Region



⁴⁶ KHRC has also been blacklisted by Strathmore University (a catholic founded university) as an internship centre because KHRC supports gay rights. This information is from students currently studying from this school who have lost marks for engaging with GALCK and KHRC in internships.

2.5 Blackmail and Extortion

Respondents who are educated professionals are often blackmailed by a cartel of colleagues at work, security agents who work in cohorts with other LGBTI persons who know the professional's sexual orientation.

I am 50 years old. I am a man, but I like other men. It is so hard to find men at this age, so I often buy sex from sex workers. One of them has been stalking me demanding payment or he will come to my house and tell my wife what we do. I have been paying him ten thousand a month for his silence. Now he wants more or else he will storm my work place screaming that I have been raping him. He is asking for fifty thousand. I cannot afford that, I am thinking of quitting my job..... 50, bisexual man

There were reports of blackmail within the community especially where same sex partners broke up and one of them would blackmail the other to offer him/her a substantive amount of money or other favour in exchange for their silence on the other's sexual orientation. One respondent reported that his sexual orientation was revealed on a popular FM station after he broke up with his partner.

I blackmailed rich men to even sign over their land, buildings and vehicles to me. I extorted a lot of money from the gay men who I slept with then later turned against them with demands for money and wealth. My threats were that I would file rape complaints (I used to preserve evidence of our sexual acts by hiding the condoms we had used the previous night with their semen inside) I was working closely with five police officers who knew my orientation and with whom we used to harass gay men with then share the proceeds. I have since changed and now champion the rights and welfare of sex workers....., 34 Gay.

Two of the respondents reported that their families threatened to expose their sexual orientation if they did not totally surrender their children to their immediate families arguing that they were morally unfit to bring up their children. Those who were bisexuals reported that they were constantly blackmailed by their heterosexual partners to give up their children and asked to part with exorbitant maintenance for their children.

I send my ex-wife 100,000kshs every month for her silence and child maintenance. If she spoke my father would strip me off my inheritance. It's also not good for our family's business empire for associates and dealers to know that I love fellow men....what would you do..... 46 Bi - Sexual

Group discussions with respondents reported that, as children or dependents, they were cut off from educational support by their parent or guardians, some were sent away from home because of they identify as LGBTI. Such measures are designed to reform them to heteronormativity.⁴⁷

I am quite effeminate and proud of myself. This landed me in trouble when I was in high school. I was expelled upon suspicion of being gay. My parents were enraged. My dad said no son of his was a woman and he sent me away from home saying that I was better off dead. He said I could only come back if I reformed. I wondered how I could prove I was reformed and what evil I was reforming from. I went to Nairobi to stay with my cousin then later ended up meeting gay men who took care of me financially in exchange for sexual favours. I was naïve and I used to have sex without a condom. I got infected with the HIV virus and I am

⁴⁷ Esther Adhiambo., 2010. *Status Report of Human Rights of LGBTI persons in Coast.* (FGD, 10 July 2010)

now living positive and proudly gay. I hope another child won't go through what I went through.32 Gay

These manipulative tactics have the effect of blackmailing the LGBTI persons to reform. These vulnerable situations are conducive for exploitation and child abuse or sex trafficking because most dependants are below 18 years at this stage.⁴⁸ Further, due to the information gap on comprehensive sex safe education for MSM in schools, most of the dependants are at high risk of contracting HIV when they venture out looking for means of survival after being chased away from their homes.⁴⁹

2.6 Poor Access to Health Care and Lack of Comprehensive Services

LGBTI Kenyans, accessing treatment for sexually transmitted infections (STIs), counseling and testing for HIV, and transgender and intersex persons seeking general care, are often afraid of honestly responding to medical interviews because honesty could lead to rebuke, arrest or both. Doctors often violate the privacy of LGBTI patients by exposing them to other staff or police, preaching to redeem them, or altogether denying them medical care.

The doctor refused to believe that I was gay; he said he had only heard of gay people on TV and that I was simply lying (even after seeing my anal warts). He then called his colleagues to come spectate. It was quite embarrassing for me. He later told me to go read Leviticus 18:25, I felt judged... , 23 MSM sex worker

⁴⁸ Leonard Mutisya., 2010. Discussions on the Domestication of the Yogyakarta Principles in Kenya(FGD, May 2010)

⁴⁹ Supra note 12 page 14

Most LGBTI persons are reportedly more concerned about exposure of their sexual identity, as well as how the health care staff might react if informed about their sexual behaviour than in getting medical treatment. Therefore, LGBTI persons seek medical attention when their health condition has significantly deteriorated and when it is often too late.⁵⁰

He told me that I had syphilis which was at stage 3 and there was nothing they could do. Said it was too late for me, too late to try and treat it. I am ready to die.
27 Gay

Respondents also stated that same sex sexual behavior is rarely discussed among health care service providers, or between providers and patients. This is despite the fact that providers see some male patients with anal sores or ulcers in the throat, which is suggestive of male-to-male sex.

In Nyeri, some of the respondents reported that they were often embarrassed when they had to explain to some naïve doctors or medical staff how they got these sores. This exhibited the lack of informed discussion among the medical practitioners of the medical needs of LGBTI persons and in particular of MSMs.

23% of the respondents who are working reported not being free to nominate their partners of choice as next of kins, or being able to share medical insurance policies with them. Further, these respondents reported their difficulty in finding medical insurance providers trained to meet their specific sexual health needs.

⁵⁰ Supra note 7

My insurance provider told me that they couldn't insure my partner as part of my family because that would be illegitimate. When I tried seeking help from the human resources manager of our organization, he said I could not share medical insurance with my partner since we are not married. I was puzzled hearing this from a human rights organization that seeks to advance the right to equality, especially women's rights..., 34 Lesbian

This illustrates the level of discrimination in accessing the same services as the other Kenyans. In particular, members of the police service and health care personnel are guilty of discriminating against and victimizing LGBTI persons in many parts of Kenya, leading to LGBTI persons living a secluded lifestyle and even avoiding health care services.

Box 1. Victimization of a Transgender Person by the Police



Source: Standard Newspapers. 1 July 2010

As a result, many LGBTI persons have been unable to access quality health care services such as Voluntary Counseling and Testing (VCT) and treatment for STIs and HIV & AIDS. This has not only made LGBTI persons more vulnerable to HIV infection but also made it more difficult for researchers to gain access to them and investigate their HIV risk behaviour and prevalence rates. Consequently, due to lack of data, LGBTI persons are still not considered to be a priority target group by many HIV & AIDS programmes planners and health care providers around the country.⁵¹

With regard to transgender and intersex persons, our researchers found no medical provisions or policies for persons who choose to undergo gender reassignment therapy, with the satisfactory and complete report of a medical practitioner trained in matters of gender identity change.

I am a transgender, I dress like a woman but I have male sex organs. I once had an accident and was rushed to Kenyatta National Hospital Emergency room for treatment. I had injuries that required the medical staff to undress me and dress my wounds. I struggled to hold onto my pants petrified of their reaction if they found out I had a penis. My supportive family member rushed in and covered me and undressed me discreetly....,25 Transgender

⁵¹ The National Aids Control Council reported to the UN General Assembly, Special Session on HIV and AIDS in its country report that 'There is an overall lack of comprehensive data on MARPs that hinders effective targeting. For example, it is known that sex workers, with relatively high HIV prevalence, are widespread in urban centers and along major transport routes. However, attempts to quantify accurately the population size have so far been unsuccessful. KNASP III uses the latest model default estimates to arrive at 80,000 sex workers for planning purposes. MSMs are a significant population but their size is difficult to estimate'

See http://data.unaids.org/pub/Report/2010/kenya_2010_country_progress_report_en.pdf. Last accessed on 5 October 2010

2.7 Medical Research Abuse

A person's sexual orientation or gender identity is not pathological and cannot be studied as a clinical condition to be treated through corrective counseling or medical experimentation without the free and genuinely informed consent of the person.⁵²

Respondents reported being subjected to practices such as forced HIV testing, forced anal and rectal examination by police, hormonal, shock or psychological therapy and or religious exorcism to correct an LGBTI identity without the consent of the person.⁵³ Most therapies are forced upon the respondents by parents or family hoping for curative effects- which often fails.

The police took me to hospital for examination. The doctors told me to kneel on the bed and bend over. They inserted cold painful objects in my anus. It was intrusive and demeaning.....31 Gay

⁵² See the Yogyakarta principles. Principle 17 and 18 available at www.yogyakartaprinciples.com, last accessed on 5 September 2010. The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity

⁵³ In Malindi, some of the respondents were forcefully examined by the police without their consent. They were duped to believe that they were being treated by the attendant government doctors.

CHAPTER 3: KHRC'S ANALYSIS

There is a deliberate failure by the state to protect sexual minorities from discrimination both in policy and legislation. Although the Minister for Justice, National Cohesion and Constitutional Affairs affirmed Kenya's commitment to enhance equality and non discrimination to all Kenyans including sexual minorities' substantive legal and policy action to qualify this is lacking as highlighted in this report.⁵⁴ The State has also failed to decriminalize consensual same sex sexual conduct despite overwhelming domestic and international research showing the negative linkage of criminalizing homosexual conduct and HIV health programmes⁵⁵.

Kenyan law and practice only recognizes the male and female gender, no recognition is made of intersex, due to the binary norm evident in the country. There is no legal framework that allows or facilitates Transgender and Intersex individuals to choose their gender and have it recognized by law; most intersex individuals are taken through unnecessary corrective surgeries when they are born or simply assigned a gender role and raised as such without being given a chance to choose their gender or undergo a sex correction surgery when they are of age. The transgender persons suffer lack of legal recognition and are legally

⁵⁴ Hon. Mutula Kilonzo addressing the 8th session of the Human Rights Council during Kenya's Universal Periodic Review in Geneva on 6th May 2010 affirmed the commitment of the Government of Kenya to protect its sexual minorities from discrimination. KHRC however notes that no substantive progress has been made. Further to this is a statement by the same Minister at the same session stating that the government of Kenya is unwilling to decriminalize consensual homosexual conduct. See Draft report of the Working Group on the Universal Periodic Review by the UN Human Rights Council available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/A_HRC_WG.6_8_L.7_Kenya.pdf last accessed on 16 September 2010

⁵⁵ Onyango-Ouma, et al, Understanding the HIV/STI Risks and Prevention Needs of Men Who have Sex with Men In Nairobi, Kenya, 2005.

bound to a gender they do not want to identify with. This is a violation of their freedom of expression. The government's persistent failure to address and make cognizance of the falsity of the gender binary norms have resulted in State sanctioned homophobia.⁵⁶

Intersex persons feel obliged to abide by the law by requiring them to choose between the male or female gender in order to get legal documents. This is because most public and government documents compulsorily require one to fill in their gender as either male or female.⁵⁷ The intersex children are raised in unsupportive environments where they are hardly given information on their conditions. They grow up in a society that treats them as 'freaks' of nature, uses derogatory terms such as 'hermaphrodites' to refer to them and are forced to identify with a gender that is not of their choice.

In cases of intersex births, the Ministry of Health lacks guidelines directing families and medical practitioners on how to facilitate a child's genuinely informed consent. Such guidelines ensure the child's body is not irreversibly altered by medical procedure in an attempt to impose a gender at the time of birth.

⁵⁶ Homophobia is the irrational hatred or fear of LGBTI persons. It also encompasses a range of negative attitudes such as antipathy, contempt, prejudice and aversion.. Homophobia is observable in critical and hostile behavior such as discrimination and violence on the basis of a perceived non-heterosexual orientation. For example, by the publication of this report, the Prime Minister Raila Odinga had ordered the arrest of all gays and lesbians in Kenya. See www.capitalfm.co.ke/.../Arrest-gays,-Kenyan-PM-orders-10670.html, last accessed on 4 December 2010

⁵⁷ See The Registration of Persons Act Cap 105 of the Laws of Kenya, Section 5 (1) (c) which requires the registrar of persons to enter details of one's sex before issuing them with a legal document to identify as Kenyan. Sex is one of the requirements but there is no statutory definition of sex. The practice, custom and usage in Kenya do not recognize any other sex beside the dichotomy of male and female. Other entries would be invalid

There is generally a low level of awareness on LGBTI issues by key service providers especially the health care practitioners and the police. As noted earlier in this report, some doctors have no idea how to treat a transsexual person and often view them as sinners in need of rebuke and counseling. These two providers regularly interact with LGBTI persons and are essential in our realization of equal access to quality service for all Kenyans.

Criminal sanctions increase vulnerability of lesbians, gays and bisexuals persons to blackmail and extortion. The vulnerability is driven by the need to hide one's sexuality from family, friends, work colleagues or the general public. Public stigmatization or internalized homophobia particularly forces one to remain secretive about their sexuality. Unfortunately, this deeply felt need for taciturn, even while affording reduced public censure of one's sexuality creates a fault-line for blackmailing and extortion to thrive.

The Penal Code (sections 162-165) provides a justification for individuals and groups opposed to sexual minorities to deny services, visit on them acts of physical violence, verbal abuse, blackmail and extortion, with impunity.⁵⁸ The Gay and Lesbian Coalition of Kenya – GALCK, has documented several cases where sexual minorities are denied health care services, even by commercial enterprises on account of their sexual orientation⁵⁹.

⁵⁸ Supra note 3

⁵⁹ Supra note 7 on page 13

The anti-homosexuality laws in Kenya further create conducive conditions for institutionalization of blackmail, which only leads to further attempts by sexual minorities to hide even more. However, LGBTI organizing in Kenya is strategically increasing and its visibility is clearer. There exists at least an LGBTI organizing group in every province/research region but the groups are fragmented and often lacking in strategic advocacy focus due to fear of criminal sanctions. There is need to bring together these groups under GALCK and harness the synergy for civil, political, social and socio- economic reasons.

Generally, most LGBTI persons who were part of this study want the government to decriminalize same-sex sexual conduct and also facilitate legal recognition of transgender and intersex people. This would be a first step in wading off stigma and discrimination of sexual minorities. The researchers spoke to a few state officers mainly from the police department who deeply confused decriminalization with gay marriages. This is the misapprehension of most people especially religious leaders. KHRC affirms that decriminalization of same sex conduct is vital in efforts to curb the spread of HIV spread , improve health service delivery and also in enhancing equality. ⁶⁰

The lack of legal recognition for LGBTI persons in Kenya has remained a major stumbling block to meeting their health needs. Reports from the National Aids Control Council (NACC) show a higher prevalence of HIV among sexual minorities such as men who have sex with men in comparison with other groups. According to NACC, 1,500 MSM get infected with HIV each year with 60% of them engaging in heterosexual

⁶⁰ See the National Aids Control Council strategic plan 2010-2013 page 22. Available on http://www.nacc.or.ke/2007/images/downloads/knasp_iii.pdf

relationships. Simultaneously, about 9,000 female partners are exposed to the AIDS causing virus.⁶¹ Sex with multiple partner increases the risk of HIV infections not only for the MSM but also for the extended sex relations. KHRC supports the plan by the NACC to decriminalize homosexual conduct in order to increase access of essential HIV prevention, management and care services to LGB groups.^{62,63}

With regard to expulsions from schools, KHRC affirms that every Kenyan has a right to access quality education and that discrimination and/or impediment of access to the same on the basis of their sexual orientation or gender identity is a clear violation of the Constitution.⁶⁴ Selection and retention in learning institutions should be purely on basis of their performance and discipline and not on sexual orientation and gender identity.⁶⁵

Human rights advocacy and responses by Civil Society Organizations (CSOs) to human rights abuses against LGBTI persons have been few,

⁶¹ Meeting HIV&AIDS Needs for Sexual Minorities in Kenya, Health Rights Advocacy Forum (HERAF) 2010

⁶² Ibid

⁶³ Supra note 25

⁶⁴ See Article 27 (4) and (5) of the Constitution of Kenya as read together with Articles 259 (4) (b) and 260 (definition of a person) the Constitution of Kenya prohibits direct and indirect discrimination against any person by the State or other person. This arguably includes sexual orientation and gender identity since the denominators for non discrimination are an open ended list. Also see the definition of marginalized groups which definition covers homosexuals who have been marginalized by laws that are discriminate (Sections 162-165 of the Penal Code, cap 63 of the Laws of Kenya. This requires judicial interpretation as it is not explicit. However article 27 (4) has an illustrative open ended list of grounds for non discrimination and reads that '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.' Article 27 (5) states that 'A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).'

⁶⁵ Gay Kenya Trust., 2010. *My Way, Your Way, or the Right Way: Implementing the Yogyakarta Principles in Kenya*. GKT,2010

reactionary and lacking in strategic focus. Moreover the interventions rarely address the real source of the problem (criminalization), nor do they build on past responses. Further to this is an absence of mainstreamed LGBTI programmes in most organizations especially those that deal with women and gender issues. Gender identity and sexual orientation are so intrinsic to the success of any gender programme in women rights and gender-based violence.

Human rights defense and jurisprudence in the Kenyan curricula and practice must be informed by the universality of rights, their interrelatedness and interdependence. As civil society, we must be devoid of priorities in rights but informed by the urgency to eliminate any rights violation on any guise or theory (be it moralistic or religious) especially against minorities who usually have no support from the majority.⁶⁶ Democracies and civil societies are judged across the world not by how they treat their majorities but their minorities; their most despised and ignored populations. Such is the LGBTI group in Kenya.⁶⁷

Religious leaders who often make LGBTI persons insecure by issuing threats to their security must refrain from hate speech. Kenya is a secular State and as such the State and religion are separate.⁶⁸ Dogmas,

⁶⁶ Pastor Niemoller's famous words 'They came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the trade unionists and I didn't speak up because I wasn't a trade unionist. Then they came for the Jews and I didn't speak up because I wasn't a Jew. Then they came for me and by that time no one was left to speak up.' Instruct that we must protect and defend minorities. See *first they came*....available at http://en.wikipedia.org/wiki/First_they_came%E2%80%A6. Last accessed on 13 October 2010

⁶⁷ Makau Mutua., 2010. *Let us Attack Homophobia not Gays*. NMG, 10 October 2010 . Available at <http://www.nation.co.ke/oped/Opinion/Let%20us%20attack%20homophobia%20not%20gays%20/440808/1029280/-/23dxu/-/index.html>. last accessed on 15 October 2010

⁶⁸ Article 8, Constitution of Kenya, 2010. Government Printer, Nairobi

ideologies and traditions, whether religious, political or social, must be weighed and tested by each individual and not simply accepted by faith as law. Kenyans must use critical reason, factual evidence in society and scientific methods of inquiry, rather than faith and morals, in making laws, defending rights and seeking answers to important human questions.

The KHRC emphasizes that the criminalisation of homosexuality is wrong in principle because it exceeds beyond the normal boundaries of the criminal law. It seeks to blur the distinction between public and private life and legitimizes state interference, making what is essentially a private matter, a very public one. In addition, the criminalisation of homosexuality oppresses a minority, who through no fault of their own (homosexuality is an objective characteristic like sex or race and not a subjective one, like hair colour; it is something that people do not choose to be) are inclined to forge relationships with people of the same sex as themselves. Given modern scientific knowledge which reaffirms this position, the KHRC affirms that the old colonial laws, from which the criminalisation of homosexuality still occurs, fly in the face of what is now common and accepted scientific knowledge. The criminalisation of homosexuality is a legacy which has now passed its use by date. The colonial laws from which the criminalisation of homosexuality emanates, have no place in a world where central to the stability of a society is the need to respect cultural variety. For such reasons, convicting those who have been found to engage in homosexuality activity has no place in a modern society.

The KHRC appreciates that the Constitution of Kenya 2010 in Article 27 (4 and 5) prohibits discrimination on any grounds (inclusive of sexual

orientation) on the one hand but inconsistency is perpetuated by the continued criminalisation of the LGBTI community via sodomy laws.

We note that Kenya continues to criminalise homosexuality despite being party to the International Covenant on Civil and Political Rights (ICCPR). Further, Kenya has not entered reservations to the articles relating to non-discrimination and procedural rights. By not entering reservations these articles, but continuing the decriminalise homosexuality, essentially means there is a continual breach of international obligations by Kenya. The KHRC wants to emphasize the key issue is not about gay rights. It is about the use of the criminal law to discriminate against LGBTI persons.

We appreciate that the government is desirous not to go against public opinion concerning decriminalisation; we note that although the government is there to uphold and abide by public views, it is also there to lead. There is a need to engage in constructive dialogue in order to take people into a new direction. By not doing so, there is the real possibility that public opinion may never change. It is inappropriate and legally wrong to make criminals of the LGBT community; Human rights belong to all people, and should not be enjoyed subject to certain conditions.

We appreciate that we all as individuals and probably organizations hold differing opinions on sexual orientation and gender identity – yet we also recognize that the continued presence of structural, policy and non-policy barriers to access to health services including HIV services

presents a variable barrier to universal access, HIV prevention, treatment and care for all in the Kenyan society.

Sections 162 – 165 of the Penal Code continue to drive LGBTI persons particularly MSMs underground, beyond the reach of health services, for fear of prosecution. In seeking treatment particularly for STIs, the MSM expose their sexual practices and thereby the attendant risk of legal prosecution. The link between HIV and STI infection is well documented and these sections of the law, act in furtherance of HIV spread. Moreover, providing safe-sex information for the MSM is construed by many in HIV programming as providing information for commission of a felony. There is therefore no need to retain structural and legal barriers to HIV/AIDS programming for sexual minorities which also serves to institutionalize human rights violations against LGBTI persons.

It is the primary concern of every open and democratic society to achieve the fulfillment, growth and creativity for both the individual and humankind in general. The KHRC affirms the jurisprudence that humanity has a constant search for objective truth, with the understanding that new knowledge and experience constantly alter our imperfect perception of it, and: a conviction that with reason, an open exchange of ideas, good will, and tolerance, progress can be made in building a better world for all present and for future generations.

CHAPTER 4: RECOMMENDATIONS

Based on the findings of this report from an analysis of the responses received:

The KHRC recommends to **the Government to:**

1. REPEAL sections of the Penal Code, CAP 63 of the Laws of Kenya (specifically 162, 163, and 165) that criminalize consensual same-sex sexual acts and ambiguous provisions of criminal law used by police to arrest and detain LGBTI persons and STOP local counties from making ambiguous criminal by-laws. It should also repeal Section 163 of the Children's Act of 2001 which discriminates homosexuals from adopting children. The language in all the written laws of Kenya should be direct. Vague language in the Penal Code that refers to sexual behavior as 'unnatural' or 'grossly indecent' , in the absence of any definition of what constitutes unnatural practices, has been misused to justify arrests and detentions of LGBTI persons . Such provisions should be repealed and the police instructed that sexual orientation and gender identity are not valid grounds for arrest.
2. PASS a comprehensive equality and non-discrimination law that expands grounds for non discrimination to include sexual orientation and gender identity and other grounds necessary for the protection of LGBTI persons.
3. IMPLEMENT police and prison reforms that ensure accurate and up to date recording of arrests and detentions made; improve the

general condition of prisons and to effect training, on the equal rights of LGBTI persons, for police, prison personnel and all other officials in public and private sector who are in a position to encourage, perpetrate, condone or prevent acts of violence. Prisons reforms should address the needs of vulnerable prisoners, and consider providing separate blocks for LGBTI persons that wish to use them. The Government should allow independent monitoring and critique of detention facilities by civil societies, including those working in the areas of LGBTI advocacy.

4. The government should ensure there is equal access to reproductive health services to all, and inclusive HIV/AIDS information and therapy that recognizes and respects the health of LGBTI Kenyans. Such can be done strategically by first drafting a policy paper to guide health practitioners and medical students on the treatment of LGBTI persons.
5. INTEGRATE in law the general principles of international law specifically the Yogyakarta principles which are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. It should also ratify international human rights instruments that Kenya signs on to and push the Government of Kenya to take back its negative position on international law that supports LGBTI persons such as the UN declaration on sexual orientation and gender identity.
6. ENSURE that in the composition of Kenya National Human Rights and Equality Commission (KNHREC) at least one Commissioner

specifically representing LGBTI issues in the context of equality and anti discrimination should be included

7. CONSTITUTE a Sexual Minorities Department in key ministries, particularly in the Ministry of Gender to undertake public education that addresses cultural and historical discriminations against LGBTI persons to counter the misunderstanding that underlies homophobia and transphobia and to identify victims of torture on basis of their LGBTI identity, and offer those remedies and redress.
8. DIRECT the Ministry of Health to issue clear policy guidelines on the handling of Transgender and Intersex persons in basic public health and on matters of reproductive health and gender reassignment therapy in manners consistent with the Yogyakarta Principles and further that these facilities are available in public hospitals.
9. ENSURE that the Ministry of Education reviews school syllabuses, particularly in social ethics and religious education to demystify sexual orientation and gender identity and correct misconceptions of LGBTI persons as social deviants and ensure that the culture in schools promote respect for all people and for human rights, and the respect for each child's family values in a spirit of understanding, tolerance and equality. School policies should provide adequate equality and non discrimination measures aimed at protecting LGBTI students, teaching and non-teaching staff from discriminate social sanctions, dismissals, social exclusion or bullying within the school and ensure that disciplinary measures in educational institutions are

administered in a manner consistent with human dignity, without discrimination on the basis of LGBTI identities.

INSTITUTE civic education measures encouraging administrators in educational institutions, media houses, religious leaders and employers (in public and private sectors) to exercise professionalism and tolerance and share opinion that does not subject LGBTI persons to social exclusion or amount to incitement to violence. INVESTIGATE, prosecute, and duly punish any individual, group, or institution that incites or carries out violence and threatens the life of any Kenyan on grounds of their sexual orientation or gender identity should be thoroughly

We recommend to **CSOs especially those organizing around human rights to:**

1. MAINSTREAM LGBTI work in their human rights advocacy work.
2. FILE and support strategic and public interest litigation on violations seeking orders for declaration of rights in the Bill of Rights to protect LGBTI persons from continued discrimination.
3. CONSTITUTE programs that sensitize judicial officers, the police, ministries, civil servants, professional and commercial organizations and other relevant actors on the human rights issues concerning LGBTI persons.

