



THE SEXUAL OFFENCES AND DOMESTIC VIOLENCE ACT, 2018

(Act No..... of 2018)

I ASSENT

MSWATI III

KING OF ESWATINI

Date: 2018

AN ACT

ENTITLED

AN ACT to make provision concerning sexual offences and domestic violence, prevention and the protection of all persons from harm from other sexual acts and acts of domestic violence and to provide for matters incidental thereto.

ENACTED by the King and Parliament of Eswatini.



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PART I

PRELIMINARY

Short title and commencement.

1. (1) This Act may be cited as the Sexual Offences and Domestic Violence Act, 2018.
- (2) This Act shall come into force on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation for Parts I to XI.

2. (1) In this Act unless the context otherwise requires “*Minister*” means Minister responsible for Children, Gender and Family Affairs.

- (2) In Parts I to XI inclusive, unless the context otherwise requires—

“*applies force*” includes the act of applying heat, light, electrical force, gas, odour, or any other substance or thing whatsoever if applied in such a degree as to cause injury or personal discomfort;

“*assault*” means striking, touching, or moving, or otherwise applying force of any kind to, the person of another, either directly or indirectly, without the consent of that other person, or with the consent of the other person if the consent is obtained by fraud, or any unconsented bodily act or gesture attempt or threat to apply force of any kind to the person of another without the consent of the other person, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the purpose of that person;

“*brothel*” includes any house or place kept or used for the purposes of prostitution or for persons to visit for the purposes of committing sexual acts or for any other lewd or indecent act for monetary gain or other non-financial benefits;

“*bestiality*” means a sexual act between a person and an animal;

“*certificate*” means a certificate mentioned in section 64;



“*child*” means, notwithstanding any other law to the contrary, a person under the age of eighteen years;

“*Court*” means the High Court, Magistrate Court or such similar Courts;

“Criminal Procedure and Evidence Act” means the Criminal Procedure and Evidence Act, Act;

“*detriment*” for the purposes of section 10, includes the following—

- (a) apprehension or fear of violence to, or against the property of, the stalked person or another person;
- (b) serious mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act a person is lawfully entitled to do;
- (d) compulsion to do an act a person is lawfully entitled to abstain from doing;

“*distribute*” includes—

- (a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not;
- (b) make available for access by someone, whether by a particular person or not;
- (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
- (d) attempts to distribute;

“*employee*” means—

- (a) a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person;
- (b) a person, other than a person referred to in (a), who in any manner assists in carrying on or conducting the business of an employer, whether or not is entitled to receive any remuneration, reward, favour or benefit;

“*employer*” means—

- (a) a department or administration of the Government or a municipality or local authority or any other functionary or institution when exercising a power or performing a duty in terms of the Constitution of Swaziland Act, 2005 or exercising a public power or performing a public function in terms of any legislation, which—
 - (i) employs persons who, in any manner and during the course of their employment, are placed in a position to work with a child or in a position of authority, supervision or care of a child or gain access to a child or places where children are present or congregate; or



- (ii) employs persons who, in any manner and during the course of their employment, are placed in a position to work with a person who is physically or mentally disabled or in a position of authority, supervision or care of a person who is physically or mentally disabled or gain access to a person who is physically or mentally disabled or places where persons who are physically or mentally disabled are present or congregate; or
- (b) a person, organisation, institution, club, sports club, association or body who or which, as the case may be—
 - (i) employs persons who, in any manner and during the course of their employment, are placed in a position of authority, supervision or care of a child or a person who is physically or mentally disabled or working with or will gain access to a child or a person who is physically or mentally disabled or places where children or persons who are physically or mentally disabled are present or congregate; or
 - (ii) owns, manages, operates, has any business or economic interest in or is in any manner responsible for, or participates or assists in the management or operation of any entity or business concern or trade relating to the supervision over or care of a child or a person who is physically or mentally disabled or working with or who gains access to a child or a person who is physically or mentally disabled or places where children or persons who are physically or mentally disabled are present or congregate;

genital organs include the whole or part of the male or female genital organs, and further includes surgically constructed or reconstructed genital organs;

“half” means, when used in reference to siblings in this Act, siblings who share one biological parent;

“licensing authority” means an authority which is responsible for granting licences or approving the management or operation of any entity, business concern or trade relating to the supervision over or care of a child or a person who is intellectually disabled;

“Minister” means Minister responsible for Children, Gender and Family Affairs;

“necrophilia” means a sexual act with a corpse of a human being;

“oral sex” means the bringing into contact of any part of the genitalia or anus of a person with any part of the mouth of another person.

“parent” includes step and adoptive parents;

“person who is physically disabled” means a person who has a restriction or inability to perform an activity in the manner or within the range considered normal for a human being, mostly



resulting from impairment, to the extent that the person at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act or sexual violation;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act or violation, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act or violation; or
- (d) unable to communicate the unwillingness of that person to participate in any such act or violation;

“person who is mentally disabled” means a person affected by a mental disability, including any disorder or disability of the mind, to the extent that at the time of the alleged commission of the offence in question, was—

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate the unwillingness of that person to participate in any such act;

“pornography” means a visual presentation, simulated or real of—

- (a) a person who is, or is depicted as participating in or assisting another person to engage in sexual acts or sexual violations or a lewd display of nudity which is intended for sexual gratification;
- (b) explicit sexual conduct which degrades a person, or which constitutes incitement to cause harm; or
- (c) bestiality;

“prescribe” means prescribed by regulations made in terms of this Act;

“property of a person” means—

- (a) property in which the person has a legal or equitable interest, whether or not another person also has an interest in the property; or
- (b) property that is otherwise—
 - (i) used and enjoyed by the person;



- (ii) available for the use of the person or enjoyment;
- (iii) in the care of that person or custody; or
- (iv) at the premises at which the person is residing;

“*prostitution*” means the act of engaging, or where a person engages or offers to engage, in the provision to another person, under an arrangement of a commercial character, of any of the following activities—

- (a) sexual intercourse;
- (b) sexual act;
- (c) masturbation;
- (d) oral sex;
- (e) any activity, other than sexual intercourse, masturbation or oral sex, that involves the use of one person by another for the sexual satisfaction of that person involving physical contact, and it does not matter, whether—
 - (i) the arrangement is initiated with the person engaging in the provision of the activity or a third person; or
 - (ii) the pecuniary or other reward under the arrangement is to be received by the person engaging in the provision of the activity or a third person;

“*Register*” means the National Register for Sex Offenders mentioned in section 56;

“*Registrar*” means the Registrar of the National Register for Sex Offenders under section 56;

“*relevant authority*” means a public office or department or administration in the of the Government or a municipality or local authority or any other functionary or institution when exercising a power or performing a duty in terms of the Constitution of Swaziland Act, 2005 or exercising a public power or performing a public function in terms of any legislation which is tasked with considering applications from prospective foster parents, care-givers, adoptive parents or curators;

“*sexual act*” means—

- (a) the insertion, even to the slightest degree, of the genital organs of a person into the genital organs, anus or other orifice of another person; or
- (b) the insertion of any other part of the body of a person or any object into the genital organs, anus or other orifice of another person for purposes of sexual gratification of the person performing the insertion or third party, and includes but is not limited to—
 - (i) the medical definition of penetration; and



- (ii) penetration of the vulva;
- (iii) penetration to the labia majora or minora;
- (iv) penetration to the hymen or hymenal remnants;
- (v) penetration past the hymen or hymenal remnants;

“*sexual exploitation*” means—

- (a) sexually assaulting a person or allowing a person to be sexually assaulted;
- (b) encouraging, inducing, or forcing a person to be used for the sexual gratification of another person;
- (c) using a person in or deliberately exposing a person to sexual acts or pornography;
or
- (d) procuring or allowing a person to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a person;

“*sexual penetration*” includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, orifice or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus or orifice of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person;

“*sexually penetrates*” has a corresponding meaning to “*sexual penetration*”;

“*sexual violation*” includes any act, not being an act of sexual penetration, which causes—

- (a) direct or indirect contact between the genital organs or anus of another person or breasts, in the case of a female, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
- (b) direct or indirect contact between the mouth of one person and—
 - (i) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (ii) the mouth of another person;
 - (iii) any other part of the body of another person, (excluding the genital organs or anus of that person or breasts, in the case of a female) which could be used in



an act of sexual penetration, cause sexual arousal or stimulation or be sexually aroused or stimulated thereby; or

- (iv) any object resembling the genital organs or anus of an animal;
- (c) direct or indirect contact between the mouth of the complainant and the genital organs or anus of an animal;
- (d) the masturbation of one person by another person; or
- (e) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.

PART II

GENERAL SEXUAL OFFENCES

Rape.

3. (1) A person who rapes another commits an offence of rape and, for purposes of this Act, the offence of rape is committed either by a male or female person against another person.

(2) For the purposes of this section Rape is defined as an unlawful sexual act with a person.

(3) An unlawful sexual act for the purposes of this Part constitutes a sexual act committed under any of the following circumstances—

- (a) in any coercive circumstance;
- (b) under false pretences or by fraudulent means;
- (c) in respect of a person who is incapable in law of appreciating the nature of the sexual act;
- (d) duress;
- (e) psychological oppression; or
- (f) fear of violence.

(4) Coercive circumstance, referred to in subsection (3) (a), includes any circumstance where there is—

- (a) a use of force against a person or against the property of that person or any other person;
- (b) a threat of harm against a person or any other person or against the property of that person or that of another person; or



- (c) an abuse of power or authority to the extent that the person in respect of whom a sexual act is committed is inhibited from indicating his resistance to such an act or his unwillingness to participate in such an act.

(5) False pretences or fraudulent means, referred to in subsection (3)(b), are circumstances where a person—

- (a) in respect of whom a sexual act is being committed, is led to believe that he is committing such a sexual act with a particular person who is in fact a different person; or
- (b) in respect of whom a sexual act is being committed, is led to believe that such an act is something other than a sexual act.

(6) The circumstance in which a person who is incapable in law of appreciating the nature of the sexual act which causes penetration, referred to in subsection (3)(c), includes circumstances where such a person is, at the time of the commission of such a sexual act—

- (a) asleep;
- (b) unconscious;
- (c) under the influence of any medicine, drug, alcohol or other substance to the extent that the consciousness of that person or judgment is adversely affected;
- (d) a mentally disabled person; or
- (e) a person below the age of eighteen years.

(7) It shall not be necessary for the purposes of this section to prove that the hymen was broken, if the victim was a virgin, or that there is evidence of spermicidal discharge.

(8) Any person who contravenes subsection (1) under circumstances where there are no aggravating factors, as referred to under the Criminal Procedure and Evidence Act shall, on conviction, be liable to a term of imprisonment of—

- (a) if the victim is or was fourteen years of age or below at the time of the offence, not exceeding twenty-five years, in the case of a first offence and, in the case of a subsequent offence, not exceeding thirty-five years;
- (b) if the victim is or was between fourteen years of age and eighteen years of age at the time of the offence, not exceeding twenty years, in the case of a first offence and, in the case of a subsequent offence, not exceeding twenty-six years;
- (c) if the victim is an adult at the time of the offence, not exceeding eighteen years in the case of a first offence and, in the case of a subsequent offence, not exceeding twenty-five years;



(9) Where it is established that the rape was committed with aggravating factors, as referred to under the Criminal Procedure and Evidence Act the offender shall, on conviction, be liable to a term of imprisonment of—

- (a) if the victim is or was ten years of age or below at the time of the offence, not exceeding thirty years, in the case of a first offence and, in the case of a subsequent offence, not exceeding forty years;
- (b) if the victim is or was between ten years of age and eighteen years of age at the time of the offence, not exceeding twenty-five years, in the case of a first offence and, in the case of a subsequent offence, not exceeding thirty-five years;
- (c) if the victim was an adult at the time of the offence, not exceeding twenty years in the case of a first offence and, in the case of a subsequent offence, not exceeding thirty years;
- (d) Notwithstanding the provision stipulated in any other Act, such a sentence may not be suspended or postponed.

(10) Where the offender is of the age of eighteen years or below or pleads guilty to the offence, the Court may use its discretion in sentencing the offender.

Incest.

4. (1) A person who engages in an act of sexual penetration or attempts an act of sexual penetration with the offspring, sibling, parent, or grandparent of that person commits the offence of incest and shall, on conviction, be liable to the penalties specified in subsection (2).

(2) A person who contravenes subsection (1) shall, on conviction, be liable to—

- (a) imprisonment without an option of a fine, for a term not exceeding twenty-five years, if the victim is less than the age of fourteen years;
- (b) imprisonment without an option of a fine, for a term not exceeding twenty years, if the victim is above the age of fourteen years but below the age of eighteen years;
- (c) to a fine not exceeding fifty thousand Emalangeneni or imprisonment for a term not exceeding ten years or to both, if the victim is eighteen years old and above.
- (d) to a fine not exceeding twenty thousand Emalangeneni or imprisonment for a term of four years or both if both parties agreed to commit the incest.

(3) It shall be immaterial that the act or attempted act of sexual penetration happened with the consent of either person.



(4) It shall be a defence to a charge under this section to prove that the accused person or persons were, at the time when the act or attempted act of sexual penetration happened, acting under the coercion of another person.

(5) A reference to an off-spring or other lineal descendant includes a relationship of the type that is a half, adoptive or step.

(6) For the purposes of subsection (6) a reference to a step relationship-

- (a) includes a relationship corresponding to a step relationship arising because of cohabitation in a relationship akin to a marriage or because of a foster relationship or other legal arrangement; and
- (b) does not include a step relationship that first arose after the relevant persons became adults.

(7) The institution of a prosecution of a person who is a child at the time of the alleged commission of the offence referred to in subsection (1) shall be authorised in writing by the Director of Public Prosecutions or a person authorised by the Director of Public Prosecutions for that purpose.

(8) The Director of Public Prosecutions or a person authorised by the Director of Public Prosecutions for that purpose, unless there are compelling reasons, may not delegate the power to decide whether a prosecution in terms of this section should be instituted or not.

Sexual assault.

5. (1) A person who unlawfully commits a sexual violation against another person, without the consent of that other person commits the offence of sexual assault.

(2) A person who commits the offence of sexual assault shall, on conviction, be liable to pay a fine not exceeding of thirty thousand Emalangeneni or imprisonment for a period not exceeding fifteen years or both.

Inspiring the belief of sexual assault.

6. A person who unlawfully inspires the belief on another person that the other person shall be sexually violated commits the offence of sexual assault and shall, on conviction, be liable to a fine not exceeding twenty thousand Emalangeneni or to a term of imprisonment not exceeding ten years or both.

Compelled sexual assault.

7. A person who unlawfully compels a third person without the consent of that third person, to commit an act of sexual violation with another person without the consent of that other person, commits the offence of compelled sexual assault and shall, on conviction, liable to pay a fine not exceeding twenty-thousand Emalangeneni or to a term of imprisonment not exceeding ten years or both.



Compelled self - sexual assault.

8. A person who unlawfully compels another without the consent of that other person to—
- (a) engage in—
 - (i) masturbation;
 - (ii) any form of arousal or stimulation of a sexual nature of the body of the complainant; or
 - (iii) sexually suggestive or lewd acts,
 - (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading the complainant; or
 - (c) cause the complainant to penetrate in any manner whatsoever the genital organs, anus or other orifice of the complainant;
 - (d) commit an act of bestiality,

commits the offence of compelled self-sexual assault and shall on conviction, be liable to pay a fine not exceeding thirty thousand Emalangenzi or a term of imprisonment not exceeding fifteen years or both.

Unlawful administering a substance.

9. Any person who intentionally administers a substance to or causes a substance to be taken by, another person—
- (a) knowing that that other person does not consent, and
 - (b) with the intention of stupefying or overpowering that other person, so as to enable himself or any person to engage in a sexual activity with the first mentioned other person,

commits an offence and shall, on conviction, be liable to pay a fine not exceeding twenty thousand Emalangenzi or to a term of imprisonment not exceeding ten years or both.

Unlawful Stalking.

10. (1) Any person who unlawfully stalks another person commits an offence of unlawful stalking and shall on conviction, be liable to pay a fine not exceeding twenty thousand Emalangenzi or to a term of imprisonment not exceeding ten years or both.
- (2) For purposes of this section, unlawful stalking shall be conduct—
- (a) directed at a person;
 - (b) engaged in on any one occasion if the conduct is protracted or on more than one occasion; and



- (c) consists of one or more acts of the following, or a similar, type of acts—
 - (i) following, loitering near, watching or approaching a person;
 - (ii) contacting a person in any way, including but not limited to, by telephone, mail, fax, email or through the use of technology;
 - (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
 - (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
 - (v) giving offensive material to a person, directly or indirectly;
 - (vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence; and
 - (vii) an act of violence, or a threat of violence, against the property of, anyone, including the defendant, without a lawful excuse or a legally justifiable reason;

that would cause the stalked person reasonable apprehension or fear.

(3) For the removal of doubt, unlawful stalking for the purposes of this section does not include the following acts—

- (a) reasonable conduct engaged in by a person for the lawful trade, business or occupation of that person;
- (b) reasonable conduct engaged in by a person to obtain or give information that the person has a legitimate interest in obtaining or giving; or
- (c) acceptable courting.

(4) For purposes of subsection (2)(a) of this section the conduct has be directed to the person who is being stalked.

Motive immaterial for unlawful stalking.

11. (1) It shall be immaterial for the purposes of section 10(2)(a), whether the person doing the unlawful stalking—

- (a) intends that the stalked person be aware the conduct is directed at the stalked person; or
- (b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed.



(2) It shall be immaterial for the purposes of section 10(2)(a) and (c) whether the conduct directed at the stalked person consists of conduct carried out in relation to another person or property of another person.

(3) It shall be immaterial for the purposes of section 10(2)(b) whether the conduct throughout the occasion on which the conduct is protracted, or the conduct on each of a number of occasions, consists of the same or different acts.

Court may restrain unlawful stalking.

12. (1) Notwithstanding subsection (2), a person who reasonably believes is being unlawfully stalked by another or any other person on behalf of the person who is being unlawfully stalked, may make an application to Court for a restraining order against the stalker and the Court shall determine the matter and issue the restraining order or dismiss the application.

(2) Whether a person is found guilty or not guilty on a charge of unlawful stalking or the prosecution ends in another way, if the presiding officer considers it desirable, the presiding officer may consider whether or not a restraining order shall be made against the person.

(3) The presiding officer may act under subsection (2) on application by the prosecutor or an interested person or on the own initiative of the presiding officer.

(4) The Court hearing the restraining order proceedings may make a restraining order against the person in relation to any person or any property if it considers it desirable to do so having regard to the evidence given at the hearing of the application or charge and on any further evidence the Court may admit.

(5) A restraining order may be varied or revoked at any time by the Court issuing the order or by another Court if the order so provides.

(6) A person who knowingly contravenes a restraining order commits an offence and shall, on conviction, be liable to pay a fine not exceeding twenty-five thousand Emalangeni or to a term of imprisonment not exceeding five years or both.

(7) A question of fact for the presiding officer in restraining order proceedings shall be decided on the balance of probabilities.

PART III

COMMERCIAL SEXUAL ACTIVITIES

Commercial sexual exploitation.

13. (1) A person who engages in commercial sexual exploitation commits an offence and shall, on conviction, be liable to pay a fine not exceeding one hundred thousand Emalangeni or to a term of imprisonment not exceeding twenty years or both, but where the victim is a child,



that person shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.

(2) For the purposes of this section, a person commits commercial sexual exploitation if, in relation to another person, for financial or other reward, favour or compensation to such person or to any other person, the first mentioned person—

- (a) invites, persuades or induces the person to allow another person to commit a sexual act or sexual violation with or on the person;
- (b) makes available, offers or engages the person for the purposes of the commission of sexual acts or sexual violations by any person;
- (c) facilitates the commission of sexual acts or sexual violations by any person with or on another person;
- (d) facilitates, allows or knowingly permits the commission of sexual acts or sexual violations by any person with a child while being a primary care-giver, parent, foster parent, kinship care-giver, temporary safe care-giver, guardian or curators of that child or for any reason has power, possession, custody or control over the child; or
- (e) detains the person, whether under threat, coercion, deception, abuse of power or force for the purposes of the commission of sexual acts or sexual violations with or on the person.

Promoting commercial sexual exploitation.

14. A person who—

- (a) prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that constitutes or is intended or likely to constitute commercial sexual exploitation as defined in section 13 or as contained in any other law or international convention; or
- (b) promotes or encourages the commission of an unlawful sexual act or an act which is similar to commercial sexual exploitation or sexual violations between one person and another person or between any number of persons,

commits an offence and shall, on conviction, be liable to pay a fine not exceeding fifty thousand Emalangi or to a term of imprisonment not exceeding ten years, but where the activities relate to a child the sentence of imprisonment shall not exceed twenty-five years and shall be without an option of a fine.

Procuring prostitution.

15. A person who procures another to engage in prostitution commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand Emalangi or to a term of



imprisonment not exceeding fifteen years or both but, where the victim is a child the term of imprisonment shall not exceed twenty years without an option to pay a fine.

Benefiting from prostitution.

16. (1) A person who receives financial or other reward, favour or compensation from the commission of sexual acts or sexual violations by another person commits an offence and shall, on conviction, be liable to pay a fine not exceeding fifty thousand Emalangeni or to a term of imprisonment not exceeding fifteen years or both.

(2) A person may not be charged with an offence under subsection (1) if that person is a child.

Living from the earnings of prostitution.

17. (1) A person who lives wholly or in part on rewards, favours or compensation from the commission of sexual acts or sexual violations by another person, commits an offence and shall, on conviction, be liable to pay a fine not exceeding thirty thousand Emalangeni or to a term of imprisonment not exceeding ten years or both.

(2) A person may not be convicted of an offence under subsection (1) if that person is a child.

Keeping a brothel.

18. (1) Subject to subsection (2), any person who keeps or is deemed to keep a brothel commits an offence and shall, on conviction, be liable to pay a fine not exceeding fifty thousand Emalangeni or to a term of imprisonment not exceeding fifteen years or both.

(2) A person who commits an offence in the circumstances specified in section 19 (a) or (g) is liable on conviction to a sentence at the discretion of the Court taking into account all the circumstances of the offence.

(3) The phrase “*keeps a brothel*” means for the purposes of this Part, owning, controlling or managing a brothel or acting or assisting in the management of a brothel.

Certain persons deemed to keep a brothel.

19. The following persons shall, for the purposes of section 18 be deemed to keep a brothel—

- (a) any person who resides in a brothel unless that person proves that, that person was ignorant of the character of the house or place;
- (b) any person who manages or assists in the management of any brothel;
- (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel;



- (d) any person who, being the tenant or occupier of any house or place, knowingly permits such house or place to be used as a brothel;
- (e) any person who, being the owner of any house or place, lets the house or place, or allows it to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;
- (f) any person found in a brothel who refuses to disclose the name and identity of the keeper, owner or manager of the brothel; and
- (g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he was ignorant of the activities of the brothel or that the house or place was a brothel or that he lives apart from the spouse who keeps the brothel and did not intentionally receive the whole or any share of the moneys taken from the business of the brothel.

Lease agreement relating to brothels void.

20. (1) An agreement to let a house or place to be kept or used as a brothel shall be null and void.

(2) An agreement of letting or hiring of any house or place shall, if subsequent to the conclusion of such contract the house or place becomes a brothel, be null and void from the date the house or place becomes a brothel.

(3) Notwithstanding subsection (2), on proof by the owner of his ignorance that the house or place was so kept or used as a brothel, the owner shall be entitled to recover damages and consequential damages.

Summary eviction when a house or place is used as a brothel.

21. The owner of a house or place kept or used as a brothel shall be entitled to apply to a Magistrate having jurisdiction in the area in which the house or place is situated for summary eviction of any person who may be keeping or using such house or place as a brothel and the Magistrate may, after hearing evidence from the parties or from one party if the other fails for whatever reason to submit any, order the summary eviction of the offending person.

Proceedings on complaint by householders or police that a house or place is used as a brothel.

22. (1) If it appears to any Magistrate on sworn statement laid before Magistrate that any house or place is being kept or used as a brothel, the Magistrate may—

- (a) issue a warrant for the arrest of the person alleged to be the keeper of such brothel; or
- (b) issue a warrant authorising any police officer not below the rank of sergeant—



- (i) to enter at any time and within such period as is stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;
- (ii) to question any person found in or upon such house or place and to require that such person provide their name and address; and
- (iii) to demand, search for, and seize any account book, receipt, paper, document or things likely to afford evidence of the commission by any person of an offence under this Act.

(2) For purposes of subsection (1), a sworn statement that any house or place is being kept or used as a brothel may be laid before a Magistrate by—

- (a) not less than two householders of good repute whose dwellings are in the vicinity of the relevant house or place;
- (c) any police officer not below the rank of sergeant; or
- (d) a social worker or a local authority official.

(3) Any person found in such a house or place who, when called upon to do so by the police officer conducting the search, refuses to furnish his or her name and address or furnishes a name or address which is false in any material or particular or refuses to disclose the name or identity of the keeper of the house or place or refuses to produce any book, receipt, paper, document or thing which that person has in his or her possession or custody or under the control of that person, commits an offence and shall, on conviction, be liable to pay a fine not exceeding twenty thousand Emalangenzi to a term of imprisonment not exceeding five years or both.

(4) The issue of a warrant under subsection (1) (b) shall not in any way affect the power of the Magistrate to issue at any time a warrant under subsection (1) (a) or under any other law.

PART IV

MAKING AND DISTRIBUTING PORNOGRAPHIC MATERIALS, AND OTHER RECORDINGS IN BREACH OF PRIVACY

Prohibition of distribution or publication of pornography.

23. (1) A person, who—
- (a) distributes, publishes, advertises or exposes material which is pornographic to child or an adult without the consent of that adult;
 - (b) publishes or exhibits any pornographic material without printing in such material his or her name and the prescribed particulars of his or her address or without indicating the age restriction or consumer advice; or



- (c) broadcasts a pornographic film, whether publicly or privately to children or non-consenting adults,

commits an offence and, on conviction, shall be liable to pay a fine not exceeding fifty thousand Emalangeni or to a term of imprisonment not exceeding fifteen years or to both.

(2) Where the person referred to under subsection (1) has parental power or control over that child, and that person commits the offence mentioned in subsection (1), that person shall, on conviction, be liable to pay a fine of not exceeding seventy-five thousand Emalangeni to a term of imprisonment of not exceeding twenty years or both.

Using children for child pornography.

24. A person who unlawfully uses a child, whether or not for financial or other reward, reason, favour or compensation to that child or a third person—

- (a) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of that child—
- (i) engaged in an act that constitutes a sexual offence;
 - (ii) engaged in an act of sexual penetration;
 - (iii) engaged in an act of sexual violation;
 - (iv) engaged in an act of self-masturbation;
 - (v) indecently exposed or the genital organs of the child in a state of arousal or stimulation;
 - (vi) in any form of stimulation of a sexual nature indecently exposing the breasts of the child;
 - (vii) engaged in sexually suggestive or lewd acts;
 - (viii) engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
or
 - (ix) indecently exposed or the body or parts of the body of the child in a manner or in circumstances which, within context, violate or offend the sexual integrity or dignity of the child or are capable of being used for the purposes of violating or offending the sexual integrity or dignity of the child; or
- (b) for the purpose of creating, making or producing or by creating, making or producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of the child—



- (i) participating in, or assisting or facilitating another person to participate in any one or such number of the acts specified under paragraph (a); or
- (ii) being in the presence of another person who commits or in any other manner being involved,

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.

Making child pornography.

25. (1) A person who makes pornographic material involving a child commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.

(2) In this section— “*makes pornographic material involving a child*” includes—

- (a) producing pornographic material involving a child; or
- (b) attempting to make pornographic material involving a child.

Benefiting from child pornography.

26. Any person who gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as a result of the commission of any act referred to under section 25 commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years.

Distributing pornographic material involving a child.

27. A person who distributes pornographic material involving a child commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years.

Possessing pornographic material involving a child.

28. A person who possesses pornographic material involving a child commits an offence and shall, on conviction, be liable to pay a fine not exceeding seventy-five thousand Emalangenis or a term of imprisonment not exceeding fifteen years or both.

Defences for sections 24 to 28.

29. It is a defence to the offences referred to under sections 24 to 28 for a person to prove that—

- (a) the person engaged in the conduct that is alleged to constitute the offence is for a genuine artistic, educational, legal, medical, scientific or public benefit purpose including Swazi cultural events; and
- (b) the conduct of that person was, in all the circumstances, reasonable for that purpose.



Excluding non-essential persons from Court when pornographic material involving a child is displayed.

30. (1) When material alleged to be pornographic material involving a child is on display in a Courtroom, the Court shall exclude from the Courtroom a person, who is not—

- (a) a party, or representing a party, to the proceedings; or
- (b) the prosecutor; or
- (c) a witness giving evidence; or
- (d) necessary or desirable, in the opinion of the Court, for the proper conduct of the proceedings,
- (e) a person who applies to the Court to be present and whose presence, in the opinion of the Court—
 - (i) would serve a proper interest of that person; and
 - (ii) would not be prejudicial to the interests of any child described or depicted in the pornographic material, whether or not any child can be identified from the child exploitation material.

(2) When forming an opinion under subsection (1) (d) or (e), the Court shall consider the public benefit of limiting the number of people with access to child exploitation material.

Using persons with a physical or mental disability for pornographic purposes.

31. (1) A person who unlawfully uses a complainant, whether or not for financial or other reward, favour or compensation to that complainant, or to a third person—

- (a) for the purpose of creating, making, producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever, of—
 - (i) the complainant engaged in an act that constitutes a sexual offence;
 - (ii) the complainant engaged in an act of sexual penetration;
 - (iii) the complainant engaged in an act of sexual violation;
 - (iv) the complainant engaged in an act of self-masturbation;
 - (v) the genital organs of the complainant in a state of arousal or stimulation;
 - (vi) any form of stimulation of a sexual nature of the breasts of the complainant;
 - (vii) the complainant engaged in sexually suggestive or lewd acts;



- (viii) the complainant engaged in or as the subject of sadistic or masochistic acts of a sexual nature;
 - (ix) the body of the complainant in a manner or in circumstances which, within context, violate or offend the sexual integrity or dignity of the complainant or are capable of being used for the purposes of violating or offending the sexual integrity or dignity of the complainant; or
- (b) for the purpose of creating, making, producing or in any manner assisting to create, make or produce any image, publication, depiction, description or sequence in any manner whatsoever of the complainant –
- (i) participating in, assisting, or facilitating another person to participate in; or
 - (ii) being in the presence of another person who commits or in any manner other manner being involved in

any act referred to in paragraphs (a)(i) to (ix), commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years.

(2) For the purpose of this section “*complainant*” means a person who is living with a physical or mental disability.

Benefiting from using persons with a physical or mental disability for pornographic purposes

32. A person who gains financially from, or receives any favour, benefit, reward, compensation or any other advantage, as a result of the commission of an act specified in section 31 commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years.

Observations or recordings in breach of privacy.

33. (1) A person who observes or visually records another person, in circumstances where a reasonable adult would expect to be afforded privacy–

- (a) without the consent of that other person; and
- (b) when that other person–
 - (i) is in a private place; or
 - (ii) is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act;

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years.



(2) A person who unlawfully observes or visually records the genital or anal area of another person, whether covered or bare, in circumstances where a reasonable adult would expect to be afforded privacy in relation to those areas—

- (a) without the consent of that other person; and
- (b) when the observation or visual recording is made for the purpose of observing or visually recording the genital or anal area of that other person—

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years.

Distributing prohibited visual recordings.

34. (1) A person who distributes a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without the consent of that other person commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years.

(2) In this section, “*prohibited visual recording*”, of another person, means—

- (a) a visual recording of the person in a private place or engaging in a private act made in circumstances where a reasonable adult would expect to be afforded privacy; or
- (b) a visual recording of the genital or anal area of that person, whether it is covered by underwear or bare, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to those areas.

Persons who are not criminally liable for offences under section 33 and 34

35. A person is not criminally liable for an offence under section 33 or section 34 if—

- (a) that person is, at the time of the offence, a law enforcement officer acting in the course of duty; and
- (b) the conduct of that person is reasonable in the circumstances for the performance of the duties.

PART V

OFFENCES INVOLVING CHILDREN

Indecent treatment of children.

36. (1) A person who—

- (a) unlawfully and indecently deals with a child;
- (b) unlawfully procures a child to commit a sexual violation;



- (c) unlawfully permits himself or herself to be indecently dealt with by a child;
- (d) wilfully and unlawfully exposes a child to a sexual violation by that person or any other person;
- (e) without legitimate reason, wilfully exposes a child to any indecent object or any indecent film, videotape, audiotape, picture, photograph, image or printed or written matter; or
- (f) without legitimate reason, takes any indecent visual image of a child—

commits an offence and shall, on conviction, —

- (i) if the child is of or above the age of twelve years, be liable to a term of imprisonment not exceeding twenty years;
- (ii) if the child is under the age of twelve years be liable to a term of imprisonment not exceeding twenty-five years; or
- (iii) if the child is, to the knowledge of the offender, a lineal descendant of the offender or if the offender is the guardian of the child or, for the time being, has the child under the care of the offender, be liable a term of imprisonment not exceeding twenty years.

(2) In this section, “*deals with*” means doing an act which would constitute an assault as defined in this Act.

Maintaining a sexual relationship with a child.

37. (1) A person who maintains a sexual relationship with a child commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty years.

(2) For an adult to be convicted of the offence of maintaining a sexual relationship with a child, the presiding officer shall be satisfied beyond a reasonable doubt that the evidence establishes that a sexual relationship with the child existed.

(3) Notwithstanding anything to the contrary contained in this Act or any other law, in respect of unlawful sexual acts involving a sexual relationship with a child—

- (a) the prosecution shall not be required by the Court, law or any person to allege the particulars of any one sexual act that would be necessary if the act were charged as a separate offence; and
- (b) the presiding officer shall not be required by law to be satisfied of the particulars of any one sexual act that it would have to be satisfied of if the act were charged as a separate offence.

(4) An adult may be charged not only with the offence of maintaining a sexual relationship with a child but also with one or more other offences contained in this Part or in



Parts II to IV and Part VI to VIII alleged to have been committed by the adult in relation to the child in the course of the alleged sexual relationship.

(5) If the adult is convicted of both the offence of maintaining a sexual relationship with a child and another offence or offences as mentioned in subsection (4), the Court convicting that person shall not order that the sentences be served concurrently.

(6) In this section, “*sexual relationship*” means a relationship that involves more than one sexual act with a child over any period of time.

Sexual grooming of children.

38. A person who—

(a) supplies, exposes or displays to a child—

- (i) an article which is intended to be used in the performance of a sexual act;
- (ii) pornography as provided for in section 23; or
- (iii) a publication,

to instruct, encourage, enable, induce or persuade the child to perform a sexual act with that person or another person; or

(b) commits an act with or in the presence of a child or who describes the commission of any act to or in the presence of a child with the intention to encourage or persuade the child or to diminish or reduce any resistance or unwillingness on the part of the child to—

- (i) perform a sexual act with that person or a third person;
- (ii) perform an act of self-masturbation in the presence of that person or third person or while that person or a third person is watching;
- (iii) be in the presence of or watch that person or a third person while that person or a third person performs a sexual act or an act of self-masturbation;
- (iv) be exposed to pornography as provided for under section 23;
- (v) be used for pornographic purposes as provided for under section 24; or
- (vi) expose the body of that child, or parts of the body of that child to that person or to a third party in a manner or in circumstances which violate or offend the sexual integrity or dignity of the child;

(c) arranges or facilitates a meeting or communication with a child by any means from, to or in any part of the world, with the intention of committing a sexual act with the child;



- (d) having met or communicated with a child by any means from, to or in any part of the world, causes, invites, persuades, seduces, induces, entices or coerces the child—
 - (i) to travel to any part of the world in order to meet that person with the intention to commit a sexual act with the child; or
 - (ii) during such meeting or communication or any subsequent meeting or communication, to commit a sexual act with that person or to discuss, explain or describe the commission of a sexual act; or to provide that person, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence as contemplated in section 24 (a) of the child or of any other person; or
- (e) having met or communicated with a child by any means from, to or in any part of the world, travels to meet or meets the child with the intention of committing a sexual act with the child,

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.

Promoting the sexual grooming of children.

39. A person who—

- (a) manufactures, produces, distributes or facilitates the manufacture, production or distribution of an article or a publication that promotes or is intended to be used in the commission of a sexual act with or by a child;
- (b) supplies, exposes or displays to a third person—
 - (i) an article which is intended to be used in the performance of a sexual act;
 - (ii) pornography as provided for in this Act; or
 - (iii) a publication,with the intention to encourage, enable, instruct or persuade a third party to perform a sexual act with a child; or
- (c) arranges or facilitates a meeting or communication between a third person and a child by any means from, to or in any part of the world, with the intention that the third person may perform a sexual act with the child,

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.



Using electronic communication to procure children.

40. (1) A person shall not use electronic communication to—
- (a) procure a child, or a person who the adult believes is a child, to engage in a sexual act or sexual violation in the Kingdom of Eswatini or elsewhere; or
 - (b) expose, without legitimate reason, a child, or a person who the adult believes is a child, to any indecent matter, either in the Kingdom of Eswatini or elsewhere.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction—
- (a) if the child is under the age of twelve years be liable to a term of imprisonment not exceeding twenty years; or
 - (b) if the child is twelve years or above, be liable to a term of imprisonment not exceeding twenty years;
 - (c) if the child is, to the knowledge of the offender, a lineal descendant of the offender or if the offender is the guardian of the child or, for the time being, has the child under the care of the offender, be liable to a term of imprisonment not exceeding twenty-five years.
- (3) For purposes of subsection (1) (a), a person engages in a sexual act or sexual violation if that person—
- (a) allows a sexual act or sexual violation to be done to the body of that person;
 - (b) commits a sexual act or sexual violation to the body of that person or the body of another person; or
 - (c) otherwise engages in an act of an indecent nature.
- (4) Subsection (3) is not limited to sexual intercourse or acts involving physical contact.
- (5) For purposes of subsection (1)(a), it is not necessary to prove that the adult intended to procure the child to engage in any particular sexual act or sexual violation and, it does not matter that, by reason of circumstances not known to the adult, it is impossible in fact for the person to engage in the sexual act or sexual violation.
- (6) For purposes of subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person.



Compelling or causing children to witness sexual offences, sexual acts or self-masturbation.

41. A person who unlawfully, whether or not for sexual gratification of that person or that of a third person compels or causes a child to be present or to watch that person or the third person—

- (a) while committing a sexual offence; or
- (b) engaging in an act of self-masturbation;

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years.

Abduction.

42. (1) For the purposes of this section abduction means unlawfully taking a child out of the control of the custodian of that child or a person in charge of that child—

- (a) with the intention of performing a sexual act or sexual violation with that child;
- (b) for the purposes of harmful rituals or sacrifices; or
- (c) for any other unlawful purpose.

(2) A person who commits an act of abduction as defined in this section commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding fifteen years.

Marrying of a child or placing them in a situation akin to a marriage.

43. A person shall not marry a child in contravention of the Marriage Act No 47 of 1964 or any Act succeeding the Marriage Act No. 47 of 1964.

PART VI

OFFENCES INVOLVING PERSONS WHO ARE PHYSICALLY OR MENTALLY DISABLED

Sexual grooming of persons who are physically or mentally disabled.

44. (1) A person who—

- (a) supplies, exposes or displays to a third person—
 - (i) an article which is intended to be used in the performance of a sexual act;
 - (ii) pornography as provided for in section 23; or
 - (iii) a publication,



to instruct, encourage, persuade, or enable the third person to perform a sexual act with a physically disabled person, without the consent of that physically disabled person, or a mentally disabled person; or

- (b) arranges or facilitates a meeting or communication between a third person and a physically disabled person, without the consent of that physically disabled person, by any means from, to or in any part of the world, with the intention that the third person may perform a sexual act with a physically disabled person without the consent of that physically disabled person;
- (c) arranges or facilitates a meeting or communication with a physically disabled person, without the consent of that physically disabled person, by any means from, to or in any part of the world, with the intention that that person may commit a sexual act with the physically disabled person, without the consent of that physically disabled person;
- (d) having met or communicated with a physically disabled person, without the consent of that physically disabled person, by any means from, to or in any part of the world, invites, causes, persuades, seduces, induces, entices or coerces the physically disabled person—
 - (i) to travel to any part of the world in order to meet that person with the intention to commit a sexual act with the physically disabled person without their consent; or
 - (ii) during such meeting or communication or any subsequent meeting or communication, to commit a sexual act with that person, discuss, explain or describe the commission of a sexual act, or provide the physically disabled person, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence as provided for in section 24 (a) without the consent of that physically disabled person; or
- (e) having met or communicated with a physically disabled person without their consent by any means from, to or in any part of the world, intentionally travels to meet or meets the physically disabled person with the intention of committing a sexual act with the physically disabled person without the consent of that physically disabled person—

commits an offence and shall, on conviction, be liable to a term of imprisonment not exceeding twenty-five years.

(2) A person who—

- (a) supplies, exposes or displays to a mentally disabled person—



- (i) an article which is intended to be used in the performance of a sexual act;
 - (ii) pornography as contemplated in section 23; or
 - (iii) a publication,
to encourage, persuade, instruct or enable the mentally disabled person to perform a sexual act; or
- (b) commits any act with or in the presence of a mentally disabled person or who describes the commission of any act to or in the presence of a mentally disabled person with the intention to encourage or persuade the mentally disabled person or to diminish or reduce any resistance or unwillingness on the part of the mentally disabled person to—
- (i) perform a sexual act with that person or a third person;
 - (ii) perform an act of self-masturbation in the presence of that person or of a third party or while that person or the third party is watching;
 - (iii) be in the presence of or watch that person or the third party while that person or the third party performs a sexual act or an act of self-masturbation;
 - (iv) be exposed to pornography as provided for in section 23;
 - (v) be used for pornographic purposes as provided for in section 24; or
 - (vi) expose body of that mentally disabled person, or parts the body of the mentally disabled person to that person or to a third party in a manner or in circumstances which violate or offend the sexual integrity or dignity of the mentally disabled person;
- (c) arranges or facilitates a meeting or communication with a mentally disabled person by any means from, to or in any part of the world, with the intention that that person may commit a sexual act with the mentally disabled person;
- (d) having met or communicated with a mentally disabled person by any means from, to or in any part of the world, invites, persuades, seduces, induces, entices or coerces the mentally disabled person—
- (i) to travel to any part of the world in order to meet that person with the intention to commit a sexual act with the mentally disabled person; or
 - (ii) during such meeting or communication or any subsequent meeting or communication to, commit a sexual act with that person, discuss, explain or describe the commission of a sexual act or provide the



mentally disabled person, by means of any form of communication including electronic communication, with any image, publication, depiction, description or sequence as provided for in section 24 (a); or

- (e) having met or communicated with a physically disabled person without their consent by any means from, to or in any part of the world, travels to meet or meets the mentally disabled person with the intention of committing a sexual act with the mentally disabled person,

commits an offence and shall, on conviction, be liable to a sentence of imprisonment not exceeding twenty-five years.

PART VII

OTHER OFFENCES

Bestiality.

45. A person who unlawfully commits an act—

- (a) which causes penetration to any extent whatsoever by the genital organs of—
 - (i) that person into or beyond the mouth, genital organs or anus of an animal; or
 - (ii) an animal into or beyond the mouth, genital organs or anus of that person; or
- (b) of masturbating an animal,

commits the offence of bestiality and is liable, on conviction, to pay a fine not exceeding twenty-five thousand Emalangeni or be liable to a term of imprisonment not exceeding ten years or to both.

Necrophilia.

46. A person who commits a sexual act with a human corpse commits an offence of Necrophilia and is liable on conviction to pay a fine not exceeding fifty thousand Emalangeni or a term of imprisonment not exceeding fifteen years or to both.

Exposure of or causing exposure or display of genital organs or anus (“flashing”).

47. (1) A person who unlawfully, whether or not for the sexual gratification of the person or a third person or not, exposes or displays or causes the exposure or display of the genital organs or anus of the person or the third party to another person, without the consent of that other person, commits an offence and shall, on conviction, be liable to a fine not exceeding fifteen thousand Emalangeni or imprisonment not exceeding five years or both.

- (2) It is a defence to the offence under subsection (1) to establish all of the following—
 - (a) the exposure or display of the genital organs was by the parent or guardian of the child;



- (b) the child was under the age of twelve;
- (c) the child required assistance with bathing;
- (d) the exposure was only for the purposes of the parent and child bathing together; and
- (e) no unlawful sexual act was committed during the course of the bathing.

(3) It shall further be a defence to the offence provided for in subsection (1) to establish that the exposure was—

- (a) strictly for medical or health purposes;
- (b) by the parent or guardian for ascertaining, on reasonable suspicion, that the child might have been sexually violated or molested;
- (c) for purposes of gathering evidence.

PART VIII

SEXUAL HARASSMENT

Sexual harassment.

48. (1) A person who sexually harasses another commits an offence and shall, on conviction, be liable to pay a fine not exceeding twenty-five thousand Emalangeni or to imprisonment for a period not exceeding ten years or to both.

(2) Sexual harassment for the purposes of this Act is committed where—

- (a) a person subjects another person to an unsolicited act of physical intimacy, including but not limited to, physical contact such as patting, pinching or touching in a sexual way or unnecessary familiarity such as deliberately brushing against another;
- (b) a person makes an unsolicited demand or request, whether directly or by implication, for sexual favours from the other person;
- (c) a person engages in any other unwelcome conduct of a sexual nature in relation to the other person including but not limited to offensive telephone calls and indecent exposure;
- (d) the person engaging in the conduct described in paragraphs (a), (b) or (c), does so—
 - (i) with the intention to offend, humiliate or intimidate the other person; or
 - (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.



(3) For purposes of subsection (2) (d) (ii), the circumstances that are relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct include—

- (a) the sex of the other person;
- (b) the age of the other person;
- (c) the race of the other person;
- (d) any impairment that the other person has;
- (e) the relationship between the other person and the person engaging in the conduct;
- (f) the nature of the place, whether private or public, and the time of the day; and
- (g) any other circumstance of the other person the Court may find or deem relevant.

PART IX

EVIDENCE

Abolishment of the cautionary rule.

49. Notwithstanding the provisions of the common law, any other law or rule of practice, a Court shall not treat the evidence of a witness in criminal proceedings before that Court with caution and shall not call for corroboration of evidence solely on account of the fact that the witness is—

- (a) the complainant of a sexual offence; or
- (b) a child.

Delay in reporting.

50. A Court, in criminal proceedings involving the alleged commission of a sexual offence, shall not draw an inference solely on account of—

- (a) the fact that previous consistent statements have not been made; or
- (b) the length of any delay between the alleged commission of such offence and the reporting of the offence to the police.

Principles of evidence in cases of sexual offence.

51. In cases of sexual offence, the Court shall be guided by and, where appropriate, apply the following guiding principles—



- (a) consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the ability of the victim to give voluntary and genuine consent;
- (b) consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving voluntary and genuine consent;
- (c) consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual offence; or
- (d) credibility, character, antecedents or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Evidence of other sexual conduct.

52. For cases being dealt with under Part I, the Court shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Admissibility of certain evidence.

53. Evidence of the surrounding circumstances and the impact of any sexual offence upon the victim may be adduced in criminal proceedings where such offence is tried in order to prove—

- (a) whether a sexual offence is likely to have been committed—
 - (i) towards or in connection with the person concerned; or
 - (ii) under coercive circumstances referred to in section 3;
- (b) the extent of the harm suffered by the person concerned for the purposes of imposing an appropriate sentence.

In camera procedure to consider relevance or admissibility of evidence.

54. (1) Where there is an intention to introduce or solicit, including by means of questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in section 51, the person intending to introduce or elicit such evidence shall make an application or give notification to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.

(2) In deciding whether the evidence referred to in subsection (1) is relevant or admissible, a Court shall hear in camera the views of the Prosecutor, the defence, the witness and the victim and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause.



(3) For purposes of this section, the Court shall be guided by the guiding principles outlined in section, especially with respect to the proposed questioning of a victim.

(4) Where the Court determines that the evidence referred to in subsection (2) is admissible in the proceedings, the Court shall state on the record the specific purpose for which the evidence is admissible and in evaluating the evidence during the proceedings, the Court shall apply the principles outlined in subsections 51.

Hearsay evidence.

55. (1) Hearsay evidence maybe admissible in proceedings brought under this Act in exceptional cases.

(2) In this section “*exceptional cases*” include cases where the victim—

- (a) is of the age of fourteen years or below at the time of the commission of the act;
- (b) is a vulnerable elderly person;
- (c) has been proven to be mentally impaired or suffering from psychological or psychiatric harm by a medical practitioner, social worker or a registered psychologist; or
- (d) has a visual, hearing or speech impairment.

PART X

NATIONAL REGISTER FOR SEXUAL OFFENDERS

Establishment of National Register for Sex Offenders and designation of Registrar of Register.

56. (1) A National Register for Sex Offenders containing particulars of persons convicted of any sexual offence or who have been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act whether committed before or after the commencement of this Act and regulations, shall be established and maintained by the Minister or an officer so designated by the Minister or other appropriate authority.

(2) The Minister or such other appropriate authority shall designate a fit and proper person, with due regard to the experience, conscientiousness and integrity of that person, as the Registrar for the National Register for Sex Offenders.

(3) The Registrar shall exercise and perform such powers, duties and functions subject to the provisions of this Act and the regulations.



Objects of the Register.

57. The objects of the Register are to protect victims of sexual offences particularly children and persons who are physically or mentally disabled against sexual offenders by-

- (a) establishing and maintaining a record of persons who have been convicted of a sexual offence, whether committed before or after the commencement of this Act and whether committed in or outside ESWATINI; or
- (b) establishing and maintaining a record of persons who are alleged to have committed a sexual offence, in respect of whom a Court, whether before or after the commencement of this Act-
 - (i) in the Kingdom of Eswatini has made a finding and given a direction in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act; or
 - (ii) outside the Kingdom Eswatini has made a finding and given a direction mentioned in subparagraph (i) in terms of the law of the country in question;
- (c) informing an employer applying for a certificate under section 64 whether or not the particulars of the person seeking employment from an employer are contained in the Register; and
- (d) informing the relevant authorities dealing with fostering, care-giving, adoption, applying for a certificate as specified in this Part whether or not the particulars of any applicant, as specified in section 58, have been included in the Register.

Contents of Register.

58. The Register shall-

- (a) be established and maintained in the prescribed manner and format; and
- (b) contain the following particulars of persons referred to in section 59-
 - (i) the title, actual or estimated age, full names and surname of the person, including any known alias or nickname and, where applicable, the profession or trade of that person;
 - (ii) the last known physical address of the person, and any other contact details, including a postal address, where applicable;
 - (iii) the identity number, passport number and driver's licence number of the person, where applicable;
 - (iv) the sexual offence in respect of which the person has been convicted, the sentence imposed, the date and place of conviction and sentence, as well as the relevant prisoner identification number, where applicable;



- (v) the Court in which the trial took place and the case number;
 - (vi) the name of the medical institution or medical practitioner of a person and details of the sexual offence allegedly committed by a person who has been dealt with in terms of section 165 of the Criminal Procedure and Evidence Act, and
 - (vii) any other particulars as may be prescribed in the regulations; and
- (c) if the conviction and sentence took place in a foreign jurisdiction, contain as far as possible the equivalent information as is mentioned in paragraph (b), as obtained from the relevant country or any other legal source.

Persons whose names shall be included in Register and related matters.

59. (1) The particulars of the following persons shall be included in the Register—
- (a) A person who in terms of this Act or any other law—
 - (i) has been convicted of a sexual offence;
 - (ii) is alleged to have committed a sexual offence in respect of whom a Court, made or has made a finding and given a direction in terms of section 165 or 319 of the Criminal Procedure and Evidence Act;
 - (iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence; or
 - (iv) has a previous conviction for a sexual offence or who has not served a sentence of imprisonment for such offence; and
 - (b) any person—
 - (i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence;
 - (ii) who, in any foreign jurisdiction, has been dealt with in a manner equivalent to that contemplated in paragraph (a)(ii) or (iii) whose particulars appear on an official register in any foreign jurisdiction, pursuant to a conviction for a sexual offence or as a result of an order equivalent to that contemplated in paragraph (a)(ii), whether committed before or after the commencement of this Act.
- (2) A Court that has in terms of this Act or any other law—
- (a) convicted a person of a sexual offence and, after sentence has been imposed by that Court for such offence, in the presence of the convicted person; or



- (b) made a finding and given a direction in terms of section 165 of the Criminal Procedure and Evidence Act, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence, in the presence of that person, –

shall make an order that the particulars of the person be included in the Register.

(3) When making an order under subsection (2), the Court shall explain the contents and implications of such an order, including section 68, to the convicted person.

(4) Where a Court has made an order under subsection (2)(a), the Registrar of the High Court or the clerk of the relevant Magistrate Court shall, where possible notify the employer in the prescribed manner, of such order and shall forthwith forward the order to the Registrar, together with all the particulars referred to in section 58 of the convicted person, and the Registrar shall immediately and provisionally, in the prescribed manner, enter the particulars of the person concerned in the Register, pending the outcome of any appeal or review and shall, after–

- (a) the period for noting an appeal or taking the matter on review has expired; or
- (b) the appeal or review proceedings have been concluded in the case of an appeal or review,

either enter or remove such particulars from the Register, depending on the outcome of the appeal or review or the abandonment or expiry of the noting of appeal or review.

(5) Where a Court, for whatever reason, fails to make an order under subsection (2) the prosecuting authority or any person shall immediately or at any other time bring this omission to the attention of the Court and the Court shall make such order.

(6) The Commissioner General of Correctional Services shall–

- (a) in the prescribed manner and within three months after the commencement of this Act, forward to the Registrar the particulars referred to in section 58 of every prisoner or former prisoner which he has on record, who, at the commencement of this Act, is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence, and the Registrar shall forthwith enter those particulars in the Register; and
- (b) in the prescribed manner and period, inform each serving prisoner whose particulars have been forwarded to the Registrar of the implications of the particulars so sent to the Registrar.



(7) The National Commissioner of the Royal Eswatini Police Service shall, in the prescribed manner and within three months after the commencement of this Act, forward to the Registrar all the available particulars in his or her possession referred to in section 58 of every person, who, at the commencement of this Act, has a previous conviction for a sexual offence and the Registrar shall forthwith enter those particulars in the Register.

(8) The Director of Health Services shall—

- (a) in the prescribed manner and within three months after the commencement of this Act, forward to the Registrar the particulars referred to in section 58 of every person, who, at the commencement of this Act, is subject to a direction in terms of section 165 of the Criminal Procedure and Evidence Act, as the result of an act which constituted a sexual offence and the Registrar shall forthwith enter those particulars in the Register; and
- (b) in the prescribed manner and period, inform each person referred to in paragraph (a) whose particulars have been forwarded to the Registrar of the implications thereof.

Obligations on person on Register to notify of any change of details.

60. (1) A person whose particulars have been submitted to the Registrar as provided for in this Part and especially in terms of section 59 and whose name or names, sex, identity number, physical or postal address or other details as required in section 58 have changed, shall notify the Registrar of any such change within fourteen days of such change.

(2) A person referred to in subsection (1) who intentionally fails to notify the Registrar of any change as required by this section, commits an offence and shall, on conviction, be liable to a pay a fine not exceeding seven thousand Emalangeneni or to a term of imprisonment not exceeding eighteen months or both.

Removal of particulars from Register.

61. (1) The particulars of a person who has been convicted of a sexual offence and who—
- (a) was at the time of the conviction a first offender, may on application, be removed from the Register after a period of ten years after completion of the sentence;
 - (b) was at the time of conviction a second or subsequent offender, may not be removed from the Register; or
 - (c) was dealt with in terms of section 165 of the Criminal Procedure and Evidence Act, may, on application be removed from the Register after a period of five (5) years has lapsed after such person has recovered from the



mental illness or mental defect in question and is discharged by the Court from any restrictions imposed on him.

(2) A person mentioned in subsection (1) may apply, in the prescribed manner, to the Registrar to have his particulars removed from the Register.

(3) The Registrar, in consultation with the Minister, shall, after considering the application, remove the particulars of the person mentioned in paragraph (a) of subsection (1) from the Register, unless the person concerned has an investigation or a charge relating to a sexual offence pending against that person and the relevant investigation or case has not yet been finalised, in which event the finalisation of the application shall be postponed until the Registrar has, in the prescribed manner, received information on the outcome of the investigation or case.

(4) The Registrar may, at the request of a person whose particulars are included in the Register, remove those particulars from the Register if the Registrar is satisfied that the entry of those particulars in the Register was clearly in error.

Confidentiality and disclosure of information.

62. (1) The Registrar and any other person who assists the Registrar in the exercise and performance of his powers, duties and functions may not disclose any information which he has acquired in the exercise of the powers, duties and performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him or her under this Act, except—

- (a) for the purpose of giving effect to the provisions of this Act; or
- (b) when required to do so by any Court.

(2) Except in so far as it may be necessary for the purpose of this Act, the Registrar and any other person who assists the Registrar in the exercise and performance of his powers, duties and functions, who wilfully discloses any information to any other person is guilty of an offence and shall, on conviction, be liable to pay a fine not exceeding ten thousand Emalangeni or to a term of imprisonment not exceeding two years or both.

(3) A person who discloses any information which that person has acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him under this Act, except—

- (a) for the purpose of giving effect to the provisions of this Act; or
- (b) when required to do so by any competent Court,

commits an offence and shall, on conviction, be liable to pay a fine not exceeding ten thousand Emalangeni or to a term of imprisonment not exceeding two years or to both.

(4) Except in so far as it may be necessary for the purposes of this Act, any person who wilfully discloses or publishes any information to any other person which that person has



acquired as a result of an application contemplated in section 64 or in any other manner commits an offence and shall, on conviction, be liable to pay a fine not exceeding ten thousand Emalangeni or to a term of imprisonment not exceeding two years or both.

Prohibition on certain types of employment of persons who have committed sexual offences against children and persons who are disabled.

63. (1) A person who has been convicted of a sexual offence or has been dealt with in terms of section 165 or 319 of the Criminal Procedure and Evidence Act, whether committed before or after the commencement of this Act, whether committed in or outside the Kingdom of Eswatini, and whose particulars have been included in the Register, may not—

- (a) be employed to work with a child or with a person who is physically or mentally disabled in any circumstances;
- (b) hold any position, related to the employment of that person, or for any commercial benefit which in any manner places that person in any position of authority or which in any other manner, places that person in a position of authority, supervision or care of a child or a person who is physically or mentally disabled or where that person gains access to a child or a person who is physically or mentally disabled or places where children or persons who are physically or mentally disabled are present or congregate;
- (c) be granted a licence or be given approval to manage or operate any entity, business concern or trade in relation to the supervision or care of a child or a person who is physically or mentally disabled; or
- (d) become the foster parent, care-giver or adoptive parent of a child; or
- (e) become the curator of a person who is mentally disabled.

(2) A person who contravenes this section, commits an offence and shall, on conviction, be liable to pay a fine not exceeding twenty-five thousand Emalangeni or a term of imprisonment not exceeding five years or both.

Persons entitled to apply for certificate.

64. An application for a certificate, stating whether or not the particulars of a person mentioned in the application are recorded in the Register may, solely for the purpose of complying with any obligation under this Act, be made in the prescribed manner by—

- (a) an employer in respect of an employee or a prospective employee as provided in section 65(1);
- (b) a licensing authority in respect of an applicant as provided in section 67 (1);
- (c) a relevant authority in respect of an applicant as provided in section 68 (1);



- (d) an employee provided in section 66 (1) and (2) in respect of his own particulars;
- (e) a person provided in section 67 (2) applying for a licence or approval to manage or operate any entity, business concern or trade in relation to the supervision over or care of children in respect of his or her own particulars;
- (f) a person mentioned in section 68 (2) applying to become a foster parent, care-giver, or adoptive parent in respect of his own particulars;
- (g) a person whose particulars appear on the Register in respect of his own particulars;
or
- (h) any other person a Court may authorise after an application has been so made to the Court.

Obligations of employers in respect of employees.

65. (1) Any employer whose employee falls under section 63(1) shall—
- (a) at the date of commencement of this Act, has in his employment an employee, may from the date of establishment of the Register, in the prescribed manner, apply to the Registrar for a certificate, stating whether or not the particulars of the employee are recorded in the Register; or
 - (b) from the date of establishment of the Register, intends employing an employee, shall, in the prescribed manner, apply to the Registrar for a certificate, stating whether or not the particulars of the potential employee are recorded in the Register.
- (2) Subject to the commencement of this Act—
- (a) an employer shall—
 - (i) subject to paragraph (d) not continue to employ an employee contemplated in subsection (1)(a); or
 - (ii) not employ an employee contemplated in subsection (1)(b), whose particulars are recorded in the Register;
 - (b) an employer who, during the course of an employment relationship, ascertains that the particulars of an employee contemplated in subsection (1)(a) have been recorded in the Register, irrespective of whether such offence was committed during the course of employment of that employee, shall, subject to paragraph (d) immediately terminate the employment of such employee;
 - (c) and notwithstanding paragraph (d) an employer shall immediately terminate the employment of an employee who fails to disclose a conviction of a sexual



offence or has been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act, as provided in section 59 (1);

- (d) an employer shall, subject to paragraph (e), take reasonable steps to prevent an employee whose particulars are recorded in the Register from continuing to gain access to a child or a person who is physically or mentally disabled, in the course of employment, including, if reasonably possible or practicable to transfer such person from the post or position occupied by him to another post or position;
- (e) if any steps to be taken under paragraph (d) shall not ensure the safety of a child or a person who is physically or mentally disabled, the employment relationship, the use of services or access, as the case may be, shall be terminated immediately.

(2) An employer or the person or persons responsible for employing persons on behalf of the employer who fail to comply with any provision of this section commits an offence and shall, on conviction, each be liable to a fine not exceeding ten thousand Emalangeneni or a sentence of imprisonment not exceeding two years or both.

Obligations of employees.

66. (1) An employee at the commencement of this Act, who is convicted of a sexual offence, or has been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act, irrespective of whether or not such offence was committed during the course of his employment, shall without delay disclose such conviction to his employer.

(2) A person who, after the commencement of this Act, applies for employment, shall, if he has been convicted of a sexual offence or has been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act, disclose such conviction or finding when applying for employment.

(3) An employee who fails to comply with subsection (1) or (2) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand Emalangeneni or to a sentence of imprisonment not exceeding two years or both.

Obligations in respect of licence applications.

67. (1) A licensing authority may not grant a licence to or approve the management or operation of any entity, business concern or trade in relation to the supervision over or care of a child or a person who is physically or mentally disabled without having determined, by way of an application to the Registrar for a prescribed certificate, whether or not the particulars of such person have been recorded in the Register.

(2) A person who, after the commencement of this Act, applies for a licence as contemplated in subsection (1) to a licensing authority shall disclose that he has been convicted



of a sexual offence or has been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act.

(3) A licensing authority or the person or persons responsible for issuing licences on behalf of the licensing authority who intentionally contravenes any provision of this section commits an offence and shall each, on conviction, be liable to pay a fine not exceeding fifteen thousand Emalangenzi or a period of imprisonment not exceeding three years or both.

(4) A person referred to in subsection (2) who contravenes that subsection commits an offence and shall, on conviction, be liable to a fine not exceeding fifteen thousand Emalangenzi or imprisonment not exceeding three years or both.

Obligations in respect of applications for fostering, care-giving, adoption of children or curatorship.

68. (1) A relevant authority may not consider an application or approve the appointment of a person as a foster parent, kinship care-giver, temporary safe care-giver, an adoptive parent or curator without having determined, by way of an application to the Registrar for a certificate, whether or not the particulars of such person have been recorded in the Register.

(2) A person who, after the commencement of this Act, applies to become a foster parent, care-giver, an adoptive parent or a curator shall disclose that he has been convicted of a sexual offence or that he or has been dealt with in terms of section 165 or section 319 of the Criminal Procedure and Evidence Act.

(3) The relevant authority or its official or employee assigned to perform its duties under subsection (1) who contravenes any provision of this section commits an offence and shall, on conviction, be liable to a sentence of imprisonment not exceeding seven years or a fine not exceeding twenty thousand Emalangenzi or both.

(4) A person contemplated in subsection (2) who contravenes a provision of this section commits an offence and shall, on conviction, be liable to pay a fine not exceeding thirty-five thousand Emalangenzi or imprisonment for a period not exceeding seven years or both.

Regulations relating to manner of dealing with sexual offences.

69. (1) The Minister shall, after consultation with the Ministers responsible for safety and security, correctional services, health and social welfare, make regulations relating to—

- (a) the manner and format in which the Register is to be established and maintained as provided in section 56;
- (b) particulars to be included in the Register, in addition to those mentioned in section 58;
- (c) the manner in which the Commissioner General of Correctional Services shall forward particulars of prisoners who are serving a sentence of imprisonment



as the result of a conviction for a sexual offence to the Registrar as required in section 59 (5) (b);

- (d) the manner and period within which the Commissioner General of Correctional Services shall inform each prisoner whose particulars have been forwarded to the Registrar as contemplated in section 59 (6) (b);
- (e) the manner in which the National Commissioner of the Royal Eswatini Police shall forward particulars of persons with a previous conviction for a sexual offence to the Registrar as contemplated in section 59 (7);
- (f) the manner in which the Director of Health Services shall forward particulars of persons who are subject to a direction in terms of section 165 of the Criminal Procedure and Evidence Act, as the result of an act which constituted a sexual offence to the Registrar as contemplated in section 59 (8);
- (g) the manner and period within which the Director of Health shall inform each person whose particulars have been forwarded to the Registrar as contemplated in section 59 (8);
- (h) the manner in which persons mentioned in section 64 shall apply to the Registrar for a certificate;
- (i) the format and content of the certificate contemplated in section 64;
- (j) persons who may apply for a certificate in terms of section 64;
- (k) any further category of employers to whom this Act shall apply;
- (l) the period within which a certificate contemplated in section 64 shall be provided to any person by the Registrar;
- (m) access to the Register;
- (n) the safe-keeping and disposal of records; and
- (o) any aspect in this Act in respect of which regulations may be required or are necessary.

(2) Regulation made in terms of this section shall be laid before Parliament in accordance with the Constitution.



PART XI

REPORTING OF OFFENCES, MEDICAL EXAMINATION OF VICTIMS AND TREATMENT OF THEM BY OTHER PROFESSIONALS

Reporting of Offences.

70. (1) Any person who witnesses or receives any information of an offence under this Act or has reasonable grounds to believe that an offence under this Act, has taken place or is about to take place, shall report the case to the police or to the relevant structure.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to pay a fine not exceeding one thousand Emalangeni or a term of imprisonment not exceeding three months or to both.

Coercion not to report or to withdraw.

71. Any person who coerces a victim of a sexual offence not to report the offence or to withdraw a complaint to the police regarding the offence because of their interest or the interest of another person commits an offence and is liable on conviction to pay a fine not exceeding twenty-five thousand Emalangeni or a term of imprisonment of not exceeding five years or both.

Duty on police to refer.

72. Notwithstanding anything to the contrary in this or any other law, it shall be the duty of a police officer who deals with a victim of a sexual offence under this Act or who is a victim of an act of domestic violence to inform the victim of the availability of counselling and other support services, in particular, the availability of Post Exposure Prophylactics (PEP).

Duty on prosecutors to refer.

73. It shall be the duty of every prosecutor dealing with cases under this Act to refer each child victim to a suitable agency for Court preparation.

Medical treatment norms and protocols.

74. (1) The Minister responsible for Health shall by notice in the Gazette prescribe the treatment norms and protocols and the procedure for attending to victims of sexual offences.

(2) Pending the implementation of subsection (1), the Guidelines of the World Health Organisation on medico-legal care for victims of sexual violence shall be followed.

Examination of a victims of sexual offence.

75. (1) Any qualified nurse or medical practitioner may examine a victim of a sexual offence with the consent of the victim.



(2) Where circumstances are such that an examination by such persons listed in subsection (1) would as a result of delay render the examination non-effective, any adult person may examine the victim with the consent of the victim.

(3) Where the victim is a child, an examination may be carried out provided it is in the best interest of that child.

Treatment of victims of sexual offences.

76. (1) A person medically examining a victim of a sexual offence shall do so in such a manner as to reasonably minimise the effects of secondary trauma on the victim.

(2) Where the victim is a child, and it is in the best interests of that child that they receive treatment including Post Exposure Prophylactics (PEP), such treatment may be given if either—

- (a) consent is obtained from the parent of the child, guardian or other care-giver; or
- (b) an order for such treatment is made by the Court.

(3) Any person who contravenes subsections (1) or (2) has engaged in behaviour which will be deemed to constitute misconduct as contemplated by the Medical and Dental Practitioners Act, 1970 and the Nurses and Midwives Act, 1965, or their successors, and the complaints and disciplinary bodies referred to in the said pieces of legislation shall forthwith be informed of such contravention.

PART XII

DOMESTIC VIOLENCE

The offences of domestic violence and interpretation for Parts XII to XXXIII

77. (1) a person who—

- (a) physically abuses;
- (b) sexually abuses;
- (c) emotionally, verbally and psychologically abuses;
- (d) economically abuses;
- (e) intimidates;
- (f) harasses;
- (g) unlawfully stalks;
- (h) causes damage to property;



- (i) enters into the residence of the aggrieved person without consent, where the parties do not share the same residence; or
- (j) engages any other controlling or abusive behaviour towards the aggrieved person—

where such conduct harms or may cause imminent harm to the safety, health or well-being of the aggrieved person, commits the offence of domestic violence and shall on conviction, be liable to pay a fine not exceeding seventy-five thousand Emalangeneni or a term of imprisonment not exceeding fifteen years or both.

(2) In Parts XIII to XXXIV, unless the context otherwise requires or unless specifically defined in any other Part—

“*applicant*” means a person who has applied for a domestic violence order either on their own behalf or on behalf of another person in accordance with section 71;

“*aggrieved person*” means—

- (a) any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence; and
- (b) the person for whose benefit a domestic violence order is in force or may be made under this Act;

“*clerk*” means a clerk of Court appointed in terms of section 9 of the Magistrate Courts Act, No. 66 of 1938, and includes an assistant clerk of Court so appointed;

“*Court*” means the High Court, Magistrate Court, Maintenance Court or such similar Courts;

“*cross application*” occurs when the person named in the original application as the respondent applies for a domestic violence order (the cross application) and the aggrieved person named in the original application is named in the cross application as the respondent;

“*damage to property*” means the wilful damage or destruction of property belonging to an applicant or in which the applicant has a vested interest.

“*dangerous weapon*” means any weapon as defined in Arms and Ammunition Act, No. 24 of 1964.

“*domestic relationship*” means a relationship between the aggrieved person and a respondent in any of the following ways—

- (a) they are or were married to each other, including marriage according to any law, custom or religion;



- (b) they live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are parents of a child or are persons who have or had parental responsibility for that child;
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence;

“domestic violence” means—

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economical abuse;
- (e) intimidation;
- (f) harassment;
- (g) unlawful stalking;
- (h) damage to property;
- (i) entry into the residence of the aggrieved person without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards the aggrieved person—

where such conduct harms or may cause imminent harm to the safety, health or well-being of the aggrieved person;

“*economic abuse*” includes—

- (a) deprivation of economic and financial resources to which the aggrieved person is entitled under law or which the aggrieved person requires out of necessity, including household necessities for the aggrieved person, and mortgage bond repayments or payment of rent in respect of the shared residence;
- (b) unreasonable disposal of household effects or other moveable or immovable property in which the aggrieved person or a dependant of the aggrieved person, has an interest or a reasonable expectation of use;



- (c) refusal by the spouse to allow the other spouse to work or engage in any other economic activities; or
- (d) notwithstanding any other law to the contrary, the refusal or denial of a spouse from registering an immovable or movable property in the name or maiden name of the other spouse;

“emergency monetary relief” means a lump sum payment of compensation for monetary losses suffered by the aggrieved person at the time of the issue of a protection order as a result of the domestic violence, including—

- (a) loss of earnings;
- (b) medical or dental expenses or both;
- (c) relocation and accommodation expenses; and
- (d) household necessities;

“emotional, verbal and psychological abuse” means a display of degrading, demeaning or humiliating conduct towards the aggrieved person, including—

- (a) insults, ridicule or name calling;
- (b) threats to cause emotional pain; or
- (c) the exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the privacy, liberty, integrity or security of the aggrieved person;

“firearm” means any arm or any armament as defined in section 1 (1) of the Arms and Ammunition Act, No. 24 of 1964;

“harassment” means engaging in a pattern of conduct that induces the fear of harm to the aggrieved person including—

- (a) repeatedly watching, or loitering outside of or near the building or place where the aggrieved person resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the aggrieved person, whether or not conversation ensues; or
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail including text messages and emails or other objects to the aggrieved person;

“interim protection order” is an order for a short period of time until a Court decides whether to make a protection order for the benefit of the aggrieved person;



“*intimidation*” means uttering or conveying a threat, or causing the aggrieved person to receive a threat, which induces fear;

“*Minister*” means Minister responsible for Children Welfare, Gender and Family Affairs;

“*physical abuse*” means any act or threat of physical violence towards the aggrieved person;

“*prescribed*” means prescribed by regulations made under this Act;

“*protection order*” means an order issued under section 81 but excludes an interim protection order;

“*respondent*” means—

- (a) a person who is or has been in a domestic relationship with the aggrieved person and who has committed or allegedly committed an act of domestic violence against the aggrieved person; or
- (b) person against whom a domestic violence order is in force, is sought or may be sought, under this Act;

“*restrictive condition*” means a condition made on either an interim protection order or a protection order in accordance with section 86 or 87;

“*sexual abuse*” includes, but is not limited to, any sexual conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity, dignity and well being of the complainant;

“*stalking*” means repeatedly following, pursuing, or accosting the applicant;

“*undue hardship*” means that—

- (a) the aggrieved person or anyone sought to be included in the order may suffer imminent harm;
- (b) there is a risk to the property belonging to the aggrieved person or anyone sought to be included in the order or property in which they have an interest or a reasonable expectation of use;
- (c) the aggrieved person has been prevented from normal enjoyment or has been removed from his residence; or
- (d) there has been usage or a threat of usage of a dangerous weapon or firearm or knife during the most recent incident of domestic violence.



PART XIII

PARTIES TO APPLICATIONS

Who can apply for a protection order.

78. (1) An application for a protection order may be made by—
- (a) the aggrieved person;
 - (b) an authorised person referred to in subsection (2); or
 - (c) a police officer.
- (2) An authorised person means—
- (a) an adult authorised in writing by the aggrieved person to appear on behalf of the aggrieved person;
 - (b) an adult whom the Court believes is authorised by the aggrieved person to appear on behalf of the aggrieved person even though the authority is not in writing; or
 - (c) any person who the Court considers has a material interest in the well-being of the applicant including, but not limited to, a counsellor, health service provider, social worker or teacher, and whom the applicant cannot give authority in writing to because they are—
 - (i) a minor;
 - (ii) mentally disabled; or
 - (iii) unconscious.
- (3) A person making an application for a protection order may make other applications or bring other proceedings under the Act in relation to the protection order.
- (4) Notwithstanding the provisions of any other law, any child or any person on behalf of a child may apply to the Court for a protection order without the assistance of the parent of the child, the guardian of the child or other care-giver.

Children as applicants and respondents generally.

79. (1) Subject to this section, a person who is a child may be named as the aggrieved person or the respondent in a protection order, but, the child may only be named as the aggrieved person or the respondent only if a domestic relationship exists or had existed between the child and the other party named in the protection order.
- (2) A person responsible for giving a document to a child—



- (a) shall also give a copy of the document to a parent of the child if they can be reasonably located; and
 - (b) shall not give the document to the child at or in the vicinity of the school of that child, unless there is no other place where service may be reasonably affected.
- (3) In this section “*other party*”, in a protection order, means—
- (a) in relation to the aggrieved person, the respondent or any one of the respondents named in the protection order; or
 - (b) in relation to a respondent, the aggrieved person named in the protection order.

The aggrieved person and respondents to an application.

80. (1) Only one person may be named as the aggrieved person in an application for a protection order.

(2) More than one person may be named as the respondent in an application for a protection order.

PART XIV

PROTECTION ORDERS

Application for protection orders.

81. An applicant may in the prescribed manner apply to the Court for a protection order.

Who can a protection order protect.

82. (1) As well as the aggrieved person, a relative or associate of the aggrieved person may be protected by the protection order, irrespective of their age.

(2) A relative or associate is protected by being specifically named in the protection order under section 84.

(3) The specifically named relative or associate is called a named person.

(4) The name of the named person may be specified in the protection order at the time it is made or at a later time.

(5) An associate means either of the following persons if it is reasonable to regard the person as an associate; —

- (a) a person whom the aggrieved person regards as an associate; or
- (b) a person who regards himself or herself as an associate of the aggrieved person.



Powers of the Court to make an order to protect against domestic violence.

83. (1) A Court may make an order against a respondent for the benefit of the aggrieved person if the Court is satisfied that—

- (a) the respondent has committed an act of domestic violence against the aggrieved person and a domestic relationship exists between the two persons; and
- (b) the respondent—
 - (i) is likely to commit an act of domestic violence again; or
 - (ii) if the act of domestic violence was a threat, is likely to carry out the threat.

(2) A person who counsels or procures someone else to commit an act that, if done by the person, would be an act of domestic violence is taken to have committed the act.

(3) If an application for a protection order names more than one respondent, the Court may make a protection order or domestic violence orders naming one, some or all of the respondents, as the Court reasonably considers appropriate.

Powers of the Court to make orders to protect relatives or associates of the aggrieved person against violence, etc.

84. (1) The Court may include the name of a relative or associate of the aggrieved person in a protection order made for the benefit of the aggrieved person if the Court is satisfied that the respondent has committed, or is likely to commit, an act of domestic violence against the relative or associate.

(2) A person who counsels or procures someone else to commit an act that, if done by the person, would be an act of associated domestic violence is taken to have committed the act.

Court may make a protection order by consent.

85. (1) A Court may make a protection order in a form agreed to by, or on behalf of, the aggrieved person and the respondent.

(2) The order may only include matters that may be dealt with under this Act.

Power of the Court to make conditions on the order.

86. (1) The Court may, by means of a protection order, prohibit the respondent from—

- (a) committing any act of domestic violence;
- (b) enlisting the help of another person to commit any such act;
- (c) doing all or any of the following in relation to a residence or premises shared by the aggrieved person and the respondent or a specified part of such



residence or premises, even though the respondent may have a legal or equitable interest in the premises—

- (i) remaining at the residence or premises;
 - (ii) entering or attempting to enter the residence or premises;
 - (iii) approaching within a stated distance of the residence or premises;
- (d) doing all or any of the following in relation to the place of the aggrieved person—
- (i) remaining at the premises;
 - (ii) entering or attempting to enter the premises;
 - (iii) approaching within a stated distance of the premises;
- (e) approaching, or attempting to approach, the aggrieved person or a named person, including stating in the order a distance within which an approach is prohibited;
- (f) contacting, attempting to contact or asking someone else to contact the aggrieved person or a named person, including, for example, if the aggrieved person or named person has taken shelter at a refuge;
- (g) locating, attempting to locate or asking someone else to locate the aggrieved person or a named person if the whereabouts of the aggrieved person or named person are not known to the respondent;
- (h) engaging in stated conduct towards a child of the aggrieved person, including prohibiting the presence of the respondent at or in a place associated with the child;
- (i) being registered to hold a weapon in accordance with the Arms and Ammunition Act, No. 24 of 1964 during the term of the order; and
- (j) committing any other act as specified in the protection order.
- (2) The Court may, by means of a protection order, make conditions—
- (a) requiring the respondent, in relation to property of the aggrieved person, to—
 - (i) return the property to the aggrieved person; or
 - (ii) allow the aggrieved person access to the property; or
 - (iv) allow the aggrieved person to recover the property; or
 - (v) do any act necessary or desirable to facilitate action mentioned in paragraphs (i) to (iii),



- (b) if the Court is satisfied that it is in the best interest of any child—
 - (i) prevent the aggrieved person or any child of the aggrieved person who ordinarily lives or lived in a shared residence referred to in subsection (1)(c) from entering or remaining in the shared residence or a specified part of the shared residence;
 - (ii) refuse the respondent access with such child;
 - (iii) order access with such child on such conditions as it may consider appropriate;
 - (iv) vary an existing order for access with a child and make an order of the type contemplated by subsections (a), (b) or (c),
- (c) revoking any previous registrations, the respondent may have to hold weapons in accordance with the Arms and Ammunition Act, No. 24 of 1964.
- (d) which it deems reasonably necessary to protect and provide for the safety, health or well-being of the aggrieved person, including an order that—
 - (i) a police officer shall accompany the aggrieved person or the respondent to a specified place to assist with arrangements regarding the collection of personal property;
 - (ii) a police officer seizes any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 149; and
 - (iii) the physical address of the aggrieved person not be disclosed to the respondent.

(3) Conditions made in accordance with subsections (1)(c) and (2)(b) shall be limited in time until such time as the High Court can consider, with respect to an order under subsection (1)(c), who the appropriate occupant of the house should be, and with respect to subsection (2)(b), an application with respect to custody and access or to vary an existing order for custody or access.

(4) In ordering a prohibition contemplated in subsection (1)(c), the Court may impose on the respondent obligations as to the discharge of rent or mortgage payments having regard to the financial needs and resources of the aggrieved person and the respondent but only until such time as—

- (a) the High Court has made a decision on who the most appropriate occupant of the formerly shared residence or premises is; or
- (b) the Court has made a decision on an application for maintenance; or



- (c) the Court has had an opportunity to determine both an application for maintenance and an application with respect to the occupancy of the former shared residence or premises.

(5) The Court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the aggrieved person and the respondent, and such order has the effect of a civil judgment of a magistrate Court or the High Court.

(6) If the Court is of the opinion that any provision of a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law, including the Maintenance Act, No. 35 of 1970, the Court shall order that such a provision be in force for such limited period as the Court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

(7) A condition in an order that prohibits a respondent from asking someone else to contact or to locate the aggrieved person or a named person does not prohibit the respondent asking—

- (a) someone else who is a lawyer to contact the aggrieved person or named person; or
- (b) someone else, including a lawyer, to locate the aggrieved person or named person for a purpose authorised by an Act.

Restrictive conditions.

87. (1) This section applies if a Court makes an order under section 89 that includes a restrictive condition.

(2) The premises that may be stated in a restrictive condition of the order include—

- (a) premises where the aggrieved person and respondent live together or previously lived together; or
- (b) premises where the aggrieved person or a named person resides, works or frequents,

irrespective of whether either the aggrieved person or the respondent or both of them have a legal or equitable interest in the property.

(3) In imposing the restrictive condition, the Court shall consider including in the order another condition allowing the respondent—

- (a) if the respondent is no longer at the premises, to return to the premises to recover stated property; or
- (b) if the respondent is at the premises, to remain at the premises to remove stated property.



- (4) For another condition under subsection (3), the Court shall state in the order—
- (a) if the respondent is present in Court when the order is made—
 - (i) the time at which, without breaching the order, the respondent may return to the premises and then shall leave the premises; or
 - (ii) for how long the respondent may, without breaching the order, continue to remain at the premises; or
 - (b) if the respondent is not present in Court when the order is made—
 - (i) the time at which, without breaching the order, the respondent may return to the premises and shall leave the premises based on the time of service of the order on the respondent; or
 - (iii) for how long the respondent may, without breaching the order, remain at the premises based on the time of service of the order on the respondent.
- (5) Before the Court makes an order that includes a restrictive condition, or another condition under subsection (3), the Court shall consider each of the following—
- (a) the extent to which a matter mentioned in an order shall be subject to the supervision of a police officer; or
 - (b) if a police officer is to supervise a matter, the need to include in the order a condition that the respondent shall not approach within a stated distance of the stated premises.

Special condition for an object that has been used as a weapon.

88. (1) This section applies if a Court is satisfied that a respondent—
- (a) has used, or threatened to use, an object in committing an act of domestic violence against the aggrieved person, or an act of associated domestic violence against a named person; and
 - (b) is likely to use the object again or carry out the threat.
- (2) The Court may, as a condition of the protection order, prohibit the respondent from possessing the object, or an object of the same type, for the duration of the order.
- (3) The power of the Court under this section does not limit its power under section 86.

Matters the Court is to consider when imposing conditions on any order.

89. (1) The following matters are to be of paramount importance to the Court when it imposes conditions on the respondent—
- (a) the need to protect the aggrieved person and any named persons; or



- (b) the welfare of a child of the aggrieved person.
- (2) The Court may also consider—
 - (a) the accommodation needs of all persons affected by the proceedings;
 - (b) the effect of the order on the child; and
 - (c) existing orders relating to guardianship or custody of, or access to, a child.
- (3) When considering making an order as referred to in section 87, the Court may consider in addition to those matters referred in subsections (1) and (2) the following matters—
 - (a) the safety, health and well-being of the aggrieved person, child or any other person affected by the domestic violence;
 - (b) the perceived risk of further harm or violence of the aggrieved person;
 - (c) the personal and material interests of the aggrieved person; and
 - (d) the best interest of the child.

Standard conditions of a protection order.

90. In making a protection order, the Court shall impose a condition that the respondent—
- (a) be of good behaviour towards the aggrieved person and not commit domestic violence or associated domestic violence; and
 - (b) be of good behaviour towards a named person in the order and not commit an act of associated domestic violence against the person.

Filing of copy of protection order.

91. (1) Upon the issuing of a protection order the clerk of Court shall, within the prescribed manner, cause to be filed a certified copy of the protection order and a certified copy of the warrant of arrest with the police, and—
- (a) the original of such order is to be served on the respondent; and
 - (b) a certified copy of such order and the warrant of arrest under section 91(1)(a), is to be served on the aggrieved person.
- (2) The clerk of Court shall forthwith in the prescribed manner forward certified copies of any protection order and of the warrant of arrest under section 91(1)(a) to the police station of the choice of the aggrieved person.



PART XV

POWER OF THE COURT TO MAKE INTERIM PROTECTION ORDERS

Act of domestic violence necessary before particular interim protection orders made.

92. (1) A Court may make an interim protection order against a respondent under this Part, other than section 95, only if it appears to the Court, on application for a protection order, that an act of domestic violence has been committed against the aggrieved person by the respondent.

(2) An interim protection order under this Part need only be supported by evidence the Court considers sufficient and appropriate having regard to the interim nature of the order.

Form of interim protection orders.

93. (1) A Court may make an interim protection order against a respondent in the same terms as a protection order but, the interim protection order shall state the time and place at which the order is returnable before the Court.

(2) An interim protection order is a summons to the respondent directing the respondent to appear at the time and place at which the order is returnable.

Interim protection order because of adjournment.

94. A Court may make an interim protection order if the Court adjourns—

- (a) the hearing of an application for the protection order, whether the Court is hearing the application under section 127 or 128; or
- (b) the matter of making a protection order on its own initiative as mentioned in section 130.

Court may make interim protection order without proof of service in certain circumstances.

95. A Court may make an interim protection order, or vary a domestic violence order, if—

- (a) an application is made for a protection order or for a variation of a domestic violence order; and
- (b) the Court does not begin to hear, or has decided not to begin to hear, the application because the applicant has not satisfied the Court that the respondent has been given a document mentioned in section 128 (1)(a) or (b), whether or not the respondent is present in Court; and
- (c) it appears to the Court—
 - (i) the aggrieved person or a named person is in danger of personal injury; or
 - (ii) property of the aggrieved person or a named person is in danger of substantial damage.



Interim protection order when cross application made.

96. (1) This section applies if–

- (a) the original application for a domestic violence order has been made and is before the Court; and
- (b) the person named in the original application as the respondent applies for a domestic violence order through a cross application and the aggrieved person named in the original application is named in the cross application as the respondent; and
- (c) the cross application is made orally or is made in writing but not served on the aggrieved person named in the original application at least one business day before the day of the hearing of the original application.

(2) If the cross application is made as mentioned in subsection (1)(c), the Court shall adjourn the hearing of the cross application and set a date by which the written cross application is to be served on the aggrieved person named in the original application, unless that the aggrieved person consents to the Court hearing the cross application before hearing the original application or together with the original application.

(3) The Court may make an interim protection order in relation to the cross application if–

- (a) the aggrieved person named in the original application does not consent as mentioned in subsection (2); and
- (b) at least one of the following persons is in danger of personal injury, or the property of at least one of the following persons is in danger of substantial damage–
 - (i) the person for whose benefit the domestic violence order, based on the cross application, is sought;
 - (ii) another person who is sought to be protected by the domestic violence order based on the cross application.

Court may make interim protection order when considering variation of protection order.

97. (1) A Court may make an interim protection order if–

- (a) it is hearing variation proceedings about a protection order or interim protection order and adjourns the hearing; and
- (b) it appears to the Court that the interim protection order is necessary to protect the aggrieved person or a named person pending its decision in the variation proceedings.



- (2) In this section, “*variation proceedings*” means proceedings—
- (a) for an application for variation of a protection order or interim protection order; or
 - (b) for varying a protection order arising because the Court is acting on its own initiative under section 130 or when dealing with a contravention of the order.

Interim protection order for application under section 100.

98. (1) A Magistrate to whom an application is made under section 100 may make an interim protection order against the respondent if it appears to the Magistrate that because of distance, time or other circumstance of the case, it is not practicable to apply to a Court for a protection order and for it to be heard and decided quickly.

(2) The interim protection order under subsection (1) may be in the same terms as if the Magistrate were then and there constituting a Magistrates Court.

Court may make interim protection order on a police application

99. A Court may make an interim protection order if the police officer making an application for a protection order under section 115, asks the Court for an interim protection order.

PART XVI

POLICE MAY APPLY FOR INTERIM PROTECTION ORDERS IN CERTAIN CIRCUMSTANCES

Out of hours applications and applications by telephone or facsimile.

100. (1) The Registrar in each region shall ensure that a roster is in place for Magistrates to deal with out of hours applications and that the contact details of which Magistrates are on roster at any given time are provided to the most senior Domestic Violence and Child Abuse Unit officer in each police station in that region.

(2) A police officer may, by way of telephone, facsimile, telex, radio or other similar facility, apply under this section for a interim protection order to a Magistrate if—

- (a) that police officer believes that because of distance, time or other circumstances, it is not practicable for an application made to a Court, or to be made to a Court, to be heard and determined quickly; or
 - (b) it is outside of ordinary Court hours or on a day which is not an ordinary Court day, and the police officer believes that the aggrieved person may suffer undue hardship if the application is not dealt with immediately.
- (3) Before making the application, the police officer shall—



- (a) prepare or assist the aggrieved person in preparing a form of application for a protection order under this section; and
- (b) if practicable, given the urgency of the matter, obtain statements or supporting affidavits from other persons who have knowledge of the matter concerned.

(4) Information regarding the distance, time or other circumstances as to why it is not practicable for an application made to a Court, or to be made to a Court, to be heard and determined quickly and, as to the need for urgency and the undue hardship which will be suffered by the aggrieved person shall be included in either the application or the supporting statements or affidavits.

(5) The police officer shall inform the Magistrate of the particulars of the application and provide him or her with copies of the supporting affidavits or statements or inform him or her as to their contents.

(6) The form of application for a protection order completed under subsection (2) is to be filed as soon as practicable after the Court reopens in the office of the clerk of the Magistrates Court at the place where—

- (a) the order sought, when made, is to be returned; or
- (b) if such order is not made, would be returned were it made.

(7) On the filing of the form of application, an application for a protection order is taken to be made to the Court at that place.

(8) An application in terms of this section shall not be made if an application for a protection order has not already been made before Court.

Duty of Magistrate upon application under section 100.

101. A Magistrate before whom an application for an interim protection order is made under section 100 shall—

- (a) if the Magistrate makes the interim protection order—
 - (i) complete and sign the order;
 - (ii) record on the order the factors that caused the Magistrate to be satisfied that a protection order could properly be made by a Court under section 83;
 - (iii) inform the applicant, by telephone, facsimile, telex, radio, or other similar facility, of the terms of the order and the time and place at which it is to be returned before Court;
 - (iv) as soon as is practicable, cause the application and supporting material conveyed by the applicant (if the same was given to them) and the order



referred to in subparagraph (1) to be given to the clerk of Court at the place where the order is to be returned; and

- (v) cause a copy of the order referred to in subparagraph (1) to be given to the National Commissioner of Police; or
- (b) if the Magistrate refuses the interim protection order—
 - (i) reduce to writing the reasons for the refusal; and
 - (ii) as soon as is practicable, cause the application and the supporting materials as conveyed by the applicant and the written reasons for the refusal to be given to the clerk of Court at the place where there is filed an application for a protection order against the respondent.

Duty of police officer for section 100 order.

102. (1) A police officer who obtains an interim protection order under section 100 shall prepare 3 copies of the order, in or to the effect of the approved form, in the terms conveyed to the officer by the Magistrate who made the order and shall specify therein—

- (a) the name of the Magistrate who made the order;
 - (b) the date and time the order was made;
 - (c) the place and time at which the order is to be returned before Court; and
 - (d) such other information as is prescribed.
- (2) Of the copies prepared as required by subsection (1), as soon as is practicable—
- (a) one shall be served on the respondent together with a copy of the application and any supporting material filed in connection with which the interim protection order was made, subject to whether such copy has already been so served or not;
 - (b) one shall be given to the aggrieved person; and
 - (c) one shall be filed in the Court in which the application for a protection order has been or is to be filed.

Return date of interim protection order.

103. (1) An interim protection order made because of an application under section 100 shall specify the time and place at which the order is returnable before Court.

- (2) If—
- (a) the Court before which the order is returnable is sitting within thirty days after the day on which the interim protection order is made; and



- (b) a suitable hearing day is available within that period;
 - (c) the day that the order is returnable shall be a day within that period.
- (3) If—
- (a) the Court before which the order is returnable is not sitting within thirty days after the day on which the interim protection order is made; or
 - (b) there is not a suitable hearing day available within the period; the day that the order is returnable shall be the first suitable hearing day available after the end of the period.

PART XVII

VARIATION AND REVOCATION OF ORDERS

Variation of a protection order.

104. (1) A Court may vary a protection order, including—
- (a) the conditions imposed by the protection order under section 86 or 87; or
 - (b) the period for which the protection order continues in force.
- (2) The application for a variation shall be made while the protection order is in force.
- (3) The Court may vary a protection order—
- (a) on an application to vary it; or
 - (b) on an application to revoke it; or
 - (c) on its own initiative under section 130; or
 - (d) when dealing with a contravention of the order.
- (4) Before Court varies a protection order, it shall—
- (a) consider the grounds set out in the application for the protection order;
 - (b) consider the findings of the Court that made the application order; and
 - (c) be satisfied if the application is made by the aggrieved person, that after questioning of the aggrieved person, the application is made freely and voluntarily.
- (5) A revocation or variation under this section takes effect on the day it is made.

Revocation of a protection order.

105. (1) A Court may revoke a protection order if an application for revocation is made to the Court under section 104.



- (2) In considering the application, the Court shall have regard to—
 - (a) any wishes of the aggrieved person expressed to the magistrate;
 - (b) any current contact between the aggrieved person and respondent;
 - (c) whether any pressure has been applied, or threat has been made, to the aggrieved person by the respondent or someone else for the respondent; and
 - (d) any other relevant matter.
- (3) The Court may only revoke the protection order if the Court considers the safety of the aggrieved person or a named person would not be compromised by the revocation.
- (4) If the Court refuses to revoke the protection order, the Court may vary the order in a way it considers does not compromise the safety of the aggrieved person and a named person.
- (5) A revocation or variation under this section takes effect on the day it is made.

Police to be given notices of applications to vary or revoke.

106. A Court shall not make an order under section 104 or 105 unless it is satisfied that the National Commissioner of Police has been given a copy of the application.

Application for revocation or variation.

107. (1) This section applies to an application for—
- (a) revocation of a protection order; or
 - (b) variation of a protection order including conditions imposed by the order.
- (2) The application may be made to a Court by—
- (a) the aggrieved person; or
 - (b) the respondent; or
 - (c) an authorised person; or
 - (d) a police officer who reasonably believes that it is for the benefit of the aggrieved person and there is sufficient reason for taking the action.
- (3) The application shall be made on the approved form.
- (4) Where an application under subsection (1) is made, the person who makes the application shall cause a copy of the application and a notification of the time and place at which the application is to be heard—
- (a) to be served on each person, being the aggrieved person or the respondent, other than the person who makes the application; and
 - (b) to be given to the National Commissioner of Police.



(5) The clerk shall cause service to be effected on the respondent, as required under subsection (4) (a), if the application—

- (a) is made by the aggrieved person or named person; and
- (b) seeks a variation of the protection order to extend the protection given to the aggrieved person or named person, to extend the period or scope of the order or to add a condition to the order.

(6) If it appears to a Court to which an application is made under subsection (1) that it is not reasonably practicable to effect service on a particular person, the Court may order that the copy of the application and the notification be served on that person by such means of substituted service as the Court thinks fit.

(7) Where a person on whom is served a copy of the application and a notification required by subsection (4) to be served including by way of substituted service ordered under subsection (6)) fails to appear at the time and place at which the application is to be heard, the Court, upon proof of such service—

- (a) may hear and determine the application in the absence of that person;
- (b) may adjourn the application; or
- (c) where that person is the respondent within the meaning of this Act, may order the issue of a warrant for the respondent to be taken into custody by a police officer and to be brought before the Court.

Duty of clerk of Court to give certain notices to National Commissioner of Police.

108. (1) The clerk of Court in which any of the following applications are made, or orders are granted, shall give notice of the application or order to the National Commissioner of Police—

- (a) an application for a protection order;
- (b) an application for a variation or revocation of such an order; or
- (c) an order made because of an application mentioned in paragraph (a) or (b), including an interim order.

(2) The clerk shall give the notice before the end of one business day after the day the application is made, or order is granted.



PART XVIII

START AND DURATION OF PROTECTION ORDERS

Start of protection orders.

109. A protection order takes effect—

- (a) on the day it is made; or
- (b) if it is made while an existing protection order against the respondent for the benefit of the same the aggrieved person is in force, at the end of the existing order.

Duration of protection orders.

110. (1) Subject to subsection (2), a Court may order that a protection order continues for a period no longer than two years.

(2) If the Court is satisfied that there are special reasons for doing so, the Court may order that a protection order continues for a period longer than two years but in any event for no longer than three years.

(3) A protection order continues in force for the period ordered by the Court and stated in the order unless it is revoked at an earlier time or the period of the order is varied.

Duration of interim protection orders.

111. (1) An interim protection order continues in force until the first of the following happens—

- (a) the order is returnable before Court unless the Court extends the order;
- (b) the order is revoked by the Court.

(2) Subsection (3) applies if—

- (a) an interim protection order is made and has not been revoked by a Court; and
- (b) a Court makes a relevant protection order relating to the interim protection order on the day the interim protection order is returnable before the Court.

(3) If the respondent is not before Court when the Court makes the relevant protection order, despite subsection (1)(a), the Court may order that the interim protection order continues in force until the respondent is served with the relevant protection order.

(4) The interim protection order continued in force under subsection (3) is binding on the respondent even though it is not served on the respondent.

(5) For the removal of doubt, it is declared that a Court may find that the respondent contravened—

- (a) the interim protection order continued in force under subsection (3); and



(b) the relevant protection order relating to the interim protection order, to the extent that the respondent contravened a condition of the protection order which a police officer notified the respondent about.

(6) In this section, relevant protection order, relating to an interim protection order, means the protection order made by a Court on an application for a protection order, being the application that allowed a Court to make the interim protection order.

PART XIX DUTIES OF COURT

Duty of clerk of Court to assist and inform applicant of available rights.

112. If the aggrieved person is not represented by a legal representative, the clerk of Court shall inform the aggrieved person, in the prescribed manner—

- (a) of the relief available in terms of this Act; and
- (b) of the right to lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent.

Court to explain order to the aggrieved person or respondent before Court.

113. (1) When the aggrieved person or respondent is making a first appearance personally before Court, the Court shall satisfy itself that the aggrieved person or respondent understands—

- (a) the nature, purpose and legal implications of the application; and
- (b) the legal implications of the Court making a protection order because of the application.

(2) If a person before Court is the respondent, the Court shall ensure that the respondent understands the following—

- (a) the purpose, terms and effect of the order, including, for example, that if the respondent has a weapons licence as defined in the Arms and Ammunition Act, No. 24 of 1964, or its successor, the licence will be revoked and if he wishes to hold a licence again in the future he will have to reapply for a licence at the expiry of the order;
- (b) what may follow if the respondent does not comply with the terms of the order; and
- (c) that the respondent may apply for revocation or variation of the order.

(3) If a person before Court is the aggrieved person, the Court shall ensure that the aggrieved person understands the following—

- (a) the purpose, terms and effect of the order; and



- (b) that the aggrieved person may apply for revocation or variation of the order.

(4) If the first appearance a person before Court is at the time which the Court is about to make a protection order, the Court may comply with subsection (1) and (2) or (1) and (3) at the same time.

(5) If the Court makes an interim protection order in accordance with section 92, the Court shall inform the parties who are personally before the Court, that the order is temporary and will only remain in place until such time as—

- (a) the High Court is able to determine who the appropriate occupant of the residence or premises should be; or
- (b) the Court varies the condition on the protection order.

(6) The process that a Court adopts to ensure either party understands the matters mentioned in subsection (1) and if applicable subsection (5) and that the respondent understands the matters mentioned in subsection (2), or the aggrieved person understands the matters mentioned in subsection (3), may include using the services of, or help from, other people to the extent the Court considers appropriate.

(7) Failure to comply with this section does not affect the validity of the protection order.

Matters relating to weapons.

114. (1) Before making a protection order, the Court shall ask about—

- (a) any registrations of any weapons which the respondent may hold or any weapons in the possession of the respondent;
- (b) whether the respondent may access weapons as part of the employment of the respondent; and
- (c) both of the following if the respondent may access a weapon as part of the employment of the respondent—
- (i) the employer of the respondent, including the name and address of the employer;
- (ii) the employment arrangements relating to the weapon that the respondent may access as part of the employment of the respondent.

(2) After asking about matters under subsection (1), the Court may include one or more of the following in the protection order to the extent the Court considers reasonable—

- (a) information about any registrations of any weapons which the respondent may hold or any weapons in the possession of the respondent;



- (b) information about weapons that the respondent had access to as part of the employment of the respondent, before the order was made; or
- (c) revocation of the licence to hold the weapon.

(3) In this section “*employment*”, of a respondent, includes employment by a partnership in which the respondent is a partner.

PART XX

POLICE FUNCTIONS, POWERS AND DUTIES

Police duty to investigate, assist and inform applicant of rights.

115. (1) If a police officer reasonably suspects a person is the aggrieved person, it is the duty of the officer to investigate or cause to be investigated the complaint, report, or circumstance on which the reasonable suspicion of the officer is based, until the officer is satisfied the suspicion is unfounded.

(2) If, after the investigation, the officer reasonably believes—

- (a) that the person is the aggrieved person; and
- (b) there is sufficient reason for the officer to take action; the officer may—
 - (i) apply for a protection order to protect the aggrieved person; and
 - (ii) take other action that the officer is required or authorised to take under this Act including but not limited to those actions referred to in subsection (3).

(3) Any police officer shall, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

- (a) render such assistance to the aggrieved person as may be required in the circumstances, including assisting or making arrangements for the aggrieved person to find a suitable shelter and to obtain medical treatment;
- (b) hand a notice containing information as prescribed to the aggrieved person in the official language of the choice of the aggrieved person;
- (c) explain to the aggrieved person the content of such notice in the prescribed manner, including the remedies available to the aggrieved person in terms of this document and the right to lodge a criminal complaint, if applicable; and
- (d) take statements from the aggrieved person and all relevant witnesses dealing with at least the following matters—
 - (i) the history of the abuse;



- (ii) a description of the most recent incidence of domestic violence;
- (iii) any medical attention sought by the aggrieved person as a result of the current incident or previous incidents;
- (iv) any evidence to show that an act of domestic violence has taken place;
- (v) the knowledge of the aggrieved person of the previous criminal records of the respondent; and
- (vi) the knowledge of the aggrieved person of any orders against the respondent including any protection orders, interdicts under the Criminal Procedure and Evidence Act maintenance orders, eviction orders or any other order related to family or property matters.

Presence at domestic violence incident.

116. (1) A police officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom the police officer reasonably suspects of having committed an offence containing an element of violence against the aggrieved person, or a relative or associate of the aggrieved person, or property belonging to either the aggrieved person or a relative or associate of the aggrieved person or in which they have an interest or a reasonable expectation of use.

(2) The respondent taken into custody may be held in custody until the earliest of the following happens—

- (a) an application for a protection order naming the respondent is heard and decided under section 116 (1);
- (b) an interim protection order is made under section 97; or
- (c) the respondent is released on bail with conditions such as those referred to in section 83 made in accordance with the terms of the Criminal Procedure and Evidence Act.

(3) A respondent may not be held under subsection (2) for more than forty-eight (48) hours from when the respondent is first taken into custody under subsection (1).

Police officer to apply for protection order etc.

117. (1) Subject to this section, if a police officer arrests and takes a person into custody under section 117, the officer shall prepare an application for a protection order in which the person is named as the respondent and immediately bring the person before the Court for the hearing and determination of the application if the person is still in custody.

(2) If—



- (a) it is not practicable to bring the person taken into custody before Court under subsection (1); and
- (b) the police officer believes that it is necessary to obtain an interim protection order under section 93 against the person before the person is released,

the police officer may make an application under section 100.

(3) When the person is released from custody, the police officer shall give the person a copy of the application for the protection order and the bail conditions, if any, on which the person is released.

PART XXI

BREACH OF AN ORDER OR CONDITIONS AND OTHER OFFENCES

Warrant of arrest on issuing of a protection order.

118. (1) Whenever a Court issues a protection order, the Court shall make an order—
- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; or
 - (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 86 or 87 as the case may be.
- (2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside or is cancelled after execution.
- (3) The clerk of Court shall issue a further warrant of arrest to the aggrieved person if the aggrieved person files an affidavit in the prescribed form in which it is stated that such warrant is required for the protection of the aggrieved person and that the existing warrant has been—
- (a) executed and cancelled; or
 - (b) lost or destroyed.
- (4) The aggrieved person may hand to any police officer the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order.
- (5) If it appears to a police officer that, subject to subsection (6), there are reasonable grounds to suspect that the aggrieved person may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the police officer shall forthwith arrest the respondent for allegedly committing any offence referred to under section 118.



(6) If the police officer concerned is of the opinion that there are sufficient grounds for arresting the respondent in terms of subsection (5), he may do so and bring the respondent before the Court as soon as practicable.

(7) In considering whether or not the aggrieved person may suffer imminent harm, as contemplated in subsection (5), the police officer shall take into account—

- (a) the risk to the safety, health or well-being of the aggrieved person;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.

(8) If the police officer determines that there is no risk of imminent harm to the aggrieved person, the police officer may arrest the respondent on summons in accordance with the provisions of the Criminal Procedure and Evidence Act.

(9) Whenever a warrant of arrest is handed to a police officer in terms of subsection (4), the police officer shall inform the aggrieved person of his right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the applicant how to lay such a charge.

Breach of an order or conditions.

119. (1) A respondent who contravenes a protection order, interim protection order or any other order made under this Act, including a condition imposed by the order, if—

- (a) the respondent was present in Court when the order was made;
- (b) the respondent was served with a copy of the order; or
- (c) a police officer told the respondent about the existence of the order—

commits an offence and is liable to penalty prescribed by subsection (2).

(2) A respondent who contravenes subsection (1) is liable on conviction to a maximum sentence of—

- (a) two years imprisonment or three thousand Emalangeni or both, in the case of a first offender; or
- (b) five years imprisonment or ten thousand Emalangeni or to both such fine and such imprisonment, if—
 - (i) the respondent has previously been convicted on at least two different occasions of an offence under this section; and
 - (ii) at least two of those offences were committed not earlier than three years before the present offence was committed.



(3) A Court may not find a respondent to have contravened an order merely because a police officer told the respondent about the existence of the order, unless the Court is satisfied that the police officer informed the respondent about the condition that the respondent is alleged to have contravened.

Other Offences.

120. Notwithstanding the provisions of any other law, any person who—

- (a) contravenes the provisions of section 139; or
- (b) wilfully makes a false statement in a material respect,

commits an offence and is liable on conviction to a fine not exceeding ten thousand Emalangenzi or imprisonment for a period not exceeding two years or both.

Offences by police and prosecutors.

121. (1) A person shall not—

- (a) refuse to institute a prosecution; or
- (b) withdraw a charge,

in respect of an offence under section 119 or section 120, unless he has been authorised thereto, whether in general or in any specific case, by the Director of Public Prosecutions.

(2) Failure by a police officer to comply with an obligation imposed in terms of this Act or the policy directives referred to in section 188, constitutes a misconduct which may be dealt with by the National Commissioner of Police or such other responsible authority.

(3) Failure by a prosecutor to comply with an obligation imposed in terms of this Act or the policy directives referred to in section 188, constitutes a misconduct which may be dealt with by the Civil Service Commission or such other responsible authority;

Matters for the Court to consider on sentence.

122. (1) When the Court is considering what sentence to impose under this Part, the Court shall take into consideration the following—

- (a) the general principles of criminal law including the grounds of justification, knowledge of unlawfulness and intention;
- (b) the pervasive or repeated nature of domestic violence; or
- (c) the social context of the aggrieved person and the respondent.

(2) When the Court is considering what sentence to impose in relation to a breach of a protection order or any of its conditions, the Court shall, in addition to those factors referred to in subsection (3), take into consideration the following—



- (a) consider the seriousness of the domestic violence, including the potential lethality of some domestic violence cases;
- (b) consider further risk or harm to the aggrieved person or any relatives or associate named in the protection order;
- (c) more individualised and creative sentencing including but not limited to incarceration or supervision on weekends, where the violence tends to escalate on the weekends; and
- (d) make every effort to use socio-economic reports prepared by social workers whether from governmental or non-governmental organisations.

(3) If the Court has ordered that a sentence be served during weekends for such hours as it may determine because the accused has dependants whom he needs to support—

- (a) the Court shall also impose a condition that the accused shall inform the Department of Correctional Services or such other body that he is under its control of any change to his circumstances including but not limited to a change to their working situation;
- (b) the Department of Correctional Services or such other body that he is under its control which shall inform the Court of the change of circumstances if it reasonably believes that a change should be made to the way the sentence is to be served;
- (c) the Court will consider the information provided by the Department of Correctional Services or such other body that he is under its control within two working days of receipt and if necessary shall re-list the matter for re-consideration of the sentence within a further two working days.

(4) An accused who fails to comply with a condition imposed under subsection (3)(a) commits of an offence and liable on conviction to a fine of one thousand Emalangeni or imprisonment for one month or both.

(5) Nothing in this provision shall prevent an accused from also being charged with another type of criminal offence arising out of the same circumstances.

Bail conditions pending determination of offence.

123. If the respondent is to be released on bail pending the determination of the offence alleged under this sentence, the presiding officer shall impose conditions on any bail that may be granted to the respondent and the minimum conditions of such bail shall reflect the provisions of the existing protection order.



PART XXII

APPEALS

National Commissioner of Police has right to appear and be heard on appeal.

124. The National Commissioner of Police has a right to appear and be heard before the High Court on an appeal to the Court under this Act.

Appeal and review.

125. The provisions in respect of appeal and review in the Magistrate Courts Act, No. 66 of 1938 and the High Court Act, No. 20 of 1954, or their successors, shall apply to any proceedings in terms of this Act.

PART XXIII

PROCEDURAL PROVISIONS

Specialised Domestic Violence Courts to be established.

126. (1) The Minister, in consultation with the Minister responsible for Justice, shall cause the establishment of specialised Courts at a Magistrates Court level to deal with domestic violence cases.

(2) A specialised Court referred to in subsection (1) is to be called a “*Domestic Violence Court*”.

(3) A Domestic Violence Court shall have the same jurisdiction and powers as a Magistrate Court established under the Magistrate Courts Act, No. 66 of 1938, or its successor.

(4) For the purposes of this Act, a Magistrate Court established under the Magistrate Courts Act, No. 66 of 1938, or its successor, shall be a Domestic Violence Court pending the establishment of such Courts under subsection (1).

Appearance of the respondent.

127. (1) This section applies if a respondent appears before the Court that will hear and determine the matter of an application for a protection order.

(2) The Court—

- (a) may hear and determine the application;
- (b) may adjourn the matter of the application (whether or not it makes an interim protection order); or
- (c) subject to subsection (3), may dismiss the application.

(3) The Court may not dismiss an application unless—



- (a) the aggrieved person has not appeared and, if the application was made by a police officer, no other police officer or Crown prosecutor requests an adjournment; and
- (b) no other person eligible to apply appears.

(4) The dismissal of the application does not affect the right of the aggrieved person to make a further application against the respondent.

(5) The appearance of the respondent is evidence that the respondent has been served.

Non-appearance of the respondent.

128. (1) This section applies if a respondent fails to appear before the Court that is to hear and determine the matter of the application for a protection order and the Court is satisfied that the respondent has been given any of the following documents—

- (a) a copy of the application; or
- (b) a copy of the application and the interim protection order made because of the application.

(2) The Court may—

- (a) proceed to hear and determine the matter of the application in the absence of the respondent;
- (b) adjourn the matter or the application; or
- (c) order the issue of a warrant for the respondent to be taken into custody by a police officer and brought before the Court.

(3) Any Magistrate may issue a warrant for the purposes of subsection (2)(c).

(4) In adjourning the matter in terms of subsection (2)(b) of this section the Court may, where necessary, make an interim protection order.

Non-appearance of both the aggrieved person and the respondent.

129. (1) This section applies if both the aggrieved person and the respondent fail to appear before the Court that is to hear and determine the matter or the application for a protection order and the Court is satisfied that the respondent has been given any of the following documents—

- (a) a copy of the application;
- (b) a copy of the application and the interim protection order made because of the application.

(2) The Court may—



- (a) if there are two or more versions of events before it and there are disputes of fact, adjourn the matter of the application;
- (b) proceed to hear and determine the matter of the application on the papers in the absence of both the aggrieved person and the respondent, whether or not there are differing versions before the Court; or
- (c) order the issue of a warrant for the respondent to be taken into custody by a police officer and brought before the Court.

(3) Any Magistrate may issue a warrant for the purposes of subsection (2)(c).

(4) In adjourning the matter in terms of subsection (2)(a) of this section the Court may, where necessary, make an interim protection order.

Power of the Court if person pleads or is found guilty of related offences.

130. (1) A Court before which a person pleads guilty to, or is found guilty of, an offence that involves domestic violence may, on its own initiative, make a protection order against the offender, if the Court is satisfied that a protection order could be made under section 76 against the offender as the respondent.

(2) If a protection order is already in force, the Court—

- (a) shall consider the order and whether, in the circumstances, the order needs to be varied, including, for example, by varying the date the order ends; and
- (b) may vary the order if the Court considers the order needs to be varied.

(3) This section applies whether or not the Court makes another order in respect of the offender.

Procedure if person found guilty etc. of related offence.

131. (1) A Court exercising its jurisdiction under section 130—

- (a) may make the protection order before the offender is discharged by the Court or otherwise leaves the Court subject to the offender being given a sufficient opportunity to present evidence and to prepare and present submissions about the making of a protection order; or
- (b) may adjourn the matter of making the protection order to a later fixed time and day and may, in the meantime, make an interim protection order under this Act.

(2) On the later day to which the matter has been adjourned, the Court may receive evidence that is necessary or desirable to assist it on the matter.



(3) If the offender fails to appear at the later time and day to which the matter is adjourned, the Court may—

- (a) make a protection order against the offender even in the absence of the offender;
- (b) adjourn the matter further; or
- (c) order the issue of a warrant for the offender to be taken into custody by a police officer and brought before the Court.

(4) Any Magistrate may issue a warrant for the purpose of subsection (3)(c).

Proforma to be completed by the Court.

132. When dealing with cases under this Part the presiding officer shall complete a *proforma* form containing details of counselling and use of Post Exposure Prophylactics (PEP).

Domestic violence matters to be dealt with in Court rather than chambers.

133. With the exception of applications brought under section 100 applications for protection orders are to be on the record and conducted in a Court room.

Police officer or authorised person may represent the aggrieved person.

134. (1) A police officer or authorised person may appear, and act on behalf of, and the aggrieved person in a proceeding for any application under this Act but shall not agree to an order under section 104 or section 105 without the specific approval of the aggrieved person.

(2) If an authorised person has made an application under this Act to a Court and the Court decides the authorised person is not able to assist it, the application is taken to have been made by the aggrieved person.

Concurrent and other proceedings.

135. (1) Any application under this Act may be made, and a Court or Magistrate may, as authorised by this Act, dispose of the application notwithstanding that a person concerned in the application has been charged with an offence arising out of conduct on which the application is based.

(2) Subsection (3) applies—

- (a) if the person against whom—
 - (i) a protection order has been made;
 - (ii) a Court has refused to make a protection order; or
 - (iii) proceedings are current in which a protection order is sought against the person;



is charged with an offence mentioned in subsection (1); and

- (b) if the person is charged with an offence mentioned in subsection (1) and the Court has done either of the following relating to a protection order naming the person as the respondent—
 - (i) revoked, or refused to revoke, the protection order;
 - (ii) varied, or refused to vary, the protection order, including the conditions imposed by the order.
- (3) A reference to—
 - (a) the making, or refusal to make, the order, or a revocation or variation;
 - (b) the existence of current proceedings mentioned in subsection (2)(a)(iii);
 - (c) the fact that evidence of a particular nature or content was given in—
 - (i) the proceedings in which the order, revocation or variation was made or refused; or
 - (ii) the current proceedings;

is inadmissible in the trial of the person for an offence arising out of conduct on which the application for the order, revocation, or variation, or relevant to the current proceedings, is based.

(4) For the removal of doubt, it is declared that, subject to this section, an application, proceeding or order under this Act in relation to the conduct of the person does not affect any proceeding for an offence against the person arising out of the same conduct.

(5) The person may be punished for the offence mentioned in subsection (4) despite any order made against him under this Act.

Child not to be a witness or swear to an affidavit.

136. (1) This section applies to a child, other than a child who is the aggrieved person or respondent in the relevant proceedings under this Act.

- (2) Subject to an order of a Court, a person shall not—
 - (a) call a child as a witness in the proceedings;
 - (b) ask a child to remain in a Court during the proceedings; or
 - (c) ask a child to swear an affidavit for the proceedings.

(3) The Court shall only make an order in accordance with subsection (2) if it considers that to do so would be in the best interests of the child.



(4) If a Court orders that a child may be called as a witness, the Court shall consider whether the child should be declared a vulnerable witness in accordance with section 160 and that the evidence of the child be given through one of the means specified in section 160.

(5) A sworn affidavit of a child is not admissible in the proceedings unless the Court had ordered the child to swear the affidavit.

Adjudication on the papers where possible.

137. Magistrates shall as far as possible adjudicate matters on the papers and shall avoid lengthy periods of oral evidence.

Adjournment of matters only where absolutely necessary.

138. Magistrates shall as far as possible only adjourn matters where—

- (a) the respondent has not been served with the application as required by the provisions of this part;
- (b) the respondent has not been given a reasonable amount of time to prepare his case; or
- (c) it is otherwise in the interests of natural justice to do so.

Attendance at proceedings.

139. (1) A person may not be present in any proceedings dealing with domestic violence under this Act, unless that person is—

- (a) an officer of the Court;
- (b) a party to the proceedings;
- (c) a person bringing an application on behalf of the aggrieved person in terms of section 71;
- (d) a legal representative of any party to the proceedings;
- (e) a witness;
- (f) a person for the purpose of providing support to the applicant;
- (g) a person for the purpose of providing support to the respondent; and
- (h) a person whom the Court permits to be present, but the Court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings.

(2) Nothing in this subsection limits any other power of the Court to hear proceedings in camera or to exclude any person from attending such proceedings.



Which Court has jurisdiction.

140. (1) Any Court within the area in which—

- (a) the aggrieved person permanently or temporarily resides, carries on business or is employed;
- (b) the respondent resides, carries on business or is employed; or
- (c) the cause of action arose,

has jurisdiction to grant a protection order under this Act.

- (2) No specific minimum period is required in relation to subsection (1) (a).
- (3) A protection order is enforceable throughout the Kingdom of Eswatini.

Orders evidence of the matters contained therein.

141. (1) In any proceeding with the view to giving effect to any provision of this Act dealing with domestic violence purporting to be—

- (a) a copy of a protection order or a temporary protection order; or
- (b) a copy of an order revoking a protection order or a temporary protection order, or varying the prohibitions and restrictions imposed by a protection order or a temporary protection order,

shall be evidence and, in the absence of evidence to the contrary, conclusive evidence of the making of the order and of the matters contained therein.

Evidentiary provisions.

142. (1) In any proceeding with the view to—

- (a) making a protection order or an interim protection order;
- (b) revoking a protection order or an interim protection order; or
- (c) varying the prohibitions and restrictions imposed by a protection order or an interim protection order,

the Court may inform itself in such manner as it thinks fit and is not bound by the strict rules of practice or as to evidence.

(2) The Court need not have the personal evidence of the aggrieved person before making a protection order.

Cross applications.

143. (1) When considering an application for a protection order, the Court shall make enquiries as to—



- (a) the existence or otherwise of any other protection orders which are existing or have existed between the parties; and
- (b) any applications for protection orders which have been filed in the Court and which are pending hearing.

(2) If there is another application for a protection order currently before Court, whether pending hearing or currently listed, the Court shall endeavour to deal with both applications together and can adjourn either application to enable this to occur.

(3) When dealing with matters where each party has applied for an order against the other, the Court will endeavour to determine who the primary perpetrator of the domestic violence is and where appropriate, after considering the safety of both parties, only grant an order to the primary the aggrieved person or party.

Court may summon persons to attend.

144. (1) The Registrar of the High Court or a clerk of a Magistrate Court may, by notice given to a person, summon the person to attend the hearing of an application for a protection order at a time and place specified in the summons—

- (a) to give evidence; and
- (b) to produce any record in the possession of that person and specified in the notice.

(2) A person served with a summons to attend as a witness shall not fail, without reasonable excuse—

- (a) to attend as required by the summons;
- (b) to attend from time to time in the course of the hearing as required by the Court; or
- (c) to produce any record that the person was required to produce by the summons served on the person.

(3) A person attending as a witness at a hearing shall not fail—

- (a) to be sworn or to make an affirmation; or
- (b) without reasonable excuse, to answer a question that the person is required to answer by the Court.

(4) If a person served with a summons fails to attend as mentioned in subsection (2)(a) or (b), the Court may order the issue of a warrant for the person to be taken into custody by a police officer and to be brought before Court.

(5) Any Magistrate may issue a warrant for the purposes of subsection (4).



(6) Subsection (4) does not limit any other powers of the Court.

Court may set aside a summons

145. (1) A Court may set aside a summons issued under section 144 if the Court is satisfied there are sufficient grounds for setting the summons aside, including—

- (a) want of relevance;
- (b) privilege; or
- (c) oppressiveness.

(2) The Court may act on the application of the person served with the summons or on its own initiative.

(3) If a Court sets aside a summons under subsection (1), the Court may make an order for costs for the benefit of the person on whom the summons was served.

PART XXIV

SERVICE

Service etc. of documents.

146. (1) A summons, order or other document to be served for the purposes of this Act may be served in the manner prescribed by the Criminal Procedure and Evidence Act with respect to service of summonses under that Act, and if it is so served, the provisions of that Act as to proof of service shall apply to proof of service for the purposes of this Act.

(2) A document to be given to any person for the purposes of this Act shall be taken to have been duly given if—

- (a) it is given to the person personally or to a person authorised by the person to whom it is directed to accept delivery of documents on behalf that person, either generally or in a particular case;
- (b) it is left at the place of residence or business of the person to whom it is directed last known to the person who gives it; or
- (c) it is sent by post to the place of residence or business of the person to whom it is directed last known to the person who gives it.

(3) A document shall be deemed to have been received by the person to whom it is directed—

- (a) where it has been given in the manner referred to in subsection (2)(a), on the day it is so given;
- (b) where it has been given in the manner referred to in subsection (2) (b), on the day next following the day it is left at the place specified therein; or



- (c) where it has been given in the manner referred to in subsection (2)(c), unless the contrary is proved, at the time it would be delivered in the ordinary course of post.

(4) A summons or warrant issued to cause a person to appear or to be brought before a Magistrates Court in connection with proceedings under this Act may be served or executed on a Sunday as on any other day.

Service of Court orders.

147. (1) This section applies if a Court—

- (a) has made a protection order;
- (b) revokes a protection order; or
- (c) varies a protection order (including the conditions imposed by it).

(2) Subject to subsection (3), the clerk of Court shall—

- (a) cause—
 - (i) a copy of the order; and
 - (ii) in the case of an interim protection order, a copy of the application for a protection order to which the protection order relates (if a copy has not already been served);

to be given to the respondent; and

- (b) cause a copy of the order to be given to the aggrieved person and each named person; and
- (c) cause a copy of the order to be given to the National Commissioner of Police.

(3) Where an order referred to in subsection (1) is made in the absence of the respondent or the aggrieved person or the clerk of Court has not caused a copy of the order to be served on the respondent or given to the aggrieved person before the respondent or, as the case may be, the aggrieved person has departed the Court precincts, the clerk shall—

- (a) in the case where a copy is to be served on the respondent, cause two copies of the order to be given to the officer in charge of the police region in which the respondent was last known to the clerk to ordinarily reside; or
- (b) in the case where a copy is to be given to the aggrieved person, cause one copy of the order to be given to the officer in charge of the police region in which the aggrieved person was last known to the clerk to ordinarily reside.



(4) The officer in charge of a police region who receives a copy or copies of an order from the clerk of Court under subsection (3) shall cause a copy of the order to be served on the respondent or, as the case may be, given to the aggrieved person as soon as is practicable.

Service of documents by police.

148. (1) Unless otherwise specified, service of any document in terms of this Act shall forthwith be effected in the prescribed manner by a member of the Royal Eswatini Police Service.

(2) The National Commissioner of Police shall ensure that internal arrangements are made to ensure that—

- (a) a central register of documents which need to be served under this Act dealing with domestic violence is kept and that such register include provision for the recording of details of service;
- (b) appropriate police officers arrange service of documents which need to be served under this Act in a timely manner; and
- (c) a senior officer is assigned to regularly check on the progress of service of documents which need to be served under this Act to ensure compliance with subsection (b).

PART XXV

WEAPONS

Seizure of arms and dangerous weapons.

149. (1) Where the respondent has threatened the use of a weapon or expressed the intention to kill the aggrieved person, a police officer shall seize any firearms or dangerous weapons which the respondent may possess and shall take the matter to Court for determination.

(2) The Court shall order a police officer to seize any firearm or dangerous weapon which may be in the possession or under the control of a respondent, if the Court is satisfied on the evidence placed before it, including any affidavits supporting an application, that—

- (a) the respondent has threatened the use of a weapon or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, by means of such firearm or dangerous weapon; or
- (b) possession of such firearm or dangerous weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the —
 - (i) state of mind or mental condition;
 - (ii) inclination to violence; or



(iii) use of or dependence on intoxicating liquor or drugs of the respondent.

- (3) Any dangerous weapon seized in terms of subsection (2) –
- (a) shall be given a distinctive identification mark and retained in police custody for such period of time as the Court may determine; and
 - (b) shall only be returned to—
 - (i) the respondent; or
 - (ii) to the owner of the dangerous weapon, if the respondent is not the owner,

by order of the Court and on such conditions as the Court may determine.

(4) Notwithstanding subsection (3), if, in the opinion of the Court, the value of the dangerous weapon so seized is below two hundred Emalangeni and if the return of the dangerous weapon has not been ordered within twelve months after it had been so seized or if the Court is satisfied that it is in the interests of the safety of any person concerned, the Court may order that the dangerous weapon be forfeited to the State.

(5) Any firearm seized in terms of subsection (2), shall be handed over to the National Commissioner of Police who shall deal with it in accordance with the provisions of the Arms and Ammunition Act, No. 24 of 1964, or its successor.

PART XXVI

DEFENCES AND MATTERS TO BE TAKEN INTO ACCOUNT IN SENTENCING

Minimum age of criminal capacity and presumption.

150. (1) A child of the age of ten years and below shall have no criminal capacity in relation to any offence under this Act.

(2) Where a child is between the ages of ten and fourteen years, the rebuttable presumption shall apply.

Previous or existing relationship not a defence.

151. Any relationship, previous or existing, shall not provide a defence to any offence under this Act.

Knowledge of age immaterial to conviction but relevant to sentence.

152. (1) Except as otherwise expressly stated, it is immaterial to a conviction, in the case of any of the offences under this Act committed with respect to a child, that the accused person did not know that the child was under eighteen years of age at the time of the offence or believed that the child was not under that age.



(2) The Court may consider when determining an appropriate sentence for any offence under this Act whether the accused person knew that the victim was under eighteen years of age at the time of the offence or believed that the victim was not under that age.

Consent to offences.

153. (1) Subject to subsection (2) consent is not a defence to any offence under this Act.

(2) Consent is a defence to a charge under section 36 and section 37 if it is proved beyond a reasonable doubt that—

- (a) both the victim and the accused were under eighteen years of age at the time of the alleged offence; and
- (b) both the victim and the accused gave their full and free consent to all of the sexual acts alleged.

(3) A prosecution may not be instituted under either section 36 or section 37 without the written consent of the Director of Public Prosecutions, where—

- (a) the victim was under eighteen years of age at the time of the alleged offence;
- (b) there was an age difference between the victim and the accused of no more than five years; and
- (c) both the victim and the accused gave their full and free consent to all of the sexual acts alleged.

Intoxication immaterial to conviction but relevant on sentence.

154. (1) Except as otherwise expressly stated or where the offence requires proof of intention, it is immaterial to conviction, whether the accused was intoxicated at the time of the alleged commission of the offence.

(2) The Court may consider when determining an appropriate sentence for any offence under this Act—

- (a) whether the accused person was intoxicated at the time of the commission of the alleged offence;
- (b) the extent of their intoxication; and
- (c) the impact that intoxication may have had on their decision-making ability at the time of the commission of the alleged offence.



PART XXVII

EVIDENCE

Subpoenas.

155. The provisions of the Criminal Procedure and Evidence Act so far as they relate to subpoenas are applicable to all criminal proceedings under this Act.

Cross-examination by legal representatives.

156. Where there is legal representation the presiding officer shall ensure the cross-examination is conducted in such a manner as not to harass the witness when dealing with the cases brought under this Act.

Standards of proof.

157. (1) When considering an application for a protection order, the Court shall apply the civil standard of proof.

(2) When considering the guilt or otherwise of an accused for any offence under this Act, including an alleged breach of a domestic violence order under section 118, the Court shall apply the criminal standard of proof.

Admissibility of certain evidence.

158. (1) Notwithstanding any other law to the contrary the following evidence shall be admissible in Court—

- (a) evidence collected electronically, visually, graphically or by any other form including recorded tapes, DVDs and other similar devices; and
- (b) evidence of a specialist or professional on the emotional condition of the applicant or complainant which is a consequence of the unlawful act.

(2) A specialist or professional for the purposes of this section means—

- (a) a medical practitioner who is registered as such under the Medical and Dental Practitioners Act, 1970, or its successor—
 - (i) against whose name the speciality paediatrics is also registered;
 - (ii) against whose name the speciality psychiatry is also registered;
 - (iii) against whose name the speciality gynaecologist is also registered;
 - (iv) general medical practitioner; or
 - (v) veterinary practitioner;
- (b) a maintenance officer who is appointed as such under section 4(1) of the Maintenance Act, 1970 or other law replacing it;



- (c) a social worker under the Department of Social Welfare who has not less than two years work experience;
- (d) a nurse who is registered as such under the Nurses and Midwives Act, 1965, or its successor, and who has not less than two years work experience;
- (e) a midwife who is registered as such under the Nurses and Midwives Act, 1965 and who has not less than one-year experience;
- (f) a child counsellor who has not less than six months experience;
- (g) a rural health motivator (*umgcugcuteli*) or a person of similar occupation who has an experience of not less than two years;
- (h) a person who has an experience of at least four years as an educator and has not at any stage, as a result of misconduct, been dismissed from service as an educator; and
- (i) a psychologist who is registered as a clinical educational or counselling psychologist under the Medical and Dental Practitioners Act, 1970, or its successor.

(3) For the purposes of subsection (2) “*educator*” means a person who teaches, educates or trains other people, or who provides professional educational services, including professional therapy and educational psychological services at a public, independent or private school as defined under the Education Act, 1981, including former and retired educators.

PART XXVIII

WITNESSES

Protection of the victims and witnesses and their participation in the proceedings.

159. A Court shall take appropriate measures, that are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses and, in so doing, a Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime.

Witness to be notified of protective measures.

160. (1) The prosecution shall inform witnesses who are to give evidence in criminal proceedings in which a person is charged with the commission of the alleged sexual offence and witnesses who are children, or their parent or guardian or a person in *loco parentis* of a possibility that he may be declared a vulnerable witness in terms of subsection (3) before such witness commences with his testimony at any stage of the proceedings.



(2) The Court shall, before hearing evidence given by a witness referred to in subsection (1), enquire from the prosecutor whether the witness has been informed as referred in that subsection and shall note the response of the witness on the record of proceedings, and if the witness indicates that he has not been so informed, the Court shall inform the witness of those matters referred to in subsection (1)

(3) The Court may on its own initiative or on the request of the prosecution or any witness other than a witness referred to under subsection (1), who is to give evidence in proceedings referred to under subsection (1), declare such a witness other than the accused, a vulnerable witness if the Court is of the opinion that the witness is likely to be vulnerable on account of—

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) cultural differences;
- (e) the possibility of intimidation;
- (f) race;
- (g) language or religion;
- (h) the relationship of the witness to any party to the proceedings;
- (i) the nature of the subject matter of the evidence;
- (j) being the victim;
- (k) being a child; or
- (l) any other factor the Court considers relevant.

(4) The Court may, if in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (1), summon any knowledgeable person to appear before it and advise the Court on the vulnerability of such witness.

(5) For the purposes of this section a “*knowledgeable person*” is—

- (a) any one of those persons defined as a specialist or professional in section 158 (2); and
- (b) any other person unrelated to the witness who in the opinion of the presiding officer has relevant skill, knowledge and experience to make an assessment.



(6) On declaration of a witness as a vulnerable witness in terms of this section, the Court shall, subject to the provisions of subsection (7), direct that such witness be protected by one or more of the following measures—

- (a) allowing such witness to give evidence by means of closed circuit television as provided for in section 223 *bis* of the Criminal Procedure and Evidence Act;
- (b) directing that the witness give evidence through an intermediary as provided for in section 223 *bis* of the Criminal Procedure and Evidence Act;
- (c) directing that the proceedings may take place in camera as provided for in section 172 of the Criminal Procedure and Evidence Act;
- (d) prohibiting the publication of any information as to the identity of the witnesses or parties concerned as provided for in section 173 of the Criminal Procedure and Evidence Act;
- (e) prohibiting the family of the applicant or accused from giving any information that may lead to the identity of the parties concerned; or
- (f) any other measure which the Court deems just and appropriate.

(7) Once a Court has declared a witness a vulnerable witness, the Court shall direct that an intermediary referred to in subsection (6) (b) be appointed in respect of such a witness unless the interests of justice justify not appointing an intermediary, in which case the Court shall record the reasons for not appointing the intermediary.

(8) In determining which of the protective measures referred to in subsection (6) should be applied to a witness, the Court shall have regard to all the circumstances of the case, including if it so considers—

- (a) any views expressed by the witness, but the Court shall accord such views the weight it considers appropriate in view of the age of the witness and maturity;
- (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the dignity of the witness and sense of safety and to protect the witness; and
- (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.



(9) The Court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary the directive given in terms of subsection (5) and the Court shall, if such revocation or variation has been made on its own initiative, furnish reasons for the revocation or variation at the time of the revocation or variation.

PART XXIX

CHILDREN AS WITNESSES

Interviews with children.

161. Any police officer undertaking investigations in relation to an offence under this Act shall—

- (a) ensure that any child victims or witnesses are interviewed using an electronic recording device as soon as practicable after the offence was reported;
- (b) ensure that the referral to counselling required under this Act is made as soon as practicable after the offence was committed and that the referral is made to a governmental or non-governmental agency providing counselling services to children;
- (c) re-interview the child only if it is in the best interests of the child to do so, but only after that child has had the opportunity to receive the counselling referred to in subsection (b).

Evidence of a child to be principally by statement or video-taped interview.

162. (1) Evidence-in-chief of child shall be given as a statement or through the use of a video-recorded interview with the child, without the child being called as a witness.

(2) The statement or video-taped recording shall be presented to a Court at the earliest possible stage.

Cross-examination of a child at a preliminary hearing in limited circumstances.

163. (1) A presiding officer at a preliminary hearing shall not require the child to be called as a witness for cross-examination unless the presiding officer is satisfied that—

- (a) the party seeking to cross-examine the child has—
 - (i) identified an issue to which the proposed questioning relates;
 - (ii) provided a reason why the evidence of the child is relevant to the issue;
 - (iii) explained why the evidence disclosed by the prosecution does not address the issue;
 - (iv) identified to the presiding officer the purpose and general nature of the questions to be put to the child to address the issue; and



- (v) the interests of justice cannot adequately be satisfied by leaving cross-examination of the child about the issue to the trial;
 - (b) the interests of justice cannot adequately be satisfied by leaving cross-examination of the child about the issue to the trial.
- (2) Without limiting the matters to which the presiding officer may have regard for purposes of subsection (1)(b), the presiding officer—
- (a) shall consider whether—
 - (i) the prosecution case is adequately disclosed; and
 - (ii) the charge is adequately particularised; and
 - (b) shall have regard to the vulnerability of children and the undesirability of calling a child as a witness for a preliminary hearing.
- (3) The presiding officer shall give reasons for a decision on the application.
- (4) If a child is to give evidence the provisions of sections 160 and 165 are to be considered as if appropriately applied.

Limitation on cross-examination.

164. (1) If the child is to be cross-examined, the presiding officer shall not allow the child to be cross-examined about an issue other than the issue in relation to which the child was required to be called unless the presiding officer is satisfied as provided in section 163(1) and (2), whichever is relevant, in relation to the issue and the presiding officer—
- (a) shall not allow cross-examination to continue to the extent that it—
 - (i) does not appear relevant to an issue for which it may be conducted; or
 - (ii) consists of exploratory questions asked in the hope of receiving any answer of any assistance to the party conducting the cross-examination, commonly known as a “*fishing expedition*”; and
 - (b) shall disallow a question that may be disallowed as being an improper question or a question simply going to credit.
- (2) The child may be re-examined by the party calling the child.

Exclusion of public.

165. (1) If a child is to give evidence about an offence of a sexual nature, the Court shall exclude from the room in which it is sitting all persons other than essential persons while the child is giving the evidence.
- (2) If the child is to give evidence other than in relation to an offence of a sexual nature, the Court shall exclude from the room in which it is sitting all persons other than essential



persons while the child is giving the evidence unless the Court is satisfied that the interests of justice require the evidence to be heard in open Court.

(3) In this section “*essential person*”, for a proceeding, means any of the following persons—

- (a) a party to the proceeding and the legal representative of that party;
- (b) the prosecutor;
- (c) a person whose presence is, in the opinion of the Court, necessary or desirable for the proper conduct of the proceeding;
- (d) a support person for the child under section 166;
- (e) a person who applies to the Court to be present and whose presence, in the opinion of the Court—
 - (i) would serve a proper interest of the person; and
 - (ii) would not be prejudicial to the child interests of the child.

Child entitled to support.

166. (1) A child, while giving evidence in a relevant proceeding, is entitled to have nearby a support person who may provide that child with support.

(2) A person may be a support person to the child after that person has been approved by the Court after an application by the party intending to call the child to give evidence.

(3) The support person shall be permitted to be in close proximity to the child, and within the sight of the child, while the child is giving evidence.

(4) A child may, with the agreement of the Court, waive the entitlement to a support person under subsection (1).

(5) The Court shall not agree to the waiver if the Court considers the waiver is not in the best interests of the child.

Dealing with a recording.

167. (1) In this Part “*recording*” means a video-taped recording or such other video recording of the child or a copy of such.

(2) Subject to subsection (3), an original recording shall not be edited or otherwise changed in any way.

(3) A presiding officer may, on application, give approval for a copy of an original recording to be edited or changed in a stated way.



Court to give directions about the use or safe-keeping of a recording.

168. (1) A presiding officer may make any order the presiding officer considers appropriate about the use or safe-keeping of a recording.

(2) Without limiting subsection (1), the presiding officer may give directions, with or without conditions, as to—

- (a) the persons, or classes of persons, who are authorised to have possession of a recording; and
- (b) the giving up of possession of a recording.

(3) The presiding officer shall have regard to the following matters when deciding the persons, or classes of persons, who are authorised to have possession of a recording—

- (a) the need for legal representatives involved in the proceeding to have access to the recording;
- (b) the need to ensure that persons authorised to have possession of the recording are able to take appropriate measures to ensure there is no unauthorised access to the recording.

(4) In this section “*use*”, of a recording, includes copying of the recording.

Unauthorised possession of, or dealing with, recording.

169. A person who, without authority—

- (a) has a recording in his possession; or
- (b) supplies, or offers to supply, a recording to any person; or
- (c) plays, copies or erases a recording or permits a person to play, copy or erase a recording,

commits an offence and is liable on conviction to a fine not exceeding twenty-five thousand Emalangeni or to a term of imprisonment not exceeding five years or both.

Publishing a recording prohibited.

170. (1) A person shall not publish all or part of a recording other than with the approval of the relevant Court and in accordance with any condition attached to the approval of the Court.

(2) An approval under subsection (1) may be given only in exceptional circumstances.

(3) In subsection (1) —

“*publish*” includes to disseminate to the public by radio or television or otherwise by the transmission of light or sound; and



“*relevant Court*” means the Court presiding at the proceeding or preliminary hearing at which the recording is made or the Court of trial or appeal at which the recording is presented.

PART XXX

ADMISSIBILITY OF DOCUMENTS

Admissibility of documentary evidence as to facts in issue.

171. (1) In any proceeding, not being a criminal proceeding, where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Act, be admissible as evidence of that fact if—

- (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
- (b) the document is, or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied, whether directly or indirectly, by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—

- (a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness;
- (b) the maker or supplier is out of the country and it is not reasonably practicable to secure the attendance of the maker or supplier;
- (c) the maker or supplier cannot with reasonable diligence be found or identified;
- (d) it cannot reasonably be supposed, having regard to the time which has elapsed since the maker or supplier made the statement, or supplied the information, and to all the circumstances, that the maker or supplier would have any recollection of the matters dealt with by the statement the maker made or in the information the supplier supplied;
- (e) no party to the proceeding who would have the right to cross-examine the maker or supplier requires the maker or supplier being called as a witness; or
- (f) at any stage of the proceeding it appears to the Court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling the maker or supplier as a witness.



(3) The Court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2) (a), (b), (c), (d) or (f).

(4) For the purposes of this Act, a statement contained in a document is made by a person if it was—

- (a) written, made, dictated or otherwise produced by that person;
- (b) recorded with the knowledge of that person;
- (c) recorded in the course of and ancillary to a proceeding; or
- (d) signed, initialled or otherwise supported by another document by that person.

Statement made before proceedings by child or mentally disabled person.

172. (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall be admissible as evidence of that fact if—

- (a) the maker of the statement was a child or a mentally disabled person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
- (b) the maker of the statement is available to give evidence in the proceeding.

(2) Subject to subsection (4), if a statement mentioned in subsection (1) (the main statement) is admissible, a related statement is also admissible as evidence if the maker of the related statement is available to give evidence in the proceeding.

(3) A “*related statement*” is a statement—

- (a) made by someone to the maker of the main statement, in response to which the main statement was made; and
- (b) contained in the document containing the main statement.

(4) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.

(5) For a preliminary hearing for a relevant offence, subsections (1)(b) and (4) do not apply to the person who made the statement if the person is a child.

(6) In the application of subsection (3) to a criminal proceeding “*party*” means the prosecution or the person charged in the proceeding.



Admissibility of representation in prescribed criminal proceedings if person who made it is unavailable.

173. (1) This section applies in criminal proceedings under this Act if a person with personal knowledge of an asserted fact—

- (a) made a representation about the asserted fact; and
- (b) is unavailable to give evidence about the asserted fact because the person is dead or mentally or physically incapable of giving the evidence.

(2) The hearsay rule does not apply to evidence of the representation given by a person who saw, heard or otherwise perceived the representation, if the representation was—

- (a) made when or shortly after the asserted fact happened and in circumstances making it unlikely the representation is a fabrication;
- (b) made in circumstances making it highly probable the representation is reliable; or
- (c) at the time it was made, against the interests of the person who made it.

(3) If evidence given by a person of a representation about a matter has been adduced by a party and has been admitted under subsection (2), the hearsay rule does not apply to the following evidence adduced by another party to the proceeding—

- (a) evidence of the representation given by another person who saw, heard or otherwise perceived the representation;
- (b) evidence of another representation about the matter given by a person who saw, heard or otherwise perceived the other representation.

(4) For the removal of any doubt, it is declared that subsections (2) and (3) only provide exceptions to the hearsay rule for particular evidence and do not otherwise affect the admissibility of the evidence.

(5) In this section “*representation*” includes—

- (a) an express or implied representation, whether oral or written;
- (b) a representation to be inferred from conduct;
- (c) a representation not intended by the person making it to be communicated to or seen by another person; and
- (d) a representation that for any reason is not communicated.

Previous statement of a witness, if proved, to be evidence of facts stated.

174. (1) Where in any proceedings a previous statement made by a witness is proved for the purpose of rebutting a suggestion that the evidence of that person has been fabricated, that



statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

(2) Nothing in this Act shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by the person to refresh the memory of that person, that document may be made evidence in that proceeding, and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such rule of law, any statement made in that document or part by the person using the document to refresh the memory of that person shall by virtue of this subsection be admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible.

Weight to be attached to evidence.

175. In estimating the weight to be attached to a statement rendered admissible as evidence, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including—

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

PART XXXI

CONFISCATION OF PROFITS

Acquisition, possession or use of proceeds of offences.

176. Any person who—

- (a) acquires;
- (b) uses; or
- (c) has possession,

of property and who knows or ought to have reasonably known that it forms part of the proceeds of unlawful acts of another person commits an offence and is liable on conviction to a fine not exceeding twenty-five thousand Emalangenani or to a term of imprisonment not exceeding five years or both.

Instrumentality of a crime.

177. (1) A Court trying offences under this Act shall determine whether an item which was a subject matter in the trial is an instrumentality of the offence.



(2) Where an item has been declared by the Court as an instrumentality of an offence in terms of subsection (1) the Court shall order that such instrumentality be forfeited to the State.

(3) Where it is found that ownership of an instrumentality of a crime belongs to a third party, the Court shall order the person convicted in relation to that instrumentality to pay the total value or such reasonable amount of the instrumentality of the crime to the State.

(4) The Court may give an estimated value of the instrumentality of the crime and in so doing, the Court shall have regard to the nature and current market value of the instrumentality.

Confiscation orders.

178. (1) Whenever an accused is convicted of any offence under this Act, the Court convicting the accused shall, on the application of a prosecutor, enquire into any benefit which the accused may have derived from the offence convicted of and if the Court finds that the accused has so benefited, shall in addition to any punishment which it may impose in respect of the offence, make an order against the accused for payment to the State of any amount proportionate to the benefit and the Court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) If the presiding officer who convicted the accused is absent or for any other reason is not in a position to proceed, any presiding officer of the same Court may consider an application referred to in subsection (1) and may hold an enquiry referred to in that subsection and he may in such proceedings take such steps as the presiding officer who is absent or not a position to proceed could lawfully have taken.

PART XXXII

JURISDICTION AND EXTRADITION

Court with appropriate jurisdiction.

179. The High Court or a Magistrate Court with appropriate jurisdiction shall hear cases under this Act or as the Chief Justice may direct from time to time.

Jurisdiction and extradition.

180. (1) The Kingdom of Eswatini is deemed to have jurisdiction over all the offences referred to in this Act when—

- (a) such offences are committed on board a ship or aircraft registered in the Kingdom of Eswatini;
- (b) the alleged offender is a Swazi national or is permanently residing in Kingdom of Eswatini and commits a sexual offence in or outside the Kingdom of Eswatini but is not extradited to his country of origin.



(2) Where the Kingdom of Eswatini is a party to a Convention and there is in force an arrangement for mutual assistance in criminal matters between the Government of the Kingdom of Eswatini and another State which a party to the Convention is, that arrangement shall be deemed, for the purposes of the Criminal Matters (Mutual Assistance) Act, 2001, or its successor, to include provision for mutual assistance in criminal matters in respect of offences arising from the scope of those Conventions.

(3) Where the Kingdom of Eswatini is a party to a Convention and there is no arrangement for mutual assistance in criminal matters between the Government of Eswatini and another State which is a party to those Conventions, the Minister responsible for Justice may, by notice published in the Gazette, treat that Convention or Conventions as an arrangement between the Government of Eswatini and that other State provided for purposes of mutual assistance in criminal matters in respect of offences arising from the scope of those Conventions.

(4) Notwithstanding anything in the Extradition Act, No. 13 of 1968, or its successor, an offence under this Act shall, for the purposes of extradition under the Extradition Act No. 13 of 1968, or its successor, be deemed not to be an offence of a political character or an offence connected with a political offence or an offence inspired by political motives.

Extra-territorial jurisdiction.

181. (1) A person who, while being a citizen of, or permanently residing in the Kingdom of Eswatini, commits an act outside of the Kingdom of Eswatini which would have constituted an offence under this Act had it been committed within the Kingdom of Eswatini, shall be deemed to have committed it in the Kingdom of Eswatini and shall be prosecuted in the Kingdom of Eswatini as if that person committed the offence in the Kingdom of Eswatini.

(2) A person may not be convicted of an offence under subsection (1) if such person has been acquitted or convicted in the country where that offence was committed.

(3) A prosecution may not be instituted under this section without the written consent of the Director of Public Prosecutions.

(4) If the consent of the Director of Public Prosecutions to institute a prosecution has been obtained in terms of subsection (3), prosecution may be instituted in any Court with the appropriate jurisdiction.

PART XXXIII

MISCELLANEOUS

Applications which are spurious or an abuse of the Court process.



182. If the Court dismisses an application for a protection order or an application for a revocation or variation of a protection order, including a variation of conditions imposed by the order, as being spurious or an abuse of the Court process, it may order that party to pay—

- (a) a fine to the Court to compensate it for wasted Court time;
- (b) the legal costs of the other party; or
- (c) both the fine and legal costs.

Approved Forms.

183. The clerk of each Court is to ensure approved forms are available when asked for by a person.

Court fees.

184. Subject to section 182, no Court fees including filing or service fees are to be charged in relation to an application brought under this Act.

Register of Protection Orders.

185. (1) The National Commissioner of Police shall cause to be kept a register of protection orders received by police officers.

(2) The register shall be kept in a central location so that police officers can seek information as to the presence or otherwise of orders when attending domestic incidents.

(3) The register shall be kept confidential and information regarding the presence or otherwise of protection orders shall only be provided to police officers, prosecutors and social welfare officers or in accordance with a Court order.

Address of the aggrieved person.

186. (1) The physical address of the applicant shall be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address.

(2) The Court may issue any directions to ensure that the physical address of the applicant is not disclosed in any manner, which may endanger the safety, health or well-being of the applicant.

Other remedies available not sufficient to refuse an order.

187. The Court may not refuse—

- (a) to issue a protection order; or
- (b) to impose any condition or make any order which it is competent to impose or make under this section,

merely on the grounds that other legal remedies are available to the applicant.



Minister to prescribe policy directives.

188. The Minister in consultation with the Minister responsible for Justice may prescribe policy directives for proper implementation of this Act by the Director of Public Prosecutions and the members of the Royal Eswatini Police.

Use of a child friendly Court.

189. (1) Wherever possible, in cases which require children to give evidence, the Court shall direct that the evidence of the child be given at any place—

- (a) which is informally arranged to set that child witness at ease;
- (b) which is so situated that any person whose presence may upset that child witness, is outside the sight and hearing of that child witness; and
- (c) which enables the Court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that child witness and any intermediary when giving evidence.

(2) The presiding officer may also make orders for the removal of robes or other formal attire.

Police responsibility.

190. Wherever possible when powers to perform certain actions under this Act are delegated to police officers, those actions are to be undertaken by members of the Domestic Violence, Child Protection and Sexual Offences Unit or the equivalent unit, within the Royal Eswatini Police Service with the exception of duties that need to be undertaken by officers from the Scenes of Crime unit.

Training for persons dealing with issues arising under this Act.

191. As soon as practicable after their appointment or the coming into force of this Act, whichever is the latter, persons who have duties or responsibilities to perform under this Act including but not limited to Domestic Violence, Child Protection and Sexual Offences Unit in the police force, prosecutors and relevant judicial officers and Court staff, are to attend training on the following issues—

- (a) domestic violence and in particular covering the types of violence and the cycle of violence;
- (b) societal attitudes towards violence and sexual assault and how they can impact on decision makers;
- (c) working with survivors of domestic violence and sexual assault including child victims;



- (d) interviewing children;
- (e) the role of the Court intermediaries; or
- (f) any other incidental training.

Priority to be given to cases under this Act.

192. Wherever possible when dealing with cases under this Act—

- (a) a police officer carrying out investigations; and
- (b) the Registrar of the High Court or clerk of a Magistrate Court dealing with the court roll in each Court,

are to give these cases priority.

Plea of guilty.

193. Notwithstanding any other provision under this Act, where an accused has pleaded guilty to any offence under this Act, the presiding officer shall take the plea of guilty as a mitigating factor when imposing a sentence.

Publication of information.

194. (1) A person, either natural or juristic shall not publish in any manner any information, which might directly or indirectly reveal the identity of any party other than the accused to the proceedings under this Act including a journalist, editor or a publisher except where publishing the identity of the accused might reveal either directly or indirectly the other parties to the proceedings.

(2) The Court, if it is satisfied that it is in the interests of justice, may direct that any further information relating to proceedings held in terms of this Act shall not be published but no direction in terms of this subsection applies in respect of the publication of a law report which does not mention the names or reveal the identities of the parties to the proceedings or of any witness at such proceedings.

(3) Any person who contravenes subsection (1) commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding ten thousand Emalangeneni or a fine not exceeding fifty thousand Emalangeneni in the case of a juristic person.

Certain Regulations.

195. (1) The Minister may make certain regulations regarding—

- (a) any form required to be prescribed in terms of this Act;
- (b) any matter required to be prescribed in terms of this Act;



- (c) designation of public health establishments for purposes of providing Post Exposure Prophylaxis and carrying out compulsory HIV testing;
 - (d) application by victim for compulsory HIV testing of alleged sex offender;
 - (e) application by victim or interested person for HIV testing of alleged sex offender;
 - (f) consideration of application by Magistrate and issuing of order;
 - (g) application for compulsory HIV testing of alleged sex offender by police official;
 - (h) application by police official for HIV testing of alleged sex offender;
 - (i) execution of orders for compulsory HIV testing and results of HIV tests;
 - (j) execution of order and issuing of warrant of arrest;
 - (k) Register of applications and orders;
 - (l) confidentiality of outcome of application;
 - (m) confidentiality of HIV test results obtained; and
 - (n) any other matter which the Minister deems necessary or expedient to be prescribed or performed in order to achieve the objects of this Act.
- (2) Any regulation made under subsection (1) –
- (a) which may result in expenditure for the State, shall be made in consultation with the Minister responsible for Finance; and
 - (b) may provide penalties for their contravention.

Repeal of law and precedence of this Act.

196. (1) The Girls and Women's Protection Act No. 39 of 1920 is repealed.

(2) Where there is inconsistency between the provisions of this Act and any other law, other than the Constitution, this Act shall take precedence.