

EXECUTIVE SUMMARY

1. This is a joint submission by the Gay and Lesbian Coalition of Kenya (GALCK) and the National Gay and Lesbian Human Rights Commission-Kenya (NGLHRC), which submission is based on: the NGLHRC 2012-2014 Legal Aid Clinic Summary Report; cases shared by the constituents of GALCK, as well as; the Kenya Human Rights Commission (KHRC) human rights reports.
2. The recently reviewed Constitution of Kenya 2010 recognizes the "aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."
3. In Kenya, a large percentage of adults who identify as Lesbian, Gay, Bisexual, (LGB) reported experiencing unequal and unfair treatment on the grounds of their real or perceived sexual orientation and expression. Of those reporting to have experienced discrimination, a large number of individuals reported the denial of their right to self determination and the ability to participate in making decisions on issues affecting their own lives.
4. Despite being party to major international human rights instruments including the ICCPR and having a national constitution that incorporates international law in Kenya as a dualistic state, Kenya continues to maintain 'sodomy' laws and its anti-discrimination laws have not been adequately defined to include the contexts of sexual orientation and expression.
5. A summary of the NGLHRC 2012-2014 Legal Aid Clinic findings is attached to this submission.

METHODOLOGY

6. This is a joint submission of equality partners working to enhance respect for the human rights of sexual minorities in Kenya. Two of the partners – GALCK and NGLHRC are national human rights organizations working in Kenya to realize the equality of all Kenyans inclusive of sexual minority individuals and communities. The third partner – Coalition of African Lesbians (CAL) - is a formation of more than 30 organizations in 19 countries in Africa committed to advancing justice for lesbian and bisexual women and transdiverse people. The fourth partner, The Sexual Rights Initiative (SRI) is a coalition of organizations that has been advocating for the advancement of human rights in relation to gender and sexuality at the UN Human Rights Council since 2006. In this submission, sexual minorities in Kenya and their representative organizations actively participated in the monitoring and documentation of human rights violations against them; acting as respondents, coordinators, monitors, paralegals, community mobilizers and data analysts in project-based legal aid clinics.
7. The collective monitoring reached 800 individuals in Kenya who reported discrimination based on real or perceived sexual orientation and expression between November 2012 and April 2014. NGLHRC project monitors collected and analyzed national legislation, programs, policy and case law related to sexual and gender non conformity. The monitors also conducted and analyzed focused group discussions and interviews with persons expressing a range of discrimination concerns in twelve (12) locations across the country including Turkana, Kakuma Refugee Camp, Embu, Meru, Nyeri, Mombasa, Garissa, Nairobi, Kisii, Kericho, Nakuru and Kisumu. Respondents in these locations were asked to share their own lived experiences, their challenges, their dreams and their theories of change for equality and inclusion in Kenya
8. Monitoring activities interrogated how the barriers and obstacles faced by LGB people affect their rights through the examination of four key human rights principles: dignity (perceptions of self-worth), autonomy (ability to make choices and decisions on issues that affect one's own life), equality (having sexual orientation and expression differences respected and disadvantages addressed and being able to participate fully on equal terms), and inclusion (being recognized and valued as equal participants and having needs understood as integral to the social and economic order and not identified as outlaws).

CHALLENGES AND CONSTRAINTS

9. An assessment of existing laws, policies, programs and case law; individual experiences (interviews) and shared struggles (focused group discussions) data collected, indicated the following major challenges and constraints to the full realization of rights by sexual orientation and expression minorities in Kenya:

Constitutional and Legislative Measures

10. Kenya adopted a new constitution in 2010 which has an expansive bill of rights. Four years after this adoption, repressive laws in subsidiary legislation still come to bear in vitiating these constitutional gains. Specifically, continued criminalization of consensual adult same-sex conduct in Sections 162-165 of the Kenya Penal Code continues to offset and justify a chain of human rights violations against persons on grounds of sexual orientation and expression. The Kenya Human Rights Commission released a report¹ in 2011 (*The Outlawed Amongst us*) which indicated that the effects of criminalization are exacerbated by the absence of a legal framework that explicitly prohibits discrimination on the grounds of sexual orientation and expression in article 27 (4) of the Constitution. **Recommendation: The State should align the Penal Code with the Constitution.**
11. The absence of clear protections in article 27 (4) of the Constitution has occasioned harassment and discrimination of persons identifying or suspected to be lesbian, gay or bisexual by state and non state actors as reported by the Kenya National Commission on Human Rights in its 2012 report on reproductive health rights². **Recommendation: i) The State should improve enforcement of existing anti-discrimination clauses in the Kenyan Constitution. ii) The State should review, consolidate and enforce equality and non-discrimination laws that prohibit discrimination on all grounds including sexual orientation and expression.**
12. This legislative gap has also been used to justify denial of fundamental freedoms including the freedom of association (the right to form NGOs)³. **Recommendation: The State should allow registration of all minority community-led organizations and NGOs in Kenya.**
13. In March 2014, legislative calls were made for stricter enforcement of sodomy laws including calls for citizens to arrest suspected gays and lesbians where the police fail to act⁴. In response, the Leader of Majority in the Kenyan Parliament reported that since 2010 to March 2014, the Kenyan state had prosecuted 595 cases of homosexuality and that there was "... need to go and address the issue the way we want to address terrorism. It is as serious as terrorism and as any other social evil."⁵. Building upon this negative perception, in a separate incident on July 3rd 2014, Mombasa Anglican Church of Kenya Bishop Julius Kalu told a congregation including Gachoka MP Mutava Musyimi that Christians are confronted by "the enemies of the Church" mainly homosexuals and lesbians and terrorism was a lesser threat.⁶ Thus far, there are 8 ongoing prosecutions of gay men under indecency charges vide section 11A of the Sexual Offenses Act since 2012 to 2014. Section 11A was inserted into law by Parliament in 2007 to protect adults from nonconsensual sex, sexual violence or abuse. However, this section of the law has now been disproportionately applied to prosecute consensual intimate expressions of sexual minorities in private. Further, negative public opinions and incitements to violence have also been supplied by the Kenyan legislature⁷. **Recommendation: The State should develop and enforce hate crimes legislation that**

¹ Kenya Human Rights Commission Report 2011 `The Outlawed Amongst Us`
http://www.khrc.or.ke/resources/publications/doc_download/14-the-outlawed-amongst-us.html

² KNCHR (April 2012); Realizing Sexual and Reproductive Health Rights: A Myth or Reality?
www.knchr.org/portals/0/reports/reproductive_health_report.pdf

³ See attached response from the Attorney General's office to constitutional petition 440 of 2013

⁴ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CDIQFjAC&url=http%3A%2F%2Fdeniszioka.co.ke%2Fwhy-kenya-will-follow-uganda-nigeria-in-enacting-new-anti-homosexuality-laws%2F&ei=GUubU5bzN8nP0AXW-oHABA&usq=AFOjCNHWLn2dVYFjF9E_79vtXX4cNfmwUQ&sig2=M-Itf5FxD___-XyxKElgEw&bvm=bv.68911936,d.d2k

⁵ Hansard Report 26th March, 2014 <http://www.parliament.go.ke/plone/national-assembly/business/hansard/wednesday-26th-march-2014-1/view>

⁶ <http://www.standardmedia.co.ke/?articleID=2000062448>

⁷ https://m.facebook.com/irungu.kangata/posts/10152237181040853?stream_ref=10

forbids violence or incitement thereto and hate speech on all grounds including sexual orientation and expression.

14. We recognize in the September 2010 UPR Report, that the Kenya Government rejected the recommendation to decriminalize homosexuality citing cultural barriers to same sex unions, in contravention of Section 27 (4) and 32 (2) of the Kenya Constitution which recognize diversity. Although decriminalization of consensual adult same-sex conduct in Kenya has been recommended as a remedy to discrimination by states and equality workers at the domestic and international level, the government of Kenya continues to decline the recommendation citing popular cultural and religious reasons. Simultaneously, virulent discrimination against sexual minorities in Kenya is endemic in public and private spheres vitiating the equality aspirations of the constitution of Kenya 2010. **Recommendation: The State should align the Penal Code with the Constitution.**
15. The Bill of Rights espouses a right to the highest attainable standard of health including reproductive health and mental health for every person⁸. Aligned to this, national health policies such the Kenya National AIDS Strategic Plan III (2009-13) have noted that criminalization of homosexuality limits the ability of gay men and other men who have sex with men⁹ from accessing this constitutionally guaranteed right with regards access to HIV services. Four (4) health centers that provide reproductive health services for Men who have Sex with Men (MSM) were threatened with closure by non-state actors between February and March of 2014, forcing temporary suspension of services for security reasons¹⁰. This was within the context of MPs in the Kenyan parliament asking citizens to engage in arrests and raids of suspected 'recruitment' centers of homosexuality¹¹. **Recommendation: The State should align all health policies with the Constitution.**
16. Programs and interventions for men who have sex with men have been put in place by the National AIDS Control Council and the National AIDS and STI Control Program since 2009. However, other arms of government such as law enforcement, the legislature and judiciary continue to undermine these national programs such that their impact is yet to be realized. The latter is clearly illustrated in the Ministry of Health statement¹². **Recommendation: The State should enact the NACC and NASCOP Key Populations HIV Policy.**

Discrimination on the basis of real and perceived sexual orientation and expression

17. More than 84% of the LGB people interviewed reported being treated unfairly and unequally on the basis of their real or perceived sexual orientation, gender identity and expression¹³. A sample of the unfair treatment included eviction from rental houses (23 cases)^{14, 15}, dismissal from work (4 cases)^{16, 17}, blackmail and extortion¹⁸ solicited with threats of being exposed to family, colleagues or being reported to law enforcement (53 cases)¹⁹, affecting the right to housing, adequate sanitation and dignity. **Recommendation: The State should incorporate comprehensive human sexuality and diversity modules, related Quality Improvement and Assurance and refresher courses into existing Police Training Curricula that will inform the police evaluation and vetting processes.**

⁸ Constitution of Kenya 2010 Article 43

⁹ Penal Code of Kenya Sections 162-165

¹⁰ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

¹¹ <http://www.mambaonline.com/2014/03/12/africas-anti-gay-crackdown-is-kenya-next/>

¹² <http://mobile.nation.co.ke/news/Gay-debate-affecting-fight-against-HIV-James-Macharia-says/-/1950946/2225564/-/format/xhtml/-/ge3d0c/-/index.html>

¹³ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

¹⁴ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

¹⁵ The case of three lesbians evicted from their homes in the 'Operation kick out homosexuals out of Kayole' *translated which took place in May 2014 and was reported at the Kenya National Commission of Human Rights.

¹⁶ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

¹⁷ Kenya Human Rights Commission Report 2011 'The Outlawed Amongst Us'

http://www.khrc.or.ke/resources/publications/doc_download/14-the-outlawed-amongst-us.html

¹⁸ <http://www.nation.co.ke/news/How-Facebook-fling-set-me-up-for-blackmail/-/1056/1675322/-/8cyvmhz/-/index.html>

¹⁹ NGLHRC 2013/2014 Legal Aid Clinic Summary Report

18. NGLHRC Legal Aid Clinic monitors found that in half of the blackmail cases, the blackmail and extortion cartels enjoyed the protection of the police who got more than 50% share of the blackmail and extortion money. Two criminal prosecutions of the blackmail cartels have been unsuccessful due to poor investigation and low cooperation with law enforcement in court attendance to adduce evidence²⁰. **Recommendation: The State should establish and strengthen a research, monitoring and evaluation structure that investigates malpractice among enforcement agents, protects evidence, witnesses, and ensures that they are brought to book.**
19. Targeted violence on the basis of real or perceived sexual orientation, gender identity and expression was also noted as a virulent. This is the statistical analysis of violence patterns since 2012 to April 2014: twelve (12) lesbian women reported being raped on account of their sexual and gender non conformity, none of these survivors of sexual violence reported the violence to the police owing to fear of stigma, ridicule and law enforcement. Four (4) gay men reported being sodomised to punish them for abdicating their masculine role in society while six (6) gay men who work as sex workers reported having been coerced into sex by male security officers from state and local authorities as a bribe for their release upon arrest during night patrols. In February 2014, two (2) lesbian women were stripped naked by mobs in Nairobi. Ten (10) lesbian women and gay men reported being beaten within their houses and their property vandalized on account of their perceived sexual orientation. Verbal violence and threats were reported by 95% of the respondents²¹. There is no hate crime legislation in Kenya and incitement to violence on account of sexual orientation and gender identity are not considered hate speech under the National Cohesion and Integration Act of Kenya. **Recommendation: : i) The State should incorporate comprehensive human sexuality and diversity modules, Quality Improvement and Assurance and refresher courses into existing Police Training Curricula that will inform the police evaluation and vetting processes. ii) The State should establish and strengthen a research, monitoring and evaluation structure that investigates malpractice among enforcement agents, protects evidence, witnesses, and ensures that they are brought to book.**
20. These violations breach the African Commission on Human and Peoples' Rights (ACHPR) Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity and Articles 4 and 5 of the African Charter that entitle every individual to respect of their life and the integrity of their person, and prohibit torture and other cruel, inhuman and degrading treatment or punishment. **Recommendation: i) The State should sensitize all state agencies on Kenya's obligations to regional and international treaties and covenants as aligned to Section 2 of the Kenya Constitution 2010. ii) The state should establish mechanisms to ensure compliance with said obligations.**

Economic and Social Rights

21. There were twenty one (21) cases of expulsion from schools on account of suspected homosexuality^{22,23}. These expulsions were common in boarding high schools and were disproportionate disciplinary measures. Resultant to this denial of the right to education was the offsetting of family rejection and a future of unemployment and economic desperation as highlighted in the past by the KHRC report²⁴. This reduced the economic agency and human development of sexual minority persons and threatened their contribution to the Kenyan political economy as well as the realization of their full potential as equal citizens. Our investigations found that even where sexual minority persons secured work, knowledge of their sexual orientation and gender identity placed them at a disadvantageous position in terms of career progress, promotion,

²⁰ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

²¹ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

²² NGLHRC 2012-2014 Legal Aid Clinic Summary Report

²³ [Kenya: 12 girls expelled from school for 'lesbianism' | Pilot ...](#)

²⁴ Kenya Human Rights Commission Report 2011 `The Outlawed Amongst Us' Pg 26

harsh working environments, sexual harassment and a higher risk of dismissal. The Employment Act of Kenya²⁵ does not forbid discrimination on the ground of sexual orientation and gender identity. **Recommendation: i) The state should initiate comprehensive education sector reforms through a multi-stakeholder process. ii) The state should enable the CIC to fully carry out its mandate.**

Inclusion

22. The Constitution of Kenya 2010 mandates that national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized – which values bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. However, our investigations revealed a significant gap between this positive constitutional morality of inclusiveness and the reality on the ground for sexual orientation and expression persons when dealing with state organs. For example, in 2013, a gay and lesbian organization was denied registration by the NGO board in breach of the freedom of expression, association and the national value of inclusion^{26, 27}. **Recommendation: The State should allow registration of all community-led organizations and NGOs that encourage minorities' participation in civic duties, governance and nation building in Kenya.**
23. Further, calls by MPs in February 2014 to arrest suspected gays and lesbians in Kenya and suspected gay and lesbian asylum seekers from Uganda²⁸ are in breach of the national values articulated above and also reflect negatively on national unity and respect for Kenya's international obligations in relation to human rights and humanitarian law. **Recommendation: i) The State must respect section 3 of the Refugee Act of Kenya which provides the ground of membership to a particular social group as basis for seeking asylum. This should be in line with the UNHCR definition of membership to a particular social group to include LGBTI persons. ii) The State should sensitize DRA officials on Kenya's international obligations in relation to human rights, humanitarian law and sexual diversity.**
24. Approximately 70% LGB people interviewed alluded to being coerced into heterosexual relationships and marriages. Similarly, according to HIV research, nearly 40% of all MSM have ever been married to women and 13% of all MSM are still currently married to a woman.²⁹ The implications of this are that sexual minority persons feel compelled to conform to heterosexual norms such as opposite sex sexual conduct in order to be accepted and gain access to social economic benefits such as family inheritance and political participation in the economy. This is harmful to the preservation of their lives^{30, 31}, dignity, social justice and realization of their potential as human beings as enshrined in the Bill of Rights of the Kenya Constitution 2010³². Of known reported cases, the study has highlighted those of five (5) lesbian women and three (3) gay men who committed suicide on account of social exclusion and societal instigated emotional anxiety over their sexual orientation³³. **Recommendations: i) The State should maintain a liberal position on matters related to sexual and reproductive health rights. ii) The state should ensure public education of state and non-state actors on fundamental and basic human rights of citizens based on the Kenya Constitution 2010. iii) The state should make sure that government and social institutions uphold constitutional values in their service and**

²⁵ <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20226>

²⁶ Petition 444 of 2013: Eric Gitari v. NGO Co-ordination Board and the Attorney General

²⁷ [Standard Digital News - Lawyer seeks to have government ...](#)

²⁸ <http://www.mambaonline.com/2014/03/12/africas-anti-gay-crackdown-is-kenya-next/>

²⁹ NASCOP, NACC, Population Council, CDCC Bio-behavioural Surveillance 2010-2011

³⁰ <http://www.gaystarnews.com/article/lesbian-family-hostage-commits-suicide-kenya140612>

³¹ http://www.galck.org/index.php?option=com_content&view=article&id=176:a-moment-of-silence-for-joan-&catid=34:news&Itemid=108

³² Dita Broz et al. (2011) High Levels of Bisexual Behaviour among Men who have Sex with Men in Nairobi, NACC, Population Council.

³³ NGLHRC 2012-2014 Legal Aid Clinic Summary Report

relations with all citizens regardless of perceived or real sexual orientation, gender identity and expression.