EQUAL IN DIGNITY AND RIGHTS
PROMOTING THE RIGHTS OF INTERSEX PERSONS IN KENYA
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Preface

This report seeks to shed light on one of the most marginalized and least understood communities in Kenya. Children from this community are neglected, abandoned and even killed by their own parents. Adolescents from this community are frequently forced out of school because of the abuse they face from fellow classmates and teachers. And adults from this community are routinely blocked from working or pursuing higher education. What community are we talking about? The intersex community.

The genesis for this report came in 2016, when the Hon. Isaac Mwaura, the nominated Member of Parliament for Special Interest Groups, presented a petition on intersex rights. The Departmental Committee on Administration and National Security then discussed this petition in a series of meetings and sought the advice of stakeholders, including the Kenya National Commission on Human Rights (KNCHR).

In exercise of its mandate the Commission undertakes this study to explore the situation of intersex persons in the country and make recommendations that will guarantee the full enjoyment of their rights.

In Kenya, the courts and parliament have shined a spotlight on the issue of intersex rights in recent years. In 2010, the High Court found that Richard Mwanzia Musya, an intersex prisoner was subjected to “inhuman and degrading treatment” by guards because of his intersex condition and the High Court awarded him compensation for his suffering. In 2014, the High Court delivered its decision in the landmark Baby ‘A’ case, in which it ordered the government to collect data on intersex persons and to establish guidelines for “corrective surgery”.

Outside of government, advocacy groups, such as Jinsiangu, have been raising awareness about intersex rights for years. And, in October of 2016, the Kenya National Committee on Human Rights (KNCHR) hosted a media breakfast, together with MP Mwaura, the Gamafrica Foundation and intersex advocate James Karanja to draw attention to Intersex
Awareness Day on October 26. The growing push for intersex rights in Kenya has also received widespread media coverage, both locally and internationally.

Kenya is not alone, in recent years there has been an upsurge in interest around the globe in intersex rights. In 2015, Uganda amended its Registration of Persons Act to allow intersex people who have been assigned the wrong gender at birth (a common problem for intersex people) to change their legal gender at a later age. And in the same year, the country of Malta passed a law protecting intersex minors from “sex assignment treatment”. In 2016, the UN Office of the High Commissioner for Human Rights created an awareness raising website “Free & Equal” with the slogan “Intersex babies are perfect just as they are.”

There is growing recognition that people born with bodies that are not typically male or typically female are subject to intense discrimination and violence, and that this situation must not be allowed to continue. It is time for the Kenyan government to enact the necessary legislative and policy reforms to ensure that Kenyans who are intersex are granted the rights and dignity that they deserve.

Kagwiria Mbogori
Chairperson
The term intersex refers to people born with sex characteristics (genetic, hormonal, physical organs) that do not fit the typical definitions for male or female bodies. Intersex people have sex characteristics that are atypical and, in some cases, they have bodies that combine both male and female sex characteristics. Sometimes intersex variations are identified at birth, as is the case with atypical genitalia; however, other intersex variations (e.g. internal sex organs or hormones that do not match external genitalia) may not be detected until puberty.

Intersex is not something new, intersex people have always existed. Intersex variations are a naturally occurring biological phenomenon and they are relatively common. It’s estimated that as many as 1-in-200 or 1-in-300 individuals are born with an intersex variation (Lee, 2016, p.2). This means that in Kenya tens of thousands of people are intersex. The invisibility of this large number is the clearest evidence of the level and degree of stigma.

Lack of knowledge feeds the superstition that intersex children are cursed. In some cases, intersex children are killed soon after birth to “protect the community”. As this report, will attest, human rights violations against intersex people in Kenya are numerous and severe. The key to eliminating the stigma against intersex persons is education and legislative reform.

Education of public servants and of the public at large is vitally important because anti-intersex stigma is based on ignorance. If the public understood that intersex people are born this way (it is not a choice) and that this is a natural biological phenomenon (it is not
a curse) the stigma would be vastly reduced. One of the intersex people we interviewed, Ryan Muiruri, told us that he was constantly ridiculed growing up and that he even attempted suicide after a group of boys stripped him of his clothes in order to identify his gender. Ryan survived these ordeals and he grew more confident later in life after educating himself about what it means to be intersex. When, as an adult, he explained his medical condition to his mother for the first time, he found her to be very supportive. His only regret is that his mother didn’t have this knowledge when he was growing up: “If my mother was aware and educated of my condition she would have been my greatest supporter and would have protected me from the ignorant community.”

In addition to education, legislative reform is urgently needed to protect the intersex community because currently this vulnerable population is largely invisible in the law. This report will suggest a number of legislative reforms, in areas such as health care and legal identification, in order to protect the rights of intersex persons and allow them to become full members of society.

The purpose of this report is to examine the human rights violations facing intersex children and adults in Kenya, and to recommend concrete legislative and policy measures to end these violations. It is organized thematically, so that each section is devoted to one specific legislative question or policy issue. For example, Chapter 7.1 examines the question, Should intersex children be registered at birth as a third gender?
The report is organized as follows. Chapter 1 presents an introduction to the issue of intersex rights in Kenya and explains the genesis of this report. Chapter 2 provides an overview of the report structure and methodology. Chapter 3 offers a definition of “intersex”, examines the question “how many intersex people are living in Kenya?”, and dispels two of the dominant myths about intersex people. Chapter 4 explains how intersex rights are an important human rights issue. Chapters 5 through 9 address particular areas of legislative and policy reform. Chapter 5 looks at the need to introduce anti-discrimination legislation to explicitly protect intersex people. Chapter 6 examines the reforms needed to provide intersex people with the highest attainable standard of health, and to protect them from medical treatment that is non-consensual and harmful. Chapter 7 investigates the legislative changes needed to protect the human rights of intersex people in the area of legal identification. Chapter 8 proposes ways to improve security for intersex people. Chapter 9 recommends strategies to raise national awareness about intersex people and combat anti-intersex prejudice. Chapter 10 concludes the report and provides some final thoughts on the issue of intersex rights.

The research for this report was conducted about seven months, from October 2016 to April 2017. A full list of references can be found at the end of this report. The research was principally compiled from six sources:
**REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW**

The recommendations in this report are based on the human rights law enshrined in seven regional and international human rights treaties to which Kenya is a party (see *References* for complete list). This report is also informed by statements and recommendations made by UN Human Rights Bodies and the African Commission on Human and Peoples’ Rights.

**KENYAN LAW**

The recommendations in this report are also based on the Constitution, Kenyan case law, and relevant statute law.

**INTERSEX KENYANS AND STAKEHOLDERS**

The information in this report is based on extensive consultation with intersex Kenyans and stakeholders: i.e. doctors, lawyers, human rights advocates, parents of intersex children, and parliamentarians working on the issue. This consultation consisted of 12 interviews, 6 group meetings, a three-day fact-finding mission to Migori, and many email and phone conversations. While a lot of useful information was gathered, it should be noted that the absence of a national intersex organization made it difficult to gauge the opinion of intersex Kenyans on important questions. In the future, more work needs to be done to both document
the lived experience of intersex people and to include intersex people in the drafting and implementation of legislative reforms.

**INTERSEX ADVOCATES OUTSIDE OF KENYA**

Reports produced by international intersex organizations, such as the Support Initiative for People with Congenital Disorders (SIPD) in Uganda, provided very helpful, as did ongoing email correspondence with leading intersex advocates. The comments and guidance provide by Julius Kaggwa (Executive Director of SIPD-Uganda), Hida Veloria (American activist and author of the memoir Born Both), and especially, Morgan Carpenter (President of Intersex International Australia) were very helpful.

**STATUTE LAW AND CASE LAW OUTSIDE OF KENYA**

This report also sheds light on the legislative and policy options available to Kenyan lawmakers by looking at some of the court decisions, laws, and human rights recommendations drafted in other countries. By examining current best practices, Kenya can draft laws that serve as a model for countries around the world.
When a child is born that has atypical genitalia—i.e. genitalia that does not look like typical male or female genitalia—the reaction is often shock, confusion, and fear. It is this fear that fuels the myth that intersex people are cursed and drives parents to neglect, abandon and even kill their own children. And it is this fear that drives community members to humiliate and attack intersex people. One of the most effective ways of reducing human rights violations against the intersex community is to spread awareness about what “intersex” actually is.

3.1 How should intersex be defined?

The term intersex describes a person born with sex characteristics (genitalia, gonads, hormones, chromosomes) that do not match the typical male or typical female body. Intersex is sometimes defined as a person who is “between male and female”; however, this definition is too narrow, it captures some, but not all intersex people. What defines intersex people as a group is that they have sex characteristics that are atypical.

There is not one type of intersex body. Just as there are many different sex characteristics that distinguish the typical male body from the typical female body, there are many different ways of being intersex. Male and female bodies are distinguished by such characteristics as external genitalia (penises, vaginas), gonads (testes, ovaries), hormones (higher testosterone, higher estrogen), and chromosomes (46XY, 46XX). While some intersex people have both male and female external genitalia, this is not the only way of being intersex. Ian Southey-Swartz at the Open Society Initiative for Southern Africa explains the diversity of intersex bodies:
Within the medical world the term “intersex” is rarely used. Instead, doctors refer to a patient’s unique condition, such as congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), or ovo-testes. In order to acknowledge that there are a wide diversity of intersex body types, some intersex advocates have adopted the term “people born with intersex variations” (OII Australia, 2009).

The labels assigned to people born with intersex variations has been the subject of much attention in recent years. Some of the terms traditionally used to identify intersex people have been rejected by intersex people themselves. For example, the term “hermaphrodite”, which was once common, is now widely viewed as degrading. And, the medical term disorders of sex development (DSDs) is rejected by many intersex advocates who do not want their bodies to be labelled “disorders”. They argue that intersex bodies should not be viewed as abnormal or unhealthy; on the contrary, they say that intersex bodies are a natural and positive aspect of human diversity.

“Some of us, myself included, view being intersex as simply another personality trait, like hair colour or ethnicity, and a beautiful one at that, and I feel that if this is not projected we will never attain equality.” Hida Viloria, American intersex advocate, 2017, January 9
Intersex is “a naturally occurring biological phenomenon”. – OII Australia

The wide range of intersex variations presents a challenge to lawmakers working to create a legal definition for “intersex”. A legal definition should be clear and comprehensive—the definition should not unintentionally exclude anyone. Kenyan statute law provides the following definition:

“Intersex means a person certified by a competent medical practitioner to have both male and female reproductive organs” (Persons Deprived of Liberty Act of 2014).

This definition is very clear, however, it is excessively narrow. Not all intersex people have both male and female reproductive organs. As the American Psychological Association explains, there are a wide variety of characteristics that can be classified as intersex:

- External genitals that cannot be easily classified as male or female.
- Incomplete or unusual development of the internal reproductive organs.
- Inconsistency between the external genitals and the internal reproductive organs.
- Abnormalities of the sex chromosomes.
- Abnormal development of the testes or ovaries.
- Over- or underproduction of sex-related hormones.
- Inability of the body to respond normally to sex-related hormones.

(American Psychological Association)

RECOMMENDATION.

Enact a legal definition of intersex that is broader and that recognizes the diversity of intersex variations. The following definition used by the UN Human Rights Office and the African Commission on Human and Peoples' Rights should be adopted:
Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty (UN Human Rights Office, 2016, October 24).

3.2 Population of Intersex in Kenya

A frequently asked question is, “In Kenya, how many people are intersex?” The short answer is that no one knows the exact number. There is no official estimate of the number of Kenyans with intersex variations and the government has never attempted to count the intersex population. In the case Baby ‘A’ v Attorney General, Petition 266 of 2013 (herein referred to as the “Baby ‘A’ case”), the High Court of Kenya called on the Attorney General to designate a government body responsible for “collecting and keeping data” related to intersex persons. As of yet, this government body has not been established; however, in May of 2017, Attorney General, Githu Muigai formed a Task Force¹ to look at this issue and, more broadly, to “propose a comprehensive framework within which to address the challenges facing intersex persons in Kenya.”

There are three factors which make it difficult to calculate the number of Kenyans with intersex variations: 1) stigma leads many intersex people to seek anonymity and hide their intersex status, 2) some intersex people are themselves unaware that they are intersex, and 3) since intersex is a spectrum (with more subtle and more prominent variations) it’s not always clear who to include in the definition. Let’s look at these one at a time.

First, due to the extreme stigma facing intersex people, most intersex people choose to keep their intersex status private. For example, even though Kwamboka Kibagendi, a prominent intersex activist, has testified to a parliamentary committee about his struggles as an intersex person, he has told few of his neighbours that he is intersex. For most

¹Gazette No. 4904 of 2017
intersex people, their intersex status is a closely held secret. High Court Justice Teresia Matheka writes in the opening to her Masters Dissertation on the topic of intersex rights, “nothing much is known or written about intersex persons in Kenya” (p.1). Later in her Dissertation, Justice Matheka interviews an intersex person who reveals why people rarely talk about their intersex status:

Very few people know about my intersex status. Recently, I gave an interview with a newspaper and they used the name I identify with. Some neighbours suspected it was me, but though I denied it, they came demanding that I move out of the house (p.60).

When intersex people speak publicly about their intersex status they risk a backlash. Intersex people will be more willing to step forward and be counted, when there is less stigma surrounding their status, and they know that they can be “out” without putting their jobs, housing and physical safety at risk.

Second, some intersex people are themselves not aware that they are intersex. Given the general lack of knowledge about intersex conditions, many people with atypical sex characteristics do not know that other people like themselves exist and they do not have a word to describe their unique body. Kwamboka remembers being in his early 20s searching the internet to answer the burning question, “Is there another person like me?” (Interview, 2016, November 23) Also, even if the government creates a registry to track the number of intersex births, many intersex people will not be counted both because a large number of births occur outside of hospitals and because many intersex variations are not visible at birth. As the American Psychology Association explains, “intersex conditions may only become apparent later in life, often around the time of puberty.” For example, Ryan Muiruri Wangui was raised as a girl in Kiambu County and it was only at puberty that his masculine sex characteristics strongly emerged: his “shoulders broadened, hips stayed straight and chest remained flat” (Duggan). Some have argued that the late appearance of intersex variations contributes to the belief that there is a “curse” at work. The Ugandan-based group Support Initiative for People with

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Justice Teresia Matheka’s Masters Dissertation is titled, “Speaking the Unspeakable! Interrogating the Rights and Legal Recognition of Intersex Persons in Kenya”. It is a very valuable addition to the topic of intersex rights in Kenya.
Congenital Disorders (SIPD) says that, from the perspective of the community, “this child was normal and now they’re not” and “this is where the discourse of witchcraft comes in” (Baseline Survey, p.8).

Third, any government body collecting data on intersex persons will have the challenge of defining who to include as intersex. A narrow definition will capture just those individuals with pronounced intersex variations (e.g. ovotestes- gonads that include both ovarian and testicular tissue), while a broader definitions will include individuals with more subtle variations. As the World Health Organization explains, “an estimate about the birth prevalence of intersex is difficult to make because there are no concrete parameters to the definition of intersex” (2016). For this reason, it is very difficult to determine the rate of intersex variations. The 2016 Global Disorders of Sex Development Update, a “consensus statement” endorsed by seven associations for paediatric endocrinology, says that when all congenital genital anomalies are considered “the rate may be as high as 1:200 [0.5%] to 1:300 [0.3%]” (Lee, 2016, p.2).

Although it will be difficult to determine the number and the geographic distribution of intersex people in Kenya it is still worthwhile gathering this information, because it will help the government identify particular threats to the health and security of intersex people, and it will give the intersex community greater visibility. When gathering this information the government should remember that estimates of the number of intersex people, will tend to underestimate the true size of the community because of the factors mentioned.

A rough estimate of the number of Kenyans with intersex variations can be arrived at by using international estimates of the general prevalence of intersex variations. If we apply the estimate of congenital genital anomalies from the 2016 Global Disorders of Sex Development Update, 0.3-0.5% of the population, to the Kenyan population, 43 million (Kenya National Bureau of Statistics, 2015), we find that as many as 129,000-215,000 Kenyans may be born with intersex variations. High Court Justice Teresia Mumbua Mathéka says that the estimated size of the intersex community is “mind boggling” given how invisible the community is (p.1).
However, the number of intersex people in Kenya who reach adulthood is likely lower than the global average because there is evidence that some intersex children are killed after birth due to prejudice. While we were not able to locate concrete cases of intersex infanticides, all of the intersex advocates and organizations we spoke with said that intersex infanticide is a known phenomenon. One intersex Kenyan we spoke with said that "in their culture" intersex infants are usually killed at birth. And, the Uganda-based organization SIPD conducted a Baseline Survey on Intersex Realities in East Africa (2016), which revealed that women who give birth to intersex children are often considered to be witches or victims of witchcraft, and the intersex children are considered a bad omen to the family, which should be gotten rid of. The ridding takes the form of murders or abandonment. Most mothers of intersex children dump and abandon their intersex children for dead in pit latrines and lonely forest areas and run from their homes for fear of possible prejudice-driven crimes towards them by family or community members (p.7).

A less sinister but no less tragic death befalls many intersex infants who die from lack of adequate medical care. Dr. Erik Hansen at Kijabe Hospital says that he has observed a curious irregularity in the type of intersex conditions he encounters. Dr. Hansen says that in high-resource countries the number one cause of ambiguous genitalia is an intersex condition known as congenital adrenal hyperplasia (CAH); however, at Kijabe hospital they see relatively few patients with this condition. Why does Kijabe hospital see very few patients with this condition? Dr. Hansen believes that in Kenya infants born with CAH are being "missed" and "they're dying because they have not been getting the necessary steroids treatment."
CAH is a potentially life-threatening condition and, in the majority of cases, children born with CAH need steroids to live.

The evidence of death due to medical neglect and the reports of infanticide indicate the extreme precariousness of life for intersex children and underlines the urgent need for government action. This report will present specific recommendations for improving health care for intersex children (Chapter 5: Health Care) and improving the security of intersex children and adults (Chapter 7: Right to Security). One immediate action that the government can take that will help on both of these fronts is to fight the stigma surrounding intersex.

3.3 Two myths about intersex

Two myths that contribute to intersex stigma are 1) that intersex people are the product of a “curse” and 2) that they are all “gay” and/or “transgender”. Both of these myths need to be dispelled, in order to remove stigma from being intersex.

The notion that intersex people are the result of a curse may strike readers as an obvious falsehood, but this belief is widely held. Ryan Muiruri, an intersex person, said that this was his experience growing up:

The community saw me as an outcast and some said I was cursed. I was taken to various community elders to try and figure out what my problem was. Some said that my parents or kinsmen must have wronged the ancestors and their punishment was getting a disabled child (Interview December 9, 2016).

Reverend Kennedy Mwita, the District Superintendent of the United Methodist Church in South Nyanza District, says that he frequently encounters the belief that intersex children are cursed. At the time this report was written, Rev. Mwita was in touch with 55 intersex children in Kuria West and Kuria East districts, and he said that “a number of intersex children, if not all, are regarded as a curse.” Rev. Mwita says that when you meet a child who is intersex “you can tell immediately, because the child looks neglected, they look
The way to dispel the curse myth is twofold. First, spread awareness that intersex is a relatively common biological phenomenon. Intersex people are not the result of a curse, they are the result of naturally occurring differences in sex development. In other words, they are the result of chromosomal and hormonal differences that cause the body to develop in unique ways. People with unique sex characteristics have always existed (the term “hermaphrodite” dates back to early Greco-Roman times) and they exist in every corner of the world; the United Nations has created an excellent intersex awareness website titled “Free & Equal”, which includes profiles of intersex people from every continent. Second, encourage religious leaders to spread acceptance of intersex people. Religious leaders understand that all children are God’s creation and they are best placed to counter superstitions which promote fear of intersex people. For example, Rev. Mwita has organized meetings between local pastors of different denominations and intersex people in order to foster greater acceptance. As he puts it, “intersex people are God’s creation. Let us show them love and understanding, and hear their story” (Interview, 2016, December 8).

In addition to the curse myth, the myth that all intersex people are gay or transgender is the cause of much confusion and stigma. Being intersex is not the same as being gay and it is not the same as being transgender. In order to understand the difference between these three groups of people—intersex, transgender, and gay—one must understand the difference between sex characteristics, gender identity, and sexual orientation.
“Sex characteristics” or “biological sex” refers to a person’s body. What defines intersex people as a group is that they have atypical sex characteristics. In other words, they have sex characteristics (genitalia, gonads, hormones, chromosomes) that do not fit the typical definitions for male or female bodies.

“Gender identity” refers to a person’s “deeply felt and experienced sense of one’s own gender” (African Commission et al., 2016). In other words, gender identity concerns whether a person feels like a woman, feels like a man, or feels somewhere in between. In everyday language, we often use the terms sex and gender interchangeably, because, for most people, their gender identity matches their sex. However, this is not true for all people. Transgender people have a strong and persistent gender identity that is not aligned with their sex. For example, transgender women are born with a male body (male sex), but strongly identify as women (female gender identity).

“Sexual orientation” or “sexuality” refers “to a person’s physical, romantic and/or emotional attraction towards other people” (African Commission et al., 2016). Heterosexual, or “straight”, refers to a man who is attracted to women, or vice-versa a woman who is attracted to men. “Gay” refers to a person who is attracted the same gender, for example, a man attracted to other men, or a woman attracted to other women. The term “lesbian” also refers to women attracted to women.

Being born intersex is very different from being born transgender or gay, but this difference is rarely understood and intersex people are frequently the victim of homophobia and transphobia. Adding to this confusion is the fact that a high proportion of intersex children are assigned the wrong gender as children. This is not surprising because it is impossible to know a child’s gender identity from looking at their body, and the possibility of assigning the wrong gender is higher than normal for people born with atypical sex characteristics. Ryan Muiruri is an intersex man who was raised as a girl. At puberty it
became clear that Ryan’s sex characteristics were predominantly male and his gender identity was male; however, his family and his community was not accepting of this new reality. When Ryan told a friend that he was intersex he was “beaten up and accused of promoting lesbianism in the community” (Interview, 2016, December 9).

The confusion of intersex with transgender or gay, not only contributes to social stigma, it also impairs an intersex person’s ability to receive a fair trial in a court of law. In her Masters Dissertation on the rights of intersex persons in Kenya, High Court Justice Matheka found that the lack of information about intersex persons in Kenya results in an “unpreparedness of the justice delivery system when confronted with cases of intersex persons” (p.12). Examining the first intersex case in Kenya, RM v Attorney General (No.705 of 2007), she found that, “the conflation of issues of sexual orientation and gender identity with those of intersex persons was evident in some of the submissions made by counsel and statements made by the court” (p.36).

The following definition of intersex—created by the African Commission on Human and Peoples’ Rights in collaboration with the Inter-American Commission on Human Rights and the United Nations—does an excellent job of defining what intersex is and what it is not:

An intersex person is born with sexual anatomy, reproductive organs, and/or chromosome patterns that do not fit the typical definition of male or female. This may be apparent at birth or become so later in life. An intersex person may identify as male, female, both or neither. Intersex status is not about sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as non-intersex people. Intersex people suffer specific human rights violations based on their sex characteristics (African Commission et al., 2016).

Educating the public that intersex is not the same as transgender or gay will increase public awareness of the intersex community—it is important to underline, though, that
all people whatever their gender identity or sexual orientation deserve equal respect and equal rights. In 2014, the African Commission issued Resolution 275 “On protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity.” In the resolution, the African Commission recalled that Article 2 of the African Charter prohibits discrimination of any kind and Article 3 entitles all people, including gay and transgender people, to equal protection of the law (African Commission, 2014). Finally, current research suggests that being gay or transgender is not a choice, sexual orientation and gender identity are traits that we are born with and that cannot be changed by any interventions (National Geographic, 2017).
Before intersex became a human rights concern, it was seen as a purely medical issue. For many years intersex people have been invisible to the public; when they were mentioned at all it was only in medical journals. Unfortunately, this narrow focus on the medical lives of intersex people has had unintended consequences. Traditionally, western-trained doctors have viewed intersex people as a medical problem that needs to be solved. In the medical field, the term *disorders of sex development* (DSDs) is most common, and as with all “disorders” the focus has been on how to “correct” the problem. Hence, many people born with atypical sex characteristics are given so-called “corrective surgery” soon after they are diagnosed, so that they can have typical sex characteristics (genitalia, gonads etc.). At first glance, this may seem like a satisfactory solution, however forced genital surgery can lead to serious health problems and it stigmatizes intersex bodies as unnatural and unhealthy.

The traditional thinking that views intersex people first and foremost as “a medical problem that needs fixing” is starting to change. Intersex advocates have rejected the “medicalization” of their lives and governments are starting to listen (Ghattas, 2015). In 2016, a spokesperson for the Government of South Africa told the UN Committee on the Rights of the Child, “As a government, we do recognize that being intersex is a
sexual characteristic and not a medical condition” (Collison). And, the Australian Senate observed, in a study on the coerced sterilization of intersex people, that the shifting perception of intersex people is analogous to the shifting perception of people with disabilities.

Both groups have sought to dislodge the primacy of the prevailing medical perspective which perceives them as ‘problems’ to be ‘solved’ by medical professionals using science, rather than as people with the right to control their lives, and choose the services they use.” (Australian Senate report, p.33)

In short, intersex advocacy has shifted the attention from the medical perspective to the human rights perspective.

The human rights violations suffered by intersex Kenyans are numerous; however, they can be broadly sorted into three categories: attacks on the right to life, attacks on the right to equality, and attacks on the right to personal autonomy (i.e. the right to control one’s own life).

The right to life is the most fundamental human right, and it is being stolen from many intersex children due to medical neglect and intentional murder. Tragically, there has been no research conducted into this issue. There is an urgent need for the government to investigate the frequency and the cause of intersex child deaths due to medical neglect and infanticide, and to develop a strategy to preserve this most basic right, the right to life (Read more on this topic in Chapter 7: The Right to Security).

The second category of human rights violations, attacks on the right to equality, are rooted in the belief that intersex people are “abnormal” or even “cursed”. Their inherent dignity as human beings is not respected and this lack of respect leads to a host of associated human rights violations, such as unequal access to health care, education, employment, and justice.
The third category of human rights violations, attacks against personal autonomy, strips intersex people of the power to control their own lives. Important life decisions are often made for intersex people, rather than by intersex people. For example, parents and doctors often decide to perform genital surgery on intersex children to “normalize” their genitalia—an irreversible decision, which can be damaging physically and psychologically. Also, if an intersex person is assigned the wrong gender at birth, the laws currently prevent them from correcting this mistake; they are forced to live with a decision made for them, rather than by them (The issue of “misgendering” will be examined in Chapter 5: Health Care).

**INTERSEX TEENAGER IN CRISIS**

The following email demonstrates the violence and social isolation faced by intersex people in Kenya.

My name is O.M. I am 19 years old from Kenya, I was born with male and female organ (Intersex) According to our clan a child born like that is supposed to be kill but my parent protect me up to this age, I have been living with a lot of frustration, abusing words, some even have attempted to rape me but failed. Please how can you help a person like me? I need help please coz i have no freedom, i cant continue with my education, i have no work, everybody are treating me like am not human being, some are calling me with some funny names just to frustrate me, please if you can offer me a support i will really thankful. There is misunderstanding between my mum and dad my dad want me to be a boy but my mum insist that i must be a girl. I have no peace at all, I am in danger, i have escape rape attempt three times now. Please give me an advice where i can get support.

(Email received March 9, 2017)

The human rights that intersex people seek—the right to life, the right to equality, and the right to personal autonomy—are three of the core rights in international human rights legislation and they are enshrined in the Constitution of Kenya. In other words, while there is much work that needs to be done to enforce these rights, the basic human rights framework is already in place.
The right to life is protected in Article 3 of the Universal Declaration of Human Rights and it is the very first right listed in the Kenyan Constitution, in the section on Rights and Fundamental Freedoms. Furthermore, the Government has a special responsibility to protect the rights and welfare of the child. Article 3 of the Children Act of Kenya states, “The Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child set out in this Part.” And Article 4(1) of the Children Act of Kenya states that “Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.”

The right to equality applies to all people, regardless of their physical characteristics. At a special meeting convened to look at the issue of intersex rights, the UN High Commissioner for Human Rights Zeid Ra-ad Al Hussein, underlined the importance of this most basic right,

All human beings are born equal in dignity and rights. Those foundational, bedrock principles of universality and equality mean that all of us, without exception, and regardless of our sex characteristics, are equally entitled to the protections of international human rights law. (Zeid, 2015)

The principle that all people are born “equal in dignity and rights” is also firmly entrenched in the Kenyan Constitution. Article 28 of the Constitution establishes that, “Every person has inherent dignity and the right to have that dignity respected and protected.” And Article 27(1) affirms that “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

The right to personal autonomy, refers to a collection of rights which give an individual control over their own life. For example, international human rights law protects the right to privacy (Art.17 ICCPR, Art.16 CRC) and this includes the right to control aspects of one’s private life, such as “gender identification” and “name” (Council of Europe Commissioner for Human Rights, p.32). In recent years, new international human rights
guidelines have been created to clarify the right to personal autonomy, especially as it pertains to medical treatment. For example, Article 5 of the Universal Declaration on Bioethics and Human Rights (2005) recognizes “the autonomy of persons to make decisions” concerning medical treatment and scientific research that affects them.

This report will examine in further detail human rights law as it applies to specific questions of intersex rights.
Given that every Kenyan “is equal before the law”, is there a need for specific legislation protecting intersex people from discrimination? Yes, there is a need for new legislation, but first let us examine the problem itself. What are the forms of discrimination faced by intersex people?

Many intersex people report that government officials do not treat them with respect and they do not treat them equally. For example, in the case *RM v Attorney General, No.705 of 2007* (herein referred to as the “RM case”), the High Court found that Richard Mwanzia Muasya was abused by prison guards for the sole reason that he was intersex:

We are inclined to believe and accept the petitioner's statement made under oath that he was subjected to humiliating invasive body searches. It is evident that, in the case of the petitioner, the strip searches were motivated by an element of sadism or mischievous curiosity, to expose the petitioner's unusual condition (Para.165).

Due to the “inhuman and degrading treatment” he suffered, Mr. Muasya was awarded 500,000 KES (Para.169). It is encouraging that this violation of Mr. Muasya’s rights was acknowledged and that compensation was awarded; however, many intersex people suffer similar indignities in silence.

Ryan Muiruri an intersex man, originally from Kiambu County, says that he suffered humiliating treatment at a bank because the gender listed on his legal identification does not match his current gender identity. Ryan was assigned the “female” gender at
birth and raised as a girl, but his body became more masculine as he grew older and Ryan now identifies as a man. Ryan recounts that he was once withdrawing money over the counter when the bank teller accused him of impersonation, because the account was registered under his legal name “Ruth”. The bank called the police and Ryan was harassed in a holding room at the bank. When he informed the officers that he was “intersex” they touched his chest and his “private parts” to confirm what he said. While he was ultimately released and allowed to withdraw the money, he had suffered a humiliating experience. When this happened to him a second time, at a different bank, he called a member of parliament, the Honourable Isaac Mwaura, who intervened and secured his release (2017, January 13).

When an intersex person is singled out for inappropriate searches by prison guards or police officers because of their atypical body, they are suffering discrimination. Intersex people deserve to be treated with the same respect as non-intersex people when interacting with government authorities. They have a right to equality. This experience of repeated discrimination has led some intersex people to try and limit or avoid interactions with government authorities. For example, Sidney Etemesi says that in order to avoid awkward or humiliating experiences with health authorities, he would “never go to a hospital”—a decision that could have serious implications for his long term health (personal interview, 2016, Dec. 7).

By law, intersex people are already protected from discrimination in Kenya. Article 27(1) of the Constitution affirms that “Every person is equal before the law and has the right to equal protection and equal benefit of the law.” And, in the Baby ‘A’ case, the High Court ruled that intersex people fall within the “ordinary and natural meaning of the term sex” and therefore suffer no lack of legal protection (Para. 60). Is there any advantage, then, to creating a new statute explicitly protecting intersex people from discrimination? Yes, we believe that a new statute would be advantageous for two reasons: first, statutes offer great legal certainty and second, they play an important educational role.

Statutes take legal precedence over case law (court rulings), therefore statutes are an important way to guarantee the rights of disadvantaged groups, such as intersex people.
The ruling of the High Court in the Baby ‘A’ case was a positive one; however, there is no assurance that future courts will interpret the law in the same way. Sally Gross, the anti-apartheid activist and founder of Intersex South Africa, points out that in some jurisdictions courts have ruled that intersex people do not fall with the natural meaning of the term sex and are therefore not protected by anti-discrimination law: “an American federal court found that the firing of a woman because she was born intersex did not breach a Pennsylvania equality statute.” Concerned that intersex rights were being left to the discretion of individual judges, Gross and other South African intersex advocates, pushed for a clear statute protecting intersex people from discrimination and they were successful (Gross). In 2005, the South African Promotion of Equality and Prevention of Unfair Discrimination Act was amended to read that “sex’ includes intersex” and the following definition for intersex was added: “‘intersex’ means a congenital sexual differentiation which is atypical” (Council of Europe Commissioner for Human Rights, p.44).

Following South Africa’s lead, a number of other countries (including Australia, Finland, Greece, Malta and the United Kingdom) have introduced legislation explicitly banning discrimination on the basis of a person’s “intersex status” and/or “sex characteristics”. The African Commission on Human and Peoples’ Rights has also explicitly listed “intersex people” among the “vulnerable and disadvantaged” groups protected in the African Charter on Human and Peoples’ Rights (2011, Section 1.e).

A second, and equally important reason, for creating a statute to protect intersex people from discrimination is that it will play an important education role. It’s likely that few public servants are familiar with the Richard Muasya case or the Baby ‘A’ case, both of which recognize intersex people’s right to protection from discrimination. A statute will help remedy this lack of awareness; it will send a clear message to public servants and the public at large that intersex people are respected by the government and protected by the law.

One of the most comprehensive and detailed reports on intersex rights is the 62 page report produced by Nils Mužnieks, the Council of Europe Commissioner for Human Rights.
Rights in 2015. In the report, the Commissioner recommends that “sex characteristics should be included as a specific ground in equal treatment and hate crime legislation or, at least, the ground of sex/gender should be authoritatively interpreted to include sex characteristics as prohibited grounds of discrimination” (p.9). Such a change, he argues, “has the advantage of playing an educational role for society at large as well as providing visibility to this marginalized group” (p.46).

Within Kenya, the call for intersex specific anti-discrimination legislation has been promoted by prominent legal scholars. Writing in her 2004 Master Dissertation on the legal recognition of intersex persons in Kenya, Teresia Mumbua Matheka (currently a High Court Justice) said that there is “an urgent need for Kenyan society to embrace intersex persons, as a sex minority, and a specific category for non-discrimination within the Constitution. The Constitution demands it” (p.52). And the proposal to enact legislation to explicitly protect intersex persons from discrimination is also strongly supported by lawyer John Chigiti, one of the founding members of the Gender Minority Advocacy Trust and a longstanding advocate for intersex rights.

**RECOMMENDATIONS**

Amend and enact legislation that gives effect to the provisions of Article 27(4) of the Constitution so as to guarantee non-discrimination to intersex persons in all spheres of life, including in: education, health care, employment, sports and access to public services, and address such discrimination through relevant anti-discrimination initiatives.
The right to adequate health care is one of the most fundamental rights. Article 43(1)(a) of the Constitution states, “Every person has the right to the highest attainable standard of health...” And this right is also entrenched in the Children Act (Article 9) and many of the international human rights treaties to which Kenya is a signatory. Unfortunately, many intersex people are routinely deprived of this basic right.

For intersex people the right to health care has two aspects: 1) avoiding unnecessary, unconsented and harmful treatment and 2) accessing necessary and respectful health care services (Council of Europe Commissioner for Human Rights, p.32).

6.1 Access to health care

How can access to health care for intersex people be improved?

In Kenya, the overriding health issue is access to health care. Not all intersex conditions require medical intervention, but for those that do, absence of health care can have severe consequences. As paediatric surgeon Dr. Hansen has pointed out, it is likely that many children born with the intersex condition *congenital adrenal hyperplasia* (CAH) in Kenya are dying at a young age, because their condition is not being identified and they are not being given the steroid treatment that they need to survive.

It’s important to underline that intersex people require access to quality care. As the Constitution states, citizens have the right to the “highest attainable standard of health”. This means that they have a right to medical care provided by professionals who
have experience treating intersex conditions (what doctors refer to as *disorders of sex development*, or DSDs). Because many intersex conditions are very rare, the average doctor has little or no experience with these conditions and they may be providing “treatment” which is totally inappropriate. Dr. Ken Muma, a paediatric surgeon and Acting Director of Kijabe Hospital, says that they sometimes observe the results of these “treatments” from non-specialists.

There are so many children out there who have been mutilated. They’re not few. They’re there, they’re out there. No investigations are done, nothing is done for them. A surgeon somewhere has just taken this child to the [operating] theatre and decided what he wants to do. Or some paediatrician somewhere has decided to just give hormones as they wish… Only specialists with the appropriate level of qualification should treat intersex patients. (Interview February 3, 2017)

Access to quality health care also means that intersex patients have access to medical teams that are interdisciplinary, and include specialists in various fields, such as surgery, endocrinology (hormones), and counselling.
THE CHALLENGES OF PARENTING AN INTERSEX CHILD WITH HEALTH NEEDS

Mr. and Mrs. ‘M’ are parents to a six year old boy who is intersex. They raised their child as a boy because he was born with a penis; however, his scrotum is not fully developed and, internally, he also has an ovary. For these parents the biggest challenge of raising their child has been the financial cost. They visited many hospitals to “try to figure out what was wrong with our son” and find appropriate medical care. They are thankful that the National Health Insurance Fund covered one three-month stay at Kenyatta National Hospital; however, they soon exhausted the NHIF coverage and had to start relying heavily upon their own savings. Ultimately, their child’s medical care “drained their finances” and they had to start taking loans from the bank to cover his treatment. The parents were unable to repay the loans and some of their property was seized.

In addition to the financial burden, the parents have had to cope with the uncertainty about their child’s health, the stress of keeping their child’s condition a secret (they have not yet informed the child that he is intersex), and uncertainty about their child’s gender identity. Although they have raised their child as a boy, recent hormone tests have revealed that their child is genetically female (46XX) and the father has noticed that the child has started to acquire “girlish behaviour, such as wanting to apply nail polish and play with dolls.” These stresses and uncertainties have taken a toll on the mother who has received counselling and is being treated for high blood pressure.

Many other parents in Kenya face similar challenges raising a child who is intersex. Here are some recommendations by Mr. and Mrs. ‘M’ on how reduce the burden on parents:

• Increase the money allocated to care for intersex medical care.
• Have “specialist doctors” deal with intersex health care. They say that they’ve seen many doctors and each one has given them conflicting information, leaving them more confused than when they began.
• Create “support groups” to help the parents and the child navigate the “stage of life”. When they heard a radio show on intersex presented by Gamafrica founder Gathoni Muchomba and intersex advocate Ryan Muiruri, they contacted them and were grateful for their support and guidance.
• Introduce the intersex topic in biology classes at the secondary level, so that students have a better understanding of the issue. (Interview February 16, 2017)
The importance of psychological counselling should not be underestimated. In a world of constant budget restrictions there is a tendency to privilege physical health over mental health, but this would be a mistake. In some cases, the mental health of intersex patients is more of a pressing issue than their physical health. For example, individuals with the intersex variation complete androgen insensitivity syndrome (CAIS) are born with typical female genitalia and there is rarely a need for surgical intervention; however, the psychological distress they suffer can be severe. As Dr. Hansen explains, many individuals with CAIS do not discover until they hit puberty that they have a 46 XY (male) chromosome and that their body will not develop like a typical female:

What they’re dealing with socially as an adolescent is [the sudden realization]: “I’m never going to have a period, I’m never going to bear children, I may have to have painful procedures, either dilations or vaginal reconstruction, to even have penetrative intercourse, I am different from all of my friends, and I’ve got ‘boy cells’” (Interview, 2017, February 3).

The need for counselling in such a situation is paramount.

Given the extreme stigma and social rejection surrounding intersex it is not surprising that intersex people have a high incidence of suicidality. Several of the intersex people we interviewed for this report disclosed that they had attempted suicide, but being counselled that intersex is a natural and relatively common condition can greatly change a person’s outlook. Ryan Muiruri says that growing up was extremely difficult. His community viewed him as an outcast and some said he was cursed. He was routinely harassed and once a group of boys followed him home and stripped off all of his clothes. The ongoing violence he faced led him to attempt suicide four times, but he says that his outlook changed drastically when he learned more about his intersex condition. “I was not happy before. But once I got educated more on intersex issues, I became very comfortable in my own skin” (Interview, 2016, December 9). Recently, Ryan informed his mother about his condition and “she became very supportive and understanding.” His only regret is that his mother wasn’t given this vital information at an earlier age: “if my mother had been
aware and educated about my condition she would have been my greatest supporter and she would have protected me from the ignorant community.” The role that hospitals can play in this context is critical. Hospitals should provide professional counselling for all intersex people and family members, to eliminate the popularly held belief that it is a curse and to promote acceptance of intersex variations. The 2016 Global Disorders of Sex Development Update, the leading international statement on intersex health, states that “psychosocial care provided by mental health staff with expertise in DSD should be an integral part of management to promote positive adaptation” (p.7).

It is very concerning that some intersex people, like Sidney Etemesi, say that they never want to enter a hospital. Clearly hospitals can be an unwelcoming place for intersex people. Some doctors and nurses are not fully understanding of intersex conditions and carry with them the prejudices of the broader society. Also, patients with rare intersex conditions are sometimes treated like “exotic specimens” to be eagerly examined with little respect for their privacy and dignity. An article published in the British Journal of Urology cites examples of intersex people being photographed nude as children only to later discover their photos published in medical journals without their consent (Creighton, p.70). Finally, some intersex people are subjected to genital surgery when they are young children to “correct” their atypical genitalia, and in some cases these non-consensual surgeries lead to long-term physical and mental distress. Too often intersex people have been treated by the medical profession like “subjects” who need to be “fixed”, rather than autonomous individuals endowed with the right to control their own body.

Intersex health care, like all health care, must be based on the principle of consent. Patients have a right to make decisions concerning their own body and that includes decisions about the type of medical treatment they receive. When patients are below the age of consent, medical interventions (surgery, hormone therapy) should be deferred to a later age. When deferral of treatment is not possible (when the medical intervention is a medical necessity), the parents should be involved in the decision-making process and informed of the treatment options.

A key aspect of medical care based on informed consent is providing the patient and, in
the case of children, their parents with full access to information. It used to be common practice in many countries for doctors to perform sex assignment surgery (so-called “corrective surgery”) on young intersex children without even informing the parents, and intersex people were sometimes barred from accessing their own medical records. As Justice Matheka discovered in her graduate research, sometimes medical care facilities in Kenya continue to deny access to information. One intersex person she interviewed was taken to a post natal clinic, but their intersex condition was never explained to the mother. Another person presented himself at a health centre for circumcision, together with his age mates, only to be turned away without any explanation (p.87). Health care providers should not add to the stigma and secrecy surrounding intersex. They have a duty to give full access to information, and when they do not have the relevant information, they should refer intersex patients to specialists who can diagnosis the condition and explain the treatment options.

We recommend that the Cabinet Secretary for Health convene an Intersex Health Working Group to come up with a plan for improving the health of people born with intersex variations. A possible model for this Working Group is offered by the country of Malta. In 2015, Malta passed a progressive piece of legislation titled the Gender Identity, Gender Expression and Sex Characteristics Act. Article 16 of that Act called for the creation of a “working group” consisting of a Chairperson and nine members: “The Chairperson shall be a medical doctor with at least twelve years’ experience. The members shall be three experts in human rights issues, three psychosocial professionals and three medical experts. The members of the working group shall review the current medical treatment protocols in line with current medical best practices and human rights standards and shall, within one year from the date of their appointment, issue a report with recommendations for revision of the current medical treatment protocols.”

Finally, the government should reach out to the intersex community to involve them in the drafting of new legislation and policies. In many countries, the government and/ or the medical profession has adopted terminology, which the intersex community finds offensive. This is decidedly unhelpful to the goal of removing intersex stigma and promoting intersex rights.
It is worrying that the gap between the expectations of human rights organisations of intersex people and the development of medical classifications has possibly widened over the past decade. This raises serious questions with regard to the medical profession’s ability to help intersex people attain “the highest possible level of health” that they have a right to.

(Council of Europe Commissioner for Human Rights, p.23)

Intersex people need to be closely involved with the creation of new medical terminology and guidelines, so that hospitals are a truly welcoming place for intersex people.

**RECOMMENDATIONS**

1. The Cabinet Secretary for Health to convene an *Intersex Health Working Group*. This Intersex Health Working Group should be comprised of medical professionals from various fields (midwifery, paediatric surgery, endocrinology, psychology) and it should involve the relevant medical associations: the Medical Practitioners and Dentist Board (MPDB), the Kenya Paediatric Association (KPA), and the Kenya Association of Paediatric Surgeons. The Intersex Health Working Group should also include human rights experts and, importantly, it should include the meaningful participation of intersex representatives and parents of intersex children.

2. Train nurses and doctors to identify intersex conditions and, when necessary, refer patients to a hospital that has specialists with expertise in treating intersex conditions. Also, train hospital staff to respect the human rights of intersex people, including the right to personal autonomy, right to privacy, and right to information.

3. Include intersex people in all training workshops and review of health care guidelines.

4. Identify a select number of hospitals—such as Kenyatta National Hospital, Kijabe Hospital, and Moi Teaching and Referral Hospital—that have
expertise in providing for the health needs of intersex people. Designate these hospitals as Intersex Care Centres and ensure that medical interventions that require special expertise are only conducted at one of these Intersex Care Centres.

5. Establish national guidelines for treating intersex patients based on the patient’s right to personal autonomy and the best interests of the child, and on medical best practices. In creating new guidelines, the Intersex Health Working Group will have to carefully scrutinize the medical treatments currently performed on intersex patients, many of which have been identified as harmful and unnecessary by international human rights bodies, such as the African Commission on Human and Peoples’ Rights (see Appendix).

6. Create a national registry to record the frequency and geographic distribution of intersex variations. The registry will help the government better allocate health care services. The registry must be kept strictly confidential and intersex people must be allowed to access their personal records at all times. This recommendation is in line with the order of the High Court in the Baby ‘A’ case which called on the Attorney General to: Submit to this Court within 90 days of this judgment information related to the organ, agency or Institution responsible for collecting and keeping data related to intersex children and persons. (Para 71, Order ii)

7. Direct the National Hospital Insurance Fund to cover the full costs of health care for intersex persons to ensure that that intersex persons receive the “highest attainable standard of health”. For many intersex people the biggest barrier to accessing health care is the cost. Not all intersex people require medical treatment for their intersex condition, but for those who do, the costs can be prohibitive.

8. Create multi-disciplinary teams to assess and care for intersex patients, including surgeons, endocrinologists, and psychologists. Supportive counselling services for intersex persons and their family is just as important as caring for the physical health of intersex persons.
9. Facilitate the formation of peer support groups. Connect intersex patients and family members, with other intersex patients and family members with shared experiences. “Peer support” is increasingly being recognized as a crucial step to removing stigma and improving health. The 2016 Global Disorders of Sex Development Update says that peer support “relieves patients from isolation and provides a unique source of identity, support, anticipatory guidance and medical information accessible to individuals of all levels” (p.2).

6.2 Sex “normalizing” treatment on young children

Should sex “normalizing” treatments be performed on young intersex children?

When a child is born with sex characteristics (genitalia, gonads, hormones) that are atypical the immediate reaction from doctors and parents is often “how can we ‘fix’ this ‘problem’?” For many years, the standard medical response in western countries was to perform surgery on the young child and initiate hormone therapy in order to “normalize” their bodies according to their assigned gender. However, in recent years, this approach has been strongly condemned. Intersex advocates and international human rights bodies have called for a ban on “normalizing” treatment on intersex children because it is not medically necessary, it can lead to serious health problems and sterility, and it is a violation of the child’s fundamental rights.

“Normalizing” treatment refers to medical interventions, such as surgery and hormone therapy, which seek to change intersex bodies to make them conform to stereotypical male or female bodies. The Council of Europe Commissioner for Human Rights report on Human Rights and Intersex People (2015) explains:
Genital surgeries on intersex babies have become routine in spite of the fact that they are rarely medically necessary. Emphasis is placed on the newborn’s ability to pass for one sex or the other, thus meeting social expectations, rather than on the child’s best interests and welfare. For example, male newborns with penises smaller than 2 cm considered “too small” are “assigned the female gender and reconstructed to look female”, while clitorises larger than 0.9 cm are considered “too big” and are reduced in size. Additionally, a greater number of intersex children are transitioned to a female sex since “a functional vagina can be constructed in virtually everyone [while] a functional penis is a much more difficult goal” (p.20).

When human rights advocates refer to “normalizing” treatment they tend to put the word “normalizing” in quotation marks to indicate that the idea of a “normal” male or “normal” female body is problematic: human bodies naturally come in a wide range of shapes and sizes, including intersex bodies.

The term “normalizing” treatment is not the only term used to describe this kind of medical intervention. In Kenyan court cases, such as the RM case and the Baby ‘A’ case, the favoured term is “corrective surgery”. This medical intervention is also referred to as either “sex assignment surgery” when the birth sex characteristics are truly ambiguous or “sex reinforcement surgery” when the sex characteristics are atypical, but are predominantly male or predominantly female. Finally, doctors themselves tend to use the term “masculinizing genitoplasty” or “feminizing genitoplasty” to refer to cosmetic surgery of the genitals.

Not all types of surgery are alike. This report makes an important distinction between “normalizing” treatment to change the cosmetic appearance of genitalia, and “therapeutic” treatments which are medically necessary (see Chapter 5.3 Medically necessary surgery). And it also makes a distinction between “normalizing” treatment performed on young children and “gender alignment” treatment that is chosen at a later age by a consenting adult (see Chapter 5.4 Funding intersex health care). The human
rights implications of a particular surgery vary greatly depending upon the motivation for the surgery and whether or not the surgery is consensual.

Internationally, the struggle to prohibit “normalizing” treatment has become the number one issue for intersex organizations. The Ugandan-based intersex organization Support Initiative for People with Congenital Disorders (SIPD) explains why in its *Baseline Survey on Intersex Realities in East Africa*. SIPD demands a stop to “harmful unnecessary surgeries” on intersex infants because these surgeries are “a violation of bodily integrity” and they “cause a myriad of negative outcomes”, including:

- Decreased or destroyed sexual sensation, including the inability to orgasm
- Chronic pain and scar tissue
- Additional surgery arising from complications due to the first surgery
- Shame and depression from being made to feel that their bodies are inadequate
- Potential discordance with gender identity
- Sterilization – the denial of the fundamental right to reproduction (p.30)

Many advocates argue that these procedures should be recognized for what they truly are: “intersex genital mutilation” (IGM).

The harmful impact of “normalizing” treatment has also been condemned by many international health and human rights organizations. In 2014, the World Health Organization together with six other UN agencies (OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF) produced a report on *Eliminating forced, coercive and otherwise involuntary sterilization*. The UN interagency report highlighted the danger of performing “normalizing” surgery on intersex children.
Intersex persons may be involuntarily subjected to so-called sex-normalizing or other procedures as infants or during childhood, which, in some cases, may result in the termination of all or some of their reproductive capacity. Children who are born with atypical sex characteristics are often subjected to cosmetic and other non-medically indicated surgeries performed on their reproductive organs, without their informed consent or that of their parents, and without taking into consideration the views of the children involved. As a result, such children are being subjected to irreversible interventions that have lifelong consequence for their physical and mental health (p.7).

The UN interagency report echoed the position taken by intersex advocates that “irreversible invasive medical interventions should be postponed until a child is sufficiently mature to make an informed decision, so that they can participate in decision-making and give full, free and informed consent” (p.8).

In addition to the potential physical harm of “normalizing” treatment, another major argument against this treatment is that it is reckless to make permanent alterations to a young person’s sex characteristics when their gender identity is still unknown. A child is assigned a gender at birth, and raised that gender throughout their childhood, but there is no guarantee that they will identify with that gender when they grow up. Gender identity is a person’s strong internal feeling of being male or female or, in some cases, neither. The idea that a child raised as one gender (e.g. “female”) may strongly identify as another gender (e.g. “male”) may strike some readers as surprising, but within the medical community this phenomena is neither startling, nor controversial. It has long been known that a person may have a gender identity that is distinct from the gender they were raised as. As the National Geographic puts it “Research suggests that gender is something we are born with; it can’t be changed by any interventions” (2017, January). Given that gender identity is not a choice, it is something we are born with, and given that a child cannot express their gender identity until they are much older, the danger of carrying out irreversible genital surgery on intersex infants is all too real.
It is not uncommon that an intersex child grows up to reject the gender they were assigned at birth. According to the Council of Europe Commissioner for Human Rights, a significant minority of intersex people, “between 8.5% and 40%”, are misgendered (p.23). In other words, they are assigned the wrong gender at birth. Interestingly, out of the six intersex Kenyans we interviewed for this report none of them identified with the gender they were assigned at birth. In other words, all six of them had been misgendered. This suggests that there may be a selection bias in who publicly identifies as “intersex”. Intersex people who have been assigned the wrong gender at birth and have to struggle to have their gender identity recognized, are more likely to be “out” with their intersex status, as opposed to intersex individuals who are comfortable with the gender they were assigned at birth. However, this selection bias, does not change the underlying fact that many intersex adults (the precise number is not important here) do not identify with the gender they were assigned at birth. It is therefore irresponsible to perform irreversible surgery on young children based on a tentative gender label which may change in the future.

Not surprisingly, all of the intersex people interviewed for this report said that they strongly opposed performing sex assignment surgery on children. Two of the people interviewed had received this surgery as children and said that they regretted it, with one of the individuals testifying that they were still “angry” about the operation. One of the intersex people who did not have surgery as a child had this to say:

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Personally, I didn’t have surgery and that’s why I’m speaking out against it, because look… I was raised a girl, went to high school as a girl, so if, I were to go to a surgery my parent would have made me a girl. But later I’ve come to define myself and I’m a male. So, I don’t support it.
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In this case, the decision not to perform surgery was extremely fortunate. Given that the gender identity of a person is not known until later in life, it is crucial to avoid sex “normalizing” treatment on young children.
In Kenya, some people have suggested that the problem of misgendering can be solved by performing chromosomal tests on all intersex newborns to reveal their “true gender”—however, this suggestion is based on a misunderstanding, because there is no way to test a person’s gender. A person’s gender identity (how they feel inside) does not always match their sex chromosomes or hormones. The 2016 Global Disorders of Sex Development Update, the leading international statement on intersex health, states that “it is impossible to predict gender development in an individual case with certainty” (p.1). And for some intersex conditions the level of uncertainty is very high. Two people with identical chromosomal and hormonal makeup can have completely different gender identities. For example, 60% of individuals born with a 46XY chromosome and an intersex condition known as 5α-reductase deficiency develop a male gender identity (Lee, p.9). This means that 40% of individuals with same XY chromosome and same intersex condition do not identify as male. Medical tests can reveal the “probable” future gender of a child, therefore they can help parents decide whether to initially raise their intersex child as “female” or “male”; however, these gender designations must be regarded as tentative and open to change in the future. The problem of misgendering cannot be eliminated using medical tests.

The strongest argument against performing “normalizing” treatment on young children is that these interventions violate the fundamental rights of the child. Children have the right to personal autonomy and this includes the right to make decisions concerning their own body. Neither doctors, nor parents have the authority to make cosmetic surgery decisions without the consent of the child. Therefore, any decisions regarding sex “normalizing” treatments must be delayed until the child is mature enough to make an informed decision for themselves. It should be emphasized, that sex assignment surgery and other “normalizing” interventions are not medically necessary and many intersex adults choose to completely forgo this surgery—they are happy to live with the unique body they were born with.

One of the first human rights statements to oppose sex “normalizing” treatment on children was the Yogyakarta Principles. In 2007, a group of distinguished human rights experts created the Yogyakarta Principles on the application of international human
rights law in relation to sexual orientation and gender identity. The report’s authors—which included the then KNCHR Chairperson Maina Kiai and KNCHR Commissioner Lawrence Mute—clarified that “normalizing” surgery violates the right to personal autonomy and they urged states to:

“Take all necessary legislative, administrative and other measures to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration” (Yogyakarta Principle 18b, p.23).

This recommendation was echoed, in 2015, by the Council of Europe Commissioner for Human Rights who argued that Convention on the Rights of the Child can be understood to mean that “all non-medically necessary normalization or gender-related treatment… must be expressly consented to by the child in line with their best interests” (p.33).

In recent years, UN human rights treaty bodies have been working actively to end the practice of “normalizing” treatment. For example, in September of 2016, the UN Committee on the Rights of the Child made a series of recommendations to New Zealand on this issue. Section 25 of the report includes the following:
 SECTION 25

NEW ZEALAND

☑ Develop and implement a child rights-based health care protocol for intersex children, setting the procedures and steps to be followed by health teams, ensuring that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guaranteeing the rights of children to bodily integrity, autonomy and self-determination, and provide families with intersex children with adequate counselling and support;

☑ Promptly investigate incidents of surgical and other medical treatment of intersex children without informed consent and adopt legal provisions to provide redress to victims of such treatment, including adequate compensation;

☑ Educate and train medical and psychological professionals on the range of biological and physical sexual diversity and on the consequences of unnecessary surgical and other medical interventions on intersex children (p.8)

The UN Committee against Torture has also indicated that “normalizing” treatment on intersex children is a form of torture and, as such, it violates international human rights law. In December of 2016, the UN Committee against Torture asked Australia to, “clarify whether non-urgent and irreversible medical or surgical treatment aimed at determining the sex of a child is permitted and performed on children and how does the State party guarantee that full, free and informed consent of the persons concerned is ensured” (p.10).

Governments are starting to heed the call to end sex “normalizing” treatment. In 2015, Malta became the first country to explicitly ban these surgeries on the grounds that the child has a “right to bodily integrity and physical autonomy”. Section 14 of the Maltese Gender Identity, Gender Expression and Sex Characteristics Act states:
It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent.

Following Malta’s lead, the Chilean Ministry of Health released a directive in 2016 ordering doctors to stop unnecessary “normalizing” treatment. And, also in 2016, a spokesperson for the South African government told the UN Committee on the Rights of the Child “we are now beginning a process in its early stages of acknowledging that such surgeries performed at a very young stage are harmful and that it needs to stop” (Collison).

Kenya is legally bound to respect the rights of the child and it therefore has an obligation to protect intersex children from unnecessary and harmful “normalizing” treatment. Not only is Kenya a signatory of the UN Convention on the Rights of the Child and the UN Convention against Torture, but Kenyan statute law also protects children from harmful cultural practices. Section 14 of the Children Act of Kenya states,

No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development.

Sex “normalizing” treatment clearly falls into the category of a cultural practice that is “likely to negatively affect the child’s life”.

“Why operate on the child’s body if the problem is in the minds of adults?”
– Mike Venhola, paediatric surgeon (Council of Europe Commissioner for Human Rights, p.25).

EQUAL IN DIGNITY AND RIGHTS
PROMOTING THE RIGHTS OF INTERSEX PERSONS IN KENYA
The strongest international statement against sex “normalizing” treatment on intersex children was issued in October, 2016. The statement—signed by 4 UN treaty monitoring bodies, 4 UN rapporteurs, and 3 regional human rights bodies, including the African Commission on Human and Peoples’ Rights—calls on states to ban sex “normalizing” treatment:

States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children. They must uphold the autonomy of intersex adults and children and their right to health, to physical and mental integrity, to live free from violence and harmful practices and to be free from torture and ill-treatment. Intersex children and their parents should be provided with support and counselling, including from peers.

The message from international human rights authorities is unequivocal: sex “normalizing” treatments on intersex children is a serious human rights violation and it must be prohibited. Normally, this would be the end of the discussion; however, in Kenya, some doctors argue that placing a ban on this type of surgery may not be in the best interest of the child.

We interviewed two paediatric surgeons at Kijabe Hospital, Dr. Ken Muma (Acting Executive Director of Kijabe Hospital) and Dr. Erik Hansen (Program Director of Paediatric Surgery). Both doctors had extensive experience treating intersex children and they both demonstrated a real empathy for their patients. They also readily acknowledged that the treatment of intersex conditions was an evolving area of medicine and that, as doctors, they must proceed with humility and with an open mind. In other words they did not fit the stereotype of the doctor who “has all the answers” and “knows what’s best” for their patient. Dr. Muma and Dr. Hansen agreed that for children born with ambiguous sex characteristics (part male, part female) it is best to defer any decisions about sex assignment surgery until the intersex child is old enough to make a decision on their own; however, they saw two problems with imposing an outright ban on “normalizing” treatment for intersex children. First, they were concerned that a ban may be “overly-
broad” and may unintentionally prevent other types of surgery that are non-controversial. And second, they worried that a ban may drive parents who are completely unaccepting of their child’s intersex condition to seek more drastic measures.

The doctors’ first concern, that a ban on surgery may be overly-broad, is based on the fact that the definition of “intersex” can be very broad. Some intersex advocacy organizations include as “intersex”, not only people who are biologically part male and part female, but also people whose only distinctive physical feature is that they have atypical genitalia. For example, an individual who in most respects has a typical male body (male chromosomes, male hormones), may be considered intersex if they have an atypical penis. Dr. Muma and Dr. Hansen fear that if the government imposes a ban on all “normalizing” treatment of intersex children, then the law may inadvertently prohibit a number of routine and non-controversial surgeries. For example, some boys are born with a condition known as “hypospadias” in which the opening of the penis is not at the tip of the penis, but somewhere on the underside. Dr. Hansen says there is no reason that a boy should have to wait until adulthood to receive hypospadias repair surgery. (Dr. Hansen was careful to note that if a child with “hypospadias” also has other atypical sex characteristics which make his sex truly ambiguous, then he would advise against surgery.)

It is true that the term sex “normalizing” treatment covers a wide range of medical procedures with varying levels of health risk. Therefore, if the government is considering banning any medical procedures it needs to clearly define which procedures are banned and why. As discussed in Chapter 6.1 Access to health care, this Commission recommends the creation of an Intersex Health Working Group composed of health practitioners, human rights advocates, and intersex representatives to review medical procedures for intersex patients and create national guidelines.

The Intersex Health Working Group’s review of medical procedures should be broad in scope: just because a particular surgery, such as hypospadias repair, is considered routine does not mean that it should avoid scrutiny. From a human rights perspective it is hard to justify any operation that can be deferred to a later age and some operations
which were once considered routine may need to be re-examined. For example, in
2015 the *Journal of Sex Research* published an article “Should surgery for hypospadias
be performed before an age of consent? The authors of the article concluded that
the justifications for performing hypospadias surgery on children are weak, “many
individuals with hypospadias do not experience the functional or psychosocial difficulties
commonly associated to the condition”, and the health risks are higher than previously
thought, therefore they recommended that surgery be performed “only if requested
by the affected individual, under conditions of informed consent” (Carmack, p.1).

The doctors’ second concern is that banning “normalizing” treatment could actually
threaten the physical safety of some intersex children. They believe that, since many
parents are fearful of and unwilling to raise a child with atypical sex characteristics,
banning “normalizing” treatment could lead some parents to abandon or even kill their
child. Dr. Hansen says bluntly, “there are some cultures where some kids would likely
be killed or left in the woods to die rather than raise the child in ambiguity for 13 years.”
Dr. Hansen and Dr. Muma agree that the long-term solution to this problem is to raise
public awareness and combat intersex stigma; however, they are also realists, and they
know that this stigma will not vanish overnight. In the meantime, lawmakers are left with
a difficult question, “Is a ban on sex “normalizing” treatment for intersex children in the
best interests of the child or not?”

In order to answer this question more information is needed. Up until now, there has
been almost no research conducted on the experience of Kenyans born with intersex
variations. Two research projects are urgently needed. The first project would investigate
reports of abuse, abandonment, and murder of intersex children, in order to assess
the scope of the problem and come up with a comprehensive strategy to protect
these children. And the second research project would examine the prevalence of sex
“normalizing” treatments and the impact on intersex Kenyans.

We need to better understand the experience of Kenyans who have undergone various
types of “normalizing” treatment. What health complications have or have not arisen as a
result of these “normalizing” treatments? And, what is their level of long-term satisfaction
or dissatisfaction with the treatments? These responses should then be compared with the experience of intersex Kenyans who have not undergone “normalizing” treatment. One of the first principles of medicine is “do no harm”, so if even a significant minority of intersex patients report mental and physical harm from their “normalizing” treatment this would be sufficient grounds to ban specific treatments.

Once these research projects have been completed we can determine whether or not a ban is the best method to combat “normalizing” treatment on intersex children. Note, the issue here is one of tactics, not of goals. There is no question that the Government should work to end “normalizing” treatment because it represents a serious violation of a child’s right to personal autonomy. While the Government gathers more information to determine whether a ban would be in the best interest of the child, it should, at the same time, actively engage with doctors and parents to end this practice. And more broadly, it should initiate an awareness raising campaign to reduce the stigma around intersex variations (See Chapter 8: Promoting Awareness).

**RECOMMENDATIONS**

1. Direct doctors at designated Intersex Care Centres to advise all parents to withhold “normalizing” surgery until children are at an age when they can make a decision for themselves. And facilitate the creation of peer support groups, so that new parents of intersex children can talk with other parents and with intersex adults in order to understand that intersex variations are not uncommon and they should not be feared.

2. The National Crime Research Centre in conjunction with the police to carry out a nation-wide study on the issue of intersex infanticide and child abuse in order to assess the scope of the problem and come up with a strategy to protect these vulnerable children.

3. Further research on the impact of sex “normalizing” treatments on intersex Kenyans. The study should include intersex people of various age groups, and include both people who have and have not received “normalizing” surgery as children.
6.3 Medically-necessary surgery

*Are guidelines needed to regulate medically-necessary genital surgery on intersex children?*

When discussing surgery on intersex children it’s important to distinguish between sex “normalizing” treatment, to create a typical male or female body, and therapeutic treatment, to manage health risks, such as cancer. While it is strongly advisable to avoid sex “normalizing” treatment, therapeutic treatments are sometimes necessary and even life-saving; however, human rights concerns still arise when it comes to performing therapeutic treatments on intersex children. The social pressure to “correct” intersex genitalia is so strong that “health risks” are sometimes exaggerated in order to justify “corrective” surgery, or patients are not informed of all of the treatment options. As the World Health Organization explained in a 2015 report on *Sexual health, human rights, and the law* medical procedures on intersex people “are sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions” (p.26). This is why it is important to set national guidelines for intersex health care based on the latest research, and to involve parents and, to the greatest extent possible, patients in the decision making.

Sometimes the line between therapeutic surgery and “normalizing” treatment is blurry. The complexity of this issue is illustrated by the debate around gonad removal in individuals with CAIS (Complete Androgen Insensitivity Syndrome). CAIS is an intersex condition in which genetic males develop a female body because they have an insensitivity to male hormones (androgens). CAIS individuals with male chromosomes, look like and identify as women; however, they have some anatomical differences from other women. For example, the gonads in women with CAIS are not ovaries, but testes. In the past, the testes of women with CAIS were often removed in early childhood without their knowledge, in order to avoid perceived psychological problems. Nowadays, testes are sometimes removed because of the perceived risk of cancer; however, there is an active debate in the medical community about the level of cancer risk and the optimal timing of testes removal. For example, while early gonad removal is still the norm in some countries, in England it is avoided.
This procedure is often delayed until after puberty because the testicles produce hormones that help girls with Complete Androgen Insensitivity Syndrome (CAIS) develop a normal female body shape without hormone treatment, and the risk of the testicles becoming cancerous before adulthood is extremely low (National Health Service of England).

It is beyond the scope of this report to make recommendations about specific medical procedures, but the CAIS example demonstrates that health care professionals sometimes disagree about which procedures are “medically necessary”. Given this fact, it’s critical that intersex patients and their families are informed about the different treatment options, and the risks and consequences of each option. For example, removing gonads can result in a need for lifelong hormone treatment, which may not be possible for many patients to access. Patient consent is only meaningful if patients and their families have access to all of the relevant information.

RECOMMENDATIONS

1. Intersex patients and their family should be informed about the different treatment options and the consequences of each option. Only when they are given full information in a form that they can understand can patients make a decision that is right for themselves.

2. The Intersex Working Group (See recommendations from Chapter 6.1 Access to health care) should establish guidelines to formalize how parents are informed about treatment options and their consent to the treatment should be put into writing to leave a record of how the decision was reached. These guidelines will ensure that patients’ and parents’ right to free, informed consent is respected, and that doctors are protected from unfair lawsuits.
6.4 Funding intersex health care

Should the government fund genital surgery and hormone therapy for consenting adults?

In the same way that it is important to distinguish between sex assignment surgery and therapeutic surgery, it is also important to distinguish between surgery performed on young children and surgery performed on adults with their free and informed consent.

There is a big difference between sex assignment surgery that is forced on a young child and sex assignment surgery that is chosen by an informed adult. It all comes down to the right to personal autonomy. Every person has the right to control their own body. For intersex people this includes the right to keep their unique body as it is, without surgical modifications or hormonal treatments, and it also includes the right to change their body, if they so desire, to align it with a typical male or female body. This is a very personal decision. No intersex person should be pressured to alter their natural body, but if they do desire to change their body through surgery or hormone treatment, that decision should be respected.

In addition to possessing the right to undergo sex assignment surgery, intersex adults also have the right to have that treatment paid for by the government because it is a fundamental part of their mental and physical health. It can be traumatic for a person to live in a body that does not match their gender identity (their internal sense of being male or female or neither).

For those adults who seek sex assignment surgery, this treatment is not a luxury, it is a necessity for their physical and mental health. Article 43(1)(a) of the Constitution states, “Every person has the right to the highest attainable standard of health” and this should be understood to include the right to gender alignment treatment.

There is a growing international consensus that access to gender alignment treatment is a human right and that the government should cover the cost of such treatment.
For example, in September of 2016, the UN Committee on the Rights of the Child (CRC) recommended that New Zealand “Extend free access to surgical interventions and medical treatment related to their intersex condition to intersex children between the ages of 16 and 18.” The age recommendations set out by the CRC is in keeping with their mandate to protect the rights of the child; however, there is no reason that free access to these treatments should not extend to all consenting adults. The Council of Europe Commissioner for Human Rights recommends simply, “Sex assignment treatment should be available to intersex individuals at an age when they can express their free and fully informed consent” (p.9).

It may be argued that offering free gender alignment treatment is not possible in a country like Kenya with many pressing health priorities and a limited budget; however, the overall impact on the budget will likely be minimal. It must be remembered that intersex people only represent a small percentage of the overall population and not all intersex people will opt for gender alignment treatment. Indeed as the stigma surrounding intersex decreases it is likely that more and more intersex people will choose to forgo surgery.

One question which will have to be answered by health care providers is, what is the age of consent for intersex people who desire gender alignment treatment? This question requires further research and is best answered by an Intersex Health Working Group, comprised of health care professionals and intersex people. In making its guideline the Working Group will likely want to set two ages of consent: a younger age of consent for hormone therapy (because the effects of hormone therapy are largely temporary) and a higher age of consent for surgery (which is irreversible). The 2016 Global Disorders of Sex Update says that hormone therapy is usually initiated “at age 10-12 in girls and 11-13 in boys, depending on the maturity, desires and informed consent of the patient and parents” (p.12-13). Surgery is usually delayed until the child is older because of the permanence of the decision; however, there is no international consensus on what the appropriate age of consent for genital surgery. For example, within Europe the age of consent for genital surgery varies widely: 12 in Belgium; 14 in Austria, Bulgaria and Germany; 15 in Slovenia; and 16 in Lithuania and the United Kingdom (EUFRA, p.7).
RECOMMENDATIONS

1. The National Assembly should recommend that there is a budget allocation by the Treasury to cover intersex health care. This budget allocation would cover both emergency medical interventions (see Chapter 5.3) performed on young children, based on up-to-date medical evidence and with the free, informed consent of parents. And, it would also cover medical interventions on older children and adults, including gender alignment treatment, when these interventions are based on the free, informed consent of the intersex individual.

2. The Intersex Health Working Group should investigate and create guidelines on the appropriate age of consent for hormone therapy and for gender alignment treatment.
Legal identification is one of the most important issues for the intersex community. Many intersex people are misgendered at birth, in other words they are assigned a gender marker (male or female) that does not match their actual gender identity. This is a common problem facing intersex people around the world. According to the Council of Europe Commissioner for Human Rights somewhere between 8.5% and 40% of intersex children are misgendered (p.23).

Unfortunately, Kenyan law does not allow intersex people who have been misgendered at birth to change their legal name and gender marker, leaving them with an unenviable choice. They must either live the rest of their life under a false identity that does not represent how they feel inside. (Imagine the difficulty of living as a woman, if you know in your heart that you are really a man.) Or, they must change their name, gender pronoun, and appearance to live as their true selves, in direct contradiction with the name and identity listed on their legal documents. The first choice, living under a false identity, frequently drives people to depression and even suicide. While, the second choice, choosing a public gender identity that does not match one’s legal identification makes it impossible for intersex people to access basic rights, such as the right to employment, education, travel, and marriage. In order to avoid this painful choice, many countries now allow intersex people who have been misgendered at birth to change their legal name and gender.

This chapter will examine four questions related to legal identification:
Q1. Should intersex infants be registered as a “third gender”?

Q2. Should consenting adults be allowed to legally identify as a “third gender”?

Q3. Should intersex people be allowed to change their name and legal gender?

Q4. Should changing legal gender require prior gender realignment surgery?

However, before we answer these questions it is useful to clarify some terminology. First, we will review the difference between “sex” and “gender”, and second, we will look at the meaning of the term “third gender”.

“Sex” versus “gender”. Any discussion of birth registration is complicated by the fact that while the terms “sex” and “gender” are distinct, they are often used interchangeably on identity documents. Sex refers to a person’s physical body—be it a female body, a male body, or an intersex body. Gender, or “gender identity”, refers to a person’s strong internal feeling of being female, male, or, for some people, neither. Identity documents, such as birth registration forms, have a category for “sex” but what they are really recording is a person’s “gender”. In other words, the documents are less about recording a person’s physical traits and more about recording how society should address that person.

In the case *RM v. Attorney General* (Petition 705 of 2007), the High Court of Kenya recognized that the term “sex” is often used as a stand in for “gender”. The Court wrote that “to interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to male and female” (Para. 130).

The fact that “sex” is often used as a stand in for “gender” is best illustrated by the fact that many countries allow a person to change their “sex” on identification documents without making any changes to their physical body.
Two motivations for creating a “third gender”. Some proposals for advancing intersex rights recommend the creation of a “third gender” category, i.e. a legal category to identify people as something other than male or female (the traditional two gender categories). There are two distinct motivations for creating a third gender category.

The first motivation for creating a third gender is to avoid the problem of assigning intersex children the wrong gender. According to this line of thinking, if intersex children are registered at birth as X, for intersex or indeterminate, (rather than M or F) then they can freely develop their own gender identity at their own pace and change their legal gender to M or F when they are of age. In this sense a third gender category is used as a placeholder that signals to the world “gender not yet decided”.

The second motivation for creating a third gender is to recognize that some people have a gender identity that is neither male, nor female—they are literally a third gender. This is a hard concept for many people to accept; however, it should come as no surprise that some of the people who have bodies that are part male and part male, also have a gender identity that is part male and part female, or somewhere in the middle. There are different terms to refer to this third gender and the terminology is still evolving; some people refer to themselves as “gender non-conforming”, while others prefer the term “non-binary”. Third gender identification is not unique to intersex individuals, some people born with typical male or female bodies also identify as a third gender.

Given the lack of research on the intersex community in Kenya, it is impossible to say exactly how many intersex people here identify as a third gender. But based on the interviews we’ve conducted and based on research from other countries we can expect that:

- A significant number of intersex Kenyans identify as a third gender.
Out of the five intersex Kenyans we interviewed for this report, one said that they do not feel either male or female, and another identified as male, but was comfortable being referred to as either male or female. In Australia, a survey of 272 intersex individuals revealed that 19%—almost 1-in-5—chose a gender option other than male or female (Carpenter, 2016, December 22).

- It’s likely that the majority of intersex Kenyans identify as one of the two traditional gender categories, either male or female.

It’s important to keep both of these points in mind, because there is a lot of confusion when it comes to intersex people and gender identity. People tend to adopt one of two myths: either they believe that “all intersex people will eventually settle on a male or female gender identity” (false), or they believe that “all intersex people have an ambiguous gender identity that matches their ambiguous sex characteristics” (false). The truth is that the majority of intersex people identify as male or female, and a significant minority identify as a third gender, such as non-binary or gender non-conforming.

### 7.1 Birth Registration

*Should intersex infants be registered as a “third gender”?

One proposal to address the problem of intersex children being assigned the wrong gender is to add a third gender category to birth registration forms. The idea is to register intersex children not as M for male, or F for female, but X for “indeterminate” or “undecided”. In this sense, the X would serve as a placeholder. When the intersex child is grown and is secure in their gender identity, then they can freely choose their legal gender marker. While it is true that this proposal would resolve the issue of misgendering we believe that this is not the approach to take because it would create other more serious problems for intersex children and there are better ways to resolve this problem. *misgender*: to assign someone a gender that does not reflect their true gender identity
Supporters of the proposal to register intersex children as a third gender argue that it will make the intersex community more visible and they will have strength in numbers. They point out that it’s hard to fight a stigma if members of the stigmatized community are largely invisible. Also, registering an intersex child as a third gender may give them a kind of “official recognition” which will help counteract the belief that intersex conditions are the product of “curses”.

These are valid points; however, this Commission believes that, on balance, registering intersex children as a third gender is not advisable because it would increase the abuse faced by intersex children, it would impair their ability to form normal peer relationships, and it would drive parents to seek drastic alternatives.

All of the intersex people interviewed for this report expressed that one of their main desires as children was to “fit in” with other children. Sometimes they were able to pass unnoticed as a “typical” child, but when their intersex condition became apparent (usually during puberty) they had to endure daily insults from classmates and people in their community. They also became the target of violent assaults, including beatings, forced public undressing, and attempted rape. In this hostile environment, registering a child at birth, not as a boy or a girl, but as “intersex” would expose them to abuse from an early age.

Also, it’s hard to imagine how a child registered as a third gender would fit in socially. Would the child that is neither “male” nor “female” be accepted into female friendship circles, or male friendship circles, or would they be isolated from the rest of their peers? Judging from the experience of the intersex people interviewed for this report, designating intersex children as a third gender would only accentuate their difference and leave them socially isolated. Julius Kaggwa, a prominent intersex advocate and Executive Director of SIPD-Uganda, opposes the proposal to register intersex children as a third gender because, he says, we need to “protect the child from early exclusion and stigma for being identified as ‘other’ in a still conservative social and political setting when they are not yet able to defend who they are” (Email from January 24, 2017).
And how would the creation of a third gender category be received by parents and family members? While some parents would, no doubt, be supportive of a third gender category, it’s likely that the majority of parents would not. All of the intersex people we interviewed, with the exception of one, had a very strained relationship with their family. They reported being abandoned, beaten, and blamed for deaths in their family because they were intersex. For example, James Karanja says that his father abandoned him as an infant because he was born with ambiguous genitalia, and his mother tried as much as possible to keep his intersex condition a secret, even to the extent of discouraging him from playing with other children: “she wanted me always to live alone, just because she felt that I would spit out the secrets. So she was always on my case, trying to know what I was doing” (Interview, 2017, March 9). How would a parent who is unsupportive of their child’s intersex condition and does not want anyone to discover their “secret” react to the imposition of a third gender category on birth registration forms? Would they obediently take their child to the hospital to be registered? Or would they seek another solution to this “problem”, for example by abandoning their child, or trying to “correct” their ambiguous genitalia and registering them as male or female? Because intersex is widely viewed as a curse it is likely that many parents would seek any alternative rather than register their child as “intersex”.

Proponents of a third gender category argue that any changes to the laws around birth registration must be accompanied by public education campaigns to eliminate anti-intersex discrimination. This Commission strongly supports public education campaigns (see Chapter 8: Promoting Awareness); however, history informs us that longstanding prejudices do not vanish from one day to the next. Registering children as a third gender is inadvisable because it would expose them to increased risk of physical and psychological harm. It would also dramatically curtail their legal rights.

The first right which would be lost with the creation of a third gender category is the right to privacy. The right to privacy is a fundamental human right and it is enshrined in Kenyan law. Article 19 of the Children Act specifies that “Every child shall have the right to privacy subject to parental guidance”. And Article 31(c) of the Constitution reads “Every person has the right to privacy, which includes the right not to have
information relating to their family or private affairs unnecessarily required or revealed.” A person’s intersex status certainly falls under the category of “private affairs”. There is no reason why a child’s intersex status need be printed on their birth certificate. The intersex advocate Julius Kaggwa points out that when other children are born with differences—be they “albino children, or children born with disabilities or other health conditions”—there is no suggestion that these differences should be highlighted on their birth certificate (Email received 2017, January 24). It is up to the child to determine “subject to parental guidance” how and with whom they share information about their intersex condition. Remember, there are many types of intersex conditions and while some intersex conditions are visible, others are not. Some intersex people live their entire lives without revealing to those around them that they are intersex—and that is their constitutional right.

Unfortunately, privacy is not the only right that would be lost with the creation of a third gender category. Because we live in a binary world that has for a long time only recognized the male and female gender, children registered as a third gender would be stripped of many basic rights and many aspects of daily life would become impossible. If a child who is legally “intersex” had to pass through security, which security guard would search them? What would happen if both the male guard and the female guard refused to search them? Would they be allow to enter the building or would they have to remain outside? If they wanted to use a public washroom, which washroom would they use? If their parents wanted to open a bank account in their name, would the bank accept the application? If they wanted to travel to another country, or were forced to flee to another country to escape persecution, would that country accept them? If they belonged to a religious group, which segregates men and women during worship services, which side of the room would they pray on? If they wanted to attend a single-sex boarding school, would they be allowed to register? If one pauses to consider the number of times that a person must identify themselves as either male or female in order to access a basic right, then the full impact of registering intersex children as a third gender sinks in. The creation of a third gender category would immediately designate intersex children as second-class citizens.
DOCTOR IN BABY ‘A’ CASE SPEAKS OUT AGAINST THIRD GENDER BIRTH REGISTRATION

In the landmark Baby ‘A’ Case (Petition 266 of 2013), the High Court agreed with two of the Petitioner’s requests and ordered the Attorney General to create an agency to collect data related to intersex persons and to create regulations for “corrective surgery”. However, on the key issue of the third gender marker the High Court disagreed with the Petitioner. The mother of Baby ‘A’ argued that her intersex child suffered “lack of legal recognition” because the birth registration form only provides for male and female gender markers and there is no gender marker for intersex children. While the Court recognized that “it may have been difficult to conclusively determine the Petitioner’s gender at that early stage” the Court was satisfied that the Baby ‘A’ could have been registered as either male or female, and it cited the Court’s decision in the RM Case (Petition 705 of 2007): “The best that could be done at infancy was to adopt the category whose external genitalia and physiological features appeared more dominant at that stage” (Para.57).

A noteworthy submission to the Baby ‘A’ Case was made by Dr. Simeon Monda, the Acting Chief Executive Officer of Kenyatta National Hospital. Dr. Monda agreed with the petitioner in the case, Baby ‘A’'s mother, that the legislature needs to create “appropriate guidelines and regulations with respect to corrective surgery for intersex children” (Para.20). However, Dr. Monda strongly disagreed with the creation of a third gender category for intersex children and he presented the following reasons:

1) “The isolation and identification of intersex persons as a unique sexual group would exacerbate the stigmatization of those persons, since they will be exposed to constant questioning and treatment with suspicion.”

2) “It would be dangerous to assume that all intersex persons would readily accept whatever mark, sign or identity that may be assigned to them by the relevant authorities.”

3) “Championing of a third category of persons known as intersexuals is itself a violation of those persons’ constitutional rights and freedoms, since it is tantamount to imposing a third category of sex without the intersexual’s consent.”

4) “Assigning an identity to intersexuals will increase the practice of corrective surgery especially when the parents of intersex children are faced with the actual task of assigning their children a third gender” (Para.20).
Proponents of third gender birth registration say that no one will become second-class citizens, as long as other laws are changed to accommodate the creation of a third gender category. But, the changes needed to accommodate a third gender are not just legal. Some of the infrastructure changes needed, such as creating “gender neutral” washrooms in every building, will take years to fully implement. Also, some accommodations may be blocked. For example, some religious groups may never accept the third gender designation and children registered as a third gender could be permanently excluded from certain places of worship.

Finally, registering Kenyan intersex children as a third gender would subject them to a kind of experiment. Currently, there are no countries in the world which register intersex children as anything other than male or female. The closest any country has come to this proposal is Germany, which in 2013 changed the law regarding the birth registration of intersex children. The new law requires that for babies born without clear gender-determining physical characteristics, the gender box should be left blank. The German case offers little to guide Kenyan policymakers, because the social and legal context in Kenya and Germany is very different, but the German case is instructive in one respect: it illustrates how the opinions of intersex people are often ignored when governments decide to “advance” intersex rights.

The German law which requires the gender box for intersex children to be left blank was trumpeted as a “victory for intersex rights” by the German government and by the international media, but it was opposed by the one group that really mattered, the intersex community. German intersex groups rejected the new law for “failing to address genital mutilations, exposing children to situations where they will be forcibly ‘outed’ and have lesser rights, and not being based on principles of self-determination” (Email from Morgan Carpenter, 2017, February 14). It is telling that intersex people were not consulted or involved in the drafting of the new German law (Viloria, 2013). When Kenyan lawmakers draft new laws to improve intersex rights, they should learn from the mistakes of German lawmakers and seek the active involvement of the intersex community.
Jinsiangu, a Nairobi-based group which supports intersex people, recommends that the best approach to take when it comes to birth registration is the “non-surgical best guess approach” (Information package, 2016, October). In other words, make a “best guess” about the gender of the child, while recognizing that the initial gender assignation is not set in stone. The law must allow the possibility for the gender marker to be changed at a later date “depending on the development and choice of the intersex person.” The “non-surgical best guess approach” is also the approach favoured by SIPD in neighbouring Uganda. And it is the approach favoured by the 30 international intersex organizations that met in Malta for the Third International Intersex Forum. They recommended: “register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.”

While the case for adopting the “non-surgical best guess approach” is strong, two lingering arguments in favour of third gender birth registration must be addressed: the data collection argument and the “preventing fraud” argument.

First, some people support registering intersex children as a third gender because it will allow the government to gather statistics about the size and distribution of the intersex population. It is true, as the High Court indicated in the Baby ‘A’ case, that there is a need for the government to start collecting data on intersex persons, but it is not necessary to create a third gender category in order to accomplish this goal. Hospitals can collect information about the number of children born with intersex variations and share that with a central data bank, without putting that information on the child’s birth registration, in the same way that pertinent information such as height and weight are collected and recorded without being placed on the birth certificate. (Note: estimates of the intersex population based on birth records will always be on the low side because some intersex conditions are not visible at birth and because many intersex children are never brought to hospitals for registration.)

Second, the argument has been made that, in the future, transgender people (people born with typical male or female bodies) may try to “pose” as intersex in order to “take advantage” of laws designed for intersex people, thus registering intersex children as a
third gender will prevent this fraudulent activity. Leaving aside the issue of transgender rights (which is a worthy topic of its own), there are two problems with this argument. Some intersex people are not born with ambiguous genitalia, their intersex variation (hormonal, gonadal, or chromosomal) is internal, therefore they “may not be recognized at birth” (American Psychological Association). Creating an identification system based on a person’s birth records may unintentionally exclude a group of intersex people, whose intersex condition only becomes apparent later in life. Also, there is a simpler and more effective way to ensure that people who claim intersex status are actually intersex, they can be required to produce certified proof from a doctor. For example, the South African *Alteration of Sex Description and Sex Status Act (No.49 of 2003)* specifies that intersex people who wish to change their legal gender must produce “a report prepared by a medical practitioner corroborating that the applicant is intersexed” (Article 2d).

“Our human rights issues cannot be reduced to a novel third checkbox on a form. Assigning infants and children to a third classification is abhorrent when that classification is experimental, not well understood or supported in society, and when it recognises lesser rights in people than the traditional categories. A child may even be confronted with forced disclosure of their stigmatised characteristics at nursery or school.”

**Morgan Carpenter, Co-Executive Director of Intersex Australia (2015)**

The best guess non-surgical strategy involves using genetic tests and historical data studies in order to determine what gender (girl or boy) an intersex child will likely feel most comfortable in. The intersex child is then raised in that gender with the understanding that the intersex person may choose a different gender at another point of their life (possibly during teenage years). This goes hand in hand with counselling and education for both the family and the intersex person to better understand and deal with the social, cultural and the legal issues related to intersexuality.

*(SIPD, Uganda Report, 2015, p.3)*
The “non-surgical best guess approach” is the best way to handle the issue of birth registration for intersex children. It greatly minimizes the harm that results from assigning an intersex child the wrong gender, and it avoids the much more serious harm, loss of privacy, and loss of rights that would result with the creation of a third gender category. Note: for this approach to work it must be possible for intersex children who have been assigned the wrong gender at birth to change their legal name and gender marker at a later date (See Chapter 6.3 Changing legal name and gender).

RECOMMENDATION.

The government should not register intersex children as a third gender. Instead, the government should implement the approach advocated by intersex groups known as the “non-surgical best guess approach”: register intersex children as female or male, strongly discourage sex assignment surgery, and allow the possibility for the intersex person to change their legal gender in the future.

7.2 “Third gender” option for adults

Should consenting adults be allowed to legally identify as a “third gender”?

The proposal to allow consenting adults to legally identify as a third gender must be understood as completely distinct from the proposal to register intersex children as a third gender. The birth registration proposal uses a third gender category, like “indeterminate” or “undecided”, as a temporary placeholder to avoid the problem of misgendering. Meanwhile the proposal to allow adults to legally identify as a third gender, is based on the recognition that some adults may have a firmly held gender identity that is neither male, nor female. These people may wish to identify as a third gender, such as “non-binary” or “gender non-conforming”, for their entire life. Also, there is an important distinction between registering a child as a third gender (a decision which they have no control over) and giving an adult the option to identify as a third gender. An adult who
chooses to identify as a third gender may still face negative repercussions—increased security risks, the loss of some legal rights etc.—but they are able to assess the risks and benefits and make a conscious choice. In short, they are able to give their informed consent.

3 MYTHS ABOUT THE THIRD GENDER

“All intersex people identify as a third gender”--False.
There is a difference between a person’s sex (i.e. their physical body) and their gender identity (i.e. whether they feel male, female, or neither). Although all intersex people have ambiguous or atypical sex characteristics, this does not mean that they all have an ambiguous or atypical gender identity. In fact, most intersex people identify as male or female.

“All intersex people identify as male or female”--False.
While it’s true that most intersex people identify as male or female, this is not true of all intersex people. A significant minority of intersex people do not identify as entirely male or entirely female. In other words, a significant minority of intersex people identify as a third gender: they may identify as part male and part female; as neither male, nor female; or as somewhere in-between. A number of traditional cultures around the world have acknowledged the existence of a third gender. For example, the concept of a “two-spirited” person is common among many indigenous peoples in North America.

“All people who identify as a third gender are intersex”--False.
Not all people who identify as a third gender are intersex. Some of the people who identify as a third gender (e.g. “gender non-binary” or “gender non-conforming”) were born with typical male or typical female sex characteristics.

In recent years, the number of jurisdictions that legally recognize a third gender has grown. The following countries now recognize a third gender option on at least some of their national identity documents: Australia, New Zealand, Malta, Malaysia, Pakistan, India, and Nepal. And there is third gender legal recognition in some regions of Canada and the United States. In its 2016 World Report, Human Rights Watch, included a special section on gender identity rights which highlighted some of the dramatic changes taking place. For example,
Nepal’s Supreme Court, in a sweeping 2007 ruling, ordered the government to recognize a third gender category based on an individual’s ‘self-feeling’... Armed with the ruling, activists successfully advocated with government agencies to include the third gender category on voter rolls (2010), the federal census (2011), citizenship documents (2013), and passports (2015) (Goshal, p.23).

Human Rights Watch also reports that “the Dutch parliament has begun considering whether the government should record a person’s gender on official identification at all” (Goshal, p.23-24). It is possible that, in the future, “sex/gender” may no longer be listed on identity documents, in the same way that outdated identifiers such as “marital status”, “religion”, and “tribe/ethnicity” are no longer included.

Should the Kenyan government change the laws to allow consenting adults to identify as a third gender? It is too early for this Commission to make a recommendation on the issue; however, we do believe that this proposal merits consideration. Before the government considers drafting a third gender law it should examine the many legal amendments which must be made to ensure that people registered as a third gender retain their constitutional right to legal equality in all areas of life (marriage, adoption, employment etc.), and it should engage with the intersex community here in Kenya to better understand their needs and priorities.

7.3 Changing legal name and gender

*Should intersex people be permitted to change their legal name and gender?*

As High Court Justice Matheka explains in her Masters Dissertation “a birth certificate is the ‘membership card’ to society” (p.69). Unfortunately, some intersex people have a birth certificate with the wrong gender listed and they are effectively blocked from becoming full members of society.
This issue does not affect all people born with intersex variations. For most intersex people, the “best guess” that their parents made when they were born turns out to be correct, and their gender identity matches the gender assigned to them on their birth certificate. However, many other intersex people are not so fortunate. They are forced to live with a legal name and gender that does not reflect their true gender identity and which makes daily life very difficult.

In October 2016, the Departmental Committee on Administration and National Security held a hearing on the issue of intersex rights and heard passionate testimony from intersex people whose lives were transformed because the wrong gender was assigned to them at birth. Ryan Muiruri explained how he was twice accused of impersonation and detained, when trying to withdraw money from his own bank account, because his male gender appearance did not match the female name and gender listed on his identification. Security guards even groped him to confirm what he was saying about his intersex condition. James Karanja reported that he was initially blocked from pursuing post-secondary education for the same reason, the female name and gender marker listed on his identification did not match his true gender identity. (Fortunately, James’ situation was resolved. With the help of university administrators, he was able to enrol at the University of Nairobi, and he is currently pursuing a degree in Political Science and Public Administration.) And, Sidney Etemesi was once fired from a job when his boss discovered that he was legally a “woman”. Ryan, James, and Sidney are not asking for special treatment; they merely want to be recognized for who they truly are, so that they can become full, contributing members of society.

The argument for amending the law to allow intersex people, who were assigned the wrong gender at birth, to change their legal name and gender rests on two constitutional principles. First, recognition of one’s gender identity is part of the right to dignity, and the right to dignity is firmly entrenched in the Constitution. And second, Article 35(2) of the Constitution recognizes that “Every person has the right to the correction or deletion of untrue or misleading information that affects the person.”

Internationally, courts have made the link between recognition of one’s gender identity and
and the right to dignity. For example, in 2014, the Supreme Court of India delivered a landmark decision, in the case National Legal Services Authority v Union of India, which recognized Hijras (a transgender and intersex community) as a legal third gender. The Supreme Court of India found that:

**Recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution (Para.68)… Determination of the gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of ‘personal autonomy’ and ‘self-determination’ (Para.74).**

This Supreme Court of India case was cited by the High Court of Kenya in the precedent-setting case *Audrey Mbugua v KNEC (Judicial Review 137 of 2013).*

In *Mbugua v KNEC*, the High Court ordered the Kenya National Examinations Council (KNEC) to change the name listed on Ms. Mbugua’s KNEC certificate from her birth name (Andrew) to her preferred name (Audrey) and to remove the gender marker. Audrey Mbugua is transgender not intersex (i.e. she was born with a typical body, but her gender identity does not match her assigned gender); however, the reasons presented by the High Court apply equally to intersex persons. Essentially, the High Court of Kenya agreed with the Supreme Court of India that gender identity should be respected because it is part of the right to dignity, a right which is enshrined in the Kenyan constitution. As the High Court explained, Article 10(2b) establishes “human dignity” as one of the national values and principles of governance, and Article 28 provides that, “Every person has inherent dignity and the right to have that dignity respected and protected.”

The constitutional argument for allowing intersex people who have been misgendered to change their legal name and gender, is further strengthened by Article 35(2): “Every
person has the right to the correction or deletion of untrue or misleading information that affects the person.” It is a foreseeable and unavoidable fact that a significant percentage of intersex children will be assigned the wrong gender at birth. The most authoritative medical statement on intersex health, the *2016 Global Disorders of Sex Development Update*, says that doctors must assign a gender based on the “*probable* adult gender identity” but this is “only *tentatively* predictable” (Lee, p.9). And it states clearly on the first page that it is “impossible to predict gender development in an individual case with certainty” (Lee, p.1). Given this reality, it is inevitable that a percentage of intersex children will be assigned the wrong gender and, as a consequence will have “untrue” information listed on their birth certificate and other identity documents. And given that this information profoundly “affects” their dignity and their quality of life, they have a constitutional right to “the correction” of this untrue information.

**ASSIGNED THE WRONG GENDER AT BIRTH: JAMES KARANJA’S STORY**

James Karanja was assigned a “female” gender at birth and raised as a girl with the name Mary Waithera, but from a young age he felt like a boy, not a girl. As he grew up, his body developed more masculine features—a deeper voice, broader shoulders—and, he says that, in every way imaginable he felt like a boy inside, “I rode bicycles, carried water like a boy, was cheeky at school like a boy, was very good at soccer” (March 9, 2017 Interview). Unfortunately, his family and community could not understand what he was going through. When his body started becoming more masculine his mother felt like he was “bringing shame” on the family and she went into a severe depression. When he began to develop feelings for girls at his school he was “accused of lesbianism and suspended”. He hit a low point, but then made an important realization, “I tried committing suicide, but I was never successful. So from there, that’s when I realized that I’m the one who makes me, it’s not the society who makes me, so I’ll have to stand up for whom I feel I am, and I should never be into what people think of me” (March 9, 2017 Interview).

Recently, James carried out a chromosomal test and discovered that genetically he is male. The law still forbids him from changing his gender, and his name and gender is still listed as “Mary, female” on his identification.
It’s difficult to overstate the importance of legal gender recognition because, as Human Rights Watch, points out, it is a “gateway to other rights” (Goshal, p.24). When someone is denied legal recognition of their gender a host of other important rights are simultaneously denied: “the right to privacy, the right to freedom of expression, the right to be free from arbitrary arrest, and rights related to employment, education, health, security, access to justice, and the ability to move freely” all hinge on the right to legal gender recognition (Goshal, p.24). The intersex people interviewed for this report have testified how their lack of gender recognition has led to arrests and inappropriate searches, denial of education, and loss of employment, not to mention the daily assault on their dignity.

Given the strong legal and moral arguments for gender recognition it is not surprising that many countries have amended their legislation to recognize this right. The list of countries that allow people to change their legal gender is long and growing. In a special issue titled “Gender Revolution” National Geographic magazine reported that “over a third of countries allow a gender change (to male, female, or another) on documents such as passports” (The Legality of Gender Change, January 2017). In 2015, the Council of Europe Parliamentary Assembly passed Resolution 2048 which states, “The Assembly welcomes the emergence of a right to gender identity... which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity.”

The point where intersex rights and transgender rights overlap

The majority of countries that allow people to change their legal gender do not distinguish between intersex and transgender people. In other words, in most of these countries, anyone who wishes to is allowed to change their legal gender. This is understandable because, as the case of Audrey Mbugua revealed, many of the same arguments (the right to dignity, the right to self-determination etc.) apply equally to intersex and transgender people. “Recognizing, in law, people’s self-identified
gender is not asking governments to acknowledge any new or special rights; instead, it is a commitment to the core idea that the state or other actors will not decide for people who they are.”
Human Rights Watch World Report 2016

RECOMMENDATION.

Amend the laws to allow intersex persons to change their legal name and gender on all of their identity documents. The laws to be amended would include the: Registration of Births and Deaths Act, Registration of Persons Act, National Hospital Insurance Fund Act, Kenya National Examination Council Act, Statistics Act, Basic Education Act, Children’s Act among other Laws.

7.4 Should surgery be required?

Should intersex people who seek a change of legal name and gender be required to first undergo sex assignment surgery?

Currently, two African countries, Uganda and South Africa, allow intersex people who have been misgendered to change their legal name and gender. These countries offer contrasting models to Kenyan lawmakers. The Ugandan law, introduced in 2015, represents an advance for intersex rights, yet it is only a partial advance. The Ugandan law allows intersex people to change their legal gender, but it requires them to first undergo sex assignment surgery, a requirement that this Commission believes is a violation of the individual’s right to personal autonomy and self-determination. Meanwhile the South African law from 2004 does not make surgery a prerequisite for intersex people seeking to change their legal gender, an approach which is respectful of the individual’s human rights.

In 2015, Uganda amended its Registration of Persons Act to allow intersex people to change their legal name and gender. Article 38 of the amended Registration of Persons
If a child born a hermaphrodite, after being registered, through an operation, changes from a female to a male or from a male to a female, and the change is certified by a medical doctor, the registration officer shall, with the approval of the Executive Director of the Authority upon application of the parents or guardian of that child update the particulars of the child, which appear on the register (Government of Uganda).

Intersex advocates welcomed the new law as an important step forward for intersex rights, while pointing out that the law fell short in three respects: it employed the outdated term “hermaphrodite” which is widely rejected by intersex persons, it applies only to children (ignoring the rights of intersex adults), and, most significantly, the law states that intersex people must undergo a sex assignment operation before they can update their personal information (name and gender) on the register.

It may seem reasonable to require intersex people to undergo a sex assignment operation before they can change their legal gender; however, this requirement is a clear violation of a person’s human rights. While some intersex adults want to receive sex assignment surgery, others do not. There are many legitimate reasons why a person may decide against surgery—high financial cost, risk of negative health complications, infertility etc.—but ultimately, a person does not need to justify their decision not to have surgery. People have a right to personal autonomy, they have a right to control what happens to their body. According to human rights principles, the government cannot require someone to undergo surgery against their will, nor can it require a person to give up one right (the right to personal autonomy), in order to obtain another right (the right to gender recognition / the right to dignity). Julius Kaggwa, Executive Director of the Ugandan intersex advocacy group SIPD, says that the surgery requirement in Article 38 puts intersex people in an impossible position, “When people want to choose an unconventional identity—when they want to change their identity, but do not want to undergo the knife—that’s when they’re driven to suicide or forced to go into exile.”
When paediatric surgeons at Kijabe Hospital were asked whether it was appropriate to make sex assignment surgery a requirement for changing one’s legal gender, their answer was an emphatic “no”. Dr. Erik Hansen, the head of Paediatric Surgery, argued that requiring surgery was equivalent to assault:

I think that no one, at any point in time, should be conscripted to assault. Conscripted operations, mandated operations, are tantamount to assault. If you’re forced into it, then it moves from a medical procedure to a physical violation and, personally, I think that’s wrong. [This requirement] would mandate a surgeon to do something and that is wholly unethical and wrong. We are taught, one of the major tenets of medicine, is first, do no harm. I should not be forced to do something that I believe is wrong and is not in the best interests of the patient and not even what the patient genuinely wants (Interview February 3, 2017).

Dr. Ken Muma, the Acting Executive Director of Kijabe Hospital and a paediatric surgeon, concurred with Dr. Hansen, pointing out that people “don’t choose to be born with a disorder of sex development” and making surgery a requirement for changing one’s legal identity is a form of “blackmail” (Interview February 3, 2017).

The South African law which permits people to change their legal gender is much less restrictive than the Ugandan law. The South African *Alteration of Sex Description and Sex Status Act (No.49 of 2003)* allows *any* person (intersex or transgender) to change their legal gender and although the Act requires transgender people to undergo sex assignment surgery (contrary to human rights principles), it waives this requirement for intersex persons. Article 2(d) of the Act stipulates that intersex people who wish to alter the sex description on their birth registration must produce:
(i) a report prepared by a medical practitioner corroborating that the applicant is intersexed; and
(ii) a report prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily, for an unbroken period of at least two years, in the gender role corresponding to the sex description under which he or she seeks to be registered. (Government of South Africa, 2003).

The South African Alteration of Sex Description and Sex Status Act offers a good model for Kenyan lawmakers seeking to advance intersex rights. Any laws which grant intersex individuals the right to change their legal gender should impose as few requirements as possible on this process.

Countries on the forefront of intersex rights have drafted their laws, so that it is a simple, straight-forward process for intersex people to change their legal gender. For example, the Maltese Gender Identity, Gender Expression and Sex Characteristics Act (2015) explicitly states that interventions such as surgery, hormone therapy, and psychological treatment are not required for a person to “make use of the right to gender identity”. And the Australian Government Guidelines on the Recognition of Sex and Gender (2013) says that changes of legal gender must be carried out promptly.

Where a person requests the sex and/or gender information on their personal record be amended, departments and agencies must respond to a correct request within 30 days, and, on request by the individual, take reasonable steps to notify a third party of a correction (Para.23).
In other words, it should require a minimal amount of time, cost, or bureaucratic hassle for an intersex person to change their legal gender. It is their human right.

**RECOMMENDATION**

Legal amendments which allow intersex persons to change their name and gender should be drafted so as to ensure that the process is simple and fast, and they should exclude requirements for medical intervention (surgery, hormone therapy, psychological treatment).
Intersex people in Kenya live in a constant state of readiness, constantly alert to potential dangers. And they go to great lengths to hide their intersex condition. One person we interviewed reported that when they were at boarding school they woke up in the middle of the night to shower. Another male-identified person often wears a heavy coat, even in hot weather, in order to conceal their feminine chest. The need to constantly conceal one’s intersex status places a heavy stress on individuals and the precautions taken are not always effective at preventing attacks. Several intersex people we interviewed reported being beaten and stripped of their clothes by people in their own community. The advocacy organization SIPD reports that many intersex people are the victim of “curiosity rape” (Baseline Survey, p.7). In short, intersex people lack of one of the most fundamental rights, the right to security.

There are several factors which make the security of intersex person particularly precarious: the belief that intersex people are cursed means that one’s own family and community often become the main source of violence, the confusion of intersex with “gay” means that intersex people are frequent targets of anti-gay violence, and law enforcement authorities (police officers, prison guards) not only fail to protect intersex people, but are frequently a source of their insecurity.

When a person cannot count on their own family to respect them and protect them, their physical safety is in real jeopardy. An article published in The Guardian titled “Is the world finally waking up to intersex rights?” (Larsson, 2016, February 10) documents the harsh reality facing many intersex people today. One alarming story concerns a boy from Malindi, Muhadh Ishmael, who was born with both male and female genitalia. His
parents raised him as a girl, but he always identified as a boy, a situation his family could not accept. When he was seventeen “a group of men, thought to be hired by his uncle, drugged him and cut off his penis. He died from his injuries”.

It is very disturbing that the biggest threat in an intersex child’s life is usually their own family. All of the people we interviewed from this report said that intersex children, particularly in rural areas, are often killed after they are born because they are viewed as a curse on their house and their community. The existence of intersex infanticide in Kenya was also corroborated by Justice Matheka in her report on intersex rights. When Justice Matheka was working as a magistrate she came across the case of a woman who was charged with criminal neglect of her intersex child. When the child’s mother and grandmother were asked why she had neglected the child, “they indicated their laxity in addressing the child’s problem was due to their previous experience with such children in the community where “a hermaphrodite is normally left to fate” (p.21).

BBC reportes Helen Grady and Anne Soy interviewed a traditional midwife in Western Kenya who offered a rare insight into the treatment of intersex infants at birth. The midwife, Zainab, said that in 2012 she delivered a child with male and female sex organs and the father immediately demanded that she kill the child.

He told me, ‘We can’t take this baby home. We want this baby to be killed.’ I told him that the child was God’s creation and must not be killed. But he insisted. So eventually I told him, ‘Leave the baby with me, I’ll kill it for you.’ But I did not kill the baby. I kept it.

Zainab says that the father came back several times to check that she had done what she’d promised and each time she hid the baby and insisted that she had killed it. A year later, when the parents discovered that their baby was alive, Zainab says, “They told me I must never reveal that the baby was theirs. I agreed and since then I’ve been raising the child as my own.”

Two years later, Zainab was amazed to deliver a second intersex baby.
This time “the mother was alone and she just fled and left me with the baby.” Once again Zainab took the baby into her home, but her husband, a fisherman on Lake Victoria, was not happy.

When he went out to the lake to fish and had a bad catch, he blamed the children. He said it was because they had brought a curse on us. He suggested I hand the children over to him so he could drown them in the lake. But I refused. I told him I would never allow that to happen. He became violent and we started fighting all the time. Eventually, Zainab says she was “forced to flee” with her children.

The BBC reporters also interviewed Joyce Mbogo, a pediatric endocrinologist, who noted that the attitudes of parents towards intersex children are starting to change thanks to greater access to information. However, it is very concerning that the practice of intersex infanticide has not stopped. Seline Okiki, chairperson of the Ten Beloved Sisters, a group of traditional birth attendants also from western Kenya, says that it used to be common practice to kill intersex babies and that this practice is still happening, although now it is done in secret.

(This has been a summary of the Helen Grady and Anne Soy’s article “The midwife who saved intersex babies” published on May 4, 2017 by the BBC World Service.)

Although we know that intersex infanticide is practiced in Kenya there is a disturbing lack of information about this crime. How common is intersex infanticide? Is it isolated to specific counties or does it occur throughout the country? Is it on the decline or on the rise? And most importantly, what can be done to stop these crimes and to eliminate the belief that intersex children (and children born with disabilities) are cursed? This is an issue which urgently needs investigation.

As adults, intersex people are twice stigmatized. They face not only the stigma of being cursed, but also the mistaken prejudice that they are all gay. Intersex, transgender, and gay people are distinct groups (see: “Chapter 2: What is Intersex?”), but to the public that they are seen as one. Julius Kaggwa, founder of SIPD, says that “In Kenya and Uganda, transgender and intersex people take all the weight of LGBT hate crimes because they are visible and the public is confused about what gay is” (2016, December 16).
The police officers, whose duty is to provide security for all Kenyans, often share the popular prejudices against intersex people, so they become an additional source of insecurity. When an intersex person is the target of a violent attack either from their family or from someone on the street, often they do not feel safe to report the crime to the police, who are hostile or, at best, unsympathetic. One intersex person interviewed by Justice Matheka told her, “I have been assaulted severely even in Nairobi, but cannot face the police to report. They ask too many questions” (p.60). Kwamboka Kibagendi says that the problem is that the police are just as confused as the public about the difference between intersex and gay, “Police need to be informed than an intersex person is not gay. Police will not harass us if they have the correct information” (Interview November 23, 2016). This is a valid recommendation, police do need to be informed of the difference between intersex and gay; however, they also need to be trained to treat all Kenyans with respect, whether they be gay, transgender, or intersex.

Another sector of law enforcement which is often seen as hostile to intersex people are prison guards. Given that intersex people represent a significant portion of the population (0.3-0.5%), it is inevitable that the prison system will come into contact with intersex people. Intersex people should be treated with the same respect and accorded the same rights as any other prisoner, but often this is not the case. For example, in the case RM v Attorney General (No.705 of 2007), the High Court determined that Richard Muasya was the victim of “inhumane and degrading treatment” on the part of the prison guards, including strip searches “motivated by an element of sadism or mischievous curiosity, to expose the petitioner’s unusual condition” (Para.165). Law enforcement must be reformed in order to end these kind of abuses and to provide intersex people with real security.

One positive reform, which deserves mention, is the amendment to the Persons Deprived of Liberty Act (2014), which came about following the Richard Muasya case. On the topic of “Restrictions on searches” the Act reads:
This Act is the one piece of Kenyan legislation which refers to intersex persons and Section 10 of the Act establishes two important precedents. First, that the government should respect the self-identified sex/gender of intersex persons, and second, that the government should make reasonable accommodations to protect the security and rights of intersex persons.

Unfortunately, another section of the Persons Deprived of Liberty Act, Section 13, is problematic for intersex people. Section 13.1(e) states that “intersex persons deprived of liberty shall be held separate from other persons.” This amendment is intended to provide greater security to intersex persons; however, it is significant how Section 13.1(e) is interpreted and implemented because if intersex prisoners are held in solitary confinement this would represent a serious violation of their rights. The UN Special Rapporteur on Torture defines solitary confinement as “the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day” (2011, August 5, Para.26) and says that prolonged solitary confinement is psychologically damaging:

The [UN Special Rapporteur on Torture] stresses that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. The Special Rapporteur defines prolonged solitary confinement as any period of solitary confinement in excess of 15 days (2011, August 5, Para.79).
If Kenyan prisons are holding intersex prisoners in prolonged solitary confinement, in response to Section 13.1(e), then they are violating the prisoners’ constitutional right to equality and freedom from discrimination (Article 27), as well as their right to be free from violence (Article 29c), psychological torture (Article 29d), and cruel punishment (Article 29f).

The question of where to hold intersex prisoners is not an easy one. The government has an obligation to house intersex prisoners in a facility where they will be safe from harm from other prisoners and, at the same time, it must refrain from imposing any measures, such as solitary confinement, which singles out intersex prisoners for special punishment. This question deserves further study in order to find a solution which provides security to the prisoner, while respecting their right to freedom from discrimination and cruel treatment. Part of the solution may be to give intersex people a say in where they are detained. Just as intersex people have “the right to decide the sex of the person by whom they should be searched”, they should also be given the right to decide the sex of the detention facility where they will be held. Another potential solution would be to create a special detention facility to hold prisoners who are at high risk of harm from other prisoners. This would include intersex prisoners, as well as prisoners who are transgender and gay.

Any proposal to improve the security of intersex prisoners must include input from Kenyan intersex advocates and it should include a study of detention practices in other jurisdictions. For example, in 2007, the Australia Capital Territory (the regional government that houses Australia’s capital city) created a policy on the management of transgender and intersex prisoners. The policy acknowledges that these prisoners “may be vulnerable in mainstream prisoner populations” (section 1.3) and it specifies that the placement of these prisoners will be based on “the gender the prisoner identifies with” (section 3.1). The Australia Capital Territory policy specifies that “unless there are overriding concerns for the safety or security of any person within the centre, a transgender/intersex prisoner should be accommodated in an area appropriate to their identified gender” (section 3.3) and it states, “ideally, the prisoner should be placed in single cell accommodation, or with other prisoners who self-identify as transgender/
intersex, and given access to a private toilet and shower facilities” (section 3.2).

The rights of an adult intersex prisoner are distinct from the rights of an intersex child; however, in both cases the government has an obligation to provide for their security. It is not enough that law enforcement officers desist from harming intersex persons, they must work to protect this vulnerable group from harm. The obligation of the state to provide “security of the person” is firmly established in international law (Article 3 of the Universal Declaration of Human Rights) and in the Constitution of Kenya (Article 29). The state also has special duty to protect children. Article 53(d) of the Constitution establishes that “every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment…” And Article 4(1) of the Children Act of Kenya states that, “Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.” The security of intersex children in Kenya should be a top priority for the government.

So, how can the government improve security for intersex persons? The government response must be multi-pronged. It must include legislative reform, awareness raising and training of public servants (see Chapter 8. Awareness Raising). And training must include not only law enforcement officials—police officers, prison guards etc.—but also the judiciary itself.

In her Masters Dissertation, High Court Justice Matheka observes that among the Kenyan judiciary there is confusion about who intersex people are. This is not surprising because there is very little information available about intersex people in Kenya; nonetheless, it is concerning because it raises doubt about whether intersex people can receive a fair trial. For example, in the case *RM v Attorney General (No. 705 of 2007)* the High Court wrote the following on the topic of the social stigma faced by intersex people:
The Kenyan Society is predominantly a tradition African society in terms of social, moral and religious values. We have not yet reached the stage where such values involving matters of sexuality can be rationalized or compromised through science. In any case, rationalization of such values can only be done through deliberate action on the part of the Legislature taking into account the prevailing circumstances and the need for such legislation. (Para.148)

This paragraph is concerning because it frames the issue of stigma against intersex people as an issue of values “involving matters of sexuality”. The term “sexuality” refers to a person’s sexual orientation or sexual preference. In other words, whether a person is straight, or gay, or somewhere in between. Although the words sound similar, the issue of “sexuality” is very distinct from the issue of “intersex”, which refers to a condition in which people are born with atypical or ambiguous sex characteristics. At other points during the same court case the High Court did recognize this distinction in terms, but it was not consistent. As Justice Matheka writes,

Certain issues stood out from Mwanzia’s case [the RM case]. The constitutional court's finding that issues of intersex persons were in the realm of public curiosity and had not graduated to general public concern to warrant government protection, regulation or legal recognition concerned me. That court’s definition of sex, maintaining the binary of male and female appeared to be inconsistent with the existence of intersex persons. I noted the occasional mix up of sex and gender, gender identity and sexual orientation, and the impact that had on the outcome of the case (p.27).

If intersex people are to have security in Kenya the courts must demonstrate a clear and unwavering understanding of who they are as a group and what their rights are. This is why the judiciary must be included in any government initiative to train public servants on the issue of intersex rights.
RECOMMENDATIONS

1. Conduct intersex awareness training for all public officials involved in law enforcement and the judiciary (also see Chapter 9: Promoting Awareness).
2. Study the interpretation and application of 13.1(2) of the Persons Deprived of Liberty Act to ensure that intersex people as a group are not being unfairly subjected to solitary confinement.
3. Study the issue of intersex prisoner detention, guided by international human rights principles and best practices, in order to improve security for intersex prisoners, while protecting their right to freedom from discrimination and cruel punishment.
4. The Inspector General of Police to ensure that human rights violations against intersex people are investigated and alleged perpetrators prosecuted, and that victims of such violations receive redress.
Anti-intersex prejudice is based on ignorance. Many people who were once openly hostile to intersex people become intersex allies once they understand that intersex is a naturally occurring condition (it is not a curse), and it is a physical condition that someone is born with (it is not a choice). Therefore the most effective way to combat anti-intersex prejudice is through education.

Legislative reform is needed to improve intersex rights, but laws alone cannot fix the problem. John Chigiti, one of the founders of the Gender Minority Advocacy Trust, and the lawyer in the landmark Baby ‘A’ case, says that “Laws are helpful, but laws alone won’t give intersex people the respect and equality they deserve. There is a need for awareness raising” (Interview, 2016, November 21). This sentiment was also expressed by the High Court in the Richard Muasya case when it called for the government and civil society to “educate the masses” about intersex (see sidebar). Education needs to take place at every level of society, but the first priority is to educate public servants themselves.
HIGH COURT IDENTIFIES NEED TO “EDUCATE THE MASSES”

The following is an excerpt from the High Court of Kenya’s decision in the landmark case RM v Attorney General (No.705 of 2007):

The social stigma suffered by the petitioner [Richard Mwanzia] is something of concern. However in our view the problem of social stigma is not a legal problem. What needs to be done is for parents and those who have such special conditions to be open about their situation, and for the society to be educated to respect the dignity of such people as human beings. As a court, we can issue orders and make declarations, but this will be of little effect considering that the stigma is connected with the public perception which is based on the public’s limited knowledge of intersex status. Few seem to appreciate the fact that the issue of gender definition for an intersex person unlike a transsexual or a homosexual, is a matter of necessity and not choice. Tolerance and acceptance in this area will come with dissemination of appropriate information leading to enhancement of knowledge and better understanding of the condition. The challenge is with the government and the civil society to educate the masses. Indeed, this is what has happened in cases of mentally challenged persons. Society has not only come to appreciate their situation but also the need to have special schools for affected children. No doubt the society has come a long way from the days when such mentally challenged children were killed or abandoned due to cultural biases and beliefs. Such a development and change of attitude can only come gradually with time (Para.145).

Intersex people have a legal right to freedom from discrimination and these rights will not become a reality until public servants are trained to understand and respect people born with intersex variations. For example, intersex people will continue to have unequal access to health care until they know that they can walk into any hospital and receive professional service. And assaults against intersex people will continue to go unreported until intersex people know that they can walk into any police station and be treated with respect. There is no area of the public service that would not benefit from intersex awareness training. Police, judges, doctors, teachers, clerks who issue identification, any public servant who comes into regular contact with the public should be provided with intersex awareness training.
The form and content of the training will vary according to the audience, but public servants must be provided with both a general overview of intersex conditions and a specific knowledge of intersex rights as it pertains to their area of work. For example, all police officers and prison officials should be familiar with the special rights granted to intersex persons under the *Persons Deprived of Liberty Act*.

Most intersex people we interviewed faced similar abuse at school, leading to dropping out of school and battles with depression and suicidality. The *Baseline Survey on Intersex Realities in East Africa* published in 2016 found that “90% of intersex youth interviewed reported that they were forced to drop out of school because of their immense stigma and discrimination associated with the non-binary development of their intersex body” (p.16).

The Ministry of Education can also spread awareness among students by highlighting the existing part of the secondary biology curriculum, which talks about genetic disorders, including disorders of sex development (DSDs). By connecting the Biology curriculum to the issue of intersex rights in Kenya, teachers can make the curriculum more relevant for students; however, they will have to explain to students that the language around intersex rights is contested and it is evolving. Many intersex people reject the term “disorder”, which has a very negative connotation, and prefer intersex “condition”, intersex “variation”, or intersex “status”. Teachers should be trained to teach this part of the curriculum in a sensitive manner because there is always a possibility that one of their students is intersex and this may be the first time that they are learning about their condition. For example, Ryan Muiruri first learned about intersex by reading the chapter on genetics in his school Biology textbook (Interview, 2016, December 9).

The government has a duty to educate the general public. This can take the form of high profile media campaigns—radio, television, newspaper—spreading awareness and acceptance of intersex conditions. Involving prominent Kenyans (politicians, athletes, media personalities) can help the campaign reach a wider audience. And we urge the government to join the United Nations and the African Commission for Human and Peoples’ Rights in celebrating Intersex Awareness Day every year on October 26.
It is important to involve intersex people in formulating the content of any awareness raising campaign. Not only do intersex people have an inherent right to define their own community using their own terms, but they are more attuned to subtle differences in messaging, which may be missed by people who are not intersex. For example, Hida Veloria, an intersex advocate who has worked with the United Nations in its intersex awareness campaign, says that a campaign which focuses on the positive potential of intersex people is more effective at changing attitudes than a campaign that focuses on intersex people as victims of violence.

I believe that being intersex is not about being mutilated people, or babies in need of protection (a perspective/framing which keeps us infantilized and invisible as adults…). We are a type of human that I believe is beautiful, equal, and has a lot to offer society, and changing society to incorporate this perspective is, I believe, our most effective strategy (Email, 2017, February 28).

This was a message reiterated by James Karanja, Kwamboka Kibagendi and Ryan Muiruri when they spoke with the Departmental Committee on Administration and National Security in October, 2016. These three intersex individuals explained that they want to be treated with dignity and equality, so that they can reach their potential and become productive members of society.

Another positive message presented by James, Kwamboka, and Ryan at the parliamentary committee meeting was that, in Kenya, religion can be a source of support for intersex people. As Kwamboka Kibagendi explains “our main entrance to the community is the pastors, the church leaders. Whenever we talk to these people they accept us immediately.” Once church leaders understand that intersex variations are congenital, in other words these physical traits are present from the time of birth, they are very supportive. The Bible teaches that we are all of us God’s creation,
For you created my inmost being; you knit me together in my mother’s womb. I praise you because I am fearfully and wonderfully made; your works are wonderful, I know that full well. My frame was not hidden from you when I was made in the secret place, when I was woven together in the depths of the earth (Psalms 139: 13-15, New International Version).

And a similar message is also present in the Holy Quran:

To Allah belongs the kingdom of the heavens and the earth. He creates what He wills. He bestows female (offspring) upon whom He wills, and bestows male (offspring) upon whom He wills. Or He bestows both males and females, and He renders barren whom He wills. Verily, he is the All-Knower and is Able to do all things (Surah 42: 49-50, Hilali and Khan Version)

The message that God does not make mistakes in his creation is an important one for combatting the stigma facing people born with atypical sex characteristics.
RELIGIOUS BELIEF LEADS SOUTH AFRICAN PARENT TO FORGO SEX ASSIGNMENT SURGERY

The message that intersex children are God’s creation has led some parents to refrain from carrying out sex assignment surgery on their young child. For example, a mother in South Africa says that she and her husband considered genital surgery, but decided against it on religious grounds.

“I have decided to keep quiet about this challenge [raising an intersex child] because according to our culture, it is a curse to have a child of this nature. But there was nothing I could do about it. My husband was the one who decided that we should leave our child the way he is, because it was God’s way of doing things” (Lekgetho).

The child was fortunate that his parents decided against surgery because it turned out that he was assigned the wrong gender at birth. For the first seven years the child was raised as a girl, but when he turned eight he decided that “he felt more comfortable as a boy” and his parents allowed him to transition from “she” to “he” (Lekgetho).

Anti-intersex stigma can also be challenged by emphasizing the value of diversity, a value which lies at the heart of the Constitution. The preamble to the Constitution states, “we, the people of Kenya, are proud of our ethnic, cultural and religious diversity” and Article 131.2(d) of the Constitution states that the President shall “promote respect for the diversity of the people and communities of Kenya”. Intersex people should be recognized as a natural and healthy manifestation of human diversity. In other words, diversity of body types, or “body diversity”, should be celebrated along with ethnic, cultural and religious diversity.

One of the main targets for an intersex awareness campaign must be the parents of intersex children. For many parents, the challenge of raising an intersex child in a country is overwhelming. James Karanja testified how his father abandoned the family soon after he was born and his mother had a mental breakdown due to the stress of raising an intersex child (Interview, 2017, March 9). And, the two parents we interviewed...
testified how they have been financially devastated by the medical cost of caring for their intersex child and one of them has had to seek psychological counselling to deal with the stress (Interview, 2017, February 16). In both cases, the parents tried to keep the existence of their child’s intersex status a secret from their friends and family for fear of their reaction. In her Masters Dissertation, Justice Matheka cites an article from a medical journal which states that “next to perinatal death, genital ambiguity is likely to be the most devastating condition to face any parent of a newborn” (p.22). An awareness raising campaign must address parental stresses and fears head on, because this is the one of the key components to improving well-being for intersex children.

**EDUCATIONAL RESOURCES**

There are an ever growing number of educational resources promoting intersex awareness. For example, the United Nations now has an excellent website titled “Free & Equal: United Nations for Intersex Awareness” ([https://www.unfe.org/intersex-awareness/](https://www.unfe.org/intersex-awareness/)), which includes a short video about two parents’ reaction at learning that their newborn is intersex ([https://youtu.be/SpWdVTzgG8](https://youtu.be/SpWdVTzgG8)). The Open Society Foundations also has great information about intersex, including a short animated video on the life of Julius Kaggwa, founder of SIPD-Uganda. The video is titled “Born Julia and Julius” ([https://youtu.be/K38SltVzBqM](https://youtu.be/K38SltVzBqM)).

The following are some of the messages that an awareness raising campaign should convey to parents:

**You are not alone.** There are thousands of intersex people in Kenya, and thousands of families struggling with the same challenges that you are struggling with. (Hopefully, as the awareness campaign raises the visibility of intersex people, more parents will find the courage to share their stories, and parent-to-parent support groups will form.)
Intersex people are not the problem, social stigma is the problem. Intersex bodies are beautiful, they are a natural part of human diversity. The problem is not with intersex bodies, but with society’s lack of acceptance. However, societal attitudes can change. Just as twins were once thought to be a curse, but education has changed this belief, so too can anti-intersex beliefs be changed.

Your child will be successful in life. The most important thing that your child needs is your love and support, and with that love and support they can overcome any challenge. Many intersex people have families of their own and have successful careers.

Do not be surprised if your child’s gender changes. It is impossible to know the gender identity of your child when they are born and there is a chance that the gender you assign your intersex child at birth will not be the gender that they identify with when they grow up. If your child does grow up to identify with another gender you should allow them to live as their preferred gender. It is important for a person’s psychological well-being and to the fulfilment of their right to self-determination that they be allowed to live as their preferred gender. It may seem surprising, but thousands of children in Kenya and around the world have changed their name, their gender pronoun (from “he” to “she” or vice versa), and their outward appearance to match the gender identity that they feel strongly inside, and they are now living happily in their new identity. Over a third of countries in the world now allow people to change the gender listed on their identity documents.

Some intersex people do not identify with either gender. Just as some intersex children will choose to switch their gender when they grow up from “he” to “she” or vice versa, some intersex children will not identify as either “she” or “he” when they grow up. People who identify as a third gender sometimes describe themselves as “gender non-binary” or “gender
non-conforming”. They may feel part male and part female; or they may feel that their gender identity is not fixed, that it is fluid; or they may feel completely androgynous, neither male, nor female.

**Do not permit sex assignment surgery on your child.** A large number of intersex people as adults deeply regret the genital surgery that was performed on them as children. Many intersex people refer to this practice as intersex genital mutilation (IGM) and international human rights bodies condemn this practice as a violation of basic human rights. Do not authorize sex assignment surgery for your child. Instead, let your child grow up to make their own decisions about what medical interventions (surgery, hormone therapy etc.) they wish or do not wish to have. Many intersex people choose to skip surgery entirely and this is perfectly fine.

**Share information with your child.** It is best to inform your child at a young age that they are intersex. They should know that their body is not typical, it is different from most other children. And, at the same time, let them know that they are not alone, there are many other children in Kenya who have bodies similar to theirs. They should also be informed of any necessary medical interventions that have been performed (such as medically necessary hormone treatment) and the reasons for these interventions. If parents feel comfortable talking with their child about their body, their child will develop a healthy relationship with their own body and they will develop the confidence to talk about any medical needs or questions that they may have. The alternative approach adopted by many parents is keep their child’s intersex status a secret, from their family and friends and even from their own child. This approach sends children the message that there is something shameful and unspeakable about their body. The documentary *Intersexion* (2012) reveals that intersex children are more likely to be victims of sexual abuse because victimizers know that these children are taught to view their own body with shame and secrecy, and they are less likely to report abuse.
Parents should learn that “God is the one who created this person and he has a purpose. They should learn how to love that child and protect him or her.” – *Sidney Etemesi, intersex advocate*

There is a lot that the government can do to promote intersex awareness; however, the most important catalyst for change is not the government, but the intersex community itself. Currently one of the things holding back the movement for intersex rights in Kenya is that the intersex community is largely invisible. A few courageous intersex individuals have been advocating for intersex rights for years, but the vast majority of Kenyans who are intersex keep their intersex status secret. Justice Matheka writes that “comparing intersex to persons with disability illustrates how their marginalization can be dealt with” (p.77-78). Justice Matheka quotes a senior official at the Kenya Law Reform Commission who is visually impaired, “Visibility is the key. It requires that the intersex persons speak for themselves” (p.78). Isaac Mwaura, the nominated Member of Parliament for Special Interest Groups, also has personal experience fighting marginalization as a member of the albino community, and he agrees that intersex people need to advocate for themselves: “I am of the opinion that people should be courageous enough to develop their own identity and to go with it” (Interview, 2017, January 13).

When the government initiates its intersex awareness campaign and sends a clear message that it stands in solidarity with intersex people, the number of intersex people willing to go public with their experience will grow exponentially. Once there is a critical mass of intersex people, and parents of intersex children, willing to “speak for themselves” the movement for intersex rights will reach national prominence. The positive impact that a strong advocacy organization can have on a country is apparent by looking at the work of the *Support Initiative for People with Congenital Disorders (SIPD)* in Uganda. SIPD is currently the only exclusively intersex organization in East Africa and during the ten years that it has been active it has achieved a lot. Among its accomplishments SIPD has: conducted in-depth research and reporting on human rights violations against intersex persons, convened the first ever regional intersex meeting with intersex advocates from Rwanda, Burundi, Kenya, Congo, Tanzania and Uganda (*Baseline Survey*, p.24), and reached out to intersex people and their families in every region of Uganda. Perhaps
most notably, SIPD’s advocacy efforts led Ugandan lawmakers to amend the laws to allow intersex people who have been misgendered to change their legal gender (Email received 2017, Mar.28). Uganda, has shown that there is nothing more effective than intersex people advocating and educating on their own behalf.

**RECOMMENDATIONS.**

1. Intersex awareness workshops should be organized, with the participation of intersex persons, and implemented in all government departments and ministries.
2. The Government should initiate a nationwide intersex awareness campaign to combat stigma and promote acceptance of intersex people.
3. The Government should foster the development of intersex advocacy by removing any bureaucratic barriers to the creation of intersex advocacy organizations, and by including intersex advocates in drafting legislative and policy reforms.
Human rights violations against intersex children and adults in Kenya represent a serious and ongoing problem. Fortunately, the Government of Kenya has signalled its intention to address this issue. Shortly before the conclusion of this report, the Attorney-General, Honourable Githu Muigai, established a Task Force on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya. The goal of the task force among other things is to: examine the existing policy, institutional, legislative, medical and administrative structures and systems governing intersex persons and recommend comprehensive reforms to safeguard their interests. As a member of this Task Force, this Commission will work towards developing reforms which uphold the rights and dignity of intersex persons.

As we proceed together to draft reforms that advance the rights of intersex people, we must do so with humility. We must listen to all stakeholders and we must carry out more research in order to better understand the challenges facing intersex people. Issues, such as birth registration for intersex children, must be studied carefully, in order to avoid reforms that worsen, rather than improve the situation for intersex people. Finally, reforms must be guided by the Constitution and international human rights law, informed by best practices in other countries, and include the active involvement of intersex people.

This Commission is committed towards building a Kenya where diversity is seen as a strength, not a weakness, and where all people are equal in dignity and rights.
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APPENDIX

Intersex Awareness Day – Wednesday 26 October

End violence and harmful medical practices on intersex children and adults, UN and regional experts urge

(24 October 2016) – Speaking ahead of Intersex Awareness Day on 26 October, a group of United Nations and international human rights experts* is calling for an urgent end to human rights violations against intersex children and adults. They urge Governments to prohibit harmful medical practices on intersex children, including unnecessary surgery and treatment without their informed consent, and sterilization.

In countries around the world, intersex infants, children and adolescents are subjected to medically unnecessary surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies. When, as is frequently the case, these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights.

Parents of children with intersex traits often face pressure to agree to such surgeries or treatments on their children. They are rarely informed about alternatives or about the potential negative consequences of the procedures, which are routinely performed despite a lack of medical indication, necessity or urgency. The rationale for these is frequently based on social prejudice, stigma associated with intersex bodies and administrative requirements to assign sex at the moment of birth registration.

Profound negative impacts of these often irreversible procedures have been reported, including permanent infertility, incontinence,
loss of sexual sensation, causing life-long pain and severe psychological suffering, including depression and shame linked to attempts to hide and erase intersex traits. In many cases intersex people do not even have access to their own medical records or original birth certificates.

While awareness of the existence and rights of intersex people is slowly growing thanks to the work of intersex human rights defenders, only a handful of countries have taken concrete measures to uphold their rights and protect them from abuses.

States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children. They must uphold the autonomy of intersex adults and children and their rights to health, to physical and mental integrity, to live free from violence and harmful practices and to be free from torture and ill-treatment. Intersex children and their parents should be provided with support and counselling, including from peers.

Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves. They should have access to support as well as to medical services that respond to their specific health needs and that are based on non-discrimination, informed consent and respect for their fundamental rights. In this connection, it is critical to strengthen the integration of these human rights principles in standards and protocols issued by regulatory and professional bodies.

States should investigate human rights violations against intersex people, hold those found guilty of perpetrating such violations accountable and provide intersex people subjected to abuse with redress and compensation.

Ending these abuses will also require States to raise awareness of the rights of intersex people, to protect them from discrimination on
ground of sex characteristics, including in access to health care, education, employment, sports and in obtaining official documents, as well as special protection when they are deprived of liberty. They should also combat the root causes of these violations such as harmful stereotypes, stigma and pathologization and provide training to health professionals and public officials, including legislators, the judiciary and policy-makers.

List of signatories
- UN Committee against Torture (CAT)
- UN Committee on the Rights of the Child (CRC)
- UN Committee on the Rights of People with Disabilities (CRPD)
- UN Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)

UN independent experts
- Mr. Juan Méndez, Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment
- Mr. Dainius Pwėras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,
- Ms. Dubravka Šimonovic, Special Rapporteur on violence against women, its causes and consequences,
- Ms. Marta Santos Pais, Special Representative of the UN Secretary-General on Violence against Children

Regional experts
- Mr. Nils Mužnieks, Commissioner for Human Rights, Council of Europe-Inter-American Commission on Human Rights