



KENYA UPR SOGIESC RECOMMENDATIONS

DATE AND TIME OF THE REVIEW: 23 JANUARY 2020, 09:00–12:30
DATE AND TIME OF THE ADOPTION OF THE REPORT: 28 JANUARY 2020, 16:30 – 18:00

During the 35th UPR Working Group Sessions, Kenya received 20 SOGIESC recommendations. It accepted 3 and noted 16 recommendations. It will provide an answer to 1 recommendation no later than the 44th session of the Human Rights Council.

A. SOGIESC Information

National Report

100. Intersex persons in Kenya have for a long time faced stigma and discrimination due to their biological make-up. The High Court in a judgment delivered on 5th December 2015 in Petition No. 266 of 2013, *Baby A v. Attorney General and others* – declared that it is the duty of the Government to protect the rights of intersex babies and persons by providing a legal framework to address issues relating to them, including registration under the Registration of Births and Deaths Act, medical examination and tests, and corrective surgeries. To this end, the executive has identified the immediate, medium and long term reforms required to respect and protect the rights of intersex people as Kenyans. Of importance is the review of the gender marker to incorporate the “intersex” as a category. The marker was used in the 2019 Kenya Population and Housing Census to determine the number of intersex people, for policy and programmatic interventions.

101. Additionally, the Persons Deprived of Liberty Act of 2014 recognizes intersex persons and provides for their humane and dignified treatment while in custody. All intersex people in custody can now choose the sex of the person by whom they should be searched. The Act also directs that intersex persons must be held separate from other persons.

Compilation of UN Information

20. Referring, inter alia, to a relevant supported recommendation from the previous universal periodic review, the Committee on the Elimination of Discrimination against Women recommended that Kenya exercise due diligence to protect all women, including lesbian, bisexual and transgender women and intersex persons, against discrimination by adopting comprehensive anti-discrimination legislation affording such protection.

21. Noting the lack of explicit legal protection against discrimination based on sexual orientation and gender identity, and citing sections 162 and 165 of the Penal Code, the United Nations country team stated that lesbian, gay, bisexual and transgender persons continued to face challenges. In addition, same-sex couples were prohibited from adopting children, and lesbian, gay, bisexual, transgender and



intersex refugees faced discrimination and considerable obstacles in accessing mainstream services and livelihood opportunities.

[...]

50. Noting that the unrecognized and undervalued work by women represented a huge barrier for them to enter the paid labour market, and also noting reports of sexual harassment of women in the workplace and the testimonies about stigmatization of and discrimination against lesbian, gay, bisexual, transgender and intersex persons in the workplace and when seeking employment, the Working Group on the issue of human rights and transnational corporations and other business enterprises recommended that Kenya step up efforts to address gender-based discrimination and sexual harassment in the workplace, including with a view to protecting all individuals, irrespective of their sexual orientation or gender identity

Summary of Stakeholder's Information

3. KNCHR¹ stated that the criminalization of same sex conduct underpinned violence, discrimination and stigmatization of lesbian, gay, bisexual and transgender persons.

43. JS4² stated that LGBTI persons suffered widespread violations of their rights to life, liberty and security, and were specifically targeted by vigilante groups. JS28³ stated that: (a) Kenya had noted recommendations to decriminalize consensual same sex sexual conduct at the previous reviews; (b) Section 162(a), (c) and 165 of the Penal Code were used by law enforcement agencies to arrest and charge persons who were, or who were perceived to be LGBTQ+; and (c) ruling on a petition challenging the constitutionality of these sections, the High Court of Kenya held inter alia that the sections were not in violation of the constitutional rights of those Kenyans who identify as LGBTQ+.

70. JS4 stated that sections 162 to 163 of the Criminal Code criminalised consensual adult same-sex relations.

B. SOGIESC Advanced Questions for Kenya

- **United Kingdom:** How will the Government ensure the protection of vulnerable groups, such as persons with disabilities, LGBT individuals, migrants and refugees, and ensure their access to all public services?
- **Belgium:** How is the government of Kenya taking measures to protect lesbian, gay, bisexual, transgender and intersex persons as well as their families against discrimination and acts of violence?

¹ Kenya National Commission on Human Rights

² Joint Submission 4 submitted by: The Advocates for Human Rights, Minneapolis, United States of America, The Eagles for Life, Kenya, and Sign Ishara.

³ Joint Submission 28 submitted by: Gay and Lesbian Coalition of Kenya, National Gay and Lesbian Human Rights Commission, Partnership to Inspire Transform and Connect the HIV Response, Kenya Legal & Ethical Issues Network on HIV/AIDS, Ishtar MSM, JINSIANGU, Kenya Sex Workers Alliance, Key Population Consortium, Nyanza, Western, Rift Valley LGBTQ+ Network, Trans* Alliance



C. Kenya's Working Group Session

- **Opening remarks:** Another significant milestone registered by the government of Kenya: the recent recognition of intersex people in Kenya. For the first time in the history of census in Kenya the gender marker incorporated the intersex as a category in addition to the male and female categories. The marker was used in 2019 Kenyan population housing census to determine the number of intersex people for policies and programmatic interventions. This milestone was achieved arising from recommendations of the taskforce that the government had appointed to look into the policies, legal, institutional and administrative reforms regarding intersex persons in Kenya.
- **Considerations made after 50 interventions:** Mr President, I want to assure the delegates who raised concerns on LGBTI issues that in Kenya nobody is asked to state their sexual orientation when they are accessing government services and the government deals with the violations of human rights irrespective of the orientation of any individual and our work around intersex persons is the point toward the commitment that the government undertakes to protect vulnerable groups and when given the example of the intersex persons we have stated before, we have the intersex persons now continued to be subject to human rights violations and largely because the public at large is not aware of the existence and we also have a great lack of research on the subject of intersex persons and this has rendered them invisible and they face stigma which are the pin to social and medical norms and their participation in modern life has been greatly inhibited. But, the intersex persons have been the subject of litigation in Kenya and in the first case that we had focused on the rights and violations to intersex persons and intersex persons who were deprived of liberty, the court found that the treatment of the petitioner by prison authorities amounted to cruel, inhuman and degrading treatment or punishment. This case set the standards on the treatment of intersex persons deprived of liberty through the Persons Deprived of Liberty Act. The second case focuses on registration at birth for intersex children, corrective surgeries on intersex children and the need for rules and guidelines to regulate corrective surgeries on intersex children. The court found that there is currently no legal framework to govern the registration of intersex persons at birth and to regulate corrective surgeries. The court asked the state to enact legislation regulating surgeries on intersex children and registration at birth. In addition, the state was asked to collect data related to intersex children and persons. In response to the court findings, the attorney general formed a task force on the policies and legal institutional reforms regarding intersex persons in Kenya, with a mandate to inter alia collect data on intersex persons, examine existing policies, legal institutions, and medical systems that govern intersex persons and recommend a comprehensive reform regarding the interests of intersex persons. And following the recommendations of this task force the government has identified the immediate and long-term reforms, required to give effect to the rights of intersex persons in Kenya. This trajectory will be used to address many issues that affect vulnerable persons in Kenya.



D. Recommendations for Cycle III (2020)

a) Remarks of States

- **New Zealand:** New Zealand remains concerned by reports of discrimination, violence and threats of prosecution experienced by the LGBTQIA community in Kenya.
- **Spain:** Spain regrets that the penal code criminalizes sexual relations between persons of the same sex and is concerned about the confirmation of the constitutionality of this situation by the High Court last May.
- **Sweden:** Sweden welcomes ongoing reforms aiming at improved accountability and respect for human rights. However, there is still need for legal reforms and actions to ensure the full enjoyment of human rights for women, girls and LGTBI-persons.

b) The following recommendations have been examined and accepted by Kenya:

- **Argentina:** Develop and adopt appropriate legislative and administrative measures to combat discrimination against women as well as discrimination and violence against LGBTI people (6.62).
- **Cyprus:** Continue collecting and analyzing disaggregated data on women with the aim to combat discrimination based on religion, ethnic background, age, health, disability and sexual orientation (6.61).
- **Netherlands:** Take additional measures to eliminate discrimination and harassment in the workplace, including on the basis of sex and sexual orientation and gender identity (6.179).

c) The following recommendations will be examined by Kenya and responses will be provided no later than the 44th session of the Human Rights Council

- **Uruguay:** Respond to the request of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (7.2)

d) The following recommendations have been examined and noted by Kenya::

- **Australia:** Repeal all provisions which criminalise consensual same-sex relations, and adopt appropriate policies and measures to tackle stigmatisation, harassment, discrimination, and violence against individuals because of their sexual orientation (8.28).
- **Canada:** Adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of sexual orientation, gender identity or expression (8.26).
- **Chile:** Repeal laws that criminalize homosexuality and combat violence based on sexual orientation and gender identity (8.31)
- **Czechia:** Step up efforts against discrimination with special emphasis on LGBTI persons and women, and eradicate the female genital mutilation (8.29)
- **Dominican Republic:** Take the necessary political and legislative measures to combat discrimination based on sexual orientation and gender identity (8.30)
- **France:** Combat discrimination against LGBTI persons and repeal provisions penalizing homosexuality (8.32)



- **Iceland:** Decriminalize consensual sexual relations between adults of the same sex and expand its anti-discrimination legislation to include a prohibition of discrimination on the basis of sexual orientation and gender identity (8.27)
- **Italy:** Decriminalize consensual same sex conduct and adopt measures to tackle discrimination based on sexual orientation (8.33)
- **Malta:** Adopt laws, policies and measures to prevent violence and discrimination on the grounds of sexual orientation and general identity and expression (8.34)
- **Malta:** Repeal sections 162, 163 and 165 of the Penal Code and decriminalise same-sex conduct between adults (8.35)
- **Mexico:** Repeal legislation that criminalizes consensual sexual relations between adults of the same sex, in particular articles 162 and 165 of the penal code (8.36)
- **New Zealand:** Decriminalise consensual same-sex relationships between adults, and enacts comprehensive anti-discrimination laws to safeguard the realisation of human rights for all individuals, irrespective of sexual orientation or gender identity (8.37)
- **Norway:** Adopt a comprehensive equality and non-discrimination law that affords protection to all individuals regardless of their sexual orientation, gender identity or expression (8.25).
- **Slovenia:** Decriminalize sexual relations between consenting adults of the same sex, as recommended previously (8.38)
- **Spain:** Decriminalize consensual sexual relations between adults of the same-sex (8.39)
- **United States of America:** Repeal articles 162, 165, and 181 of the Penal Code that criminalizes LGBTI status, conduct, and/or expression (8.40)

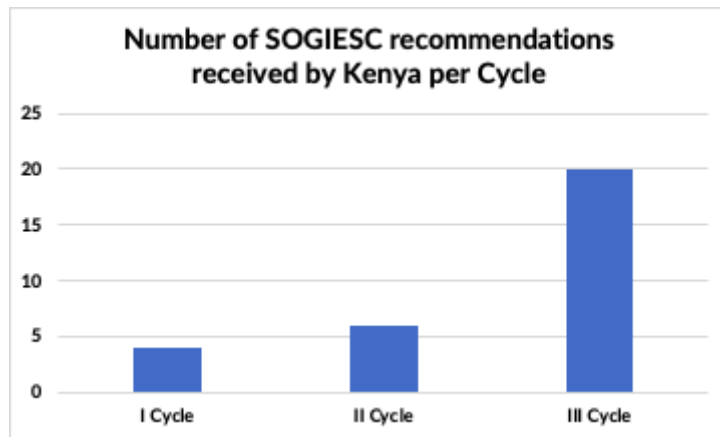
E. Recommendations for Cycle II (2015)

RECOMMENDATION	RECOMMENDING STATE	RESPONSE
Adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity	Sweden	Supported
Repeal legal provisions that foresee penalties against lesbian, gay, bisexual or transgender persons, in order to respect the principle of non-discrimination	France	Noted
Decriminalize sexual relations between consenting adults of the same sex	Slovenia	Noted
Decriminalize consenting relationships between adults of the same sex and adopt measures against violence and hate speech against lesbian, gay, bisexual, transgender or intersex persons and associations	Chile	Noted



Decriminalize consensual same-sex conduct between adults	Denmark	Noted
Decriminalize sexual relation between consenting adults of the same sex	Poland	Noted

F. Graphic Comparison Between Cycles (1–3)



G. [Video of Kenya's UPR Working Group Session](#)

H. SOGIESC Mentions During Kenya's UPR Outcome (This section will be completed after the 44th session of the Human Rights Council, in July 2020)