

4. CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

This report is published at a moment of profound political and social change in Kenya. The country has seized the opportunity for national renewal presented in the wake of the 2008 post-election violence, adopting a Constitution which reflects a strong commitment to the principles of non-discrimination and equality and to maintaining Kenya's unity in diversity. Coming at the end of a decade which saw the introduction of laws prohibiting discrimination on grounds of disability, race and ethnicity and HIV status, and on a range of grounds in respect of employment, the Constitution marks the latest – and largest – improvement in Kenya's legal framework on equality and non-discrimination.

Acknowledging this achievement, this report assesses the extent to which people in Kenya enjoy the rights to non-discrimination and equality by examining both evidence of the lived experience of discrimination and the effectiveness of the legal, policy and enforcement framework – as currently constituted – to meet the aspirations expressed in the Constitution for a more equal society. The report makes this assessment against the standards defined in the Declaration of Principles on Equality, which derives from, and builds upon, the requirements of international instruments to which Kenya is party.

Measured against these standards, the general conclusion arising from the analysis of patterns of discrimination and inequality in Part 2 of the report is that, in spite of the recent positive developments in the legal regime, the rights to equality and non-discrimination are yet to be effectively implemented in Kenya. Similarly, the assessment of the legal and policy framework in Part 3 identifies a number of problems which exist despite the introduction of the 2010 Constitution and the adoption of laws providing protection from discrimination on grounds of race and ethnicity, disability and HIV status, together with protections for children suffering discrimination and those experiencing discrimination in employment. Despite the prohibition on discrimination by the state, discriminatory provisions in some laws remain in place and state actors – including notably the police and immigration services, but also public servants involved in delivery of services such as health and education – discriminate with relative impunity. Gaps and inconsistencies in the legal system – from the lack of protection for LGBTI persons and persons

with albinism in all areas of life to the lack of protection for women and other groups in specific areas such as education or health services – mean that different levels of protection are afforded to different groups and in different situations. Moreover, implementation and enforcement of those provisions which are in place – including the protection from discrimination in employment, for example – is weak. As the analysis of patterns of discrimination and inequality has identified, the existence of legal protections does not directly translate into improvements in practice.

Thus, the report concludes that while Kenya has made great progress, discrimination exists across a range of grounds and areas of life, and major substantive inequalities remain. Taking the adoption of the new Constitution as a starting point, the report makes recommendations about further legal and policy reforms which Kenya can undertake, and measures to improve implementation and enforcement. In so doing, this report seeks to contribute to the ongoing debate about how Kenyans can create the equal society to which they aspire.

Patterns of Discrimination and Inequality

As outlined in the introduction to this report, ERT identified two factors – poverty and ethnicity – as being of overarching importance in most Kenyan people’s experience of discrimination and inequality. **Poverty** is the unavoidable backdrop to any discussion of discrimination and inequality in Kenya. Kenya is a poor country, both on average and aggregate measures. Moreover, inequalities in wealth and income, coupled with lack of infrastructure and public services in certain parts of the country mean that poverty impacts on different groups in profoundly unequal ways. This report confirms that discrimination and inequality are closely linked to poverty, finding that poverty is both a cause and a consequence of discrimination. **Ethnic identity** is another key determinant of an individual’s ability to participate in life on an equal basis with others, largely because certain ethnic groups live in areas with under-developed economies, poor infrastructure, and a lack of public services. These two aspects of an individual’s identity – their economic status and their tribal identity – frame most people’s experience of discrimination and inequality, with people experiencing disadvantage either on these grounds alone, or in combination with other grounds. They also form part of a power relationship, where political leaders use relative poverty and ethnic identity as means to elicit support from certain groups.

This report has identified a number of both **directly and indirectly discriminatory laws**. Arguably the most severe and far-reaching of these are the provisions of the Penal Code which have been consistently interpreted as prohibiting consensual sex between men, effectively criminalising men who have sex with men and contributing to prejudice and stigma against all LGBTI persons. Women are also particularly vulnerable to discriminatory laws – including in particular in respect of tax, succession and in questions of marriage, divorce and matrimonial property. The report also identifies substantial evidence of **discrimination by the state and its agents in carrying out public functions**. There is evidence of both direct and indirect discrimination on grounds of ethnicity in the allocation of public resources through infrastructure and development funding by public officials, acts which accelerate the disadvantage of those living in marginalised, arid areas. The report finds that there is substantial evidence to suggest that two particular ethnic groups – Kenyans of Somali origin and Nubian Kenyans – routinely suffer direct discrimination when applying for citizenship and identity registration and are subjected to police harassment. The report also finds that the criminalisation of same sex intimacy between men leaves gay men vulnerable to extortion and harassment by law enforcement officials.

This report identified a serious problem with **discriminatory violence** against particular groups because of their actual or perceived characteristics, including in particular sexual orientation and sex. Women are particularly vulnerable to discriminatory violence, as revealed by statistics on rape and domestic violence. The report also reviews evidence of discriminatory violence – often motivated by ignorance, superstition and prejudice – against persons with disabilities and persons with albinism.

The report finds evidence of **discrimination and inequality in employment** across a range of grounds, including notably gender, sexual orientation, gender identity and disability. Data collected by government, intergovernmental agencies and non-government organisations indicates that women suffer discrimination in recruitment, pay and conditions of work, and that they are exposed to a higher risk of unemployment. Access to employment presents a substantial problem for persons with disabilities, due to their relative lack of education, prejudice among employers about the capacities of persons with disabilities and lack of reasonable accommodation in the workplace, despite the protection provided by the Employment Act. LGBTI activists interviewed for the report indicated that discrimination on grounds of sexual orientation

and gender identity – grounds which are not protected under the Employment Act – affects openly gay men and transgender persons.

Evidence shows **discrimination and inequality in access to health and education**. Thus, the report investigates the presence of a “Red Strip” across the north of the country, where educational participation and outcomes, and access to healthcare and health outcomes are substantially below the national average. It finds that these regional disparities are closely aligned with ethnicity. Similarly, it finds that those vulnerable to discrimination on the basis of other aspects of their identity – gender, disability, sexual orientation and gender identity and HIV status, for example – tend to have poorer access to education, health and other services.

Finally, the report found compelling evidence of the particular disadvantages suffered by **persons with disability**. Those interviewed for this report highlighted under-provision of assistive devices – including white canes, wheelchairs and crutches – limited use of sign language and Braille, and lack of reasonable accommodation, as critical factors preventing participation in employment and education by persons with disability. A lack of clear statistical data prevents a quantitative analysis of these problems, but the evidence produced by ERT field research indicates that persons with disability are denied equal participation in all areas of life as a consequence of a lack of basic accommodation. The Persons with Disabilities Act 2003 – despite containing strong provisions on direct disability discrimination and creating a National Council for Persons with Disabilities – does not appear adequate to address this problem.

Thus, it is clear that Kenya is currently some way from ensuring enjoyment of the rights to non-discrimination and inequality in practice.

Legal and Policy Framework

As highlighted above, the Constitution of Kenya 2010 represents a substantial step forward in increasing the protection of the rights to equality and non-discrimination. Article 27 substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution. It creates a duty of non-discrimination both on the state and private actors. This is bolstered by the provisions in Articles 22 and 23 which enable individuals, groups of individuals and associations to bring proceed-

ings in cases of discrimination and to receive relief including compensation. It is supplemented in part three of the Bill of Rights by a number of articles providing for the application of rights to particular groups. In addition, the Constitution introduces both a general permission for positive action and a number of specific requirements for positive action on particular grounds. Finally, through a series of measures designed to devolve power and re-distribute wealth between Kenya's regions, the Constitution provides a possible means to address the long-standing patterns of ethno-regional discrimination which flared into conflict in 2008. This combination of measures means that the Constitution of Kenya 2010 provides a strong basis for addressing the problems of discrimination and inequality discussed in this report.

Prior to the introduction of the Constitution, the last decade has witnessed developments in respect of increasing protection from discrimination in Kenya. Most notably, the Persons with Disabilities Act 2003 and the National Cohesion and Integration Act 2008 provide protection from discrimination on grounds of disability and race, respectively. In addition, the Children Act 2001 provides a general non-discrimination protection for children on an extensive list of grounds, while the HIV and AIDS Prevention and Control Act 2006 prohibits discrimination on the basis of actual, perceived or suspected HIV status in areas including employment, education, health, transport and insurance services. In addition to these instruments which provide protection on particular grounds across a range of areas of life, the Employment Act, enacted in 2007, provides protection from discrimination in employment on an extensive list of grounds.

However, problems in the legal framework remain. The level of protection provided is inconsistent across different grounds of discrimination and areas of life. There are serious **gaps in legal protection**, both with regards to the absence of legislation prohibiting all forms of discrimination on particular grounds – such as sex, sexual orientation, gender identity, age, and genetic inheritance – and the absence of any provisions prohibiting discrimination on all grounds in particular areas of life – such as provision of education or health services. In addition to the lack of protection on particular grounds, the lack of comprehensive protection means that multiple discrimination is inadequately regulated. There are also a number of **inconsistencies between provisions in different laws**, undermining efforts to ensure their implementation and enforcement. Such inconsistencies are an inevitable result of the multitude of different instruments which provide protection from dis-

crimination. Thus, the range of competing legal norms, and the gaps in protection for particular groups or in particular areas of life suggests that there is a need for harmonisation. Finally, there is a significant problem with the **poor implementation and enforcement** of existing laws. A host of factors – including inadequate enforcement mechanisms, low levels of awareness of rights and obligations among both rights-holders and duty-bearers, financial and other barriers preventing access to justice for victims of discrimination – result in a lack of effective implementation of the right to equality.

Thus, the report identifies a complex picture in respect of the legal protection of the rights to equality and non-discrimination. While the Constitution provides general protection from discrimination by state and non-state actors in all areas of life, it does not provide explicit protection from discrimination on grounds such as sexual orientation, gender identity and genetic inheritance, or multiple discrimination. Moreover, constitutional provisions alone are insufficient to ensure that victims of discrimination are able to access justice and appropriate remedies for discrimination. As UN treaty bodies have stated, governments have an obligation to adopt specific legislation in order to provide effective and comprehensive protection from discrimination in all areas of life. Such legislation is needed to make the rights to equality and non-discrimination effective, by defining prohibited conduct such as direct and indirect discrimination, harassment and failure of reasonable accommodation, setting out provisions for access to justice and establishing appropriate systems of enforcement.

4.2 Recommendations

ERT and KHRC have identified a clear need for Kenya to harmonise and strengthen its legal system in respect to equality. Based on an analysis of both the patterns of discrimination and inequality which prevail in Kenya and the legal and policy framework which is in place, ERT and KHRC make a number of recommendations which would enable Kenya to meet its obligations to respect, protect and fulfil the rights to non-discrimination and inequality and in so doing meet the aspirations expressed in the Constitution of Kenya 2010.

The first set of recommendations relate to the need that Kenya further improve its record of ratifying key **international instruments related to equality**. The second and third sets of recommendations relate to Kenya's obligation to respect the rights to non-discrimination and equality. It is rec-

ommended that the government conducts an audit of **discriminatory laws** and provide a list of discriminatory provisions which should be repealed or amended. It is also recommended that Kenya takes all appropriate measures to **ensure that state actors do not discriminate** in the exercise of their functions. This recommendation was felt to be particularly important given the range of alleged directly and indirectly discriminatory practices of state actors identified in the report.

Principal among the report's recommendations is that Kenya adopts **comprehensive equality legislation, preferably through a single equality Act**. ERT and KHRC recognise that harmonisation of equality law can be achieved either through the adoption of a single equality law or through the development of a complex system of individual laws providing protection on different grounds or in different areas of life which, together, would provide comprehensive protection. Under this second approach, Kenya would be required to adopt new legislation providing protection from discrimination on a number of grounds, including gender, sexual orientation, gender identity, age and genetic inheritance, where legislation does not currently exist. In addition, it would be required to amend the various pieces of existing legislation to resolve inconsistencies within each Act and between different Acts, and to ensure that the standard and scope of legal protection met its international obligations. This would be a significant legislative challenge. Moreover, any system of separate laws providing protection from discrimination on different grounds or in different areas of life would ignore the inter-connected nature of discrimination on different grounds and in different contexts. As such, it would be ill-suited to adequately address multiple discrimination, to provide protection for the admission of new protected grounds, and to provide a consistent level of protection across different grounds. Furthermore, it would be likely to perpetuate a complicated system of different procedures, standards and remedies, an outcome which a number of treaty bodies have called into question. Cost-effectiveness is also a factor that weighs strongly in favour of a single equality Act.

The authors therefore recommend the adoption of single, comprehensive equality law, which should reflect the agreements in the "**Statement of Principles for Equality Law**" and "**Legislative Map for Equality Law**" developed and endorsed by civil society actors in 2010-2011. Such a law should prohibit discrimination on a conditionally open list of protected grounds which should incorporate at least all of the grounds set out in Article 27 of the Constitution

of Kenya, together with the additional grounds of sexual orientation, gender identity and genetic inheritance. It should provide a test or other mechanism for the admission of new grounds in addition to those explicitly protected. It should prohibit all forms of discrimination and should cover all areas of life regulated by law in the private and public sectors. The law should provide for the development and implementation of positive action measures, should allow the transfer of the burden of proof to the alleged discriminator in civil proceedings and should provide effective remedies, and sanctions which are effective, proportionate and dissuasive. Exceptions to the law should be limited and be reasonable and justifiable, in the sense that it can be shown to be necessary for the achievement of a legitimate purpose and where there is no alternative which is less restrictive. The provisions of such a law when enacted should, in the event of any conflict or inconsistency, supersede the provisions of any other legislation relating or incidental to the prohibition of discrimination and the promotion of equality.

In part five of the recommendations, ERT and KHRC identify **measures to address substantive inequality**. The authors urge Kenya to take such measures, including through the adoption and implementation of legislation, policies, practices and plans of action, to ensure that it meets its obligations to fulfil the right to equality. Recommendations include that the government finalise and adopt policies relevant to equality and non-discrimination and that it consider introducing a National Equality Policy. ERT and KHRC urge the government to introduce positive action in order to overcome past disadvantage and to accelerate progress towards equality of particular groups. Finally, the authors urge the government to ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner, paying due regard to the principles of equality and non-discrimination embodied in the Constitution.

All recommendations are based on international human rights law related to equality, and on the Declaration of Principles on Equality, a document of international best practice adopted in 2008.

1. Strengthening of International Commitments

1.1 Kenya is urged to ratify the following international human rights instruments which are relevant to the rights to equality and non-discrimination:

a) UN instruments:

- i. Optional Protocol I to the International Covenant on Civil and Political Rights (1966);
- ii. Optional Protocol I to the International Covenant on Economic, Social and Cultural Rights (2008);
- iii. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999);
- iv. Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006);
- v. Optional Protocol II to the Convention on the Rights of the Child (2000);
- vi. Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- vii. Convention against Enforced Disappearance (2006);
- viii. United Nations Educational, Scientific and Cultural Organisation Convention against Discrimination in Education (1960);
- ix. UN Convention on the Status of Stateless Persons (1951).

b) International Labour Organisation Conventions:

- i. ILO Convention No. 169 on Indigenous and Tribal Peoples.

1.2 Kenya is urged to make a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination allowing individual complaints.

1.3 Kenya is urged to withdraw its reservation against Article 10(2) ICESCR, which requires that states make provision for paid maternity leave.⁷⁸⁷

787 International Covenant on Economic, Social and Cultural Rights, Article 10(2): “[The States Parties to the present Covenant recognize that:] Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.”

2. Repeal or Amendment of National Legislation

2.1 Kenya is urged to undertake a review of all legislation and policy in order to (i) assess compatibility with the rights to equality and non-discrimination, as defined under the international instruments to which Kenya is party and the Constitution of Kenya 2010; and (ii) amend, and where necessary, abolish, existing laws, regulations and policies that conflict or are incompatible with the right to equality.⁷⁸⁸ This process should include review of:

Constitutional Provisions:

- a) Article 26(2) and (4), Constitution of Kenya 2010, which prohibit abortion in all cases except those defined as medical emergencies;
- b) Article 45 (2), Constitution of Kenya 2010, which discriminates against same-sex couples in marriage;
- c) Article 24(4), Constitution of Kenya 2010, which provides that the rights to equality and non-discrimination shall be qualified to the extent necessary for the application of Muslim law before the Kadhis' courts in the areas of personal status, marriage, divorce and inheritance;
- d) Articles 83, 99(2)(e) and 193(2)(d), Constitution of Kenya 2010, which deny political rights to persons of "unsound mind".

Legislative Provisions:

- e) Sections 138, 162, 163 and 165 of the Kenyan Penal Code;
- f) Section 45 of the Income Tax Act;
- g) Sections 32, 33, 35, 36 and 39 of the Law of Succession Act;⁷⁸⁹
- h) Section 38 and subsection 43(5) of the Sexual Offences Act;
- i) Section 3 of the Citizenship Act;
- j) Section 86 of the Civil Procedure Act;

788 Kenya has been advised to undertake such a review by treaty bodies. See, for example, Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, UN Doc./CEDAW/C/KEN/CO/6, 10 August 2007, Para 18.

789 Kenya has already agreed to review this legislation at the review of Kenya's most recent periodic report to CEDAW: Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, UN Doc./CEDAW/C/KEN/CO/7, 5 April 2011, Para 45.

- k) Section 7 of the Transfer of Property Act;
- l) Section 8 of the Matrimonial Causes Act;
- m) Section 3 of the Immigration Act.

Family Law

2.2 The family law system in Kenya is complex and provides numerous opportunities for discrimination, particularly against women. While some laws in this area contain discriminatory provisions, others provide for the application of legal norms which discriminate, including in customary legal settings; the multiplicity of laws in the field means that discrimination is more likely to occur unchecked. In line with the recommendations of the Committee on the Elimination of Discrimination Against Women, Kenya is urged to “harmonize civil, religious and customary law with article 16 of the Convention and to complete its law reform in the area of marriage and family relations in order to bring its legislative framework into compliance with articles 15 and 16 of the Convention”.⁷⁹⁰ This would include a review of:

- a) The Kadhis’ Court Act;
- b) The Mohammedan Marriage, Divorce and Succession Act;
- c) The Hindu Marriage and Divorce Act;
- d) The Matrimonial Causes Act.

3. Measures to Ensure State Actors Respect the Rights to Equality and Non-discrimination

Kenya is urged to take all appropriate measures to ensure that all public authorities and institutions respect the rights to non-discrimination and equality. Such measures would include, but are not limited to:

- a) Reviewing guidelines, policies and practices to ensure that they do not contravene the rights to non-discrimination and equality;
- b) Developing guidelines to ensure that policies and practices do not contravene the rights to non-discrimination and equality;
- c) Taking steps to educate public officials and other agents of the

⁷⁹⁰ Committee on the Elimination of Discrimination Against Women, *Concluding Observations on Kenya*, UN Doc./CEDAW/C/KEN/CO/6, 10 August 2007, Para 44.

- state as to their obligations with respect to the rights to non-discrimination and equality;
- d) Making effective and accessible mechanisms for individuals to bring complaints about discrimination by state actors available;
 - e) Requesting the National Gender and Equality Commission to undertake proactive investigations and to invite the submission of complaints by those claiming to have suffered violations of the rights to non-discrimination and equality;
 - f) Enforcing effective, proportionate and dissuasive sanctions against public bodies and agents found to have engaged in discrimination;
 - g) Taking steps to raise public awareness, through a programme of civic education, of the rights and obligations of state actors in respect of the rights to non-discrimination and equality.

4. Laws to Give Effect to the Rights to Equality and Non-discrimination

Constitution of Kenya 2010

- 4.1 A strong commitment to the principles of equality and non-discrimination is evident throughout the Constitution of Kenya 2010; the Bill of Rights provides a strong set of protections from discrimination in both the public and private spheres, together with excellent enforcement mechanisms and remedies; and key provisions elsewhere in the Constitution provide the basis to tackle some of the critical problems which perpetuate systemic *de facto* inequalities. As such, its adoption is a very important step in giving effect to Kenya's international legal obligations to respect, protect and fulfil the rights to equality and non-discrimination.
- 4.2 In order to fully discharge Kenya's obligations under international law, it is necessary that the provisions of the Constitution which deal with the rights to equality in non-discrimination are interpreted in line with the spirit of the Constitution and with international law, including the interpretations of relevant treaty bodies. The Kenyan judiciary is called upon to interpret the Constitution in such a way as to reflect Kenya's international obligations to respect, protect and fulfil the rights to equality and non-discrimination, and the commitment to equality evidenced throughout the Constitution itself, including in particular by considering that:
- a) The words "any ground, including" in Article 27(4) are interpreted as creating a class of "other status", which itself is interpreted in line

with the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20, including in particular that “other status” covers “sexual orientation” and “gender identity”.⁷⁹¹

- b) The words “any ground, including” in Article 27(4) are interpreted as creating a prohibition on multiple discrimination, in line with the recommendation of CESCR in its General Comment 20.⁷⁹²
- c) Article 27(6), which creates a duty of affirmative action, and Article 56, which requires the state to take a range of measures to ensure the participation of all groups “disadvantaged by discrimination on one or more grounds provided in Article 27(4)” in governance, education and employment, are interpreted and implemented in line with the recommendations of *inter alia* the UN Human Rights Committee (HRC), CESCR, the Committee on the Elimination of Racial Discrimination (CERD) and the Committee of the Elimination of Discrimination against Women about positive action measures.
- d) Article 24, which sets out permissible limitations of rights provided in the Bill of Rights, including the rights provided in Articles 27, 53, 54, 55, 56 and 57, is interpreted strictly in light of Kenya’s international obligations to respect, protect and fulfil the rights to equality and non-discrimination, and in line with constraints provided for such limitations in Article 24(1) itself.
- e) Article 24(4), which limits the application of the rights to equality and non-discrimination to exclude the application of Muslim law before the Kadhis’ courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance, is interpreted in line with Kenya’s international obligations to provide effective protection from discrimination, in line with the precedent set by the courts in *Rono v Rono and Another*.

Specific Anti-discrimination and Equality Law

4.3 Kenya is urged to reform its system of laws prohibiting discrimination in order to ensure that the law provides protection from discrimination on all grounds and in all areas of life. Such laws should aim at eliminating

791 Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 27.

792 *Ibid.*, Para 17.

direct and indirect discrimination in all areas of life regulated by law and attribute obligations to public and private actors, including in relation to the promotion of *de facto* equality.

- 4.4 In order to give effect to recommendation 4.3 – and in recognition of the gaps in legal protection and problems of inconsistency which arise from the multiplicity of laws on discrimination in Kenya, including failure to provide effective protection from multiple discrimination, as well as to make a transition from anti-discrimination to equality law – Kenya is urged to consider the enactment of a single comprehensive Equality Act, offering consistent protection across all grounds of discrimination and in all such areas of life. In this regard, Kenya is urged to consider adopting legislation in line with the “Statement of Principles for Equality Law” and “Legislative Map for Equality Law” developed and endorsed by civil society actors in 2010-2011, which are based on the Declaration of Principles on Equality, an international best practice document adopted in 2008.

5. Measures to Address Discrimination and Substantive Inequality

- 5.1 In addition to the obligations to respect and protect the right to non-discrimination, Kenya has an obligation to fulfil the rights to non-discrimination. This includes, *inter alia*, obligations to introduce and implement strategies, policies and plans of action to promote equality and non-discrimination; obligations to adopt positive action measures to overcome past disadvantage and accelerate progress towards equality; and other measures to eliminate systemic discrimination, including in particular in those areas highlighted below.

Government Policy

- 5.2 In this regard, Kenya should consider:

- a) Finalising and introducing the Draft National Policy on Human Rights;
- b) Finalising and introducing the Draft National Land Policy;
- c) Finalising and introducing the Draft National Policy on Ageing;
- d) Reviewing and updating the National Policy on Gender and Development;

- e) Reviewing and updating the Kenya National Youth Policy;
- f) Reviewing and updating the Public Sector Workplace Policy on HIV and AIDS.

5.3 Kenya is urged to consider introducing a National Equality Policy in order that equality and non-discrimination are effectively mainstreamed into government policy-making and the delivery of public functions and services.

Positive Action

5.4 Kenya should take positive action, which includes a range of legislative, administrative and policy measures, in order to overcome past disadvantage, as required by Article 27(6) of the Constitution and Kenya's legal obligations under a range of international instruments.

Measures to Address Systemic Discrimination and Inequality

5.5 In order to meet its obligations to take an active approach to eliminating systemic discrimination, Kenya should ensure that those parts of the Constitution which provide for the devolution of power to county governments and the redistribution of public resources are implemented in a comprehensive and timely manner, paying due regard to the principles of equality and non-discrimination embodied in the Constitution. In addition, Kenya should respect and implement Articles 202 and 203, setting out the need to share revenue on an "equitable" basis between the national government and the counties.

5.6 Kenya should implement expeditiously Article 204 of the Constitution establishing an Equalisation Fund, with due regard to the principles of non-discrimination and inequality as defined in the Declaration of Principles on Equality.

6. Awareness-raising

The Kenyan government should take action to raise public awareness about equality, and to introduce suitable education on equality as a fundamental right in all educational establishments. Such action is particularly necessary in order to modify social and cultural patterns of conduct and to eliminate prejudices and customary practices which are based on the idea of the inferiority or superiority of one group within society over another.

7. Data Collection

The Kenyan government should collect and publicise information, including relevant statistical data, in order to identify and measure inequalities, discriminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality.

8. Participation

Kenya should ensure that those who have experienced or who are vulnerable to discrimination are consulted and involved in the development and implementation of laws and policies implementing the rights to non-discrimination and equality.

9. Enforcement and Implementation

Proceedings, Access to Justice, and Remedies

9.1 The Chief Justice of Kenya, in discharging obligations arising under Article 22(3) of the Constitution to develop rules governing proceedings brought under the Bill of Rights, should have regard to the need for such rules to “ensure that individuals (...) have accessible and effective remedies to vindicate” the rights to equality and non-discrimination.⁷⁹³ In particular, where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.⁷⁹⁴

9.2 Kenya should introduce legislation in order to harmonise the range of regimes which presently exist to provide access to justice for those subjected to discrimination on different grounds and in different areas of life, so that all individuals are able to access justice and remedies where they have been subjected to discrimination. In particular, the Kenyan government should ensure that such legislation:

793 Constitution of Kenya 2010, Article 22(3).

794 Committee on Economic, Social and Cultural Rights, note 13, Para 40; Committee on the Elimination of Racial Discrimination *General Recommendation No. 30: Discrimination against Non-Citizens*, 2004, Para 24; see also: *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 21, p. 13.

- a) Expands the protection of individuals from any adverse treatment or consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions (victimisation) to complaints in respect of all grounds, rather than solely race and ethnicity, as currently provided in the National Cohesion and Integration Act.
- b) Adapts legal rules related to evidence and proof in order to ensure that victims of discrimination are not unduly inhibited from obtaining redress. In particular, rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the right to equality. Such provisions are currently found in the Employment Act; they should be expanded into other areas of life.

9.3 Sanctions for breach of the right to equality have to be effective, proportionate and dissuasive. Appropriate remedies must include reparations for material and non-material damages. Sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational or policy change that is necessary for the realisation of the right to equality.

Legal Aid and Assistance

9.4 The government should introduce mechanisms for victims of discrimination to have effective access to judicial and/or administrative procedures, including through the provision of legal aid for this purpose. In this regard, the government should consider the expansion of the National Legal Aid (and Awareness) Pilot Programme to include discrimination cases and to operate throughout the country.

Enforcement and Implementation Bodies

9.5 Kenya should ensure that the National Gender and Equality Commission be able to operate independently and with adequate resources, in line with the relevant provisions of the National Gender and Equality Commission Act 2011, and the UN Principles relating to the Status of National Institutions (the Paris Principles).