KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

MEMORANDUM ON THE HUMAN RIGHTS DIMENSIONS OF COVID-19

PRESENTED TO

THE SENATE AD HOC COMMITTEE ON THE COVID-19 SITUATION

8TH APRIL, 2020
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A. INTRODUCTION

The Kenya National Commission on Human Rights ("KNCHR" or "National Commission") is an independent National Human Rights Institution established under Article 59 of the Constitution with a broad mandate to promote and protect human rights in the Republic of Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the Paris Principles.

The National Commission under Article 249 of the Constitution has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.

It is on this basis that the KNCHR submits this memorandum to the Senate Ad Hoc Committee on response to the COVID-19 situation.

B. BACKGROUND

Pursuant to the Senate Resolution to establish this Ad Hoc Committee on response to the COVID 19 situation and the subsequent call for submission of memorandum, the National Commission tenders its submissions and addresses you as follows:

The COVID-19 pandemic is a global healthcrisis that has greatly disrupted the lives of many Kenyans. Barely 3 weeks since the first case was confirmed, Kenya has reported rising cases of infections and fatalities. Other than the right to health, the novel Corona virus has had far reaching effects on an array of civil and political rights as well as economic, social and cultural rights. In this regard, the Office of the High Commissioner for Human Rights has underscored the significance of human rights in ensuring long-term and durable solutions as the government tackles the public health threat posed by the COVID-19 pandemic.

1 As per the Ministry of Health, as at 8th April, 2020 the number of confirmed COVID-19 cases were 172, 7 recovered and 6 deaths
We laud the State for its tireless efforts to address the pandemic. However, there is need to increase adherence to human rights principles and approaches in formulation and implementation of interventions by the state.

C. HUMAN RIGHTS CONCERNS ARISING FROM COVID-19 SITUATION

The National Commission humbly submits as follows in relation to human rights and the following five thematic areas;

1. HEALTH ISSUES

1.1. Mandatory quarantine

The Cabinet Secretary in charge of health in his statement dated 22 March 2020 stated that those coming into Kenya between 22 March 2020 and 25 March 2020 will ‘undergo mandatory quarantine at government designated facilities at their own expense.’ In addition, he directed that any person who has tested positive for the Corona Virus disease shall undergo a mandatory quarantine at a designated health facility.

Public health may be invoked as a ground for limiting certain rights including right to movement under Article 12 of the International Covenant on Civil and Political Rights to allow governments to tackle serious threats to public health. The Siracusa Principles state that in limiting rights because of public health concerns, due regard shall be given to the international health regulations of the World Health Organization.

Furthermore, the Committee on Economic, Social and Cultural Rights has further elaborated on using public health as grounds for limiting the exercise of other fundamental rights. In General Comment No 14 on Article 12 on the right to the highest attainable standard of health, the Committee has called on state parties to ensure that limitations must be proportional, for limited duration and subject to review.

The World Health Organization (WHO) has recommended isolation and quarantine as a measure to contain the spread of the COVID-19 thereby limiting freedom of movement. The WHO has given direction/key considerations for repatriation and quarantine of travellers in

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In line with Article 32 of the international health regulation, the World Health Organization has advised countries as follows:

i. **Infrastructure**: whereas there is no universal guidance on infrastructure for a quarantine facility, space should be respected not to further enhance potential transmission.

ii. **Accommodation and supplies**: travellers should be provided with appropriate accommodation including sleeping arrangements, clothing, protection of baggage and other possession and appropriate medical treatment.

iii. **Communication**: establish appropriate means of communication channels so as to avoid panic

iv. **Respect and dignity**: travellers should be treated with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress with such measures

v. **Duration**: the WHO recommends 14 days of quarantine; however, this may be extended due to delayed exposure.

In assessing government’s action on quarantining travellers in Kenya, due regard must be accorded to the above principles.

**We call upon the Senate to:**

i. **Ensure that accommodation in the quarantine facilities encourage social distancing to prevent potential transmission of COVID-19.** Complaints/concerns emerging from government quarantine facilities regarding sleeping arrangement which do not encourage social distancing and conditions of sanitary facilities within the quarantine areas need to be promptly addressed.

ii. **Ensure constant communication with those in mandatory quarantine.** This includes a channel through which those in mandatory quarantine can channel their complaints including on charges for accommodation.

iii. **Ensure the respect for dignity and human rights of persons in mandatory quarantine.** This includes ensuring that the conditions of quarantine facilities are conducive for human habitation. Those in mandatory quarantine should have access to food, medical care, portable and safe water, sanitary facilities, clothing, information concerning period of quarantine and reasons thereof etc. The security of the persons in the quarantine facilities, especially the women, children and persons with disabilities, must also be safeguarded.

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1.2. **Right to health in the context of COVID-19**

The COVID-19 pandemic engages the right to health under Kenya’s international and domestic human rights laws. The human right to health is recognised in a number of instruments including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples Rights.

Reference is made to General Comment No 14 on the right to the highest attainable standards of health of the Committee on Economic, Social and Cultural Rights. The right to health ought to be viewed as an:

...inclusive right extending not only **timely and appropriate health care** but also to **underlying determinants of health** such as **access to safe and portable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health** (emphasis added). A further important aspect is the participation of the population in all health-related decision making at community, national and international levels.

A human rights-based approach to addressing the COVID-19 pandemic requires that the government address and ensure that the population including the most vulnerable have underlying determinants of health such as safe and portable water; adequate sanitation, and health related information and education on COVID-19. In ensuring access to health-related information and education, the government ought to ensure that the information is accessible to persons with disabilities in line with its obligations under the Convention on the Rights of Persons with Disabilities.

The Committee has further elaborated on the content of Article 12 of International Covenant on Economic, Social and Cultural Rights as follows:

i. **Availability**: refers to functioning public health and health care facilities, services as well as programs in sufficient quantities. There is a recognition by the Committee that the precise nature of goods and services may vary depending on numerous actors including the level of development in state parties. A human rights-based approach requires that the government scale up investment (based on available resources available) in the existing public health infrastructure to meet the health needs of the community including prevention, treatment and control of the pandemic.

ii. **Accessibility**: the Committee has reiterated that health facilities, services and goods must be available to all persons without discrimination. Accessibility has four overlapping dimensions which includes non-discrimination; physical accessibility; economic accessibility; and information accessibility.
The UNAIDS in its publication titled ‘Rights in the time of COVID-19: lessons from HIV for an effective, community-led response’ has stated that “In the context of an acute outbreak, where public transport has been halted and business operations shut down, access to medicines and services— including anti-retroviral therapy, pre-exposure prophylaxis, opioid substitution therapy, sterile needles and other harm reduction services, mental health care and medication for other chronic conditions— must continue uninterrupted.”

We call upon the Senate to require that the government invests resources it has mobilised to ensure:

i. That all persons in need of treatment and care are able to have physical access to medical/health facilities even during time of curfew.

ii. In line with the World Health Organizations directive, government must work to ensure that there is accessible and quality screening, testing and hospital care in order to prevent, treat and control the COVID-19 epidemic. Accessibility further connotes that government has a positive obligation to ensure continuing access to health care and medicines for all and a people centred approach for persons who are most vulnerable.

iii. Health facilities, goods and services ought to be affordable for all. That health services, goods and facilities are accessible to all including the most vulnerable and marginalised sections of society. Out of pocket payments should not be a barrier to accessing testing and hospital care for those who have acquired COVID-19.

iv. Economic accessibility further extends to underlying determinants of health such as safe and portable water, adequate sanitation facilities, food and nutrition. A human rights-based approach to addressing COVID-19 would require that government (at national and county level) to take measures to ensure access to safe and portable water, hand sanitizers and sanitation facilities essential towards preventing the spread of COVID-19 pandemic.

v. Acceptability: health facilities, goods and services must be respectful to medical ethics and must be culturally appropriate. In addition, the health facilities, goods and services must be designed to respect confidentiality and improve the health status of those concerned.

vi. Quality: health facilities, goods and services must be scientifically and medically appropriate and of good quality. A human rights-based approach requires that the government invests in skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and portable water, hand sanitizers and sanitation. Within the COVID-19 context, it is critical for the government to invest in adequate numbers of health personnel, personal protective equipment, testing and screening equipment and other equipment/medicines needed to support the care of a person who has acquired COVID-19 and is in need of treatment. Ensure uninterrupted access to quality health and services to those in
need of care and treatment such as treatment and care of those with chronic or life-long health conditions.

2. ECONOMIC AND FINANCE ISSUES

It is our humble submission that COVID-19 has effectively paused the tracks of the global economy as well as our national economy. Businesses are executing strategies to minimize costs and eventual losses arising from the current restrictions on free movement that have significantly slowed down production and trading capacity. The majority of Kenyan businesses are small enterprises that fall under non-essential category of enterprises within the current restrictions of undertaking business. As a result, many companies have deferred contractual payments, refused delivery of already produced goods and canceled orders. These actions raise concerns around the impact on human rights as well as sustainability of businesses. Throughout supply chains, workers have fully or partially lost their wages and are facing serious difficulties to weather out the pandemic. Those who continue to work such as health workers, do so at the grave risk of their own lives. Migrant workers have no access to social security and travel restrictions means that they are unable to return home. Vulnerable groups are also facing additional barriers due to their vulnerability.

The UN Guiding Principles on Business and Human Rights remind us that even in times of severe burdens, the duty to respect human rights by government and businesses cannot be waived. Business activities must be seen to uphold human rights at all times. Notably, businesses can become involved in human rights violations through business relationships, hence, an important time to pull together and address the challenges collaboratively and in a broader spectrum especially now when the risk to human life is so high.

The National Commission applauds the government for offering taxation reliefs and applaud businesses that have taken measures to significantly reduce negative impacts on human rights. In order to deepen the resolve to respect human rights during this time, KNCHR recommends the following:

i. Collaboration: The Government should encourage and support businesses to dialogue within sectoral multi-stakeholder associations such as KEPSA, KAM and Chamber of mines in order to mitigate COVID-19 impacts cumulatively. Collaborative measures are useful in the pool of resources specially to assist those that have it more difficult than others.

ii. Employment: In order to promote sustainability, we have seen businesses taking up contingency measures such as salary reduction and withdrawal of benefits. These measures are not captured in company policies or employment contracts, thus, a risk to human rights violations. Although it is an extraordinary time requiring extraordinary measures, businesses must not
violate Labor laws or take up measures that have discriminatory impacts as business stand the risk of employment discrimination lawsuits. Mitigation efforts should match the human rights risks. As the first measure, businesses must be encouraged to exhaust every opportunity to retain workers, and as a last resort take up contingency measures that are guided by a human rights-based approach which includes consultation and participation of workers in decision making. In order to support social distancing paid leave should be highly encouraged and supported.

iii. Health and Safety: Businesses must prioritize health and safety through different measures that comply with social distancing as well as the Occupational Safety and Health Act. Some interventions include provision of PPEs, trainings on COVID-19 and where applicable, ensuring worker housing and office sitting arrangements are appropriate for social distancing. Protecting workers and public safety is essential for maintaining business reputation, consumer confidence and the social license to operate, as well as staying operational.

iv. Financial prudence: Businesses should be encouraged to maintain the highest level of ethical financial management and responsibility, including maintain timely payments to suppliers and work with customers facing financial challenges.

To this end, we call upon the Senate to take steps to ensure that:

i. The government rolls out emergency economic assistance programmes, issue cash transfers, issue wage subsidies among other measures to help businesses stay afloat.

ii. Even as Kenya relies on external financing in the implementation of its projects, the government should prepare for sudden stops and disorderly market conditions, possibly requiring foreign exchange intervention or temporary capital flow measures.

iii. Companies are offered grant tax breaks to increase their capacity to produce import substitute goods, which could mean zero-rating VAT for the next few months. Additionally, there should be measures to strengthen the local supply chain for traders to be able to access import substitute goods.

iv. Industries that are worst hit e.g. businesses involved in export of horticulture and agricultural goods; are offered tax reliefs and funds to catalyze their growth at the end of the pandemic.
v. There are uniform instructions to all financial institutions including SACCOs to relieve borrowers from consequences of non-payment of loans for a specified period of time. After all, the Central Bank advised Commercial Banks to restructure or review loan terms for borrowers. A large percentage of the population are members of SACCOs and have loans with these institutions.

vi. The administration of the COVID-19 Emergency Response Fund is transparent and accountability measures as spelled out in the Public Finance Management (Covid-19 Emergency Response Fund) Regulations, 2020 are complied with to the latter.

3. SOCIAL, PUBLIC ORDER AND HUMAN RIGHTS ISSUES

Under this thematic area the National Commission submits on the following areas;

- Protection of the rights of migrants
- Access to Justice and Petty Offences
- Police Accountability
- Disproportionate impact of COVID-19 on women and girls
- Disability-inclusive COVID-19 Response
- Right to Education

3.1. Protection of the rights of migrants

It is evident that the COVID-19 pandemic has brought about a lot of legal issues. Key amongst those issues is the problem of migrants within the country. There have been cases of migrants whose temporary permits to be in the country are due to expire at a period when there are restrictions on travel across the world. This therefore prevents the said persons from travelling back to their countries of origin.

Handling of refugees in the urban areas should be prioritised by the Refugee Affairs Secretariat, the UNHCR and relevant organizations to support them to access proper protective equipment, access the requisite medical treatment and comply with Ministry of Health recommendations as we fight the COVID-19.

We call upon the Senate to ensure that:

i. The government puts in place and communicates guidelines by the immigration officers on how to enforce migration laws without further violation of the human rights of migrants during this pandemic period. Further, the guidelines must include proposals of various options of
handling migration related offences to avoid unnecessary arrests of people who have expired visas, lack proper travel documentation until the pandemic has been addressed. Contingency measures in liaison with respective embassies need to be explored to see how amicably this situation can be addressed in the interim. Police should also be advised against arresting person with expired permits as modalities for either extending those permits or suspension of the same are communicated from the responsible ministry.

ii. There are specific targeted measures in place to manage and handle displaced persons i.e. Internally Displaced Persons and Refugees.

3.2. Access to justice and Petty Offences

Continued arrests of petty offenders by the police even during this period where issues like social distancing are encouraged will strain existing penal and reform institutions such as police cells, remand and prisons. Moreover, courts around the country have currently scaled down and only handle serious offences as per the directions of the Chief justice.

The prisons are congested as it stands and a single case of COVID-19 within a prison will throw the entire system into chaos as measures for isolation and treatment are non-existent. Therefore, the judiciary in conjunction with other actors within the criminal justice system need to develop a strategy on release of petty offenders and other offenders with less than 6 months remaining on their sentences to reduce the numbers within the prison service. Sentences of civil debtors should also be suspended until the pandemic has been addressed.

We call upon the Senate to ensure:

i. Appropriate measures e.g. instant fines and low police bonds for petty offenders are introduced by the government to avoid pressure on the existing penal and reform institutions. The police should also be restricted to serious crimes since the avenue for adjudicating petty offences is currently under suspension. Arrests without courts to adjudicate on the issues presents an avenue for abuse and contravention of the constitutional right to access justice.

ii. Development of a strategy by criminal justice actors to deal with petty offenders so as to decongest penal and reform institutions.

iii. Facilitation of PPEs to police and prison officers and the upscale of the requisite underlying determinants of health including safe and portable water and sanitizers in all police stations and places of detention
iv. Designation of quarantine units within prisons across the country

v. The enhancement of public education on COVID in all prisons

3.3. Police Accountability:

Police officers should desist from unwarranted arrests and hoarding of people either in one place for long or locking them up for long hours in enforcement of the curfew and other government directives to curb the spread of COVID-19. This poses two dangers; possibility of infecting other detainees and also transmission of the virus to law enforcement officers and their families.

The police guidelines on the alternative ways of handling the various offenders should also be released to the public to enable accountability and fight against upsurge of petty crimes even as we continue to observe the Government’s dusk to dawn curfew, containment and all other Government directives on COVID-19 prevention.

Police officers to uphold the rights of special groups like the children, women, persons with disability, street children/ families, migrants and sexual minorities during this period to avoid further violations.

We call upon the Senate to

i. Emphasise on compliance with human rights principles by law enforcement agencies. After all, COVID-19 is a reason to re-affirm, and not abandon, human rights.6

ii. Police guidelines on alternative ways of handling the various offenders to be released to the public to enable accountability as we continue to observe Government directives on COVID-19 prevention.

iii. Appropriate measures be put in place for accountability of human rights violations by security agencies and any other actors during this period. Personal and command responsibility should also be enforced to ensure culpability of the officers who violate the rights of the citizens.

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3.4. **Disproportionate impact of COVID-19 on women and girls**

Outbreaks of diseases have gendered impacts, and in particular women and girls experience more harmful impacts due to longstanding gender inequity. Given that women are primarily more interactive at the community level, and participate in much of the social care work, they face higher exposure to risks of contracting COVID-19. Additionally, the raft of measures undertaken by the government to mitigate the pandemic has resulted to increased police activity, overload of healthcare systems, reallocation of resources, low availability of medical supplies, loss of wages and income, all that impact rights of women and girls disproportionately. Some of the impacts include lower attention to Sexual and Reproductive health rights, increased gender-based violence and discrimination in labor practices.

With regards to the security of women, statistics both globally and nationally have seen a spike in gender-based violence exacerbated by the various government directives including lockdown and curfews.

**In order to address these concerns, we call upon the Senate to put in place measures that ensure:**

i. *Increased government surveillance and response to gender dimensions of Covid-19 including the disaggregation of data to include sex, age, gender and pregnancy status.*

ii. *Provision of messaging that enhances people’s safety, dignity and rights.*

iii. *Health care overload and budget cuts do not significantly affect women and girls of reproductive age including expectant women in need of treatment*

iv. *Psychosocial support systems are considered a priority to promote mental well-being of all as well as offer remedy for victims of gender-based violence.*

v. *Close collaboration of partners to enhance gendered approaches in all responses by state and non-state actors seeking to manage the pandemic.*

vi. *Prioritization of gender violence cases during the pandemic in investigations and prosecutions and availing safety measures to the victims including provision of safe houses and hot lines.*
3.5. **Disability-inclusive COVID-19 Response**

The World Health Organization notes that certain populations, such as those with disabilities, may be impacted more significantly by COVID-19 and calls for mitigation through protective measures to be taken by key stakeholders. People with disabilities may be at greater risk of contracting COVID-19 because of a variety of reasons. First, persons with disabilities may experience barriers to implementing basic hygiene measures, such as hand washing (e.g. hand basins or sinks may be physically inaccessible, or a person may have physical difficulty rubbing their hands together thoroughly). Secondly, persons with disabilities may have difficulty in enacting social distancing because of additional support needs (such as need for support in eating, dressing, toileting) or because they are institutionalized (for example in mental health facilities). Thirdly, persons with disabilities may experience barriers to accessing public health information. Finally, some persons with disabilities may be at a higher risk of contracting COVID-19 due to respiratory conditions caused by certain impairments.

**Key issues for consideration** as relating to persons with disabilities during the COVID-19 pandemic include:

3.5.1. Access to information - Persons with disabilities experience barriers in accessing information on COVID-19 in accessible formats by all, barriers in accessing information about services that they may require as a result of their disabilities (e.g. mental health services for those with psychosocial disabilities) and in being able to communicate with the Ministry of Health.

3.5.2. Currently, there are barriers in accessing information on COVID-19, particularly by people in psychiatric units, and by people with intellectual disabilities who require information in easy to understand formats, people with dementia and children. Additionally, among the Deaf community, there are complaints that media houses zoom in on the state official giving the daily briefings and not the interpreter and therefore access to information is hampered, even though there is usually a sign language interpreter at the daily briefings. Information, for example about curfews, is not always in accessible formats, especially for individuals with intellectual disabilities.

*We call upon the Senate to put in place measures to ensure that:*

i. **Persons with disabilities receive information about COVID-19 infection mitigating tips, public restriction plans, and the services offered, in a diversity of accessible formats with use of accessible technologies where appropriate.**

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7International Disability Alliance ‘Toward a Disability-Inclusive COVID19 Response: 10 recommendations from the International Disability Alliance’ (19 March 2020)
media communication should include captioning, national sign language (for all live and recorded events and communications, including national addresses, press briefings, and live social media)\(^8\), high contrast, large print information.\(^9\) It is also critical to convert public materials into “Easy Read” format so that they are accessible for people with intellectual disabilities or cognitive impairments,\(^10\) including persons with dementia.

ii. The Ministry of Health actively involves organisations of persons with disabilities, including advocacy bodies and disability service providers to disseminate information about COVID-19.\(^11\)

iii. There is provision of a hot line in multiple formats (e.g. telephone and email) for people with disabilities to communicate with the government, ask questions, and raise concerns.\(^12\) The national hotline should be publicized on national media (including vernacular stations).

iv. Disclosure of information relating to a patient’s health status, treatment or stay in a health facility is not to be actively disclosed unless with the express and informed consent of the patients as to the nature of exposure. This is in line with section 11 of the Health Act (No. 21 of 2017) as well as the Access to Information Act. This will ensure that persons who test positive and their families are safeguarded against stigma and discrimination based on their health status which would negatively impact the mental health of patients and their families and claw back on efforts towards containment of spread of the disease.\(^13\)

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\(^11\) Ibid

\(^12\) Ibid

\(^13\) See similar provisions with regard to privacy and disclosure of information contained in the HIV and AIDS Prevention and Control Act (No. 14 of 2006).
3.5.3. Access to the physical environment and services - Persons with disabilities experience barriers in accessing health care generally. These include physical barriers (such as uneven pathways, stairs, hard-to-reach spaces or hard-to-use equipment); attitudinal barriers (such as social stigma against disability and the denial of essential services); and financial barriers (such as high costs related to treatment or accessing the facility).\textsuperscript{14}

We call upon the Senate to put in place measures to ensure that:

\begin{enumerate}
  \item All clinics providing testing and services related to COVID-19 are completely accessible and that information about the accessibility of COVID-19 health services is disseminated to people with disability and their caregivers.\textsuperscript{15}
  \item Quarantined persons with disabilities have access to interpretation and support services, either through externally provided services or through their family and social network.\textsuperscript{16}
  \item Community Health Workers are utilized and where possible, deliver home-based consultations for people with disabilities, including for their general health needs and, where appropriate, for COVID-19 related needs.\textsuperscript{17}
  \item Telephone consultation, text messaging and video conferencing are utilized for the delivery of health care for people with disabilities. This may be for their general health, and include rehabilitation needs and, where appropriate, COVID-19 related needs.\textsuperscript{18}
  \item Government planners always consider that mobility and business restrictions disproportionately impact persons with reduced mobility and other persons with disabilities and allow for adaptations. For example, Australia has reserved specific opening hours in supermarket for persons with disabilities and older persons.\textsuperscript{19}
\end{enumerate}

\textsuperscript{15} Ibid
\textsuperscript{18} Ibid
\textsuperscript{19} International Disability Alliance ‘Toward a Disability-Inclusive COVID19 Response: 10 recommendations from the International Disability Alliance’ (19 March 2020)
3.5.3 Preventive measures in psychiatric units and institutions - Persons in psychiatric units and institutions may have difficulty in adhering to the safety measures that are recommended for protection against COVID-19, including social distancing and increased hygiene. This makes these facilities high-risk zones for the spread of the infection.

We call upon the Senate to put in place measures to ensure that:

i. The state urgently implements sanitary and preventive strategies to avoid infections in psychiatric units and institutions including environmental cleaning and disinfection, air circulation, regular hand hygiene and free access to sanitary supplies such as soap, hand sanitizer, toiletpaper, and paper towels. This is a concern for all places of detention generally, including prisons. It is also a concern for charitable children’s institutions, many of which host children with disabilities.

ii. Medical personnel within psychiatric units and institutions are provided with protective wear. It is critical that Kenya learns from the Wuhan Mental Health Centre in China where many staff and patients were infected with the coronavirus.²⁰

3.5.4 Persons with mental health conditions, intellectual disabilities and dementia coming in conflict with the law – We are in receipt of reports of persons with mental health conditions, intellectual disabilities and dementia being beaten by police for being out during curfew hours. Persons with mental health conditions, intellectual disabilities and dementia may not always understand what terms such as ‘curfew’ means, or may not be able to adhere to the same as a result of their impairment. An example is a case reported in Kakamega of a mentally ill man reportedly beaten to death by police enforcing curfew.²¹

We call upon the Senate to emphasise on the State to:

i. Sensitize Police officers on handling persons with mental health conditions that may make it difficult for them to understand the current situation in the Country.

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ii. **Provide information about curfews and other orders related to COVID-19 in easy to read and plain language.**

iii. **Engage family members and other support networks in the community in providing information on curfews and other orders related to COVID-19 and helping the identified vulnerable people to follow these orders.**

3.5.5 Enhanced social protection measures - Generally, persons with disabilities are poorer than the average population, given difficulties finding and maintaining jobs especially in the light of inaccessible environment and negative attitudes towards them. Their families may also earn less as a result of time used up in the care-taking role. Persons with disabilities also have additional costs, for example related to medication or adult diapers, that heighten the need for social protection programmes targeting this group. This heightens their need for economic support during the COVID-19 pandemic.

**We call upon the Senate to ensure that:**

i. **Any program to provide support to the marginalized groups in the light of COVID-19 should be disability-inclusive.**

ii. **The state provides resources to secure provision of essential supplies for vulnerable persons with disabilities and principal caregivers who are not registered under the social security system through Ministry of Health, local administration and nyumba kumi through the COVID-19 Emergency Response Fund.**

iii. **Measures are in place to safeguard persons with psychosocial disabilities from discrimination in accessing the temporary measures implemented by governments to provide economic support during the COVID-19 outbreak, including social protection programs. Many are not registered as persons with disabilities, and this may be a challenge.**

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3.6. **Education**

COVID-19 pandemic is foremost a health crisis but it has greatly affected the Education Sector. Governments globally have resorted to closure of schools and universities, so as to reduce contact and to save lives. Schools, colleges and universities are considered high-risk because of the congregation of learners who also come from different backgrounds. On March 15th, the Kenyan government suspended learning and over 15 million students are affected. While school closures are logical in enforcing social distancing, they tend to have negative impacts especially on the vulnerable students. This disruption will not just have short-term but can also have long-term consequences for the affected cohorts and are likely to increase inequality. While acknowledging that the Kenya Institute of Curriculum Development (KICD) and other publishers have introduced education oriented programmes through TV, Radio and online platforms, these are not far reaching to all students in Kenya.

The impact of COVID-19 on the right to education are as follows:

3.6.1. Loss of learning for students. There is a real risk of regression for children whose basic, foundational learning i.e. reading, was not strong to begin with. Drop-out rates across the country are likely to rise as a result of this massive disruption to education access.

3.6.2. Disruption of the school calendar. The closure of schools, colleges and universities in Kenya, not only interrupted teaching and learning but also coincided with a key assessment period and many exams have been postponed or cancelled. Internal assessments are meant to make parents/guardians and teachers aware of the students’ progress, lack of this information may long term consequences on the students.

3.6.3. 2020’s university graduates’ careers may be severely affected as they have experience major interruptions and are likely to graduate at the beginning of a global recession.

3.6.4. Negative effects on the mental health of students which may lead to unfavorable effects on learning and their psychological health i.e. international students who are staying far from home are worried of their health, safety and education as well as the wellbeing of their families.

3.6.5. Family units are central to education and often provide major inputs into a child’s learning. While home schooling might be seen as an effective solution this should not be generalized over the whole population as there is likely be substantial disparities in the extent to which parents and guardians can help their children learn. The key differences include the amount of time guardians or parents are available to devote to teaching, the non-cognitive skills of the parents and guardians, learning
resources available and also the amount of knowledge parents or guardians have on specific topics.

3.6.6. Children may lack playing areas during the period of the ‘stay at home’ directive given by the Ministry of Health. This may result to poor development of a child’s psychomotor skills.

Without access to education, as COVID-19 shocks are being unfolded and experienced i.e. loss of life, health impacts and loss of livelihoods, children are more vulnerable and unprotected. Household finances being strained and needs increasing, children beneficiaries of the school feeding programs are missing out on the important component on the right to food thereby increasing the burden on low income households, out-of-school children are more likely to be exposed to risks like family violence, child labor, early and forced marriage, trafficking and exploitation. For the most vulnerable children, education and schools are a safe zone while also instilling hope for a brighter future. Therefore, it is important that the Kenyan Government priorities the continuation of education through alternative learning pathways so as to ensure the interruption to education is as limited as possible.

To this end, we call upon the Senate to ensure:

i. Implementation of measures that mitigate loss of learning impact through encouraging remote learning strategies. UNESCO recommended that states “adopt a variety of hi-tech, low-tech and no tech solutions to assure the continuity of learning. 23 1st world countries are already moving to online learning strategies but this would be a challenges in Kenya as most families do not have basic needs let alone books and internet connectivity. This would result to inequality in opportunities amplifying. Fortunately, in most countries we are seeing creativity in the education sector, i.e. in Kenya where lessons are learnt through radio stations.

ii. Measures are in place for continued access to quality education, this can include24; through use of online/e-learning platforms; Radio, podcast and television broadcast for academic content; Assigning teachers to conduct daily/weekly follow up with students; Review/Develop accelerated academic strategies. These measures should be accessible to learners with disabilities.

24UNICEF; Key Messages and Actions for COVID-19 Prevention and Control in Schools
iii. The Kenyan government has in place strategies to ensure sufficient resources are given to schools rebuild the loss in learning once they reopen. They should also adopt strategies to factor in plans to recover teaching hours lost and adjustment of school calendars and exam schedules.

iv. Policies are in place to support the new graduates’ entry to the labour market to avoid longer unemployment periods.

v. The government adopts measures to mitigate the unequal effects on children who already experience barriers to education, or who are vulnerable or marginalized i.e. girls, those with disabilities, intersex children, those affected by their physical location and other inequalities. These measures should support all students through closures.

vi. Implementation of specific measures by government to monitor compliance with compulsory education and ensure government education officials monitor students’ returns once schools reopen. This is because school closures may jeopardize efforts to increase school enrolments and retention and increase school drop outs, particularly at the secondary level. Education officials should focus attention on areas with high incidence of child labor or child marriage and ensure all children return to school. Officials should also focus on vulnerable students i.e refugee students and adopt outreach measures to ensure they too return to school including by working with religious and community leaders.

vii. Continued meal provision during the ongoing school closures for children in the school feeding programs and from low-income families who will miss subsidized meals. This can be done through Cash transfers programme to the parents

4. ACCESS TO FOOD, WATER AND OTHER BASIC COMMODITIES

The Commission notes that Kenya has ratified the International Covenant on Economic, Social and Cultural Rights which places the government under an obligation to mitigate the deep negative impact that the COVID-19 has on the enjoyment of economic, social and cultural rights. Economic and social rights are also provided for under Article 43 of the Constitution of Kenya, 2010.

The raft of measures by government geared towards managing and containing the COVID-19 infections have also had the effect of negatively impacting the standard of living of Kenyans especially the vulnerable communities such as the urban and rural poor and people
residing in informal settlements. While there has been a decline on the income of most households in the country, there has been an increase in the prices of basic supplies and commodities such as foodstuffs. The prices of essential services such as water and sanitation in informal settlements have also greatly spiked. Access to clean and safe water is essential towards the fight against COVID-19. It is therefore imperative that the government invests the maximum available resources to ensure availability and access to safe and quality water for all.\(^\text{25}\)

Measures towards preventing and containing the spread of COVID-19 should ensure that the most vulnerable groups and communities are able to access essential goods and services through targeted measures so as not to bear disproportionate burden of accessing goods in the private market.\(^\text{26}\) The Commission commends the government for measures towards distributing hand sanitizers in informal settlement and amongst the urban poor. We however call on the government to ensure regulatory measures are adopted to prevent profiteering on foodstuff, housing, hygiene products (face masks and hand sanitizers) and essential medicines and supplies.\(^\text{27}\)

*We call upon the Senate to make adequate proposals with the intention of:*

1. Enhance the access to food, water and other basic commodities by the most vulnerable in society. This includes a guiding framework for the distribution of food subsidies during this period to the most vulnerable communities.
2. Reduction of essential expenditure including transportation costs to mitigate on the cost of production of goods.
3. Providing continuous clean and safe water in adequate quantities as well as reasonable standards of sanitation especially in areas that lack piped water.
4. Lift or subsidize taxes charged on goods such as food-staff, rent, hygiene products, and essential medicines and supplies

5. **SUPPORT SERVICES AND CROSSCUTTING ISSUES**

5.1. *Addressing stigma and discrimination in the context of COVID-19 pandemic*

Human rights-based approach in responding to the COVID-19 requires the government to take steps to reduce and confront stigma, discrimination and existing inequalities. Equality and non-discrimination are cardinal principles within human rights framework that is


\(^{27}\) Ibid
underpinned in all major international treaties and convention including those that Kenya has ratified.

Drawing from the experience in tackling the HIV epidemic, the UNAIDS in its publication of human rights during the COVID-19 has proffered the following five approaches towards addressing stigma and discrimination;

i. The first approach concerns providing leadership and guidance around messaging on COVID-19: The suggestion is to have guidance and leadership from the government on how best to discuss the epidemic in a manner that is non-stigmatising and non-discriminatory. The observation made by UNAIDS is that the way conversations around the epidemic are driven by government, communities and media will shape how people and communities choose to perceive and respond to the epidemic. UNAIDS calls on government to ensure that in communication, stakeholders choose neutral phrases such as ‘acquired’ rather than ‘infected’. In addition, government, media and communities should refrain from associating the virus with a particular region, nationality, race or town which can lead to rise in stigmatization of local regions or towns.

ii. The second approach concerns protecting health workers: Special mention has been made of health-care workers who are perceived to be in contact with the virus. Protecting health care workers from stigma and discrimination and providing them with the support they need is critical on this front.

iii. Privacy of medical information: Measures should be taken to ensure and assure the public that sensitive personal information—including names, diagnosis, and medical history is protected and confidentiality is maintained by government, health workers, and public entities.

iv. Criminalization is not the answer and can do more harm than good: UNAIDS has observed that the overuse of criminal law (emphasis added) can have negative outcomes for both individual and the response as a whole. The overuse of criminal law has the potential of dissuading people from testing and destroy trust between the government and communities. The approach is one of discouraging the use of criminal laws to respond to public-health emergencies. In its stead, UNAIDS calls on governments to empower and enable (emphasis added) people and communities to protect themselves and others which would have better outcome.

v. Address exiting inequalities: As noted by UNAIDS, both the virus and the government response can lead to indirect forms of discrimination. Epidemics often expose existing inequalities in society, it is therefore critical for the
government to ensure that its responses address needs of vulnerable groups such as:

- Persons deprived of liberty who have little control over access to health services;
- Residents in informal settlements or communities who have little to no access to safe and portable water and soap or where self-isolation is next to impossible without significant investment of resources to cater for their well-being;
- Women who have the burden of caregiving which limits their ability to work and make a living due to closure of schools. Women and girls are also at risk of sexual and gender-based violence;
- Persons with disabilities whose access to information, buildings, services is limited due to existing barriers.

We call upon the Senate to: adopt and implement the above approaches to address stigma and discrimination.

5.2. Privacy and Data protection issues

In response to the pandemic, Kenya has been using data and technology in their efforts to contain the spread of the virus. Collection, use and storage of health records, tracking and geo-location are but a few examples of how technology is employed in the fight against the novel coronavirus in the country. It is therefore crucial to re-affirm the right to privacy and data protection and make deliberate efforts to safeguard the same. According to the UN Committee on Economic, Social, and Cultural Rights, “The right to health is closely related to and dependent upon the realisation of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly, and movement. These and other rights and freedoms address integral components of the right to health.”

In this regard, we call upon the Senate to put in place measures to ensure that the state adheres to the principles of data protection and privacy as envisaged by the Constitution as well as Section 25 of the Data Protection Act.

28 UN Committee on Economic, Social, and Cultural Rights. The right to the highest attainable standard of health, 2000. <https://apps.who.int/disasters/repo/13849_files/o/UN_human_rights.htm> Accessed on 8th April, 2020
D. CONCLUSION

The KNCHR Acknowledges the pivotal role played by the Senate in over-sighting actions and measures by National & County Governments in addressing the spread and effects of the COVID-19.

E. ANNEXES

The Commission brings to the attention of the Senate the following attached annexes that provide more in-depth information on human rights in the COVID-19 pandemic.

ii. Press Statement: The Law Enforcement Agencies must Adhere to the Basic Checklist on Human Rights and Fundamental Freedoms dated 27 March 2020
iii. Advisory on Public Finance Management(COVID-19 Emergence Response Fund) Regulations 2020 dated 1st April 2020
iv. Advisory on Public Health (Prevention, Control and Suppression of COVID 19) Rules, dated 3rd April 2020
vi. Compilation of submissions on mental health during the COVID - 19 pandemic by the CSO Stakeholders’ Forum on Mental Health – Convened by the Kenya National Commission on Human Rights dated 8th April 2020

Therefore, we trust the Senate will promptly and adequately address the human rights issues and concerns detailed in this Memorandum.

Dr. Bernard Mogesa, PhD, CPM
Secretary to The Commission/Chief Executive Officer
PRESS STATEMENT: ADVISORY ON THE COVID-19 DISEASE RESPONSE IN KENYA

Nairobi, 17th March, 2020

1. The Kenya National Commission on Human Rights (KNCHR) lauds and welcomes the government’s rapid response efforts to put in place measures and mechanisms, as announced by His Excellency the President, to curb the spread of the COVID-19 pandemic and help stem the virus in our country. Globally the disease has been declared as a “public health emergency of international concern” and the Commission acknowledges the government’s decision of suspending some national operations to contain the spread of the corona virus. KNCHR supports the government to remain the mainstay role in disseminating information relating to this disease for the sole purpose of national unity.

2. While KNCHR acknowledges that the current extraordinary times call for extraordinary emergency response strategies and unity of purpose to mitigate the effects of the COVID-19 virus, KNCHR wishes to bring to the fore the following:

2.1 THAT in employing the necessary measures to contain the COVID-19, all duty bearers, both in public and private sectors, must observe a human rights-based approach. This means that any directive, policy or mechanism must be in tandem with human dignity, non-discrimination and protection of the marginalised.

2.2 THAT the needs of the most vulnerable in our society must be considered and be at the centre of all the rapid responses. This includes the elderly, the sick, persons with disability, children, the rural population in marginalised areas, the homeless, refugees, prisoners and those in informal settlements, who are likely to be most disadvantaged by measures already in place to contain the virus which could threaten their daily survival. KNCHR particularly wish to highlight those whose livelihood will be affected by the announced preventive measures; those who will not have the purchasing power to stock up supplies owing to lack of access, pricing and lack of livelihood. KNCHR thus urges both national and county governments to put in place measures, including affirmative action, emergency relief supplies so as to cushion the poor and most vulnerable groups in our society. This is in line with the State obligations under Article 56 of the Constitution and the Bill of Rights.

2.3 THAT whilst it is understood that in cases of life-threatening circumstances, certain rights may be limited, KNCHR wishes to reiterate that certain rights are non-derogable under national and international human rights obligations. These include the right to life, freedom from torture, inhuman and degrading treatment, freedom from slavery, fair trial, and habeas corpus. KNCHR thus advises that where the government is faced with two or more options that the less restrictive alternative be preferred to contain the situation. Any restrictions should meet the standards of necessity and proportionality and in line with Article 24 of the Constitution on limitation of fundamental rights and freedoms and international human rights imperatives.
2.4 FURTHER and in follow up to the announcement by the National Council on the Administration of Justice regarding the scaling down of court operations, KNCHR wishes to state that the government endeavours to put in place methods to monitor operations at the police stations to avoid incidents of abuse and human rights violations and harassments through arbitrary arrests. Right to a fair trial is a fundamental right to which derogation is not allowed under Article 25 of the Constitution.

3. In view of the need to contain the spread of the COVID-19 disease and secure lives while at the same time upholding the dignity and human rights of all Kenyans, KNCHR therefore CALLS UPON:

3.1 National and County Governments:
- To ensure that the preservation of the human dignity and a human rights-based approach is at the centre of all the response efforts to combat the COVID-19 disease.
- To do all that is within their powers to cushion the most vulnerable in our societies to ensure that their access to the basic necessities of life is not compromised. As the United Nations High Commissioner for Human Rights advises, “… our efforts to combat this virus won’t work unless we approach it holistically, which means taking great care to protect the most vulnerable and neglected in society, both medically and economically”. Towards this end, efforts towards the emergency relief aid needs to be considered in such situations.
- To monitor and ensure accessibility and affordability of the necessary supplies in adequate quantities to bolster hygiene including running water, soap, sanitizers and other protective measures.
- To sustain the now frequent and timely updates to the public on all the vital information relating to the COVID-19 disease.
- While the focus is in the fight against the pandemic, that other chronic health care concerns are not forgotten and that the right to health and life is addressed holistically.

3.2 The Private Sector and Business Community: To abstain from practices such as hoarding, overpricing of goods and forestall any unfair labour practices particularly targeting those in short-term employment. Further, to provide the required standards of hygiene and provide adequate protective gear to its employees to avoid exposure in line with the occupational safety requirements and other employment laws. In addition, to join hands with the government to mitigate against the economic impact that the pandemic shall have on the nation including corporate social responsibility interventions targeting the vulnerable in our society.

3.3 Consumer Advisory Committee and the Competition Authority: To heighten vigilance and ensure that consumer rights are not abused with regard to quality, affordability and accessibility of goods and services. To further ensure that consumer rights secured under Article 46 of the Constitution and other laws are well guarded and enjoyed by all consumers.

3.4 Media: The Commission appreciates the important role that the media continues to play in advancing the realisation of the right to access to information under Article 35 of the Constitution. Dissemination of the accurate and timely information is key to addressing the pandemic. KNCHR therefore urges the media to remain true to their professionalism and as usual exercise due diligence to monitor and ensure accurate and objective coverage of the COVID-19 pandemic to keep the citizens well informed on the progress in a bid to avert unnecessary panic through misinformation.
3.5 The Inspector General of Police: To fast-track the issuance of guidelines with regard to handling of arrests during this pandemic period while referencing the announcement made by the Chief Justice. These guidelines should call on all officers to abide by the law and the Service Standing Orders in the arrests and handling of arrested persons. Further the Inspector General to direct all officers to desist and avoid situations of compromise, unwarranted deprivation of the right of security and liberty of the person, harassment, extortion of Kenyans following the scaling of Court processes. Further, in recognition of the important role that our officers in the National Police Service will be carrying out in the various aspects of the pandemic responses, the Inspector General to ensure that there is requisite support provided including protective gear and medical care to mitigate the threats of the COVID-19 disease.

3.6 The Ministry of Health: To upscale and sustain the training of national and county health workers and frontline staff at the country’s entry points on how to contain the spread of the COVID-19 disease. Further ensure that health workers and the frontline staff have the requisite occupational and safety gears and relevant working tools to cushion themselves from infection in the course of their noble duties. KNCHR further calls on the Ministry of Health to confirm the restoration of the withdrawn NHIF health care insurance for civil servants that also covers health workers and officers of the National Police Service and Kenya Prisons.

3.7 Matatu Owners and Operators: To abide by the laws and guidelines stipulated by the State department of transport services under the Ministry of Transport and Infrastructure to protect themselves and passengers in order to prevent and contain the spread of the Corona virus within the transport system. Due to the constant national and county vehicular movement of public service vehicles, there is need for sustained advocacy and outreach for operators to observe the relevant basic hygiene procedures to protect the users of the public service vehicles.

3.8 ALL KENYANS: To be law-abiding citizens and keep calm. Further, to remain vigilant and put into place precautionary measures to protect self and others as advised by the government agencies and support the government’s efforts in curbing the spread of the COVID-19 disease. Ultimately, members of the public must desist from spreading unverified information which could mislead and cause unnecessary panic.

4. During the rapid response period, the Kenya National Commission on Human Rights will closely monitor the unfolding of events to ensure that human rights FOR ALL are upheld in all the concerted efforts to tackle the COVID-19 disease. KNCHR urges all Kenyans to remain vigilant individually and collectively and keep safe by following the measures and mechanisms announced by the government in order to contain the spread of COVID-19 disease. Let us all work together to defeat this pandemic.

Dr. Bernard Mogesa, PhD, CPM
Secretary to The Commission/ Chief Executive Officer
Press Statement

Nairobi, Friday March 27, 2020

For Immediate Release

The Law Enforcement Agencies Must Adhere to the Basic Checklist on Human Rights and Fundamental Freedoms

The attention of the Kenyan National Commission on Human Rights (KNCHR) has been drawn to the heart rending clips and images circulating on social media, clearly showing uncalled for brutality and ruthless beating being meted on innocent and defenceless Kenyans by uniformed police officers and other law enforcement officers following the start of the much touted dusk to dawn curfew across the country. It is pitiable and despicable to watch the video clips of uniformed law enforcement officers, who are deemed to be custodians of law and order, incessantly bludgeoning innocent and unarmed Kenyans, especially in Mombasa, at the entrance of the Kenya Ferry Services and other parts of the country. Indeed the enforcement of the Covid-19 pandemic curfew directives should not be a ticket to unleash terror.

The gusto, attitude and zeal in which the law enforcement officers were seen harassing and beating innocent members of the public; that included vulnerable persons like women, defeated the solemnity in which they need to handle the mitigating measures of spreading COVID 19. Equally critical actors such as journalists and other essential service providers like drivers of food supplies were not spared in this sheer brutality. That, the law enforcement officers are seen isolating innocent members of the public solely for purposes of inflicting bodily harm to them is a total abuse of basic human rights and fundamental freedoms as enshrined in our Constitution. In this instance the police officers are in total breach of peace, failed to protect the innocent and their actions have the potential of further spreading the novel Corona virus.

KNCHR would have expected the law enforcement officers to treat the home-goers in a humane manner and respect their rights and dignity as dictated by the law and even facilitate orderly observance of the curfew timings. Members of the public must not be subjected to torture, cruel, inhuman or degrading treatment or punishment as evidenced in the police officers’ actions seen in the social media video clips. The Police officers and law enforcement officers must proactively and in a professional manner work towards helping to defuse tension and preventing dangerous escalations and especially during this period of observing containment of the novel Corona virus through social distancing. The melee caused by the law enforcement officers defeats this purpose.

The Commission further reiterates that any human rights violations or abuses in the context of enforcing the curfew by the law enforcement officers must be investigated promptly, thoroughly and impartially. Victims should be provided with access to

1 | Page
remedy and redress for such violations and abuses through judicial, oversight body or other national mechanisms, based on law and in conformity with human rights obligations and commitments.

KNCHR reiterates its advisory issued on 17th March 2020 where it stressed the importance of safeguarding human rights at all costs during all COVID-19 responses. Pursuant to Article 59 of the Constitution, Section 8 of the KNCHR Act and Section 12 of the Prevention of Torture Act the Commission thus directs as follows;

1. **THAT** the bill of rights as encapsulated in our Constitution **HAS NOT BEEN** suspended during this pandemic and every person is still entitled to his/her fundamental rights and freedoms. In the event of any limitation to any right, then the proper constitutional and legislative provisions as provided for under Article 24 of the Constitution and Part IV of the Public Order Act must be followed to the letter.

2. **THAT** even in the event of limitation of rights, the freedom from torture, inhuman and degrading treatment is non-derogable and cannot be wished away by any person.

3. **THAT** respect for human rights, Rule of Law and Access to Justice are critical and essential in combating the COVID-19 pandemic. All actors both State and non-State actors are hence bound by the tenets of our Constitution and the various regional and international human rights instruments which Kenya is a signatory.

4. **THAT** all officers under the National Police Service are bound by the cardinal rules and principles of Article 238 and 244(d) of the Constitution to protect the rights of all and further the legislative obligations under the sixth schedule of the National Police Service Act and Section 14 of the Public Order Act on the use of force.

5. **THAT** the Government directives on COVID-19 more specifically social distancing and reasonable distance between persons must be respected by ALL including the police during arrests, crowd control and detentions.

In view of the prevailing, the KNCHR therefore **Calls Upon**:

1. The Inspector General of Police, as a matter of urgency, to fast-track the issuance of guidelines with regard to handling members of the public during this COVID 19 pandemic period and enforcement of the dawn to dusk curfew. These guidelines should call on all law enforcement officers to abide by the law and the Service Standing Orders in the arrests and handling of arrested persons. Further the Inspector General to direct all officers to desist and avoid situations of compromise, unwarranted deprivation of the right to security and liberty of the person, harassment and extortion of Kenyans.

2. The immediate investigations and prosecutions of all officers culpable of the human rights violations witnessed yesterday,

3. The Inspector General of Police issues an immediate directive on zero tolerance to human rights violations by all law enforcement officers to avert further deterioration and perpetuation of human rights violations,

4. Employers to put in place mechanism to ensure that their staff have ample time to ensure the curfew timings are adhered to,
5. The Government to put in place mechanisms to cushion the vulnerable and persons from the lower income bracket that still have to fend for their families despite the prevailing risk of the COVID-19 and

6. All members of the public to play their civil responsibility in adhering to the directives given by the Government to ensure as a country we flatten the curve on the COVID 19 in Kenya.

Respect for human rights, rule of law and access to justice are critical and essential in combating the novel Corona virus pandemic. Thus, the Kenya National Commission on Human Rights in exercise of its mandate under Chapter 4 and Article 59 of the Constitution shall be monitoring the enforcement of the curfew to ensure compliance with human rights principles and standards.

While KNCHR fully supports the Government’s response mechanisms and measures of dealing with the COVID 19 pandemic, KNCHR reiterates that observance of human rights and fundamental freedoms is cardinal. KNCHR applauds the media, members of the public and human rights defenders for courageously capturing the violations witnessed yesterday.

The Kenya National Commission on Human Rights invites members of the public with information on the illegal law enforcement officers’ actions and/or the affected person(s) to contact the Commission via: Mobile: 0741 584 608 / 0721 519 715; WhatsApp number: 0798 849871 Email: complaint@knchr.org; haki@knchr.org; Twitter:@hakiKNCHR; Facebook- facebook.com/knchr.org; KNCHR SMS: 22359.

Dr. Bernard Mogesa, PhD, CPM
Secretary to The Commission/Chief Executive Officer
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

ADVISORY ON THE PUBLIC FINANCE MANAGEMENT (COVID-19 EMERGENCE RESPONSE FUND) REGULATIONS, 2020

PRESENTED TO

THE PRINCIPAL SECRETARY, THE NATIONAL TREASURY AND PLANNING

1ST APRIL 2020
A. Introduction


2. The National Commission under Article 249 of the Constitution has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.

3. It is in this regard, that the National Commission issues this advisory on the Public Finance Management (COVID-19 Emergence Response Fund) Regulations, 2020.

B. General Comments

4. The proposed Public Finance Management (COVID-19 Emergence Response Fund) Regulations, 2020 have been put in place in response to the COVID-19 global pandemic currently being experienced across the world. The main purpose of the regulations is to establish a fund that will cushion vulnerable persons and entities against the negative effects of the pandemic.

5. The Commission notes that the Fund has been established in line with Section 24 (4) of the Public Finance Management Act No. 18 of 2012. Of concern however, is that there is no adequate public participation from the members of the public, some of whom shall benefit directly from this Fund. Article 201 (a) of the Constitution of Kenya 2010 provides that there shall be openness and accountability, including public participation in financial matters as one of the guiding principles of public finance in the Republic. Notably, the Commission expresses concern that appointments appear to have preceded the regulations, putting to question on the value of the public participation at this stage within the constrained timeframes.
6. KNCHR welcomes the move to create the emergency fund that is aimed at inter alia, cushioning the vulnerable persons in the society from the negative effects of the pandemic. However, caution must be exercised in the administration of the Fund to ensure that only the genuine and deserving cases actually benefit from the Fund. Towards this end, there is need to clearly define the mode of identification of the vulnerable persons and persons without clear means of livelihood. Clarity from this point will ensure that the funds are put to optimal and equitable use and for the most deserving of cases.

7. The Commission notes that the application of the fund should flow in harmony with while improving and expanding the existing structures of social protection for the various marginalised groups including persons with disabilities, orphans and older persons. It is for this reason that the Commission herein proposes the inclusion of the Cabinet Secretary responsible for matters relating to Labour and Social Protection as part of the Board among others.

8. The protection of the vulnerable groups is in line with Articles 21 and 56 of the Constitution. Article 21 states that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities. Article 56 details the obligation of the State towards the protection of minorities and marginalised groups including the affirmative action programmes.

9. In terms of application of the fund, there is value in clearly stipulating the basic principles governing the application of the fund in the proposed Regulations which must include Article 10 of the Constitution on national values and principles of governance including transparency, accountability, equity, non-discrimination, public participation, good governance, protection of the marginalised and human rights. Other values governing the public finance system under Chapter 12 of the Constitution such as openness and accountability as well as prudence and responsible utilisation of resources should also be clearly stipulated in the Regulations as principles governing the application of the Fund. This is would provide a useful governing compass in interpretation and any priority actions on the fund. It is proposed that this paragraph be inserted immediately after paragraph 9 of the Regulations.
10. There is also need for the Regulations to make reference to an accountability structure where queries regarding the application of the fund and the beneficiary projects can be channelled. On access to relevant information, a general statement under Part V on ‘General Provisions’ stating that the Information concerning the operations of the fund shall be made available in line with the provisions of the Access to Information Act, 2016 would suffice.
### C. Specific Comments

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<tr>
<th>Clause and Title</th>
<th>Proposed Recommendations</th>
<th>Justification</th>
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<tbody>
<tr>
<td>2 Interpretation</td>
<td>Add chiefs, assistant chiefs and village elders to the list of frontline workers.</td>
<td>Due to the nature of their work and proximity to the mwananchi.</td>
</tr>
<tr>
<td></td>
<td>Define what constitutes frontline worker. Include health professionals in the definition of frontline workers</td>
<td>Clarity and completeness</td>
</tr>
<tr>
<td></td>
<td>Add persons with disabilities, persons with underlying medical conditions and persons in refugee camps</td>
<td>They are also vulnerable due to their health status and living conditions</td>
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<td></td>
<td>Define who qualifies to be ‘persons without clear means of livelihood’ and how the State shall identify such persons.</td>
<td>For clarity in identification and ensure transparency</td>
</tr>
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<td></td>
<td>Essential supplies: Add emergency medical vehicles and equipment.</td>
<td>Emergency medical vehicles are critical towards addressing emergency medical treatment &amp; response a right provided under article 43 (1) (a) of the Constitution of Kenya</td>
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<td></td>
<td>Add a new definition to read: <strong>Vulnerable entities</strong>: To include micro, small and medium sized enterprises.</td>
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<tr>
<td>4(2)(b) object and purpose of the fund</td>
<td>Delete the phrase <strong>‘urban informal settlements’</strong>.</td>
<td>The vulnerable, poor and older persons are spread out in the country in both the urban and rural settlements and thus the fund should cater for them as well.</td>
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<tr>
<td>Clause and Title</td>
<td>Proposed Recommendations</td>
<td>Justification</td>
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<tr>
<td>7 Board of the Fund</td>
<td>Add a new sub-clause to read: The President shall ensure that there is regional and gender representation in the Board.</td>
<td>To ensure that the interests of all people across the country are well represented.</td>
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<td></td>
<td>Add a new member to the Board i.e Cabinet Secretary responsible for matters relating to Labour and Social Protection.</td>
<td>The social protection portfolio will assist the State in identifying the vulnerable persons who should benefit from the Fund.</td>
</tr>
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<td></td>
<td>Add Cabinet Secretary in charge of Health</td>
<td>The Ministry of Health is a critical player in the management of the crisis hence, the Cabinet Secretary ought to be included to give insights on medical aspects. The recommendation is in line with the object and purpose of the fund which includes to ‘fund the purchase of essential supplies for public hospitals and other related institutions, health professionals, and frontline workers, as needs arises.’</td>
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funding purchase of essential supplies for public hospitals and other related institutions, health professionals, and frontline workers, as needs arises.’
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<td></td>
<td>Add CEO / Chairperson of the National Council for Persons with Disabilities.</td>
<td>This will ensure that the interests of persons with disabilities are represented in line with Article 54(2) of the Constitution.</td>
</tr>
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**SIGNED BY:**

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Dr. Bernard Mogesa (PHD, CPM)
Commission Secretary
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

ADVISORY ON THE PUBLIC HEALTH (PREVENTION, CONTROL AND SUPPRESSION OF COVID-19) RULES, 2020

PRESENTED TO

THE MINISTRY OF HEALTH THROUGH THE OFFICE OF ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

3RD APRIL, 2020

Kenya National Commission on Human Rights
1st Floor, CVS Plaza, Lenana Road
P.O. Box 74359-00200
NAIROBI, KENYA
Tel: 254-20-2717908 /2717256/2712664
Fax: 254-20-2716160
Website: www.knchr.org
Email: haki@knchr.org
A. Introduction


2. The KNCHR is the State’s lead agency in promoting and protecting human rights. The National Commission achieves this through investigating and providing redress for human rights violations, researching and monitoring the compliance of human rights norms and standards, advising both private and public sectors on human rights principles and standards, conducting human rights education as well as collaborating with stakeholders. The National Commission under Article 249 of the Constitution has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the Constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.

3. It is in this regard, that the National Commission issues this advisory on The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020.

B. General Comments

4. The proposed The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 ("The Rules") have been formulated in response to the COVID-19 global pandemic currently being experienced across the world. The Rules are made pursuant to section 36(m) of the Public Health Act (Chapter 242, Laws of Kenya) which provision empowers the Minister to make rules ‘whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease,’ aimed at prevention, control or suppression of infectious diseases.

5. The National Commission generally welcomes measures by the Ministry of Health to contain the Covid-19 disease, which has quickly become a grave matter of public health
concern nationally. The KNCHR recognises the need for urgent measures to safeguard
the health and life of all persons by containing the spread of the coronavirus and
treatment of those suffering from the covid-19 disease.

6. While recognising that these are extraordinary circumstances, and while respecting that
the State is under a duty to secure the life and health of all persons in Kenya during this
pandemic, the Commission hastens to caution that the rule of law and constitutionalism
must not be suspended. As the National Commission has always reiterated, we continue
to urge duty bearers to abide by the Constitution, constitutionalism and adopt a human
rights based approach in all legislative, policy, administrative and institutional measures
directed towards the fight against Covid-19.

7. The Statutory Instruments Act, 2013 (Act No. 23 of 2013) provides a comprehensive
regime for the making, scrutiny, publication and operation of statutory instruments. The
Act amongst other things requires regulation-making authorities to undertake
appropriate consultation before making statutory instruments. It also establishes a
mechanism for parliamentary scrutiny of statutory instruments as well as mechanisms
to ensure that statutory instruments are periodically reviewed. The law requires every
Cabinet Secretary responsible for regulation-making (in this case, the Cabinet Secretary
in charge of health) to ensure that a copy of the statutory instrument is transmitted to
the responsible Clerk for tabling before Parliament. The House Standing Orders
establishes the Committee on delegated legislation and details the nature of scrutiny of
statutory instruments. If a copy of a statutory instrument is not laid before Parliament
as required, the law provides that such statutory instrument ceases to have effect
immediately after the last day for it to be so laid.

Virtual checks

8. The National Commission is alive to the increasing demand to formulate regulations to
guide various actions on the response to the Covid-19 crisis. The Commission thereby
urges the Office of the Attorney General, in exercise of its constitutional and statutory
mandate as the adviser of government and state bodies, to advise government on due
process in enacting rules and regulations during this period to ensure that meaningful
public participation and Parliamentary oversight is observed to the greatest extent

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1Section Statutory Instruments Act, 2013.
2Section 11, Statutory Instruments Act, 2013.
   Instruments Act provides the criteria that the Committee is to use in scrutinizing a statutory instrument.
4Section11(4), Statutory Instruments Act, 2013.
possible. Such scrutiny and oversight is of great significance particularly where the proposed legislation governs matters of great public interest and directly and indirectly impacts on individual and/or group rights and liberties.

9. Effective alternatives to the usual manner of doing business need to be explored. For instance, virtual meetings and scrutiny by members of Parliament can and should be encouraged to ensure that the oversight and legislative roles of Parliament are not lost. Notably, skipping this process brings with it the risk of watering down the principle of separation of powers which is at the very heart of our constitutional democracy. In a situation whereby even access to justice in our courts has been limited, every viable available opportunity and alternative, within the law, should be pursued to preserve the existing system of checks and balances in governance. We therefore recommend that Parliament and other oversight bodies explore alternatives to the ordinary way of discharging business that respects the recommended social distancing rule, such as virtual checks.

10. Definition and Protection of Health workers
The medical officers and other frontline workers are at risk of contracting the coronavirus in the course of applying the Rules as stipulated. The safety of the frontline workers is crucial even as they work to save lives. The rights of health workers, volunteers, community health workers and all those on the frontline must be highly safeguarded including personal protective equipment (PPE) and they must be protected from violence by civil unrest. The Rules need to recognise this and provide measures to ensure their PPE as well as their security. Moreover, the Commission proposes the expansion of the definition of health worker to contemplate a situation whereby community health workers would be involved in this process should the crisis escalate to a demand beyond the contemplated professionals.

11. Age, gender, culture and other Diversity perspectives
Our society is diverse with various categories of people; the young, old, mothers and children. The Commission notes a gap in the Rules with regard to recognition of diverse groups. This includes vulnerable groups of persons including infected mothers with infants, pregnant mothers, adolescent girls, elderly and persons with special needs. The Rules need to be sensitive to the unique needs and care particularly when it comes to removal of the ‘carriers’ and the movement to new premises where the suspected cases of covid-19 will be relocated. This includes sanitary, aides and other special needs as the case may be. It also
includes communication that is sensitive to the special interest groups including persons with disability.

12. Management of gatherings and crowded places
The Commission takes cognisance of the intensified risk posed in crowded places such as IDP camps, refugee camps and places of detention including police cells and prisons. As such, it is imperative for the Ministry to put in place specific measures that would address challenges of space and make provision for quarantine spaces, access to health care facilities, water and sanitation programmes so as to mitigate the risk of COVID-19 occurrence or exposure in these enclosed spaces.

The National Commission notes the significance of safeguarding the privacy and confidentiality of information in the fight against the Covid-19 pandemic. As such, disclosure of information relating to a patient’s health status, treatment or stay in a health facility must not be actively disclosed unless with the express and informed consent of the patients as to the nature of exposure. This is in line with section 11 of the Health Act (No. 21 of 2017) as well as the Access to Information Act. The KNCHR therefore recommends that the proposed Rules be amended to include a separate paragraph that expressly forbids any person, whether a medical health worker or occupier of building from disclosing the status of COVID-positive patients. This will ensure that persons who test positive and their families are safeguarded against stigma and discrimination based on their health status which would claw back on efforts towards containment of spread of the disease. Towards this end, the Commission suggests the borrowing of similar provisions with regard to privacy and disclosure of information contained in the HIV and AIDS Prevention and Control Act (No. 14 of 2006). More sensitisation will however need to be undertaken by the Ministry and other stakeholders at a community level to de-stigmatise the Covid-19 disease.

14. Overall, the Kenya National Commission on Human Rights emphasizes the need to underline the principle of human dignity in all its legislation, policies and administrative measures. The Rules, while seeking to protect the larger public from the spread of Covid-19 must be sensitive to and recognise the dignity of the carriers of the disease and the need for them to be provided with adequate requisite information, care and support including psychosocial support and counselling.
A breakdown of the specific comments on the proposed Rules is contained in the table below:
### C. Specific Comments

<table>
<thead>
<tr>
<th>Paragraph/section</th>
<th>Proposed Recommendation(s)</th>
<th>Justification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrangement of paragraphs</td>
<td>Delete the words appearing alongside paragraph 9 to read ‘Reception by health facilities’ and not ‘Control of public gatherings’.</td>
<td>Accuracy and alignment of the arrangement of paragraphs with the content in the body of Rules.</td>
</tr>
<tr>
<td></td>
<td>Delete the words appearing alongside paragraph 10 to read ‘Escaping from isolation and quarantine’ and not ‘Reception by health facilities’.</td>
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<td></td>
<td>Generally rearrange the arrangement of paragraphs section from Paragraph 9 all through to 13 to align with substantive content.</td>
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<tr>
<td>Citation of enabling provision: Reads,</td>
<td>Include (b), (c), (d) (g) immediately before (m) to read “sections 36(b),(c),(d)(g)(m).</td>
<td>The scope of the Regulations goes beyond the general 36(m). For instance, they also touch on confinement, the removal of persons, house visitations and interment. It therefore makes sense to specifically invoke all the other relevant subsections as well or simply the entire section 36.</td>
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<tr>
<td>“IN EXERCISE of the powers conferred by section 36(m) of the Public Health Act, the Cabinet Secretary for Health...”</td>
<td>Alternatively, delete (m) immediately after 36 to simply read section 36 of the Public Health Act.</td>
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<tr>
<td>Paragraph/section</td>
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<tr>
<td>Application of Rules</td>
<td>Insert a new paragraph immediately after paragraph 1 on the scope/object of the proposed Rules. This new paragraph should be the new paragraph 2.</td>
<td>Defining the scope of the regulations- helps to cap the application of these Rules so as being to be specific and targeted in nature. While the title provides a clue as to the application of the Rules, there is no telling as to the period of application of the Rules. The object is key, so that it is clear once the object is met, the Rules become obsolete.</td>
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<tr>
<td>2 Responsibility for notification</td>
<td>Delete the last part of the paragraph; ‘or take that person to a medical officer, medical practitioner or health facility for treatment’.</td>
<td>The obligation of the owner, person in charge of, or occupier of premises, and employer should stop at responsibility to notify a medical practitioner and should not extend to giving these individuals power to take the person to hospital. The latter risks infringing on the right to personal integrity of the person suspected to be suffering from COVID-19 unreasonably. In any case, these individuals (owner, person in charge of, or occupier of premises, and employer) are not health professionals and might put themselves at risk when taking the person to hospital against the person’s will (for example, breach of social distancing requirement). The head of household may retain the obligation to take his/her children to hospital in addition to notifying medical practitioners.</td>
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<tr>
<td>Paragraph 3</td>
<td>Insert a new subparagraph that expressly provides for confidentiality of the information obtained by the health professionals or other person in the course of dealing with Covid-19 patients or suspected cases. Moreover, a duty to provide full information to the patient in a language that the patient understands regarding his/her treatment should be expressly included in the provision. This should include an obligation to provide information in accessible formats for persons with disabilities.</td>
<td>In line with provisions of the Health Act, 2017. In line with the provisions of the Access to Information Act (section 5(2)).</td>
</tr>
<tr>
<td>Paragraph 5 Power of Search</td>
<td>Delete the paragraph in totality. In the alternative, replace the title ‘power of search’ to read ‘power of entry’ or even better ‘home visitations by authorised medical officer’ in the language of section 36(b) which allows the Minister to make rules governing ‘house to house visitation’.</td>
<td>The proposal for deletion is based on two grounds: First, the provisions may be abused or subjected to arbitrariness. There is already a separate paragraph in the Rules that place an obligation on an occupier of building, head of household or owner of premises to report any suspected cases of Covid-19. The additional ‘power of search’ may be excess for the purpose. Should the provision be retained, there is need for identification and such entry must be within a reasonable period during the day. Secondly, and without prejudice to the foregoing, there is already a provision in the parent Act regarding Power of entry (section 38 of the Act) which authorises the Director of Medical Services and his officers to enter on any premises or vessels for</td>
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| 11(3): The subparagraph reads as follows:  
‘Where a medical officer of health determines that a person is believed or suspected to be a carrier and that the necessary examination and investigations cannot be properly carried out at the house or place of residence of that person, the medical officer of health may direct that person to proceed or to be removed to a hospital or other suitable place for the purpose of examination and investigation and to remain or to be detained in that place for such reasonable period as may be required for that purpose.’  
Delete the phrase ‘to be removed’ and substitute therefor the words, ‘cause to be moved’. | the purpose of executing or superintending the execution of any rules made under section 36 of the Act. The provision would therefore be superfluous.  
The change of marginal note (in lieu of deletion) is make it in tandem with the more friendly term used in the Act. Power of search has a more ‘punitive’ connotation to it, as used in criminal processes. | A person is not an object to be ‘removed’. Also makes grammatical and drafting sense to say, ‘cause to be moved to a hospital’ rather than ‘or to be removed to a hospital’. |
Paragraph/section | Proposed Recommendation(s) | Justification
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11(4): The paragraph provides as follows  
(4) Every carrier shall at all times observe and give effect to all reasonable instructions given to him or her by the medical officer of health in regard to the disposal of his or her infectious materials and the cleansing of the articles used by the carrier, and any other precautions for preventing the spread of infection | The Clause should include a proviso that obligates the government to support or provide the necessary for the cleansing any other instructions as may be given to them by the medical officer. | The carriers are victims and depending on the situation including poverty levels, may be in a situation whereby they are unable(not unwilling) to give effect to all the instructions. There should be room to offer the necessary support on a case by case basis.

**SIGNED BY:**

Dr. Bernard Mogesa (PHD, CPM)

**COMMISSION SECRETARY/CEO**
Nairobi, Wednesday, April 8, 2020

For Immediate Release

Harassment and Intimidation of Journalists During the COVID-19 Pandemic Coverage

The attention of the Kenya National Commission on Human Rights has been drawn to an unfortunate trend of harassment and intimidation of the media practitioners in the course of their work of providing coverage on the goings-on of the current COVID-19 pandemic in our country. KNCHR makes this statement to express its displeasure and concern at the intimidation and harassment being meted on broadcast and print journalists during their noble assignments of providing Kenyans with the much needed information on the COVID-19 pandemic.

Our Government has reiterated that the fight towards the containment of the COVID-19 disease calls for the concerted efforts of all Kenyans and as a Commission we are supportive of all its initiatives and the call for the observance of all the measures already in place. In all these efforts the media is a very critical and an important cog to deliver the much needed results of fighting this pandemic.

So far cases of media harassment and intimidation by law enforcement officials have been brought to the fore and include the physical harassment of a Mombasa based NTV Journalist Peter Wainaina, harassment of Weru TV journalist Gregory Muriithi in Meru, arrest of Citizen TV journalists, John Wanyama and Charles Kerecha in Eldoret and the summoning of two Nakuru based Standard Group journalists - Julius Chepkwony and Daniel Chege over stories pertaining to the curfew and lockdown due to the novel Corona virus. In the latter case, there has been a bid to coerce the journalists disclose their sources of information. All these instances smirk intimidation, harassment and threats to members of the fourth estate. Media etiquette all over the world is succinct when it comes to the protection of news sources. Further calling out of these journalists instead of their respective publishers exposes them to grave danger and compromises their safety and security.

During this period of COVID-19 disease crisis access to accurate information can mean the difference between life and death. That is why right now, journalists in our country are working round the clock to make sure the citizens in the communities where they are reporting from are well informed as the COVID-19 virus ricochets through our country, our cities and towns and our families.

It is especially in times like these that collaboration between various government agencies and the media can help. It is evidently clear that the media is supportive of the government’s efforts to combat the pandemic. Journalists and media
establishments have a duty to inform the public and the public has a right to receive information and this requires an enabling and secure environment for the enjoyment of this right. This environment should and can only be provided by the State, through its agents, as the principal duty bearer.

The Kenya National Commission on Human Rights re-emphasizes that the rights provided for in our Constitution guarantee unrestricted press freedom. KNCHR reiterates that the enjoyment of media freedom is clearly stipulated and anchored in the Constitution under Article 34 on the freedom of the media and Article 35 on access to information. Freedom of expression is an enabling right and limiting it in media work means limitation of other rights within the Constitution and other written laws.

The journalists must equally therefore enjoy their rights to dignity, privacy and life. Journalist must not become the target of restraint in the course of their fundamental duties and accountability to the public. Article 32 (2) emphasizes that the State shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium or penalize any person for any opinion or view or the content of any broadcast, publication or dissemination.

The rights and freedoms of media and journalists are not only secured under our Constitution but also flow from our Government’s voluntary commitments under the African Union and United Nations. Under the various treaties and conventions, Kenya is duty bound to protect freedom of expression and independence of the media. The Commission further wishes to remind the State of its most recent undertaking at the international level before the Human Rights Council in January 2020, where it committed to ensure safety of journalist as well as guarantee the freedoms of expression, press, association and peaceful assemblies and to ensure attacks against journalists and human rights defenders are properly investigated.

Furthermore, Sustainable Development Goal No. 16, an agenda the Republic of Kenya has actively supported, calls on States to secure the right to access information and safety of journalists.

Until we see the rights of journalist protected, KNCHR shall not relent in its pursuit for media freedom in Kenya. As a nation, we must demand that the members of the fourth estate feel secure to carry out their duties without intimidation and coercion especially during this period that the Government is uniting the country in the fight against the novel Corona virus.

Dr. Bernard Mogesa, PhD, CPM
Secretary to The Commission/Chief Executive Officer
Compilation of submissions on mental health during the COVID-19 pandemic

By the CSO Stakeholders’ Forum on Mental Health – Convened by the Kenya National Commission on Human Rights

To the Senate ad hoc Committee on COVID-19

Introduction

The COVID-19 virus was first detected in Wuhan, China and reported to the World Health Organization (WHO) on 31st December 2019.¹ The virus rapidly spread to other parts of the world, culminating to the World Health

Organisation (WHO) declaring the outbreak as a ‘pandemic’ on 11th March 2020. The COVID-19 pandemic is impacting all spheres of life and generating stress throughout the population. The challenges and recommendations presented in this memorandum have been developed by a network of Civil Society Organisations that work on mental health in Kenya,2 convened by the Kenya National Commission on Human Rights.3 This memorandum examines the impacts of COVID-19 on mental health in the Kenyan context and makes recommendations to ensure that mental health is a critical part of the government’s response to COVID-19.

1. Holistic approach to mental health

Challenge: Currently, the focus on mental health in the light of COVID-19 is fragmented and not holistic.

Background information: In the light of COVID-19, it is critical to have a wholesome approach to mental health that is rights-based. In particular, it is important to respond to the mental health needs of five categories of people.

a) Persons being treated for COVID-19 and their families. The pandemic has sparked a rise in stigma and discrimination against people who have the virus; people from countries where the virus originated or are considered hot zones; people who have travelled outside Kenya recently; or even those who it is believed have come in contact with someone who has the virus. Persons suspected of having COVID 19 and their families also experience heightened stress while waiting for their test results (not to mention the risk of children being separated from their guardians where these caregivers are in quarantine). In addition, positive results can be anxiety provoking; all of which impact mental health.

b) Frontline providers of care/medics. In addition to dealing with the possibility of becoming infected with the virus, which is in itself anxiety provoking, people who work in health care may also feel

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2 Contributing organisations include: Africa Mental Health Research and Training Foundation; Alzheimer’s and Dementia Organisation – Kenya; BasicNeeds – Kenya; Calmind Foundation; Centre for Mental Health and Wellness in Kenya; Health Rights Advocacy Forum; Jinsiangu Transgender Kenya; Kenya Association for the Intellectually Handicapped; Tunawiri CBO; Ulemavu Research Institute; Users and Survivors of Psychiatry – Kenya; Validity Foundation; Watu Health Innovation Summit Foundation Africa; Consortium of KAIH, African Institute for Children; Studies and Kamili Mental Health Organisation. Individuals include: Ms. Loise Machira; and a group of Mental Health Advocates represented by their contact person, Ms. Charity Muturi.

3 The Kenya National Commission on Human Rights (“KNCHR” or “National Commission”) is an independent National Human Rights Institution established under Article 59 of the Constitution with a broad mandate to promote a culture of respect of human rights in the Republic of Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the Paris Principles.
stigmatized, because the community may assume they must have the virus.

c) Persons with pre-existing mental health conditions and chronic illnesses, both communicable and non-communicable, who are likely to experience even more heightened anxiety in this situation, as well as affected in a myriad of others ways as explained in more details in this memorandum.

d) People who are usually marginalised in society, and are therefore made especially vulnerable by the crisis. These may include older persons; people with disabilities (especially those who require a high level of support); women; intersex, transgender and gender non-conforming persons; refugees and those falling under the category of ‘urban poor’. These categories tend to face a variety of barriers as they endeavour to access necessary services and amenities, including health care.

e) The general population. In this regard, anxiety rates may go up due to COVID-19 pandemic effects including isolation, toxic home environments, economic challenges affecting resources for health care among others. In addition, there is a high risk of individuals getting into the habit of using/misusing/abusing substances during the pandemic as many peoples’ day-to-day routines have been disorganized.

Proposed solutions

a) Quantify the needs, that is to say, clarity regarding what it will take to offer psychosocial support for the different categories of groups identified above, and mapping out current providers, that is who is currently doing what (Department of Mental Health, Red Cross, Civil Society Organisations), and how a more coordinated response can be established, including considering budgetary implications.

b) Managing stigma and prejudice in messaging on COVID-19 through appropriate communication to the public the pandemic.

c) Providing specific psychosocial support for persons awaiting COVID-19 results; as well as tailored support for persons who have tested positive for COVID-19 and their families.

d) Ensuring that the conditions of individuals while under quarantine do not subject them to further unnecessary stress. In addition, orient all responders, including nurses, ambulance drivers,

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security personnel, volunteers, case identifiers, teachers and community leaders and workers in quarantine sites, on how to provide basic emotional and practical support to affected people using psychological first aid.\(^5\)

e) Briefing and debriefing sessions for frontline providers of care/medics (in this regard, it is also critical to have supervision/debriefing for those doing the debriefing to prevent burnout. In addition, partner inexperienced workers with their more experienced colleagues. The buddy system helps to provide support, monitor stress and reinforce safety procedures.\(^6\)

Provide mental health psychosocial support for frontline workers on a need basis.

f) Noting that health care professionals have been victims of the virus while in the line of duty, it is critical to set up a special insurance package to cover them in the event they contract COVID-19.

g) Non-discrimination in the provision of mental health services to those who are usually marginalised in society and continuing education to health care providers about these categories. For instance, intersex, transgender and gender non-conforming persons should be able to access services without facing prejudice based on gender identity and/or expression, especially in cases where a person’s appearance or presentation does not match their identification documents.

h) Constant advocacy and positive awareness messages on how persons can take care of their mental health during the COVID-19 pandemic, including encouraging online connection, considering that social distancing is associated with increased mental health challenges. Publicize the Ministry of Health & Red Cross psychosocial support number (1199).

i) Most interventions in this paper focus on persons with pre-existing mental health conditions, people who are usually marginalised in society and the general population. The bottom-line is to ensure that mental health support resources are equitably shared between COVID-19 patients and families directly, while not neglecting patients with pre-existing conditions.

2. Access to information

**Challenges:** There are barriers in accessing information on COVID-19 in accessible formats by all such as sign language, Braille, Easy Read; and also,

\(^5\) World Health Organisation ‘Mental Health and Psychosocial Considerations During the COVID-19 Outbreak’ 18 March 2020

\(^6\) World Health Organisation ‘Mental Health and Psychosocial Considerations During the COVID-19 Outbreak’ 18 March 2020
barriers in accessing information about mental health services and in members of the public being able to communicate with the Ministry of Health

**Background information:** Currently, there are barriers in accessing information on COVID-19, particularly by people in psychiatric units, and by people with intellectual disabilities who require information in easy to understand formats, people with dementia and children. Additionally, among the Deaf community (who also have mental health needs like everyone else), there are complaints that media houses zoom in on the State Official giving the daily briefings and not the interpreter and therefore access to information is hampered, even though there is usually a sign language interpreter at the daily briefings. Information, for example about curfews, is not always in accessible formats, especially for individuals with intellectual disabilities. This time may also be very challenging for children and adolescents, some of whom might not understand the reasons for school closures and the cancellation of extracurricular activities. In addition, they are likely to be bombarded with information through social media and from their friends that can cause anxiety and alarm.

**Proposed solutions**

a) Information about COVID-19 should be presented in ways that are accessible to all. This means providing information in plain language/easy to understand formats, ensuring that Deaf persons can receive information on COVID-19 on an equal basis with others and providing information in culturally sensitive child friendly formats. This may also entail providing education for parents on how to talk to their children about COVID-19 and its impacts. For persons who are Deaf, in lieu of sign language interpreters, COVID-19 adverts must include captions/ subtitles to communicate spoken text to hearing impaired viewers. Additionally, the messaging on the virus should also be in local languages where possible and local media outlets should be used to disseminate the messages as a matter of urgency.

b) Publicize the Ministry of Health & Red Cross psychosocial support number (1199). The hotline should be manned by trained individuals to prevent re-traumatization. Additionally, connect all available CSO hotlines to the national line for consistency and data collection. This will assist in creating a database on mental health information that will be used in planning and improvement of service delivery.

c) Provide emergency contacts for national and county public facilities that provide mental health services. Contacts for general inquiries should also be provided, and all these contacts should be publicized on national media (including vernacular stations).

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7 For children with or without hearing impairment, visual information is most preferable and accessible. The adverts, videos or animations must have captions.
d) Publicize availability and access of private patients services including tele-conferencing through the Ministry of Health/ Kenya Psychiatrists Association/ Kenya Medical Practitioners and Dentists Board as some persons with mental health conditions access doctors through hospitals, not clinics.

e) Ensure there is oversight of the media when reporting about Covid-19 to avoid over-sensationalized reporting.

f) For people with mental health conditions who are in psychiatric units/institutions, ensure non-alarmist information about COVID-19. In the light of banning hospital visits, provide alternative ways to enable them to keep in touch with their friends and families.

g) Disclosure of information relating to a patient’s health status, treatment or stay in a health facility must not be actively disclosed unless with the express and informed consent of the patients as to the nature of exposure. This is in line with section 11 of the Health Act (No. 21 of 2017) as well as the Access to Information Act. We recommend that the proposed Rules be amended to include a separate paragraph that expressly forbids any person, whether a medical health worker or occupier of building from disclosing the status of COVID-positive patients. This will ensure that persons who test positive and their families are safeguarded against stigma and discrimination based on their health status which would claw back on efforts towards containment of spread of the disease. Towards this end, we suggest the borrowing of similar provisions with regard to privacy and disclosure of information contained in the HIV and AIDS Prevention and Control Act (No. 14 of 2006). More sensitisation will however need to be undertaken by the Ministry and other stakeholders at a community level to de-stigmatise the Covid-19 disease.

3. Continuity of care

Challenges: Access to the whole range of health care services, including mental health care has been compromised by the COVID-19 pandemic.8

Background information: As the government shifts focus to containing the spread of COVID-19, resources are being drawn away from other health conditions. In this regard, some drugs have already run out at public and private facilities, owing to reduced global supply and panic buying. It is noteworthy that for people with mental health conditions, adjustment to new mental health drugs has difficulties, takes time and risks re-lapses. Additionally, patients who require to attend regular outpatient visits for

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evaluations and renewal of prescriptions are hugely affected by the movement limitations and any potential lockdowns.

**Proposed solutions**

a) Step up efforts to develop a wide range of community-based services, in the light of the fact that mental health institutions may issue a moratorium on new admissions. People with mental health conditions and their families should have access to options in terms of provision of mental health care, particularly when the mental health facilities decline to take up new cases. (Community-based health care is discussed in more details below).

b) Prioritise scheduling of appointments for patients based on mental health status (i.e on a non-discriminatory basis) to ensure continuity of care during the COVID-19 pandemic.

c) Guarantee voluntary access to drugs to those with pre-existing conditions (including psychiatric drugs, anti-convulsant drugs and drugs provided at Methadone Clinics) from the national level down to the community level during the COVID-19 outbreak. The country’s Essential Drug List should prioritize mental health drugs and ensure availability of all varieties and quantities. These drugs should be easily made accessible from the national level to the community level.

d) Improve and monitor availability and access to drugs in both public and private facilities through Kenya Medical Supplies Authority (KEMSA) and Kenya Pharmacy and Poisons Board (KPBD) nationally and in counties. Additionally there should be accountability and transparency mechanisms put in place to ensure the drugs have been distributed to the various health facilities.

e) Provision of funds to enable outpatient National Health Insurance Fund (NHIF) packages, for all mental health patients to allow the use of the NHIF card in all hospitals. This is in order to prevent discrimination by health insurance systems towards persons with Mental, Neurological and Substance Use Disorders from accessing health insurance policies especially during this difficult period. Mental Health is an integral part of health and should be equally prioritized.

f) Ensure continued access to support for people experiencing distress or mental health crisis during the COVID-19 outbreak, including through the creation of a national hotline by the ministry of health and online psychosocial support and peer support, based on respect for individual will and preferences.
4. Preventive measures in psychiatric units and institutions

**Challenges:** Persons in psychiatric units and institutions may have difficulty in adhering to the safety measures that are recommended for protection against COVID-19, including social distancing and increased hygiene. This makes these facilities high-risk zones for the spread of the infection.

**Proposed solutions**

a) Urgently implement sanitary and preventive measures to avoid infections in psychiatric units and institutions including environmental cleaning and disinfection, air circulation, regular hand hygiene and free access to sanitary supplies such as soap, hand sanitizer, toilet paper, and paper towels. This is a concern for all places of detention generally, including prisons. It is also a concern for charitable children’s institutions, many of which host children with disabilities. Accountability measures should be put in place in this regard, including monitoring these institutions.

b) Provide protective wear for medical personnel within psychiatric units and institutions. It is critical that Kenya learns from the Wuhan Mental Health Centre in China where many staff and patients were infected with the virus.⁹

5. Persons with mental health conditions, intellectual disabilities and dementia coming in conflict with the law

**Challenge:** There are reports of persons with mental health conditions, intellectual disabilities and dementia being beaten by police for being out during curfew hours.

**Background information:** Persons with mental health conditions, intellectual disabilities and dementia may not always understand what terms such as ‘curfew’ means, or may not be able to adhere to the same as a result of their impairment. An example is a case reported in Kakamega of a mentally ill man reportedly beaten to death by police enforcing curfew.¹⁰

**Proposed solutions**

a) Police officers should be sensitized about people living with conditions that may make it difficult for them to understand the current situation in the Country. In particular, police officers should be sensitized about

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persons with mental health conditions, intellectual disabilities and dementia to avoid wrongful arrests simply because a person may not be coherent or may not understand jargon.

b) Provide information about curfews and other orders related to COVID-19 in easy to read and plain language.

c) Engage family members and other support networks in the community in providing information on curfews and other orders related to COVID-19 and helping the identified vulnerable people to follow these orders.

6. Community-based mental health care

Challenges: Community-based mental health care is not always available or accessible in Kenya, and there is concern over existing outpatient services as well as methadone clinics being shut down. In addition, not all Community Health Workers are trained on mental health.

Background information: Families are under increased stress for many reasons during the COVID-19 pandemic. These include the isolation wrought by social distancing, uncertainty about the future, economic pressures owing to closure of businesses and loss of earnings, and inability to take breaks from caregiving owing to curfew restrictions and other measures put in place to address the outbreak. Additionally, people are being forced to be together for long periods of time within the household, which has the capacity to increase strain and tension in the family, including increasing gender based violence cases. Many people now find themselves without a daily routine, the effects of which are exacerbated for certain groups of people. For example, for many people with intellectual disabilities, this means their coping mechanisms and psychosocial supports have been stripped, and they now face considerable challenges at home which was mitigated by being able to go out and do things.

Proposed solutions

a) Provide human resource and administration for nurses/Community Health Workers to call and visit persons with mental health conditions who are due for follow up clinics to assess status, advise on how to access drugs, etc. Additionally, community mental health care must be understood to mean and include both medical and social approaches, involving the medical workers, and also other crisis response teams such as local ward administrators and local community leaders.

b) Propose mental health training of Community Health Workers to be able to create awareness on mental health during this pandemic as many of the healthcare workers are on the frontline of fighting the outbreak. Subsequently, use Community Health Workers to provide psychological first aid and deliver drugs to persons with mental health conditions at risk of immunosuppression including the elderly, children with comorbidities that include seizures and patients with epilepsy.
c) Keep Methadone Clinics open or deliver drugs to specific pickup points closer to clients or their homes. Consider setting up a satellite clinic/s for several counties.

d) The Ministry of Health should reach out to local media channels like radio to talk about the mental health state of citizens during this time. Many people may not have smart phones or TVs but many listen to their local radio channels. Encouraging messages during this time of crisis, as well as messages that engage people to think about how they are feeling and to channel their thoughts into positive action are especially critical. It is also important to ensure that media reporting on the pandemic is not exaggerated to cause unnecessary alarm.

e) The Department of Mental Health should amplify mental health education at this time. Topics could focus on gender based violence, conflict resolution, sensitization campaigns of what supporting each other within the family looks like in action and positive parenting during high stress periods. Other topics could sensitise religious leaders to promote peace and cohesion messaging for families towards improving mental wellbeing and reducing stress and toxicity in homes which is leading to increased anxiety, mental health issues and domestic violence.

7. **Enhanced social protection measures**

**Challenges:** Generally, persons with mental health conditions are poorer than the average population, given difficulties finding and maintaining jobs especially in the light of negative attitudes towards people with mental health conditions. Their families may also earn less as a result of time used up in the care-taking role. This heightens their need for economic support during the COVID-19 pandemic.

**Background information:** People who are usually marginalised in society and their families (including older persons; people with disabilities (especially those who require a high level of support); women; intersex, transgender and gender non-conforming persons; refugees and those falling under the category of ‘urban poor’) are over-represented in the categories of ‘unemployed’ or ‘low-income earners working in the informal sector and dependent on daily wages’, and have been especially hard hit by COVID-19 in economic terms. Consequently, most of them are unable to practice social distancing because they still have to work outside their homes on a daily basis. Some have no source of income due to unemployment or sudden loss of income because the nature of their work does not allow them to work from home. Thus, they are unable to sustain themselves during this period including not having the agency to stock up on essentials such as food, toiletries and medicine, and pay bills. Persons with disabilities also have
additional costs, for example related to medication or adult diapers that heighten the need for social protection programmes targeting this group. Notably, lack of medication and sufficient nutrition increases susceptibility to COVID-19 owing to low immunity.

Proposed solutions

a) Ensure persons with psychosocial disabilities are not discriminated against in accessing the temporary measures implemented by governments to provide economic support during the COVID-19 outbreak, including social protection programs. Many are not registered as persons with disabilities, and this may be a challenge.

b) Provide resources to assess and provide essential supplies for vulnerable persons with mental conditions and principal caregivers that are not registered under the social security system through Ministry of Health, local administration, reputable religious organisations and nyumba kumi for all developmental, intellectual, psychosocial, neurological, substance use disorders/conditions/disabilities through the COVID-Emergency Response Fund.

c) Consider a waiver on the costs incurred in case a person with a disability or their care-giver is quarantined.

8. Involvement of organisations of people with disabilities in the fight against Coronavirus.

Challenges: Solutions being developed that address disability-related concerns without the engagement of persons with disabilities and their representative organisations.

Proposed solutions

a) Consult and actively involve persons with disabilities and their representative organizations (including persons with mental health conditions) in the State response to the COVID-19 outbreak.

b) Involve persons with disabilities and their representative organizations in the independent monitoring of institutional settings, including psychiatric facilities.

Conclusion
Many of the proposals made above can be undertaken within the current legal and policy structures. Additionally, it may be important for specific legal instruments to be approved to deal with aspects that may be novel. We call upon the concerned ministries to urgently address the issues raised in this memorandum.
List of contributing organisations and individuals

National Human Rights Institution
   1. Kenya National Commission on Human Rights

Civil Society Organisations
   2. Africa Mental Health Foundation
   3. Alzheimer’s and Dementia Organisation - Kenya
   4. BasicNeeds - Kenya
   5. Calmind Foundation
   6. Centre for Mental Health and Wellness in Kenya
   7. Health Rights Advocacy Forum
   8. Jinsiangu Transgender Kenya
   9. Kenya Association for the Intellectually Handicapped
  10. Tunawiri CBO
  11. Ulemavu Research Institute
  12. Users and Survivors of Psychiatry - Kenya
  13. Validity Foundation
  14. Watu Health Innovation Summit Foundation Africa
  15. Consortium of KAIH, African Institute for Children Studies and Kamili Mental Health Organisation

Individuals
   16. Ms. Loise Machira
   17. Mental Health Advocates (contact person: Ms. Charity Muturi)

Dr. Bernard Mogesa (PHD, CPM)
COMMISSION SECRETARY
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS