

## SUBMISSION TO THE COMMITTEE AGAINST TORTURE CONCERNING KENYA'S THIRD PERIODIC REPORT

73<sup>rd</sup> Session of the Committee against Torture, 18 March 2022

### INTRODUCTION

1. [REDRESS](#) and the [National Gay & Lesbian Human Rights Commission](#) (NGLHRC) make this submission to draw the Committee against Torture's attention to the issue of discriminatory violence affecting individuals identifying or perceived as LGBTIQ+ in Kenya (paragraph 33 of the List of Issues)<sup>1</sup>. This submission is based on our extensive experience working against torture and on LGBTIQ+ issues in Kenya.
2. Forms of violence against LGBTIQ+ persons identified in this submission often, alarmingly, amount to torture and other cruel, inhuman or degrading treatment or punishment (CIDTP). Acts of violence perpetrated by State and non-State actors against LGBTIQ+ persons in Kenya include arbitrary detention, sexual assault, physical assault, forced anal examinations, conversion therapy practices, extortion, and other forms of ill-treatment.
3. Since its last periodic report to this Committee, Kenya introduced stand-alone anti-torture legislation, the Prevention of Torture Act 2017 (PTA), which incorporates the State's international obligations under UNCAT into their domestic legal framework. Article 4 of the PTA adequately criminalises torture for all purposes comprised in the UNCAT definition of torture, including that of "*discrimination of any kind*", which is particularly relevant to address violence against LGBTIQ+ Kenyans perpetrated based on discrimination on grounds of sexual orientation and gender identity. Positively, in 2018, the Mombasa Court of Appeal declared forced anal examinations as unconstitutional on account that they violate principles of human dignity, anti-discrimination, and security of the person (including freedom from torture and cruel, inhuman or degrading treatment).<sup>2</sup>
4. However, despite such efforts, and even though violence against LGBTIQ+ persons will often satisfy the definition of torture, such acts are rarely prosecuted as such. In practice, violence against the LGBTIQ+ community is often ignored or considered a minor offence or otherwise as an offence not characterised as torture and CIDTP. Further, urgent action is needed to improve prevention strategies, including repealing discriminatory laws that fuel violence against LGBTIQ+ persons, and to strengthen investigative and accountability mechanisms to ensure such violence is appropriately addressed, including by providing adequate training on LGBTIQ+ issues and the PTA for relevant State authorities.

### THE CONTEXT OF LGBTIQ+ VIOLENCE IN KENYA

5. In Kenya, there is an overall environment of hostility towards LGBTIQ+ individuals, who commonly suffer harassment and discrimination because of their sexual orientation, gender identity, gender expression and sex characteristics. Such discrimination affects LGBTIQ+ persons in many areas of life, preventing them from exercising fundamental

<sup>1</sup> Committee against Torture (CAT), '[List of issues prior to submission of the third periodic report of Kenya](#)' (11 January 2016), UN Doc. CAT/C/KEN/QPR/3.

<sup>2</sup> Kenya Court of Appeal at Mombasa, [COI & another v Chief Magistrate Ukunda Law Courts & 4 others](#) [2018], Civil Appeal No. 56 of 2016, 2018.

rights, such as healthcare, employment, and education. It also fuels violence against them, including torture and other ill-treatment, and impacts their access to justice and to reparation.

### **Criminalisation of same-sex activities as a factor that fuels LGBTIQ+ violence**

6. In Kenya, the Constitution provides that individuals shall not be discriminated against on the basis of sex and case law has stated that, on a case-by-case basis, this may include sexual orientation. However section 162 of the Penal Code<sup>3</sup> (unnatural offences) criminalises acts “*against the order of nature*”, which have been interpreted by the High Court as including anal sex.<sup>4</sup> Further, section 165 of the Penal Code<sup>5</sup> (indecent practice between males) criminalises any act of “*gross indecency*” between male individuals. These offences carry a penalty of up to fourteen (s. 162) and five years of imprisonment (s. 165).
7. These discriminatory offences were challenged on the basis of their unconstitutionality in *EG v Attorney General* (NGLHRC recognised as interested party). Nonetheless, in 2019 the High Court of Kenya dismissed the case, ruling that such offences did not violate any constitutional right, including the rights to privacy, and to freedom and security of person, when read in conjunction with the right to marry only a person of the opposite sex (Art. 45(2)). The High Court considered that if acts described in those sections of the Penal Code were legal, it would result in same-sex couples being allowed to live together as a couple and “*such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution... therefore, decriminalizing the impugned provisions would indirectly open the door for unions among persons of the same sex.*”<sup>6</sup> This decision is under appeal at the time of writing this submission.<sup>7</sup>
8. Despite the High Court’s argument that the offences in question apply to “*any person*” (s. 162) and “*any male person*” (s. 165), and not specifically to those of a particular sexual orientation, in practice, these offences are used to target individuals who identify or are perceived as LGBTIQ+ in the country.
9. This criminalisation of same-sex conduct or other behaviour linked to non-normative sexual orientation or gender identity tends both to legitimise State violence and also to encourage discriminatory and violent behaviour by non-State actors.<sup>8</sup> In the context of such criminalisation, LGBTIQ+ persons face increased risks of arbitrary arrests and detention, direct physical violence upon arrest and in custody, extortion by police

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<sup>3</sup> Section 162. Unnatural offences Any person who— (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if— (i) the offence was committed without the consent of the person who was carnally known; or (ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

<sup>4</sup> Kenya Penal Code, 2012. See also Kenya Court of Appeal at Nairobi, [Non-Governmental Organisations Co-ordination Board v. EG & 5 Others](#) [2019] (*NGO Co-ordination Board v. EG*), Civil Appeal No. 145 of 2015, 2019; High Court of Kenya at Nairobi, [EG & 7 others v. Attorney General; DKM & 9 others \(Interested Parties\); Katiba Institute & another \(Amicus Curiae\)](#) [2019] (*EG v. Attorney General*), Petition No. 150 of 2016, 2019, para. 271.

<sup>5</sup> Section 165. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

<sup>6</sup> [EG v. Attorney General](#), paras. 296-297.

<sup>7</sup> Human Dignity Trust, ‘[Eric Gitari & Others v. Attorney General Kenya \(2019\)](#)’, 2019.

<sup>8</sup> See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), ‘[State Sponsored Homophobia 2019](#)’, March 2019.

officers, societal violence, and also indirect violence due to fear of reporting crimes or seeking support. Hence, decriminalisation of such offences, and repealing other discriminatory laws, are fundamental in addressing LGBTIQ+ violence, including torture and other ill-treatment.

### Forms of LGBTIQ+ violence by State and non-State actors

10. LGBTIQ+ persons in Kenya are disproportionately affected by State and non-State violence. NGLHRC since the inception of its legal clinic in 2014 has received and responded to approximately 2,707+ cases of violence against LGBTIQ+ Kenyans, and refugees and asylum seekers in Kenya, based on their real or perceived sexual orientation or gender identity. These cases include sexual assault, physical assault, verbal abuse and threats to violence, murder, conversion therapy practices, among others.<sup>9</sup> The UN Human Rights Committee also recently expressed its concern about such violence against LGBTIQ+ persons in Kenya.<sup>10</sup>
11. *Conversion therapy practices.* In 2020, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity noted the practice of conversion therapy in Kenya, and the existence of camps or “rehabilitation facilities” where individuals are subjected to “beatings, shackling and food deprivation” (amongst other things).<sup>11</sup> Also noted was the practice of so-called “corrective” rapes and other forms of sexual abuse against gay men and trans men in the country.<sup>12</sup>
12. *Arbitrary arrests, extortion and violence in police custody.* Arbitrary arrests with the intent to extort are disproportionately carried out against LGBTIQ+ persons in Kenya. NGLHRC has dealt with 679 cases of blackmail and extortion since 2014 but there is anecdotal evidence among local organisations of thousands of such cases. In 2021, instances of extortion by undercover police officers who lured LGBTIQ+ persons through a dating app illustrate the extent of the effort and creativity employed to practice extortions against this group.<sup>13</sup>
13. In other cases, where lawyers were not involved, victims of this type of extortion have suffered severe beatings by both police officers and members of the public, sometimes requiring hospital treatment.<sup>14</sup> There are also reports of instances of use of the threat of physical violence by the police against LGBTIQ+ individuals in order to elicit a confession.<sup>15</sup> Forced anal examinations, despite being ruled unconstitutional as mentioned above, also continue to be practiced.<sup>16</sup>

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<sup>9</sup> See generally National Gay & Lesbian Human Rights Commission (NGLHRC), [‘2020/2021 Annual Legal Aid Report’](#), 2021; [‘July 2019/July 2020 Legal Aid Report’](#), 2020, and [‘2018/2019 Legal Aid Brief’](#), 2019.

<sup>10</sup> UN Human Rights Committee (HRC), [‘Concluding observations on the fourth periodic report of Kenya’](#), 11 May 2021, UN Doc. CCPR/C/KEN/CO/4, para. 12(c).

<sup>11</sup> UN Human Rights Council (UNHRC), [‘Practices of so-called “conversion therapy”, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ \(Practices of conversion therapy report\)](#), 1 May 2020, UN Doc A/HRC/44/53, paras. 30 and 52. See also: openDemocracy, [‘I was afraid I was going to die’: Kenyan survivor of conversion therapy’](#) (12 July 2021); [‘Aid donors to investigate anti-gay ‘therapy’ revealed by openDemocracy’](#) (30 June 2021); LVCT, [‘LVCT health response to the open democracy article’](#) (1 July 2021); NGLHRC, [‘2020/2021 Annual Legal Aid Report’](#), pp. 3, 11 (para. 3.3), and 16 (para. 4.2.7) and [‘July 2019/July 2020 Legal Aid Report’](#), p. 19 (para. 10).

<sup>12</sup> *Ibid* UNHRC, ‘Practices of conversion therapy’, para. 39; See also NGLHRC, [‘2020/2021 Annual Legal Aid Report’](#), pp. 1, 17 (para. 4.4.6) and [‘July 2019/July 2020 Legal Aid Report’](#), p. 15 (para. 4.0).

<sup>13</sup> Sarah Johnson, [‘I’d been set up’: the LGBTQ Kenyans ‘catfished’ for money via dating apps](#), The Guardian, 4 January 2022.

<sup>14</sup> *Ibid*.

<sup>15</sup> Human Rights Watch, [‘The Issue is Violence – Attacks on LGBT People on Kenya’s Coast’](#), September 2015.

<sup>16</sup> NGLHRC, [‘July 2019/July 2020 Legal Aid Report’](#), 2020, p. 24 (para. 15.2). See also NGLHRC, [‘2018/2019 Legal Aid Brief’](#), p. 4.

14. Furthermore, threats of outing LGBTIQ+ persons to their family or wider community are also practiced in the context of police custody. These threats tend to be effective due to the stigmatisation and ostracisation faced by the LGBTIQ+ community. In addition, the Kenya Human Rights Commission and the Equal Rights Trust have documented and reported instances of LGBTIQ+ persons being blackmailed not only by members of the security forces, but also by their partners, family members, and colleagues, often to extort money or to force custody agreements to be entered into over children.<sup>17</sup>
15. *Violence in detention facilities.* LGBTIQ+ persons also face discrimination and multiple forms of violence, often amounting to torture or CIDTP, in detention settings, as has been recognised by various UN bodies including the Special Rapporteur on torture (SRT) and this Committee.<sup>18</sup> By way of example, in February 2019, 20 LGBTIQ+ refugees were arrested and detained, supposedly for “*public nuisance, trespassing and even defecating in public*”, and suffered physical abuse and sexual assault at the hands of both prison guards and other prisoners.<sup>19</sup> Six of the detainees, who identified as trans women, were also kept in the men’s prison.<sup>20</sup> NGLHRC has also received reports of violence against gay and bisexual men and men who have sex with men perpetrated by other prisoners.<sup>21</sup> Abuses in detention settings could be prevented or at least reduced through the effective implementation of safeguards in places of detention, and through specific amendments to the Persons Deprived of Liberty Act (see section below on prevention).
16. *Violence against LGBTIQ+ refugees.* LGBTIQ+ refugees and asylum seekers who have to flee their countries due to discrimination based on sexual orientation or gender identity (or other reasons), are often met with hostility, further discrimination and violence in receiving countries. Kenya is one of the few countries in Africa accepting refugees on the basis of sexual orientation and gender identity persecution, and it is suggested that Kenya is safer than neighbouring countries in this regard.<sup>22</sup> Once in Kenya, however, hostility from other refugees is common, sometimes acting as a barrier for LGBTIQ+ refugees to access livelihood programs, as observed in the Kakuma Refugee Camp.<sup>23</sup> There are also reports of exploitation of refugees by the police on account of being LGBTIQ+, leading to increased uncertainty and fear amongst LGBTIQ+ applicants.<sup>24</sup> Finally, reports from 2020 and 2021 note that high rates of verbal abuse and physical assaults against LGBTIQ+ refugees remain a significant concern.<sup>25</sup>

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<sup>17</sup> Equal Rights Trust, ‘[Submission to the United Nations Human Rights Council for a universal periodic review \(21st session\) of Kenya](#)’, 2015; Kenya Human Rights Commission (KHRC), ‘[The Outlawed Amongst Us](#)’, 2011.

<sup>18</sup> See Statement by the CAT, Subcommittee on the Prevention of Torture, Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, and UN Voluntary Fund for Victims of Torture on the International Day for the Victims of Torture 2016: ‘[Targeted and Tortured: UN Experts Urge Greater Protection for LGBTI People in Detention](#)’, 2016.

<sup>19</sup> The Washington Post, ‘[These LGBT refugees came to Kenya seeking freedom. Now they say they’ve been imprisoned and abused.](#)’, 19 March 2019.

<sup>20</sup> *Ibid.*

<sup>21</sup> See Case No. SO E 093/2021, pending at Mombasa Law Courts.

<sup>22</sup> Rainbow Railroad and Organization for Refuge, Asylum & Migration (ORAM), ‘[The Challenges Facing LGBTIQ+ Refugees in Kakuma Refugee Camp, Kenya](#)’, October 2021, p. 5.

<sup>23</sup> *Ibid.*, pp. 5-6.

<sup>24</sup> The Washington Post, ‘[‘We were so ready’: LGBT refugees in Kenya live in fear as global resettlement is put on hold](#)’, 26 May 2020.

<sup>25</sup> Rainbow Road and ORAM, ‘[The Challenges facing LGBTIQ+ Refugees In Kakuma Refugee Camp, Kenya](#)’; Human Rights Centre, University of Minnesota, ‘[Submission for the List of Issues: Kenya, 128<sup>th</sup> Session of the UN Human Rights Committee](#)’, January 2020.

## DUTY TO PREVENT AND INVESTIGATE LGBTIQ+ VIOLENCE

17. In Kenya, whilst in some cases the police have protected LGBTIQ+ persons from violence, there remain many cases in which the police have either refused to assist LGBTIQ+ individuals or became perpetrators of violence themselves. LGBTIQ+ persons who have attempted to report incidents of violence or crime to the police have been subjected to further verbal or physical abuse, or even arrest, as a result of officers' perception of the victims' sexual orientation or gender identity.<sup>26</sup>
18. In light of these experiences, it is unsurprising there is a general fear of reporting violence against LGBTIQ+ persons, especially where the violence was motivated by discrimination on grounds of sexual orientation or gender identity.<sup>27</sup> Also, in cases where an individual has suffered sexual violence at the hands of the police, attempts to report such incidents have on occasion been unsuccessful due to the reluctance of the police to investigate and prosecute their own.<sup>28</sup>

### Initiatives to prevent and investigate gender-based violence

19. It must be noted that Kenya has taken some steps in recent years to prevent and address sexual and gender-based violence (SGBV), including:
  - a) the development of a monitoring and evaluation framework facilitated by the National Gender and Equality Commission and a County Government Policy on SGBV (in 2017) designed to progressively eliminate such violence;
  - b) the adoption of National Guidelines on the Management of Sexual Violence (in 2014), aimed at medical practitioners, with a view to better preserve evidence for court use and provide appropriate psycho-social and medical support to survivors;
  - c) the development of a Training Manual on SGBV for Prosecutors, which provides guidance to investigators, medical practitioners, and civil society on the elements of prosecution under the Sexual Offences Act. The Manual specifically includes guidelines on how to record statements, handle crime scenes and evidence, identify offenders and expert witnesses, and related challenges;<sup>29</sup>
  - d) the enactment of the Protection against Domestic Violence Act in 2015.<sup>30</sup>
20. By properly acknowledging and addressing the specific discriminatory causes of SGBV, as well as developing guidelines and best practices on addressing instances of this type of violence, the efforts described above are important to shed light on the gravity of such violations and to ensure effective prevention and adequate remedies.<sup>31</sup>
21. Nonetheless, the above framework has not been used to address violence against the LGBTIQ+ community. The National Gender and Equality Commission does not tend to

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<sup>26</sup> Human Rights Watch (HRW), [‘The Issue is Violence – Attacks on LGBT People on Kenya’s Coast’ \(The Issue is Violence\)](#), September 2015; See also NGLHRC, [‘2020/2021 Annual Legal Aid Report’](#), pp. 12 (para. 42.), 18 (paras 5.1, 5.2, 5.4 and 5.5); [‘July 2019/July 2020 Legal Aid Report’](#), pp. 21 (para.14.2), 22 (para. 14.3), 23 (para. 14.5) and [‘2018/2019 Legal Aid Brief’](#), pp. 3, 10-11 (para. 6.2).

<sup>27</sup> NGLHRC, [‘2020/2021 Annual Legal Aid Report’](#), pp. 9 (para. 1.1), 18 (paras 5.4, and 5.6); [‘July 2019/July 2020 Legal Aid Report’](#), pp. 7, 8, 11-12 (para. 1.0), 21 (para. 14.2), and [‘2018/2019 Legal Aid Brief’](#), pp. 3, 6 (para. 2.1.2), 7 (para. 2.3.2).

<sup>28</sup> HRW, [‘The Issue is Violence’](#).

<sup>29</sup> HRC, [‘Fourth periodic report submitted by Kenya under article 40 of the Covenant, due in 2015’](#), 26 April 2019, UN Doc. CCPR/C/KEN/4, paras. 80-81.

<sup>30</sup> [Protection against Domestic Violence Act, No. 2 of 2015](#).

<sup>31</sup> UNHRC, [‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’](#), 5 January 2016, UN Doc. A/HRC/31/57, para. 6.

receive nor investigate instances of violence based on discrimination against sexual orientation or gender identity specifically. Also, the use of the above frameworks to address LGBTIQ+ violence is hindered by the fact that LGBTIQ+ persons rarely report instances of gender-based violence or intimate partner violence due to their fear of having to disclose the nature of their status or relationship and, consequently being further discriminated or being arrested themselves as a result (for example, under sections 162 and 165 of the Penal Code) (see paragraphs 17-18 above).<sup>32</sup>

22. A gender-based approach as used in the initiatives detailed above would serve as “a sharp lens for analysing the root causes of violence and discrimination based on sexual orientation and gender identity and expression.”<sup>33</sup> Indeed, initiatives to counter SGBV must pay particular attention to how such violence affects LGBTIQ+ persons, albeit without diminishing the importance of protecting other affected groups.

### **Urgent action needed to prevent and investigate LGBTIQ+ violence**

#### Prevention strategies

23. Despite these efforts with regards to SGBV, and as demonstrated in previous sections, there is still a need to adopt effective measures to specifically prevent LGBTIQ+ violence in Kenya, including but not limited to that which amounts to torture or CIDTP.
24. An important step made by the State in this regard (mentioned by Kenya’s government report to this Committee) is the Persons Deprived of Liberty Act, which was enacted in 2014. The Act provides key protections to detained persons in Kenya, including the right of intersex persons to decide the sex of the person by whom they are to be searched.<sup>34</sup> However, the Act fails to protect transgender persons or persons of non-conforming gender. The Act also states that an “intrusive search or search in or around a concealed body cavity” should be done in private and “with due regard to personal safety and health”, and that these searches should be carried with decency and dignity.<sup>35</sup> Though this provides some protection against forced anal examinations, further amendments are needed to prohibit all anal examinations without explicit consent and to reflect the High Court’s finding that the practice, when forced, violates constitutional principles of dignity and security (including freedom from torture and ill-treatment). Further training and implementation on the application on this provision is also needed, since reports document the continued practice (see para. 13 above).
25. The Persons Deprived of Liberty Act also requires that authorities ensure, for instance, that intersex persons are detained separately from others, presumably to protect them from violence, harassment and discrimination by other inmates.<sup>36</sup> Yet, this provision does not refer to other LGBTIQ+ persons and should be amended accordingly.<sup>37</sup> There are also instances where, instead of being placed in a separate cell for protection, LGBTIQ+ persons have been inappropriately transferred to psychiatric centres.<sup>38</sup>

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<sup>32</sup> NGLHRC, ‘[2020/2021 Annual Legal Aid Report](#)’, p. 9 (para. 1.1) and ‘[July 2019/July 2020 Legal Aid Report](#)’, 2020, pp. 7, 8, and 14 (para. 3.1).

<sup>33</sup> UNHRC, ‘[Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#)’, 3 June 2021, UN Doc. A/HRC/47/27, para. 7.

<sup>34</sup> [The Persons Deprived of Liberty Act, 2014](#), s 10(3).

<sup>35</sup> *Ibid*, ss 10(4) and (5).

<sup>36</sup> *Ibid*, s 12(3)(e).

<sup>37</sup> See case pending at the Mombasa Law Courts, Case No. SO E 093/2021, regarding the need to detain gay and bisexual men and men who have sex with men separately for their protection. This is also highlighted in an upcoming Legal Aid Report by NGLHRC.

<sup>38</sup> This is also highlighted in an upcoming Legal Aid Report by NGLHRC.

26. Another relevant step reported by the State (this time to the Human Rights Committee in 2019), refers to an apparent training initiative by different stakeholders for State officers on LGBTIQ+ issues. According to Kenya's government, the National Police Service, National Gender and Equality Commission, the Kenya Human Rights Commission and NGOs, are "sensitising public officers on how to handle matters relating to Lesbian, Gay, Bisexual and Transgender matters."<sup>39</sup> However, there is no information available on when and how many times such initiatives were implemented, how many State officials received training, which issues were covered, and what was the impact of such trainings.
27. In any case, the issues presented in this submission suggest that there is a problem of structural discrimination against LGBTIQ+ persons, including institution-wide concerns in relation to the police, where there is an urgent need to better understand the rights of LGBTIQ+ persons. Such concerns could be addressed or at least mitigated by the inclusion of LGBTIQ+ rights in an appropriate manner in the official curriculum of law enforcement agencies, and not just in the form of one-off training sessions (although such initiatives should be commended and incentivised).
28. Finally, further efforts are also needed to prevent violence perpetrated against the LGBTIQ+ community by non-State and private actors. These might include, for example, (i) legislative reforms, such as the adoption of a comprehensive anti-discrimination law with specific reference to discrimination on grounds of real or perceived sexual orientation and gender identity; (ii) public awareness campaigns on LGBTIQ+ issues and non-discrimination; (iii) systematic data collection to monitor and record instances of LGBTIQ+ violence, which can clarify the nature and scale of the problem, and assist in the identification of patterns of discrimination and violence as well as key areas or circumstances where further preventive efforts are needed; and (iv) the effective investigation and sanction of the perpetrators in order to deter future instances of torture and ill-treatment.

#### Investigation strategies

29. The general absence of accountability for torture, CIDTP and other forms of violence against LGBTIQ+ persons in Kenya can be attributed, among other things, to the lack of gender sensitive protocols on the effective investigation of LGBTIQ+ violence specifically, and the lack of appropriate training of State officials dealing with such investigations.<sup>40</sup>
30. Even when investigations are conducted, the discriminatory purpose behind violent acts is not always explored. Therefore, there is a need to encourage actors involved in the investigation of LGBTIQ+ violence to:<sup>41</sup>
  - a) refrain from using discriminatory presumptions and stereotyping when receiving, processing and investigating complaints, and ensure victims can report torture and ill-treatment in spaces in which their privacy can be guaranteed;
  - b) take all reasonable measures to collect and secure evidence, avoiding re-victimization and additional harm to victims;

<sup>39</sup> HRC, 'Fourth periodic report submitted by Kenya', UN Doc. CCPR/C/KEN/4, para. 20.

<sup>40</sup> Victims sometimes opt not to report violations due to lack of trust in the investigative process. See NGLHRC, 'July 2019/July 2020 Legal Aid Report', p. 15 (para. 4.0).

<sup>41</sup> See, for example, European Court of Human Rights, *Case of Aghdgomelashvili and Japaridze v. Georgia*, App no. 7224/11 (8 January 2021), para 38; Inter American Court of Human Rights, *Case of Azul Rojas Marín et al v. Peru*, Series C No. 402, 12 March 2020, paras. 194-197, 244.

- c) explore all practical means of discovering the truth concerning the incident;
  - d) take all reasonable steps to unmask possible discriminatory motives and establish whether feelings of hatred or prejudices played a role in the events; and
  - e) deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence motivated by gender-based discrimination.
31. This means actors investigating LGBTIQ+ violence should be encouraged and trained to pursue relevant lines of enquiry to assess whether violence was motivated by discrimination on the ground of sexual orientation and gender identity.<sup>42</sup> Such actors should also be encouraged and trained to, where relevant, characterise instances of LGBTIQ+ violence as torture under the PTA.
32. In this regard, the State is urged to ensure that issues pertaining specifically to LGBTIQ+ individuals are adequately included in the Training Manual on Sexual and Gender based Violence mentioned above (as well as in other initiatives related to sexual and gender-based violence) and consider developing a similar protocol for the investigation of LGBTIQ+ violence.

### **RECOMMENDATIONS**

33. In order to meet its obligations under UNCAT in relation to the issues highlighted in this submission, REDRESS and NGLHRC consider that Kenya should:
- a) Ratify the Optional Protocol to UNCAT and implement a national preventive mechanism.
  - b) Make a specific declaration under Article 22 of UNCAT to recognise the competence of this Committee to receive and consider individual communications.

### **Legislative reforms**

- c) Conduct a review of the current legal framework and repeal laws and specific provisions that directly or indirectly discriminate against LGBTIQ+ persons, and/or encourage or legitimise torture, CIDTP and other forms of violence based on sexual orientation and gender identity. Specifically, the State is encouraged to decriminalise offences under sections 162 and 165 of Kenya's Penal Code.
- d) Amend national legislation to adequately protect LGBTIQ+ persons from violence, including by:
  - i. adopting a comprehensive anti-discrimination law with specific reference to discrimination on grounds of real or perceived sexual orientation and gender identity;<sup>43</sup>
  - ii. criminalising hate speech intending or likely to stir up hatred based on real or perceived sexual orientation or gender identity;
  - iii. amending the Persons Deprived of Liberty Act to protect all persons identifying as LGBTIQ+; and
  - iv. prohibiting forced medical treatment such as conversion therapy practices and forced anal examinations.

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<sup>42</sup> *Ibid.*

<sup>43</sup> The State could explore the option of amending the National Cohesion and Integration Act for that matter.

### **Policy reforms**

- e) Through the Kenya Human Rights Commission and/or law enforcement agencies, collate disaggregated data on LGBTIQ+ violence and document reports of violence against the LGBTIQ+ community by State and non-State actors, as well as information on the investigations opened and their result.
- f) Develop and adopt a best practices protocol and/or guidelines into the effective investigation of allegations of LGBTIQ+ violence, based on international standards and following consultation with relevant stakeholders, including experts and civil society organisations.
- g) Encourage lawyers, prosecutors and judges to make use of the anti-torture legislation (Prevention of Torture Act, 2017) and criminal laws to prosecute violence perpetrated against LGBTIQ+ persons, and characterise it as torture and CIDTP where relevant.
- h) Acknowledge increased vulnerability of specific groups, such as LGBTIQ+ asylum seekers and migrants, and LGBTIQ+ persons deprived of their liberty, and strengthen prevention mechanisms, including through monitoring and ensuring adequate conditions in detention facilities and in refugee camps.

### **Educational and other initiatives**

- i) Provide an ongoing and rolling program of obligatory training on LGBTIQ+ issues, and anti-torture standards (including in relation to LGBTIQ+ violence) for law enforcement officials and other State institutions, including the Kenya Human Rights Commission, police and prison officers, border guards, immigration officers, medical personnel, prosecutors, and members of the judiciary. Such training initiatives should include modules on due diligence on investigations and judicial processes into allegations of torture or other forms of violence against LGBTIQ+ persons, based on international human rights standards.
- j) Incorporate comprehensive education on issues around sexual orientation and gender identity, in line with Principle 16 of the Yogyakarta Principles, covering non-discrimination, equality and gender roles, and sexual diversity, into the school curriculum, with a view to raise awareness and promote cultural change and acceptance, and eradicate practices that may legitimise or exacerbate violence and discrimination against LGBTIQ+ persons.
- k) Consult with civil society organisations working on these issues, and/or regional and international experts, prior to and during the development of such educational initiatives.
- l) Conduct public information campaigns on the human rights of LGBTIQ+ persons, in partnership with civil society organisations that work on LGBTIQ+ issues.