****

**THE KENYA NATIONAL COMMISION ON HUMAN RIGHTS**

**ADVISORY ON**

**THE DRAFT PRINCIPLES AND GUIDELINES ON THE RIGHT TO CHALLENGE THE LAWFULNESS OF DETENTION BEFORE COURT**

***PRESENTED TO***

**THE WORKING GROUP ON ARBITRARY DETENTION**

**A. Introduction**

The Kenya National Commission on Human Rights (KNCHR) welcomes the development of the Draft Principles and Guidelines on the Right to Challenge the Lawfulness of Detention before Court by the Working Group on Arbitrary Detention (WGAD).  The commission lauds the States, organizations and individuals that contributed to the successful preparation of the preliminary draft and welcomes the opportunity to provide its comments.

**B. General Comments**

1. KNCHR commends the WGAD for being the first charter-based mechanism that takes into account individual complaints from all over the world. The right of an individual to petition is in itself a core aspect of the right to fair trial.
2. The international and regional legal framework is well provided for as the standards are set in jurisprudence; KNCHR therefore appreciates the recognition and inclusion of the Guidelines on Conditions of Police Custody and Pretrial Detention in Africa (the Luanda Protocol) by the WGAD in the development of the preliminary draft.
3. KNCHR notes that the draft Principles and Guidelines create various State obligations and it therefore proposes inclusion of an in-built oversight mechanism to provide for mandatory state reporting on the progress of the implementation and fulfillment of their obligations therein.
4. In exercise of the right to challenge unlawful detention by vulnerable groups, KNCHR proposes that the provisions with regard to persons with disability (PWDs) be strengthened since they face unique challenges and often, discriminatory treatment when pursuing their rights. This proposal is advised by KNCHR’s work as Kenya’s monitoring agency under Art 33 (2) of the Convention on the Rights of Persons with Disabilities (CRPD) for the period February 2011-June 2014. Of particular note are provisions on access to information by detainees. The information ought to be provided in formats that are accessible to PWDs such as Braille or sign language interpretation where required, among others. The detention facilities should also take into account the special needs of PWDs as most structures do not take into consideration their special needs. In addition, it is a common occurrence to delay presentation of detained PWDs to the reviewing body before which to pursue their rights on the basis of lack of availability of appropriate mode of transport. States should be obligated, as a matter of priority to ensure that PWDs are presented before reviewing within stipulated time.
5. KNCHR proposes that the reviewing bodies should also be placed under obligation to facilitate access by all detainees, to legal aid programs especially where they are unrepresented by counsel. Such programs should also provide free legal representation and /or advice among others.
6. KNCHR proposes that detention facilities be placed under obligation to ALWAYS keep full and proper records of all detainees therein, the reason(s) for their detention and any transfers to other facilities, among other factors; such records should be accessible to the public as a matter of right.
7. Lengthy pretrial detention is a serious issue in many countries due to poor bail procedures. KNCHR proposes that bail be provided by reviewing bodies as matter of right and not discretion; such a provision will enhance the detainees’ prospects of challenging lawful detention.
8. Many individuals are detained for investigative purposes in many jurisdictions. KNCHR considers such practice a gross violation of the rights of the detainees and proposes that detention must be based on material evidence that implicates the detainee in the crime under investigation.

**C. Conclusion**

KNCHR looks forward to the finalization of the Guidelines on the Right to Challenge the Lawfulness of Detention before Court and was honored to be part of the stakeholders’ deliberations to review the preliminary draft by the WGAD, subsequent to which these presentations are made.

We are of the opinion that the finalized Guidelines, once implemented will enhance the rights and liberties of many detainees globally.