



INTERSEX PERSONS IMPLEMENTATION COORDINATION COMMITTEE (IPICC)



TUMAINI

LAWS PROTECTING INTERSEX CHILDREN AND PERSONS IN KENYA

ABSTRACT

This publication provides a source of HOPE and solace for intersex children and persons who have endured neglect, marginalization, stigmatization, ridicule, and a sense of being forgotten for an extended period. It acknowledges their enduring struggles while advocating for their comprehensive inclusion and equitable access to vital services over the course of many decades. Encouragingly, Kenya is emerging as a global trailblazer in safeguarding their inherent human dignity and protecting their fundamental rights. In the subsequent sections, we present a comprehensive review of the existing Kenyan laws, policies, and pending parliamentary bills that serve to safeguard and protect the welfare of intersex children and persons within the country.

Developed by: *IPICC Secretariat, June 2023*

NO.	RELEVANT STATUTE	ISSUE ADDRESSED	ACTION FOR IMPLEMENTATION	ACTOR RESPONSIBLE	RELEVANT MATRIX IN THE TASKFORCE REPORT	ROLE OF IPPIC IN SUPPORTING IMPLEMENTATION
EXISTING STATUTES						
1.	Persons Deprived of Liberty Act, No. 23 of 2014	S. 2 : Defines the term 'intersex'	A person certified by a competent medical practitioner to have both male and female reproductive organs.	Personnel responsible for different legally mandated holding facilities.	This legislation was enacted before the tabling of the Intersex Taskforce Report. It however falls under the Legislative pillar, particularly recognition of IPs in law.	Coordinate state bodies tasked in the Report, together with potential partners to facilitate the necessary amendments proposed to be effected to this legislation.
		S. 10 (3) : Searches of detainees	Intersex Person has the right to decide the sex of the person by whom they should be searched.			
		S.12 (2) (e) : accommodation in holding facilities.	Intersex Person deprived of liberty to be held separate from other persons.			
2.	Children's Act No. 29 of 2022.	S. 2 : Defines the term 'intersex'	Child with a congenital condition in which the biological sex characteristics cannot be exclusively categorized in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.	Principal Registrar of Births and Deaths	Falls under the Legislative pillar, specifically the recognition of IPs in law through the introduction of a comprehensive definition of who an IP is.	Participated in the legislative process by giving context to the definition as well as other provisions that touch on IPs in the Act, through the process of public participation.
		S. 7(3) : Birth documentation	Measures to be taken to ensure correct documentation and registration of intersex Children at birth.	Government	Legislative pillar, particularly provision of birth certificates and other official documentation through including provision for the intersex 'I' marker	Coordinate the state bodies and potential partners to engage appropriately and ensure that the requisite steps are taken to enable registration of intersex children at birth.

S. 21: Rights of an Intersex Child.	Right of an intersex child to be treated with dignity, be accorded a proper medical treatment, special care, education, training and consideration as a special need category in social protection services.	Government	Mainstreaming of IPs in existing social protection frameworks.	Coordinate the respective state bodies (MDAs) and potential partners tasked in the Report, to ensure that this provision is effected.
S. 23: Protection from harmful cultural practices.	An intersex child shall not be subjected to organ change or removal except with the advice of a medical geneticist.	General public	Under the pillar of Health; Surgical and hormonal interventions for children in relation to their intersex status should only be carried out in case of medical emergency based on informed consent.	<ul style="list-style-type: none"> • Heighten awareness creation to the general public and relevant stakeholders. • Device means to conduct monitoring for purposes of confirming compliance with this provision.
S. 26 (3): Detention of children in conflict with the law.	Intersex children deprived of liberty shall be accommodated separately. (in child protection units to-S.63)	Responsible facilities of detention.	Legislative pillar, specifically review of laws to ensure equal treatment, respect and protection of dignity within the criminal justice system.	Conduct more awareness in places of detention as well as monitor the situation therein to confirm the status of compliance with this provision.
S. 95 (2)(b): Factors for consideration in children proceedings.	The intersex nature of a child shall form factors of consideration in children's proceedings.	Children's Court		
S. 144: Children in need of care and protection.	An intersex child is considered to be a child in need of care and protection if s/he has been or is likely to be subjected to; intersex genital mutilation or is subjected to or likely to be subjected to discriminatory treatment or abuse.			Conduct more awareness to the general public for purposes of sensitization of this law as well as continuous monitoring to confirm compliance.
S. 174(4): Persons qualified to foster children.	A person who applies to be a foster parent to an intersex child shall not be required to already be a parent to one.	Family Court		

SUBSIDIARY LEGISLATIONS (REGULATIONS AND POLICIES)

3.	National Police Service Standing Orders.	Par. 15(4)(b): Detainees in police custody.	Intersex persons shall be held separate from men and women.	National Police Service.	Legislative pillar (this amendment was effected prior to the TF Report).	Monitor compliance.
4.	National Reproductive Health Policy, 2022-2032	Defines the term 'intersex'. Objective 2: To improve responsiveness to client's reproductive health needs.	A congenital condition of sex development in which the development of the chromosomal, gonadal or anatomic sex is atypical leading to ambiguous genitalia making it difficult to identify their sex at birth and before development of secondary sexual characteristics at puberty. Sub-objective (iv); To ensure that persons born intersex attain the highest standards of reproductive health.	National and County governments.	Health pillar.	Engage and coordinate MoH, MPDPB and other state bodies named in the Report to build develop comprehensive treatment guidelines focusing on a child. Centered and human rights-based approach for the medical care and protection of intersex children.

EXISTING BILLS

5.	Huduma Bill, 2021	S.2: Defines the term 'gender'	Proposal to amend the term 'gender' in the Interpretation and General Provisions Act (Cap 2) to include 'intersex'.	Parliament	Legislative pillar, i.e. recognition of IPs in law.	Coordinate the state bodies and potential partners identified in the Report and lobby parliamentarians to support the proposal therein.
6.	The Assisted Reproductive Technology Bill, 2022.	S.22: Right to assisted reproductive technology by intersex persons	Measures to be put in place to ensure that intersex persons have access to assisted reproductive technology services.	National and County governments.	Health pillar.	Coordinate relevant stakeholders and bodies to lobby parliamentarians to support this provision.

7. The Family Reproductive Healthcare Bill, 2022	S. 2: Defines 'intersex persons' and 'sex'.	Adopted the Report's definition and included the term 'intersex' under the definition of sex.			Coordinate the relevant state bodies and stakeholders and lobby for support of these provisions.
	S. 60: Proximate provision for reproductive healthcare rights without discrimination.	(e) Women, girls and intersex persons who are PWDs to be provided with the same quality of healthcare.	County Governments.	Health pillar.	Offer input on the bill through public participation.
	S. 62: Reproductive Health related research to inform policy on Intersex Persons.	Undertake continuous health related research to inform policy interventions and service provision for intersex persons.	National government.		
	S. 63: Access to healthcare by intersex persons.	(i) Put in place measures to ensure that intersex persons have access to the highest attainable standard of reproductive health-care services.	National and County governments	Health pillar.	Offer input on the bill through public participation.
		(ii) Ensure that all health facilities have qualified personnel and sufficient facilities and equipment to correctly diagnose, manage and offer informed counselling and professional advice on intersex persons.			
S. 64: Research related to reproductive issues of intersex persons.	(i) Promote and facilitate research in connection with the prevention, diagnosis, management and treatment of medical and reproductive conditions which affect intersex persons.	National and County governments.	Health pillar.		
	(ii) Develop policies, standards and guidelines on the prevention, diagnosis, treatment and				

management of medical conditions affecting intersex persons.

S. 65: Prohibition of intersex genital mutilation without consent.	Forbids intersex genital cutting which includes; forced or coerced sterilization; forced gender assignment surgery; forced genital examinations; forced human experimentation.	General public	Health pillar.	Offer input on the bill through public participation.
	Ensure an intersex person give informed consent to all surgical and non-surgical medical procedures. In case of an intersex child, parent/ guardian to do it on their behalf.	Healthcare provider		
S. 66: Incapacitating an intersex person from reproducing.	Criminalizes the act of rendering an I.P incapable of sexual reproduction through surgical or non-surgical procedures without the persons prior, express or informed consent.	Healthcare provider	Health pillar.	
	Further forbids obtaining consent through force, inducement, willful misinformation, or intimidation. (Penalty is a fine of not more than 1M. or a term not exceeding 2yrs or both).			
S. 67: Prohibition against involuntary cosmetic genital surgery	Criminalizes the performance of cosmetic genital surgery on an I.P without prior, express or informed consent.	Healthcare provider.	Health pillar.	Offer input on the bill through public participation.
	Obtaining such consent through force or by means of willful misinformation, threats or intimidation is an offence punishable by a fine of not			

exceeding 1M or 2years in prison or both.

S. 68: Prohibition against involuntary hormone administration to an intersex person.

Criminalizes administration of hormone to an intersex Person without consent. Further criminalizes obtaining such consent fraudulently. Prescribes punishment for those found guilty as follows:

- (a) Fine not exceeding 1M or a term not exceeding 2yrs or both.
- (b) Healthcare providers- proceedings under S.20 of the MPD Act.
- (c) Reparations in form of compensation and any other form granted by law.

General public

Health pillar.

S. 70: Awareness and education on intersex.

Undertake public education and awareness campaigns to eradicate stigma among the general public on the medical and reproductive conditions affecting intersex persons.

National and County government

Health pillar.

S. 71: Publishing and publicizing of information on matters intersex.

Publishing and publicizing of comprehensive and accurate information on medical and reproductive conditions affecting intersex persons.

Offer input on the bill through public participation.

S. 80: Management of menstrual hygiene.

Provision of free, sufficient and quality sanitary towels and an environmentally friendly mechanism for disposal of the sanitary towels to every girl or I.P who has reached puberty and is enrolled in a public basic education institution.

National government

Health pillar.

S. 83: Membership of The National Reproductive Healthcare Committee.

The Bill establishes the said Committee whose membership will consist of among others one intersex person.

Cabinet Secretary to nominate

OTHERS

- Inclusion of intersex sex marker in the Kenya National Bureau of Statistics (KNBS), 2019 Kenya Population and Housing Census (KPHC) and relevant data collection tools.
 - Different MCDAs have mainstreamed intersex persons in their systems and structures by making provision for them in their documents/platforms, e.g.; KNCHR internal complaints management system, IPICC database and others, M-Chanjo by the MoH, The ODPP in the charge sheet, Ministry of Agriculture & Livestock.
 - A Report on the Status of Intersex Persons in the Kenyan Criminal Justice System by the NCAJ Committee on Criminal Justice Reforms jointly with IPICC. The Report proposes a review of laws in the criminal justice sector.
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REGIONAL AND INTERNATIONAL FRAMEWORKS ON INTERSEX

- IPICC and KNCHR has been on the forefront advocating for recognition and protection of intersex persons. Below is one of the resolutions (ACHPR/Res.552 (LXXIV) 2023 – Resolution on the Promotion and Protection of the rights of Intersex Persons in Africa) that was successfully adopted by the African Commission on Human and Peoples Rights (ACHPR).
 - Further, IPICC and KNCHR has continued to contribute to various state reports in fulfillment of Kenya’s obligation outlined in UN treaties, conventions and regional frameworks. For example, Kenya’s state report on CRC, The African Charter on the Rights and Welfare of the Child (ACRWC/the Charter) and ICCPR, etc.
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ACHPR/Res.552 (LXXIV) 2023 – Resolution on the Promotion and Protection of the rights of Intersex Persons in Africa

The IPICC together with KNCHR and other Intersex Persons Organizations in Kenya and Africa have clamored for the recognition of intersex persons rights and those efforts have resulted to the following resolutions by the Commission during its 74th Ordinary Session:-

Recalling its mandate to promote and protect human and peoples' rights in Africa under Article 45 of the African Charter on Human and Peoples' Rights (the African Charter);

Recalling also that Article 2 of the African Charter prohibits any form of discrimination against any person on the basis of race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Noting that Article 3 of the African Charter grants equal protection of the law to all, and that Article 5 guarantees to all the recognition of legal personality and the prohibition of torture and cruel, inhuman and degrading treatment;

Noting also that Article 16 of the African Charter guarantees everyone the right to the enjoyment of the highest attainable standard of physical and mental health, and that Article 9 of the African Charter guarantees everyone the right of access to information, including medical records and histories;

Considering that Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and Article 21 of the African Charter on the Rights and Welfare of the Child prohibit harmful social and cultural practices;

Recognizing that intersex persons, who are born naturally with a chromosomal abnormality and reproductive or sexual anatomy that does not appear to fit the typical definitions of female or male, exist in all African societies;

Recognizing that intersexuality is an inherent handicap at birth and that it should not be considered a taboo in all African societies;

Recognizing also that non-consensual and unnecessary surgical and other genital normalization procedures performed on intersex persons, in a medical or other setting, may cause them lifelong physical and psychological suffering, permanent sterility, incontinence, and loss of sexual pleasure;

Further recognizing that the above-mentioned non-consensual and unnecessary surgical and other genital normalization procedures have irreversible consequences similar to genital mutilation and can be considered as such;

Concerned about human rights violations against intersex persons which include, but are not limited to, rejection in society; infanticide and abandonment of children; lack of proper legal recognition and administrative processes that prevent intersex persons from acquiring or altering identity documents; unfair discrimination in schools, health facilities, competitive sports, work; access to public services; and detention;

Further concerned about the invisibility and lack of awareness and sensitivity to the plight and situation of intersex persons in African communities;

Recalling that States Parties to the African Charter have the obligation to recognize the rights, duties and freedoms guaranteed by the African Charter by adopting legislative or other measures to implement them;

Noting that most States Parties do not have appropriate legislative, policy or other measures to guarantee the protection of the rights of intersex persons;

The Commission calls on States Parties to:

1. Promote and protect the rights of intersex persons on the continent;
2. Stop non-consensual genital normalization practices on intersex persons, such as surgical, hormonal and sterilization procedures that alter the sexual characteristics of intersex persons and ensure respect for their rights to make their own decisions regarding their bodily integrity, physical autonomy and self-determination;

3. Ensure that any action concerning an intersex minor is carried out with the permission of the parents and after medical analysis, taking strict account of the best interests of the child;
4. End human rights violations against intersex persons, such as infanticide and abandonment of intersex children;
5. Prohibit discrimination based on intersex traits and characteristics or intersex status, including in education, health, employment, competitive sports, and access to public services, and address such discrimination through appropriate anti-discrimination initiatives;
6. Ensure that intersex human rights defenders work in an environment free from stigmatization, retaliation, or criminal prosecution because of their human rights activism;
7. Incorporate intersex education into prenatal counselling and support services, and provide training for health care personnel focused on the health needs and human rights of intersex persons, as well as the appropriate counselling and care to be given to intersex parents and children, respecting the autonomy, psychological integrity and sexual characteristics of the intersex person;
8. Enact enabling legislation and institutionalize administrative processes that allow intersex persons to change the gender designation on their birth certificates and other official documents, based on decision taken through medical intervention;
9. Ensure intersex people's right to full information, including access to their own medical records and history;
10. Ensure that human rights violations against intersex people are investigated, perpetrators are prosecuted, and victims have access to effective remedies, including redress and compensation;
11. Raise awareness of intersex issues and the rights of intersex persons in society; and
12. Ensure that members of the judiciary, immigration officials, law enforcement officers, health, education and other officials and personnel are sensitized to the respect and equal treatment of intersex persons.

7th March 2023