

The Intersex Bill 2023

Litigated cases in Courts, complaints received and reports generated by the Kenya National Commission on Human Rights and other civil society organizations have revealed that Intersex Persons in Kenya continue to face human rights violations mainly centered on their legal recognition which has a negative ripple effect in the enjoyment of their other human rights and fundamental freedoms.

Sometime in **May 2017**, the then Attorney General, Prof. Githu Muigai formed a Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya. The membership of the Taskforce was drawn from various institutions including Kenya Law Reform Commission (KLRC), Office of the Attorney General & Department of Justice, Directorate of Immigration & Registration of Persons, National Gender and Equality Commission, Kenya National Commission on Human Rights (KNCHR) and the CRADLE.

Further, in **2022** the **Children Act** was amended to recognize Kenya's third gender with an 'T' gender marker in response to the **Children Act 2022**. Notably, Kenya is the first African country that has granted the intersex community this universal right. The **Children Act 2022** therefore requires intersex children to be treated with dignity and have equal access to basic services like medical treatment and education, in addition to social protection services as a special need. It also requires the accommodation of intersex children in child protection centers and other facilities.

Against this background, the **Intersex Bill 2023** has been formulated. We have reviewed the current version of the bill circulating amongst industry stakeholders and set out below the key provisions for the recognition, protection and safeguarding of intersex persons' human rights in Kenya; to provide for the equalization of opportunities, affirmative action and non-discrimination of intersex persons.

- **Requirement for Registration of Births:** The Bill provides that at birth, an intersex child shall be entitled to be issued with an acknowledgement of the birth notification in writing, indicating that the child is intersex or official certificate of birth indicating the sex characteristic of the child. The registration shall contain name and date of birth of the child, name and date of birth of one or both of the child's parents and sex of the child, as either male, female or intersex.
- **Amendment of official documentation by Intersex persons:** The Bill proposes that an intersex person may at any time apply to the Registrar to amend the sex marker from male to intersex, female to intersex; or intersex to male or female.
- **Realization of rights of Intersex Persons:** The Bill provides that the Government shall take steps to ensure the full realization of human rights and fundamental freedoms of intersex persons provided for in the Constitution and in this part. To this end, a duty is placed upon the Cabinet Secretary in charge of Labour and Social Protection to ensure development, review and implementation of relevant laws and programmes to give effect to these rights.
- **Prohibition of Harmful Practices targeting Intersex persons:** The Bill forewarns that a person who subjects an intersex person to any form of harmful practice; or aids, abets, allows or encourages any other person to subject an intersex person to any harmful practice, commits

an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to a term of imprisonment of not less than six months or to both.

- **Right to Education:** The Bill also prohibits learning institutions from denying admission to an intersex person to any course or study for any reason including their being intersex. A further duty is placed upon institutions to ensure that the best interests of an intersex person is assessed in accordance with the proposed Bill and shall ensure that an intersex person is provided with the necessary facilities conducive to their status
- **Right to Health:** The Bill provides that intersex person's right to the highest attainable standard of health includes the right to access health services that are respectful of diversity and delivered according to the principles envisioned under the proposed Bill; and not to be subjected to intrusive and involuntary medical testing, treatments or procedures that may have negative long-term consequences.
- **Medical Report:** The Bill proposes that an intersex person who is required to prove their sex inclination shall obtain a medical report in the prescribed form from a medical practitioner. The medical report so referred to shall contain the name and age of the intersex person and the intersex condition or variation of the person.

Conclusion

We conclude this legal alert by noting that not everyone is born with sex characteristics that fit typical definitions for male or female bodies. That notwithstanding it does not vary the constitutional right that every person has inherent dignity and the right to have that dignity respected and protected.

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