



BRIEFING REPORT ON THE IMPLEMENTATION OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

**TO AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE
OF THE CHILD**

AUGUST, 2020

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

1st Floor, CVS Plaza, Kasuku Road
P.O.BOX 74359-00200 Nairobi, Kenya

Website: www.knchr.org

Email: haki@knchr.org

TABLE OF CONTENTS

PART A	2
INTRODUCTION	2
PART B	3
INFORMATION REGARDING IMPLEMENTATION OF CONCLUDING RECOMMENDATIONS ISSUED BY THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD ON KENYA 1ST PERIODIC REPORT ON THE STATUS OF IMPLEMENTATION OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD	3
1.0 <i>General Measures of Implementation</i>	3
1.1 Review of the Children Act, 2001	3
1.2 Strengthening promotion and protection of the rights of the child through the National Human Rights Institutions.....	4
1.3 Operationalization of the Public Benefits Organizations Act, 2013	5
1.4 Definition of a Child.....	6
1.5 <i>Name, nationality and birth registration</i>	7
1.5.1 Intersex children.....	7
1.5.2 Children of Nubian descent.....	9
2.0 <i>Protection against torture and abuse</i>	10
2.1 Enactment of legislation to address torture and ill-treatment of children.....	10
2.2 Harmful cultural practices.....	12
3.0 <i>Right to Education</i>	13
3.1 Access to education for children in arid and semi-arid areas.....	13
3.2 Access to education for children with disabilities	14
3.2.1 Challenges.....	14
3.3 The right of children with disabilities to live in the community.....	18
3.3.1 The right of children with disabilities to access to justice	19
PART C	21
INFORMATION REGARDING CLARIFICATIONS SOUGHT BY THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD FROM THE GOVERNMENT OF KENYA	21
1.0 <i>Information on the National Human Rights Institution and its role in promoting and protecting child rights</i>	21
2.0 <i>Activities carried out by the Commission concerning the promotion and protection of the rights and welfare of the child.....</i>	24
2.1 Processing complaints on violations of children’s rights.	24
2.2 Public interest litigation	28
2.3 Election monitoring.....	31
2.4 Public Inquiry into human rights violations	32
2.5 Review of laws and policies relating to the protection of children’s rights	32
2.6 Research into matters concerning children rights.....	33
2.7 Coordination of activities of Taskforce on Legal, Institutional, Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya and the Intersex Persons Implementation Co-ordination Committee.....	33
3.0 <i>Information on whether the Kenya National Commission on Human Rights has created a child specific office to promote and protect the rights and welfare of children</i>	34
4.0 <i>Information on the human resource and financial resources of the Commission</i>	35

Part A

Introduction

The Kenya National Commission on Human Rights (KNCHR or the Commission) is the National Human Rights Institution of Kenya created under article 59 of the Constitution of Kenya, 2010 and operationalized under the KNCHR Act, 2011 (revised 2012). KNCHR has a broad mandate to promote the protection and a culture of human rights in Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of independent national human rights institutions commonly referred to as the Paris Principles. KNCHR is accredited as an 'A' Status Institution for its compliance with the Principles relating to the Status of National Institutions (Paris Principles) by the Global Alliance of National Human Rights Institutions. The Commission has an affiliate status with the African Commission on Human and Peoples' Rights.

The Commission makes this submission to the African Committee of Experts concerning the status of the rights of children in Kenya. The report covers Kenya's implementation of her obligations under the African Charter on the Rights and Welfare of the Child. In this regard, the report is divided into two main sections. Section B of the report provides information regarding the status of implementation of concluding observations issued by the Committee in 2014. The information provided in Section B covers the period 2014 to 2019. Section C of the report provides information on clarifications sought by the African Committee of Experts on the Rights and Welfare of the Child from the Government of Kenya in December 2019.

Part B

Information Regarding Implementation Of Concluding Recommendations Issued By The African Committee Of Experts On The Rights And Welfare Of The Child On Kenya 1st Periodic Report On The Status Of Implementation Of The African Charter On The Rights And Welfare Of The Child

1.0 General Measures of Implementation

1.1 Review of the Children Act, 2001

The Committee recommended that the State Party urgently expedite the review and amendment of the Children Act, 2001 to bring it in line with the Constitution of Kenya, 2010. The Committee further recommended that the State Party urgently finalize the adoption of other laws undergoing revision or a process of adoption

The State Party is yet to finalize the review and amendment of the Children Act, 2001 in order to align it to the Constitution of Kenya, 2010. Moreover, the State Party has since 2010 not reviewed and amended the Persons with Disabilities Act, 2003 to align the same to the African Charter on the Rights and Welfare of the Child (as it pertains to children with disabilities), United Nations Convention on the Rights of Persons with Disabilities and the Constitution of Kenya 2010. The Commission has on numerous occasions called upon the State Party to fast-track the amendment of the Children Act, 2001 and the Persons with Disabilities Act, 2003.

Proposed recommendation:

The State Party should fast-track the review and amendment of the Children Act, 2001 and the Persons with Disabilities Act, 2003 to align the same to the Constitution of Kenya and the African Charter on the Rights and Welfare of the Child as well as the United Nations Convention on the Rights of Persons with Disabilities.

1.2 Strengthening promotion and protection of the rights of the child through the National Human Rights Institutions

The Committee encouraged the government of Kenya to establish an independent organ to promote and protect the rights and welfare of children. It therefore recommended that the government create a child specific office in the Kenya National Commission on Human Rights and the National Gender and Equality Commission.

During its seventy-first session, the Committee on the Rights of the Child had similarly recommended that the Government ensures the Kenya National Commission on Human Rights pays special attention to the concerns of children, by establishing a children's rights unit which is in charge of the promotion and protection of the rights of children.¹

Under Kenyan law, however, human rights Commissions have different mandates. Whereas the KNCHR is empowered to promote and protect general human rights, the 2011 National Gender and Equality Commission Act designated the National Gender and Equality Commission as the principal state organ that promotes and protects the human rights of special interest groups such as children. However, this has not stopped the KNCHR from continuing to complement the role of NGEC by pursuing the protection of children's rights. During the reporting period, the KNCHR has designated a Senior Program Officer as the focal lead on matters relating to Children within the Commission. In addition, the Commission has mainstreamed matters concerning children in its programmatic interventions.

However, the Commission continues to face challenges in its resource allocation which has remained a hindrance to the full execution of its mandate in accordance with the Principles relating to the Status of National Institutions (the Paris Principles) and the Constitution of Kenya, 2010. The Commission often experiences shortfalls in its programmatic budget of which a portion of it is funded by development partners. The increase in the Commission's mandate in relation to being designated as the National Monitoring Agency of the implementation of the Convention on the Rights of Persons with Disabilities and additional functions under the Prevention of Torture Act, 2017 has not been accompanied by additional funding. The table below shows the financial trends of the Commission from the financial year 2013/14 to 2018/19.

¹ Concluding observations on the combined third to fifth periodic reports of Kenya, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKEN%2fCO%2f3-5&Lang=en page 4

Table 1: KNCHR budget allocation outlook for the past five years.

Financial Year	GOK Receipts
2013/2014	263,770,000
2014/2015	345,200,000
2015/2016	441,700,000
2016/2017	416,145,000
2017/2018	398,766,234
2018/2019	393,789,280

In terms of staffing, the Commission has recently transitioned into a new organizational structure. The new approved staff establishment as per the re-organization requires the Commission to have 461 staff to operate optimally. The Commission currently has 106 staff in post. This means the Commission is operating at a low 25% of its staffing establishment.

Proposed recommendation:

Provide adequate funding and staffing to the Kenya National Commission on Human Rights.

1.3 Operationalization of the Public Benefits Organizations Act, 2013

The Committee in the previous review of Kenya had expressed concern over amendments to the Public Benefits Organizations Act, 2013 whose purpose was to impose restrictions on funding for Civil Society Organizations

The State Party abandoned amendments whose purpose was to impose restrictions on funding for civil society organizations. However, the State Party has failed to operationalize the Public Benefits Organizations Act that was enacted into law in 2013. The legal framework is intended to ensure a more efficient, transparent and accountable civil society sector(including those that work on children’s matters) with effective leadership. The High Court has on two occasions pronounced itself on the persistent failure to operationalize the Act as being a violation to the Constitution and has directed the state to operationalize the Public Benefits Organizations Act. Despite the court directive and orders, the Act is yet to be operationalized.

In the case of *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning*²(KNCHR appearing as *Amicus Curiae*)High Court Petition Number 351 of 2015, the petitioners challenged the failure of the Ministry of Devolution to appoint a date for the coming into operation of the Public Benefit Organization Act and further sought order of mandamus to compel the Cabinet Secretary in charge of Devolution and Planning to appoint

²(2016) e KLR available at <http://kenyalaw.org/caselaw/cases/view/128172/>

and gazette a date for the coming into operation of the Act. The Court found that the failure by the Cabinet Secretary to appoint a commencement date for the Public Benefits Organizations Act is inconsistent with the Constitution. The Court issued an order of mandamus compelling the Cabinet Secretary in charge of Devolution and Planning, within the fourteen days of issuance of the order, to appoint a date of coming into operation of the Act. The Order was not complied with and instead the function of regulation of Non-Governmental Organization was transferred from the Ministry of Devolution and Planning to the Ministry of Interior and Coordination of National Government. The transfer is irregular as section 2 (1) of the Public Benefits Organizations Act places regulation of Public Benefits Organizations under the Ministry of Devolution and Planning. The Commission views the transfer of the function as a scheme to frustrate and circumvent judicial orders through exercise of administrative powers.

The Commission together with Civil Society Organizations subsequently moved to court seeking orders that the Cabinet Secretary in charge of Ministry of Devolution and Planning and the Cabinet Secretary in Charge of Ministry of Interior and Coordination of National Government be cited and held in contempt of court orders. The Court found that the Cabinet Secretaries had wilfully disobeyed a valid court order and ordered the National Government to comply with the judgment within 30 days of the date of service, failure of which the Cabinet Secretary in charge of Ministry of Interior and Coordination of National Government would be committed for contempt. Despite the court order, the National Government has not operationalized the Act.

Proposed recommendation:

The State Party operationalize the Public Benefits Organizations Act, 2013.

1.4 Definition of a Child

The Committee in Kenya's previous review expressed concern over the age of criminal responsibility as being 8 years of age. The Committee called upon the State Party to revise and raise the minimum age of criminal responsibility to 12 years through the adoption of the Child Justice Bill

The age of criminal responsibility in Kenya is still retained at 8 years, below the international minimum of 12 years. The Children Bill proposes to raise the age of Criminal Responsibility to 12 years.

Proposed recommendation:

Amend the law to raise the age of criminal responsibility from 8 years to 12 years.

1.5 Name, nationality and birth registration

1.5.1 Intersex children

The Committee raised a concern about the registration of all children including transgender and intersex children by the State Party and recommended the State Party to adopt a registration model which specifies the registration of transgender and intersex children.

The state has taken some progressive steps towards recognition of intersex children. In May, 2017, the Attorney General constituted the *Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya* vide Gazette Notice No. 4904 on 26th May 2017 whose mandate expired on 10th December, 2018. The Taskforce formally handed over its report titled “*Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding intersex persons in Kenya*”³ to the Hon Attorney General on 21st March, 2019. One of the key findings of the Taskforce report was that a majority of intersex persons lacked birth certificates and those who had them, the recorded sex conflicts with the self-recognized sex. Further that birth certificates make it difficult for intersex persons to acquire Identity cards (ID) also compounded by their changed physical appearance that may conflict with the recorded sex. This has resultant social implications and missed opportunities including in voting and employment. Furthermore, the conflicting documentation leads to identity crisis which impedes their access to financial services where some intersex persons have even been harassed and accused of impersonation. Moreover, the report reveals that intersex persons have been in constant conflict with law enforcement officers due to the identity challenge. In its report, the Taskforce has made a raft of recommendations which include amending several laws such as the *Births and Deaths Registration Act*, the *Registration of Persons Act* as well as the *Kenya Citizen and Immigration Act*, to include a third sex, ‘intersex’.

Kenya has made encouraging progress with regard to recognition of intersex persons through legislation; for instance, the *Persons Deprived of Liberty Act*, and the new *Police Service Standing Orders* as well as progressive court jurisprudence. More however, remains to be done. The Kenya National Commission on Human Rights particularly takes cognizance of the historical milestone in the enumeration of intersex children and adults in the just concluded Kenya Population and Housing Census, 2019. There have also been more progressive steps in the recent past towards registration of persons. This includes through a proposed law, the *Registration of Persons (Amendment) Bill, 2019* that seeks to amend *Registration of Persons Act, Cap. 107* and the *Births and Deaths Registration Act, Cap. 149* in order to make provision for the registration (and amendment of particulars) of intersex children and adults.

³ Available at <https://www.knchr.org/Portals/0/FINAL%20INTERSEX%20TASKFORCE%20REPORT.pdf>

Moreover, there have been progressive judgments around registration of the child for instance in the case of *L.N.W v Attorney General & 3 others 2016*⁴ which concerned the registration of their births and the circumstances under which the name of the biological father should be inserted in the birth certificate of the child. The High Court declared that all children born out of wedlock shall have the right and or liberty to have the names of their fathers entered in the births registers. The Court rendered as unconstitutional section 12 of the *Registration of Persons Act* [the section provided that the name of the father of a child born outside marriage can only be entered in the register of births upon the joint request of the father and mother, or upon proof of marriage]. This essentially had denied children born out of wedlock identity and the right to a name. The Court found that a situation in which such children and their mothers are discriminated against on the basis of the law cannot be allowed to continue under Kenya's transformative constitution.

Despite these developments, issues of intersex genital mutilation persist which is not only torture, inhuman and degrading treatment but more fundamentally violates the bodily integrity of minors.

Furthermore, the succession law continues to discriminate against children. Submitting an advisory to the Senate with regard to the Law of Succession (Amendment) Act, 2020, the Commission called on Parliament to amend sections 3(2) and 3(3) of the Law of Succession Act so that parents can provide for their children, born out of wedlock in line with the judgment of the *High Court in NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another 2019*. In this judgment, the Court found the provisions to be unconstitutional for being discriminatory against children born out of wedlock contrary to Articles 27 and 53 of the Constitution and the paramount principle of best interests of the child.

Proposed Recommendations:

1. The State should fast track amendments of Registration of Persons Act, the Births and Deaths Registration Act and the Penal Code respectively to inter alia recognize intersex children and outlaw forced surgeries or intersex genital mutilation for children. In line with the recommendations of the Taskforce, the State, through the Ministry of Health should formulate guidelines that govern the treatment and care of intersex children, sensitization of health care providers and the general public and the operationalization of intersex centers of excellence.
2. Parliament should amend sections 3(2) and 3(3) of the Law of Succession Act to allow parents to provide for their children, born out of wedlock without discrimination.

⁴ Available at <http://kenyalaw.org/caselaw/cases/view/122371/>

1.5.2 Children of Nubian descent

The Committee, previously raised concerns on the issue of children of Nubian descent and the non-implementation of its decision of 2011. Noting that the right of children to nationality and registration is a milestone for the realization of other rights enshrined in the Charter, the Committee called upon the State Party to urgently implement the decision on the Communication and grant Nubian children nationality.

The Commission notes that article 27 of the 2010 Constitution prohibits discrimination on any grounds including birth. The 2010 Constitution provides for the issuance of birth certificates to all categories of children born in Kenya. Children born to Kenyan mothers are now citizens of Kenya irrespective of the father's nationality. Additionally, the Kenya Citizenship and Immigration Act 2011 confers citizenship on children (of less than eight years) whose parents and nationality are unknown.

There have been some positive developments regarding the recognition of Nubians in Kenya. One such development is the inclusion of the Nubians in the vetting committee responsible for issuance of identity cards. The government also issued title deeds to the Nubi of Kibra. The Nubian Rights Forum (NRF) in collaboration with UNHCR and the Department of Civil Registration have previously mounted birth registration campaigns in various parts including Kibra, to ensure registration of all children. The National Commission also notes on a positive note that the just concluded Kenya Population and Housing Census 2019 identified Nubians an ethnic code which provided room for children and adults of Nubian descent to be identified and literally count.

Despite these positive developments, the Commission however notes with concern the government's move to overhaul the data registration and identification systems through the *Huduma* law may serve to negate these gains and disenfranchise a section of the ethnic minorities through the National Identification Integration Management System (NIIMS) and National Education Management Identification System (NEMIS) registration process. The Commission has in its previous advisory to the Ministry on interior on the proposed law cautioned on the need to take into account the danger of rendering ethnic minorities as stateless. In a subsequent advisory on the proposed *Registration of Persons (National Integrated Identity Management System) Regulations 2020*, the Commission again reiterated the need to take into consideration intersex persons when collecting biometric data and the need to provide a mechanism for recognition of stateless minors and those from border communities. The Commission has categorically cautioned against using registration to discriminate and deny government goods and services particularly for the marginalized and vulnerable groups and communities.

While the State has made some progress in assenting to a data protection law, there are various gaps that such an undertaking will have to address. Cases have already been filed in court challenging this process in which the Commission is part of (Petition No. 56 of 2019 as consolidated with Petitions 58 & 59 of 2019).⁵ In this case, the Commission was concerned that the amendments made to the Registration of Persons Act, which introduced a National Integrated Identity Management System (NIIMS) was a violation of the constitutional provisions of right to privacy and dignity, and right to public participation in the enactment of any law. The Commission sought a declaration that these amendments were unconstitutional, null and void and further prohibition of implementation of the NIIMS until effective policy, legal and institutional frameworks are put in place. In a January 2020 judgment, the High Court established that the collection of DNA and GPS coordinates for purposes of identification under NIIMS was intrusive and unnecessary and a violation of the constitutional right to privacy. It further prohibited the implementation of NIIMS until an appropriate and comprehensive constitutional regulatory framework on its implementation is in place.⁶

Proposed recommendation:

The Commission therefore proposes a more robust public participation regarding the proposed comprehensive overhaul of the country's registration and identification system to ensure that the concerns regarding the marginalized and vulnerable groups including intersex persons and those from minority communities are taken into account.

2.0 Protection against torture and abuse

2.1 Enactment of legislation to address torture and ill-treatment of children

The Committee expressed concern over weak prosecution for child torture as the Prevention of Torture Bill was yet to be adopted. The Committee therefore urged the State Party to adopt the Prevention of Torture Bill as the legal and normative basis for the prevention of abuse or torture against children.

Prevention of Torture Act (2017) was passed by the National Assembly on 6th April 2017 and was signed into law by H.E. the President on the 12th April 2017 and took effect as from 20th April 2017. The Prevention of Torture Act 2017, seeks to give effect to Articles 25 (a) and 29 (d) of the Constitution as well as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Act in its current form provides appropriate protection against torture. The Act provides for a broad definition of torture as provided for

⁵ Available at <http://kenyalaw.org/caselaw/cases/view/172447/>

⁶ Available at <http://kenyalaw.org/caselaw/cases/view/189189/>

in Article 1 of the Convention and creates the offence of torture and the offence of cruel, inhuman or degrading treatment. The punishment prescribed for the offence of torture under section 5 of the Act is imprisonment for a term not exceeding twenty-five years. If the victim dies as a result of the torture, the penalty prescribed is life imprisonment. The penalty prescribed for the offence of cruel, inhuman or degrading treatment or punishment is imprisonment for a term not exceeding fifteen years and/or a fine not exceeding one million shillings (USD 10,000).

The Act under Section 6 provides that no justification can be invoked for torture, cruel, inhuman or degrading treatment or punishment. The Act makes evidence or confession obtained by means of torture, cruel, inhuman or degrading treatment inadmissible in any proceedings. The Act prohibits the grant of amnesty or immunity to a person who is accused of the offence of torture, or cruel, inhuman or degrading treatment or punishment.

Section 11 of the Act provides that in sentencing a person convicted of torture or of cruel, inhuman or degrading treatment, the court shall take into consideration the severity of the offence including the victim's age.

The Act under Section 12 bequeaths the Kenya National Commission on Human Rights with the powers to: investigate alleged violations of the act; promote the right to freedom from torture, cruel, inhuman or degrading treatment; call for information from any public or private body to facilitate monitoring of compliance with the act; monitor compliance by the state with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment; issue summons; recommend effective measures for the prevention of torture, cruel, inhuman or degrading treatment, create awareness among public on their right to freedom from torture, cruel, inhuman or degrading treatment; receive reports from public entities with respect to implementation of the Act; Advise the government on matters relating to prevention of torture; and work with enforcement agencies towards the promotion of compliance with international best practices and prevention of torture and cruel, inhuman or degrading treatment and punishment.

Challenges

The Commission has experienced challenges in carrying out its mandate areas under the *Prevention of Torture Act, 2017*. These include:

1. Discrepancies of penalties for the crime of torture under different laws. Under the 2017 Prevention of Torture Act, the crime of torture attracts a penalty of an imprisonment for a term not exceeding twenty-five years. However, under other laws, the penalty prescribed for the offence of torture is less stringent. The 2014 Persons Deprived of Liberty Act, for instance, imposes a two-year imprisonment penalty or a fine of Kshs 500,000 (USD 5000) on anyone found guilty of torturing a person deprived of liberty. Similarly, the 2001 Children Act and the 2013 Basic Education Act

imposes a prison term not exceeding twelve months or a fine not exceeding Kshs 50,000 (USD 500), and a prison term not exceeding six months or a fine not exceeding Kshs 100,000 (USD 1000), respectively.

2. Denial of access to places of detention in police stations and military barracks to monitor, investigate and report on allegations of torture of civilians by national security organs.
3. Intimidation of victims and witnesses which in turn has frustrated the Commission's efforts of ensuring accountability for victims of torture.
4. Lack of funding to the Commission which has significantly hampered its ability to carry out its designated mandate under section 12 of the Prevention of Torture Act, 2017.
5. Lack of reparations for victims of torture and the non-operationalization of the Victim Protection Trust Fund.

2.2 Harmful cultural practices

The Committee recommended the State Party to continue raising awareness on issues of harmful cultural practices and establish rescue centres to provide children who flee from the threat of harmful traditional practices particularly of FGM and child marriage or who are rescued with the appropriate shelter.

In Kenya there is a prevalence of harmful practices including child and forced marriage, female genital mutilation and intersex genital mutilation. Statistics from the 2014 Kenya Demographic and Health Survey indicate that child marriage and Female Genital Mutilation are still a cause of concern in Kenya, although rates have steadily reduced over the years. In 2008 for instance, FGM prevalence rate stood at 27%, while in 2014 it stood at 21%, signifying a decline. This positive development can largely be attributed to the legal, policy and institutional measures adopted by the Government to curb the practice. The State Party has established the Anti-Female Genital Mutilation Board, pursuant to the Prohibition of Female Genital Mutilation Act. This Board is mandated to formulate policies, mobilize resources, design and co-ordinate public awareness programs against FGM and advise the government on matters concerning FGM. In addition, in April 2014, the State Party established the Anti-FGM and Child Marriage Prosecution units within the Office of the Director of Public Prosecutions to fast-track the prosecution of FGM and child marriage cases.

The acts of forced medical interventions, invasive searches and medical procedures without informed consent amount to torture, inhumane and degrading treatment contrary to the Prevention of Torture Act, 2017 and the Constitution of Kenya, 2010, regional as well as international human rights standards. The Taskforce Report on Policy, Legal, Institutional and

Administrative Reforms Regarding Intersex Persons in Kenya recognizes that acts of forced medical interventions, invasive searches and medical procedures without informed consent amount to torture, inhumane and degrading treatment contrary to the Prevention of Torture Act, 2017. The Report called on the need to operationalize the National Coroners Service Act (No. 18 of 2017) that came into effect in July of 2017 and the need to fully operationalize the Act to ensure that cases of infanticide arising from intersex status, whether accidentally or willfully at birth or due to medical negligence at any stage of life, are properly investigated and prosecuted.

3.0 Right to Education

The Committee urged the State Party to ensure access to education for children with disabilities by training teachers in special needs education, providing and improving basic infrastructure suitable to children with disabilities and preparing teaching materials which can be utilized by children with disabilities.

It further recommended that the education system should accommodate girls who get pregnant while in school and called the State Party to improve the quality of education, especially in public schools, considering the desired learning outcomes. It encouraged adoption of a code of conduct for teachers to ensure non-absenteeism, high ethics and professionalism; undertake monitoring of private education, as well as assessment of the impact of privatization; develop minimum standards for all education institutions and monitor pre-schooling so that it is not solely left to the private sector. The Committee further encouraged the State Party to provide children with the time and materials for play giving due consideration to children with disabilities, and to monitor schools and their environment.

3.1 Access to education for children in arid and semi-arid areas

The right to education for every child is safeguarded under a number of legal and policy frameworks in Kenya. Under article 53 of the 2010 Constitution of Kenya, every child has the right to, among others, free and compulsory basic education.⁷ The right to education is also one of the economic and social rights that every person is entitled to under article 43 of the 2010 Constitution of Kenya. Additionally, the 2001 Children Act and the 2003 Persons with Disabilities Act emphasize that every child has the right to be educated without any form of discrimination. The fundamental importance of this right is also evident in article 56 of the 2010 Constitution which imposes a positive duty on the State to put in place affirmative action programmes to ensure that minorities and marginalized groups are provided special opportunities in educational and economic fields.

⁷ Article 53, 2010 Constitution of Kenya

There are several barriers to access to free and compulsory basic education in Kenya. These include low student to teacher ratio, the shortage of teachers due to enrolment of pupils, insufficient learning facilities, poor learning environment particularly in arid and semi-arid areas and urban slums.

The Kenya National Commission on Human Rights has documented the impact of insecurity on the enjoyment of rights in North Rift through a Public Inquiry it carried out in 2016 focusing on Baringo, ElgeyoMarakwet, West Pokot, Turkana and Samburu Counties - a semi-arid area of the country. The objective of the inquiry which focused on the period between 2005 and 2015 was to inquire into the conflict that has affected the above mentioned counties in order to ascertain the actors, motivations, nature of human rights violations, consequences and make recommendations.

With respect to the education sector, the inquiry documented how conflict and insecurity has affected education for children living in the five counties. The inquiry found that the education sector in the North Rift region has been negatively affected by insecurity occasioned by perennial conflict.

Impact on education of children in this area is evidenced by interruption in learning due to conflict; limited number of teachers (teacher to pupil ratio stands at 1:105 pupils), destruction of school infrastructure, low class transition rates and high school dropout rates. Insecurity has also contributed to low education attainment as compared to other counties of which insecurity is a key contributor.

3.2 Access to education for children with disabilities

It is worthwhile to note that the government has introduced a myriad of programmes to advance the enjoyment of the right to education in the country. These include the 100% Transition Policy; bursaries including under the National Government Constituencies Development Fund and the National Development Fund for Persons with Disabilities; the Secondary Education Quality Improvement Project and the Sanitary Towels Program which procures and distributes sanitary towels for 3.7 million girls in public primary and secondary schools.

3.2.1 Challenges

- A. Lack of clarity on the meaning of inclusive education in the Kenyan context, unclear government approach to inclusive education and ambiguity of the means through which it will be achieved.

In 2018, the government put in place the Sector Policy for Learners and Trainees with Disabilities (2018) which recognizes the need for Kenya to move towards inclusive education, instead of segregated education. However, there is no clarity on the definition of inclusive

education, the desired model to be adopted or roadmap to guide the shift towards inclusive education. The Policy views inclusive education as an overarching principle, advocating for the right of every learner with disability to be enrolled in regular classroom together with his or her peers without disabilities. This does not portray inclusive education as a programme area or an education model that needs to be adequately planned for and resourced but rather a principle to be taken into consideration when planning or resourcing education programmes. Currently the government uses the integration model for planning, resourcing and delivery of education services to learners with disabilities in primary schools. The model entails special units established within the regular school to cater for learners with a specific type of disability. This is still a form of segregation and contravenes Article 24 of the Convention on the Rights of Persons with Disabilities (CRPD) which was ratified by Kenya in 2008.

Proposed recommendations: 3.2.1 (A)

1. In compliance with Article 24 of the CRPD, the Ministry of Education should clearly define the government's approach to inclusive education, models to be used and timeline for transition from integration to inclusive models for delivery of education to learners with disabilities across all levels of basic education. Defining the government's approach to inclusive education should be done in consultation with a wide range of stakeholders including persons with disabilities, caregivers of persons with disabilities and organizations for and of persons with disabilities.
2. Capacity building on inclusive education approaches should be organized for teachers, Curriculum Developers, Education Administrators, Quality Assurance Standards Officers (QASO) and the Examination Councils officers.
3. Kenya Institute of Special Education (KISE) should rebrand to become a champion for inclusive education and their teacher training curriculum re-engineered towards preparing more teachers to teach in inclusive schools and tertiary institutions such as technical colleges.

B. Inadequate focus on the intersecting drivers of exclusion from education for all learners and addressing inclusive education in silos (a systemic challenge).

Exclusion from education often results from the intersection among various aspects of an individual child's identity including disability, sex, health status, economic status, ethnic or social origin, age, religion or other status. One ongoing challenge in this regard is that interventions to address these prohibited grounds of discrimination in education are often disconnected from each other, resulting in duplication of efforts, non-optimal utilization of resources, and ultimately, exclusion of some learners. For example, the following agencies/departments address different aspects of education in Kenya: National Council for Nomadic Education in Kenya (NACONEK), Directorate of Special Needs Education (DSNE), and

Directorate of Adult and Continuing Education. Additionally, there are many programmes established by State and Non-State actors to keep vulnerable children in school (including girls and refugees). This creates complex service delivery structures that are not effective. In addition, targeted interventions and support has further been limited by the lack of up to date disaggregated data, specifically on learners with disabilities. Notably, one of the commitments the Government of Kenya made during the 2018 Global Disability Summit was to promote inclusive education and the collection of accurate data on persons with disability, disaggregated by gender, age, disability and geographic location for use in planning.⁸

Proposed recommendations: 3.2.1 (B)

1. The government should strengthen accountable governance structures and monitoring and tracking systems to ensure that no learner falls through the cracks. It is important to shift from a focus on individual elements (disability, gender, poverty etc.) to a focus on opportunities for inclusion including: curricula, policy, infrastructure, parents' engagement, funding, effective teacher training, adequacy of data and learning resources.
2. The government should establish a framework on how to engage the different agencies/departments in inclusive education in a coherent manner.
3. Assessment of children before placement should be conducted by a multi-disciplinary assessment team that would take into account the intersecting grounds that may make a particular child more vulnerable to exclusion. Such a team would be in a position to propose solutions that address the multi-factors that lead to some children being left behind in education.
4. The Government should provide up to date disaggregated data on learners with disabilities, in line with its Global Disability Summit commitments, in order to enable targeted interventions and support.

C. Inadequate and flat rate capitation for learners with disabilities

In relation to primary school education, the government provides an annual capitation of Ksh1, 422 to each child and a top up of Ksh2, 300. At secondary school level, Ksh57, 974 is given annually to learners enrolled in secondary schools. The current figures represent a very small increase from the initial amounts set in 2003 when Kenya introduced free primary and day-secondary education. Since 2003, it is not clear the criteria the government uses to arrive at the amount of capitation allocated to the learners with disabilities. For instance, the capitation is not individualized in that it does not take into consideration the type of

⁸ Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731878/Global-Disability-Summit-Summary-Commitments_2.pdf

disability, the individual needs of the learner, support services and personnel required etc. In relation to financing and sustainability, the Sector Policy for Learners and Trainees with Disabilities (2018) indicates that, the Ministry of Education shall continuously review and increase budgetary allocation to institutions and programmes. It is important that the reviews and budget allocations are based on established unit cost of educating a learner with disability.

Proposed recommendations: 3.2.1 (C)

The government should develop and implement a differentiated unit cost for educating learners with different types of disabilities. The unit cost should take into account the type of disabilities, individual needs of learners including costs for provisions of support services such as occupational therapy, speech therapy, provision of appropriate devices and learning materials, etc. The unit cost should be basis for planning and budgeting for learners with disabilities.

D. Challenges related to laws and policies

Challenges related to laws and policies include gaps in legislation and existing policy frameworks, slow implementation of positive provisions in laws and policies and poor dissemination of existing policies whereby implementers are not aware of policy changes.

In terms of laws and policies on education in Kenya, in addition to Article 54(1)(b) of the Constitution, the Basic Education Act, 2013; the Persons with Disabilities Act, 2003 (sections 18 and 19); and the Children's Act, 2001 (section 12,) address critical issues on the enjoyment of the right to education by learners with disabilities.

However, these laws contain critical gaps in terms of inclusive education as established under Article 24 of the UN Convention on the Rights of Persons with Disabilities. To illustrate, Section 44 of the Basic Education Act entrenches in law special education as opposed to inclusive education as the main approach towards providing education to children with disabilities. This is not in line with global human rights trends on education. Section 18(3) of the Persons with Disabilities Act provides that 'special schools and institutions, especially for the deaf, the blind and the mentally retarded, shall be established to cater for formal education, skills development and self-reliance'. Leaving aside the derogatory terminology ('mentally retarded'), the provision supports segregated rather than inclusive education.

In relation to poor implementation of existing laws and policies, Section 12 of the Children's Act is to the effect that a child with a disability 'shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible'. This affirmative action measure would advance access to education by children with disabilities, given the intersection that exists in many cases between poverty and disability. Contrary to the positive intent of Section 12 of

the Children's Act, the prevailing situation is that even basic education is not free to many children with disabilities, because many schools for children with disabilities are boarding schools which require that the children pay boarding fees and other related expenses.

Furthermore, the Sector Policy for Learners and Trainees with Disabilities (2018) contains many positive provisions which if implemented would enhance access to education by learners with disabilities. These include individualized education plans (and figuring out how to operationalize these given the pupil-teacher ratio), provision of the required infrastructure, and investment in teacher training for inclusive education.

The National Education Sector Strategic Plan 2018 – 2020 also comprises many positive provisions which would advance the enjoyment of the right to education by learners with disabilities. These include reiterating the commitment to implement inclusive education, establishing functional assessment and early intervention Services in education and training, curriculum adaptation for inclusive education, and human resource development for effective inclusive education.

Proposed recommendations: 3.2.1 (D)

1. The Government should implement positive provisions in existing laws and policies and review laws and policies that have gaps as identified above. There should also be a clear strategy for disseminating policies to policy implementers.
2. The government should set up a formal and standardized mechanism for monitoring, evaluating and reporting on implementation of laws and policies.

3.3 The right of children with disabilities to live in the community

The Commission notes with concern the violations to article 19 of the Convention on the Rights of Persons with Disabilities on the right to living independently and being included in the community.

The Commission has received complaints of children with high support needs who are locked up and isolated in homes by families who have limited options, in the absence of State funded support services and respite care. In the Kenyan context, often, support to children with high support needs comes from families and the nature and quality of support is based on the financial ability of the family among other factors. Isolation and exclusion from the community makes children with high support needs vulnerable to abuse, exploitation and undignified living conditions.

Proposed recommendations:

1. The government should provide age-appropriate state funded support services for children with disabilities at community level, including caregivers, respite services, peer support and personal assistance services.
2. The Cash Transfer Programme for persons with disabilities should be scaled up to ensure that caregivers are able to devote time to caring for their children with disabilities rather than being forced to lock them up as they leave the home for economic reasons.
3. The government should enhance access to inclusive education for all children. This would ensure that children with disabilities are in school with their peers rather than isolated in homes.

3.3.1 *The right of children with disabilities to access to justice*

A review of 11 reported cases at the High Court concerning acts of sexual assault against children with disabilities⁹ reveals that unfortunately, in at least 8 of these matters the courts have resorted to either reducing the initial sentence or ordering a re-trial. For example, in the case of Benson MututuKimani the court reduced the accused sentence from a period of 20 years to 13.5. Similarly, in Boniface Mutua Ngolanya the sentence was reduced from 20 years to 15 years.

The haphazard approach adopted by the courts seeks to encourage appeals, which seemingly favor the accused. Thus, even where a person has been sentenced and tried, the outcome on appeals seems to favor a reduced sentence.

Proposed recommendations: 3.3.1

1. The justice system should ensure that age-appropriate reasonable accommodation measures are provided to children with disabilities to enhance access to justice in line with Article 13 of the UN Convention on the Rights of Persons with Disabilities.
2. The child's disability should be considered as an aggravating circumstance in sentencing, rather than being used as a ground for casting doubt on the competency of the child's testimony.

⁹ Benson MututuKimani v Republic [2016] eKLR, Boniface Mutua Ngolanya v Republic [2016] eKLR, Charles Mathenge Kariuki v Republic [2018] eKLR, David Mwangi Njoroge v Republic [2015] eKLR, Geoffrey Amkwach v Republic [2018] eKLR, George Mbugua Ngendo v State [2019] eKLR, H K A v Republic [2018] eKLR, J M v Republic [2015] eKLR, Johana Kariuki Waweru v Republic [2018] eKLR, Joseph KivuvaKitheka v Republic [2017] eKLR, Ndoro Sammy & another v Republic [2018] eKLR.

3. Actors in the justice sector including magistrates, judges, prosecutors and police should be trained about the specific barriers faced by children with disabilities in accessing justice, and their role in dismantling these barriers to ensure non-discrimination in accessing justice.

Part C

Information Regarding Clarifications Sought By The African Committee Of Experts On The Rights And Welfare Of The Child From The Government Of Kenya

The Clarifications sought by the African Committee of Experts on the Rights and Welfare of the Child request for the following information as pertains to the Kenya National Commission on Human Rights:

- The structure and functions of the KNCHR and its role in addressing children issues. (Paragraph 7 of the Clarifications Sought)
- Information on financial and human resource allocation to KNCHR and whether it is adequate. (Paragraph 5 of the Clarifications Sought)

1.0 Information on the National Human Rights Institution and its role in promoting and protecting child rights

The Kenya National Commission on Human Rights (KNCHR) is established under Article 59 as the Kenya National Human Rights and Equality Commission. The Commission's operations are regulated by the Kenya National Commission on Human Rights Act 2011 (revised 2012) and guided by the United Nations Paris Principles on the establishment and functioning of independent national human rights institutions.¹⁰ The Commission is accredited as an 'A' status institution by the Global Alliance of National Human Rights Institutions and enjoys affiliate status with the African Commission on Human and Peoples Rights.¹¹ The Commission has a broad mandate to promote the respect and a culture of human rights in the Kenya. In relation to treaties and conventions relating to human rights, the Commission has a specific mandate to 'act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights.'¹²

The Commission also has a mandate to:

¹⁰ Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

¹¹ See Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialized Human Rights Institutions in Africa by the African Commission on Human and Peoples Rights (ACHPR/Res.370 (LX) 2017) available at <http://www.achpr.org/sessions/60th/resolutions/370/>

¹² Article 59 (2) (g) Constitution of Kenya 2010

- (a) Monitor and report on the observance of human rights;¹³
- (b) Receive, process and investigate complaints on human rights violations¹⁴;
- (c) Seek appropriate redress where human rights have been violated¹⁵;
- (d) Conduct research on matters in respect to human rights and make recommendations to improve functioning of the state¹⁶;
- (e) Act as the principal organ of the State with the mandate to enhance state compliance with international and regional instruments relating to human rights;
- (f) Formulate, implement and oversee programs that create public awareness of rights and duties under the constitution.¹⁷

In executing its mandate, the Commission has the powers to:

- (a) Summon and enforce attendance of any person for investigations.
- (b) Require the discovery and production of any document.
- (c) Requisition any public record or copy thereof from any public officer.
- (d) Apply negotiation, conciliation and mediation in resolving human rights violations.¹⁸

During the reporting period, the Commission was designated as the national monitoring agency under the Convention on the Rights of Persons with Disabilities by the Attorney General.

Furthermore, the Prevention of Torture Act¹⁹ was enacted into law in 2017 and mandates the Commission to:

- (a) Receive complaints of violations of the Act and conduct investigations into alleged violations;
- (b) Promote the right to freedom from torture and cruel, inhuman or degrading treatment or punishment;

¹³Section 8 (c) Kenya National Commission on Human Rights Act No 14 of 2011 available at http://www.knchr.org/Portals/0/Articles/KenyaNationalCommissiononHumanRights_Act_No14of2011.pdf?ver=2016-08-01-132051-907

¹⁴Section 8 (d) Kenya National Commission on Human Rights Act

¹⁵Section 8 (d) Kenya National Commission on Human Rights Act

¹⁶Section 8 (e) Kenya National Commission on Human Rights Act

¹⁷Section 8 (f) Kenya National Commission on Human Rights Act

¹⁸Article 252 of the Constitution.

¹⁹Section 12 of the Prevention of Torture Act, No 12 of 2017 available at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PreventionofTortureAct2017.pdf>

- (c) Monitor compliance by the state with the provisions of the Act and international treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment;
- (d) Advise government on matters relating to the prevention of torture and cruel, inhuman or degrading treatment or punishment;
- (e) Recommend effective measures for prevention of torture and cruel, inhuman or degrading treatment or punishment;
- (f) Create awareness among the public of the provisions of the Prevention of Torture Act and the right to be free from torture and cruel, inhuman or degrading treatment or punishment;
- (g) Receive reports from public entities on implementation of the Prevention of Torture Act; and
- (h) Work with enforcement agencies towards promotion of compliance with international best practices on prevention of torture and cruel, inhuman or degrading treatment or punishment.

The Commission has its headquarters in Nairobi County and five regional offices in Kisumu, Kitale, Laikipia, Mombasa, and Wajir. The Commission has also embarked on increasing its presence and accessibility to the public through Government's one stop shop for public services dubbed as *Hudumacentre*, by establishing a desk in Kiambu County Huduma Centre (Thika) and Nairobi County *Huduma Center* (Makadara). In order to ensure effective delivery of services, the Commission hopes to devolve its services to all 47 counties. However, lack of resources has hampered the ability of the Commission to devolve its services in all 47 counties as required under article 6 of the Constitution of Kenya.

In addition, the Commission has strengthened its partnership with state and non-state actors to enhance its complaints handling mandate by establishing a complaint handling referral mechanism which enables efficient case processing, referral and resolution of all complaints relating to human rights including child rights cases. The Complaints Referral Mechanisms meets quarterly to assess progress of processing complaints. The Complaints Handling Referral Mechanism also has membership from National Gender and Equality Commission and the Commission on Administrative Justice.

2.0 Activities carried out by the Commission concerning the promotion and protection of the rights and welfare of the child

During the reporting period, the Commission has undertaken the following activities in promoting and protecting the rights and welfare of the Child:

2.1 Processing complaints on violations of children's rights.

The Commission has received and processed a total of 720 complaints. The breakdown of complaints received by subject matter is captured in the table 2.

Table 2: Complaints received by the Kenya National Commission on Human Rights for the period August 2014 to February 2020.

S/No	Nature of Complaints
Parental Support	695
Custody	185
Protection from abuse	102
Sexual Abuse	88
Protection from neglect	67
Free and compulsory basic education	65
Basic nutrition, shelter and healthcare	46
Inhuman treatment or punishment	37
Succession/inheritance	19
Protection from harmful cultural practices	15
Right to registration	14
Visitation	12
Protection from exploitative labour	11
Trafficking	6
Right to acquire nationality	4
Right to name	3
TOTAL	1,369

The Commission has an elaborate complaints handling and Referral Partners Network which has continuously worked together to address complaints with regards to abuse of children rights.

Additionally, the Commission sits in different national platforms comprising of advisory committees and taskforces which are key towards promoting rights and welfare of children. The committees are:

A. The National Council on Administration of Justice (NCAJ) Special Taskforce on Children

The KNCHR is a member of the National Council on Administration of Justice (NCAJ) Special Taskforce on Children Matters that was appointed by the Hon. Chief Justice vide Gazette

Notice No. 369 of January 29, 2016 with the mandate to address gaps regarding the administration of justice with regard to children. The main mandate of the committee is captured in three themes, namely legislative, policy, procedural and practice directions reforms; Survey and data compilation on all matters of children and training, and infrastructure and co-ordination of all the actors.

The Task force in collaboration with the Judiciary set up and conducted Children Service weeks across the country with an aim of reducing the backlog of children cases in courts. It is through such initiatives that the Judiciary together with the Court Users Committees (CUCs) have set aside the month of November of every year as declared as the service week for children, where courts would endeavor to prioritize Children matters in that month and have them dispensed with. The process entailed screening of child related matters for mediation, plea-bargaining in suitable matters, and the hearing of sexual offences.

The Task Force sought to have children matters filed using colour coding to distinguish them at the Court registries. The use of white colour files has continuously been encouraged so as to easily identify children's files when stored in the registry or when matters are being heard.

The Taskforce also developed a Protection and Care (P &C) form (Form 1) to be used in court for children in need of care and protection. This was important to replace the use charge sheets in children matters. This was in compliance with section 119 of the Children's Act.

In order to allow children to testify freely, the Taskforce introduced witness protection boxes in children's court. For instance, Makadara court introduced services such as day care unit for children, counselling services, lunch for children's, and play therapy.

The Taskforce participated in the conducting of colloquia on Children matters with Judges and magistrates in which the focus was on the handling of children matters and the use of alternative dispute resolutions.

Members of the Taskforce participated in the Second Children Devolution Conference to discuss issues affecting children. In the said conference, the children developed a communiqué that was presented to the President of the Republic of Kenya.

The task force conducted visits across the country to children institutions and holding facilities, which include: children remand homes, rehabilitation schools, rescue centres, reception centres, probation hostels, Borstals and women's Prison children wing, Child Protection Units (CPUs), children's courts. The purpose of these visits was to examine state of the children in these institutions and also the infrastructure, programmes, and pending matters with an aim of reviewing their adequateness among other issues and make the appropriate recommendations for their improvement.

Challenges

- (a) Children continued to live Poor and deplorable conditions in some remand homes. In some courts children are held together with adult remandees. Lack of proper arrangements for children in conflict with the law (transport, holding facilities, human resources, financial resources, etc);
- (b) Inadequate funding was an issue that cut across all Children institutions and Police stations. In some instances, officials would resort to using their own funds to meet needs such as water, clothing, electricity, desks etc;
- (c) Understaffing at children institutions and police stations and the inadequate capacity development for institutions and persons who handle children matters;
- (d) The bulk of Children cases across the involved defilement. Most of the children in court lacked representation for both victims and witnesses. The Taskforce also noted that there were inadequate number of prosecutors in courts;
- (e) Despite the introduction of plea-bargaining and the diversion guidelines by the Office of the Director of Public Prosecution, there was little awareness of plea-bargaining;
- (f) Some magistrates/ courts did not understand the nature of children matters and end up committing children to institutions where the children cannot attend school;
- (g) There was a misconception in some courts regarding the purpose of the remand, thus resulting to the committal of underage children to the remand homes; and

Court, litigants, prosecutors and children officers did not have adequate notice of the Children service week, and thus made it difficult to bring forward case dates and obtain parties/witnesses who often travel long distances. Most of the Court Users Committees (CUC) visited had not convened legal aid committees, to facilitate the provision of legal aid services.

The Taskforce made the following recommendations:

1. The Taskforce recommends that there should be the adequate allocation of resources to children institutions, for the maintenance of buildings, purchase of beds, bedding, clothing, kitchen utensils among others. In addition, the taskforce recommends that funds for home tracing and reintegration of children allocation of budget lines in police stations to cater for children

2. The Taskforce recommends that administrators of rehabilitations schools should encourage linkages with neighbouring schools to enable children attend schools and continue with their learning at their localities.
3. The Taskforce also recommends the recruitment of prosecutors, Police officers and children officers respectively so as to ensure that the staffing/cadres are commensurate with the needs of the institutions that deal with children matters.
4. The Task force recommends the setting up of Child protection Units at every police station
5. The Training of personnel within the criminal justice system (magistrates, police officers, prosecution) on children matters should be enhanced across the country.
6. Collaboration with Court User Committees (CUCs) and local leadership (e.g. chiefs) to fast track children matters and create awareness and facilitate service weeks and for the public especially on the best interest of the child, namely in cases of sexual abuse and children with disabilities.
7. The Taskforce also recommends the enhancing of partnership between the Court Users Committees and County Government with an aim of providing funding to cater for the best interests of the child (medical care, remand/CPU, food supplies). Provision of psychosocial support for child victims at all stages in the justice system is imperative and that all institutions involved should collaborate with organisations providing these services.
8. The Taskforce recommends the creation of a separate Children's Register at every court and police station and the mandatory use of Care and Protection forms in dealing with cases of children in need of care and protection, in addition, the development and implementation of a policy to ensure children's institutions receive a complete copy of the child's file upon committal.

B. The Counter-Trafficking in Persons' Advisory Committee

The Commission is a member of the Counter-trafficking in Person Advisory Committee that is established pursuant to section 19 of the Counter-Trafficking in Persons Act.²⁰ The Committee has a broad mandate to advise the Cabinet secretary in charge of the Ministry of Labour and Social Protection on inter-agency activities aimed at combatting trafficking in persons and implementation of preventive, protective and rehabilitative programs for trafficked persons.

²⁰ No 8 of 2010 available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Counter-TraffickinginPersonsAct_No8of2010.pdf

Other advisory committees and taskforces which are key towards promoting rights and welfare of children are:

1. National Legal Aid Service Board- The National Legal Aid Board is established under section 9 of the Legal Aid Act 2016.²¹
2. Advisory boards of the following institutions; the Witness Protection Agency (WPA), The Office of The Director of Public Prosecution (ODPP) and The Independent Policing Oversight Authority (IPOA),
3. The National Committee on Criminal Justice Reforms- The Committee was formed by the Chief Justice in 2017 to spearhead comprehensive review and reform of Kenya's criminal justice system in Kenya. The Committee is expected to develop, operationalize and oversee the execution of a comprehensive implementation framework, strategy and plan on recommendations it makes with respect to criminal justice reform.

2.2 Public interest litigation

The Commission engaged in four cases geared towards promoting and protecting rights of the child. A breakdown of the cases, KNCHR's role, and contribution to the jurisprudence in the issues canvassed is captured in table 2 below.

Table 3: Cases on children's rights litigated by the Kenya National Commission on Human Rights for the period August 2015 to August 2017

Name of The Case	Role Played by The Commission	Issues Canvassed in The Case	Decision of The Court
Baby 'A' (Suing through Mother EA) & another versus Attorney General & 6 Others (2014) e KLR ²²	Interested Party	Whether failure to register intersex children during birth due to an indeterminate sex amounts to discrimination and is a violation of the rights to legal recognition Whether corrective surgery	On the question of registration of Baby 'A' the court dismissed the case of the petitioner that Baby A was not registered because he was not assigned a sex at birth. However, the court recognised the need for law reform to ensure registration of intersex

²¹ No 6 of 2016 available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%206%20of%202016>

²² Petition 266 of 2013 available at <http://kenyalaw.org/caselaw/cases/view/104234/>

		<p>carried out on intersex children without rules and regulations to govern conduct of surgery violates the right to physical integrity and the right to self-determination of children.</p>	<p>children.</p> <p>The court directed the state to come up with appropriate legal framework governing issues related to intersex children based on internationally accepted guidelines. The directive was given upon the court's recognition that there is no legal framework on intersex person in place.</p> <p>The court ordered for the Attorney General to report within 90 days on the status of the organ, agency or institution responsible for collecting and keeping data on intersex children and persons generally. The AG was also to report on the status of a law regulating the place of inter-sex persons as a sexual category and guidelines for corrective surgery on inter-sex person</p>
<p>LNW versus Attorney General & 3 Others (2016) e KLR²³</p>	<p>Amicus Curiae</p>	<p>Whether section 12 of the Registration of Births and Deaths Act allowing fathers of children born out of wedlock to decide whether to include their names in the child's birth certificate amounts to discrimination and whether the provision violates the best interest of the child principle.</p>	<p>Section 12 of the Registration of Births and Deaths Act which has the effect of differentiating between children on the basis of whether they were born in or out of wedlock amounts to unfair discrimination and violates article 27 of the Constitution of Kenya</p>
<p>JLN & 2 others versus Director of Children Services & 4 Others (2014) e KLR²⁴</p>	<p>Interested Party</p>	<p>Custody of children born out of surrogacy agreements.</p> <p>Whether children born out of a surrogacy agreement</p>	<p>Any action taken on children born out of surrogacy including custody of the child must be weighed against the best interest of the child principle. A</p>

²³ Petition 484 of 2014 available at <http://kenyalaw.org/caselaw/cases/view/122371/>

²⁴ Petition 78 of 2015 available at <http://kenyalaw.org/caselaw/cases/view/99217/>

		<p>are in need of care and protection and therefore need the intervention of the director of children services?</p>	<p>determination of whether a child is in need of care and protection must be weighed against section 119 of the Children's Act and the best interest of the child principle. Therefore, it is not all situations in which a child born out of surrogacy agreement renders them in need of care and protection</p> <p>The court recognised that there is no legal framework to govern issues concerning children born out of surrogacy agreements and therefore in order to secure their rights, it was fundamental duty of the state to provide a legal framework for such children.</p>
<p>Kyalo Mutua Muthiani versus Republic Criminal Appeal No 1 of 2015</p>	<p>Watching brief</p>	<p>A minor being handed the death penalty on his own plea of guilt.</p> <p>The Commission was involved in an appeal from the decision of the trial court in Mavoko PMCC Criminal Case No 189 of 2014 in which the appellant was convicted for the offence of robbery with violence and sentenced to suffer death while he was a minor.</p> <p>Breach of right to a fair hearing- the minor was not represented as is required under Article 50 (g) (h); he did not understand the magnitude of pleading guilty to the offence of robbery with violence.</p>	<p>The appeal was allowed and the sentence quashed.</p>

Nubian Rights Forum & 2 others versus Attorney General & 6 others (2019) e KLR²⁵	Co-Petitioner	<p>The amendments made to the Registration of Persons Act, establishing the National Integrated Identity Management System (NIIMS) that would become a single repository of personal information of all Kenyans and foreigners were unconstitutional.</p> <p>The collection of DNA and GPS coordinates for purposes of identification under the NIIMS was a violation of the right to privacy under article 31 of the 2010 Constitution.</p> <p>These amendments were introduced and passed without public consultation or participation.</p> <p>The NIIMS would also disproportionately disadvantage the Nubian Community which already faces challenges in accessing national identification documents.</p>	<p>The collection of DNA and GPS coordinates for purposes of identification was intrusive, unnecessary and a violation of article 31 of the Constitution.</p> <p>The implementation of NIIMS may proceed only if an appropriate and comprehensive regulatory framework on its implementation that complies with the Constitution is enacted.</p>
--	---------------	---	--

2.3 Election monitoring

The Commission in the reporting period engaged in monitoring the 2017 elections pursuant to its constitutional mandate to monitor adherence to human rights by state and non-state actors and make recommendations toward improving functioning of the state. The Commission undertook monitoring to ensure that human rights principles are protected and promoted during electoral process. During the monitoring process, the Commission collated data on rights violations that directly concerned children. The findings of the monitoring process have been documented in four reports covering the political party primaries²⁶, the

²⁵ Consolidated Petition 56, 58 & 59 of 2019, available at <http://kenyalaw.org/caselaw/cases/view/189189/>

²⁶ Kenya National Commission on Human Rights 'The Fallacious Vote: A Human Rights Account of the 2017 Political Parties Primaries (May 2017)' available at http://www.knchr.org/Portals/0/CivilAndPoliticalReports/2017_Party%20Nominations%20%20Report.pdf?ver=2017-08-24-112628-117 (accessed 1st May 2018)

August 8th general election²⁷ the repeat presidential election²⁸ and the special series on Sexual Violence.²⁹ The Commission documented 10 electoral related deaths of children, disruption of learning activities during school calendar due to political campaigns and 15 cases of election related sexual and gender based violence.

2.4 Public Inquiry into human rights violations

The Commission has carried out and completed two public inquiries into rights violations during the reporting period. The inquiries have focused on the rights violations occasioned as a result of insecurity in the North Rift³⁰ and mining activities in TaitaTaveta Counties.³¹ The inquiries measured the impact of insecurity and mining activities on children and make recommendations to state agencies towards ensuring enjoyment of rights by children guaranteed in the Constitution of Kenya 2010 and the African Charter on the Rights and Welfare of the Child.

2.5 Review of laws and policies relating to the protection of children's rights

The Commission reviews laws at both the National and County levels with a view to advising the state on its compliance with human rights treaties and conventions that Kenya has ratified. Notably, the commission has been involved in review of the Children Bill 2017, the Nairobi City County Childcare Facilities Bill, 2017, the Children(Charitable Children Institutions) Regulations, 2020 the Children (Care and Protection) Regulations 2020, and the Child (Welfare Programmes) Regulations, 2020 with a view to ensuring compliance with the African Charter on the Rights and Welfare of the Child as well as the United Nations Convention on the Rights of the Child.

²⁷Kenya National Commission on Human Rights 'A Mirage at Dusk: A Human Rights Account of the 2017 General Election (September 2017)' available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/MIRAGE%20AT%20DUSK%20-%20A%20Human%20Rights%20Account%20of%20The%202017%20General%20Election.pdf.pdf?ver=2017-10-09-130024-457>

²⁸Kenya National Commission on Human Rights 'Still a Mirage: A Human Rights Monitoring Report on the 2017 Repeat Presidential Election (November 2017)' available at <http://www.knchr.org/Portals/0/CivilAndPoliticalReports/A%20HUMAN%20RIGHTS%20MONITORING%20REPORT%20ON%20THE%202017%20REPEAT%20PRESIDENTIAL%20ELECTIONS.pdf?ver=2017-12-20-084352-583> (accessed on 1st May 2018)

²⁹Kenya National Commission on Human Rights 'Silhouettes of Brutality: An Account of Sexual Violence During and After the 2017 General Election (November 2018)'. Available at https://www.genderinkenya.org/wp-content/uploads/2018/12/KNCHR_Silhouettes_of_Brutality.pdf

³⁰Kenya National Commission on Human Rights 'Mending the Rift: Public Inquiry Report on Insecurity and Its Impact on the Enjoyment of Fundamental Human Rights in the North Rift (May 2017).'

³¹Kenya National Commission on Human Rights 'Public Inquiry Report on Mining and Impact on Human Rights: TaitaTaveta County (August 2016).'

2.6 Research into matters concerning children rights

The Commission has conducted a study on the rights of inter-sex persons in Kenya with a view to guiding its work on advocacy for legal and policy reforms in Kenya.³² The Research was commenced following the Commission's engagement with the National Assembly departmental committee on Administration and National Security and the Office of the Attorney General on violations suffered by inter-sex persons including children in Kenya. The study documents human rights violations suffered by inter-sex persons and children in Kenya and makes recommendations to various stakeholders towards their protection. The report was submitted by KNCHR to inform the work of the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Inter-sex Persons in Kenya constituted by the Attorney General.

2.7 Coordination of activities of Taskforce on Legal, Institutional, Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya and the Intersex Persons Implementation Co-ordination Committee.

The taskforce³³ was also established in response to judgment of the high court of Kenya in the case of *Baby 'A' (Suing through the Mother E A) & Another versus Attorney General & 6 Others* ordering the Attorney General to report to the court within 90 days of delivery of the judgement information on agencies responsible for collecting data on inter-sex children and information on status of the law regulating the place of intersex as a category and regulation on corrective surgeries on inter-sex persons. The taskforce was mandated to compile comprehensive data regarding the number, distribution and challenges of intersex persons; examine existing policy, institutional, legislative, medical and administrative structures and systems governing intersex persons; recommend comprehensive reforms to safeguard the interest of intersex persons. The taskforce has membership from Kenya Law Reform Commission (Chair), the Registrar of Persons, Ministry of Health, Office of the Attorney General, CSO representatives and the Kenya National Commission on Human Rights. The Commission and the Office of the Attorney General served as secretariat to the taskforce. The taskforce completed its work and launched its report³⁴ on the 15th April 2019. The taskforce report addresses and makes recommendations on registration of inter-sex children in line with the concluding recommendations of the Committee 'that the state party adopt a registration model which specifies the registration of intersex children.'

³² Kenya National Commission on Human Rights '*Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya* (2018)' Available at https://www.knchr.org/Portals/0/GroupRightsReports/Equal%20In%20Dignity%20and%20Rights_Promoting%20The%20Rights%20Of%20Intersex%20Persons%20In%20Kenya.pdf?ver=2018-06-06-161118-323

³³ Gazette Notice No 4904 dated 18th May 2017 available at http://kenyalaw.org/kenya_gazette/gazette/download/Vol.CXIX-No_.67_.pdf

³⁴ Available at <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf>

Following the launch of the taskforce report, the Attorney General appointed an Intersex Persons Implementation Coordination Committee³⁵ with a mandate to:

- (a) Co-ordinate prioritized strategies and plans for the implementation of the recommendation of the taskforce on policy, legal institutional and administrative reforms regarding intersex persons in Kenya;
- (b) Assist in formulation and dissemination (in appropriate language) of recommended policy, legislative, institutional and administrative measures intended to address the plight of intersex persons in Kenya;
- (c) Assist in development of tools and information on intersex persons for advocacy, policy, legislative and administrative dialogue, awareness raising, education and decision making;
- (d) Coordinate and facilitate collaboration and establishment of strategic synergies among implementation stakeholders and interest groups; and
- (e) Strengthen the commitment, and build the capacity of stakeholders in public and private institutions to advocate, promote and protect the rights of intersex persons in Kenya.

The implementation committee members are drawn from the Kenya National Commission on Human Rights (which serves as both chair and secretariat to the Committee); Office of the Attorney General and Department of Justice; Ministry of Interior and Coordination of National Government; Ministry of Health; Ministry of Education; Department of Children Services; Kenya Law Reform Commission; National Hospital Insurance Fund; the Intersex Persons Society of Kenya and CRADLE, the Children Foundation. The Committee has a term of four years and is expected to report to the Attorney General once in every six months.

The Commission as part of its mandate coordinates the activities of the Intersex Persons Implementation Coordination Committee.

3.0 Information on whether the Kenya National Commission on Human Rights has created a child specific office to promote and protect the rights and welfare of children

The Commission has designated an officer as (focal point) within the institution to take charge of children matters. However, in implementation of its mandate the Commission continues to ensure matters concerning children rights are mainstreamed in programming as evidenced in various programmatic interventions and reports.

³⁵Gazette Notice No 7264 dated 9th August 2019 available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTk4OQ--/Vol.CXXI-No.105/

4.0 Information on the human resource and financial resources of the Commission

The Commission gets funding from both the Government of Kenya and development partners. The Operational costs of the Commission such as Salaries and Remuneration, Utilities, Rent, and Communication systems are met by the allocation given by the Government of Kenya. The Commission often experiences shortfalls in its programmatic budget of which a portion of it is funded by development partners. The increase in the Commission's mandate has not been accompanied by corresponding additional funding. The table below shows the financial trends of the Commission from the financial year 2013/14 to 2018/19.

Table 4: Financial trends of KNCHR for 2013/14 to 2018/19.

Financial Year	GOK Receipts
2013/2014	263,770,000
2014/2015	345,200,000
2015/2016	441,700,000
2016/2017	416,145,000
2017/2018	398,766,234
2018/2019	393,789,280

In terms of staffing, the Commission has recently transitioned into a new organizational structure although recruitment of core staff is yet to be made.

The new approved staff establishment as per the re-organization requires the Commission to have 461 staff to operate optimally. The Commission currently has 106 staff in post. According to the Public Service Commission Evaluation Report for the Year 2017/2018 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution³⁶, the Commission was ranked the most under-established Constitutional Commission operating at 24.5% of its authorized staff establishment. Nonetheless, the Report rated the Commission highly on three of the six domains of evaluation including Performance Management (100%); Improvement in Service Delivery (100%); Accountability for Administrative Acts (90.6%). The Commission also led in four of the six domains of evaluation in the Commission and Independent Offices Category including Performance Management, Improvement of Service Delivery, and Accountability for Administrative Acts and Diversity Management.

³⁶ Public Service Commission, 'Evaluation Report for the Year 2017/2018 on Public Service Compliance with the Values and Principles in Articles 10 and 232 of the Constitution' Prepared and Issued Pursuant to Article 234(2)(h) of the Constitution (December, 2018); Available at: <http://publicservice.go.ke/index.php/publications/reports>